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Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq

Bartram Brown, *Chicago-Kent College of Law*

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*Bartram S. Brown**

A civilized government cannot help having barbarous neighbors: when it . . . finds itself obliged to conquer them . . . it has had so much to do with setting up and pulling down their governments, and they have grown so accustomed to lean on it, that it has become morally responsible for all the evil it allows them to do.

. . . it can seldom, therefore – I will not go so far as to say never – be either judicious or right, in a country which has a free government, to assist, otherwise than by the moral support of its opinion, the endeavours of another to extort the same blessing from its native rulers.**

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* Professor of Law and Co-Director, Program in International and Comparative Law, Chicago-Kent College of Law, Illinois Institute of Technology; Visiting Fellow, 2004, Lauterpacht Research Centre for International Law, University of Cambridge, U.K.

** John Stuart Mill, *A Few Words on Non-Intervention* (1859), in *ESSAYS ON EQUALITY, LAW, AND EDUCATION* BY JOHN STUART MILL 119, 123 (John M. Robson, ed., 1984) [hereinafter Mill].

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I. INTRODUCTION

A. *Armed Intervention as Assumption of Responsibility*

By invading and occupying Iraq, and then attempting to establish a pro-U.S. democracy, the United States government¹ accepted

¹ The U.S. is not the only acknowledged occupying power in Iraq; much of this analysis applies to the other such power, the United Kingdom, as well. It might also apply to a lesser extent to other members of the *ad hoc* "Coalition of the Willing" who actually participated in the invasion of Iraq.

potentially open-ended legal responsibility.² This responsibility still weighs heavily upon the U.S., and is likely to do so for many years, despite the officially announced transfer of sovereignty to an Iraqi Interim Government. The principle of “you break it, you own it”³ applies here.⁴

The general duties of the occupying power are established by the body of law that sets out the rules applicable during armed conflict. Known variously as the “law of armed conflict,” “international humanitarian law,” or *jus in bello*, it is for the most part separate from the *jus ad bellum*, or “just war theory” that sets out the conditions under which war, or the use of force, is thought to be justified. Stressing the separation between these bodies of law one analyst noted recently that, “the duties of an occupying power exist whether or not it was

² As used in this study, the term “responsibility” refers to “[t]he obligation to answer for any act done, and to repair any injury it may have caused.” BLACK’S LAW DICTIONARY 1476 (rev. 4th ed. 1968). Two distinct aspects of this notion are relevant here. First there are “responsibilities,” the primary obligations and standards of conduct that can come to be binding on states under international law. “State responsibility” is a term-of-art referring to the principle that states may be under a secondary obligation to make reparation for any injury caused by the breach of primary obligations under international law.

³ According to some reports, “[t]wo months before the invasion of Iraq, Secretary of State Colin L. Powell warned President Bush about the potential negative consequences of a war.” Douglas Jehl, *Wary Powell Said to Have Warned Bush on War*, N.Y. TIMES, Apr. 17, 2004, at A1. Bob Woodward has attributed a now-legendary quote on the so-called “Pottery Barn Rule” to Secretary Powell:

“You are going to be the proud owner of 25 million people,” he told the President. “You will own all there [sic] hopes, aspirations and problems. You’ll own it all.” Privately, Powell and Armitage called this the Pottery Barn Rule: You break it, you own it.

BOB WOODWARD, PLAN OF ATTACK 150 (2004).

⁴ Without confirming the specific details of the conversation quoted by Bob Woodward in his book PLAN OF ATTACK, *supra* note 3, Secretary of State Colin Powell has publicly acknowledged that the U.S. accepted responsibility for Iraq when it invaded:

The President knew that when we undertook military action to eliminate this despotic regime, we would become responsible for the country and for 25 million people. And it was for that reason that he told the American people we’d be committed there for a period of time with our military forces and with our political presence and with Ambassador Bremer and the Coalition Provisional Authority until such time as we could put in place an interim government.

Interview by Ted Koppel, ABC, with Colin Powell, Secretary of State, Washington, D.C. (Apr. 24, 2004).

lawful to use the armed force that resulted in the occupation.”⁵ This article does not dispute this truism; instead, it focuses on the overlapping layers of obligation and responsibility that apply to the U.S. and U.K. as both intervenors and occupying powers.

The just war debate should not be viewed as merely a question of politics or morality. Without a valid legal justification, attacking and occupying another sovereign country is a violation of international law, and as such entails the legal responsibility of the intervening country. But *jus ad bellum* should concern more than the just or unjust initiation of war. It should also encompass the no-fault legal responsibility assumed by states that initiate just wars. This article does not attempt to resolve the continuing debate on the legality of the invasion of Iraq.⁶ It argues that the U.S. bears continuing post-war responsibility for conditions in Iraq even if the war was legal.

This article focuses principally upon the primary obligations⁷ under international law assumed by the U.S. as an intervening power and as an occupying power, considering only in passing the issue of possible U.S. violations of international law and corresponding secondary responsibility for reparation.

⁵ Frederic L. Kirgis, *Security Council Resolution 1483 on the Rebuilding of Iraq*, ASIL INSIGHTS (May 2003), at <http://www.asil.org/insights/insigh107.htm> (last visited Nov. 7, 2004).

⁶ Maggie Farley, *The Conflict in Iraq: Annan Calls U.S.-Led Invasion of Iraq Illegal*, L.A. TIMES, Sept. 17, 2004, at A7.

⁷ In the Commentary to the Draft Articles, this important distinction is explained:

These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the *secondary rules of State responsibility*: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. *The articles do not attempt to define the content of the international obligations* breach of which gives rise to responsibility. *This is the function of the primary rules*, whose codification would involve restating most of substantive international law, customary and conventional. (Emphasis added).

Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *International Law Commission Report on the work of its fifty-third session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 62, U.N. Doc. A/56/10 (2001) [hereinafter Commentaries], available at <http://www.un.org/law/ilc/reports/2001/2001report.htm> (last visited Nov. 21, 2004). The ILC Draft Articles are the product of decades of research and study by the International Law Commission, the body created by the U.N. General Assembly in 1947 to fulfill its responsibility to encourage “the progressive development of international law and its codification” as mandated by Article 13(1)(a) of the U.N. Charter.

Under international humanitarian law the rights and duties of the occupying power are the same, regardless of the legality of the decision to invade. By virtue of its *de facto* authority, the occupying power may legally exercise certain rights, but must accept corresponding obligations including those to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety,” and to maintain the pre-existing law and justice system of the occupied territory “unless absolutely prevented.”⁸

Massive reconstruction efforts such as the one presently underway in Iraq involve many potentially conflicting interests and many layers of obligation for the powers involved. The short to medium-term goals of preventing retribution and promoting stability are difficult to reconcile with the longer term goals of fostering a viable national system based on both self-determination and the rule of law.

B. A Practical and Philosophical Perspective: J.S. Mill on Intervention, Self-Determination, and Democracy

John Stuart Mill, a central figure in the development of Western liberal thought, recognized almost 150 years ago the basic contradiction involved in trying to impose a free and just government upon a society from the outside:

In 1867 he observed that

The only test possessing any real value, of a people's having become fit for popular institutions, is that they, or a sufficient portion to prevail in the contest, are willing to brave labour and danger for their liberation. . . . if they have not sufficient love of liberty to be able to wrest it from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own will have nothing real, nothing permanent. No people ever was and remained free, but because it was determined to be so If a people – especially one whose freedom has not yet become

⁸ The 1907 Hague Regulations set out the corresponding obligations of the occupying power in the following terms:

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 safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention IV with Respect to the Laws and Customs of War on Land, with annex of regulations, Oct. 18, 1907, art. 43, 3 Martens Nouveau Recueil (ser. 3) 461, 205 Consol. T.S. 227, 295 [hereinafter Hague Convention IV].

prescriptive – does not value it sufficiently to fight for it, and maintain it against any force which can be mustered within the country . . . [then] it is only a question in how few years or months that people will be enslaved . . .⁹

Mill wrote these words in the context of his discussion of non-intervention, and in particular of whether humanitarian intervention intended to free a beleaguered people from the oppression of their own government could be justified.¹⁰ He concluded that, in general, the answer was that such intervention would rarely be justified.¹¹ Mill was not, therefore, advising on how best to construct a new order once the fateful decision to intervene had already been irrevocably made and implemented. Such, of course, is the situation now faced in Iraq by the U.S., the coalition and the entire international community.

Mill lived in the mid 19th century, one hundred years before the end of the colonial era. Many assumed at the time that European peoples should spread their rule, their law and their populations around the world as much as possible in order to civilize it. This notion of the “White Man’s Burden,”¹² or as the French have called it,

⁹ John Stuart Mill, *A Few Words on Non-Intervention* (1859), in *ESSAYS ON EQUALITY, LAW, AND EDUCATION BY JOHN STUART MILL* 122 (John M. Robson, ed., 1984) [hereinafter Mill].

¹⁰ As he put the issue:

The disputed question is that of interfering in the regulation of another country’s internal concerns; the question whether a nation is justified in taking part on either side, in the civil wars or party contests of another; and, chiefly, whether it may justifiably aid the people of another country in struggling for liberty; or may impose on a country any particular government or institutions, either as being best for the country itself, or as necessary for the security of its neighbours.

Mill, *supra* note 9, at 121.

¹¹ As he stated,

it can seldom, therefore – I will not go so far as to say never – be either judicious or right, in a country which has a free government, to assist, otherwise than by the moral support of its opinion, the endeavours of another to extort the same blessing from its native rulers.

Id. at 123.

¹² The first section of this famous poem reads:

Take up the White Man’s burden--
Send forth the best ye breed--
Go bind your sons to exile
To serve your captives’ need;

“mission civilatrice”¹³ (civilizing mission) was widely accepted in the Western world. Mill, as a central figure in the development of Western liberal thought, might well have been superficially tempted by the notion of a “civilizing mission” but his utilitarian background¹⁴ ultimately led him to take a more practical view.

Mill’s basic point relevant to the issues under discussion here is that if prudent limits upon outside intervention are not observed, the net result could be negative for all concerned. In this practical observation lay the germ of the concept of self-determination. Thus Mill drew a logical connection between the values of democracy, self-determination and non-intervention. A prudential logic of non-interference, similar to that expressed by Mill in 1867 was codified into international humanitarian law soon thereafter with the adoption of the 1907 Hague Regulations.¹⁵

The duties of the occupying power under international humanitarian law were formulated during the state-centric era before the development of the international law of human rights. Today, the responsibilities of the occupying power must be understood in light of the relatively newer norms of international human rights law which also protect individuals during armed conflict.

The U.S., as the world’s predominant power, has focused that power recently on diluting the role and effectiveness of international

To wait in heavy harness,
On fluttered folk and wild--
Your new-caught, sullen peoples,
Half-devil and half-child.

Rudyard Kipling, *The White Man’s Burden* (1899), available at <http://www.fordham.edu/halsall/mod/Kipling.html> (last visited Nov. 7, 2004). It should be noted that “[t]his famous poem, written by Britain’s imperial poet, was a response to the American take over of the Philippines after the Spanish-American War.” INTERNET MODERN HISTORY SOURCEBOOK, at <http://www.fordham.edu/halsall/mod/Kipling.html> (last visited Nov. 7, 2004).

¹³ “[T]here is nothing at all new in wars being fought, in the eyes of those who fought them, for the values of civilisation and justice. That was just what imperialists thought they were doing when they brought the rest of the world their ‘mission civilatrice’.” Geoffrey Wheatcroft, *The NS Essay - Send forth the best ye breed; Geoffrey Wheatcroft explains why the left wants the white man’s burden again*, NEW STATESMAN, July 5, 1999.

¹⁴ For Mill, justice involved a hedonistic calculus, designed to promote the greatest good for the greatest number. See John Stuart Mill, *Utilitarianism*, in THE PHILOSOPHY OF JOHN STUART MILL: ETHICAL, POLITICAL, AND RELIGIOUS 335 (Marshall Cohen ed., 1961).

¹⁵ The 1907 Hague Regulations, Hague Convention IV, *supra* note 8, are discussed in greater detail, in *infra* notes 24 to 29 and accompanying text.

law and organization. Success in this objective can only be a pyrrhic victory, won at the cost of undermining the credibility, and thus the utility, of international law and organization for the future.

II. THE INTERNATIONAL LAW OF OCCUPATION

Whatever philosophical perspective one takes, in Iraq there have been serious practical difficulties balancing the temporary trusteeship and supervision of the occupying powers with the need to allow the Iraqi people to take responsibility for their own affairs. Any workable formula for the future will need to take into account legitimate Iraqi national interests, the interests of the international community, and the legitimate security concerns of the occupying power or powers who have assumed responsibility for keeping order.

A number of different legal frameworks are relevant to the delimitation of these interests including international humanitarian law, international human rights law and, of course, the basic rules of general international law. These legal frameworks can only be understood in terms of the differences between them, but the issue of how to relate and prioritize between them is equally important.

By its very nature, the military occupation of one country by another implies an attempt to reconcile different interests which may in fact be impossible to reconcile. It must be distinguished from the "normal" situation in which a government has a clear interest in providing the basic peace and tranquility required by its own citizens. The occupation clearly affects the vital interests of the occupied state and its inhabitants. The occupying power, for its part, must expend considerable resources to establish, maintain and exercise its authority over occupied territory, and in doing so demonstrates that it considers developments on that territory to be a matter of important state interests.

Questions about the legality of the use of force are raised by any decision to intervene militarily in another state, and some of them can be quite difficult to resolve. The legal justifications invoked for the invasion of Iraq were based, in the first instance, on the right of self-defense against potential weapons of mass destruction,¹⁶ alternatively, on a supposed right to enforce earlier Security Council resolutions on

¹⁶ See David E. Sanger, *Threats and responses: The President: Bush Tells Critics Hussein Could Strike at Any Time*, N.Y. TIMES, Oct. 6, 2002, at 22; see also Elisabeth Bumiller and James Dao, *Eyes on Iraq: Cheney Says Peril of a Nuclear Iraq Justifies Attack*, N.Y. TIMES, Aug. 27, 2002, at A1 ("There is no doubt that Saddam Hussein now has weapons of mass destruction," Mr. Cheney said. "There is no doubt that he is amassing them to use against our friends, against our allies and against us.").

Iraq¹⁷ (even without the contemporaneous approval or authorization of the Council), and, as a final alternative, on the right of humanitarian intervention¹⁸ to free the Iraqi people from Saddam Hussein's tyranny. Each is subject to multiple and conflicting formulations. The standards of *jus in bello*, in particular those applicable to territory occupied by war, have at least been codified into agreed texts. These texts make it clear that when a state chooses to intervene militarily and to occupy foreign territory it assumes a specialized set of legal responsibilities, many of which are non-derogable. The most important of these is interim responsibility for maintaining order and stability. The basic standard is set out in Article 43 of the 1907 Hague Regulations, discussed below.

A. *Duties of the Occupying Power under International Humanitarian Law*

States have a shared interest in defining their mutually agreed rights and duties during times of armed conflict. For their reciprocal benefit, they have agreed to regulate hostilities between themselves in order to soften the hardships of war.¹⁹ The body of law created for this purpose, formerly known as *jus in bello* or the "law of armed conflict," has more recently come to be known as "international humanitarian law."²⁰ The original purpose of this law is to define the rights and duties of states in wartime with sufficient clarity to establish the legal responsibility of states for clear violations. It has always served a humanitarian interest as well, by deterring violations which could be

¹⁷ For arguments, pro and con, that earlier resolutions might have justified the invasion of Iraq, see Michael Byers, *Agreeing to disagree: Security Council Resolution 1441 and intentional ambiguity*, 2 GLOBAL GOVERNANCE 10, 165 (2004).

¹⁸ Mark Turner, *Annan calls on world leaders to rally behind rule of law*, FIN. TIMES (LONDON), Sept. 22, 2004, Section: International Economy, at 10 ("Many fear that arguments for international humanitarian intervention have been debased by their selective application in Iraq; last week, Mr. Annan said the U.S.-led Iraq invasion was illegal.").

¹⁹ The process began with the first Geneva Convention of 1864, and continued with the Hague Conventions of 1899 and 1907, the revision and expansion of the Geneva Convention into the four Geneva Conventions of 1949 and their Protocols, and with the acceptance of related treaties such as the Genocide Convention. The relevant treaties are discussed in greater detail below.

²⁰ "It is the object of international humanitarian law to regulate hostilities in order to attenuate their hardships. Humanitarian law is that considerable portion of international law which is inspired by a feeling for humanity and is centered on the protection of the individual in time of war." JEAN S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 1 (1985).

detrimental to vulnerable individuals such as civilians, prisoners of war and the sick and wounded.

1. Hague Law Standards

The Hague Peace Conferences at the end of the 19th century were the first major multilateral negotiations to include representatives from non-European and non-Western powers on an equal basis as would be the practice thereafter of all global conferences and institutions.²¹ As such, they represent an important evolutionary step from what had hitherto been known as the “public law of Europe” toward a more inclusive international law among formally equal sovereign states from every region of the world. The 1907 Hague Convention (IV) Respecting the Laws and Customs of War, and its annexed Hague Regulations, represent the crowning achievement of the Hague peace process. Articles 42 and 43 of those Regulations offer history’s first multilaterally agreed upon codification of the rights and duties of the occupying power under international law.

Governments whose armies control hostile territory sometimes deny their status as an occupying power, perhaps hoping to avoid the responsibilities that come with it.²² This has not been an issue in Iraq. In 2003 both the U.S. and U.K. acknowledged their status as occupying powers in Iraq,²³ and the matter was not disputed. In any case, the two

²¹ Inis Claude describes the Hague System, comprised of the two International Peace Conferences held at the Hague in 1899 and in 1907:

A leading feature of the Hague System was its approach toward universality. Whereas the first conference was attended by only twenty-six states and was predominantly European in composition, the second involved representatives of forty-four states, including the bulk of the Latin American republics This was a significant step toward broadening the focus of international diplomacy, toward escaping the increasingly unrealistic European-fixation, and toward defining more accurately the boundaries of the community of nations with whose problems statesmen had to deal.

INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATION* 29 (4th ed. 1971).

²² The government of Israel has long maintained that the so-called “Occupied Territories” of the West Bank and Gaza are not under “occupation” for purposes of the Geneva Convention. See Shamgar Commission, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. ON H.R. 262, 263-66 (1971); see also Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44, 63 (1990).

²³ See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003); see also Letter from the Permanent Representatives of the United States of

countries clearly qualified under the 1907 Hague Regulations which set out the definition of “occupied territory” in very practical terms. “Territory is occupied when it is placed under the authority of the hostile Army.”²⁴

When a country is occupied by a foreign power it maintains its status as a sovereign state under international law.²⁵ Thus under the 1907 Hague Regulations the occupying power is bound to safeguard the capital of state properties such as public buildings, real estate, forests and agricultural estates by administering them according to “the rules of usufruct,”²⁶ rules which by definition apply to the right of temporary possession, use and enjoyment of something that belongs to somebody else.²⁷ The state that retains reversionary ownership of these public properties must still legally exist even when its territory is

America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003).

²⁴ 1907 Hague Regulations, Article 42. The full text of that article provides:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Hague Convention IV, *supra* note 8, at art. 42.

²⁵ As Frederic Kirgis has noted:

[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. Iraq remains a state as a matter of international law, with rights and obligations toward other sovereign states. The Security Council has imposed restrictions on some of those rights and obligations, and for the time being the occupying powers will act on behalf of Iraq in carrying them out, but Iraq’s sovereignty under international law remains intact.

Kirgis, *supra* note 5. Years later, the first Protocol to the 1949 Geneva Conventions would similarly affirm that “[n]either the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.” Protocol Additional to the Geneva Conventions, Aug. 12, 1949; Relating to the Protection of Victims of International Armed Conflicts, Protocol I, art. 4, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

²⁶ Hague Convention IV, *supra* note 8, at art. 55, which provides:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

²⁷ “Usufruct” can be defined as “[t]he right of enjoying a thing, the property of which is vested in another . . .” See BLACK’S LAW DICTIONARY 1712 (4th ed. 1968).

under occupation. The occupying power, by virtue of its *de facto* authority, may legally exercise certain rights, but must also accept the corresponding obligations.

The Hague Regulations establish the basic framework for balancing the rights of the occupying power with the appropriate obligations. The basic balance between the rights and responsibilities of the occupying power is simple. The occupying power, by virtue of its *de facto* military control, gains “authority of legitimate power.” In exchange, the occupying power must “take all the measures in his power to restore, and ensure, as far as possible, public order and safety” while, at the same time, “respecting, unless absolutely prevented, the laws in force in the country.”²⁸

Although the occupying power is under a general duty to maintain the pre-existing law and justice system of the occupied territory, the Hague Regulations implicitly acknowledge that this may not always be possible. The priority is to ensure “public order and safety,” and thus concerns about maintaining pre-existing laws in force must take a back seat to this consideration. As will be discussed below, a different, less deferential approach to the existing laws is both necessary and justified where the prior justice system has been notorious for visiting atrocities upon the local population. This seems especially true today, in an age of internationally recognized human rights including those relating to democratic governance.

Just what interests are these Hague rules on occupation intended to protect? Fifty-one years after the signature of the 1907 Hague Convention, the Commentary to related provisions of the Geneva Convention (IV) would note the broad scope of the still applicable Hague Regulations noting that:

this provision of the Hague Regulations is not applicable only to the inhabitants of the occupied territory; it also protects the separate existence of the State, its institutions and its laws. This provision does not become in any way less valid because of the existence of the new Convention, which merely amplifies it so far as the question of the

²⁸ The 1907 Hague Regulations set out the corresponding obligations of the occupying power in the following terms:

art. 43. 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 safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention IV, *supra* note 8, at art. 43.

protection of civilians is concerned.²⁹

Thus the Hague rule, still formally applicable today, protects many different interests, including those stemming from the sovereignty rights of the state under general international law, those related on one level to the self-determination of the people of the state insofar as they are to be protected from the imposition of a foreign system of laws, and those of a more fundamentally humanitarian nature such as the protection of civilians from unnecessary turmoil and chaos. The Geneva Convention (IV) of 1949 would expand upon the protections for civilians already implied in the Hague standard.

2. Geneva Law Standards

In 1949 the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War reformulated the 1907 Hague standard with a new focus upon the rights of “protected persons.”³⁰ As the civilian population of Iraq fell under U.S. control they became protected persons under this convention and thereby gained many rights under its terms.³¹ As long as they remain non-combatants, these protected persons retain many rights under the Geneva Convention (IV), but if suspected of being a threat to security they may not claim any rights and privileges, under the convention, that would be prejudicial to the security of the state.³²

²⁹ COMMENTARY TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 273-274 (Jean S. Pictet ed., 1958).

³⁰ See Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 75 U.N.T.S. 287, [hereinafter Geneva Convention IV] (stating that

[p]ersons 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).

³¹ These include the right to humane treatment (art. 27), freedom from physical or moral coercion (art. 31), and freedom from collective penalties, measures of intimidation, terrorism, reprisals (art. 33) or hostage-taking (art. 34). There are also extensive provisions governing criminal law, criminal procedure, criminal detention and fair trial rights all for the benefit of these protected persons. Geneva Convention IV, *supra* note 30, at arts. 27-34.

³² In a very explicit and potentially open-ended exception, the Geneva Convention IV recognizes the primacy of state security interests in the law of occupation:

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall

The 1949 Geneva Convention (IV) relates stability of law and institutions to the rights of the local inhabitants. Protected persons in occupied territory may not be deprived of the benefits of the Convention by any change introduced by the occupying power into the institutions or government of the territory.³³ The Convention calls for the penal laws and the tribunals of the occupied territories to remain in effect, although these may be repealed or suspended by the occupying power if they constitute a threat to the security of the occupying power or to the application of the Convention itself.³⁴

The text of the Geneva Convention (IV) as well as the commentaries make it clear that, unlike the older Hague rule, the Geneva rule is more narrowly focused on humanitarian interests and that it

is of an essentially humanitarian character, its object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such It does not expressly prohibit the Occupying Power from modifying the institutions or government of the

not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Geneva Convention IV, *supra* note 30, at art. 5.

³³ *Id.* at art. 47 (“Protected 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 change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory . . .”).

³⁴ The relevant article provides:

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. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Geneva Convention IV, *supra* note 30, at art. 64.

occupied territory.³⁵

The more humanitarian character of this particular Geneva rule, as opposed to its Hague law predecessor, should be understood in the context of a gradual evolution from a 19th century law of armed conflict, focused on the rights and obligations of states, to a more people-based international humanitarian law in the mid-20th century.

One important way that all four of the 1949 Geneva Conventions seek to protect humanitarian interests is by defining international crimes against protected persons and establishing a treaty-based enforcement regime. Each of these treaties defines a special category of “grave breaches” and obliges the parties “to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed”³⁶ any of those grave breaches. Prior to 1949, international law had not incorporated a general system of international criminal law or international criminal procedure, largely because these matters were considered to be exclusively within the province of states.³⁷ International humanitarian law recognized that individual criminal responsibility for war crimes was appropriate, but it did not prescribe any particular modalities for achieving this. States

³⁵ Pictet, *supra* note 29, at 274 (footnotes omitted from quotation).

³⁶ See Geneva Convention IV, *supra* note 30, at art. 146; see also *id.* at art. 147 (defining the grave breaches), and art. 148 (preventing states from absolving themselves from any responsibility for grave breaches). See generally Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49-51, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50-52, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129-131, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950).

³⁷ In discussing the declaration in Article 1 of the Genocide Convention that genocide is a “crime under international law,” a 1989 Report on that Convention by the U.S. Senate Committee Foreign Relations Committee expressed skepticism about the entire concept, and reduced it entirely to a matter of municipal criminal law:

The term “crime under international law” has a variety of meanings. As used in the Genocide Convention, it combines two ideas: internationally authorized municipal criminal law and municipal criminal law common to civilized nations. Parties to the Convention undertake to enact domestic legislation making genocide a municipal crime. Thus, common to the municipal law of all parties to the Convention is a proscription against genocide, a proscription enacted as part of each party's obligation under the Convention.

Genocide Convention Implementation Act of 1987 (1988), Senate Report, reprinted in 28 I.L.M. 760, 763 (1989).

were under no formal obligation to prosecute violations of international humanitarian law, and if a state did decide to prosecute, it was free to rely on its own courts, its own legal procedures, and even its own substantive law.³⁸ Today, however, international criminal law standards and procedures are being developed and applied by international Tribunals as international law evolves beyond its state-centric origins.

B. Other Obligations of the Occupying Power

1. Duties under general international law

All states are subject to certain general duties under international law. Even while Iraq remains under military occupation that by definition precludes the normal exercise of state sovereignty by an Iraqi government, Iraq remains a state under international law³⁹ and

³⁸ See, e.g., *U.S. v. Calley, Jr.*, 46 C.M.R. 1131 (A.C.M.R. 1973). In much publicized proceedings, the appellant was convicted by a general court-martial of three specifications of premeditated murder and one of assault with intent to commit murder in violation of Articles 118 and 134 of the Uniform Code of Military Justice (10 U.S.C. §§ 918, 934, respectively). He was sentenced to

dismissal, forfeiture of all pay and allowances, and confinement at hard labor for life. The convening authority approved dismissal and the forfeitures, but reduced the period of confinement to twenty years. The offenses were committed by First Lieutenant William L. Calley when he was performing as a platoon leader during an airmobile operation in the subhamlet of My Lai (4) in Song My village, Quang Ngai Province, Republic of South Vietnam, on 16 March 1968. *Although all charges could have been laid as war crimes, they were prosecuted under the UCMJ.*

Id. at 1138 (emphasis added).

³⁹ Indeed, even through the four-power occupation of Germany after World War II, and the eventual diplomatic recognition of two separate German states (the German Federal Republic and the German Democratic Republic since absorbed by the former), the pre-1945 state of Germany was still said to exist. An authoritative study of the matter written in 1987 stated that

Germany continues to exist as a state in international law though it has not had a central government (apart from the organs established by the four powers to govern Germany). . . . The continued existence of Germany was recognized by the four powers, as well as by the authorities of the courts of a number of States, including those of the Federal Republic. This position was not affected by the termination of the state of war with Germany, or by the establishment of in 1949 of the Federal Republic of Germany and the GDR, or by their recognition as States having the full authority of sovereign States over their internal affairs.

therefore retains the fundamental rights of a state. The rights of territorial integrity and political independence are foremost among these rights. Article 2(4) of the U.N. Charter,⁴⁰ a partial codification of *jus ad bellum*, strictly prohibits any threat or use of force against either of them. Despite many questions as to the legality of the initial invasion and occupation of Iraq⁴¹ the U.S. and the U.K., as the occupying powers, made no territorial claims upon Iraq, and have supported numerous Security Council resolutions reaffirming its “sovereignty and territorial integrity.”⁴² In any case, the continuing sovereignty of Iraq necessarily implies the obligation to end the occupation eventually.

2. Obligations under International Human Rights Law

All of international law has been tempered and redefined by the development of the international law of human rights.⁴³ The rights of individuals under international human rights law limit the prerogatives of states even on their own territory. The obligation to respect, protect, and ensure these rights binds the occupying powers as well. The international law of human rights imposes obligations *erga omnes*,

I.D. HENDRY AND M.C. WOOD, *THE LEGAL STATUS OF BERLIN* 19 (1987).

⁴⁰ “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2, para. 4.

⁴¹ The stated goal of “regime change” was *prima facie* inconsistent with the political independence of Iraq, but alternative justifications such as self-defense against WMD and humanitarian intervention to free the people of Iraq from dictatorship have been offered at various times. See Henry A. Kissinger, *Iraq is becoming Bush's most difficult challenge*, CHI. TRIB., Aug. 11, 2002, at C9 (arguing that war was justified, but that “the objective of regime change should be subordinated in American declaratory policy to the need to eliminate weapons of mass destruction from Iraq as required by the U.N. resolutions.”); see also Peter Slevin, *U.S. Says War Has Legal Basis; Reliance on Gulf War Resolutions Is Questioned by Others*, WASH. POST, Mar. 21, 2003, at A14 (discussing Iraqi failure to comply with Security Council resolutions as a justification for the invasion).

⁴² See, e.g., S.C. Res. 1472, U.N. SCOR, 58th Sess., 4732d mtg., U.N. Doc. S/RES/1472 (2003); S.C. Res. 1483, *supra* note 23; S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., U.N. Doc. S/RES/1500 (2003); S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc S/RES/1511 (2003) (all “reaffirming the sovereignty and territorial integrity of Iraq”).

⁴³ W. Michael Reisman, Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990) (arguing that international human rights norms are “constitutive norms,” in that they imply a radical and qualitative change in international law as a whole). Reisman therefore sees the need for a process which might be referred to as the “updating,” “contemporization,” or “actualization” of international norms in light of human rights norms.

owed not just to another state but to the international community as a whole.⁴⁴ The primary global treaties codifying the positive international law of human rights are the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights.⁴⁵

a. Self-Determination

Both of the international human rights covenants of 1966 set out the right of self-determination in the same Article 1.⁴⁶ Self-determination is a fundamental right of “peoples” and as such is very much the human rights counterpart of the rights of sovereignty and territorial integrity held by the states in which those peoples live. Thus the full realization of the right of a people to “freely dispose of their

⁴⁴ *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, at 32 (Feb. 5). In the *Barcelona Traction* case, the International Court of Justice defined the concept of obligations *erga omnes* in the following terms:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

⁴⁵ See International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1997), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1997), 993 U.N.T.S. [hereinafter ICESCR].

⁴⁶ See Article 1 of both the ICCPR and the ICESCR, *supra* note 45. That article reads as follows:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

natural wealth and resources” requires maintaining sovereignty over the territory in which those resources are located.

Of course, as a human right, the right of self-determination is also a limitation upon state sovereignty.⁴⁷ More relevant to the issue of reconstructing Iraq is the admonishment of the two Covenants that all Parties “shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”⁴⁸ The International Covenant on Civil and Political Rights, which entered into force for the U.S. in 1992,⁴⁹ also incorporates a hard promise to “respect and to ensure” the human rights defined in its articles to those “within its territory and subject to its jurisdiction.”⁵⁰ Occupied territories are within the jurisdiction of the occupying power, but the proper scope of the obligation regarding self-determination can only be understood in relation to the other rights and obligations discussed here.

b. Promotion of Democracy and the Rule of Law

Under the 1907 Hague standard, still formally in effect,⁵¹ the occupying power is seemingly under a general duty to maintain the pre-existing law and justice system of the occupied territory. But, can this still be true in light of key developments in the intervening years? Perhaps most relevant to this question are the evolving international human rights norms which impose new duties on the occupying power to consider the consistency of existing laws with fundamental internationally recognized human rights. Recent post-intervention practices in other places such as Afghanistan and Kosovo, involving elaborate internationally-supported programs to promote human rights and the rule of law, also cast doubt upon the viability of the Hague standard.

Security Council Resolution 1244,⁵² on the situation in Kosovo, is an example of how the Council has, in another recent case, wrapped

⁴⁷ In this regard, see the discussion of human rights and democracy, *infra* notes 53-65 and accompanying text.

⁴⁸ See ICCPR, *supra* note 45, at art. 1.

⁴⁹ See United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 I.L.M. 645 (1992).

⁵⁰ See ICCPR, *supra* note 45, at art. 2.

⁵¹ See S.C. Res. 1483, *supra* note 23, at para. 5. This resolution, which was adopted in the early months of the occupation, “[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.”

⁵² S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

together into one complex package many of the different considerations relevant to reconstruction of a war-torn and ethnically divided territory. That resolution calls for the establishment of a U.N. Interim Administration in Kosovo (now known as UNMIK) whose purpose is:

to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will 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.⁵³

The Security Council has similarly passed resolutions supporting the transition to democracy and the rule of law in other countries such as in Afghanistan.⁵⁴ Together all these developments call into question the 1907 Hague standard. In the time since 1907 there have been profound changes in international norms and attitudes concerning self-government. The 1948 Universal Declaration of Human Rights declares that:

[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.⁵⁵

The International Covenant on Civil and Political Rights, a treaty accepted by 152 of the 192 states in the international community contains very similar language.⁵⁶ Further evidence of an emerging

⁵³ *Id.* at art. 10.

⁵⁴ See S.C. Res. 1453, U.N. SCOR, 57th Sess., 4682th mtg., U.N. Doc. S/RES/1453 (2002).

⁵⁵ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810, art 12 para. 3, at 71 (1948).

⁵⁶ See ICCPR, *supra* note 45, at art. 25. The International Covenant expresses political rights in the following terms:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which

right of democratic governance can be found in the work of leading scholars⁵⁷ and in resolutions passed by the U.N. Commission for Human Rights.⁵⁸

These positive developments in the international law of human rights cannot justify the reduction of the protections provided to individuals by international humanitarian law, but they do justify reducing the degree of deference that occupying powers must pay to the previous legal order. There can be little doubt that, today, the promotion of democracy and the rule of law is a legitimate goal in the process of reconstruction in occupied territories. But the legitimacy of this goal, in the abstract, does not authorize the occupying power to pursue its vision of local democracy by any means necessary or according to whatever timetable it sees fit.

As a practical matter, the U.S. cannot directly impose democracy in Iraq because any specific system or constitution it might impose would be perceived as undermining the legitimate aspiration of Iraqis for self-determination. To address this issue of perceived legitimacy, an elaborate succession of Iraqi governmental authorities has been deployed on the path towards full democratic sovereignty in Iraq. The Coalition Provisional Authority was directly appointed and run by the occupying powers,⁵⁹ and recognized by the Security Council as representing them.⁶⁰ It attempted to move matters forward by itself appointing the Governing Council of Iraq, composed of Iraqis hand-picked by the U.S. to oversee the next stage in the restoration of Iraqi sovereignty.⁶¹ The Interim Government, endorsed by the U.N. in June of

shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

⁵⁷ See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

⁵⁸ See, e.g., *Promotion of the right to democracy*, U.N.H.R. Res. 1999/57 (1999) (adopted Apr. 27, 1999 by the U.N. Commission for Human Rights).

⁵⁹ See *Coalition Provisional Authority Regulation Number 1* (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (according to its own terms, was issued by Coalition Provisional Authority (CPA) Administrator Paul Bremer “[p]ursuant to my authority as Administrator of the CPA, relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war”).

⁶⁰ See S.C. Res. 1483, *supra* note 23, at paras. 13-14.

⁶¹ See Patrick E. Tyler, *After the War: Transition; Interim Leaders, Supported by U.S., Meet in Baghdad*, N.Y. TIMES, July 14, 2003, at A1; see also S.C. Res. 1511, *supra* note 42, at para. 4 (The Security Council “[d]etermines that the Governing Council and its ministers are the principal bodies of the Iraqi Interim Administration.”).

2004,⁶² contained many of the same Pro-Western Iraqis. The next steps already endorsed by the Security Council include the holding of democratic elections to select a Transitional National Assembly which will have responsibility for forming a Transitional Government, and drafting a permanent constitution for Iraq leading to a constitutionally elected government by the end of 2005.⁶³

As far as the timing is concerned, respect for both the continuing sovereignty of the state of Iraq, and for the right of self-determination of the Iraqi people, requires that military occupation should be brought to an end within a reasonable time. Just what is reasonable must of course be defined according to the specific circumstances, but the occupying power's discretion is not unlimited. There are a number of different models of democracy and of the rule of law, and the occupying power's right to insist upon any one is limited by the rights of sovereignty and self-determination of the local population.⁶⁴

Those seeking to establish democracy for the first time in an occupied country are undertaking an ambitious task. So what are the occupying powers to do? Is it best to continue the occupation and try to build respect for human rights and the rule of law, or leave and risk plunging the occupied territories into chaos? To leave a country in chaos would be both embarrassing and irresponsible. Building true

⁶² See S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg. at para. 1, U.N. Doc. S/RES/1546 (2004) (endorsing

the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below . . .).

⁶³ *Id.* at 4(c) (endorsing a very elaborate timetable calling for

holding of direct democratic elections by 31 December 2004 if possible, and in no case later than 31 January 2005, to a Transitional National Assembly, which will, inter alia, have responsibility for forming a Transitional Government of Iraq and drafting a permanent constitution for Iraq leading to a constitutionally elected government by 31 December 2005 . . .).

⁶⁴ *Cf.*, the following principle from a U.N. General Assembly resolution which passed without opposition in 1965: "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State." *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, G.A. Res. 2131 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1966), reprinted in 5 I.L.M. 374, at para. 5 (1966). Also relevant are paragraphs 1 and 6.

democracy, human rights and the rule of law will require the support of others not so directly implicated in the military occupation. It is only with the authorization and support of the United Nations that the occupying powers can legitimately claim the time and international support needed to sustain any realistic hope of achieving the democratization of Iraq.

Even with international support, determining the timetables for a transition to democratic self-rule can be a difficult balancing act. A premature rush towards superficially democratic elections could exacerbate ethnic and political tensions, and could even legitimate extremist candidates and their preferred policies. But political pressures, and aspirations for immediate self-determination, can make delays equally problematical. If it is to be successful in the long term, the transition to democratic self-rule should not be rushed according to an artificial timetable. As Kofi Annan, the U.N. Secretary-General, said about the most recent U.N. intervention in Haiti:

This time I hope the international community is not going to put a Band-Aid on to help stabilise the current situation, but assist Haitians over the long haul and really help them pick up the pieces and build a stable country.⁶⁵

III. RESIDUAL RESPONSIBILITIES OF THE INTERVENOR

A. *Residual Responsibilities: The Legal Basis*

By the very act of invading and occupying Iraq, the U.S. has assumed some very broad and potentially long-term responsibilities. Whether the invasion itself was legal or not, forcible intervention and reconstruction are tied under international humanitarian law via the duties of the occupying power. Any state having chosen to intervene forcibly in another country and occupy its territory, by the very fact of the occupation, assumes interim responsibility for maintaining order and stability. However the legal responsibility so assumed may not end abruptly when the occupying forces leave. A continuing post-war burden of legal responsibilities for the intervening state is both necessary and appropriate to discourage destabilizing acts of intervention. That post-war legal burden can be justified in terms of the moral theory of John Stuart Mill, principles of humanity

⁶⁵ Tim Reid & Elaine Monaghan, *US seeks to restore stability as Aristide heads for exile*, TIMES (London), Mar. 2, 2004, at 14.

(sometimes referred to as elementary considerations of humanity) cited by the International Court of Justice and other international courts as a source of obligations binding upon states, and the established principles of state responsibility endorsed by the International Law Commission.

1. J.S. Mill's Moral Philosophy

John Stuart Mill suggested that, even without regard to fault, some degree of residual legal responsibility for the consequences of invasion and occupation is appropriate. He observed that even if war is necessary (and therefore presumably legal) it could result in long term moral responsibility for the effects of meddlesome intervention in the internal affairs of another state.

A civilized government cannot help having barbarous neighbors: when it . . . finds itself obliged to conquer them . . . it has had so much to do with setting up and pulling down their governments, and they have grown so accustomed to lean on it, that it has become morally responsible for all the evil it allows them to do.⁶⁶

Mill further observed that when a strong state has reduced the military power of a weaker despotic state to a nullity, it may be obliged to offer its own military power as the only bulwark against anarchy.

This is the history of the relations of the British Government with the native states of India. It was never secure in its own Indian possessions until it had reduced the military power of those states to a nullity. But a despotic government only exists by its military power. When we had taken away theirs, we were forced, by the necessity of the case, to offer them ours instead of it.⁶⁷

Thus, in terms of Mill's moral theory, by invading Iraq and abolishing the Baathist regime the U.S. assumed responsibility for keeping order there.

2. The Martens Clause: Principles of Humanity, Requirements of the Public Conscience, and Elementary Considerations of Humanity

Appropriate primary obligations for the intervening powers could be based on the "principles of humanity" and "requirements of the

⁶⁶ Mill, *supra* note 9, at 119.

⁶⁷ *Id.* at 119.

public conscience” first formulated⁶⁸ in the 1899 Martens clause:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.⁶⁹

A slightly modified but essentially similar version was included in the preamble of the 1907 Hague Convention,⁷⁰ and many other, often weaker versions have been incorporated in international humanitarian law treaties over the years. The clause was originally included for the modest purpose of allowing for some supplementary or residual protections until codification of the laws of war could be completed, but as Theodor Meron observes, “since then, a broad understanding has emerged to the effect that the Martens clause reaches all parts of international humanitarian law.”⁷¹ The clause affirms that binding rules of armed conflict exist beyond codified treaty, and perhaps even beyond uncoded customary international law.⁷² The Martens clause was invoked by the U.S. Military Tribunal in Nuremberg as the basis for finding criminal responsibility in a case not otherwise falling under applicable treaties.⁷³

⁶⁸ Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78, 79 (2000) (The eminent jurist F. F. de Martens, the Russian delegate to the Hague Peace Conference, proposed that the clause has ancient antecedents rooted in natural law and chivalry.).

⁶⁹ HAGUE CONVENTION II WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND, preamble para. 10, with annex of regulations, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429, 431.

⁷⁰ Hague Convention IV, *supra* note 8, at 205; Consol. T.S. 227, 279, preamble.

⁷¹ Meron, *supra* note 68, at 79.

⁷² Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT’L REV. RED CROSS 128 (1997) (“It appears that, when determining the full extent of the laws of armed conflict, the Martens Clause provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of public conscience.”).

⁷³ In that case, the court said that the Martens clause

is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and Regulations annexed to it do not cover specific cases occurring in warfare, or

There are many views concerning the true significance of the Martens clause.⁷⁴ Perhaps it is merely referring to customary international law.⁷⁵ A much more expansive view was taken by Judge Shahabuddeen in the ICJ's Advisory Opinion on *Nuclear Weapons*:

In effect, the *Martens Clause* provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another (emphasis added).⁷⁶

If, as Judge Shahabuddeen says, the Martens clause helps international humanitarian law to adapt to evolving conditions then it is time to put its principles to use. The fact that warfare today is waged with such terrible and precise weaponry may encourage some policymakers to indulge in illusions of quick and easy victory. Only in recent years have so many ambitious efforts at regime change and political transformation been attempted. The principles of humanity and the requirements of the public conscience referred to in the Martens clause could be the source of new principles, so sorely needed, establishing that a duty of reasonable care applies to any forcible intervention and occupation.

The principles of humanity referred to in the Martens Clause are essentially the same as the "elementary considerations of humanity"⁷⁷ applied by the International Court of Justice in the *Corfu Channel Case*. That court described them as follows:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general,

concomitant to warfare.

In re Krupp, 15 ANN. DIG. & REP. PUB. INT'L. L. CASES 620 (U.S. Mil. Trib. 1948).

⁷⁴ Ticehurst, *supra* note 72, at 126 (different interpretations of the Martens Clause).

⁷⁵ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809 (1996) (concluding that Martens Clause is a customary international rule regulating state conduct).

⁷⁶ *Id.* at 861 (Shahabuddeen, J., dissenting).

⁷⁷ Meron, *supra* note 68, at 82 ("Principles of humanity are not different from elementary considerations of humanity.").

the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefields exposed them. Such obligations *are based*, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but *on certain general and well-recognized principles, namely: elementary considerations of humanity*, even more exacting in peace than in war . . . (emphasis added).⁷⁸

Just as these elementary considerations of humanity placed Albania under an obligation in that case, they similarly justify imposing a duty of care on the intervening and occupying states in Iraq. They should take all reasonable efforts not to leave Iraq in worse shape than before the intervention.

3. State Responsibility for the Injurious Consequences of Conduct Not Prohibited

The International Law Commission, in the Commentary to its Draft Articles on Responsibility of States for Internationally Wrongful Acts has referred favorably to the notion of “obligations to compensate for the injurious consequences of conduct which is not prohibited . . . by international law.”⁷⁹ Although this notion is beyond the scope of the Draft Articles to which it relates, it supports the view that a principle of no-fault legal responsibility could indeed apply under positive international law. The ILC was careful to distinguish the no-fault “requirements of compensation or restoration [which] would involve primary obligations” from the secondary fault-based international responsibility that would result from failure to meet these

⁷⁸ Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

⁷⁹ Commentaries, *supra* note 7, at 62 (stating

the articles deal only with the responsibility for conduct which is internationally wrongful. *There may be cases where States incur obligations to compensate for the injurious consequences of conduct which is not prohibited, and may even be expressly permitted, by international law* (e.g. compensation for property duly taken for a public purpose). There may also be cases where a State is obliged to restore the *status quo ante* after some lawful activity has been completed. These requirements of compensation or restoration would involve primary obligations; it would be the failure to pay compensation, or to restore the status quo which would engage the international responsibility of the State concerned (emphasis added)).

requirements by paying compensation or restoring the status quo.⁸⁰

4. Compensation or Restoration Related to Rights and Responsibilities *Jus Ad Bellum* or *Jus Post Bellum*

Forcible intervention and reconstruction are tied via the duties of the Occupying Power. Under international humanitarian law these duties are owed without regard to any finding of fault by the intervening state. But international humanitarian law is not the only possible source of responsibility for that state. The dilemmas of military occupation are generally preceded by a decision to intervene militarily on the territory of another state. This issue of the legality of war under *jus ad bellum*, is often a difficult one but, regardless of the justness of a war tough choices may follow concerning the nature and duration of any post war occupation and reconstruction. The implications of any use of force are so potentially far reaching that the *jus ad bellum* should concern more than the just or unjust initiation of war. It should also encompass the legal responsibility assumed by states that initiate the use of force even in a just and legal cause. Just war theorist Michael Walzer⁸¹ now says that debates on *jus ad bellum* are not enough, and that a new *jus post bellum*, or just post war moral theory is needed.⁸² Where this moral theory leads, law now needs to follow.

The idea of legal responsibility for damage caused even by the justified use of force is rather novel, but all of the legal bases mentioned above strongly support it. If, as Mill's observations concerning the British Empire would suggest, forcible intervention is likely to cause more sorrow than it relieves, states choosing to intervene nonetheless should be subject to a duty of care, even if they act in pursuit of a legitimate goal such as self-defense.

The lack of planning for the post-war phase of the operation in Iraq has proved to be as disastrous as the decision to invade. In particular, the precipitous decision to disband key national institutions such as the police and the military with no successors in place was a dangerously destabilizing blunder. The laws of war (or post war) should impose state responsibility for damages caused by misfeasance⁸³

⁸⁰ *Id.*

⁸¹ MICHAEL WALZER, JUST AND UNJUST WARS (3rd ed. 2000). This book is the most broadly read and quoted modern work on the moral theory of just war.

⁸² See MICHAEL WALZER, ARGUING ABOUT WAR 160-168 (2004) (arguing that just war is not enough, and arguing for a *jus-post-bellum*, or just post war).

⁸³ Misfeasance may be defined as "A misdeed or trespass. The improper performance of some act which a man may lawfully do." BLACK'S LAW DICTIONARY 1151 (4th ed. 1968).

in the use of armed force. This would recognize the right of civilian populations not to be victimized due to mistakes by intervening powers. Principles of humanity and the requirements of the public conscience require no less. It is debatable whether this protection should be considered part of *jus ad bellum*, as part of the *jus in bello*, or as part of a new *jus post bellum*. Formal recognition of these protections would establish a limitation or qualification on the exercise of the right *jus ad bellum* to enter into a just war abroad, and for this reason could be seen as the development of a new part of the *jus ad bellum*.

5. Compensation or Restoration for the Injurious Consequences of Regime Change and Humanitarian Intervention

The stated goal of “regime change”⁸⁴ has influenced the policy of the U.S. government in Iraq since before the invasion, and its effects continue. By pursuing a number of political goals in Iraq the U.S. administration has accepted even greater responsibility than it did by the initial military intervention. The occupying powers in Iraq have imposed a process of forced de-Baathification, disbanded the Police and the Army, and created transitional authorities to replace the entire existing government. All this was done in the hope of eventually establishing a stable and pro-U.S. democracy in Iraq. A brief occupation and withdrawal would have entailed lesser responsibility.

The goal of regime change has been justified, especially after the fact, as a matter of humanitarian intervention to free the people of Iraq from Saddam Hussein’s brutal tyranny. There is an ongoing debate about the legality of humanitarian intervention as a matter of *jus ad bellum*,⁸⁵ but for purposes of the present discussion much of that debate is beside the point. The issue of humanitarian intervention involves a potential clash of fundamental values. On the one hand there is the principle of non-intervention, a basic rule of the nation-states system now reflected in Article 2(4) of the U.N. Charter. This principle underpins the fundamental rights of state sovereignty and in general promotes international peace and stability.⁸⁶ On the other,

⁸⁴ Many months before the invasion, President Bush explicitly called for regime change. “The American people know my position, and that is that regime change is in the interests of the world. How we achieve that is a matter of consultation and deliberation.” Amy Goldstein, *President Reiterates Call for ‘Regime Change,’* WASH. POST, Aug. 22, 2002, at A14.

⁸⁵ See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1677, 1683 (2000).

⁸⁶ LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY*

there are the human rights of the people who may happen to be within a state that neither protects nor respects their fundamental rights. When the Security Council fails to act to stop a continuing humanitarian crisis, these two basic pillars of the Post World War II legal order come into dramatic conflict.⁸⁷

Should the right of the state to be free from foreign intervention yield to the moral, and perhaps legal, imperative to promote and protect human rights? If so, when and under what circumstances is this appropriate?⁸⁸ Two essential requirements for any viable standard of permissible humanitarian intervention are especially worth mentioning here: These are the duty not to make the humanitarian situation worse than it otherwise would have been, and responsibility for reconstruction.

Doubts about the net effect of humanitarian intervention form one of the principal objections to the idea that it ought to be legally

145 (2d ed. 1979).

Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other. Human rights, I believe, will have to be vindicated, and other justices remedied, by other, peaceful means, not by opening the door to aggression and destroying the principal advance in international law, the outlawing of war and the prohibition of force.

⁸⁷ Kofi A. Annan, *Two Concepts of Sovereignty*, THE ECONOMIST (London), Sept. 18, 1999. U.N. Secretary-General Kofi Annan has defined the dilemma of humanitarian intervention in the following terms:

The genocide in Rwanda showed us how terrible the consequences of inaction can be in the face of mass murder. But this year's conflict in Kosovo raised equally important questions about the consequences of action without international consensus and clear legal authority.

It has cast in stark relief the dilemma of so-called "humanitarian intervention." On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked? The inability of the international community to reconcile these two compelling interests in the case of Kosovo can be viewed only as a tragedy.

⁸⁸ Brown, *supra* note 85, at 1683 (arguing that the human rights of individuals sometimes trump the sovereignty-based rights of the State, but that several very important requirements apply. These include the requirements of necessity, legitimate purpose and proportionality, the duty to respect international humanitarian law and international human rights, the duty not to make the humanitarian situation worse than it has been, and responsibility for reconstruction.).

tolerated.⁸⁹ According to Mill's utilitarian calculus, intervention for democracy and human rights would most likely make things worse. Unless this problem is addressed no act of humanitarian intervention can claim legitimacy. A responsible approach to humanitarian intervention would require good intelligence, careful military, political and civilian transition planning, and disciplined professional execution in order to minimize the dangers for non-combatants. A wrongly conceived, ill-planned, and unauthorized act of international armed intervention is analogous to drunken driving or playing with loaded firearms but on a global scale: an irresponsible, and extremely dangerous adventure. It should be well within the law to hold intervening states to some standard of reasonable care in the first instance (a primary obligation) and to hold them responsible for reparation if and when they fail to meet that standard.

The Statute of the International Court of Justice authorizes it to consider general principles of law as a possible source of law.⁹⁰ A review of the Anglo-American legal principles applicable to the issue of aid to individuals in peril supports the view that a state which elects to intervene forcibly for humanitarian purposes is subject to a duty of care not to make the situation worse than it would have been.

In their internal law, states take two different approaches to the responsibilities of the bystander witnessing an individual in distress. In many civil law countries, such as Germany⁹¹ or France, the bystander has a duty to intervene to assist if he can. In such cases a failure to provide assistance is a punishable criminal act. States have no affirmative legal duty to undertake humanitarian intervention, except

⁸⁹ R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 114 (1986) (noting that "we may expect two general attitudes . . . toward the question of intervention . . . The first is one of doubt about the motives of the interveners. The second is one of scepticism about any good outcome of intervention.").

⁹⁰ See Statute of the International Court of Justice, June 26, 1945, art. 38(1)(c) [hereinafter ICJ Statute] (identifying as a source of international law "the general principles of law recognized by civilized nations").

⁹¹ PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY, § 323c, 231; The American Series of Foreign Penal Codes (Joseph J. Darby trans., vol. 28, 1987). According to the Penal Code of the Federal Republic of Germany:

Whoever fails to render assistance in case of accident, common danger or emergency, although such assistance was needed and could have been expected from him under the circumstances, especially since he could have rendered it without placing himself in significant danger and without violating any important duties, shall be punished by up to one year's imprisonment or by fine.

perhaps to prevent impending genocide.⁹²

Under the common law rule, as applied in the United States, the bystander has no duty to provide aid,⁹³ but once he *elects* to become involved he can be civilly liable if he makes the situation worse.⁹⁴ This roughly corresponds to the situation of a state electing, on its own authorization, to undertake forcible humanitarian intervention on the territory of another state.⁹⁵ Such a state is not under a duty to intervene, but once it has affirmatively acted to do so it must thereby accept added legal responsibilities. Whether rooted in *jus ad bellum* principles about the justness of initiating the use of force, in the wartime rules of *jus in bello*, or in the new *jus post bellum* proposed by Michael Walzer, enforceable standards of responsibility should apply to humanitarian intervention. It is undoubtedly true that imposing such a responsibility “operates as a real, and serious, deterrent to the giving of needed aid.”⁹⁶ Such a deterrent is needed to minimize the poten-

⁹² See Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”).

⁹³ See *La Raia v. Arizona*, 150 ARIZ. 118, 121; 722 P.2d 286, 289 (Ariz. 1986)

(Since nonfeasance was not actionable except in certain special relationships, the common law generally refused to impose a duty upon one person to give aid to another, no matter how serious the peril to the other and no matter how trifling the burden of coming to the rescue Thus, a defendant might with impunity sit on the wharf, smoke his cigarette and refuse to throw his rope to a person drowning just below.);

W. PROSSER & W. KEETON, THE LAW OF TORTS § 56, at 375 (5th ed. 1984) (In the words of Prosser and Keeton,

Because of . . . reluctance to countenance 'nonfeasance' as a basis of liability, the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life.).

⁹⁴ See *La Raia*, *supra* note 93, at 122 (stating “Even where the defendant is not responsible for plaintiff's peril, when he assumes to act affirmatively . . . he assumes a duty of reasonable care”); PROSSER & KEETON, *supra* note 93, at 378-79 (stating “If there is no duty to go to the assistance of a person in peril, there is at least a duty to avoid any affirmative acts which make his situation worse”).

⁹⁵ Where the Security Council has authorized the initial use of force under Chapter VII of the U.N. Charter, a different standard should apply. States which only intervened pursuant to Security Council authorization should not bear the same responsibility for the risk of intervening in the first place.

⁹⁶ See PROSSER & KEETON, *supra* note 93, at 378.

tially destabilizing effects of humanitarian intervention.

To have any hope of being effective, humanitarian intervention requires follow-through and long-term commitment in the form of assistance with reconstruction.⁹⁷ This would be consistent with the general principle that any state invoking the right of humanitarian intervention accepts additional responsibilities as well as with the obligation not to make things worse. It would also discourage abuse of the claimed “right” of humanitarian intervention. Without regard to whether it constitutes a violation of international law, armed humanitarian intervention is a hazardous undertaking entailing great risk. A state attempting to justify both armed intervention and the occupation which follows on humanitarian grounds, should therefore be held to a very high standard of care⁹⁸ and face potential state responsibility if it fails to meet that standard. Defining the precise contours of that standard may take some time, but the principle of the intervenor’s responsibility to meet some reasonable standard should certainly apply.

B. When do the responsibilities of the occupying and intervening powers terminate?

On June 28, 2004, the “transfer of sovereignty” to an Interim Government in Iraq was announced.⁹⁹ Even before the Iraqi Interim Government took office, it was recognized as the sovereign government by the Security Council in a resolution¹⁰⁰ which also declared the end of occupation of Iraq.¹⁰¹ Does this mean that the responsibilities of the occupying powers under international

⁹⁷ Annan, *supra* note 87 (arguing that the entire international community must be committed to reconstruction:

[W]hen fighting stops, the international commitment to peace must be just as strong as was the commitment to war. In this situation, too, consistency is essential. Just as our commitment to humanitarian action must be universal if it is to be legitimate, so our commitment to peace cannot end as soon as there is a ceasefire. The aftermath of war requires no less skill, no less sacrifice, no fewer resources than the war itself, if lasting peace is to be secured.).

⁹⁸ Mill, *supra* note 9, at 119.

⁹⁹ See Dexter Filkins, *U.S. Transfers Power to Iraq 2 Days Early*, N.Y. TIMES, June 29, 2004, at A1.

¹⁰⁰ See S.C. Res. 1546, *supra* note 62, at para. 1.

¹⁰¹ *Id.* at para. 2. The resolution “[w]elcomes that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.”

humanitarian law were immediately lifted on that date? The answer is clearly no.

While the June 2004 transfer of sovereignty may prove to be significant turning point, the substance of the *de facto* occupation continued after this event. Under the terms of the 1907 Hague Convention the duration of the occupation depends on the factual issue of whether the territory in question “is actually placed under the authority of the hostile army.”¹⁰² The 1949 Geneva Convention (IV), also directly applicable, clearly states that “the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory.”¹⁰³ Maintaining security and stability is a basic function of government which the occupying powers would be required to exercise for some time after the formal transfer of sovereignty. The same Security Council resolution that formally purported to declare the end of the occupation¹⁰⁴ also recognized that the incoming Iraqi Interim Government would not yet be in a position to assume responsibility for maintaining security and stability in Iraq.¹⁰⁵ The resolution assigns this responsibility to the multinational force said to be remaining in Iraq “at the request of the Interim Government of Iraq.”¹⁰⁶ This force, formerly the Coalition’s occupying force, was granted “authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”¹⁰⁷

¹⁰² Hague Convention IV, *supra* note 8, art. 42 (“Territory is considered occupied when it is actually placed under the authority of the hostile army.”).

¹⁰³ Geneva Convention IV, *supra* note 30, at art 6.

¹⁰⁴ S.C. Res. 1546, *supra* note 62, at para. 2.

¹⁰⁵ *Id.* at para. 8 (providing that the Council:

Welcomes ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces (hereinafter “Iraqi security forces”), operating under the authority of the Interim Government of Iraq and its successors, which will progressively play a greater role and ultimately assume full responsibility for the maintenance of security and stability in Iraq . . .).

¹⁰⁶ *Id.* at para. 9:

Notes that the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq and therefore *reaffirms* the authorization for the multinational force under unified command established under resolution 1511 (2003), having regard to the letters annexed to this resolution.

¹⁰⁷ *Id.* at para. 10 (This June 2004 resolution “[d]ecides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance

In the months following the transfer of sovereignty and end to the occupation, the U.S.-led multinational force retained both formal responsibility for maintaining security and stability in Iraq and the authority and the discretion to do so. This represented little change, *de facto*, from the situation under the occupation. One principal difference *de jure* is that a multinational force in Iraq “at the request of the incoming Interim Government”¹⁰⁸ could in principle be asked to leave at the request of that government.¹⁰⁹

The jury is still out as to the full scope and extent of the responsibility assumed by the U.S. in the invasion of Iraq. Even a well-intended intervenor with the means to win an easy military victory may be unable to impose a lasting legal and political order. Nationalism and/or other types of resistance to foreign political domination complicate the latter task. Often, as in Iraq, multilateralization of the occupation and transition, under U.N. auspices, may emerge as the only viable path forward.¹¹⁰ The residual obligations of the intervening powers will nonetheless persist. The extent of the responsibility assumed by an intervening power must depend, to some extent, upon the results of the enterprise.

The process of Iraq’s political transition has only just begun, and it remains to be seen whether that process will provide a viable path forward. As long as large numbers of Coalition troops retain authority to act on Iraqi soil, and until there is an Iraqi government capable of providing security and stability on its own, those formerly designated as occupying powers cannot be released from their responsibilities as such under international humanitarian law. For the moment, the responsibilities of the occupying power have been reformulated as the responsibilities of its successor, the Multinational Force. These responsibilities could continue for as long as Iraq is unable to provide for its own security and stability. The Security Council declared ahead of time that “the occupation will end” when the Interim Government of Iraq assumes full responsibility and authority, and has even adopted language declaring an end to the responsibilities of the occupying powers.¹¹¹ This formal statement cannot prematurely release the *de*

of security and stability in Iraq . . .”). This language seems to accord the broadest discretion possible to that U.S.-led multinational force.

¹⁰⁸ *Id.* at para. 9.

¹⁰⁹ *Id.* at para. 12.

¹¹⁰ See the discussion of The Role of International Institutions, *infra* notes 120-165 and accompanying text.

¹¹¹ See S.C. Res. 1551, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S/Res/1551 (2004):

facto occupying power from the responsibilities it still holds. Their true point of termination will be determined more by developments on the ground in Iraq than by formal declarations of the Security Council.

C. State Responsibility for Internationally Wrongful Acts

In addition to the no-fault primary legal responsibilities which are the subject of this article, the matter of state responsibility for internationally wrongful acts should at least be mentioned here. It is a fundamental principle of international law¹¹² that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”¹¹³ Thus an intervening or occupying power, like any state, is legally responsible whenever it breaches an obligation under international law.¹¹⁴ This is the most familiar form of responsibility under international law.

The Occupying Power assumes many responsibilities, but where the hostilities were initiated by the occupying state in violation of *jus ad bellum* the burden of responsibility under a new *jus post bellum* should be greater.¹¹⁵ Responsibility for violations of international law

Reaffirms the sovereignty and territorial integrity of Iraq, and *underscores*, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, *inter alia* through steps envisaged in paragraphs 4 through 7 and 10 below . . .

¹¹² *Factory at Chorzów, Merits*, 1928, P.C.I.J., Ser. A, No. 17, at 29. As the Permanent Court of International Justice observed in 1928, “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”

¹¹³ Commentaries, *supra* note 7, at 62.

¹¹⁴ *Id.* at 68. The two elements of an internationally wrongful act of a State are that it must be “attributable to the State under international law” and that it “[c]onstitutes a breach of an international obligation of the State.”

¹¹⁵ Peter Steinfels, *A leading scholar on just-war theory turns his thoughts elsewhere: to just aftermaths*, N.Y. TIMES, Sept. 4, 2004, at 6 (*quoted in* MICHAEL WALZER, ARGUING ABOUT WAR (2004)). The New York Times quotes war theorist Michael Walzer on the moral imperative of a just post war, *jus post bellum*:

“Once we have acted in ways that have significant negative consequences for other people (even if there are also positive consequences), we cannot just walk away,” he writes. Closure encompasses responsibilities to “think seriously” about post-victory actions (a moral test he believes was not met

extends to the damage done to the nationals of the offended state. As the Permanent Court of International Justice noted in the *Chorzow Factory* decision in 1928:

It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law.¹¹⁶

So if the invasion were adjudged to be illegal,¹¹⁷ the legal responsibility of the intervening powers could extend even to the indirect negative consequences for Iraqi citizens. The decision to dismantle key national institutions such as the police and military, for example, has proved to be dangerously destabilizing in Iraq.

The question of whether there was a *jus ad bellum* violation in Iraq is, of course, controversial. The war has been harshly criticized by some¹¹⁸ and strongly defended by others.¹¹⁹

IV. THE ROLE OF INTERNATIONAL INSTITUTIONS

The United Nations is a flawed institution with limited power. Its

in Iraq) and to expend sufficient resources on reconstruction. ("A just occupation costs money; it doesn't make money.")

"... *Jus post bellum* can't be entirely independent of *jus ad bellum*," Dr. Walzer says. "The distribution of the costs of the settlement is necessarily related to the moral character of the war."

¹¹⁶ *Factory at Chorzów*, *supra* note 112, at 4-5.

¹¹⁷ The U.S. government is not likely to consent to ICJ jurisdiction over the ultimate question of *jus ad bellum* in Iraq. But the recent practice of the U.N. General Assembly in requesting advisory opinions and of the ICJ in handing them down, suggests that a General Assembly requested advisory opinion on the Iraq invasion is a very real possibility.

¹¹⁸ Maggie Farley, *The Conflict in Iraq; Annan Calls U.S.-Led Invasion of Iraq Illegal*, L.A. TIMES, Sept. 17, 2004, at A7 (U.N. Secretary General Kofi Annan was quoted as saying of the U.S.-led invasion that "[f]rom our point of view and from the charter point of view it was illegal.").

¹¹⁹ See Vice President Dick Cheney, *In Cheney's Words: The Administration Case for Removing Saddam Hussein* (Aug. 6, 2002) in N.Y. TIMES, Aug. 27, 2002 (excerpts from a speech August 6, 2002, by Vice President Dick Cheney to a national convention of Veterans of Foreign Wars in Nashville, as recorded by Federal News Service Inc.) (citing Iraq's failure to comply fully with Security Council resolution 687 adopted in 1991, the threat of Iraqi Weapons of Mass Destruction, and the benefits that "regime change" would bring to the people of Iraq, the Middle East, and the world, as justifications for the war to come).

most powerful organ, the Security Council, has expansive authority on paper, but can act effectively only when there is a consensus among its sometimes contentious Permanent Members. Frustration with the inability of the Council to enforce its earlier decisions on the disarmament of Iraq was cited as an important factor motivating the U.S.-led invasion in 2003. When the Council declined to support a U.S.-sponsored proposal to authorize that invasion, the U.S. responded by assembling an *ad hoc* "Coalition of the Willing" as an alternative means of providing multilateral legitimacy to the effort. It was not particularly effective for this purpose. In public perception there is a trade-off between unilateral domination and multilateral legitimacy: the greater the degree of perceived unilateral domination the lesser the degree of perceived multilateral legitimacy.

Despite its many flaws the U.N. has proved to be indispensable. Each time the political and security situation in occupied Iraq has fallen into crisis the U.S. has had no choice but to turn the U.N. in an effort to rescue the situation. Sometimes even the world's dominant power needs the legitimating effect of a global organization which is ostensibly impartial and independent of direct control by any single country.

A. *Chapter VII: The Authority to Rebalance Priorities and Reconcile Different Layers of Obligation*

The occupying powers in Iraq have been subject to potentially conflicting obligations. International humanitarian law requires the maintenance of the existing legal system¹²⁰ and international human rights law requires the promotion of democracy and the rule of law.¹²¹ The authority of the U.N. Security Council under Chapter VII of the U.N. Charter provides the best path towards reconciling these obligations. The Charter affirms the sovereign equality of states,¹²² prohibits the threat or use of force against their territorial integrity,¹²³ and affirms that, as a general rule, the U.N. is not to intervene in matters which are essentially within the domestic jurisdiction of any state.¹²⁴ The one important exception concerns the application of

¹²⁰ See *supra* notes 19-38 and accompanying text (discussing the Duties of the Occupying Power under International Humanitarian Law).

¹²¹ See *supra* notes 43-65 and accompanying text (discussing the Obligations of the Occupying Power under International Human Rights Law).

¹²² U.N. CHARTER art. 2, para. 1.

¹²³ *Id.* at para. 4.

¹²⁴ *Id.*

enforcement measures under Chapter VII of the Charter.¹²⁵ Under Chapter VII, the Security Council has the power to determine the existence of any threat to the peace, breach of the peace or act of aggression, and to make such decisions as are necessary to maintain or restore international peace and security.¹²⁶ Based on these sweeping powers and on the fact that the decisions of the Security Council under the Charter are binding upon its member states,¹²⁷ there is little doubt that the Council also has the authority to adjust the rights and duties of the occupying powers in Iraq.¹²⁸ It first attempted to do so in Security Council Resolution 1483, passed soon after the invasion and occupation of Iraq.

Resolution 1483 notes that the U.S. and the U.K. recognize their responsibilities as “occupying powers.”¹²⁹ As noted above, these responsibilities include the general obligation to maintain the existing legal system. But Resolution 1483 also calls for the Coalition Authority to promote work with the Special Representative of the Secretary General to “restore and establish national and local institutions for representative governance.”¹³⁰ Since there was no “representative

¹²⁵ U.N. CHARTER art. 2, para. 7.

¹²⁶ The key Chapter VII powers of the Security Council are set out in Articles 39-42 of the U.N. Charter.

¹²⁷ 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.”).

¹²⁸ See the discussion of hegemonic international law, *infra* notes 135-157 and accompanying text. While it is clear that the U.N. Charter gives the Security Council the formal authority to adjust these rights, the matter of the perceived legitimacy of Security Council decisions on Iraq is a separate important consideration.

¹²⁹ S.C. Res. 1483, *supra* note 23, at para. 2. The only reference to the occupying powers to be found in Security Council resolutions on Iraq thus far reads as follows:

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “Authority”).

¹³⁰ *Id.* at para. 8; *see also id.* at para. 4. When framing the responsibilities of the U.N. Special Representative for Iraq, the resolution also sets out a shared responsibility with the Coalition Authority:

3(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq.

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.¹³¹

In light of international human rights standards¹³² calling for free and fair elections as the basis of legitimate government it is appropriate to require the occupying power to promote this goal as well. The challenge is to reconcile this new responsibility with the obligations of the occupying power under international humanitarian law. At least one scholar has suggested that the Chapter VII authority of the Security Council allows it to “carve out” a special exception to the general rule requiring maintenance of the existing legal system under the Hague and Geneva Conventions.¹³³ The fact that a special exception is needed to authorize an occupying power to promote representative governance speaks volumes. It seems clearly to indicate that the applicable norms of international humanitarian law have become outdated.

¹³¹ The preamble to Resolution 1546 welcomes “a new phase in Iraq’s transition to a democratically elected government,” and “the commitment of the Interim Government of Iraq to work towards a federal, democratic, pluralist, and unified Iraq” while reaffirming “the right of the Iraqi people freely to determine their own political future.” S.C. Res. 1546, *supra* note 62.

¹³² See *supra* notes 55-58 and accompanying text.

¹³³ Thomas D. Grant, *Iraq: How to reconcile conflicting obligations of occupation and reform*, ASIL INSIGHTS (June 2003), available at <http://www.asil.org/insights/insigh107a1.htm> (last visited Nov. 7, 2004). Thomas Grant, after focusing on these apparently conflicting obligations and considering alternative explanations, concluded that:

The better view may be that Res. 1483 has created 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

It does not seem too remarkable a proposition that a resolution of the Security Council could carve out such provisions. The Security Council has sweeping dispositive authority, as evidenced by its resolutions establishing a legal basis for such ambitious programs as the independence of East Timor or administration of Kosovo, not to mention power to create upon the member states obligations, which, owing to Article 103 of the Charter, enjoy primacy over treaty obligations, where the two conflict. If it has used the authority wisely, the Council will be seen to have carved from the treaties an exemption just broad enough to permit an Occupying Power to execute in Iraq the mission the Council itself has defined.

B. Hegemonic International Law: A Threat to the Credibility and Utility of International Institutions

The U.S. is clearly the predominant power in the world today. The unmatched military and economic power of the U.S. has raised concern even among U.S. allies. In the language of international relations the U.S. is, or at least could be, the “hegemon”¹³⁴ or “hegemonic power.” In recent years even some NATO countries have expressed concern about the “hegemony of a hyperpower”¹³⁵ and have called for strengthened international norms as a check upon U.S. power.¹³⁶ The U.S. also has tremendous influence within the Security Council. Some members of the Council, including France, Russia and China, have expressed concern that its Chapter VII powers should not be used to legitimate and to extend the already disproportionate influence of the U.S. Council members can attempt to restrain U.S. policy by declining to support U.S.-sponsored draft resolutions such as the one that would have authorized the invasion of Iraq in advance.

¹³⁴ Scheherazade S. Rehman, *American Hegemony: If Not US, Then Who?*, 19 CONN. J. INT'L L. 407, 408 (2004). The term hegemon is not easily defined. One author's recent compilation of the term's usage is the following:

Although the definition of “hegemony” is highly debated, more often than not it is defined as the following: (a) “the predominant influence, as of a state, region, or group, over another or others”; or (b) “leadership; preponderant influence or authority -- usually applied to the relation of a government or state to its neighbors or confederate”; or (c) the domination of one state over its allies.” Perhaps differences in worldviews of American hegemony do not stem from, as is often thought, pro- or anti-Americanism, but rather from the root differences in how the hegemon is seen. For example, Europeans view the U.S. as very religious while Islamic nations view it in quite the opposite manner. As Fouad Ajami put it, America is seen as “religious to the secularists, [and] faithless to the devout.” Moreover, America's hegemon status comes in a myriad of faces: it has been called a “hectoring hegemon,” a well-intentioned hegemon, an ill-at-ease hegemon, an easily manipulated hegemon, a self-conscious hegemon, a reticent hegemon, an immature, thus dangerous hegemon, a sporadic, self-serving hegemon, and a benevolent hegemon, just to name a few.

¹³⁵ *To Paris, U.S. Looks Like a ‘Hyperpower,’* INT'L HERALD TRIB., Feb. 5, 1999, at 5. French Foreign Minister Hubert Vedrine described the United States as a “hyperpower . . . a country that is dominant or predominant in all categories.” He suggested that this domination could best be resisted “[t]hrough steady and persevering work in favor of real multilateralism against unilateralism, for balanced multipolarism against unipolarism, for cultural diversity against uniformity.”

¹³⁶ See Andrew Borowiec, *France seeks big U.N. role on Iraq; Urges alternative to ‘brutal force,’* WASH. TIMES, Dec. 23, 1998, at A14.

But the fact that the Security Council did not support the U.S. on that one occasion does not establish the Council's freedom from undue U.S. domination.

1. Security Council Resolutions on Iraq as Examples of Hegemonic International Law

Detlev Vagts, noting that the United States is increasingly referred to "as the hegemonic (or indispensable, dominant, or preeminent power)"¹³⁷ has suggested that a distorted hegemonic international law¹³⁸ might result from this dominance. As he describes it, hegemonic international law downplays the idea of the equality of states.¹³⁹ Instead, the hegemonic power uses ambiguous or indeterminate treaty language to claim greater freedom to impose its own preferred interpretation of applicable rules.¹⁴⁰ In particular, Hegemonic International Law is characterized by the hegemon's circumvention of the basic rule against military intervention in the internal affairs of other states.¹⁴¹ Although hegemonic international law is most often associated with the unilateral power of a dominant state, the U.S. could use its unmatched unilateral power to help mobilize the Security Council's multilateral authority as well.¹⁴² It is entirely appropriate for the U.S.

¹³⁷ Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L. L. 843, 843 (2001).

¹³⁸ Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873 (2003):

HIL jettisons or severely undervalues the formal and de facto equality of states, replacing pacts between equals grounded in reciprocity, with patron-client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance. The hegemon promotes, by word and deed, new rules of law, both treaty based and customary. It is generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it has adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule. Substantively, HIL is characterized by indeterminate rules--whose vagueness benefits primarily (if not solely) the hegemon--recurrent projections of military force, and interventions in the internal affairs of other nations.

¹³⁹ See Vagts, *supra* note 137, at 845 ("The received body of international law is based on the idea of the equality of states To get to HIL, one must discard or seriously modify this principle.").

¹⁴⁰ See *id.* at 846.

¹⁴¹ See *id.* at 845 ("A shift to HIL most specially requires setting aside the norm of nonintervention into the internal affairs of states.").

¹⁴² See *id.* at 846 (observing that "a hegemon can use an international organization

to exercise leadership in the Security Council, as long as this is done in pursuit of legitimate multilaterally shared objectives. However, since the 2003 invasion of Iraq was not authorized by the Security Council there are many doubts as to its legitimacy as a matter of *jus ad bellum*. This raises concern that Security Council resolutions on Iraq might “legitimate, *post hoc*, what was formerly illegitimate.”¹⁴³ There is clear evidence of hegemonic international law to be found in these resolutions.

Security Council Resolution 1483, passed on May 22, 2003, has been criticized for its failure to identify any specific duties for the occupying powers or to discuss their possible accountability for any of their actions in Iraq,¹⁴⁴ and is cited as an example of hegemonic international law.¹⁴⁵ The vague language¹⁴⁶ in that resolution suggested

to magnify its authority by a judicious combination of voting power and leadership, as the United States has often done.”).

¹⁴³ See Alvarez, *supra* note 138, at 884:

While Resolution 1483 deliberately avoids any suggestion of post hoc Council approval of the U.S. invasion, it remains to be seen whether the Council will provide multilateral cover for the Authority's subsequent actions or indeed whether, as arguably occurred with respect to Kosovo, the Council will legitimate, post hoc, what was formerly illegitimate.

¹⁴⁴ See *id.* at 883 (noting with regard to Resolution 1483):

While the Council suggests, obliquely, that, under relevant law, the United States and the United Kingdom are responsible for any violations of the many duties of an occupying power, the resolution gives these powers carte blanche without suggesting whether or how they will be held to any of the relevant obligations under international humanitarian law, from protection of Iraqi cultural and other forms of property to avoidance of cruel or inhuman forms of punishment or forcible transfers of persons.

¹⁴⁵ See *id.* at 883.

¹⁴⁶ S.C. Res. 1483, *supra* note 23, para. 8. The Security Council's vague language on the U.N. role was as follows:

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

- (a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

that the occupation had been accepted and approved by the U.N., but failed to specify the nature of the U.N. role or to accord the U.N. any real authority over the process. This left the organization in an awkward and compromised position. It was in the midst of this ambiguous legal situation that a terrorist explosion devastated the U.N. Headquarters in Iraq and killed U.N. Special Representative to Iraq Sergio De Mello and many others.¹⁴⁷ In its almost 60 years of existence the U.N. had rarely been directly attacked in this way.¹⁴⁸ The U.N. temporarily withdrew its personnel from Iraq, and the operational

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

¹⁴⁷ Dexter Filkins & Richard A. Oppel Jr., *After the War: Truck Bombing; Huge Suicide Blast Demolishes U.N. Headquarters in Baghdad; Top Aid Officials Among 17 Dead*, N.Y. TIMES, Aug. 20, 2003, at A1.

¹⁴⁸ Felicity Barringer, *After the War: United Nations; Questions Haunt a Saddened Annan*, N.Y. TIMES, Aug. 21, 2003, at A13. In comments before the Security Council the next day, U.N. Secretary-General Kofi Annan stressed the importance of maintaining the proper perception of the U.N., and the danger that something precious could be lost:

Yesterday's events have broader implications for the United Nations beyond Iraq. Wherever the United Nations goes in to help and whatever measures are taken for staff security it is sustained by the perception among the local population that the United Nations is there to help them . . . The blue flag has never been so viciously assaulted as it was yesterday.

capabilities of the U.N. in Iraq have yet to recover fully from that blow.

There have been concerns about undue U.S. influence on more recent Security Council resolutions on Iraq as well. The Governing Council of Iraq, hand-picked by the U.S. administration, was completely lacking in political legitimacy and popular support. Nonetheless, Security Council Resolution 1511 of October 2003 boldly proclaims that the Governing Council “embodies the sovereignty of the State of Iraq during the transitional period.”¹⁴⁹ This endorsement raises questions about the Security Council’s objectivity and credibility, and thus about the legal and practical significance of its pronouncements on related issues such as the status of the Interim Government, the duration and termination of the occupation, and the responsibilities of the occupying powers and the Multinational Force in implementing the Council’s resolutions on Iraq.

Security Council Resolution 1546, adopted shortly before the formal transfer of sovereignty from the Coalition Provisional Authority to the Interim Government of Iraq, is another example of hegemonic international law emanating from the Security Council. This resolution recognizes the Interim Government as the legal sovereign until an elected Transitional Government of Iraq assumes office.¹⁵⁰ It also renews the mandate of the U.S.-led but U.N.-sponsored Multinational Force, and entrusts that force with seemingly unlimited discretion to act in Iraq.¹⁵¹

Vagts has questioned whether the U.S. has the political and psychological infrastructure to act as a true hegemon.¹⁵² Nonetheless,

¹⁴⁹ S.C. Res. 1511, *supra* note 42, at para. 4:

Determines that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period.

¹⁵⁰ S.C. Res. 1546, *supra* note 62, at para. 1.

¹⁵¹ *Id.* at para. 10. This June 2004 resolution “[d]ecides that the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq” *Id.* This language seems to accord the broadest discretion possible to that U.S.-led multinational force.

¹⁵² See Vagts, *supra* note 137, at 844-45. According to Vagts, doubts remain about the U.S. as hegemon:

The terrible blows of September 11, 2001, raise the question whether the United States can or will act as a hegemon in a drastic way, that is, in Krauthammer’s terms, whether it can carry out “unapologetic and implacable demonstrations of will.” . . . Nor does the United States have

the possibility of “hegemonic capture of the Security Council”¹⁵³ is very real. Some might see this as a positive development. Those who believe that international law is not really law¹⁵⁴ or who believe that the U.S. should be unapologetic about using its singular power to reshape international norms¹⁵⁵ would presumably welcome the extension of U.S. hegemony through the Security Council’s decisions.

2. The Costs of Hegemonic International Law

Even if the Security Council resolutions discussed above do reflect hegemonic international law, this does not necessarily mean that they are unlawful or even ineffective.¹⁵⁶ But even if it might help to achieve a diplomatic victory in the short run there may nonetheless be hidden costs to any hegemonic misuse of the Security Council.

One such cost may come in the politicization of the Council, undermining its internal consensus and capacity for positive cooperation. Another eventual cost could be paid in terms of the loss of credibility, reputation and moral authority of the Council. Separately or together, these costs could undermine the effectiveness and utility of the Security Council by unnecessarily politicizing it.

the political and psychological infrastructure hegemony calls for. Thus, the jury is still out on whether we will be a hegemon

¹⁵³ See Alvarez, *supra* note 138, at 873-74 (arguing that

despite that body's refusal to give explicit approval to Operation Iraqi Freedom in advance, worries about the hegemonic capture of the Security Council (along with other forms of global HIL) should not be relegated to science fiction. At the same time, it should be understood that global HIL, like other forms of hegemony, is a Janus-faced phenomenon, capable of winning praise or condemnation from all points on the political spectrum.).

¹⁵⁴ See John R. Bolton, *Is There Really “Law” in International Affairs?* 10 TRANSNAT’L L. & CONTEMP. PROBS. 1, 48 (2000).

¹⁵⁵ Charles Krauthammer, *The Bush Doctrine In American foreign policy, A New motto: Don't ask. Tell*, TIME, Mar. 5, 2001, at 42 (“America is no mere international citizen. It is the dominant power in the world, more dominant than any since Rome. Accordingly, America is in a position to reshape norms, alter expectations and create new realities. How? By unapologetic and implacable demonstrations of will.”).

¹⁵⁶ See Alvarez, *supra* note 138, at 886-87. While characterizing Security Council Resolutions 687, 1373, and 1483 as examples of “global hegemonic law,” Alvarez nonetheless concludes that they “are quite plausibly lawful . . . also, quite plausibly, necessary.”

C. The Concept of Politicization

The term “politicization” refers to an organizational dysfunction in which actions or decisions relating to technical or “non-political”¹⁵⁷ matters are influenced by “political” considerations unrelated to the agreed purposes of the organization.¹⁵⁸

The concept of politicization can best be understood in relation to the functionalist theory of international organization prevalent in the 1940s. The theory holds that the process of international organization should begin with the creation of “non-political” international agencies dealing with specific economic, social, technical, or humanitarian functions upon which state actors can most easily agree, leaving more ambitious political goals until later.¹⁵⁹ According to the functionalist theory it is only after states have developed habits of effective international cooperation that it will be possible for them to cooperate in resolving high-level political problems.¹⁶⁰ The fact that certain inter-governmental organizations are referred to as non-political is a reflection of this theory. In stressing that international organizations must be built upon the consensus of states, this theory helps to clarify the link between the agreed purposes of an organization and the notion of politicization.

In a separate work the present author has developed a legal approach to the issue of politicization in the law and practice of the World Bank.¹⁶¹ Unlike the U.N., the World Bank is a technical organization officially dedicated solely to economic development, but with a few necessary adjustments that analytical approach can, at least in part, be applied to a political organ, such as the Security Council as well.

International organizations, such as the U.N., are established

¹⁵⁷ International organizations dealing with specific economic, social, technical or humanitarian functions are sometimes said to exist for non-political purposes, although it is clear that there can be a political side to all these functions. In any case, the term “politicization” as used in this study cannot be applied in any meaningful way to an organization such as the United Nations whose primary function is political, i.e. the maintenance of international peace and security.

¹⁵⁸ See BARTRAM S. BROWN, *THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY* 14 (London, Kegan Paul International 1992) (providing a more detailed discussion of the concept of politicization).

¹⁵⁹ See DAVID MITRANY, *A WORKING PEACE SYSTEM* (4th ed., London, National Peace Council 1946) (providing the most classic exposition of the theory of functionalism).

¹⁶⁰ CLAUDE, *supra* note 21, at 384. Inis L. Claude Jr. calls this the “separability-priority” thesis.

¹⁶¹ See BROWN, *supra* note 158, at 234-253.

based on a political consensus between their members to work to achieve common goals. A negotiated consensus on these goals, and on a set of rules and principles for achieving them, is then incorporated into a constitutive document in the form of a binding treaty.¹⁶² It is understood from the beginning that each international organization should be used only within the terms of its own rules and principles. Any use of an international organization to promote matters beyond that agreed consensus may violate its constituent document and constitute a politicization of the organization. The U.S., having elected to launch the invasion without the support of the Security Council, risks compromising that body over the same issue by involving it in a hegemonic and politicized misuse of multilateral authority. Seeking a new consensus within the Security Council is part of the normal diplomatic process, but that process is subject to the agreed rules especially including Article 2(4) of the U.N. Charter prohibiting the threat or use of force inconsistent with the purposes of the U.N.¹⁶³

The International Court of Justice has ruled that U.N. member-states are subject to a duty not to recognize an illegally established situation.¹⁶⁴ International institutions should be subject to a similar duty. Within the Council there has been disagreement from the start as to the legality of the most recent Iraq war.¹⁶⁵ The U.S. supported

¹⁶² See *id.* at 17.

¹⁶³ U.N. CHARTER art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

¹⁶⁴ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970) 1971 I.C.J. 16 (June 21) at 56. The International Court of Justice held that U.N. member states must:

recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and . . . refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.

¹⁶⁵ At various times the U.S. government has formulated three principal arguments for the legality of the invasion: that it was authorized under earlier Security Council decisions, that it was justified as pre-emptive self-defense against Iraqi Weapons of mass destruction, and that it was justified as a form of humanitarian intervention to free the Iraqi people from Saddam Hussein. These arguments have never been accepted by the Council as a whole. See Peter Ford, *As attack on Iraq begins, question remains: Is it legal?*, CHRISTIAN SCI. MONITOR, Mar. 21, 2003, at 5 (considering controversy over arguments that the war was justified by earlier Security Council resolutions, that it was justified as self-defense, and noting earlier debate about the legitimacy of humanitarian

the war but the Council did not approve it. Other members of the Council who believe it was illegal¹⁶⁶ should not be called upon to adopt language condoning it after the fact. When they are required to do so it can provoke resentment and conflict within the Council and complicate future cooperation.

If Hegemonic International Law leaves too large a fingerprint upon the decisions of the Security Council, it could seriously undermine the credibility and moral authority of the U.N. The ultimate cost, potentially to be borne by the U.S. as by others, is that this could reduce the future utility of the institution to states and to the international community as a whole.

V. CONCLUSIONS

Invasion and military occupation can lead to a conundrum of conflicting obligations, seemingly impossible to reconcile. The occupying power cannot legally or practically hope to impose its unilateral will on the institutions of an occupied land, nor can it responsibly withdraw in haste to leave a vacuum of power and institutions potentially more dangerous (for the country, the occupying power and the world) than the original situation. Multilateralization of the reconstruction effort, under the authority of the U.N. Security Council, may in practice be the only way out. 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.

President George W. Bush once suggested that if the Security Council did not support the U.S. invasion of Iraq, the U.N. would fall into irrelevance.¹⁶⁷ In retrospect, it is clear that he severely under-

intervention after the 1999 intervention in Kosovo).

¹⁶⁶ See *id.* (quoting French President Jacques Chirac as stating that he had opposed the war "in the name of the primacy of the law").

¹⁶⁷ President George W. Bush, President's Remarks to the United Nations General Assembly (Sept. 12, 2003), available at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html> (U.S. President George W. Bush challenged the U.N. to support tough action against Iraq:

The conduct of the Iraqi regime is a threat to the authority of the United Nations, and a threat to peace. Iraq has answered a decade of U.N. demands with a decade of defiance. All the world now faces a test, and the United Nations a difficult and defining moment. Are Security Council resolutions to be honored and enforced, or cast aside without consequence? Will the United Nations serve the purpose of its founding, or

estimated the importance of that institution. When the Security Council refused to authorize the invasion, the U.S. and an *ad hoc* group of allies proceeded with it nonetheless. In the aftermath of that war, the U.N. has proved indispensable to efforts to build positive political developments on the ground. The U.N. is essential, not only because of its legal authority under the Charter, but also because of the legitimating moral authority it has based on its credibility as an independent institution promoting shared global interests. If that credibility and authority are to be a resource for use in possible future crises as well, the U.N. must avoid the appearance of being manipulated by the U.S. for its own ends. International institutions can help, but to be effective, they must be given sufficient authority and responsibility to make their multilateral role credible and their policies distinguishable from those of any single power or group.

Every state has the right to use proportionate force as and if necessary to protect its vital interests. But the U.S., as the clearly predominant global power, should be wary of pursuing extreme hegemonistic policies that motivate other states to coalesce against it to preserve their rights.¹⁶⁸ There is a potentially high political and diplomatic cost associated with being perceived as the aggressor.¹⁶⁹

Forcible armed intervention is an extremely hazardous activity. As a matter of elementary considerations of humanity, states electing to intervene should be held to some standard of reasonable care in the

will it be irrelevant? (Emphasis added).).

¹⁶⁸ Vagts, *supra* note 137, at 844, "But alongside hegemony the practice of balance of power emerged, in which the other states banded together to countervail the strongest. While primarily a diplomatic exercise, it was tinged with legal overtones."); see also Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. INT'L L. 555 (1979).

¹⁶⁹ EMER DE Vattel, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 1 (1st. ed 1758) (1883), Editor's Note with additional notes and references by Edward D. Ingraham, Esq. (Joseph Chitty ed. 1999), available at <http://www.constitution.org/vattel/vattel.htm> (last visited Nov. 7, 2004). Joseph Chitty, who edited the "new edition" of de Vattel's the Law of Nations in 1883, explained how the balance of power system responds to aggression:

all nations, although for a time astounded and surprised by the unexpected aggression of an oppressive and ambitious conqueror, will yet ultimately feel, and endeavour to give effect to, the true law of nations, lest, by suffering its continued violations, they may individually be sacrificed; and consequently, as in the instance alluded to, they will ultimately coalesce and associate in one common cause, to humiliate and overcome the proud invader of all just rights and principles.

undertaking. The invasion and occupation of Iraq have failed to meet that standard. The 2003 invasion of Iraq initially went well from a military point of view, but there was a notorious failure of realistic planning for the subsequent security and political challenges. A responsible approach to intervention would require good intelligence, careful military, political and civilian transition planning, as well as disciplined professional execution in order to minimize the dangers for non-combatants. Carrying out an ill-planned, and unauthorized act of international armed intervention, in the absence of urgent necessity, is both reckless and irresponsible. Standards of accountability are sorely needed.

J.S. Mill prudently counseled against trying to impose free democratic institutions through military intervention and occupation. His observations led him to conclude that attempts to impose freedom and democracy are likely to fail and could, in fact, cause more harm than good. That risk remains, even though it is now accepted that human rights can sometimes take priority over considerations of state sovereignty.

Some of Mill's conclusions might well be different if he could apply his prudential utilitarian analysis to the present situation in Iraq. He would surely still conclude that armed intervention in the internal political affairs of another state should not be undertaken lightly, not even for the laudable goal of bringing freedom and democracy to an oppressed people. What has changed is that the United Nations, at least if used properly, can now do a lot to help establish democracy and the rule of law in occupied lands. The U.N. is a relatively new tool, unknown to Mill's 19th-century world, and is vitally needed to deal with the challenges of today. It should not be misused, and a prudent man like Mill would have appreciated this.

The jury is still out as to the full scope and magnitude of the post-war responsibility assumed by the U.S. and other intervening and occupying powers in Iraq. This must ultimately depend, at least to some extent, upon the results of the intervention and occupation. Unfortunately, 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. "You break it, you own it" implies long term ownership of, and responsibility for, the situation resulting from an ambitious program of armed intervention.