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Humanitarian Occupation

GREGORY H. FOX

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In Bosnia, Kosovo, East Timor and Eastern Slavonia, the international community took the extraordinary step of assuming powers of a national government. With the backing of the UN Security Council, the international administrators passed laws, engaged in law enforcement and even signed agreements on behalf of the territories. Most importantly, they sought to create democratic political institutions. These "humanitarian occupations" turned traditional notions of sovereignty on their head: the international became the national.

This book explores two aspects of these remarkable missions. First, it argues that, contrary to much recent literature, the missions strongly affirm the centrality of the state in the international order. Each of the missions sought to preserve existing borders and populations, consistently rejecting efforts to change either. In so doing the missions followed on important trends in international law that seek to create civic notions of citizenship within existing national territories. Second, the book argues that conventional legal justifications for the missions are inadequate. Each employs rules designed to restrain individual states in competition with each other. But humanitarian occupation is undertaken by the international community in pursuit of collective goals. Existing state-centric norms are ill-suited to judge the missions, since Security Council actions already embody many of the collective goals advanced by those norms.

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For Sharon, with all my love.

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Introduction

State autonomy is said to be a fundamental principle of international law.[1] At the heart of the autonomy principle lies a guarantee that nations will enjoy self-government – the capacity to make political, social, economic and other policy decisions without external interference.[2] In order for a state even to come into existence it must have the means to exercise autonomy, namely a government.[3] Autonomy was the great

[1] See Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 530 (1993) ("State autonomy continues to serve the international system well in traditional spheres of international relations. The freedom of states to control their own destinies and policies has substantial value: it permits diversity and the choice by each state of its own social priorities."). "Autonomy" is a compound idea, encompassing principles of state juridical equality, freedom from external intervention and a state's discretion to take decisions affecting territory over which it exercises jurisdiction. See UN Charter, art. 2(1) (juridical equality of all member states); *ibid.* art. 2(4) (prohibition of use of force against "the territorial integrity of political independence of any State"); *ibid.* art. 2(7) (except when Security Council acts under collective security provisions, UN shall not "intervene in matters which are essentially with the domestic jurisdiction of any State"). These various rights create the conditions necessary for autonomous decision-making.

[2] See *Military and Paramilitary Activities (Nic.* v. *US) (Merits)* 1986 ICJ Rep. 14, at 131 ("A state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems."); Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law 383-4 (9th edn, 1992) ("In consequence of its internal independence and territorial authority, a state can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases. . .subject always, of course, to restrictions imposed by rules of customary international law or by treaties binding upon it.").

[3] See James Crawford, The Creation of States in International Law 56 (2d edn, 2006) (stating because "territorial sovereignty is not ownership of but governing power with respect to, territory," there is "a good case for regarding government as the most important single criterion of statehood, since all the others depend upon it").

rallying cry of the decolonization movement of the 1950s and 60s; in the words of a landmark General Assembly resolution, it was the belief in the "inalienable right" of all peoples "to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[4]

Of course, autonomy is by no means absolute. For one, legal protection of human rights circumscribes state discretion when individual freedoms are at stake. Some have also written of a right to democratic government, calling into question states' freedom to select their leaders in any way they choose.[5] And in the post-Cold War era, a concern with destructive civil wars has led the international community to address a wide variety of domestic political questions when assisting in post-war reconstruction efforts.[6] But despite the decreasing number of *issues* subject to exclusive domestic jurisdiction, international law has generally not been understood to reach a state's *capacity* for self-government.

That assumption is now under challenge. In Kosovo, Bosnia, East Timor and Eastern Slavonia, with important variations in each case, international actors have effectively *become* national governments. Moving beyond condemnation of particular policies or practices, and well beyond mediation between parties to civil wars, beginning in the mid-1990s, the United Nations and other international bodies entirely replaced the legal authority of national governments in these territories. The veil of state sovereignty was fully pierced. No national governing authorities stood between the legal power of international actors and the individual citizens over whom they ruled.

The first of these missions was to Bosnia-Herzegovina, whose civil war ended with the 1995 Dayton Accords.[7] The Accords created an international High Representative as the supreme and final legal authority in the state.[8] The Representative's powers came to include the ability to remove elected leaders from office as well as to impose and veto national legislation.[9] The second occupation was in Eastern Slavonia

[4] GA Res. 1514 (XV) (Dec. 14, 1960).

[5] See Democratic Governance and International Law 123 (Gregory H. Fox and Brad R. Roth eds., 2000).

[6] See Ending Civil Wars (Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens eds., 2002); Peacebuilding as Politics: Cultivating Peace in Fragile Societies (Elizabeth M. Cousens and Chetan Kumar eds., 2001).

[7] General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 (1995).

[8] *Ibid.* Annex 10.

[9] See International Crisis Group, Bosnia's Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building (2003).

and surrounding areas of Croatia, where, in 1996, the UN supervised the return of a largely Serbian area to Croatian government control.[10] The third occupation was in Kosovo, a province of the Federal Republic of Yugoslavia. In 1999, a brutal campaign against the local Albanian population led to bombing by NATO forces and ultimate agreement by the Yugoslav authorities to surrender control over the territory to an "interim international administration."[11] Yugoslavia thereby lost all legal authority to act against the Kosovars: virtually all its military, police and administrative officials were withdrawn; UN officials acquired the power to preempt Yugoslav law as well as restructure Kosovo's judicial system; and Kosovo's borders came under the control of NATO troops.

Finally, in East Timor in 1999, following rampages by Indonesian-backed militias opposed to Timorese independence, the UN assumed full governmental control over the territory.[12] Its authority lasted until East Timor became independent on May 20, 2002.[13] The UN's capacity to act on behalf of East Timor was so complete that UN officials convened war crimes tribunals to try militia leaders and signed a treaty on East Timor's behalf.[14]

This book examines these remarkable initiatives. They represent a phenomenon I will call "humanitarian occupation." Others use terms such as "international territorial administration," "internationalized territory" and "neo-trusteeship." "Humanitarian occupation" is an effort to capture more precisely two salient characteristics of the missions. First, their purpose has been to end human rights abuses, reform governmental institutions and restore peaceful coexistence among groups that had recently been engaged in vicious armed conflict. In this sense, they are "humanitarian." The missions are social engineering projects that

[10] See Basic Agreement on the Region of Eastern Slavonia, Baranja, and Western Sirmium, Nov. 12, 1995, available at www.usip.org/library/pa/croatia/croatia_erdut_11121995.html; SC Res. 1037 (Jan. 15, 1996) (approving transitional administration for Eastern Slavonia as outlined in the Basic Agreement).

[11] See SC Res. 1244 (June 10, 1999). See generally KOSOVO AND THE INTERNATIONAL COMMUNITY (Christian Tomuschat ed., 2002).

[12] See SC Res. 1264 (Sept. 15, 1999) (creating UN mission); IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR (2001).

[13] See SC Res. 1392 (Jan. 31, 2002) (stating UN mission to terminate upon Timorese independence).

[14] See UNTAET Regulation No. 2000/15 (creating East Timorese courts with jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offenses and torture committed between January 1 and October 25, 1999); Memorandum of Understanding between East Timor and Australia - Timor Sea Arrangement (July 5, 2001) (governing petroleum activities in seabed between East Timor and Australia).

take international standards of human rights and governance as their blueprints. They may indeed be seen as the most far-reaching efforts at implementing those and other norms of social relations the international community has ever mounted. Second, the governing authority assumed by the international administrators is quite similar to the de facto authority of traditional belligerent occupiers. Both are outsiders to the territory they control, both assume ultimate legal authority and both are avowedly temporary. Just as occupiers under humanitarian law do not assume "sovereign" powers over territory, the Security Council has consistently affirmed the sovereignty of the host state in creating humanitarian occupation missions. "Humanitarian occupation," then, may be defined as the assumption of governing authority over a state or a portion thereof, by an international actor for the express purpose of creating a liberal, democratic order. In all the cases except Bosnia, the international actor has been the United Nations.

I. Why humanitarian occupation?

The phenomenon of humanitarian occupation poses two fundamental questions. The first is why the international community would take the remarkable step of effectively inverting accepted notions of state sovereignty. Most international lawyers accept a clear division between the international and the domestic. Traditionally, the division was territorial: virtually everything done within national borders was a matter of domestic jurisdiction.[15] Today there are few such clear distinctions, as international law has come to regulate extensively within states on a range of topics that defies neat categorization. But the idea still remains that national governments are responsible, first and foremost, for prescribing and enforcing law for inhabitants in their territories. Even the most extensive international regulatory schemes oversee acts of states,

[15] As Charles Evans Hughes wrote in the Island of Palmas arbitration:

> Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organization of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

The Island of Palmas (US-Neth.) (April 4, 1928) (Hughes, sole arbitrator), reprinted in 22 Am. J. Int'l L. 867, 875 (1928).

and compliance is achieved when state institutions act in accord with international standards.

Humanitarian occupation fundamentally rejects the division of competences between the domestic and the international spheres. When international actors become national governments, legislate new rules for citizens, engage in law enforcement, stamp passports, enter into international agreements and in other ways act on behalf of the state, there is little meaningful distinction between the national and the international. For three of the four territories under humanitarian occupation, the supreme national legislature was the United Nations Security Council, whose Chapter VII resolutions shaped the mandate of the missions exercising control. In Bosnia, the Security Council commended the work of the international High Representative, who regularly rejected laws passed by national and provincial legislatures, imposed laws those bodies refused to pass and removed elected leaders from office deemed to be obstructing implementation of the Dayton Accords. While the Council also affirmed the sovereignty and territorial integrity of the states under humanitarian occupation, these statements were legal fictions having little relation to the reality that final governmental authority had been internationalized.

What could account for this remarkable step? A number of answers suggest themselves. First, all of the missions have been to states in which brutal internal conflicts had just ended. Civil wars became the dominant security concern of the United Nations in the 1990s, and for good reason. Fifty-seven armed conflicts were fought from 1990–2005, only four of which were between states (Eritrea–Ethiopia; India–Pakistan; Iraq–Kuwait; Iraq-US and allies). The other fifty-three occurred within states and concerned either control of government (thirty conflicts) or control over territory (twenty-three conflicts).[16] While the Cold War stalemate effectively prevented the United Nations from addressing civil wars in any meaningful fashion, the opening of the early 1990s created opportunities for genuine efforts at their resolution. Thus, part of the explanation for humanitarian occupation is simply that vastly more opportunities arose after 1989. Societies in which political and social institutions had collapsed and sub-state groups demonized each other quickly came to preoccupy the Security Council. One could argue that where lesser

[16] Lotta Harbom & Peter Wallensteen, *Patterns of Major Armed Conflicts, 1990-2005,* in Stockholm International Peace Research Institute (SIPRI) Yearbook 2006: Armaments, Disarmament and International Security 108 (2006).

forms of intervention were inadequate to remedy the absence of moderating political authority in post-conflict states, humanitarian occupation became the logical next step.

But an enhanced opportunity to intervene in civil wars does not explain why intervention took place. So a second explanation is that the nature of civil wars prompted humanitarian occupation. International law substantially predating the end of the Cold War addressed virtually all the tactics typical of group-based struggles for power. Dominant groups have sought to exterminate their opponents, place them in a permanent subordinate status (such as in apartheid South Africa), forcibly expel minority populations and enter into population exchange agreements with other states. Human rights law has now taken all of these tactics off the table as possible "solutions" to group-based conflict. While one cannot empirically demonstrate a cause and effect relationship between these well-established norms and humanitarian occupation, states supporting the occupations repeatedly justified their votes in the Security Council on the grounds that these tactics were unacceptable. Efforts to homogenize a state population had become sufficiently odious that, at the very least, a compelling case for intervention arose when those efforts were employed.

There is yet another piece missing in this explanation. States can be homogenized by the tactics described above, or by simply dismantling the state altogether. Several of the conflicts to which humanitarian occupation was directed – Bosnia and Kosovo – involved secessionist movements. If secession were an acceptable means of dividing groups that appear unable to coexist within a single state, outside intervention would be unnecessary in order to make the state a viable whole. Groups finding no home for their interests in the existing state would simply leave. Alternatively, the competing groups might negotiate a partition to accomplish the same end. But this tactic has not been acceptable. Even prior to the interventions in Bosnia and Kosovo, the Security Council repeatedly affirmed the territorial integrity of the states concerned and the missions themselves worked on many fronts to dampen secessionist impulses.[17] This dedication to existing borders, like the rejection of

[17] After eight years of international administration, a Special Envoy of the UN Secretary-General proposed a form of supervised independence for Kosovo in March 2007. *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, UN Doc. S/2007/168 (2007). But as of this writing, innumerable obstacles stand in the way of realizing his proposal, most notably a Russian veto in the Security Council and Serbian opposition. And the legal effect of Kosovar independence, even if it came to

homogenization tactics, is now well-grounded in international law. A legal entitlement to secession has little, if any normative support and secessionist groups have found virtually no support from multinational institutions.

Taken together, these three factors suggest humanitarian occupation is a profound expression of support for maintaining existing borders and demographic profiles. The international community could have followed countless episodes in history and allowed groups to dominate their rivals or permitted the states to fragment or even disappear. That the Security Council took the exceptional step of assuming governing control over these territories suggests a deep commitment to preserving existing states, but equally to a model of the state embodied in the human rights and territorial integrity norms. Quite simply, it is a vision of existing states made viable through liberal democratic efforts.

Apart from skepticism over the particulars of this conclusion, there is likely to be reaction to its more general implication: that international law is interested in preserving the state at all. Reports of the demise of a state-centric international legal system are by now old news to international lawyers and international relations theorists. Since the end of the Cold War, as one study quotes, authors have "pictured sovereignty as perforated, defiled, cornered, eroded, extinct, anachronistic, bothersome, even interrogated."[18] But the central objective of humanitarian occupation is the rehabilitation of a state. Indeed, the territories subject to humanitarian occupation are the most dysfunctional contemporary examples of statehood. Their breakdown has generally involved vast human suffering. If any states were candidates for a normative shift away from state-centrism it is the occupied states discussed here. Yet the missions are instead projects of state-building. Seen in this light, I will argue in later chapters, and contrary to much recent literature, humanitarian occupation represents an important affirmation of the state's centrality to the international legal order.

The norms supporting the continuity of existing states thereby create an essential role for humanitarian occupation. In essence, the norms prescribe only one solution for states imploding in group-based violence: a

fruition, is far from clear, as the Special Envoy himself stated repeatedly that Kosovo was not a precedent for permitting secessions elsewhere. See e.g., *ibid.* at 4 ("Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts.")

[18] Michael Ross Fowler and Julie Marie Bunck, Law, Power and the Sovereign State 2 (1995) (citations omitted).

cooperative political system that both allows participation by all factions and protects discrete ethnic, religious or other minority groups from persecution.[19] Standing on its own, this would seem a recipe for continued mayhem. A "democratic" solution to internal conflict can only be proposed seriously if the international community also commits to constructing inclusive and egalitarian governing institutions for the state as well as serving, at least initially, as an on-site guarantor of their functioning.[20] As Michael Ignatieff has written, "It is still necessary to protect individuals from tyrannously strong states; but there is now the additional need to create states strong enough to protect their citizens."[21] Most of the rejected alternatives to heterogeneity (secession, partition, mass expulsion, etc.) could be largely self-implementing. Creating a pluralist democracy in societies brimming with group hatreds cannot. As Doyle and Sambanis observe, "deep hostility, multiple factions, or lack of coherent leadership may complicate the achievement of self-enforcing cooperation. Conscious direction by an impartial agent to guarantee the functions of effective sovereignty becomes necessary."[22]

II. Legal Justifications

The second question concerns the legal basis for humanitarian occupation. Each of the missions to date has been justified on two grounds: an agreement with the host state and a resolution of the United Nations Security Council under Chapter VII of the Charter. Neither has been closely examined, and perhaps for good reason. Ordinarily, there is nothing controversial about a state consenting to foreign forces on its territory. Nor is there legal objection to states voluntarily ceding functions

[19] Such systems are not monolithic and have come in many varieties, such as federal and consociational. See RUTH LAPIDOTH, AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS (1997); David Wippman, *Practical and Legal Constraints on Internal Powersharing*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 211–41 (David Wippman ed., 1998).

[20] As Thomas Friedman wrote in the midst of the Kosovo crisis:

> NATO says it wants three things in Kosovo - multi-ethnicity, democracy and a very small NATO/U.S. presence. But when you have two intermingled populations that fear and loathe each other, as you do in Kosovo, you can only have two out of three. You can have multi-ethnicity and democracy, but only with a large NATO presence that puts a policeman on every corner.

Thomas L. Friedman, *Kosovo's Three Wars*, NY TIMES, Aug. 6, 1999, at A19.

[21] Michael Ignatieff, *The Rights Stuff*, NY REV. BKS, June 13, 2002, at 18, 20.

[22] Michael W. Doyle and Nicholas Sambanis, *International Peacebuilding: A Theoretical and Quantitative Analysis*, 94 AM. POL. SCI. REV. 779, 781 (2000).

of government to outsiders, as Liechtenstein and San Marino have done with their foreign policies.[23] And most commentators find few, if any, legal limits on the Security Council's Chapter VII authority. But significant questions arise for both justifications.

First, the "consent" to humanitarian occupation occurs in an unusual setting. All of the missions have been designed to move beyond mere conflict resolution and address the root causes of political dysfunction in states. They seek to create institutions designed to redirect group hostilities into democratic processes. This effort to replace war with politics gave rise to the term "peace-building," now widely used in UN circles.[24] Yet new democratic institutions create potent mechanisms for citizens to confront the very regimes consenting to the missions. In particular, democratic elections may oust the regimes entirely or lead to declarations of illegitimacy should they lose an election but refuse to leave office. Henry Steiner describes how rights regimes can become progressively more threatening to those agreeing to their creation:

> The stakes for power rise as we move further along the spectrum of human rights. The major human rights instruments empower citizens to "take part" in government and to vote in secrecy in genuine, periodic, and nondiscriminatory elections. In given circumstances, an authoritarian government can stop torturing and arresting without surrendering its monopoly of power. As events in Eastern Europe illustrate, however, such a government cannot grant the right to political participation without signing its death warrant. "Throw out the rascals" speaks the more dramatically after decades of unchosen and oppressive regimes.[25]

As Steiner suggests, the further one moves along this spectrum, the less the incentive exists for governments to consent to intervention. Adept diplomats, of course, have other options at their disposal.[26] But creative diplomacy has its limits. Especially when a conflict is ongoing

[23] See Jorri C. Duursma, Fragmentation and the International Relations of Micro-States 160-63, 222-3 (1996).

[24] See Hugh Miall, Oliver Ramsbotham and Tom Woodhouse, Contemporary Conflict Resolution 185-237 (1999).

[25] Henry J. Steiner, *Book Review, The Youth of Rights*, 104 Harv. L. Rev. 917, 930 (1991), reviewing Louis Henkin, The Age of Rights (1990).

[26] Peace agreements may establish power-sharing arrangements or particular electoral systems that guarantee all players a stake in the immediate post-war government. And human rights enforcement may be put in the hands of international or quasi-international bodies that are perceived by the government to be sufficiently neutral that they are as likely to constrain opposition groups as they are the government. These tactics may successfully reassure governments that they are not consenting to their own demise in agreeing to UN reconstruction missions.

and the government believes it has a good chance of prevailing, only the threat or use of military force may suffice. If all governance missions carry the potential to threaten the continued authority of the parties granting consent, even if the threat can be artfully mitigated in some cases, there is cause to be suspicious about the legitimacy of consent.

And indeed, elements of coercion surround the consent given for each of the humanitarian occupation missions. In Kosovo and Bosnia agreement was secured by NATO bombing campaigns. In the other cases, different forms of pressure were applied. The international law of treaties renders coerced agreements void ab initio.[27] Is this fatal to the consent rationale? Peace agreements are generally understood to stand outside the anti-coercion rule, since they are often coercive by their very nature. But that exception has only been applied to inter-state agreements, not agreements involving sub-state actors whose status as "treaties" is far from clear. Moreover, the peace agreement exception is limited to coercion by lawful force.[28] The force used to secure consent to humanitarian occupations has usually been authorized by the Security Council, and would likely be considered unlawful if undertaken without Council approval.[29] This means the "lawfulness" of the force is dependent on the lawfulness of the Council's actions, an entirely separate legal question.

The second justification is such a Chapter VII resolution. Since the end of the Cold War, the Council has vastly expanded its Chapter VII powers, to the point where few, if any, legal limits can be discerned. But the Council cannot have unlimited powers, for example, to order genocide, apply economic sanctions to the point of starving a civilian population or ordering forces under UN command to execute prisoners of war. Like all international organizations, the UN enjoys powers commensurate with the goals envisioned by its founders, and such violations of fundamental principles were not among those goals. If limits exist, the question becomes how they are to be defined and whether they are exceeded by the Council divesting a state of all control over some or all of its territory.

This inquiry takes several paths, but most usefully focuses on *jus cogens* norms – foundational international legal principles that cannot be

[27] Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 311.
[28] *Ibid.*
[29] The exception is Kosovo, where the Council did not approve the force that brought about agreement to the international presence. But because the Council approved the agreement itself in Resolution 1244 (June 10, 1999), the same goal was accomplished.

transgressed even by treaty.[30] Most commentators assume an established *jus cogens* norm would limit any construction of the United Nations Charter that allowed the Security Council to violate that norm. Does such a norm exist here? The strongest claim would involve a norm of internal self-determination providing that a state's capacity for independent decision-making is inexorably bound up in its equal sovereign status. Without its own government, or with its governmental decisions subject to the veto of international officials, a state is incapable of self-government and has ceased to be independent for all practical purposes. Whether such a claim can succeed depends in part on the empirical validity of the *jus cogens* norm itself. But it also depends on viewing *jus cogens* as a norm hierarchically superior to a Chapter VII resolution. Normally this question does not arise, since the competing treaty cannot claim the universal status of *jus cogens*. But the UN Charter provides that Security Council Chapter VII resolutions are enacted on behalf of the entire United Nations membership. While one may argue about whether the two norms are therefore equivalent or not, their usual disparity in status that grants *jus cogens* trumping power is largely absent.

One final legal justification exists, the international law of occupation. We have noted the similarities between the humanitarian missions and traditional belligerent occupation. Does that parallelism extend to their legal regulation? At first blush, no: occupation law governs states' behavior in the course of armed conflict and not the decision to initiate conflict (*jus in bello* as opposed to *jus ad bellum*), whereas regulation of humanitarian occupation would seem to involve the opposite. Yet the objectives of the two normative regimes converge in humanitarian occupation. A *jus ad bellum* objection would claim that an intervention to assume legislative authority over a state was illegitimate. A *jus in bello* objection based on occupation law would claim that the broad exercise of legislative authority itself was illegitimate. While unconventional, occupation law provides a useful legal framework to evaluate the missions.

A traditional reading of occupation law would make this analysis quite brief. Occupiers exercise *de facto* power and do not assume the prerogatives of the ousted sovereign, a distinction marking the important borderline between occupation and annexation. For this reason, occupation law traditionally held that occupiers must respect the laws in force in the territory and not assume legislative authority unless

[30] *Ibid.* art. 53.

military necessity or the obligations of occupation law itself compelled legal changes. That traditional reading was directly challenged by the United States' 2003–2004 occupation of Iraq. The Coalition Provisional Authority engaged in broad reform of all sectors of the Iraqi legal system, with the avowed purpose of changing an authoritarian state with a centrally planned economy into a liberal democracy following a free-market model. If the international community accepted the legitimacy of these reforms, then occupation law would provide an important buttress for the similar actions of humanitarian occupiers.

IV. A Collective innovation

Each of these legal justifications thus faces significant challenges. In part, this can be attributed to the nature of humanitarian occupation itself, as a radically new form of action inevitably sits uneasily with traditional legal categories. But as I will argue at length in Chapter 8, this mismatch has a more fundamental origin. The three legal regimes that provide the existing justifications – treaty law, *jus cogens* and the law of occupation – are rules designed for states acting against other states. Their origins, assumptions and internal logic assume regulation of state actors with all the attributes and legal capacities they possess. For example, *jus cogens* are assumed to void treaties between states giving effect to their own national interests. Those private interests are superseded when they conflict with the fundamental public policy of the international community. But the actor subject to be regulated by *jus cogens* in the case of humanitarian occupation is not an individual state but the UN Security Council, the most important forum for collective decisions on matters of peace and security. The Council shares few characteristics of a community of autonomous states, each pursuing its own national interests. The Council is assumed to embody the collective interests of member states. Insights of the institutionalist school of international relations theory suggest that in practice, states engaged in collective deliberations – as occur in the Council – are more likely to find common interests and utility in collective action.

If this hypothesis is correct, the two major themes explored in this book come together. The first posits that humanitarian occupation is grounded in a legal model of the state that, through extensive practice, has come to reject changes to existing borders and populations in favor of democratic solutions. The second, the legal framework used to evaluate humanitarian occupation, must take account of this collective

vision of territory, individual rights and political institutions. To juxtapose Security Council actions based on a now well-accepted vision of the state with norms designed to restrain individual states acting against collective values is nonsensical. At a minimum, we must entertain a skepticism about the propriety of applying state-centric rules to the Council. This is not to say the Security Council always acts lawfully and can never deviate from this model of the state or other foundational principles. Chapter 8 will suggest limits that involve both the nature of Council decision-making and the legal context in which its decisions are made. It is rather an attempt to confine legal analysis of the Council to the plane of collective action from which humanitarian occupation emanates.

The danger of this argument, of course, is that things may change. It is possible, for example, that the model of statehood I have posited as emerging from international law will be challenged by new developments. Events surrounding the final status of Kosovo, still unfolding at this writing, are illustrative: if Kosovo were to secede with the explicit or implicit benediction of the Security Council, what would remain of the argument that international law is committed to the boundaries of existing states? I hope to demonstrate that the practice supporting this and other aspects of the statehood model is sufficiently broad and deep to withstand an arguably contrary case (which Kosovo may not be, even from preliminary indications). But because my claims about a collective vision of the state are largely empirical, they are susceptible to challenge based on new developments. That is a danger I am willing to accept.

Section I Historical antecedents

1 The historical origins of humanitarian occupation I: governance in service of outsiders

Some writers have described a long historical pedigree for the humanitarian occupation missions of the 1990s.[1] Beginning in the early nineteenth century, the dominant states of Europe entered into a series of multilateral agreements providing that certain governmental powers would be exercised directly by international actors. In the twentieth century, the mandate and trusteeship systems of the League of Nations and United Nations created supervisory regimes over the former colonies of defeated powers. And after the end of the Cold War, the UN dispatched numerous missions to rebuild the governments of post-conflict states.

In this chapter, examining cases running through the creation of the UN trusteeship system, I will begin to ask whether this historical perspective is of any use to understanding contemporary humanitarian occupations. Can these early cases be understood as representing a coherent legal phenomenon? Were governmental functions internationalized in the same way? Did internationalization occur for the same reasons? Most previous scholarship has focused on the extent of international control over these early territories. I am interested in *how* these international territories were governed and whether they represented an idealized model, normative or otherwise, of legitimate national governance. More particularly, was governance internationalized primarily for the benefit of the inhabitants – or was it done for other reasons? I will argue that if the welfare of the inhabitants was not the primary reason for internationalization, then humanitarian occupation represents not continuity with past practice but a crucially important deviation.

[1] See Simon Chesterman, You the People 11-25 (2004); Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 Am. J. Int'l L. 583 (2001); Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 Am. J. Int'l L. 76 (2001).

Meir Ydit's 1961 study remains the most comprehensive historical review of international territorial administration. Ydit coined the phrase "internationalized territories" to describe the phenomenon. He defined these territories as:

a. populated areas established for an unlimited duration as special State entities in which supreme sovereignty is vested in (or de facto exercised by) a group of States or in the organised international community,
b. The local element in these territories is restricted in its sovereign powers by the provision of an International Statute (Charter, Constitution, etc.) imposed upon it by the Powers holding supreme sovereignty over the territory.[2]

One might understand Ydit as describing a new legal category of authority over territory. As with domestic property law, international law describes a variety of possessory interests, from *de facto* to *de jure* entitlements.[3] Traditionally, all these rights were held by states.[4] But here was an arguably new species of *res communis*, a separate category of rights in which various forms of control were vested in international organizations. Of course, most of the cases Ydit described had arisen after European wars and involved agreements among European states. But this problem of historical particularism aside, the post-Cold War governance and democratization initiatives arguably continued this internationalization of domestic authority by vesting international actors with governance functions normally (even today) seen as essentially domestic in nature.

James Crawford has argued that territories identified by earlier scholars as "internationalized" varied to such a degree that there appeared "to be no legal – as distinct from political – concept of 'internationalized territory'."[5] A closer examination of these territories suggests that Crawford was correct in finding few common traits that might define a coherent legal category, either in the territories' creation or in their supervision.

[2] Méir Ydit, Internationalised Territories 21 (1961) (footnote omitted). For a summary of more recent literature on internationalized territories, see David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 Va. J. Int'l L. 275, 324-30 (1996).

[3] See Malcolm Shaw, Title to Territory in Africa 1-26 (1986); Robert Y. Jennings, The Acquisition of Territory in International Law 4 (1963).

[4] See Shaw, *supra* note 3, at 1-7; Jennings, *supra* note 3, at 1-6.

[5] James Crawford, The Creation of States in International Law 233 (2nd edn, 2006).

The reasons for internationalization in the earlier periods differ substantially from those supporting the cases of the 1990s, and these differences in motivation are reflected directly in the political architecture of the territories themselves. The recent cases can be seen as a logical, perhaps even necessary, outgrowth of international norms addressing the continuity of territory and the relation between states and their citizens. The earliest cases demonstrate no such normative groundings.[6] Their origins lay in strategic concerns of the dominant states.

In describing the evolution of internationalized territories, I hope to demonstrate these rather stark differences. Instead of doctrinal unity, a slow evolution will emerge in the interests served by these collective arrangements. In the roughly one hundred years of their existence, internationalized territories have changed from arrangements strategically advantageous to the most powerful European states to state-building projects of the UN. Later chapters will link these changes to broader normative forces that have radically altered our conception of the state, forces that effectively foreclosed other solutions to the brutal civil wars that raged in all the states recently targeted for internationalization. For now, in an effort to capture this dichotomy, I shall refer to these two categories of internationalized territories as those primarily serving the interests of "outsiders" and those primarily serving the interests of "insiders." This chapter examines territories rather squarely in the first category, running from the early nineteenth century to the advent of the UN trusteeship system. The next chapter examines more recent cases. These chapters do not purport to be comprehensive histories, ably undertaken by others,[7] but a review highlighting these trends.

I. Origins in the nineteenth century

Prior to the settlements ending World War I, international control over territory was quite limited. Most cases involved authority exercised jointly by the dominant powers over small areas outside Europe, effectively rendering them shared instances of the colonial dominion exercised individually by European states. Echoing later developments,

[6] Some writers in the early twentieth century argued that League mandate territories and later UN trust territories followed an obligation of trusteeship toward dependent peoples that is traceable first to domestic law and then to international conferences in the late nineteenth century. But even these writers stop short of describing such obligations as having entered international law. See e.g., LEAGUE OF NATIONS, THE MANDATE SYSTEM: ORIGIN, PRINCIPLES, APPLICATION 12 (1945) (LEAGUE MANDATE SYSTEM).

[7] See e.g., CHESTERMAN, *supra* note 1.

each was also part of a post-war settlement. The International Settlement of Shanghai (1854–1943), for example, followed the Opium War and was essentially an extension of the European capitulations system, "[aiming] at the avoidance of clashes between the foreign powers competing for spheres of influence and footholds in China."[8] The Free City of Cracow, created at the Congress of Vienna, was internationalized in the sense that it fell under the joint "protection" of Austria, Prussia and Russia, but the City is best seen as a collective version of the protectorates common in the period.[9] This lack of grounding in any authority other than the strategic needs of the major European powers was later confirmed by the City's abolition in 1846 by a treaty among the same three states.[10] Minimal international standards for non-European territories were also set forth in the 1885 General Act of Berlin, setting the ground rules for acquisition of territory in Africa, as well as at the Brussels Conferences of 1890 and 1899 on slave trade and liquor traffic.[11]

None of these arrangements contained any provisions about governance in the colonies or created institutions to supervise the colonial powers. In hindsight, the reason for this is clear: locals were the subjects, but not the objects of these regimes. Their collective fate was central to conflicts among the major powers, but the inhabitants' individual welfare had little bearing on the outcome of territorial readjustments. One commentator has remarked that "so far as the welfare of the natives was concerned for the next twenty years, these treaties might just as well not have been drawn up."[12] These early cases epitomize international governance arrangements for the benefit of outsiders.

II. Territories administered as a result of the 1919 settlement

The peace settlement at Versailles began the modern era of international organizations and the assertion of collective authority over territory. There was no change, however, in the unexamined assumption that victors in war possessed the legal authority to dispose of the territory of defeated powers. Much time was spent at Versailles debating the new map of Europe and the fate of German and Ottoman overseas possessions. But pre-Charter law would not have recognized

[8] YDIT, *supra* note 2, at 23. [9] *Ibid.* at 97 and n. 7. [10] *Ibid.* at 105-6.

[11] General Act of Berlin, Martens NRG 1853-85, Tome X, 419, arts. VI and IX; General Act of the Brussels Anti-Slavery Conference, Martens NRG, 1881-90, IIème Serie, Tome XVI, 3.

[12] ELIZABETH VAN MAANEN-HELMER, THE MANDATES SYSTEM IN RELATION TO AFRICA AND THE PACIFIC ISLANDS 24 (1929).

legal objections to the Allies' capacity to make these decisions.[13] Wars throughout history had ended with a variety of territorial rearrangements, from minor border modifications to wholesale annexation and extinction of occupied states. As Jennings has written, "given a system in which war is no illegality it ineluctably follows that victorious war must be allowed to change rights."[14] This situation would not change until 1945.

One group of territories considered by the Peace Conference was a series of strategically important areas in Europe whose final disposition remained in dispute among the Allied powers. As with most territorial settlements at Versailles, these areas presented a conflict between Wilsonian self-determination and the historical, strategic and economic claims of various outsiders. But even Wilson was eventually convinced that accommodation to these competing claims was inevitable and that applying self-determination to the ethnic polyglot of Europe "in practice inevitably involves its violation."[15] In the end, ideas about legitimate governance in internationalized territories played only a minor role at Versailles.

Thus, Germany renounced sovereignty over the Memel Territory "in favor of the Allied and Associated Powers," who held title jointly.[16] The treaty made no mention of how Memel would be governed or by whom. Authority was exercised by a French High Commissioner with the assistance of French troops.[17] The arrangement was short-lived: in January 1923, Lithuania seized the territory and its sovereignty was recognized shortly thereafter in a treaty with the Allied Powers.[18] That treaty did create an international Harbor Board to oversee free maritime transit in the port, but the League exercised no direct control over the Board's functioning.[19]

The Free City of Danzig was another strategic compromise at Versailles, created to balance Wilson's promise to the new Polish state of an outlet to the sea with the City's overwhelmingly German character.[20] The Allied

[13] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 170 (4th edn, 2005).
[14] JENNINGS, *supra* note 3, at 52.
[15] Quoted in G.M. GATHORNE-HARDY, A SHORT HISTORY OF INTERNATIONAL AFFAIRS 1920-1939 24 (4th edn, 1950).
[16] Treaty of Versailles, Ger.-Allies, art. 99, June 28, 1919, 225 Consol. TS 188.
[17] IAN F.D. MORROW, THE PEACE SETTLEMENT IN THE GERMAN POLICY BORDERLANDS 429 (1936).
[18] *Ibid.* at 431-7. [19] YDIT, *supra* note 2, at 49-50.
[20] I.F.P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS 90 (1952). See also Malcolm M. Lewis, *The Free City of Danzig*, 5 BRIT. Y.B. INT'L L. 89 (1924). A somewhat more progressive arrangement was created for the Free Territory of Trieste

and Associated Powers once again received title, but Danzig was "placed under the protection of the League of Nations."[21] A League High Commissioner was created and the City's constitution was placed "under the guarantee" of the League.[22] The Versailles Treaty was silent, however, on the substance of the constitution. To ensure Poland could make economic use of Danzig, the Versailles Treaty also guaranteed Poland rights of access and improvement, as well as authority to conduct the City's foreign relations.[23] But starting in the mid-1930s, Nazi Germany steadily increased its influence over the City's politics until local German sympathizers announced its incorporation into Germany in September 1939.[24]

The League was granted a clearer role in governing the Saar region, whose "government" Germany renounced "in favour of the League of Nations, in the capacity of Trustee."[25] The Saar's valuable coal mines, however, were ceded to France.[26] German disengagement from governing and economically exploiting its territory was to last fifteen years, at which time a plebiscite would determine the Saar's ultimate disposition. The Treaty did provide that certain of the inhabitants' pre-existing rights under German law were to survive this arrangement.[27] But apart from guaranteeing suffrage to women in local elections, the Treaty hardly addressed the substance of government in the Saar. Certainly, nothing approaching a blueprint for political or legal institutions appeared. In the 1935 plebiscite, Saarlanders chose reunification with Germany over affiliation with France and League control was terminated.[28]

in the peace treaty with Italy following World War II. See Treaty of Peace with Italy, arts. 21-22, Feb. 10, 1947, 49 U.N.T.S. 3. Italian sovereignty over Trieste was terminated and its "integrity and independence" were to be guaranteed by the UN Security Council. The Council was to appoint a governor, but the other organs of government were to be created "in accordance with democratic principles." *Ibid.*, Annex VI, arts. 9--11. Implementation of the plan fell victim to Cold War stalemates, however. After nine years of fruitless negotiation, Trieste was partitioned between Italy and Yugoslavia. See YDIT, *supra* note 2, at 231-72.

[21] VERSAILLES TREATY, *supra* note 16, art. 102. [22] *Ibid.* art. 103.

[23] *Ibid.* art. 104. In the subsequent Convention of Paris between the Allied and Associated Powers and Poland, however, Poland was prohibited from entering into treaties on behalf of the City without approval of the League High Commissioner. Of this complex relationship the Permanent Court remarked, "[A]s regards the foreign relations of the Free City, neither Poland nor the Free City are completely masters of the situation." Free City of Danzig and International Labor Organization, Advisory Opinion, 1930 P.C.I.J. (ser. B) no. 18, at 13 (Aug. 26).

[24] WALTERS, *supra* note 20, at 796-7. [25] VERSAILLES TREATY, *supra* note 16, art. 49.

[26] *Ibid.* art. 45. [27] *Ibid.* Annex (following arts. 42-50), chapter II.

[28] See JOHN I. KNUDSON, A HISTORY OF THE LEAGUE OF NATIONS 180 (1938).

A final arrangement in Europe grew out of a plebiscite held to determine the location of the German-Polish border in Upper Silesia.[29] The vote in 1921 favored Germany. But political tensions led the League to recommend an international supervisory body (the Upper Silesian Mixed Commission) to oversee free traffic and commerce in the region. This was memorialized in a 1922 German-Polish treaty.[30] Actual sovereignty remained with the two states, however, and none of the supervisory functions delegated to the Commission addressed legal or political institutions in any significant fashion.[31]

Outside of Europe, the League briefly administered Leticia, a small town in the Amazon valley on the Colombian-Peruvian border. Leticia was the subject of low-level military conflict between the two countries in the early 1930s.[32] A 1933 Agreement called for the League to administer the territory "in the name of the Government of Colombia" for one year, while Peruvian occupation troops were withdrawn and control returned to Colombia.[33] The nature of the administration was left entirely to the Commission, as the Agreement provided "[t]he Commission shall have the right to decide all questions relating to the performance of its Mandate."[34]

The League's role in the Leticia affair – facilitating resolution of a territorial dispute but receiving virtually no brief on how it was to treat the territory's inhabitants – is emblematic of how these inter-war cases were conceived. Success for the League came when it provided a neutral administration of territories disputed by its member states. The territories' inhabitants barely rose above their collective identity as objects of one or another state's claim, meriting little direct attention from the League in their own right.

III. League of Nations mandates

A. Fashioning international authority

A far more systematic form of international supervision was put in place for League mandate territories. Mandates were the former colonies of powers defeated in World War I, severed from Germany and the Ottoman

[29] CHESTERMAN, *supra* note 1, at 21-2.
[30] F.S. NORTHEDGE, THE LEAGUE OF NATIONS: ITS LIFE AND TIMES 80 (1988).
[31] YDIT, *supra* note 2, at 47. [32] See GATHORNE-HARDY, *supra* note 15, at 211-13.
[33] See 1933 League of Nations O.J. 944-5. [34] *Ibid.* at 945.

Empire, and allocated to the victorious allied states.[35] The mandates departed from the agnosticism toward governance evident in the other internationalizations at Versailles and, for the first time, provided international administrators with clear supervisory standards. But did concern for the inhabitants' welfare, or more radically, a desire to foster self-government in the territories, trump the geostrategic concerns so evident in the other internationalizations at Versailles? The answer lies in how construction of the mandate regime unfolded and in the specific obligations of the mandatory powers.

The League Covenant set out general principles for the mandate system. Because colonies of the defeated powers were "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world," there "should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization."[36] The mandatory powers – the "advanced nations" – would undertake "the tutelage of such peoples."[37] Three categories of territories were described, later to become Class A, B and C mandates. The first were former Ottoman territories, deemed nearly ready for independence. These would be governed by a mandatory power "until such time as they are able to stand alone."[38] The second, exemplified by central African territories, "are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion,"[39] as well as other safeguards such as prohibitions on the slave trade. The third, exemplified by South-West Africa and the South Pacific islands, were deemed so remote and backward that they were "best administered under the laws of the Mandatory as integral portions of its territory."[40] The safeguards applicable to the second class of mandates would apply to the third as well.[41]

While the Covenant described the mandate system in ringing universalist terms, it unfolded with a limited and somewhat arbitrary reach. The allies disposed only of the German and Ottoman territories, excluding Austro-Hungarian possessions entirely. Of the Ottoman territories, the entire Arabian Peninsula was excluded and left to devolve into independent states. One small slice, the Hijaz, even became an original League member state before being absorbed by Saudi Arabia in

[35] VERSAILLES TREATY, *supra* note 16, arts. 118-27; Treaty of Lausanne, Allies-Turk., art. 16, July 24, 1923, 28 L.N.T.S. 12. See generally H. DUNCAN HALL, MANDATES, DEPENDENCIES AND TRUSTEESHIPS (1948); NORMAN BENTWICH, THE MANDATES SYSTEM (1930).

[36] League of Nations Covenant, art. 22, ¶ 1. [37] *Ibid.* art. 22, ¶ 2.

[38] *Ibid.* art. 22, ¶ 4. [39] *Ibid.* art. 22, ¶ 5. [40] *Ibid.* art. 22, ¶ 6. [41] *Ibid.*

1932.[42] More importantly, none of the vast colonial holdings of the victorious powers was covered. Mandate territories subject to the Covenant's "sacred trust of civilization" thus came into being immediately adjacent to Allied colonies subject to no external scrutiny whatsoever. "Tanganika, in East Africa, became a British Mandate, wedged between the British colony of Kenya to the north, the Portuguese colony of Mozambique to the south, and to the west British Northern Rhodesia and the Belgian Congo."[43] Of the Samoan islands, eight were mandated to New Zealand while the other six remained possessions of the United States, as they had been since 1900.[44] In the end, the League administered only fourteen mandate territories. The 104 additional overseas dependencies of the inter-war world were beyond its control.[45]

The actual assignment of the territories to the victorious powers reflected political compromise and legal confusion. The German territories were divided among the Allies at the Paris Conference on May 7, 1919 and the Ottoman territories at the San Remo Conference on April 25, 1920. Both allocations occurred *before* the territories had been relinquished by their soon-to-be-former sovereigns, events not taking place until the Versailles Treaty on June 28, 1919 (Germany)[46] and the Lausanne Treaty in 1923 (the Ottomans).[47] The tribunal in the Eritrea-Yemen Arbitration confirmed that territories eventually severed by Lausanne remained under Ottoman sovereignty until the treaty entered into force, presumably calling into question their distribution to Allied mandatories three years earlier.[48] Moreover, only the Versailles Treaty provided for League supervision over the mandates. The Lausanne Treaty contained no such provision.[49] Finally, Article 22 of the League Covenant provided that in the case of the four Class A mandates – Syria, Lebanon,

[42] JAMES WYNBRANDT, A BRIEF HISTORY OF SAUDI ARABIA 187 (2004).
[43] HALL, *supra* note 35, at 34-5. [44] *Ibid.* at 34. [45] *Ibid.* at 44.
[46] Article 119 provided that "Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions." VERSAILLES TREATY, *supra* note 16, art. 119.
[47] LAUSANNE TREATY, *supra* note 35, art. 16.
[48] Eritrea-Yemen Arbitration: Phase I - Territorial Sovereignty and Scope of Dispute, ¶ 164 (Oct. 9, 1998), available at www.pca-cpa.org/RPC/#Eritrea.
[49] The Lausanne Treaty set out the borders of the new Turkish state and provided that the Ottomans renounced "all rights and title whatsoever over or respecting the territories situated outside the frontiers laid down in the present Treaty and the islands other than those over which her sovereignty is recognized by the said Treaty, the future of these territories and islands being settled or to be settled by the parties concerned." LAUSANNE TREATY, *supra* note 35, art. 16. The reference to dispositions "being settled" could be read as a retrospective ratification of the Mandate system then already in place. See M.F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 265 (1926).

Iraq and Palestine – the "wishes of these communities must be a principal consideration in the selection of the Mandatory." A visiting commission concluded in 1919 that residents of Syria and Lebanon preferred Britain over France as their mandatory, but the United States over both.[50] The San Remo Conference, however, granted mandates over both territories to France.[51]

B. The mandatories' governance obligations

Despite these problems of selectivity and legal imprecision, the Covenant's explicit limitations on the mandatories' governing powers were clearly a major legal innovation. Under Wilson's prodding, the Versailles conferees adopted a policy of non-annexation toward the colonies of the defeated powers. The mandate territories were not allocated in fee simple absolute, as had been the case following so many previous wars, but came subject to good governance obligations owed to the inhabitants and reporting requirements owed to League. Unlike the European territories placed under international supervision at Versailles, the mandate system operated under common principles and was subject to a central supervisory authority – the Mandates Commission. With international oversight taking an important step forward, then, the critical question for our purposes is whether the mandate scheme embodied or promoted any specific principles of governance.

The League certainly took an interest in the conditions of life in the territories. Article 22 of the Covenant, in describing the "tutelage" entrusted to "advanced nations" over the Class B and C mandates, required that they be administered "under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic." These dictates were echoed and elaborated upon in the agreements between the mandatory powers and the League.[52] The B agreements provided that mandatories "shall be responsible for the peace, order and good government of the territory, and shall undertake to promote to the utmost the material and moral well-being and the social progress of its inhabitants."[53] The C agreements obligated the powers to "promote to the utmost the material and moral well-being and the social progress of its inhabitants."[54]

[50] NORTHEDGE, *supra* note 30, at 205. [51] *Ibid.*

[52] See BENTWICH, *supra* note 35, at 135-194 (reprinting representative mandate agreements).

[53] HALL, *supra* note 35, at 303 (reprinting representative B agreement for Tanganyika).

[54] *Ibid.* at 308 (reprinting representative C agreement for Pacific island territories).

But "good government" is not synonymous with *self-government* and the League did not require mandatories to provide political rights to the inhabitants. This represented a functional limit on the nature of the mandatories' governance obligations: the rule of the colonial authorities might be tempered and its worst excesses tamed, but there was no obligation to foster debate, participation, or political decision-making among the inhabitants. Such political engagement would only make sense if the territories were ultimately destined for independence, since to promote the tools of popular sovereignty would call into question the ultimate legitimacy of the mandatory's political authority. Self-rule, however, was an explicit goal only for the Class A mandates, and even there it proved somewhat illusory. The A territories, declared the Covenant, had "reached a stage of development where their existence as independent nations can be provisionally recognized." Full independence would come when they could "stand on their own." But provisional recognition never materialized for any of the A territories. Because no timetable was provided for their independence, and because the League lacked authority to press the British and French to move Palestine, Syria and Lebanon to self-rule, independence materialized in only one case during the League's lifetime: Iraq.[55]

The scheme for the B and C territories contained no explicit promise of self-rule, democratic or otherwise. Indeed, the C mandatories were permitted to administer their territories as integral parts of the metropolitan state, an arrangement wholly incompatible with movement toward political autonomy.[56] Some have found a nascent promise of independence in the very concept of "tutelage," which would implicitly last "only until the peoples under tutelage are capable of managing their own affairs."[57] But given that none of the B and C territories in fact attained such capacity in the eyes of the mandatories and the League, as none became independent during the League's lifetime, this seemed an overly optimistic reading. In the immediate post-imperialist world, the degree of territories' "backwardness" was a more telling guide to

[55] Iraq's time as a mandate also did little to advance the rigor of League oversight. Its mandate agreement never entered into force. Instead, Britain entered into a bilateral treaty with the recently installed King Faisal. See P.E. Corbett, *What is The League of Nations*?, 5 BRIT. Y.B. INT'L L. 119, 129-30 (1924).

[56] For example, the agreement concerning the Pacific islands provided that Japan "may apply the laws of the Empire of Japan to the territory, subject to such local modifications as circumstances may require." HALL, *supra* note 35, at 307. Northedge describes this full integration as treating the C territories "as annexed domains." NORTHEDGE, *supra* note 30, at 196.

[57] LEAGUE MANDATES SYSTEM, *supra* note 6, at 23.

the mandates' assumed destiny. Most League member states appeared to accept that independence for B and C territories "was hardly within the reach of practical politics."[58] Given these assumptions, and the limited expectations of autonomy that followed, political tools for inhabitants to govern themselves served no legitimate purpose.

If the nature of mandatory rule left any doubt as to whether the details of governance in the territories had been fully internationalized, the League's meager supervisory powers confirmed that they had not. Oversight was entrusted to a Mandates Commission that in turn reported to the League Council. Neither body exercised direct review over the territories. The Commission collected no information of its own, relying instead on reports and responses to questionnaires it submitted to the mandatory powers.[59] With several minor exceptions "there were no direct official contacts between organs of the League and the people in the Mandated territories."[60] When the Commission sought to broaden its questionnaires beyond the specific obligations listed in mandate agreements to examine "the whole administration" of the territories, the Council rejected the proposal.[61] And in its reports to the Council, which Hall describes as "perfunctory," the Commission rarely engaged in direct criticism of the mandatories' practices.[62]

C. The locus of sovereignty debate

For international lawyers of the inter-war period, however, discussions of authority over the territories gave rise to an entirely different legal question: where to locate "sovereignty." A debate raged among scholars of the inter-war period over whether the League, the mandatory powers or the victorious Allies emerged from the post-war settlements as "sovereign," and thus endowed with ultimate political authority. The sovereignty debate was not a product of the questions about international notions of legitimate governance explored here. But because prevailing conceptions of sovereignty included full control over most functions of government, to assign sovereignty was also to assign the capacity to govern. A conclusion that the League had acquired sovereignty would have brought with it certainty that the organization could legislate for the territories, or at least compel the mandatories to adopt certain policies. Perhaps more importantly for our purposes, it

[58] NORTHEDGE, *supra* note 30, at 196. [59] HALL, *supra* note 35, at 49.
[60] EMIL J. SADY, THE UNITED NATIONS AND DEPENDENT PEOPLES 18 (1956).
[61] HALL, *supra* note 35, at 191. [62] *Ibid.* at 195.

also would have brought an assumption that the League, like any state possessing sovereignty, held primary responsibility for the welfare of the territories' inhabitants. The sovereignty debate thus presents an important window into how governance questions might have been answered during the League period.

Three major views on mandate sovereignty emerged. Importantly, none favored the territories' inhabitants.[63] A claim of indigenous sovereignty could plausibly be made only for the A mandates, which the Covenant in article 22 described as nearly ready for independence. As noted, no such language appeared for the B and C territories. But even inhabitants of the A territories had no right to dispose of the territories or to demand full independence. More importantly, the claim was anathema to prevailing eurocentric notions of statehood, as Quincy Wright demonstrated in his brusque dismissal of even the possibility of indigenous sovereignty: "It is hardly proper to attribute sovereignty to communities which do not exist."[64]

The first group of scholars argued that sovereignty resided with the League of Nations. Article 22 of the Covenant provided that mandatories would exercise their authority "on behalf of the League," a formulation repeated in the mandate agreements.[65] Moreover, the League Council defined "the degree of authority, control or administration to be exercised by the Mandatory," approved the terms of the mandates and retained final authority to modify the agreements.[66] But critics pointed out that the mandates had been transferred directly from the "allied and associated powers" to the mandatories without consulting the League.[67] Accordingly, the League had no authority to revoke a mandate unilaterally.[68] Critics concluded that if the power to dispose of territory was

[63] See QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS 325-6 (1930); R.N. CHOWDHURI, INTERNATIONAL MANDATES AND TRUSTEESHIP SYSTEMS: A COMPARATIVE STUDY 231-2 (1955); FRANCIS B. SAYRE, THE ADVANCEMENT OF DEPENDENT PEOPLES 269-70 (1947); Francis B. Sayre, *Legal Problems Arising From the United Nations Trusteeship System*, 42 AM. J. INT'L L. 263, 271 (1948).

[64] WRIGHT, *supra* note 63, at 331.

[65] League of Nations Covenant, art. 22. For example, the British Mandate for Palestine provided: "His Britannic Majesty has accepted the Mandate in respect of Palestine and undertaken to exercise it on behalf of the League of Nations in conformity with the following provisions. . ." Mandate for Palestine and Transjordan (July 24, 1922), reprinted in BENTWICH, *supra* note 35, at 137-8.

[66] League of Nations Covenant, art. 22 (quoted language in ¶ 8); AARON M. MARGALITH, THE INTERNATIONAL MANDATES 157 (1930).

[67] MARGALITH, *supra* note 66, at 162; WRIGHT, *supra* note 63, at 334.

[68] LINDLEY, *supra* note 49, at 266.

an essential requisite of sovereignty, the League clearly lacked sovereign powers.[69]

The second group of scholars argued that sovereignty lay with the principal Allied and Associated Powers.[70] This claim was based primarily on Germany and the Ottoman Empire having relinquished sovereignty in favor of the Allies in the peace treaties.[71] The Allies, and not the League, then proceeded to designate the mandatories.[72] Although the League then assumed supervisory authority over the mandates, the Allies never transferred the title they arguably acquired by treaty. Proponents regarded the mandate system as a limitation on but not a relinquishment of allied sovereignty.[73]

But this theory created problems for the United States and Italy, which were among the "allied and associated powers" but not members of the League. On this view, they would have been in the position of holding joint sovereignty but possessing no control over the territories. More concretely, none of the Allied Powers ever claimed the residents of the territories as their citizens, a natural consequence of sovereignty.[74] Finally, to the extent the "allied and associated powers" ever existed as a corporate body, it disappeared shortly after the peace settlements.[75]

The final school of scholars favored the mandatory powers. This view relied on a functional conception of sovereignty that focused on the mandatories exercising virtually all powers of governance over the territories. The mandate agreement for Palestine, for example, provided that Great Britain would "have full powers of legislation and of administration, save as they may be limited by the terms of this Mandate."[76] This included authority to enter into treaties on the territory's behalf and

[69] *Ibid.* at 265-6; MARGALITH, *supra* note 66, at 162-3; CHOWDHURI, *supra* note 63, at 232-3; SAYRE, *supra* note 63, at 271.

[70] See WRIGHT, *supra* note 63, at 319-24; MARGALITH, *supra* note 66, at 154-57; LINDLEY, *supra* note 49, at 264-5.

[71] VERSAILLES TREATY, *supra* note 16, art. 118. As noted, the Lausanne Treaty provided rather unhelpfully that the fate of former Ottoman territories would be determined by the "parties concerned." See *supra* note 49.

[72] WRIGHT, *supra* note 63, at 323.

[73] As Lord Balfour argued before the League Council, "A Mandate is a self-imposed limitation by the conquerors on the sovereignty which they exercised over the conquered territory. In the general interests of mankind the Allied and Associated Powers have imposed these limitations upon themselves, and had asked the League to assist them in seeing that this general policy is carried out." 1922 League O.J. at 547, quoted in MARGALITH, *supra* note 66, at 154.

[74] CHOWDHURI, *supra* note 63, at 231.

[75] MARGALITH, *supra* note 66, at 155.

[76] Mandate for PALESTINE AND TRANSJORDAN, *supra* note 65, art. 1.

the obligation to ensure the territory did not come under the control of a foreign power.[77] As Lindley argued:

> in all cases except that of Iraq, the whole of the existing sovereignty de jure as well as de facto, is in the Mandatory State, but that that sovereignty is limited by the conditions laid down in the respective Mandates. . .[T]he restrictions imposed upon the sovereignty of the Mandatory would not appear to be different *in kind* from such limitations upon sovereignty as are set by general International Law.[78]

The distinctive feature of the mandates, however, was that they had not been disbursed as spoils of war. Mandatories exercised authority "on behalf of the League of Nations."[79] The lack of clarity in defining the degree of League control can perhaps be explained by the lukewarm reception given to Wilson's self-determination principle at the Peace Conference. But the welfare of the territories' inhabitants sufficiently concerned the Allies that they firmly rejected outright annexation.[80] When the ICJ considered the status of South-West Africa, a mandate South Africa had refused to convert to a UN trusteeship territory, Judge Read stated in his separate opinion that "the mandatory power, as such, was not the sovereign of the territory. It had no right of disposition, no jus disponendi: it was merely a Mandatory on behalf of the League."[81] The full court held that only the General Assembly, as the successor to the League Council, could modify the mandate. South Africa could not do so unilaterally.[82]

The sovereignty debate was thus inconclusive, though not surprisingly so. Old taxonomies do not readily admit new players. As Quincy Wright mused after sifting through the minutiae of these various arguments, "[t]he ingenuity of statesmen usually outstrips the classificatory skills of jurists. Statesmen sometimes even display an aversion to jurists, perhaps from an instinct that the latter by confining them to traditional forms will blind them to useful innovations."[83] But it is still useful to ask whether these various claims might help illuminate contemporary cases of international governance. Taken on its own terms, the

[77] *Ibid.* arts. 19 and 5. Similarly, France was "entrusted with the exclusive control of the foreign relations of Syria and the Lebanon and with the right to issue exequaturs to the consuls appointed by foreign Powers." Mandate for Syria and the Lebanon, reprinted in BENTWICH, *supra* note 35, at 166-7.

[78] LINDLEY, *supra* note 49, at 266-7. [79] League of Nations Covenant, art. 22.

[80] MARGALITH, *supra* note 66, at 165.

[81] International Status of South-West Africa, Advisory Opinion, 1950 ICJ 128, 164, 168 (July 11) (separate opinion of Judge Read).

[82] *Ibid.* at 137. [83] WRIGHT, *supra* note 63, at 265.

sovereignty debate would cast the mandates as a very tentative step toward the full international governance of the 1990s. Indicia of a plenary international authority to structure politics in the territories might be taken as a precursor of normative judgments about how national politics *should* be structured. But of course the inter-war debates cannot be taken on their own terms, since the dramatic legal changes following World War II have substantially altered our understanding of the nature of territorial authority. Contemporary international law endows any territory subject to external control with counter-veiling rights that preclude a direct comparison to the mandate experience. Colonial territories, to the extent they still exist, are entitled to self-determination and must be given an immediate option of independence.[84] Fully sovereign states enjoy a right of territorial integrity that must be considered if their capacities for self-government are to be limited by an international organization. The virtually uncontested creation of the mandate arrangements, therefore, cannot now be replicated and any comparison between the League's powers over territory and those of contemporary international actors must use a metric other than the locus of sovereign authority.

But the mandates may provide indirect lessons about the *functions* served by international governance. This question is easily disengaged from the now dated sovereignty question. In the *South-West Africa* case, Judge Arnold McNair took this approach by refocusing inquiry about the mandates' status to specifying authority for particular attributes of control over the territories. Following Quincy Wright, McNair described mandates and UN trusteeships as "a new institution – a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other."[85] They were "a new species of international government, which does not fit into the old conception of sovereignty and which is alien to it."[86] Sovereignty over the mandates, in his view, was held "in abeyance" until independence. Before that point, the crucial question for the attribution of

[84] *Declaration on the Granting of Independence to Colonial Peoples*, GA Res. 1514 (XV) (Dec. 14, 1960) ("Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations."); Western Sahara, Advisory Opinion, 1975 ICJ 3, 31-3 (Oct. 16) (detailing emergence of the decolonization obligation in General Assembly resolutions).

[85] *South-West Africa Advisory Opinion*, 1950 ICJ at 146, 150 (separate opinion of Sir Arnold McNair).

[86] *Ibid.*

responsibility to each actor involved in the administration of the territories was "not where sovereignty lies, but what are the rights and duties of the Mandatory [or Trustee] in regard to the area of territory being administered by it."[87]

McNair's insight was that pre-World War I notions of unified political authority cannot be reified merely by employing the language of sovereignty. Proclaiming one actor "the sovereign" does not make it so. Legal authority over mandate and trust territories had been disaggregated, requiring an understanding of political power that was diverse and multifaceted. The transition of UN trust territories to full statehood, for example, resulted from acts of the local populations (voting in referenda), the UN (supervising the voting, certifying its fairness, voting to terminate the trusteeship, admitting the territory as a UN member state), *and* the administering powers (renouncing trusteeship and severing constitutional ties to the territory).[88]

McNair's functionalism is a welcome diversion from the tyranny of categories that so dominated the sovereignty debate. It provides a useful methodological tool for situating the mandate experience in our historical review since McNair returns us to the question of precisely which functions of government were vested in the League. As we have seen, the obligations imposed on mandatories involved a short checklist of rights and good governance obligations that do not include the rights of political participation traditionally at the heart of liberal self-governance. The actual authority given to the League was minimal; its supervision was several layers removed from direct control over the territories and public criticism of the mandatories' conduct was rare if non-existent. Most importantly for our purposes, the mandate system put forth no coherent theory of domestic politics or governmental legitimacy. Even if the mandates promised a more benign form of colonialism, which they surely did, it was colonialism nonetheless. This, more than conclusions about the locus of political authority, helps illuminate the vast differences between mandates and contemporary humanitarian occupations.

IV. United Nations trusteeship territories

The UN trusteeship system emerged in a much more coherent fashion than the mandates, with all obligations set out in the UN Charter and

[87] *Ibid.*

[88] See generally Yves Beigbeder, International Monitoring of Plebiscites, Referenda and National Elections 129-43 (1994).

subsequent trusteeship agreements.[89] One is tempted to read this doctrinal clarity as reflecting an underlying political clarity on the need for increased international supervision of dependent territories. With the colonial empires exhausted after two world wars, and the UN Charter proclaiming a right to self-determination for all peoples, the trusteeships seemed a decisive step toward full sovereignty for this group of colonial territories.[90] The new international authority would craft political institutions for the territories that would make self-government, or at least the promise of self-government, a reality. The sheer scope of this undertaking gave the matter an added significance: at the end of World War II, fully one-third of the world's population lived under colonial rule.[91]

As the UN took up the many issues surrounding colonialism, however, something unexpected happened. A doctrine of supervision became a doctrine of emancipation. What was described in the Charter as an invigorated version of the League's system of benign oversight was transformed into an imperative to decolonize immediately. In John Springhall's words, decolonization became a "seemingly irresistible

[89] See UN Charter, arts. 75-91 (structure of trusteeship system and duties of Trusteeship Council); HALL, *supra* note 35, at 340-70 (reprinting trusteeship agreements).

[90] After much debate, the Charter reflected very different standards for the colonial territories of the victorious allied powers, the "non-self governing territories," which are addressed in Chapter XI. At San Francisco, the political future of colonial territories was "one of the most disputed subjects of the conference." CHOWDHURI, *supra* note 63, at 53. China proposed that the Charter proclaim independence as a goal for all dependent territories - both trust and "non-self governing" territories - a position supported by the Soviet Union but opposed by the United States, Britain, France and South Africa. See James B. Reston, *US Avoids Pledge to Free Colonies; Veto Plan Stands*, NY TIMES, MAY 18, 1945, at 1. The colonial powers prevailed. The Chair of the Committee responsible for drafting the trusteeship articles recounted that "the colonial powers led by the United Kingdom refused to approve the Declaration [on non-self governing territories in Chapter XI of the Charter] if it mentioned 'independence' as a possible objective." EUGENE CHASE, THE UNITED NATIONS IN ACTION 318 (1950), quoted *in* SADY, *supra* note 60, at 24. After acrimonious debate the delegates reached a compromise by which "independence" would be mentioned only in relation to trusteeship territories. Thus, while Chapter XII of the Charter set "*self-government or independence*" as a goal for trusteeship territories, Chapter XI promised only "*self-government*" for the non-self governing territories. In addition, colonial powers were only required to take "due account" of the political aspirations of their dependent territories, whereas the trustee powers were required to respect the "freely expressed wishes of the peoples." See UN Charter, arts. 73(b), 76(b). Eventually, the General Assembly declared information about political developments in the colonies to be indispensable and authorized a new Special Committee to study the information provided. See GA Res. 1700 (XVI) (Dec. 19, 1961); GA Res. 1535 (XV) (Dec. 15, 1960); GA Res. 1468 (XIV) (Dec. 12, 1959).

[91] WENDELL GORDON, THE UNITED NATIONS AT THE CROSSROADS OF REFORM 134 (1994).

historical force."[92] In the process, any elaboration of governance standards for the trust territories was effectively abandoned.

The eleven trust territories comprised all the former League mandate territories that had not attained independence (with the exception of South-West Africa), plus several divested from Japan and Italy by the World War II peace treaties.[93] In contrast to the League's distinctions between Class A, B and C mandates, the UN Charter held a unified and positive view of eventual self-government for the trust territories. Article 76(b) provided that among the "basic objectives" of the trusteeship system was "to promote the political, economic, social, and educational advancement of the inhabitants of the Trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned." The obligation to promote self-government was repeated in the trusteeship agreements, often in the form of detailed obligations for the trustee powers to create local political institutions.[94] Following article 76(c), the agreements also guaranteed political rights to the inhabitants that had not been provided in the mandate system.[95]

[92] JOHN SPRINGHALL, DECOLONIZATION SINCE 1945, 203 (2001).

[93] The eleven trust territories were the Cameroons (held by France), the Cameroons (UK), Togoland (France), Togoland (UK), Rwanda-Urundi (Belgium), Tanganika (UK), Western Samoa (New Zealand), New Guinea (Australia), Nauru (Australia, New Zealand and the UK), Pacific Islands Trust Territory (US), and Somaliland (Italy). See UNITED NATIONS OFFICE OF PUBLIC INFORMATION, FROM DEPENDENCE TO FREEDOM: THE UNITED NATIONS ROLE IN THE ADVANCE OF DEPENDENT PEOPLES TOWARDS SELF-GOVERNMENT OR INDEPENDENCE 8-9 (1961).

[94] The trust agreement with Great Britain for Tanganyika provided, for example:

> The Administering Authority shall promote the development of free political institutions suited to Tanganyika. To this end, the Administering Authority shall assure to the inhabitants of Tanganyika a progressively increasing share in the administrative and other services of the Territory; shall develop the participation of the inhabitants of Tanganyika in advisory and legislative bodies and in the government of the Territory, both central and local, as may be appropriate to the particular circumstances of the Territory and it peoples; and shall take all other appropriate measures with a view to the political advancement of the inhabitants of Tanganyika in accordance with Article 76(b) of the United Nations Charter.

Trusteeship Agreement for the Territory of Tanganyika, art. 6, UN Doc. T/8 (1947).

[95] Article 76(c) states that it shall be an objective of the trusteeship system "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." The trust agreement with France for French Togoland thus provided:

> The Administering Authority shall ensure in the Territory complete freedom of thought and the free exercise of all forms of worship and of religious teaching which are consistent with public order and morality. . .

This obligation to promote a capacity to govern and potentially, full independence, represented "a decided advance over the Mandates system."[96] The substantially enhanced system of UN oversight was also an improvement over the League; indeed, the Charter contemplated the possibility that the UN itself might serve as a territorial administrator, though this never came to pass.[97] The Trusteeship Council required that administrating powers include information about the territories' political advancement in their annual reports.[98] To obtain first-hand information about local conditions, the Council was empowered to visit the territories and review petitions from inhabitants, both with a view to enhancing the conditions of life.[99] The General Assembly demanded early on that the Council use these oversight mechanisms to hasten movement toward self-government or independence.[100] Unlike the independence commitments made to the Class A mandates, this goal was eventually fulfilled for all the trust territories: in 1994, Palau became the last trust territory to achieve independence.[101]

Thus, the charge to the Trusteeship Council was to ensure that inhabitants were granted, in the words of the trusteeship agreements, a "progressively increasing share in the administrative and other services of the Territory." Had this slow transfer of authority in fact occurred, the UN might have developed a body of standards against which later devolutions to local control might have been measured. The nature of the "free political institutions" established in the territories (again quoting

> The provisions of this Article shall not, however, affect the right and duty of the Administering Authority to exercise such control as may be necessary for the maintenance of public order and morality, and for the educational advancement of the inhabitants of the Territory.
> . . .
> The Administering authority shall guarantee to the inhabitants of the Territory, freedom of speech, of the press, of assembly and of petition, subject only to the requirements of public order.

Trusteeship Agreement for the Territory of Togoland under French Administration, art. 10, UN Doc. T/8 (1947).

[96] JAMES N. MURRAY, THE UNITED NATIONS TRUSTEESHIP SYSTEM 45 (1957).
[97] UN Charter, art. 81. [98] MURRAY, *supra* note 96, at 132. [99] UN Charter, art. 87(c).
[100] GA Res. 320 (IV) (Nov. 15, 1949). The General Assembly directed the Trusteeship Council to include a special section in its reports "dealing with the implementation by the Administering Authorities of the Council's recommendations concerning the measures adopted to grant the indigenous inhabitants of the Trust Territories a larger degree of self-government through participation in the legislative, executive and judicial organs and procedures of the Trust Territories." *Ibid.* ¶ 2.
[101] Shortly thereafter the Trusteeship Council suspended its operations. See www.un.org/documents/tc.htm.

the trusteeship agreements) would have been evaluated, critiqued and, perhaps, altered by international actors. Once again, an opportunity had arisen to describe international standards of governance.

But the opportunity was not taken. In part, this can be explained by the sheer resistance shown by the trusteeship powers, who could withhold acquiescence to the Trusteeship Council's recommendations.[102] During this same period (the 1950s), the colonial powers were vigorously opposing scrutiny of political developments in their non-trust colonies – the "non-self-governing territories." They argued that administration of these territories was an internal matter and that article 2(7) of the Charter precluded even discussion of self-government in UN fora.[103] Although this argument eventually failed, it was symptomatic of the colonial powers' general antipathy toward UN scrutiny. As late as 1960, the General Assembly committee responsible for the non-self-governing territories complained that "only a small fraction" of the colonial powers had transmitted information on political developments in their territories. As a result, the committee found itself unable "to appraise development towards self-government on the basis of constitutional changes and the evolution of political institutions."[104] The situation was not so different for the trust territories. In a 1957 book notable for its earnest optimism about the trusteeship project, James Murray conceded that:

> [w]hen the various administering states placed territories under the system they did not thereby commit themselves to policies in those territories entirely different from those followed in their respective colonies. This is not to say that the trusteeship system has no influence on the practice of administering authorities. It is to say that while the trusteeship system is not a mere reflection of general contemporary colonial practice, it is not, likewise, the cause of any radical transformation of colonial policies. . .The commitments of trusteeship involve modifications of, rather than departures from, the various administering states' policies.[105]

More remarkable than the antipathy of colonial powers was that proponents of decolonization themselves abandoned the idea of a slow, UN-supervised transition to self-government. The notion that colonies should develop mature governing institutions before attaining

[102] MURRAY, *supra* note 96, at 148.
[103] THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 926 (Bruno Simma ed., 1995).
[104] *Report of the Committee on Information from Non-Self Governing Territories*, at 21, UN G.A.O.R. (Supp. 15) (1960).
[105] MURRAY, *supra* note 96, at 216.

independence came to be seen as just another delaying tactic, postponing the arrival of full and equal statehood. In 1953, the General Assembly did set out a variety of political benchmarks for attaining certain forms of self-government, which included requirements for free and fair elections.[106] But for the most part, as Harold Jacobson wrote in 1962, "the majority in the United Nations has viewed the task of supervising colonial administration principally in terms of bringing those regimes to a close."[107] Anti-colonialists had little patience for a process that would first create representative institutions in the territories and then leave to them the task of choosing "self-government or independence," in accordance with article 76(b). They were championed by the steadily growing number of newly independent states joining the UN in the 1950s. David Kay describes these new nations as "almost totally mesmerized by the compulsion to hasten the total end of colonialism in the underdeveloped world."[108]

The door to specifying modes of governance in the trust territories closed for good in 1960, when the General Assembly declared in its ground-breaking Declaration on the Granting of Independence to Colonial Countries and Peoples that "inadequacy of political, economic, social and educational prerequisites should never serve as a pretext for delaying independence."[109] In debate preceding the vote, developing countries mounted a vigorous and often angry attack on what the Philippine ambassador called the Charter's "philosophy of gradualism."[110] The idea was a pretext, one speaker said, since the colonial powers would never view their colonies as ready for independence: "according to Western standards, a thousand years will not suffice for a people to attain independence when they are denied education and are barred from the simple art of learning to govern themselves."[111] Another asked why conflicts for power within the territories were taken as a sign of political immaturity when "political leaders all over the world have always fought for power by various means."[112] Many speakers denounced colonialism

[106] GA Res. 742 (VIII) (Nov. 27, 1953) (Annex).
[107] Harold K. Jacobson, *The United Nations and Colonialism: A Tentative Appraisal*, 16 Int'l Org. 37, 47 (1962).
[108] David A. Kay, The New Nations in the United Nations, 1960-1967 150 (1970).
[109] GA Res. 1514 (XV) (Dec. 14, 1960).
[110] 15 UN G.A.O.R., 933rd mtg., at 1104 (Dec. 2, 1960) ("Dec. 2 mtg.").
[111] 15 UN G.A.O.R., 902nd mtg., at 681 (Oct. 12, 1960) ("Oct. 12 mtg.") (statement of Liberian ambassador).
[112] 15 UN G.A.O.R., 928th mtg., at 1021 (Nov. 30, 1960) ("Nov. 30 mtg.") (statement of Ethiopian ambassador).

itself as the cause of any alleged lack of preparedness, arguing that only independence would allow true political and economic development to take place.[113] Others pointed to the experience of newly independent colonies as giving the lie to claims of political immaturity.[114] The reality was that by 1960 no pragmatic arguments about the need for gradual and orderly transitions would prevail.[115] "We prefer complete independence with danger to servitude in tranquility," declared the Ghanaian ambassador, "and, therefore, we are firmly of the opinion that inadequacy of political, economic, social or educational preparedness should never be used as a pretext to delay the transfer of sovereignty and independence."[116]

Given this imperative to decolonize immediately, it is not surprising that none of the General Assembly's resolutions terminating the trusteeships made reference to "self-government" or any other form of political maturation having been achieved.[117] And no effort was made to ensure that any of the reforms instituted during trusteeship carried over to the post-colonial regimes.[118]

The goal of rapid decolonization – hard fought and entirely laudable – effectively overtook a more measured political evolution for the territories that might have passed judgment on particular political arrangements. As a result, virtually no practice developed on the nature of those arrangements.

V. Conclusions

Traditional international law treated individuals as objects rather than subjects, viewing their relation to legal rules through the lens of their links to a state. The majority of the early internationalized territories fit this paradigm well. The primary goal of the nineteenth century examples, the European settlements at Versailles and the League mandate territories and was, first and foremost, to accommodate the interests of the

[113] OCT. 12 MTG., *supra* note 111, at 681 (statement of Ghanaian ambassador); 15 UN G.A.O.R., 926th mtg., at 994 (Nov. 28, 1960) (statement of Iranian ambassador); NOV. 30 MTG., *supra* note 112, at 1044 (statement of Colombian ambassador); 15 UN G.A.O.R., 937th mtg., at 1173 (Dec. 6, 1960) (statement of Honduran ambassador).

[114] DEC. 2 MTG., *supra* note 110, at 1104 (statement of Philippine ambassador).

[115] 15 UN G.A.O.R., 931st mtg., at 1056-7 (Dec. 1, 1960) (statement of Jordanian ambassador).

[116] 15 UN G.A.O.R., 927th mtg., at 1012 (Nov. 29, 1960).

[117] BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS 1110 (2nd edn, 2002).

[118] JACOBSON, *supra* note 107, at 47.

states involved. In the first two groups, virtually no provisions were made for how the governments were to be chosen or run. The League mandates added the rhetorically revolutionary idea of colonial power being subject to a "sacred trust," but in practice this involved few actual standards and virtually none related to political life in the territories. The trust territories, destined by the Charter for "self-government or independence," promised a much greater degree of international standard-setting. But the combination of resistance by the colonial powers and the rapid shift at the UN from managed devolution to immediate independence, effectively foreclosed the elaboration of international governance standards here as well. Even the ascendance of the self-determination principle – often conceived as a doctrine of human rights – failed to move beyond treating the trust territories as collectivities.

If this history has taken on a critical tone, finding failure to articulate international standards at every turn, that has not been my intention. I have highlighted the lack of concern for matters of governance not in order to cast judgment, but rather to demonstrate that the history of internationalized territories is not linear and that internationalization has not always occurred for the same reasons, with the same objectives, or using the same legal tools. It is instead markedly heterodox and, like much of international law, responsive to specific events. In each of the cases reviewed in this Chapter the central event precipitating internationalization was the settlement of an interstate war. It is neither surprising nor morally suspect, therefore, that the interests of the victorious states largely dictated the terms of the agreements embodying those settlements. A direct focus on the interests of "insiders" would come only later.

2 Historical origins of humanitarian occupation II: internationalized territory in service of insiders

Most of the larger United Nations trust territories gained independence by the early 1960s, leaving only island territories under international supervision.[1] As the trusteeship system began to wind down so also did the international community's involvement in territorial administration. The Cold War had not been a major obstacle to decolonizing the trust territories since the Soviet bloc enthusiastically supported liberation movements in the developing world and the US, while not nearly as vocal, provided muted support. But Cold War divisions did preclude administration of territory within sovereign states. Ideologically, the conflict over theories of governmental legitimacy lying at the heart of the East-West struggle made agreement on forms of international administration a virtual impossibility. Politically, many of the developing states that might have been deserving candidates for supervision were mired in proxy wars that neither side was willing to resolve through international administration. As a result, issues of governance were effectively off the multilateral agenda. With a few isolated exceptions they would not return until after 1989.

[1] Togoland (UK) became independent as Ghana in 1957. French Cameroons became independent and British Cameroon joined Nigeria in 1960 and 1961 respectively. Somalia (Italy) was granted independence and merged with former British Somaliland, in 1960. Tanganyika (UK) became independent in 1961 and merged with Zanzibar in 1964 to form Tanzania. Ruanda-Urundi (Belgium) gained independence in 1962 as the countries of Rwanda and Burundi. Western Samoa (New Zealand) became independent in 1962 as Samoa. Nauru (Australia) became independent in 1968. New Guinea (Australia) was granted independence as Papua New Guinea in 1975. The Trust Territory of the Pacific Islands (US) was split into the Commonwealth of the Northern Mariana Islands (1978), the Republic of the Marshall Islands (1979), the Federated States of Micronesia (1979) and the Republic of Palau (1994).

This chapter focuses on the remarkable surge in international governance missions at the end of the Cold War. Almost everything about these missions differed from the arrangements discussed in the previous chapter. First, they were deployed to sovereign states. Unlike the colonial territories under mandate and trusteeship, or the European territories briefly administered after World War I, the states hosting these missions possessed full juridical rights over their territories. Each of the post-Cold War missions thus required a superseding legal justification. These came in two forms: consent by the host government and a resolution of the Security Council under Chapter VII of the UN Charter. Where one of these justifications has been missing or contested, the legal basis for UN authority has remained uncertain.

Second, the missions did not oversee territorial transitions. The post-World War I missions administered territories whose final status had not been resolved by the Versailles conference. The missions terminated once their status became clear, through a plebiscite or otherwise. The mandate and trusteeship systems were not explicitly temporary in all cases, but as anti-colonialism gained momentum in the late 1950s and early 1960s, the primary task of international oversight became securing the territories' independence. The post-Cold War missions, by contrast, took the boundaries and sovereign authority of their host states as fixed. In part, this was because none of the missions followed wars in which the victors dismantled empires or engaged in other territorial realignments. But it was also because the host states were members of the very organization authorizing the missions – the UN. None would have consented to initiatives designed to alter their borders or introduce new sovereigns.

Third, and perhaps most importantly, the missions focused on matters of governance. The civil wars that precipitated UN involvement were signals of social dysfunction, if not outright collapse, in the host states. Existing political institutions could not accommodate the conflicting demands of various groups. In many cases, rebel groups had simply opted out of normal politics. The post-Cold War missions were ambitiously designed to reverse as much of this institutional collapse as possible. Their mandates included monitoring elections, securing human rights, reinvigorating criminal justice systems and demobilizing combatants. From these reforms, it was hoped, would emerge cohesive political communities that reflected the principles of pluralism and tolerance underlying the new institutions. This new politics, the UN argued, would

re-channel the parties' grievances into open debate and competitive elections and so prevent a return to conflict.[2]

In sum, if the early cases of international governance primarily served the interests of *outsiders*, the post-Cold War missions primarily served the interests of *insiders* – the citizens of host states. Most missions originated in peace agreements ending civil wars, which brought local voices into the missions' design that were wholly absent from the prior initiatives. More importantly, these missions sought to change the nature of governance in the territories. They were not mere assertions of international control to change the status of the territory. With limited exceptions, success for the earlier initiatives would come when a territory's final status was peacefully secured. Success for the post-Cold War missions came when former combatants began to coexist in the manner envisioned by peace agreements and new democratic institutions. To be sure, other states had strategic interests in ending the conflicts. But these were consequences of the missions' primary goals for insiders and not the goals themselves.

In this chapter, I will begin review of the post-Cold War missions by describing the political changes in the late 1980s that made the initiatives possible. I will then review three crucial facets of the missions: maintaining the host states' territorial integrity, promoting democratic institutions and securing human rights. Finally, I will explore the question of host state consent and its problematic role in missions where the UN found itself challenging the very actors whose consent made its presence possible.

One rather *sui generis* case of international governance falls chronologically between the decolonization initiatives and the post-1989 missions. This was the 1962 mission to Western New Guinea (Irian Jaya), where the UN did assume full governing authority for an eight-month period.[3] In form, the West Irian mission more closely resembled the "outsider" initiatives. The UN presence was a negotiated compromise between Indonesia's increasingly aggressive efforts to assert control over the territory and the Netherlands' desire to have its future determined by

[2] These goals were regularly and often angrily decried as naïve by some commentators. See e.g., Edward N. Luttwak, *Give War a Chance*, FOR. AFF., July-Aug. 1999, at 36.

[3] See DEREK W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 225-61 (1964); John W. Halderman, *United Nations Territorial Administration and the Development of the Charter*, 1964 DUKE L. J. 95, 103-5.

a popular referendum.[4] The basis for the mission intermingled consent of the parties and UN authorization: the General Assembly had debated the status of the territory extensively, and a treaty between the Netherlands and Indonesia providing for a UN role was brokered by the Secretary-General.[5] The General Assembly, in authorizing the mission, simply ratified the UN's role as described in the treaty.[6]

The treaty provided that the United Nations Temporary Executive Authority (UNTEA) would administer the territory during the interim period, during which time the UN flag would fly over West Irian.[7] The agreement made only brief mention of the nature of the UN administration. UNTEA was to respect the laws in force, though it had the power to promulgate new laws "within the spirit and framework of the present Agreement."[8] It would "guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly, of the inhabitants of the area."[9]

But the mission had little opportunity either to succeed or fail. Its eight-month tenure "was too long for a mere holding operation but too brief to stamp the period with UNTEA's own plans and policies."[10] While no major disruptions took place during that time, relentless Indonesian pressure to skew the territory's "opportunity for freedom of choice" (any explicit mention of a referendum in the treaty was omitted at Indonesia's insistence) led to numerous suppressions of pro-independence voices.[11] The "choice," ultimately held in August 1969, involved a small group of "specially selected" delegates who voted in the presence of Indonesian government officials.[12] "Even members of the Indonesian

[4] See Paul W. Van Der Veur, *The United Nations in West Irian: A Critique*, 18 INT'L ORG. 53, 54-5 (1964).

[5] BOWETT, *supra* note 3, at 255-6; Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea, Aug. 15, 1962, reprinted in 57 AM. J. INT'L L. 493 (1963) ("Indonesia-Netherlands Agreement"). The inhabitants of West Irian may well have objected, however, since the agreement put off a referendum on affiliation with Indonesia until 1969, a move that most diplomats understood as effectively ratifying Indonesian control over the territory. See THOMAS M. FRANCK, NATION AGAINST NATION 76-82 (1985).

[6] The General Assembly "acknowledge[d] the role conferred upon the Secretary-General in the Agreement" and "authori[zed] the Secretary-General to carry out the tasks entrusted to him in the Agreement." GA Res. 1752 (XVII).

[7] INDONESIA-NETHERLANDS AGREEMENT, *supra* note 5, art. II & IV(1).

[8] *Ibid.* art. IX. [9] *Ibid.* art. XXII(1). [10] VAN DER VEUR, *supra* note 4, at 58.

[11] *Ibid.* at 67-71. [12] FRANCK, *supra* note 5, at 81.

government were reported to have admitted, privately, that this consultation was a meaningless formality."[13]

I. The rise of post-conflict reconstruction

At the end of the Cold War, three developments led the United Nations to begin vigorously promoting democratic reform in post-conflict states. The first was a new institutional capacity to address destructive civil wars. Internal conflicts in Yugoslavia, West Africa, Central America and elsewhere dominated peace and security discussions in the late 1980s and early 1990s.[14] Some described these conflicts as leading to "failed states," an idea that generated a related discussion of whether the Westphalian model of statehood had been prematurely or carelessly transplanted to the regions in turmoil.[15] Almost by definition, states in civil war lacked the strong political infrastructure needed to resolve their disputes. As one report observed in 2001:

> The main threat to the security of the international community is the weakness of states owing to a lack of democratic structures and an inability to manage and combat such phenomena as organized crimes, international and domestic terrorism, corruption, lack of political liberties, human rights abuses, religious and ethnic conflicts, and aggressive nationalism. In many states, institutional mechanisms are unable to resolve these problems with norms and the tenets of the rule of law.[16]

Any meaningful attempt to resolve these conflicts thus fell to external actors. Yet the UN Charter had been drafted in the long shadow of World War II and assumed that *inter-state* conflicts would be the principal threats addressed by the organization. The Charter makes no mention of internal conflicts. The realities of the early 1990s demanded that the Council revisit this inter-state orientation. As a jurisdictional matter it

[13] *Ibid.*

[14] See INTERNATIONAL LAW AND ETHNIC CONFLICT (David Wippman ed., 1998); THE UNITED NATIONS AND CIVIL WARS (Thomas G. Weiss ed., 1995); INTERNATIONAL ORGANIZATIONS AND CIVIL WARS (Hilaire McCoubrey & Nigel D. White eds., 1995); ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS (Lori Fisler Damrosch ed., 1993).

[15] See Daniel Thürer, *The "Failed State" and International Law*, INT'L REV. RED CROSS, No. 836, at 731 (1999); Jeffrey Herbst, *Responding to State Failure in Africa*, 21 INT'L SEC. 120 (1996-1997); Henry J. Richardson, *"Failed States," Self-Determination and Preventive Diplomoacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMPLE INT'L AND COMP. L.J. 1 (1996).

[16] Adam Daniel Rotfeld, *The Organizing Principles of Global Society*, in 2001 SIPRI Y.B. 3.

did so in short order, finding a series of internal conflicts and their consequences to constitute "threats to the peace," triggering its Chapter VII authority to authorize force and impose binding obligations.[17] Human rights violations, mass starvation, ethnic cleansing and other traditionally "domestic" events were held to constitute "threats to the peace."

Second, the changing nature of the conflicts themselves also created new opportunities for the UN. Many civil wars pre-1989 had been fought as proxy wars between the two Superpowers, with each viewing the outcomes in zero-sum terms. Granting the UN mediating authority in these circumstances would have been incompatible with the total victory sought by East and West. But the fall of the Soviet Union removed each side's strategic interest in the wars. A focus on purely local issues could begin and the conflicts addressed on their own terms. Thus, in 1988, Mikhail Gorbachev spoke approvingly of UN peacekeeping – a significant departure from existing Soviet policy – and even offered Soviet contingents for future operations.[18] With the Security Council emerging from years of veto-induced paralysis, it soon assumed a leadership role. This was a remarkable reversal: a collective interest in avoiding UN involvement had been replaced by a collective interest in full UN engagement.

The third development was a focus on domestic reform as a means of avoiding renewed fighting in post-conflict states. A consensus emerged among Security Council member states and in the Secretariat that democratic institutions could effectively address the causes of civil war. As the Secretary-General reported to the General Assembly in November 1992, "The organization of free and periodic elections can provide a most positive solution to potential or existing conflict. By assisting in this field, the United Nations can help to build confidence among parties currently in dispute and facilitate peaceful solutions."[19] The wave of democratic transitions that started in the late 1980s meant that advocacy of political

[17] This is the only trigger in crucial Article 39 of the Charter that could conceivably cover events occurring wholly within a single state. The two other triggers for Chapter VII - a "breach of the peace" and an "act of aggression" - have not been invoked in these circumstances. For a discussion of the Council's expansive interpretation of "threat to the peace," see INGER ÖSTERDAHL, THREAT TO THE PEACE: THE INTERPRETATION BY THE SECURITY COUNCIL OF ARTICLE 39 OF THE UN CHARTER (1998).

[18] John Mackinlay and Jarat Chopra, *Second Generation Multinational Operations*, 15 WASH. Q. 113 (1992).

[19] Report of the Secretary-General, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, at 20-21, UN Doc. A/47/668 (1992). The General Assembly requested this report in a 1991 resolution on the same topic. The Assembly began passing

democracy no longer demarcated the ideological fault line between East and West. At the first-ever summit of Security Council Heads of State and Government in January 1992, the leaders declared their support for democratic reform in post-conflict states:

> The members of the Council note that United Nations peace-keeping tasks have increased and broadened considerably in recent years. Election monitoring, human rights verification and the repatriation of refugees have in the settlement of some regional conflicts, at the request or with the agreement of the parties concerned, been integral parts of the Security Council's effort to maintain international peace and security. They welcome these developments.[20]

The summit asked the Secretary-General to analyze ways in which UN peacekeeping could be made more effective and efficient. Secretary-General Boutros-Ghali responded in his landmark report, *An Agenda for Peace*, that the organization would engage in "rebuilding the institutions and infrastructures of nations torn by civil war and strife."[21] He introduced the term "post-conflict peace building" to describe domestic reform efforts that might pacify conflicting groups within societies and so prevent a return to war.[22] In his view, "[t]here is an obvious connection between democratic practices – such as the rule of law and transparency in decision-making – and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities."[23]

Under these more favorable conditions, the number of UN post-conflict missions soared. The United Nations had launched fifteen peacekeeping missions of all kinds from 1948 to 1988. From 1988 to 2006, it launched forty-six missions.[24] Of these, twenty-four can be classified as

resolutions affirming the importance of free and fair elections in 1988 and has continued to do so since. See GA Res. 43/157 (Dec. 8, 1988) ("[P]eriodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms."); GA Res. 60/162 (Dec. 16, 2005). It has also passed companion resolutions entitled *Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes*. See *e.g.*, GA Res. 44/147 (Dec. 15, 1989); GA Res. 60/164 (Dec. 16, 2005).

20 *Note by the President of the Security Council*, at 2, UN Doc. S/23500 (1992).

21 *An Agenda for Peace*, ¶ 15, UN Doc. A/47/277-S/24111 (1992).

22 *Ibid.* ¶ 57. 23 *Ibid.* ¶ 59.

24 United Nations Department of Peacekeeping Operations, List of Operations 1948-2007, available at www.un.org/Depts/dpko/list/list.pdf.

post-conflict reconstruction missions.[25] The first such mission to Angola in 1988 kept a foot in the first generation of ceasefire monitoring missions, as it supervised the withdrawal of Cuban troops from the country. But the Cubans' departure only began the process of winding down the country's civil war, and three reconstruction missions to Angola followed in the next six years. The largest early mission was UNTAC to Cambodia, which deployed 15,547 troops at its height.[26] This was later surpassed by UNAMSIL in Sierra Leone, which deployed 17,368 uniformed personnel and, later, by MONUC in the Democratic Republic of Congo with 18,417.[27] While separate figures do not exist for post-conflict missions, the number of personnel in all active missions went from approximately 10,000 in January 1991 to over 78,000 in July 1993 to over 47,000 in November 2001 to almost 81,000 in October 2006.[28] The vast majority of the post-conflict missions were deployed either to Africa (Angola, Burundi, Central African Republic, Democratic Republic of Congo, Côte D'Ivoire, Liberia, Mozambique, Rwanda, Sierra Leone, Somalia and Sudan) or Latin America (El Salvador, Guatemala and Haiti). Only UNTAC in Cambodia and UNMOT in Tajikistan were deployed outside those regions.

II. Common tasks and objectives

The post-conflict missions sought to create legitimate democratic institutions in societies riven by long and destructive civil wars.[29] Their focus on domestic solutions to conflict stood in sharp contrast to the "first generation" of UN peacekeeping missions. These observation missions were deployed between the forces of two states that had agreed to a ceasefire and consented to a UN presence. The first-generation peacekeepers were lightly armed and sought to prevent a return to hostilities by their

[25] See Table below. This list excludes minor precursor missions that laid the groundwork for more substantial initiatives to come.

[26] Cambodia-UNTAC: Facts and Figures, available at www.un.org/Depts/dpko/dpko/co_mission/untacfacts.html.

[27] Sierra Leone-UNAMSIL: Facts and Figures, available at www.un.org/Depts/dpko/missions/unamsil/facts.html; Democratic Republic of the Congo-MONUC: Facts and Figures, available at www.un.org/Depts/dpko/missions/monuc/facts.html.

[28] United Nations Department of Peacekeeping Operations, Uniformed Personnel in UN Peacekeeping 1991-2006, available at www.un.org/Depts/dpko/chart.pdf.

[29] See generally John Prendergast and Emily Plumb, *Building Local Capacity: From Implementation to Peacebuilding*, in ENDING CIVIL WARS 327 (Stephen John Steadman, Donald Rothchild and Elizabeth M. Cousens eds., 2002); SIMON CHESTERMAN, KOSOVO IN LIMBO: STATE-BUILDING AND "SUBSTANTIAL AUTONOMY" (2001); Gregory H. Fox, *International Law and Civil Wars*, 26 N.Y.U. J. INT'L L. AND POL. 623 (1995).

mere presence.[30] Passive inaction, in other words, would (and often did) accomplish the mission. Post-conflict missions, by contrast, were engaged in affirmative action. These "second-generation" missions deployed in and among the conflicting factions and sought to change social dynamics from conflict to cooperation. Success would come when cooperative relations were institutionalized in laws and political processes and those institutions were accepted as legitimate by the various factions.

As peace-building missions evolved throughout the 1990s, a set of common goals and tasks emerged. While the missions varied considerably in the breadth of their mandates – turning most crucially on whether the conflict was indeed over – the reforms they pursued were remarkably consistent. *An Agenda for Peace* prescribed "comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people."[31] Marina Ottoway has referred to a "blueprint for reconstructing failed states."[32] Elizabeth Cousens discusses a "holistic approach" to keeping the peace in post-conflict societies.[33] All describe a thoroughgoing effort to create a functional democratic politics in states that appeared on the verge of social collapse, fragmentation or both. The tasks are broad and varied. They include compliance with peace agreements, monitoring ceasefires, demilitarization of former combatants, economic reform, repatriation of refugees, mine clearance and reform of police forces and other aspects of law enforcement.[34]

Governance issues have been at the center of each of the missions, and in particular, the question of how to foster a broad base of political participation.[35] In many cases the country's political institutions have been restructured entirely through the promulgation of new constitutions or

[30] On the evolution of UN peacekeeping, see ALEX J. BELLAMY, PAUL WILLIAMS AND STUART GRIFFIN, UNDERSTANDING PEACEKEEPING (2004).

[31] *Agenda for Peace*, *supra* note 21, ¶ 55.

[32] Marina Ottaway, *Rebuilding State Institutions in Collapsed States*, 33 DEV. AND CHANGE 1001, 1007 (2002).

[33] Elizabeth M. Cousens, *Introduction*, in PEACEBUILDING AS POLITICS: CULTIVATING PEACE IN FRAGILE SOCIETIES 1 (Elizabeth M. Cousens and Chetan Kumar eds., 2001).

[34] See *Report of the Panel on United Nations Peace Operations*, at 3, 6-8, UN Doc. A/55/305 (2000) (Brahimi Report).

[35] See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS J. 1, 16 (2000); Report of the Secretary-General, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, UN Doc. A/54/491 (1999); Report of the Secretary-General, *Support of the United Nations System of the Efforts of Governments to Promote or Consolidate New Democracies*, UN Doc. A/52513 (1997).

statutory schemes, uniformly along liberal democratic lines.[36] A variety of human rights initiatives buttress this goal, from judicial reform to truth commissions to purges of human rights violators from positions of authority to the organizing and monitoring of elections.[37] In assuming the role of advocate for a liberal democratic politics, as Michael Doyle and his co-authors observe, the UN seeks to transform "identities and institutional contexts."[38] The organization seeks to engage individuals in national political processes, thereby fostering a civic identity of national citizenship while at the same time reforming (and even abolishing) institutions that tend to reinforce factional divisions.

Peace-building missions have thereby given the international community an ongoing role in the structure and quality of national government. In contrast to the UN's original (and still primary) role in matters of inter-state security, peace-building "contemplates deep collective involvement in areas long thought to be the exclusive domain of domestic jurisdiction."[39] But the two are linked. "Liberal" international relations theorists have come to regard domestic political dynamics as an important explanatory variable in state behavior, a view that challenges the Realist calculus of state interests based purely on external phenomena.[40] Peace-building missions accept this linkage and, in their intimate involvement in projects of domestic social engineering, epitomize the view that successful transition to liberal democratic government is a legitimate interest of the international community.

Here I will highlight three of the assumptions central to the states the missions seek to create.

[36] See BRAHIMI REPORT, *supra* note 34; *Report of the Secretary-General on the Work of the Organization*, ¶ ¶ 101-8, UN Doc. A/54/1 (1999).

[37] Terrence Lyons, *The Role of Postsettlement Elections*, in ENDING CIVIL WARS, *supra* note 29, at 215; Tonya L. Putnam, *Human Rights and Sustainable Peace*, in *ibid.* at 237; PEACEBUILDING AS POLITICS, *supra* note 33, at 36, 165-7.

[38] MICHAEL W. DOYLE, IAN JOHSTONE AND ROBERT C. ORR, KEEPING THE PEACE: MULTIDIMENSIONAL UN OPERATIONS IN CAMBODIA AND EL SALVADOR 382 (1997). See also HUGH MIALL, OLIVER RAMSBOTHAM AND TOM WOODHOUSE, CONTEMPORARY CONFLICT RESOLUTION 56-7 (1999) (defining peace-building as "the attempt to overcome the structural, relational and cultural contradictions which lie at the root of the conflict in order to underpin the process of peacemaking and peacekeeping").

[39] DOYLE ET AL., *supra* note 38, at 381-2.

[40] See MICHAEL W. DOYLE, WAYS OF WAR AND PEACE 205-311 (1997); Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

A. Territorial integrity

Many of the post-conflict states faced grave threats to their territorial integrity. Deep ethnic cleavages, secessionist forces, intervention by neighboring states and a lack of central control over outlying regions called into question the state's ongoing viability as a political community. Yet none of the missions to date received a mandate that would have allowed a state to fragment. To the contrary, in the vast majority of cases, the Security Council has explicitly reaffirmed the states' territorial integrity or continued national cohesion when authorizing the missions.[41]

Dysfunction has been noted and essentially ignored by the Council as a reason not to deploy reconstruction missions, though it has obviously affected the missions' mandates and the resources they receive. Thus, in his report recommending a mission to Côte D'Ivoire, the Secretary-General warned "it is clear that there are hard-line elements among the Ivorian parties who are determined to undermine the peace process and seek a military solution to the crisis."[42] Six weeks later, the Council approved the UNOCI mission.[43] In the Democratic Republic of Congo, a vast country with little infrastructure where various armed groups fought with the government and each other, the Secretary-General was equally blunt about the challenge: an effective peacekeeping mission "would have to be large and expensive. It would require the deployment of thousands of international troops and personnel. It would face tremendous difficulties, and would be beset by risks."[44] The Council did not conclude that the country had ceased to be viable. Rather, it authorized an additional phase of the MONUC mission and affirmed its support for the "sovereignty, territorial integrity and political independence

[41] See e.g., SC Res. 976 (Feb. 8, 1995) (supporting territorial integrity of Angola); SC Res. 1545 (May 21, 2004) (supporting territorial integrity of Burundi); SC Res. 1159 (March 27, 1998) (stressing importance of "process of national reconciliation" in Central African Republic); SC Res. 1528 (Feb. 27, 2004) (reaffirming "its strong commitment to the sovereignty, independence, territorial integrity and unity of Côte d'Ivoire"); SC Res. 1020 (Nov. 10, 1995) (supporting process of "national reconciliation" in Liberia); SC Res. 1270 (Oct. 22, 1999) (affirming "the commitment of all States to respect the sovereignty, political independence and territorial integrity of Sierra Leone"); SC Res. 814 (March 26, 1993) (emphasizing the need for "reconciliation, agreement on the setting up of transitional government institutions").

[42] *Report of the Secretary-General on the United Nations Mission in Côte D'Ivoire Submitted Pursuant to Security Council Resolution 1514 of 13 November 2003*, at 20, UN Doc. S/2004/3.

[43] SC Res. 1528, *supra* note 41.

[44] *Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, at 16, UN Doc. S/2000/30.

of the Democratic Republic of the Congo and all States in the region."[45] Even in the Sudan, whose peace accord provided for a referendum on independence for the South following six years of autonomy, the Council affirmed "its commitment to the sovereignty, unity, independence and territorial integrity of Sudan" and, in creating the United Nations Mission in Sudan, stated "its determination to help the people of Sudan to promote national reconciliation, lasting peace and stability, and to build a prosperous and united Sudan."[46] In sum, as Ottaway observes, "the international community has refused to entertain the possibility that some collapsed states may be simply too dysfunctional to be patched back together, and that other solutions might thus need to be considered."[47] Existing borders are taken as given. The missions' extraordinary challenge has been to devise cooperative arrangements acceptable to citizens within those borders.

B. Democratic politics

Building democratic institutions has been at the center of post-conflict reconstruction. The most common task has been monitoring elections, though in keeping with the widely accepted view that democracy is not defined by elections alone, many other tasks are described as furthering "democratic" goals. Prime among these are human rights and the rule of law, discussed below.[48] Of the seventeen post-conflict states to which the UN sent reconstruction missions, all but one held elections under UN direction or observation.[49] Each followed one of three models of electoral assistance.[50] The first is electoral supervision, in which the mission itself serves as the electoral authority, organizing the voting and certifying the results. Cambodia is the preeminent example.[51] The

[45] SC Res. 1291 (March 24, 2000). [46] SC Res. 1590 (March 24, 2005).

[47] Ottaway, *supra* note 32, at 1001.

[48] Brahimi Report, *supra* note 34, at 7 ("Elections need the support of a broader process of democratization and civil society building that includes effective civilian governance and a culture of respect for basic human rights, lest elections merely ratify a tyranny of the majority or be overturned by force after a peace operation leaves.").

[49] The exception was the 1996 MINUGUA mission to Guatemala. However, the Organization of American States monitored the Presidential election that followed implementation of a peace accord monitored by the United Nations. See Annual Report of the Inter-American Commission on Human Rights, Chap. 5 (1996), available at www.cidh.oas.org/annualrep/96eng/chap.5b.htm.

[50] See Jeff Fisher, Introduction to Elections and Peace Operations, 1989-2001 3 (IFES Center for Transitional and Post-Conflict Governance, 2005), available at pbpu.unlb.org/pbpu/view/viewdocument.aspx?id=2&docid=688.

[51] See Steven R. Ratner, The New UN Peacekeeping 150-51 (1995).

UNTAC mission undertook to build an entire electoral infrastructure, from drafting electoral laws and procedures to registering voters and parties to educating citizens to responding to complaints to certifying the results as free and fair.[52] The second is technical assistance to national electoral bodies, who independently certify the final results.[53] Third is observation, "where each element of the electoral process [is] subject to monitoring, scrutiny and evaluation."[54] In each case, the missions play a crucial role in judging the legitimacy of elections and, as a result, the leaders who claim electoral mandates.

For many missions, elections cap a long process of institution-building and public education. A successful election provides the missions at least some evidence that democratic processes have been accepted by leaders and the population, and therefore a basis for judging whether their democracy-promotion mandates have been fulfilled. The UN Department of Peacekeeping Operations views elections as "critical milestones" for comprehensive peace missions. "Whether the purpose is to create the foundation of a newly democratic State or rehabilitate an existing democracy, a credible election will strongly influence the course of the mission and its relationship with the host government."[55] The course of democratic transition, of course, may take many paths even after a successful election, and Cambodia provides a much-discussed example of how a well-managed and well-regarded election can have little influence on future democratization. The 1993 UNTAC election had a ninety percent turn-out rate in the face of Khmer Rouge threats of retribution against voters.[56] Yet Prime Minister Hun Sen refused to accept his party's loss, resulting in a negotiated co-prime ministership with Prince Norodom Ranariddh.[57] And four years later, Hun Sen ousted Ranariddh in a coup "that erased many of the political gains" made during and just after the UNTAC period.[58] But the prospect of such failures, while tempering early enthusiasm for elections as virtually embodying democratic transitions, has not diminished their role as the most prominent symbol of a move away from violence and political gridlock. As Stromseth, Wippman and Brooks write, the now regular practice of holding

[52] *Ibid.* at 151. [53] FISHER, *supra* note 50, at 4. [54] *Ibid.*

[55] PEACEKEEPING BEST PRACTICES UNIT, UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, HANDBOOK ON UNITED NATIONS MULTIDIMENSIONAL PEACEKEEPING OPERATIONS 148 (2003) (PEACEKEEPING HANDBOOK).

[56] RATNER, *supra* note 51, at 180. [57] *Ibid.* at 187.

[58] Michael Doyle, *Peacebuilding in Cambodia: Legitimacy and Power*, in PEACEBUILDING AS POLITICS, *supra* note 33, at 89.

post-conflict elections usually "presumes that the antecedent civil strife represents only a temporary break in the unity of the political community of the state, which can be overcome by the legitimacy that will attach to any popularly elected government."[59]

The Security Council, the Secretary-General and others in the UN system frequently describe credible elections as furthering the goal of post-conflict reconciliation. In establishing an observer mission to Tajikistan in 1994, for example, the Council stated "the international assistance provided by this resolution must be linked to the process of national reconciliation, including *inter alia* free and fair elections."[60] In the same year, the Council called on the parties in Mozambique - which had just held its first post-conflict election - to base national reconciliation "on a system of multi-party democracy and the observance of democratic principles which will ensure lasting peace and political stability."[61] Many of the conflicts originated in exclusions of various groups from national politics and their consequent belief that political voice could only be achieved by violence. States holding credible elections are seen as repudiating such an exclusionary politics.[62] As Kofi Annan wrote in 2002, "At the center of virtually every civil war is the issue of the state and its power – who controls it, and how it is used. No armed conflict can be resolved without responding to these questions. Nowadays, the answers almost always have to be democratic ones, at least in form."[63] Elections are therefore not only retrospective in the sense of channeling old animosities into a new, non-violent forum, but they are a prospective means of preventing renewed conflict in the future.[64]

While optimism about the conciliatory power of elections and democratic institutions might be seen as dangerously naive, this view follows

[59] Jane Stromseth, David Wippman and Rosa Brooks, Can Might Make Right? Building the Rule of Law After Military Interventions 86 (2006). The authors find a slightly different set of assumptions supporting elections following conflicts that turn on national identity. *Ibid.* at 86-7.

[60] SC Res. 994 (Dec. 16, 1994).

[61] SC Res. 957 (Nov. 15, 1994).

[62] Peacekeeping Handbook, *supra* note 55, at 147 ("The role of elections in a post-conflict situation is to replace a violent contest for political power with a non-violent one.").

[63] Kofi A. Annan, *Democracy as a Global Issue*, 8 Global Gov. 135, 137 (2002).

[64] Kofi Annan made this link between democracy-promotion and conflict prevention in his 2001 review of ten years of UN activities since the *Agenda for Peace* report:

> The work undertaken by the United Nations to support democracy in its Member States contributes significantly to conflict prevention. Such assistance encompasses the provision of comprehensive support in the area of governance and the rule of law, including electoral assistance. It has been proven to play an important role in preventing the breakdown of democratic institutions and

directly from the many peace agreements calling for a UN role in post-conflict elections (see Table, below). States weakened by civil war provide little in the way of security guarantees or a capacity to make good on promises requiring an administrative infrastructure.[65] Thus, negotiations look forward and seek to create positive sum outcomes for all parties, particularly rebel groups with little faith in the governments they are fighting. Each group must be promised at least as much opportunity for achieving its agenda as it hoped to achieve by violence. For a group faring poorly in a conflict, this is easily accomplished by rights of political participation and assurances that electoral results will be respected. For a group that is winning, however, the situation is more complicated. There must be implicit or explicit costs for continuing the conflict until victory. These may take the form of sanctions or external military intervention. If a conflict is instead in stalemate, both sides must be convinced that future reversals of fortune are unlikely and that the assured benefits of democratic politics are to be preferred over the uncertain and unlikely prospect of military victory.

This incentive system is straightforward. Here, the critical point is that it involves essentially the same set of carrots and sticks available to UN missions designing or observing elections. Incentives may be provided by multilateral lenders, teams of experts in state reconstruction and others. Sanctions in a variety of forms may be imposed by the Security Council.[66] But at bottom, it is the benefits promised by peaceful politics that serve as the major incentive for the protagonists.

C. Human rights

Almost all the post-conflict missions were given mandates to protect human rights.[67] Many simply repeated the human rights provisions of peace agreements that the United Nations agreed to help implement. The scope of the mandates has varied substantially, from mere reporting

> processes, particularly in societies in transition, or in new or restored democracies.
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> *Report of the Secretary-General on the Prevention of Armed Conflict*, ¶ 79, UN Doc. A/55/985-S/2001/574 (2001).

[65] See Donald Rothchild, *Settlement Terms and Post-Agreement Stability*, in ENDING CIVIL WARS, *supra* note 29, at 120.

[66] See, e.g., SC Res. 1591 (March 29, 2005) (imposing a travel ban and asset freeze for human rights violators in the Sudan).

[67] For some states to which there have been multiple missions, human rights were part of the mandate for some but not all those missions. Four missions were sent to Angola, for example, but only the last (MONUA) had a human rights mandate. See SC Res. 1118 (June 30, 1997). The mission to the Central African Republic had no clear human rights mandate.

obligations to UNTAC's broad charge to "foster an environment in which respect for human rights shall be ensured."[68] Many post-conflict missions have created separate human rights divisions. For the UNMIS mission to Sudan, for example, the Security Council declared there should be "an adequate human rights presence, capacity, and expertise within UNMIS to carry out human rights promotion, civilian protection, and monitoring activities."[69] UNMIS created a Human Rights Office, with a presence throughout the country, charged with tasks such as monitoring compliance with the human rights provisions of the Comprehensive Peace Agreement, investigating violations, monitoring the police, prosecution and judiciary responsible for "ensuring accountability for human rights abuses at the local and national level" and assisting the new Sudanese National Commission on Human Rights.[70]

UNMIS also coordinated with the UN High Commissioner for Human Rights, an increasingly common feature of post-conflict missions. The High Commissioner regularly enters into Memoranda of Understanding with states hosting post-conflict missions that define the nature of the Commissioner's tasks[71] as well as coordinating with the Department of Peacekeeping Operations (DPKO) and treaty monitoring bodies.[72] In 2005, the High Commissioner supported human rights work in fourteen missions.[73] For UNMIS, the High Commissioner deployed fifty-seven

[68] The language is from the Comprehensive Settlement Agreement for Cambodia, which described UNTAC's obligations in detail. See Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, art. 16, Oct. 23, 1991 [hereinafter Cambodia Agreement], available at www.usip.org/library/pa/cambodia/agree_comppol_10231991_toc.html. The Security Council adopted those obligations for UNTAC in Resolution 745 (Feb. 28, 1992). In order to accomplish its human rights objectives, UNTAC was to provide for:

(a) The development and implementation of a programme of human rights education to promote respect for and understanding of human rights;
(b) General human rights oversight during the transitional period;
(c) The investigation of human rights complaints and, where appropriate, corrective action.

Cambodia Agreement, *supra*, Annex I(E).

[69] SC Res. 1590, *supra* note 46, ¶ 4(a)(ix).

[70] UNMIS Human Rights Office, at www.unmis.org/english/humanrights.htm.

[71] Office of the United Nations High Commissioner for Human Rights, Annual Report 2005 54 (2006) (HCHR 2005 Report).

[72] *Ibid.* at 115-16. The HCHR and the DPKO entered into their own Memorandum of Understanding in 2002, providing for "dual reporting lines to both the SRSG and OHCHR and joint responsibilities for the recruitment of human rights officers for peacekeeping operations." Peacekeeping Handbook, *supra* note 55, at 102.

[73] HCHR 2005 Report, *supra* note 71, at 116.

international human rights officers into two main "clusters," addressing capacity and institution-building and monitoring and information management.[74]

The legal framework for the missions' human rights activities is not often spelled out in the authorizing Security Council resolution. DPKO has filled this void by mandating reference to a series of widely ratified multilateral treaties, as well as bodies of associated norms such as international humanitarian law, refugee law and international criminal law.[75] The Council also frequently instructs missions to perform specific human rights tasks, such as protecting vulnerable groups like women and children and ending impunity for violators.[76] Additional specific guidance may also be set out in the peace agreements.[77]

Like the missions' democratization initiatives, human rights serve both short-term and long-term interests. They are obviously intended to protect vulnerable groups while the missions are deployed. But they also seek to build local capacity in a way that integrates human rights protection into the states' political life.[78] After the missions depart, states with weak leadership, inadequate institutions and an absence of civil society groups to monitor compliance may experience regression to past

[74] *Ibid.* at 104.

[75] PEACEKEEPING HANDBOOK, *supra* note 55, at 103. The treaties are the International Covenant on Civil and Political Rights and its two Optional Protocols, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Discrimination against Women and its Optional Protocol, the Convention on the Rights of the Child and its two Optional Protocols and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. *Ibid.*

[76] See e.g., SC Res. 1291, *supra* note 45, ¶ 7(g) (directing MONUC mission to Democratic Republic of Congo to pay particular attention to conditions of women, children and demobilized child soldiers); SC Res. 1528, *supra* note 41, ¶ 6(n) (UNOCI mission to Côte D'Ivoire to "help investigate human rights violations with a view to help ending impunity").

[77] This was the case for the MONUC mission to the Democratic Republic of Congo, which was charged in Resolution 1291, *supra* note 45, with implementing the Lusaka Ceasefire Agreement between the parties. The Agreement provided for the cessation of "all acts of violence against the civilian population by respecting and protecting human rights." Lusaka Ceasefire Agreement, art. 1(3)(c), July 10, 1999, available at www.usip.org/library/pa/drc/drc_07101999.html.

[78] See e.g., SC Res. 1536 (March 26, 2004) (police reform in Afghanistan); SC Res. 1542 (April 30, 2004) (judicial reform in Haiti); SC Res. 1020, *supra* note 41 (assisting local human rights groups in fundraising and training).

practices. Since UN actors have also identified human rights violations as one of the root causes of conflicts whose reoccurrence the missions are designed to prevent, human rights capacity-building is also seen as a means of conflict prevention.[79] Of course, the much-noted tension between condemning human rights violators and the need to work with those violators in creating a secure environment is present in most missions. But as the mainstreaming efforts of the High Commissioner suggest, the UN has not responded to this tension by minimizing human rights in the missions but by accepting the tension in theory while seeking to avoid direct conflicts in specific cases.[80]

III. Centrality of consent

The missions' focus on governance issues was their first radical departure from prior international administrations. The second was that they sought to reform sovereign states. The mandate and trusteeship systems supervised colonial territories and the ad hoc arrangements in Europe under the Versailles Treaty involved small territories of defeated powers. The virtually unlimited discretion of international actors in these early cases was long gone by the 1990s. The UN Charter's guarantees of territorial integrity and state equality meant that in all but the most exceptional cases, a state would need to consent to a governance mission. Consent is formally unnecessary when the Security Council invokes Chapter VII of the Charter, which overrides invocations of protected domestic jurisdiction.[81] But forcing states – or more precisely, multiple warring factions within states – to accept a tolerant, democratic politics seems

[79] See Report of the Secretary-General, *In Larger Freedom*, ¶ 137, UN Doc. A/59/2005 (2005) ("Effective national legal and judicial institutions are essential to the success of all our efforts to help societies emerge from a violent past.").

[80] See Espen Barth Eide, Anja Therese Kaspersen, Randolph Kent and Karen von Hippel, Report on Integrated Missions: Independent Study for the Expanded UN ECHA Core Group 8 (2005) ("The human rights system of the UN will often be required both to provide 'inside' support to transitional processes (for instance in the design of governance reform measures, justice and security sector reform etc.) while maintaining the role of 'outside critic' of the overall process.").

[81] Article 2(7) of the Charter provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

almost an oxymoron. Compulsion under Chapter VII, therefore, has not been the Council's first option, leaving actual consent of the parties crucial to any mission's success.

A. The role of consent in post-conflict missions

Prior to the end of the Cold War, host state consent was an essential element of UN peacekeeping.[82] As noted, these missions came after the end of hostilities between two states and sent lightly armed forces to police a buffer zone in order to deter future breaches of the ceasefire. Early missions to the Sinai, Western New Guinea, Cyprus and Lebanon followed this model.[83] Their goal was not so much to create peace as to deter the recurrence of war so that a comprehensive peace could be pursued diplomatically.[84] In any event, the peacekeepers did not carry enough firepower actually to prevent a resumption of hostilities. Their role was symbolic, a manifestation of the international community's belief that the states were genuinely committed to peace. The entire enterprise presumed the parties were proceeding in good faith toward a negotiated solution. That the peacekeepers remained in the theatre only with the consent of the host state was part and parcel of this cooperative ethos. Where cooperation ceased and consent was withdrawn, the peacekeepers left, as they did in 1967 when Egypt withdrew its consent to the UNEF I mission.[85]

Two early plans for UN control over territory illustrate how the lack of consent from key local actors can doom such projects to failure. In 1947, the General Assembly devised a plan to internationalize Jerusalem. In its partition arrangement for Great Britain's Palestine mandate, the Assembly provided that Jerusalem would be established "as a *corpus separatum* under a special international regime and shall be administered by the United Nations."[86] A statute prepared by the Trusteeship Council called for the Council to administer the city on behalf of the United

[82] See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 307-8 (4th edn, 2005).

[83] JOHN HILLEN, BLUE HELMETS: THE STRATEGY OF UN MILITARY OPERATIONS 23 (2nd edn, 2000).

[84] *Ibid.* at 25.

[85] Joseph Garvey, *United Nations Peacekeeping and Host State Consent*, 64 AM. J. INT'L L. 241 (1970).

[86] GA Res. 181 (II) (Nov. 29, 1947).

Nations through an appointed governor.[87] But Israel and the Arab states vehemently rejected the statute and there matters ended.[88]

The second plan created the UN Council for Namibia. Namibia (South-West Africa) was a former German colony governed by South Africa pursuant to a League of Nations mandate. When South Africa began exporting apartheid into the territory, the General Assembly declared those acts contrary to the mandate, which, according to the ICJ, was still in force.[89] In October 1966, with South Africa intransigent, the General Assembly declared the mandate terminated and that "henceforth South West Africa comes under the direct responsibility of the United Nations."[90] In order to discharge this responsibility, the Assembly created the UN Council for Namibia, which was to administer the territory until its independence.[91] The Council was given authority to draw up a constitution, promulgate laws and maintain law and order.[92] South Africa, however, refused to allow Council members even to enter Namibia and the Council never exercised any actual authority in the territory.[93]

[87] See Special Report of the United Nations Trusteeship Council, *Question of an International Regime for the Jerusalem Area and Protection of the Holy Places*, Annex II, arts. 5, 12, 13, 5 UN G.A.O.R. (Supp. No 9) (1950) (Trusteeship Council Report).

[88] Arab states objected to the partition plan *in toto*. See THE JERUSALEM QUESTION AND ITS RESOLUTION: SELECTED DOCUMENTS 13-17 (Ruth Lapidoth and Moshe Hirsch eds., 1994) (collecting statements by Arab representatives to the General Assembly). Israel argued that the General Assembly and Trusteeship Council could only administer territory in accordance with Chapter XII of the UN Charter. See Memorandum Submitted by the Government of Israel to the Trusteeship Council on May 26, 1950, reprinted in TRUSTEESHIP COUNCIL REPORT, *supra* note 87, at 29, 31. The government of Jordan, the other state asserting control over Jerusalem in 1950, did not respond to requests by the President of the Trusteeship Council for comment on the draft statute. *Ibid.* at 28. However, King Abdalla had previously stated that Jerusalem "would be internationalized over his dead body." NY TIMES, Oct. 19, 1949, quoted in MÉIR YDIT, INTERNATIONALISED TERRITORIES 305 (1961).

[89] See GA Res. 2074 (XX) (Dec. 17, 1965) (condemning apartheid in South-West Africa); International Status of South-West Africa, Advisory Opinion, 1950 ICJ 128, 141 (July 11) (finding that United Nations succeeded to League of Nations' rights under the mandate).

[90] GA Res. 2145 (XXI), ¶ 4 (Oct. 27, 1966). [91] GA Res. 2248 (S-V) (May 19, 1967). [92] *Ibid.*

[93] GA Res. 2325 (XXII) (Dec. 16, 1967) (noting "the refusal of the Government of South Africa to co-operate with the United Nations in the implementation of resolutions 2145(XXI) and 2248 (S-V)"); GA Res. 2372 (XXII) (June 12, 1968) (the lack of South African cooperation makes it "impossible for the United Nations Council for South-West Africa to perform effectively the functions that were entrusted to it by the General Assembly"); see also Ebere Osieke, *Admission to Membership in International Organizations: the Case of Namibia*, 51 BRIT. Y.B. INT'L L. 189, 192 (1980). The Council did perform quasi-governmental functions outside the territory, such as assisting Namibian refugees, issuing travel documents and establishing a program of

Both the Jerusalem and Namibia initiatives obviously predated the rise of post-conflict reconstruction and would have involved a substantially greater degree of international control. But they usefully illustrate the limits of later consent-based reform, since Jerusalem and Namibia occupied a kind-of half-way house between the territories of defeated World War I and World War II powers, which had no capacity to resist international governance efforts, and the states targeted for post-conflict missions, which possessed full rights to exclude international actors. That both plans were frustrated by local resistance did not bode well for consent playing an even larger role in the missions of the 1990s.

Traditional inter-state peacekeeping was not grounded in the trumping provisions of Chapter VII. Indeed, peacekeeping is not mentioned in the UN Charter at all, and was jokingly referred to by Secretary-General Dag Hammarskjold as a "Chapter 6½" operation, partly grounded in the peaceful means of dispute resolution found in Charter VI but also sharing in the coercive, forceful nature of Chapter VII.[94] But this nod to Chapter VII does not include acquiring its override of the Charter's prohibition on interference in matters essentially within member state's domestic jurisdiction (Article 2(7)), a limitation clearly applicable to stationing forces on national territory. Host state consent, then, represents both an exercise of the state's entitlement to refuse a foreign presence on its territory and a limitation on UN competence.

Post-conflict reconstruction missions, of course, do not follow the traditional peacekeeping model. The missions have been dispatched not after inter-state conflicts but civil wars. They do not seek to preserve the *status quo post bellum* while a peace agreement is negotiated, but follow negotiated agreements that call for UN deployments. The missions are anything but passive symbols. They are instead social engineering projects, deeply enmeshed in the institution building tasks we have noted. And early on in the new era, peacekeepers found themselves caught up in the resumption of hostilities or sporadic acts of defiance by one side or the other. It was often said they had no peace to keep.[95]

emergency economic and technical assistance. See Sushma Soni, *Regimes for Namibia's Independence: A Comparative Study*, 29 COLUM. J. TRANSNAT'L L. 563, 580 (1991).

[94] See UNITED NATIONS, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 5 (2nd edn, 1990).

[95] See Elgin Clemons, Note, *No Peace to Keep: Six and Three-Quarters Peacekeepers*, 26 N.Y.U. J. INT'L L. AND POL. 107 (1993).

Despite these differences, when such "multidimensional" operations lacked a Chapter VII mandate, they relied on state consent. But the complexity of the missions' tasks substantially complicated the rather straightforward consent obtained for the first generation missions. As participants in rapidly-evolving social reform efforts, the post-conflict missions faced both challenges to their authority and demands that they take on new tasks. Initial consent, even embodied in a detailed peace agreement, was often inadequate to these new developments. In Adrezej Sitkowski's words, "Consent of today may turn into a hostile denial tomorrow, and seeking consent of various warlords might provide them with legitimization and prestige, without bringing about other results."[96] Doyle and Sambanis argue that consent to multidimensional peacekeeping operations is an "obsolescing bargain," in which the positions of the parties are reversed over the course of the mission.[97] At the outset, local parties expect all will cooperate and that the peace agreement can be implemented. But only UN intervention can achieve these results. "The UN, in short, holds most of the cards."[98] But after the UN invests money, personnel and prestige, the parties' cooperation becomes the key to the mission's success. As a result, "their bargaining power rapidly rises."[99] This creates an obvious incentive to assert new demands, which the UN may be unable or unwilling to meet.

The UN sometimes responded by simply living with parties' noncompliance, as occurred in Cambodia and Bosnia. Sometimes it acquiesced in new demands by revising the missions' mandate, as was done in Croatia.[100] It also abandoned consent altogether in favor of Chapter VII authorizations.[101] But compulsion has its own limits and costs. Many of the missions' political reform goals simply could not be achieved by compulsion. And shifting to an enforcement approach risked compromising the missions' neutrality, another traditional element of peacekeeping essential to mediating the ongoing conflicts that typify post-conflict environments. None of these options proved satisfactory, and

[96] Andrzej Sitkowski, UN Peacekeeping: Myth and Reality 14 (2006).
[97] Michael W. Doyle and Nicholas Sambanis, Making War and Building Peace 309 (2006).
[98] *Ibid.* [99] *Ibid.*
[100] See Christine Gray, *Host-State Consent and United Nations Peacekeeping in Yugoslavia*, 7 Duke J. Comp. and Int'l L. 241, 266-7 (1996). UNPROFOR, the operation in both Bosnia and Croatia, was not a post-conflict reconstruction mission.
[101] David M. Malone, *Conclusion*, in The UN Security Council: from the Cold War to the 21st Century 617, 619 (David M. Malone ed., 2004) (discussing Yugoslavia, Somalia and Haiti).

the early 1990s saw a vigorous debate on the continued necessity of consent, focusing on the "extent [to which] the UN forces should have changed their modus operandi to accomplish their missions in contested environments."[102]

The United Nations itself vacillated on the consent question, as Ian Johnstone has noted.[103] In his widely discussed *Agenda for Peace* report, Secretary-General Boutros-Ghali called for "peace enforcement units" that would take on tasks then being given to peacekeepers but with a robust mandate to "respond to outright aggression, imminent or actual."[104] In a 1995 follow-up report, the Secretary-General drew quite different lessons from the unsuccessful missions to Bosnia and Somalia, where peacekeepers "were given additional mandates that required the use of force and therefore could not be combined with existing mandates requiring the consent of the parties."[105] In his view this was a mistake: "The logic of peace-keeping flows from political and military premises that are quite distinct from those of enforcement; and the dynamics of the latter are incompatible with the political process that peace-keeping is intended to facilitate." He concluded that "[t]o blur the distinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel."[106] Five years later, the Secretary-General's Panel on United Nations Peace Operations seemed to do just that, arguing that the distinction between missions that require the use of deadly force and those that do not was "misleading" and "exaggerated."[107] Most peace operations, it noted, now receive a Chapter VII mandate. "This is on the basis that even the most benign environment can turn sour – when spoilers emerge to undermine a peace agreement and put civilians at risk – and that it is desirable for there to be complete certainty about the mission's capacity to respond with force, if necessary."[108]

[102] HILLEN, *supra* note 83, at 166.
[103] Ian Johnstone, *Discursive Power in the UN Security Council*, 2 J. INT'L L. AND INT'L REL. 73, 82-3 (2005).
[104] *Agenda for Peace*, *supra* note 21, ¶ 44.
[105] *Report of the Secretary-General on the Work of the Organization, Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, ¶ 35, UN Doc. A/50/60-S/1995/1 (1995).
[106] *Ibid.*
[107] *Report of the Panel on United Nations Peace Operations*, ¶¶ 212-13, UN Doc. A/55/305-S/2000/809 (2000).
[108] *Ibid.* ¶ 213.

As a matter of policy, then, consent became a necessary, but often insufficient, source of authority for the post-conflict missions. Deemed essential for the cooperative tasks of reform, it would be obtained whenever possible at the outset of a mission. But if essential tasks were resisted, a Chapter VII mandate might be obtained as well. A delicate balance between the two was obviously necessary. As Michael Doyle observes, international actors and their local allies must hold "both a military predominance and a predominance of popular support, which together permit them to impose a peace on the recalcitrant military forces and their popular supporters."[109]

B. Actual consent

Despite these complications, all of the UN's post-conflict missions from 1988 to 2005 were grounded in the consent of the parties. As the Table shows, in each case, save the two later missions to Haiti (UNSMIH and MINUSTAH), a request for a UN presence was set out in a peace agreement among warring local parties. In some cases these were interim agreements, such as Somalia. In others, such as Angola, the agreement was intended to be final, but a party's non-compliance led to new rounds of negotiations and a new accord. In the Somali case, a later agreement produced a new request for UN assistance and the Security Council responded by authorizing a new mission (UNSOM II). The same was true in Angola, where UNAVEM III succeeded UNAVEM II based on a new request in the Lusaka Accord. In some cases, the agreements set out a detailed mandate for the requested UN mission. In others there was only a general request for "supervision" of the accords' implementation. It is important to note that the image of the Council in each case "responding" to local requests for assistance is somewhat misleading. The talks that produced the peace agreements were often sponsored by the United Nations itself or had significant UN participation, usually in the person of a Special Representative of the Secretary-General. Thus, in El Salvador, Democratic Republic of Congo, Guatemala, Haiti, Liberia and Tajikistan, among others, the UN was instrumental in producing requests that it authorize a mission. But there is little evidence the parties viewed their consent as having been thereby manipulated or coerced. A willingness (and ability) to monitor compliance with the agreements was, after all, the primary asset the UN brought to the negotiations. If anything, not having to wonder whether a party not present at the talks might deliver

[109] Michael W. Doyle, UN Peacekeeping in Cambodia: UNTAC's Civil Mandate 76-7 (1995).

a neutral observer force would make the parties more willing to consent to a document in which such a party played a pivotal role.

In several cases, the Council abandoned consent as the sole basis for the mission and invoked Chapter VII. In Congo, MONUC changed from a small planning and liaison mission to a robust military force with a mandate to oversee all aspects of a ceasefire. In Angola, the UNITA rebel group's continual refusal to adhere to the Lusaka agreement four years after its conclusion led the Council to invoke Chapter VII for the MONUA mission. Non-compliance with peace accords and continued violence also led to mid-course shifts to Chapter VII for UNAMSIL in Sierra Leone and UNOSOM I in Somalia. In Sierra Leone, the RUF's defiance, combined with a pull-out by regional African peacekeeping forces, led the Secretary-General to conclude that UNAMSIL "through its military presence, military capabilities and posture, [must] be able to deter attempts to derail the peace process."[110] In Somalia, an anarchic environment in which humanitarian aid could not be distributed to an increasingly desperate population led the Council to invoke Chapter VII.[111] Resolution 794 authorized cooperating member states to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."[112]

Finally, five of the missions supplemented consent with a Chapter VII mandate from the outset. In each of these cases – Burundi, Côte D'Ivoire, Haiti (MINUSTAH), Somalia (UNSOM II) and Sudan – it was clear at the missions' inception that parties would resist the UN despite having given their consent. All but one of these missions (Somalia) came after the widely discussed 2000 Brahimi Report, which firmly rejected a passive strategy of failing to hold parties to their agreements. "In the context of modern peace operations dealing with intra-State/transnational conflicts," the Report noted, "consent may be manipulated in many ways by the local parties."[113] "Once deployed, United Nations peacekeepers must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate."[114] These missions did not abandon consent in the sense of

[110] *Second Report of the Secretary-General Pursuant to Security Council Resolution 1270 (1999) on the United Nations Mission in Sierra Leone*, at 6-7, UN Doc. S/2000/13.

[111] See Letter dated November 24, 1992 from the Secretary-General to the President of the Security Council, UN Doc. S/24859 (describing deteriorating conditions in Somalia and UNSOM I's inability to cope).

[112] SC Res. 794 (Dec. 3, 1992).

[113] BRAHIMI REPORT, *supra* note 34, ¶ 48.

[114] *Ibid.* ¶ 49.

Table *Origins of post-conflict missions*

Mission	Request in Peace Agreement	Chapter VII Mandate
Angola UNAVEM I	Cuba-Angola Agreement 1988[1]	No
Angola UNAVEM II	Angola Peace Accords 1991[2]	No
Angola UNAVEM III	Lusaka Protocol 1994[3]	No
Angola MONUA	Lusaka Protocol 1994	Yes but not initially[4]
Burundi ONUB	Arusha Peace Agreement 2000[5]	Yes[6]
Cambodia UNTAC	Paris Accords 1991[7]	No
Central Africa Republic MINURCA	Bangui Agreements 1997[8]	No
DR Congo MONUC	Ceasefire Agreement 1999[9]	Yes but not initially[10]
Côte D'Ivoire UNOCI	Linas-Marcoussis Agreement 2003[11]	Yes[12]
El Salvador ONUSAL	Mexico Agreements 1992[13]	No
Guatemala MINUGUA	Framework Agreement 1994[14]	No
Haiti UNMIH	Governors Island Agreement 1993[15]	No
Haiti UNSMIH	Presidential Request 1996[16]	No
Haiti MINUSTAH	Presidential Request 2004[17]	Yes[18]
Liberia UNOMIL	Cotonou Agreement 1993[19]	No
Mozambique ONUMOZ	General Peace Agreement 1992[20]	No
Rwanda UNAMIR	Arusha Peace Accords 1993[21]	No
Sierra Leone UNOMSIL	ECOWAS Peace Plan 1997[22]	No
Sierra Leone UNAMSIL	Lomé Peace Agreement 1999[23]	Yes, but not initially[24]
Somalia UNOSOM I	Mogadishu Ceasefire Agreement 1992[25]	Yes, but not initially[26]
Somalia UNOSOM II	Addis Ababa Agreement 1993[27]	Yes[28]
Sudan UNMIS	Comprehensive Peace Agreement 2005[29]	Yes[30]
Tajikistan UNMOT	General Agreement 1997[31]	No

[1] Agreement Between the Government of the Republic of Cuba and the Government of the People's Republic of Angola for the Conclusions of the Internationalist Mission of the Cuban Military Contingent, Dec. 22, 1988, available at www.c-r.org/our-work/accord/angola/bilateral-agreement.php.

[2] Peace Accords for Angola, Annex, UN Doc. S/22609 (1991).

[3] Lusaka Protocol, Annex, UN Doc. S/1994/1441.

[4] MONUA was given a Chapter VII mandate by SC Res. 1173 (June 12, 1998).

[5] Arush Peace and Reconciliation Agreement for Burundi, Aug. 28, 2000, available at www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html.

[6] SC Res. 1545 (May 21, 2004).

[7] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 22, 1991, available at www.usip.org/library/pa/cambodia/agree_comppol_10231991.html.
[8] UN Doc. S/1997/561, Annex.
[9] UN Doc. S/1999/815.
[10] MONUC was given a Chapter VII mandate by SC Res. 1291 (Feb. 24, 2000).
[11] Linas-Marcoussis Agreement, Jan. 23, 2003, UN Doc. S/2003/99.
[12] SC Res. 1528 (Feb. 24, 2004).
[13] Mexico Agreements, April 27, 1991, available at www.usip.org/library/pa/el_salvador/pa_es_04271991_mexico.html.
[14] Framework Agreement for the Resumption of the Negotiating Process between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca, Jan. 10, 1994, Annex, UN Doc. A/49/61-S/1994/53.
[15] Agreement of Governor's Island, July 3, 1993, UN Doc. S/26063 (1993).
[16] The request from President Préval in a May 31, 1996 letter was noted by the Secretary-General in his report to the Council on June 5, 1996. *Report of the Secretary-General on the United Nations Mission in Haiti*, ¶ 31, UN Doc. S/1996/416.
[17] The request was noted by the Security Council in SC Res. 1529 (Feb. 29, 2004).
[18] SC Res. 1542 (April 30, 2004).
[19] Cotonou Agreement, July 25, 1993, available at www.usip.org/library/pa/liberia/liberia_07251993.html.
[20] General Peace Agreement for Mozambique, Oct. 4, 1992, UN Doc. S/24635 (1992).
[21] Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Aug. 4, 1993, available at www.incore.ulst.ac.uk/services/cds/agreements/pdf/rwan1.pdf.
[22] Economic Community of West African States six-month peace plan for Sierra Leone, Oct. 23, 1997, available at www.usip.org/library/pa/sl/sl_ecowas_10231997.html.
[23] Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, UN Doc. S/1999/777.
[24] UNAMSIL received a Chapter VII mandate in SC Res. 1289 (Feb. 7, 2000).
[25] In SC Res. 746 (Mar. 17, 1992), the Security Council noted that the ceasefire included "agreements for the implementation of measures aimed at stabilizing the cease-fire through a United Nations monitoring missions."
[26] UNOSOM I received a Chapter VII mandate in SC Res. 794 (Dec. 3, 1992).
[27] Addis Ababa Agreement concluded at the first session of the Conference on National Reconciliation in Somalia, March 23, 1993, available at www.usip.org/library/pa/somalia/somalia_03271993.html.
[28] SC Res. 814 (March 26, 1993).
[29] Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities between the Government of the Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/SPLA) during the pre-interim and interim periods, Dec. 31, 2004, available at www.usip.org/library/pa/sudan/cpa01092005/ceasefire_agreement.pdf.
[30] SC Res. 1590 (March 24, 2005).
[31] General Agreement on the Establishment of Peace and National Accord in Tajikistan, June 27, 1997, UN Doc. S/1997/510.

substituting the Council's judgment about the tasks the missions were to undertake. They instead became means of holding the parties to their own prior agreements.

C. Constructed consent

The UNTAC mission to Cambodia and the UNSOM II mission to Somalia represent the outer edge of consent-based deployments. In both countries, domestic political turmoil precluded the UN from obtaining consent from an established government in effective control of the nation. Rather than dispensing with consent, however, the UN's response was to seek authority from extra-governmental bodies seen as having a broader popular legitimacy than those ostensibly in charge. "National Councils" were established on the initiative of international actors and were said to embody the nation's sovereignty for a period of transition to full indigenous rule. In Cambodia, the Paris Accords created a Supreme National Council (SNC) – a coalition group headed by Prince Sihanouk – that was said to be "the unique legitimate body and source of authority in which, throughout the transition period, the sovereignty, independence and unity of Cambodia are enshrined."[115] The problem stemmed from the fractious nature of Cambodian politics, which the major powers determined could undermine the complex process of holding fair elections. The United Nations, in their view, needed final authority to mediate disputes and reject attempts to derail the process. But who would grant such authority? At Paris, the Permanent Five members of the Security Council raised the idea of an SNC, since according to Steven Ratner, there was no "single government accepted by all states as politically legitimate and legally able to delegate power" to UN administrators.[116] Having created the SNC, the Paris Accords then provided that it delegated to the UN "all powers necessary to ensure the implementation of this Agreement."[117] This included final authority to override the SNC in the event its decisions were deemed inconsistent with the objectives of the Paris Accords.[118]

In Somalia, the UN instigated creation of a Transitional National Council shortly after the Security Council created UNSOM II. Two hundred-

[115] The Final Act of the Paris Conference on Cambodia, art. 3, Oct. 23, 1991, 31 I.L.M. 180 (1992) (Paris Accords). See also SC Res. 668 (Sept. 20, 1990) (same).
[116] Steven R. Ratner, *The Cambodia Settlement Accords*, 87 AM. J. INT'L L. 1, 9 (1993).
[117] PARIS ACCORDS, *supra* note 115, art. 6. [118] *Ibid.* Annex I, §A(2)(a) and (e).

and-fifty representatives from a cross-section of Somali society met in Addis Ababa at a Conference on National Reconciliation convened by the Secretary-General. Their two-year transitional plan provided that the TNC would serve as "the repository of Somali sovereignty" during that period.[119] It would "be the prime political authority having legislative functions." Most significantly, the TNC would "interact, as appropriate, with the international community, including UNSOM." Though the need to obtain TNC consent for UNOSOM II operations had at that point substantially diminished – the previous day the Security Council had granted the mission a Chapter VII mandate to restore order and perform a variety of reconstruction tasks[120] – the anarchy that made consent literally impossible to obtain had been bypassed. The disaster that lay several months ahead for the Somali mission sidelined the entire Addis plan and the SNC never functioned.[121]

Conventional doctrine on the recognition of governments strains to account for the Cambodian and Somali arrangements. But they served as pragmatic bridges to a consent apparently deemed essential to the missions' legitimacy. As David Wippman has observed of these cases, "the formal legal status of the signatories to an internal settlement is not really at issue. What matters is whether the wills of the political communities that form the state have been adequately represented and effectively expressed. When that happens, the international community ordinarily accepts whatever agreement results."[122]

IV. Conclusions

The post-conflict reconstruction missions of the post-Cold War era were both more and less intrusive into the affairs of their host territories than

[119] Addis Ababa Agreement Concluded at the First Session for the Conference on National Reconciliation in Somalia, March 27, 1993, reprinted in UNITED NATIONS, THE UNITED NATIONS AND SOMALIA 1992-1996 265 (1996); *Further Report of the Secretary-General submitted in pursuance of paragraph 18 of resolution 814* (1993), with annex on the re-establishment of police, judicial and penal systems, ¶ 27(a), UN Doc. S/26317 (1993). The Security Council approved creation of the Transitional National Council in June 1993. See SC Res. 837 (June 6, 1993).

[120] SC RES. 814, *supra* note 41.

[121] See Yemi Osinbajo, *Legality in a Collapsed State: the Somali Experience*, 45 INT'L AND COMP. L.Q. 910, 919 (1996).

[122] David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 643 (1995).

the early missions reviewed in the last chapter. They were more intrusive because they addressed governance issues at the heart of states' constitutional order. They were less intrusive because, with the limited exception of the UNTAC mission in Cambodia, governing authority remained in the hands of local parties. Even when the Security Council invoked its binding Chapter VII powers, it did so only to hold the parties to the terms of their own peace agreements. The missions cannot be described as full international governance.

But their advocacy of liberal democratic governing models, along with their refusal to alter national borders, made them analytically inseparable from the humanitarian occupation missions that would begin in the mid-1990s and which would take the next step of asserting actual international control. The imperative of domestic reform, I would argue, was a much stronger impetus for full international control than the possibility of administration represented by the earlier cases. For the post-conflict missions were grounded in strongly held ideas about the ameliorative power of cooperative politics. The appeal of this idea only grew with time and as missions were deployed to even more fragile and conflict-ridden states, such as Sudan and Democratic Republic of Congo. As Chapter 5 will demonstrate, a substantial international practice, emerging during the same period, supported the missions' democratic imperative. When neither consent nor Chapter VII compulsion would move local authorities to cooperate with a post-conflict mission, the next step was for the international community to take on the reforms itself. The logic of international administration in these cases drew little from the older, largely apolitical transitional arrangements.

The evolving nature of consent in the post-conflict missions also carried important lessons. Following on the first generation of peacekeeping missions, consent was a necessary legal requirement of deploying in a sovereign state. In all cases but Haiti, the parties willingly gave consent in a peace agreement. It soon became apparent that consent also had a pragmatic function: the new political arrangements supervised by the missions could not possibly function without the cooperation of the host government and other parties to the conflict.

What to do, then, when one or more of those parties resisted? First generation peacekeepers would have withdrawn. In some cases the post-conflict missions adopted a version of that deferential approach by trying to carry on despite a lack of cooperation. But the Security Council pushed back and began engrafting Chapter VII mandates on to

consent, either after a mission encountered difficult, or later at the missions' inception. Chapter VII did not replace consent-based deployments. Indeed, the fictional consent obtained for Cambodia and Somalia demonstrates the lengths to which the UN would go to preserve a tool. One may be skeptical of the utility of fictional consent. But this approach too would carry over to the humanitarian occupation missions, which took the idea one step further by obtaining consent by coercion.

3 Full international governance

When the United Nations began authorizing post-conflict reconstruction missions in the 1990s, it entered unfamiliar territory. The organization had become involved in shaping the political, economic and social priorities of its member states. The question of how nations are governed had moved beyond the social contract between state and citizen and become a question for the broader international community. To extend the metaphor, one might say the international community was not only dictating the terms of the social contract, but had become, in a very real sense, its guarantor. Many of the post-conflict reconstruction missions reviewed in the last chapter originated in agreements among multiple international actors. Each had a defined role in supervising the process of reform, tasks that could not be left to national political factions still mistrustful of each others' motives and only moderately committed (at best) to the goal of inclusive national politics. Outsiders, in other words, both designed states' domestic institutions and policed any deviations from those designs. In describing these first efforts of the 1990s, the Secretary-General sought to place the UN's work in a familiar setting, linking the missions to widely-accepted goals such as conflict prevention.[1] But the internationalization of national politics was undeniably new, whatever its arguable connection to traditional Charter values.

This chapter examines the outer parameters of this new undertaking by exploring the four most intrusive examples of international administration to date: Bosnia, Kosovo, East Timor and Eastern Slavonia. In each case, the target state was divested of governmental functions over

[1] In his 1992 Agenda for Peace, Boutros-Ghali wrote, "There is an obvious connection between democratic practices - such as the rule of law and transparency in decision-making - and the achievement of true peace and security in any new and stable political order." *An Agenda for Peace*, ¶ 59, UN Doc. A/47/277 - S/24111 (1992).

some or all of its territory. International organizations took on a dizzying array of tasks in governing day to day, from profound matters of policy to mundane custodial functions.[2] These are the cases of "humanitarian occupation." This term, discussed earlier, attempts to capture two salient aspects of these governance missions. They are "humanitarian" because the stated purpose of each intervention was to establish social stability, respect for human rights and democratic institutions. They are "occupations" because, like classical belligerent occupations, they involved control over a territory by a temporary regime that did not claim full sovereignty, but at the same time assumed virtually all functions of local government.

Two important themes run through these cases, both familiar from the last chapter. The first is that international actors went to extraordinary lengths to preserve existing borders and populations. These were not simply missions to assist populations under siege, which they were, but commitments to maintain those populations intact and in particular places. In later chapters I will link these commitments to a variety of supportive norms and practice. Second, an initial hesitancy or outright refusal by the target states to accept humanitarian missions was not an impediment to international action. If consent could not be obtained freely, it was coerced – in several cases by military force. As subsequent

[2] Hansjorg Strohmeyer, legal advisor to the Kosovo and East Timor missions, recounts that in those cases:

> These tasks included the reconstruction and operation of public utilities, ports, airports, and public transportation systems; the creation of a functioning civil service; the establishment of a network of social services, including employment offices and health care; the reconstruction of road networks; and the resuscitation of the primary, secondary, and tertiary education systems. In addition, the interim governments had to create the conditions for economic development, a goal that meant establishing a banking system, formulating budgetary and currency policies, trying to attract foreign investment, and establishing a comprehensive tax, customs, and levies system. There was also the urgent need not only to develop public broadcasting, civil education, and mass media capabilities, but to establish a political system that allowed political parties to peacefully cooperate. In East Timor, the mission has the additional challenges of facilitating a process for drafting the constitution and taking on certain foreign policy functions such as normalizing relations with Indonesia, integrating the new country into the ASEAN community, and negotiating with Australia the future regime that would govern petroleum exploitation in the Timor Sea, issues of vital importance to the future stability and prosperity of the half-island.

Hansjoerg Strohmeyer, *Making Multilateral Interventions Work: the UN and the Creation of Transitional Justice Regimes in Kosovo and East Timor*, 25-SUM FLETCHER F. WORLD AFF. 107, 109-10 (2001) (Strohmeyer, *Multilateral Interventions*).

chapters make clear, the legal basis for coercive reworkings of national politics is far from clear.

I. The Bosnia mission

A. Following the territorial imperative

The Bosnia mission followed four years of fruitless diplomacy and reactive peacekeeping by the European Union and United Nations.[3] After the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) in 1991, and Bosnian independence the next year, the government in Sarajevo lost control over most of its national territory. In short order, Bosnia also ceased to function as a coherent state as the three competing ethnic groups – Serbs, Croats and Muslims – plunged into what became the paradigm of post-Cold War ethnic conflict. The brutality and intractability of the fighting led many commentators to decry efforts to preserve Bosnia as fruitless and short-sighted. Some recommended partition.[4] John Mearsheimer and Stephen van Evera, for example, called partition "the only feasible scheme for peace."[5] To insist on a multi-ethnic Bosnia was to accept "a dogmatic American faith that other multiethnic societies can harmonize themselves, that ethnic groups elsewhere can learn to live together as America's immigrants have."[6] The international community, they concluded, "must be willing at times to decide that some states cannot be sustained and should instead be disassembled."[7]

But from the outset of the conflict, the Security Council committed itself to maintaining Bosnia's existing borders.[8] It could hardly do

[3] See generally Ivo H. Daalder, Getting to Dayton: The Makings of America's Bosnia Policy (2000); Steven L. Burg and Paul S. Shoup, The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention (1999); Former Yugoslavia Through Documents: From its Dissolution to the Peace Settlement (Snezana Trifunovska ed., 1999).

[4] The arguments for and against partition in Bosnia and elsewhere are discussed in more detail in Chapter 4.

[5] John J. Mearsheimer and Stephen van Evera, *When Peace Means War*, The New Republic, Dec. 18, 1995, at 17.

[6] *Ibid.* at 22. [7] *Ibid.*

[8] See SC Res. 787 (Nov. 16, 1992) (affirming all parties must "respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and [the Council] affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted"); SC Res. 770 (Aug. 13, 1992) (affirming "the need to respect the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina"); SC Res. 757 (May 30, 1992) (affirming that "no territorial gains or changes brought about by violence are acceptable and that the borders of Bosnia and Herzegovina are inviolable").

otherwise, as the Badinter Commission had conditioned the recognition of Bosnia (and of the other former Yugoslav republics) on adherence to the *uti possidetis* principle – the view that internal provincial borders of the SFRY would become the international borders of the newly independent states.[9] In debate over the early resolutions, Council members rejected the partionists' view of separation as the necessary consequence of violent ethnic conflict. Russia, no ally of the Bosnian Muslims then under siege from Serb forces, declared it "intolerable that merely to satisfy the political ambitions of some political leaders, people should be killing each other and devastating the soil of Bosnia and Herzegovina, where diverse ethnic and religious groups have lived in peace and harmony for decades."[10] Instead, "all the inhabitants of the country who are involved in this conflict must preserve their experience of coexistence and remember that in the future they must continue to live side by side."[11] Pakistan demanded "the reversal of the gains of Serb aggression."[12] Germany declared that "the international community will not accept the results of a policy of force. This applies first and foremost to attempts to divide Bosnia and Herzegovina, whatever the label applied."[13] Hungary told the Council that it "vigorously condemns efforts to bring about the creation of so-called nation-States through 'ethnic cleansing' and the establishment of 'ethnically pure' territories."[14]

Maintaining Bosnia's borders while at the same time seeking to halt ethnic cleansing and the country's disintegration into constituent ethnic sub-units, however, produced a three-year diplomatic gridlock.[15] In Geneva negotiations sponsored by the UN and EU, the Bosnian Serbs refused to relinquish any significant territory ethnically cleansed of its Muslim and Croat residents, while the international organizations refused any settlement seen as legitimizing the Serbs' actions. The turning point came in May 1995 when Bosnian Serb forces suffered a series of defeats at the hands of advancing Croatian and Bosnian forces.[16] In late August, following a deadly mortar attack on a residential neighborhood in Sarajevo, NATO forces began heavy bombardment of Serb positions around the city. The campaign – Operation Deliberate Force – was the largest in NATO history.[17] According to Richard Holbrooke, the

[9] See Conference on Yugoslavia, Arbitration Commission, Opinion Nos. 1-7 (Jan. 11, 1992), 8-10 (July 4, 1992), reprinted in 31 I.L.M. 1488 (1992).
[10] UN Doc. S/PV.3136, at 4 (1992). [11] *Ibid.* [12] *Ibid.* at 30.
[13] UN Doc. S/PV.3135, at 37 (1992). [14] UN Soc. S/PV.3137, at 12 (1992).
[15] See DAVID OWEN, BALKAN ODYSSEY (1995).
[16] These facts are taken from Elizabeth Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT'L L. J. 789, 795-6 (1997).
[17] RICHARD HOLBROOKE, TO END A WAR 102 (1998).

lead US diplomat, while the campaign was not initially designed as part of the Geneva negotiating strategy, it was largely perceived as such by the Balkan leaders.[18] NATO adapted quickly and soon decisions on whether to continue the bombing were closely tied to the success of the Geneva talks.[19] Results materialized shortly thereafter: an agreement on basic principles was reached on September 8, a ceasefire on September 14, and, after renewed NATO bombing in early October, the Dayton peace talks convened on November 1. Holbrooke concluded that the bombing made "a huge difference" in the parties' willingness to talk and compromise.[20]

B. Creating consent

The three weeks of difficult negotiations at Dayton resulted in a series of interrelated texts: a General Framework Agreement, followed by twelve substantive annexes, the fourth of which was the Bosnian constitution.[21] Secretary Christopher waxed eloquent at the signing ceremony on November 21 that "we've come to this hopeful moment because the parties made the fundamental choice that lasting peace can be achieved."[22] But the talks largely involved the United States presenting a series of its own proposals that the parties were persuaded to accept.[23] "Holbrooke not only outlasted the various Balkan representatives, he out bullied them, driving them to do what he was sure was good for them even if they did not yet recognize it themselves."[24] The *Washington Post* described Dayton as "not simply an agreement among the parties to balance out

[18] *Ibid.* at 104.

[19] Derek Chollet, The Road to the Dayton Accords: A Study of American Statecraft 5-7 (1997). President Clinton linked force and diplomacy in his address to the nation, making the case for US participation in the post-Dayton peacekeeping mission. Referring to the NATO bombing he stated, "Those air strikes - together with the renewed determination of our European partners and the Bosnian and Croat gains on the battlefield - convinced the Serbs, finally, to start thinking about making peace." *US Support for Implementing the Bosnian Peace Agreement*, US Dep't State Dispatch, Nov. 27, 1995, ¶ 15. Secretary Christopher told the Senate Foreign Relations Committee shortly after the Dayton talks concluded, "We led a NATO bombing campaign to convince the Bosnian Serbs that nothing more could be gained by continuing the war." *Bosnia: An Acid Test of US Leadership*, US Dep't State Dispatch, Nov. 27, 1995, ¶ 6.

[20] Holbrooke, *supra* note 17, at 104.

[21] General Framework Agreement for Peace in Bosnia and Herzegovina With Annexes, Dec. 14, 1995, 35 I.L.M. 75, 89 (1996) (General Framework Agreement).

[22] *Initialing of the Peace Dayton Agreement*, US Dep't State Dispatch, Dec. 15, 1995, ¶ 10.

[23] Holbrooke, *supra* note 17, at 231-312.

[24] David Halberstam, War in a Time of Peace 358 (2001).

competing interests as best they could, although it was that. It was also an instance of coercive diplomacy - the application of military force and economic pressure by outsiders to bring about a certain political result."[25] Paul Szasz gave perhaps the bluntest assessment of the parties' "consent" to the Dayton Accords: "The truth is that they were largely bludgeoned and partly bribed into putting their initials and (a few weeks later in Paris) their signatures to texts that none of them had any significant role in developing."[26]

The Bosnian Serbs had been the main obstacle to reaching agreement during the previous three years. On the eve of the Dayton talks, they controlled approximately seventy percent of Bosnian territory, acquired through a series of ethnic cleansing campaigns, and thus had the most to lose from a peace plan creating a multi-ethnic national government. This made their consent critical to any settlement. But the Bosnian Serb leadership was not present at Dayton. Radovan Karadzic and Ratko Mladic had been indicted in July by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and they would be indicted again in November, on the eve of the talks, for their role in the Srebrenica massacre.[27] Holbrooke made clear to Milosevic that Karadzic and Mladic would be arrested the minute they landed on American territory.[28]

How, then, to conduct negotiations with these crucial players absent? The impasse was broken when Milosevic secured the Bosnian Serbs' "agreement" to have him represent their interests at Dayton. This included full authority to commit to any final agreement.[29] This legal fiction was acceptable to all the other Dayton parties and it removed the last obstacle to convening the talks. But the fiction took a toll on the Accords' legitimacy. According to Richard Goldstone, the ICTY Prosecutor at the time, if Karadzic and Mladic had not been indicted and were free to attend Dayton, the Bosnian Muslim delegation would have refused to attend, thereby dooming the conference to failure before it

[25] *Dayton II*, Wash. Post, Feb. 20, 1996, at A10.

[26] Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 Cornell Int'l L. J. 759, 764 (1997).

[27] See Aryeh Neier, *Accountability for State Crimes: The Past Twenty Years and the Next Twenty Years*, 35 Case W. Res. J. Int'l L. 351, 356 (2003).

[28] Holbrooke, *supra* note 17, at 107.

[29] *Ibid.* at 105-6. The General Framework Agreement noted in its preamble "the agreement of August 29, 1995, which authorized the delegation of the Federal Republic of Yugoslavia to sign, on behalf of the Republika Srpska, the parts of the peace plan concerning it, with the obligation to implement the agreement that is reached strictly and consequently." General Framework Agreement, *supra* note 21.

began.[30] The actual consent of all the parties, in other words, would have been impossible to obtain. Thus, the Accords could only be negotiated by excising the Bosnian Serbs' views from the discussions and the final agreement. Although American envoys later did obtain the Bosnian Serbs' consent – after "presumably exerting further pressure and perhaps making further promises"[31] – Holbrooke did not want the Accords held hostage to their possible refusal. Accordingly, the General Framework Agreement provided in Article XI that all the Dayton documents would enter into force immediately upon signature, thereby eliminating the need for subsequent ratification votes that may well have failed.[32] This preemptive action ensured the legal fiction would remain intact.

C. The Dayton model of statehood

As we have seen, the Security Council had determined well before Dayton that Bosnia's borders were not to be altered. Opening the talks, Secretary Christopher described as a "key condition" that "must be met" the preservation of Bosnia "as a single state within its internationally recognized borders and with a single international personality."[33] But given the three groups' inability to cooperate, to put matters mildly, this was a tall order indeed. As Susan Woodward has remarked, "the peace accord's goal is to restore an image of prewar Bosnia that the warring parties had aimed, more or less successfully, to destroy."[34] The territorial imperative required creating state institutions that would somehow make cooperation possible, and the immutability of borders, therefore, shaped all other aspects of the Accords.

First and foremost, the territorial imperative ensured that none of the Bosnian parties would achieve their war-time objectives, which were largely incompatible with this goal. The Muslims failed to obtain a strong central state that could compel relative peace among the three groups.

[30] Richard Goldstone, *United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 233 (1997).

[31] SZASZ, *supra* note 26, at 763.

[32] See Robert M. Hayden, *Bosnia: The Contradictions of "Democracy" without Consent*, 7 EAST EUR. CONST. REV. 47, 48 (1998) ("The Dayton Agreement was never subjected to ratification by the peoples of Bosnia and Herzegovina, presumably because it was unlikely to gain acceptance by the Serbs and Croats.").

[33] *Statement by Secretary Christopher upon arrival at Wright-Patterson Air Force Base, Ohio, November 1, 1995*, US Dep't State Dispatch, Nov. 6, 1995, ¶ 35.

[34] Susan L. Woodward, *Compromised Sovereignty to Create Sovereignty: Is Dayton Bosnia a Futile Exercise or an Emerging Model?*, *in* PROBLEMATIC SOVEREIGNTY 252 (Stephen D. Krasner ed., 2001).

The Serbs and Croats were unable to dominate the central government or leave the state completely to join their neighboring ethnic kinsmen. Only the international community's objectives were vindicated: preserving borders, an end to fighting that threatened the state's unity and a promise to allow the return of ethnically cleansed refugees.[35] Thus, the most basic answer to the question of why a humanitarian occupation was necessary for Bosnia is that only the occupiers were fully invested in the state designed at Dayton.

Second, the immutability of borders led the Dayton parties to make enormous concessions to the groups' mutual animosities. This was not inconsistent with preserving borders, since the concessions all took effect within a unified state where pre-war population would, in theory, be restored. A set of disaggregated political institutions placed most political power in the hands of two ethnically based provincial units, the Federation of Bosnia and Herzegovina and the Republika Srpska.[36] Bosnian Muslims (or Bosniacs) and Croats had formed the Federation in 1994 as an alliance against the more militarily successful Serbs.[37] The Republika Srpska, the Serb region, had opposed Bosnian statehood in the first place and boycotted the referendum on independence required by the Badinter Commission. Most governing responsibilities were assigned to these two entities. The national government was given a very limited set of tasks, such as international relations, immigration, monetary policy and air traffic control.[38] Each of the three elected branches of government (the Presidency and Upper and Lower Houses) was divided equally among the three ethnic groups.[39] In further "yielding certain points to ethnic particularism,"[40] the Bosnian Constitution allowed the two entities to conclude "special parallel relationships with neighboring states," an evident acknowledgement that Serb and Croat Bosnians desired closer ties with their neighboring ethnic kinsmen than with their Muslim fellow citizens.[41] The overall arrangement

[35] See Szasz, *supra* note 26, at 765.

[36] General Framework Agreement, *supra* note 21, art. I(3).

[37] *Bosnia and Herzegovina: Constitution of the Federation*, 33 I.L.M. 740 (1994).

[38] General Framework Agreement, *supra* note 21, art. III(1) (responsibilities of national institutions); *ibid.* art. 3(2) (responsibilities of the entities).

[39] *Ibid.* art. 4 (House of Peoples and House of Representatives); *ibid.* art. 5 (Presidency).

[40] Thomas D. Grant, *Internationally Guaranteed Constitutive Order: Cyprus and Bosnia as Predicates for a New Nontraditional Actor in the Society of States*, 8 J. Transnat'l L. and Pol. 1, 48 (1998).

[41] General Framework Agreement, *supra* note 21, art. III(2)(d). The Constitution attempted to limit the reach of these agreements by providing that they must be

has been described as "essentially a customs union with a foreign ministry attached."[42] The Security Council approved the Accords, invoking Chapter VII, on December 15.[43]

It may well be that a more powerful central government could not have been achieved at Dayton. Holbrooke and others were determined to find a constitutional arrangement that would stop the fighting, and they were willing to live with a radically decentralized state if that was the price to be paid. But the negotiators were not naive about such a state's chance for survival on its own. By far the majority of Dayton provisions are dedicated to subjecting Bosnian institutions to a remarkable series of checks by international norms and institutions. The constitution itself is an annex to the Accords and creates international obligations running between the state parties (Bosnia, Croatia and Yugoslavia (Serbia and Montenegro)), though the nature of those obligations is not entirely clear.[44] Since an agreement between the three Bosnian entities alone would have simply re-channeled their mistrust and disagreements into the new institutions, the addition of other state parties was, from the perspective of enforcement, a virtual necessity.

Substantively, the constitution provides that the rights set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall apply directly in Bosnia and "shall have priority over all other law."[45] Further, Bosnia shall "remain or become party" to a list of fifteen major human rights treaties.[46] All Bosnian authorities are required to "cooperate with and provide unrestricted access to" the supervisory bodies established by these treaties.[47] Substantive Bosnian law is thus made co-terminus with the highest international standards of human rights.

"consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina." *Ibid.*

[42] SUMANTRA BOSE, BOSNIA AFTER DAYTON 24 (2002), quoting ROBERT HAYDEN, BLUEPRINTS FOR A HOUSE DIVIDED: THE CONSTITUTIONAL LOGIC OF THE YUGOSLAV CONFLICTS 126 (1999).

[43] SC Res. 1031 (Dec. 15, 1995).

[44] Article V of the General Framework Agreement provides that the parties "welcome and endorse the arrangements that have been made concerning the Constitution of Bosnia and Herzegovina. . .The Parties shall fully respect and promote fulfillment of the commitments made therein." The Accords were also "witnessed" by the European Union, France, Germany, Russia, the United Kingdom and the United States. It has been argued that the witnessing states did not incur legal (as opposed to political) obligations. See Paola Gaeta, *The Dayton Agreements and International Law*, 7 EUR. J. INT'L L. 147, 154 (1996).

[45] GENERAL FRAMEWORK AGREEMENT, *supra* note 21, art. II(2).

[46] *Ibid.* art. II(7) and Annex I. [47] *Ibid.* art. II(8).

Layered on top of the national legal system is a set of international actors charged with ensuring compliance with the Dayton standards. The Accords provide implementation responsibilities for seven different international organizations: the United Nations, NATO, the Organization for Security and Cooperation in Europe (OSCE), the UN High Commissioner for Refugees, the International Committee of the Red Cross and the World Bank.[48] Ultimate civilian authority resides in the Office of the High Representative (OHR) – effectively the international community's governor-general – who has jurisdiction over virtually every aspect of economic reconstruction, human rights and institutional rehabilitation.[49] The one exception is security, which was to be controlled by a NATO Implementation Force (IFOR).[50] The High Representative also has non-appealable authority to interpret civilian aspects of the Dayton documents.[51]

Finally, a series of ancillary arrangements lock in still other tasks for the international community. These take the form not of treaties but decisions of international organizations. They relate to IFOR (later SFOR and still later, replaced by the EU's EUFOR), the UN International Police Task Force, the OSCE's Election Commission and other tasks such as economic assistance.[52]

[48] See COUSENS, *supra* note 16, at 803.

[49] At the outset of his tenure, the first High Representative, Carl Bildt, reported on developments relating to the unification of Sarajevo, economic reconstruction, demining, elections, media freedom, human rights, freedom of movement, refugees and displaced persons, prisoners of war, missing persons, police issues, regional stabilization, inter-entity boundary issues, the federal constitution and the Muslim-Croat federation. *Report of the High Representative for Implementation of the Bosnian Peace Agreement to the Secretary-General of the United Nations* (March 14, 1996), available at www.ohr.int/other-doc/hr-reports/default.asp?content_id=3661.

[50] IFOR's mandate is set out in Annex I-A to the GENERAL FRAMEWORK AGREEMENT, *supra* note 21. IFOR is given control over the movement of persons within the country in addition to monitoring all aspects of troop redeployment, disarmament and cessation of hostilities. The IFOR commander "shall have the authority, without interference or permission of any Party, to do all that the Commander judges necessary and proper, including the use of military force, to protect the IFOR and to carry out" the force's security mandate. *Ibid.* art. VI(5). One commentator has described IFOR's powers as "not dissimilar to those of an occupying army." GAETA, *supra* note 44, at 153 note 18.

[51] The OHR's mandate is set forth in Annex X to the GENERAL FRAMEWORK AGREEMENT, *supra* note 21. That mandate was further amplified by Security Council Resolution 1031 and the conclusions of the London Conference on Peace Implementation. See SC RES. 1031, *supra* note 43; *Conclusions of the Peace Implementation Conference Held at Lancaster House* (Dec. 8-9, 1995), available at www.eusrbin.org/int-com-in-bin/pic/1/?cid=356,1,1.

[52] SZASZ, *supra* note 26, at 60.

Early on, the High Representative faced substantial opposition to implementing the Accords, mostly from the Republika Srpska and its political leaders. In response, the Peace Implementation Council (PIC), a body of fifty-five states that functions as the mission's oversight body, met in Bonn in December 1997 and granted the High Representative extraordinary powers to confront local obstructionism.[53] Using the Bonn powers, the five High Representatives have invalidated numerous laws passed by the entities deemed contrary to the Accords.[54] They have also imposed statutes and procedures they believed were required by the Accords, but which were not enacted by the entities or the national government.[55] These have included amendments to the entities'

[53] The High Representative was given authority to make "binding decisions, as he judges necessary," on the following issues:

a. timing, location and chairmanship of meetings of the common institutions;
b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;
c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

PIC Bonn Conclusions (Dec. 10, 1997), available at www.ohr.int/pic/default.asp?content_id=5182#11.

[54] See e.g., Decision Annulling Five RS Laws Concerning State-Level Competencies, which Were Passed in Violation of the Bih Constitution (Oct. 1, 1999) (invalidating five laws enacted by the Serbian entity's National Assembly deemed contrary to the Bosnian Constitution), available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=356; Decision annulling the RS Law on Return of Confiscated Property and Compensation (Aug. 30, 2000) (annulling law of the Serbian entity because it "is flawed both as to procedure and as to substance"), available at www.ohr.int/decisions/plipdec/default.asp?content_id=216; Decision Annulling the Federation Prime Minister's Decision Published in the Federation Official Gazette on 19 October 2000 (Dec. 20, 2000) (annulling decree said to sanction tax and customs fraud), available at www.ohr.int/decisions/econdec/default.asp?content_id=56. Only one other annulment, dated October 2005, was issued after this last Decision. See Decision Annulling the Decision of the Assembly of the Public Enterprise International Airport Sarajevo Changing the Name of the Enterprise (Oct. 14, 2005), available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=35694.

[55] See e.g., Decision Establishing Interim Procedures to Protect Vital Interests of Constituent Peoples and Others, including Freedom from Discrimination (Jan. 11, 2001) (requiring legislatures of both entities to amend their constitutions to implement decisions of the Bosnian Constitutional Court), available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=365; Decision Imposing the Law on the Human Rights Ombudsman of Bosnia and Herzegovina (Dec. 12, 2000) (imposing

constitutions.[56] Most remarkably, the High Representatives have removed numerous elected individuals from office accused of deliberately obstructing implementation efforts. For example, on March 7, 2001, the High Representative removed Ante Jelavic as the Croat member of the three-person national Presidency, a position to which he had been elected:

> As a member of the Presidency of Bosnia and Herzegovina and as party president of a prominent political party in Bosnia and Herzegovina, the HDZ BiH, Mr. Jelavic is and was subject to the fundamental duty to actively uphold the Constitutional order of the country. Furthermore, Mr. Jelavic had an explicit duty to serve the citizens and constituent peoples, in particular the Croat people, of Bosnia and Herzegovina through the legal institutions of the country at all levels.
>
> Instead Mr. Jelavic has directly violated the constitutional order of the Federation of Bosnia and Herzegovina and of Bosnia and Herzegovina. This culminated on Saturday 3 March 2001 in Mostar with the unconstitutional initiative led by Mr. Ante Jelavic to undermine the constitutional order of the Federation of Bosnia and Herzegovina and Bosnia and Herzegovina and establish an illegal parallel structure.
>
> Overall Mr. Ante Jelavic has displayed a pattern of behaviour that seeks to cripple the institutions set up under the General Framework Agreement for Peace in Bosnia and Herzegovina and has thereby seriously obstructed the implementation of the said Agreement.[57]

Dayton thus tied the Bosnian constitutional order directly to international norms and institutions, which were erected as a fail-safe to ensure minimum standards of human rights. National and international law are

law required by Dayton Accords and drafted by international advisors but not acted upon by Bosnian Parliament), available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=364; Decision Imposing Amendments to the Law on Travel Documents Introducing a Single National Passport (Sept. 29, 2000) (imposing law providing for temporary national passports based on commitments made by three Bosnian co-Presidents to Security Council), available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=361.

[56] See Decision Enacting Amendments to the Constitution of the Republika Srpska (Dec. 12, 2005), available at www.ohr.int/decisions/statemattersdec/default.asp?content_id=36230.

[57] Decision Removing Ante Jelavic from his Position as the Croat Member of the BiH Presidency and Further Banning Jelavic From Holding Public and Party Offices (March 7, 2001), available at www.ohr.int/decisions/removalssdec/default.asp?content_id=328. The removals were gradually reversed on a case-by-case basis. On July 7, 2006, facing the imminent elimination of his office, the High Representative reversed all bans except those related to non-cooperation with the ICTY. See Decision Lifting the Ban from Office within Political Parties in the Removal Decisions Issued by the High Representative (July 7, 2006), available at www.ohr.int/decisions/removalssdec/default.asp?content_id=37615.

so fully intermingled that the constitution cannot be said to "posit the whole plan of domestic order."[58] While not governed directly by international actors as in Kosovo, post-Dayton politics in Bosnia were wholly the creation of outsiders, who ran roughshod over any local attempts to chart a different direction.

II. The Kosovo operation

Of the four humanitarian occupations to date, Kosovo stands out.[59] Unlike Bosnia, the international administration of Kosovo did not supervise local governing bodies but (at least initially) governed the population directly. And unlike East Timor and Eastern Slavonia, the occupation of Kosovo had no prescribed end point. It is also the occupation most clearly resulting from the forcible coercion of national authorities.

A. The genesis of the conflict and early international involvement

While historians continue to debate whether the Yugoslav wars of the early 1990s drew on animosities of "ancient" or recent vintage, there is little question that local leaders "harness[ed] historical memory to national causes" with tragically effective results.[60] This was nowhere more evident than in Kosovo. Prior to Tito's rule in the post-World War II era, Kosovars and Serbs had engaged in periodic purges and counterpurges to gain control in the territory.[61] Tito brought general stability, and in 1974, Kosovo – lying wholly within Serbia – was given an autonomous status in the new Yugoslav constitution.[62] But President Milosevic revoked Kosovo's autonomy in March of 1989 and persecution of Kosovo's Muslims escalated in the early 1990s.[63] A corresponding

[58] GRANT, *supra* note 40, at 21.

[59] See generally WILLIAM G. O'NEILL, KOSOVO: AN UNFINISHED PEACE (2002); David Marshall and Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations: Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95 (2003); William Moorman, *Humanitarian Intervention and International Law in the Case of Kosovo*, 36 NEW ENG. L. REV. 775 (2002); David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L. J. 129 (2001); Diane F. Orentlicher, *The Imprint of Kosovo on International Law*, 6 ILSA J. INT'L AND COMP. L. 541 (2000).

[60] NORMAN M. NAIMARK, FIRES OF HATRED 141 (2001).

[61] NOEL MALCOLM, A SHORT HISTORY OF KOSOVO 273-8 (1999).

[62] JULIE MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR 19 (1999).

[63] "Continuing clashes with police led to the arrest of large numbers of Kosovar Albanian activists. Albanian-language schools were closed down. Albanians were

increase in armed actions by the Kosovo Liberation Army (KLA), which by the mid 1990s was calling for secession from Serbia,[64] fueled an even more aggressive Serb response. By 1998, a loud chorus of international actors was issuing repeated condemnations of what had become a two-tiered society in Kosovo.[65]

The difficulty was Slobodan Milosevic. Most NATO countries regarded his actions in Kosovo as simply another chapter in the series of violent conflicts he had initiated in pursuit of a Greater Serbia. As the Canadian ambassador told the Security Council in March 1999, "For ten years we have been witnessing the tragedy being played out in the Balkans: first in Slovenia, next in Croatia and then in Bosnia. During the past year, the same disproportionate violence against the civilians of an ethnic group has prevailed in Kosovo."[66] The ethnic cleansing of Kosovars in particular seemed disturbingly familiar.[67] Serb aggression in Bosnia had only been halted through NATO bombing and a Croatian ground offensive, which the United States had quietly encouraged.[68] The perceived lessons of this history weighed heavily on NATO and its supporters as diplomatic efforts to halt the violence in Kosovo continued with little success in late 1998 and early 1999. As the Bosnian ambassador told the Security Council, "for three and a half years in Bosnia and Herzegovina, people promoted talks, and for three and a half years, the war, the genocide, the aggression and the ethnic cleansing continued. Only after military intervention took place did diplomacy succeed."[69] In Security Council debate, supporters of military action argued again and again that the Belgrade leadership would respond only to force.[70]

A wide range of diplomatic initiatives did indeed precede the NATO bombing campaign of March 1999. In September 1997, the Contact Group, an informal entity composed of the United States, Russia, Britain, France, Germany and Italy, began to coordinate the international

persecuted on the street and in their homes. Many lost their jobs. Serbs were openly favored in economic policies, Albanians clearly discriminated against." NAIMARK, *supra* note 60, at 152.

64 MERTUS, *supra* note 62, at 307-08.

65 See SC Res. 1160 (March 31, 1998); GA Res. 53/163 (Feb, 25, 1998); UN Hum. Rts. Comm'n Res. 1998/79; Declaration by the Presidency on behalf of the European Union Concerning the Upsurge of Violence in Kosovo, 98/18/CFSP (March 3, 1998).

66 UN Doc. S/PV.3988, at 5 (1999).

67 See NAIMARK, *supra* note 60, at 175.

68 HOLBROOKE, *supra* note 17, at 159-60. Action on Kosovo had been avoided at the 1995 Dayton conference because Milosevic's cooperation was deemed necessary to reach settlement of the Bosnian conflict. See Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT'L AFF. 211, 218 (1999).

69 UN DOC. S/PV.3988, *supra* note 66, at 18-19.

70 See *ibid. passim*.

response.[71] The Group's first major initiative came in 1998, following a major upsurge in violence by Serb forces against the KLA and its ostensible popular supporters.[72] Meeting on March 9, the Group called on Yugoslavia to withdraw its special police units from Kosovo and to begin "a process of dialogue" with the Kosovar Albanians.[73] Crucially, the Contact Group proposed a rather ambiguous form of autonomy for Kosovo. This "intermediate sovereignty" – neither full independence nor legal subservience to the Yugoslav federal government – closely foreshadowed the solution ultimately adopted by the Security Council in July:

> We support neither independence nor the maintenance of the status quo. As we have set out clearly, the principles for a solution to the Kosovo problem should be based upon the territorial integrity of the Federal Republic of Yugoslavia, and be in accordance with OSCE standards, the Helsinki principles and the Charter of the United Nations. Such a solution also must take into account the rights of the Kosovo Albanians and all those who live in Kosovo. We support an enhanced status for Kosovo within the Federal Republic of Yugoslavia which a substantially greater degree of autonomy would bring and recognize that this must include meaningful self-administration.[74]

This formula, while ambitious in protecting the Kosovars' human rights, notably rejected the secessionist demands of the KLA. Preserving the territorial integrity of the Federal Republic of Yugoslavia (FRY) would remain a staple of all future diplomatic proposals for Kosovo. This rejection of secession was of course not surprising, given the unyielding effort three years earlier to keep Bosnia intact, as well as the seemingly endless number of minority groups in the Balkans potentially making similar claims. As the Greek ambassador told the Security Council in March 1998, clearly mindful of the situation in Macedonia, while his government sought human rights protections for the Kosovars, it "also insists upon the need to safeguard the inviolability of existing international borders, which is a fundamental and *sine qua non* condition for peace and stability in the Balkans."[75]

[71] Contact Group Foreign Ministers, Statement on Kosovo, New York, 24 September 1997, reprinted in THE KOSOVO CONFLICT AND INTERNATIONAL LAW 121 (Heike Krieger ed., 2001).

[72] Paul Williams, *Earned Sovereignty: the Road to Resolving the Conflict over Kosovo's Final Status*, 31 DEN. J. INT'L L. AND POL. 387, 398 (2003).

[73] Statement on Kosovo adopted by the members of the Contact Group meeting in London on 9 March 1998, Annex, at 4, UN Doc. S/1998/223 (1998).

[74] *Ibid.* ¶ 5.

[75] UN Doc. S/PV.3868, at 27 (1998).

B. *Escalating international involvement*

On March 31, with violence between Yugoslav forces and the KLA little diminished, the Security Council passed Resolution 1160, its first to address Kosovo.[76] Condemning violent acts by both parties, the Security Council endorsed the Contact Group's intermediate sovereignty plan:

> [T]he principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration.[77]

Meeting again on June 12, the Contact Group concluded that little progress had been made, and strongly condemned "Belgrade's massive and disproportionate use of force" in Kosovo.[78] On September 23, the Security Council, in Resolution 1199, echoed the Contact Group's concern over the "excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties."[79] The Council warned that if the measures outlined in Resolution 1160 were not taken, it would "consider further action and additional measures to maintain or restore peace and stability in the region."[80]

At the end of September 1998, news emerged of a massacre near the village of Obrinje in central Kosovo.[81] US Ambassador Holbrooke conducted ten days of negotiations in Belgrade, while on October 13, NATO stepped up pressure on Milosevic by approving an activation order that give the NATO Secretary-General authority to initiate air strikes.[82] The order "was the first time in its history that NATO authorized the use of force against a country due to internal repression."[83] Holbrooke and Milosevic reached an agreement on the same day.[84] While this accord has never been published, "the key provisions included a promise to

[76] SC Res. 1160, at 31 (Mar. 1998). [77] *Ibid.* ¶ 5.
[78] Statement on Kosovo issued by the Foreign Ministers of the Contact Group in London on 12 June 1998, at 2, UN Doc. S/1998/567 (1998).
[79] SC Res. 1199 (Sept. 23, 1998). [80] *Ibid.* ¶ 16.
[81] Malcolm, *supra* note 61, at preface (not paginated).
[82] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 Am. J. Int'l L. 161, 169 (1999).
[83] *Ibid.* [84] UN Doc. S/1998/953, Annex, at 2 (1998).

scale down the Serbian deployment in Kosovo to its pre-February levels, an agreement that all Kosovar refugees could return to their homes, and an acceptance of the presence of an international force of observers to make sure that these pledges were fulfilled."[85] Shortly thereafter, the FRY entered into two separate agreements to verify its compliance with Resolutions 1160 and 1199 and the cease-fire negotiated by Holbrooke. First, on October 15, President Milosevic signed an agreement with NATO providing for monitoring by air.[86] Second, on October 16, Belgrade agreed to allow the OSCE to establish a Kosovo Verification Mission (KVM) of two thousand unarmed observers.[87] The Security Council endorsed both agreements.[88] At first, these initiatives seemed to diminish the level of violence. Yugoslav security forces began withdrawing from Kosovo in late October and the Secretary-General reported in early December that the cease-fire appeared to be holding.[89]

But on January 15, 1999, forty-five Kosovar civilians were massacred in the village of Racak. Many of the victims "appeared to have been summarily executed, shot at close range in the head and neck."[90] When William Walker, the KVM Head of Mission, condemned Yugoslav forces for the massacre, Belgrade declared him *persona non grata*.[91] On January 18, the Chief Prosecutor of the ICTY attempted to enter Kosovo to investigate the Racak killings. Yugoslav officials turned her back at the border.[92] The Security Council condemned each of these actions as "violations of its resolutions and of relevant agreements and commitments calling for restraint."[93]

[85] MALCOLM, *supra* note 61, at preface.

[86] Kosovo Verification Mission Agreement between the North Atlantic Treaty Organization and the Federal Republic of Yugoslavia, Annex, UN Doc. S/1998/991 (1998).

[87] Agreement on the Kosovo Verification Mission of the Organization for Security and Cooperation in Europe, Annex, UN Doc. S/1998/978 (1998).

[88] SC Res. 1203, ¶ 1 (Oct. 24, 1998).

[89] *Report of the Secretary-General prepared pursuant to resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, ¶¶ 6, 14, 16, UN Doc. S/1998/1068 (1998); *Report of the Secretary-General prepared pursuant to resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, ¶ 8, UN Doc. S/1998/11147 (1998).

[90] *Report of the Secretary-General prepared pursuant to resolutions 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council*, ¶ 11, UN Doc. S/1999/99 (1998) (SG January 1999 Report).

[91] OSCE, *Monthly Report on the situation in Kosovo pursuant to the requirements set out in United Nations Security Council resolutions 1160 and 1203*, Annex, at 4, UN Doc. S/1999/214 (1999).

[92] SG JANUARY 1999 REPORT, *supra* note 90, ¶ 12.

[93] Statement by the President of the Security Council, at 2, UN Doc. S/PRST/2 (1999).

C. *The Rambouillet conference*

Pressure on Yugoslavia mounted quickly. Meeting in London on January 29, the Contact Group summoned the parties to Rambouillet, a chateau outside Paris, to negotiate a final political settlement.[94] This was clearly an effort to recreate the successful Dayton meeting for Bosnia. Like at Dayton, the parties at Rambouillet would have little leeway to bargain. The Contact Group "insisted that the parties accept that the basis for a fair settlement must include the principles set out" in prior Group statements.[95] The negotiations were to last for seven days, beginning on February 9. Acting on the same day as the Contact Group, the Security Council endorsed the Rambouillet formula.[96] The next day, January 30, the North Atlantic Council authorized the NATO Secretary-General to initiate air strikes should the FRY not comply with the October 15 agreement.[97] President Clinton would later describe this approach as "diplomacy backed by force."[98]

The proposed agreement presented to the parties at Rambouillet was based on a draft first circulated in October 1998 by Christopher Hill, the US Ambassador to Macedonia.[99] In substance, it hewed closely to the Contact Group formula. Most importantly, while the Rambouillet Accords professed to retain "the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia,"[100] the succeeding eighty-three pages detailed the virtual abnegation of Yugoslav sovereignty over Kosovo. Its nine chapters, which included a constitution for Kosovo, effectively removed all Yugoslav control and set in place numerous overlapping safeguards to ensure that control would not be reasserted while the Accords were in effect.[101]

[94] Statement by the Contract Group Issued in London on Jan. 29, 1999, Annex, ¶¶ 2, 3(d), UN Doc. S/1999/96 (1999).

[95] *Ibid.* ¶ 3(a).

[96] Statement by the President of the Security Council, UN Doc. S/PRST/5 (1999).

[97] Statement by the North Atlantic Council on Kosovo, NATO Press Release No. (99) 12, ¶ 5 (Jan. 30, 1999).

[98] *Remarks on United States Foreign Policy*, Feb. 26, 1999, 1999 Weekly Comp. Pres. Docs. 317, 320.

[99] WELLER, *supra* note 68, at 219.

[100] Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, Annex, at 3, UN Doc. 5/1998/648 (1999).

[101] After a preamble and "Framework" agreement, the Accords contained chapters on: (1) the Kosovo Constitution; (2) Police and Civil Public Security; (3) the Conduct and Supervision of Elections; (4) Economic Issues; (5) Humanitarian Assistance, Reconstruction and Economic Development; (6) Implementation; (7) an Ombudsman;

The Accords would have significantly altered Kosovo's place in the FRY's constitutional structure, providing that the province would "govern itself democratically" through the organs set out in its new constitution.[102] The FRY would retain competence in a few areas having little to do with day-to-day governance.[103] Despite this functional autonomy from the FRY, the new constitution provided that Kosovo would be entitled to at least ten deputies in the FRY's House of Citizens of the Federal Assembly and at least twenty deputies in the National Assembly of the Republic of Serbia.[104] In addition, Kosovo was entitled to at least one judge on the Federal Constitutional Court and Federal Court, as well as three judges on the Supreme Court of Serbia.[105] While prior to 1989, Kosovo had been an "autonomous region," the Accords specified that it would have a status equivalent to other Yugoslav Republics for purposes of conducting foreign relations within areas of its responsibility.[106] The Accords also created an Ombudsman to monitor violations of individual and group rights in Kosovo. The Ombudsman, who was to be chosen from a list of candidates prepared by the President of the European Court of Human Rights, was given "the right to appear and intervene before any domestic, Federal or (consistent with the rules of such bodies) international authority upon his or her request."[107]

Military authority in Kosovo was to be internationalized. The Accords provided that within 180 days all FRY military personnel would be withdrawn from Kosovo.[108] KLA personnel were to be demilitarized and disarmed.[109] In their place, NATO was to create KFOR, an air, ground and maritime force "subject to the direction and the political control of the North Atlantic Council through the NATO chain of command."[110] Any state, whether or not a member of NATO, could participate in KFOR. No other armed forces would be permitted to enter Kosovo without

(8) additional provisions on Implementation; and (9) Amendment, Comprehensive Assessment and Final Clauses.

[102] RAMBOUILLET ACCORDS, *supra* note 100, at 9.

[103] The FRY was given competence over the following areas "except as specified elsewhere" in the Accords:

> (a) territorial integrity, (b) maintaining a common market within the Federal Republic of Yugoslavia, which power shall be exercised in a manner that does not discriminate against Kosovo, (c) monetary policy, (d) defense, (e) foreign policy, (f) customs services, (g) federal taxation, (h) federal elections, and (i) other areas specified in this Agreement.

Ibid.

[104] *Ibid.* at 26. [105] *Ibid.* at 27. [106] *Ibid.* at 10. [107] *Ibid.* at 55.

[108] RAMBOUILLET ACCORDS, *supra* note 98, at 62. [109] *Ibid.* at 64-5. [110] *Ibid.* at 58.

the permission of KFOR.[111] In order to fulfill its mandate, KFOR was empowered "to take such actions as are required, including the use of necessary force."[112]

Finally, the Accords provided in an annex that Kosovo's final status was to be revisited in three years' time:

> Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.[113]

D. War and peace

Not surprisingly, none of the parties took well to the Rambouillet draft. After much arm-twisting, the Kosovar delegation agreed to sign. Belgrade, however, refused. Accordingly, on March 24, the NATO Secretary-General ordered air strikes to begin against the FRY.[114] The bombing, he said in a prepared statement, was intended to secure agreement with the Rambouillet draft.[115] At a Security Council meeting called hastily the same day, the FRY denounced Rambouillet as "not negotiations about the autonomy of Kosovo and Metohija, but a crude and unprecedented attempt to impose a solution clearly endorsing the separatists' objectives, under pressure, blackmail and the threat of use of force against my country."[116] Before the Council again two days later, the FRY repeated the charge of blackmail, arguing that "it has been offered two alternatives: either voluntarily to give up a part of its territory or to have it taken away by force. This is the essence of the 'solution' for Kosovo and Metohija that was offered by way of an ultimatum at the 'negotiations' in France."[117] The Yugoslavs also took their arguments to the International Court of Justice, where on April 29 they requested provisional measures to halt the bombing. Their agent castigated Rambouillet as an attempt "to impose a project of self-government, non-existent anywhere in the world, which encompasses elements of sovereignty and jurisdiction over

[111] *Ibid.* at 59. [112] *Ibid.* [113] *Ibid.* at 88.
[114] Statement by Dr. Javier Solana, Secretary General of NATO, NATO Press Release No. (1999) 040 (March 23, 1999).
[115] *Ibid.* [116] UN Doc. S/PV.3988, *supra* note 64, at 14.
[117] UN Doc. S/PV.3989, at 11 (1999).

and above those of federal units. . .There is no State with a minimum self-respect that could possibly accept such a proposal."[118] The Court refused to grant provisional measures.

Given that no resolution was ever introduced to the Security Council approving the NATO bombing, the FRY's protests of illegality had much potency and have subsequently become the subject of an intense scholarly debate.[119] They failed to move a majority on the Council, however. On March 26, a Russian-sponsored resolution calling for a halt to the bombing was defeated 12-3.[120]

The bombing continued for more than two months. On June 3, one week after President Milosevic was indicted by the ICTY for crimes against humanity, the FRY reached agreement on a peace plan with EU envoy Martti Ahtisaari and special envoy of the Russian Federation Victor Chernomyrdin.[121] The plan consisted of ten "principles" rather than a detailed roadmap for action. The most important of these called for an end to violence in Kosovo, the withdrawal of FRY military police and paramilitary forces and the deployment of an international "civil" and "security" presence in Kosovo. These international forces would function "under United Nations auspices" and would be "acting as may be decided under Chapter VII of the Charter."[122] An interim administration would be established as part of the "civil" presence under which "the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations."[123] Rambouillet, it seemed, had triumphed after all.

On June 10, the Security Council passed Resolution 1244, which approved and elaborated upon the Attishari/Chernomyrdin agreement.[124] Acting under Chapter VII, the Council decided that the

[118] Statement of Mr. Etinski, May 10, 1999, available at www.icj-cij.org/docket/files/105/4473.pdf.

[119] See e.g., Brad R. Roth, *Bending the Law, Breaking it, or Developing It? The United States and the Humanitarian Uses of Force in the post-Cold War Era*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 232 (Michael Byers and Georg Nolte eds., 2003); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 20-44 (2002); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); Antonio Cassese, *Ex Iniuria Jus Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999).

[120] See UN Doc. S/1999/328 (1999) (draft resolution); UN DOC. S/PV.3989, *supra* note 117 (debate and vote). Along with Russia, China and Namibia also voted for the draft resolution.

[121] UN Doc. S/1999/649 (Annex) (1999). [122] *Ibid.* at 2. [123] *Ibid.*

[124] SC Res. 1244 (June 10, 1999).

international civil and security presence in Kosovo would be deployed "under United Nations auspices," though the Council also welcomed "the agreement of the Federal Republic of Yugoslavia to such presences."[125] Civil authority was to be "controlled" by a Special Representative of the UN Secretary-General (SRSG).[126] The security presence would have "substantial North Atlantic Treaty Organization participation."[127]

E. The Interim international administration

The details of the legal framework governing post-war Kosovo are dispersed across a small group of critical documents: the Ahtisaari/Chernomyrdin/FRY agreement, Resolution 1244, two reports of the UN Secretary-General pursuant to that resolution,[128] and a June 9 Military-Technical Agreement between KFOR and the FRY.[129] Together, they delegate to various international organizations virtually all the "classical powers of a state."[130]

All legislative and executive powers in Kosovo, including administration of the judiciary, are vested in the UN Mission in Kosovo (UNMIK).[131] The SRSG, the "highest international civilian official in Kosovo," is to "perform the executive functions of government during the transitional period until new legitimate authorities" are established.[132] He may also issue legislative regulations that "change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration."[133]

The SRSG oversees four components of UNMIK, each of which is controlled by a different international entity: a civilian administration (the UN), humanitarian affairs (the UN High Commissioner for Refugees), institution building (the OSCE), and reconstruction (the EU).[134] The SRSG has authority to appoint and remove all officials of the interim administration.[135] The Security Council directed the interim

[125] *Ibid.* ¶ 5. [126] *Ibid.* ¶ 6. [127] *Ibid.* ¶ 7 and Annex 2, ¶ 4.

[128] UN Doc. S/1999/672 (1999); UN Doc. S/1999/779 (1999).

[129] Military-Technical Agreement Between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, Enclosure, UN Doc. S/1999/682 (1999).

[130] Carsten Stahn, *Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government*, 14 LEIDEN J. INT'L L. 531, 540 (2001).

[131] UN DOC. S/1999/779, *supra* note 128, ¶ 35. [132] *Ibid.* ¶ 18.

[133] *Ibid.* ¶¶ 41, 39. In this, as in all its functions, UNMIK is to be "guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo." *Ibid.* ¶ 42.

[134] UN DOC. S/1999/779, *supra* note 128, ¶¶ 8-14. [135] *Ibid.* ¶ 40.

administration to establish "institutions for democratic and autonomous self-government."[136] Elaborating on this formula, the Secretary-General called for "multi-ethnic governmental structures," the "application of international instruments on human rights,"[137] "pluralistic party structures,"[138] administrative "procedures of democratic governance,"[139] elections,[140] and the creation of a "viable, market-based economy."[141] All these initiatives, the Secretary-General hoped, would contribute to creating "conditions of normalcy in Kosovo."[142]

The international security presence, operating under UN auspices,[143] was initially assigned to oversee the departure of FRY forces from Kosovo as well as to ensure they did not enter the "ground safety zone" and "air safety zone" created as buffers around Kosovar territory.[144] In the longer term, the security forces are to establish a secure environment, deter renewed hostilities, ensure public safety and order, and ensure the safety of officials of the international civil presence, including their freedom of movement.[145] In order to accomplish all these tasks, the security presence was authorized to "take such actions as are required, including the use of necessary force." The commander of KFOR was also given final authority to interpret the terms of the military agreement with the FRY.

As in the Rambouillet Accords, these documents leave plans for Kosovo's final status deliberately vague. The most detailed description of Kosovo's ultimate disposition appears in an annex to the resolution incorporating principles first articled by the G-8 foreign ministers on May 6. This formulation employs language familiar from prior Council resolutions and repeated several times elsewhere in Resolution 1244.[146] The annex formula calls for:

[136] SC Res. 1244, *supra* note 124, ¶ 11(c). [137] UN Doc. S/1999/779, *supra* note 128, ¶ 69.
[138] *Ibid.* ¶ 80. [139] *Ibid.* ¶ 81. [140] *Ibid.* ¶ 84. [141] *Ibid.* ¶ 103. [142] *Ibid.* ¶ 119.
[143] SC Res. 1244, *supra* note 124, ¶ 5.
[144] UN Doc. S/1999/682 (Enclosure), arts. I(3)(d and e), I(4)(a).
[145] SC Res. 1244, *supra* note 122, ¶ 9.
[146] See *ibid.* ¶ 1 (reaffirming prior calls for "substantial autonomy and meaningful self-administration for Kosovo"), *ibid.* ¶ 11(a) (pending final settlement, civil presence will promote "substantial autonomy and self-government in Kosovo, taking full account. . .of the Rambouillet accords"), *ibid.* ¶ 11(e) (stating civil presence will facilitate "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords"), *ibid.* annex 2, ¶ 8 (same), *ibid.* Annex 2, ¶ 4 (stating civil presence should ensure "the people of Kosovo can enjoy substantial autonomy").

A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA.[147]

Unconnected to any specific timetable is a schedule of five stages leading to termination of the UN presence, the third of which will involve "the finalization of preparations for and the conduct of elections to what may be termed the Kosovo Transitional Authority."[148] Efforts to "facilitate the political process designed to determine Kosovo's future states, taking into account the Rambouillet accords, will be intensified during this phase."[149] Whatever the form this future status takes, during the fifth phase "UNMIK would oversee the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement."[150]

Since it was established, the interim administration made full use of its governing powers.[151] Most notably, UNMIK decreed that all laws enacted for Kosovo after March 22, 1989, the date on which Kosovo's autonomy was revoked, were invalid.[152] In May 2001, after intensive debates between UNMIK and local Kosovar leaders, the SRSG promulgated a "Constitutional Framework for Self-Government," which set out a plan to transfer many areas of government and administration to Provisional Institutions of Self-Government.[153] Elections were held for the Kosovo Assembly as well as for municipalities.[154]

F. Final status negotiations

As of this writing, final status discussions for Kosovo are underway and may be headed toward a limited form of independence. But much is

[147] *Ibid.* Annex 1. [148] UN Doc. S/1999/779, *supra* note 128, ¶ 114.
[149] *Ibid.* [150] *Ibid.* ¶ 116.
[151] See generally Tobias H. Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, 44 Ger. Y. B. Int'l L. 353 (2001); Wendy S. Betts, Scott N. Carlson and Gregory Grisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 Mich. J. Int'l L. 371 (2001); F. M. Lorenz, *The Rule of Law in Kosovo: Problems and Prospects*, 11 Crim. L. F. 127 (2000).
[152] *On the Applicable Law in Kosovo*, UN Doc. UNMIK/REG/1999/241 (1999), available at www.unmikonlinexs.org/regulations/1999/reg24-99.htm.
[153] UNMIK Reg. 2001/9 (May 15, 2001). [154] Irmscher, *supra* note 151, at 361.

uncertain. Since 2005, the Secretary-General's Special Envoy, Martti Ahtisaari, had been seeking an accommodation between Serbian demands for continuation of Kosovo's autonomy within Serbia and the Kosovar demand for independence. Despite extensive consultations, he reported in March 2007 that "both parties have reaffirmed their categorical, diametrically opposed positions."[155] Ahtisaari argued that alternatives to independence were not viable. Reintegration into Serbia was unacceptable to the Kosovars, partly as a result of the brutality of the 1999 expulsions but also because eight years of international administration had created an "irreversible" inertia against the return of Serbian rule.[156] And continued international control would retard the emergence of genuine democratic institutions in Kosovo, as well as prolong an uncertainty that stifles foreign investment, integration into the European Union and other development initiatives.[157]

Ahtisaari's solution is "supervised independence", a plan endorsed by the Secretary-General[158] An International Civilian Representative, with powers to annul laws and remove officials similar to those of the High Representative for Bosnia,[159] would have the authority to conclude international agreements and seek membership in international organizations.[160] While the settlement would not include a full constitution for an independent Kosovo (as occurred at Dayton for Bosnia), Ahtisaari's plan contains a long list of items the constitution "must provide."[161] These are mostly intended to preserve Kosovo's multi-ethnic character.[162] On the assumption the transition will not be entirely peaceful, KFOR

[155] *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, UN Doc. S/2007/168, at 2 (2007).

[156] *Ibid.* at 3. [157] *Ibid.* at 4.

[158] The Comprehensive Proposal for Kosovo Status Settlement (Feb. 2, 2007), available at www.unosek.org/unosek/en/statusproposal.html; *Report of the Special Envoy*, *supra* note 155, at 1 (Secretary-General endorses Special Envoy's settlement proposal).

[159] The International Presence, available at www.unosek.org/pressrelease/2007-01-16%20Fact%20Sheet%20ICR-ESDP.doc.

[160] Constitutional Provisions, available at www.unosek.org/pressrelease/Constitution%20011507.doc.

[161] *Ibid.*

[162] For example, the constitution must state that Kosovo is a "multi-ethnic society based upon the equality of all its citizens," prohibit an official religion, provide that Serbian and Albanian will both be official languages, declare that Kosovo will have no territorial claims on neighboring states and guarantee that "non-majority communities will be represented in the Assembly through a system of guaranteed/reserved seats." *Ibid.*

would remain in the territory until Kosovar institutions are "are capable of assuming responsibility for Kosovo's security."[163]

Many questions about the proposal remain to be answered. Will Russia support independence in the Security Council?[164] Since Resolution 1244 affirms Serbia's territorial integrity, a UN independence plan would require a new Council resolution disclaiming that position. Would even a majority on the Council vote for a resolution that compelled the partition of a member state? And even if these obstacles were overcome, what if Serbia forcefully resisted independence? Would NATO forces then reoccupy the territory, essentially returning matters to 1999? What then?

G. Observations

In the run-up to the NATO bombing that ultimately compelled Serb agreement to the internationalization of Kosovo, the UN made clear that the goals sought by each side were unacceptable. The Serbian repression and ethnic cleansing of the Albanian population was deemed a violation of fundamental human rights. The Kosovars had a right to remain in their homes and not to be treated as second-class Yugoslav citizens. But equally, the secession sought by the KLA was unacceptable, as the Security Council repeatedly affirmed the FRY's territorial integrity.[165] The challenge for architects of the post-war occupation was the same as at Dayton: having ruled out changes both to Kosovo's ethnic composition and its external borders, that is, the very factors at the heart of the conflict, how could one avoid a return to the brutalities that had prompted intervention in the first place? The Security Council's answer was to constitute itself, in essence, as the guarantor of a pluralist political order. In part, this was a pragmatic necessity, as the years of conflict with Belgrade had stripped the territory of its "entire administrative and executive superstructure."[166] But the goal was obviously not just orderly administration. Assuming all powers of governance, the international community declared it would bring tolerance, democracy and the rule of law to the territory. It granted itself an indefinite mandate to accomplish this ambitious goal.

[163] The International Presence, *supra* note 159.

[164] See Novosti, *Russia to veto UN Kosovo resolution if PACE backs independence* (Jan. 24, 2007), available at en.rian.ru/world/20070124/59628837.html.

[165] Virtually all resolutions on Kosovo contained such language. Resolution 1244 repeated the point, "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2." SC Res. 1244, *supra* note 122.

[166] Strohmeyer, *Multilateral Interventions*, *supra* note 2, at 112.

Such arrangements obviously cannot last forever. The crucial question is how the eventual winding-down of humanitarian occupation will affect the legal principles that seemingly compelled the mission in the first place. In Kosovo, the Secretary-General decided that years of work to reintegrate feuding political communities had failed and endorsed independence as the only viable option. Does this decision undermine the prior commitment to existing borders? With an all-too-clear awareness of this possible implication, Special Envoy Ahtisaari argued that it did not:

> Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.[167]

III. The East Timor mission

A. From voting to violence

The crisis in East Timor followed the pattern of Kosovo: a reign of government-sponsored terror, intense external pressure to desist and eventual acquiescence to an international administration.[168] Indonesia had invaded East Timor in 1975, after Portuguese colonial authorities hastily withdrew and an internal conflict raged. The occupation was brutal. While no country (save Australia) recognized Indonesian sovereignty over East Timor, and UN organs described it (albeit intermittently) as a case of incomplete decolonization, there was little collective pressure to secure an Indonesian withdrawal.[169] After a change of Indonesian leadership in May 1998, however, the UN secured a commitment from Jakarta to put the political status of the island to a vote of its inhabitants.[170] The agreement provided that if the Timorese voted for independence, there would follow a "transfer of authority in East Timor to

[167] *Report of the Special Envoy*, *supra* note 155, at 4.

[168] See generally IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR (2001); Jarat Chopra, *The UN's Kingdom of East Timor*, 42 SURVIVAL, Autumn 2000, at 29.

[169] See Roger S. Clark, *East Timor, Indonesia and the International Community*, 14 TEMPLE INT'L AND COMP. L. J. 75 (2000).

[170] See *Question of East Timor: Report of the Secretary-General*, Annex I, UN Doc. A/53/951, S/1999/513 (1999) (SG May 5 Report).

the United Nations," which would then supervise the final transition to statehood.[171] Neither the agreement nor the Secretary-General in his report outlining the mission provided any more details about the interim administration.

In June 1999, the Security Council dispatched the UN Mission in East Timor (UNAMET) to organize and monitor the vote.[172] But UNAMET arrived to find conditions hardly conducive to free and fair polling. Violence and intimidation by pro-Indonesian militias had started well beforehand, as the Secretary-General reported to the Security Council: "Despite repeated assurances that measures would be taken by the Indonesian authorities to ensure security in East Timor and curtail the illegal activities of the armed militias. . .credible reports continue to be received of political violence, including intimidation and killings, by armed militias against unarmed pro-independence civilians."[173] One result, he noted, was that most of the pro-independence leaders had either fled the capital or gone into hiding.[174] This was all the more disturbing because the 1998 agreement provided that Indonesian forces would remain responsible for security during the voting.[175] Jakarta, however, rejected calls for an international security force.[176]

Despite this tense atmosphere, turnout for the vote on August 30 was an astonishing ninety-eight percent. Seventy-eight percent of those voting opted for independence.[177] Not unpredictably, an orgy of violence followed. Pro-Indonesian militias rampaged through East Timor, "ransacking towns and forcibly displacing hundreds of thousands of East

[171] *Ibid.* at 7.

[172] SC Res. 1246 (June 11, 1999). Its mandate was "to organize and conduct a popular consultation, scheduled for 8 August, 1999, on the basis of a direct, secret and universal ballot, in order to ascertain whether the East Timorese people accept the proposed constitutional framework providing for a special autonomy for East Timor within the unitary Republic of Indonesia or reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia. . ." *Ibid.* ¶ 1.

[173] *Question of East Timor: Report of the Secretary-General*, ¶ 23, UN Doc. S/1999/595 (1999). The Security Council, via a Presidential Statement, stated on June 29 that it was "especially concerned that the militias and other armed groups have carried out acts of violence against the local population and exercise an intimidating influence over them, and that these activities continue to constrict political freedom in East Timor, thus jeopardizing the necessary openness of the consultation process." UN Doc. S/PSRT/1999/20 (1999).

[174] *Ibid.* [175] SG MAY 5 REPORT, *supra* note 172, Annex III, art. 4.

[176] James Cotton, *The Emergence of an Independent East Timor: National and Regional Challenges*, 22 CONTEMP. S.E. ASIA 1, 7 (2000).

[177] *Question of East Timor: Report of the Secretary-General*, ¶ 31, UN Doc. A/54/654 (1999) (SG December Report).

Timorese to the hinterlands and to West Timor."[178] More than three-quarters of the territory's population was displaced.[179] The Secretary-General reported to the Council credible evidence of involvement by the Indonesian Armed Forces.[180] UNAMET reluctantly withdrew all its personnel from outside the capital, Dili, where conditions were not much better: the UN compound took in two thousand refugees and came under direct siege from the militias.[181] A visiting delegation from the Security Council reported on September 14 that "the Indonesian authorities were either unwilling or unable to provide the proper environment for the implementation of the 5 May agreement."[182]

B. Pressure to internationalize

Indonesia quickly faced pressure from many quarters to reign in the militias or consent to an outside intervention. President Clinton spoke of vetoing new loans to Indonesia from the World Bank and International Monetary Fund, a dire threat given that it came in the midst of the Asian financial crisis.[183] He was supported by the President of the World Bank, who wrote to the Indonesian President on September 8 that "[f]or the international community to be able to continue its full support, it is critical that you act swiftly to restore order, and that your government carry through on its public commitment to honor the referendum outcome."[184] At a Security Council meeting on September 11, many states had apparently concluded that Indonesia would not restrain the militias. After recalling UN temporizing in Bosnia, Rwanda and elsewhere, Council members demanded that Indonesia accept an outside force.[185] The British ambassador declared, "We have unimpeachable evidence from UN and other observers of what is going on. . .If Indonesia is unable to meet its obligations under the 5 May Agreement, it must allow the international community to assist in restoring order and in securing an orderly transition to independence for East Timor."[186] Portugal

[178] *Ibid.* ¶ 32.
[179] Jarat Chopra, *Building State Failure in East Timor*, 33 DEV. AND CHANGE 979, 983 (2002).
[180] SG DECEMBER REPORT, *supra* note 177, ¶ 32.
[181] COTTON, *supra* note 176, at 7. [182] *Ibid.*
[183] See MARTIN, *supra* note 168, at 104, 109, 111; COTTON, *supra* note 176, at 8.
[184] Quoted in MARTIN, *supra* note 168, at 108. Ian Martin observes, "The weight of international pressure building up on Jakarta was well illustrated by the banner headline of the Washington Post of 10 September: 'US, IMF move to isolate Jakarta; Clinton cuts ties to Indonesian military; loan program suspended.'" *Ibid.* at 109.
[185] See UN Doc. S/PV.4043 (1999). [186] *Ibid.* at 9, 10.

declared, "The rape of East Timor has taken place before our eyes. . .The UN cannot afford to – and it must not – once again intervene in a conflict only to stand by helplessly while the process then loses its way."[187] Brazil noted that "[s]ome countries have already indicated their readiness to participate in an international force. . .We expect that the Government of Indonesia will accept this international force without any delay."[188] The Secretary-General also warned, in an unusually blunt statement, that Indonesia had no other options: "The international community is asking for Indonesia's consent to the deployment of such a force. But I hope it is clear that it does so out of deference to Indonesia's position as a respected member of the community of States. Regrettably, that position is now being placed in jeopardy by the tragedy that has engulfed the people of East Timor."[189] The next day, the President of Indonesia informed the Secretary-General that he would agree to a deployment of peacekeepers.[190]

The Security Council first acted to address the security situation, authorizing an Australian-led force (INTERFET) on September 15 to enter East Timor immediately and restore order.[191] Although the Council noted Indonesia's consent to the deployment, it nonetheless invoked Chapter VII and authorized participating states "to take all necessary measures" to restore peace and security.[192] In the wake of the militia's devastation, however, it quickly became apparent that "the civil administration in East Timor was no longer functioning, the judiciary and court systems had ceased to exist and essential services were on the brink of collapse."[193] An argument for immediate, direct UN control thus emerged: if East Timor lapsed into anarchy, the organization could not fulfill its original (and still pending) task of giving effect to the vote for independence. As in Bosnia and Kosovo, commitment to a specific territorial status created the imperative for collective action.

This imperative was fulfilled in Resolution 1272, enacted on October 25, creating the UN Transitional Administration in East Timor

[187] *Ibid.* at 9, 11. [188] *Ibid.* at 18. [189] *Ibid.* at 8.

[190] SG DECEMBER REPORT, *supra* note 177, ¶¶ 32, 34. James Cotton reports that on September 7 the United Nations had "given Indonesia forty-eight hours to stem the violence." COTTON, *supra* note 176, at 8.

[191] SC Res. 1264 (Sept. 15, 1999). [192] *Ibid.* preamble and ¶ 3.

[193] SG DECEMBER REPORT, *supra* note 177, ¶ 37. The Secretary-General later described East Timor as experiencing "a complete vacuum of administrative authority and of policing and justice." *Report of the Secretary-General, Transitional Administration in East Timor*, ¶ 3, UN Doc. S/2000/53 (2000).

(UNTAET).[194] Although Indonesia also consented to this deployment – though it had presumably already done so in the May 5 Agreement – the Council once again invoked Chapter VII to authorize UNTAET to "take all necessary measures to fulfill its mandate."[195] Shortly before Resolution 1272 passed, Portugal informed UN officials that it had no intention of resuming authority in East Timor and that UNTAET would function as its successor, once authorized by the Security Council.[196] UNTAET governed the territory for almost three years, ending on May 20, 2002 when East Timor became independent and joined the UN.

C. The UNTAET mandate

UNTAET's mandate comprised the familiar tasks of nation-building: creation of a regulatory infrastructure, rule of law initiatives, building democratic institutions and training local personnel.[197] It was "endowed with overall responsibility for the administration of East Timor and. . .empowered to exercise all legislative and executive authority, including the administration of justice."[198] The Transitional Administrator had the power to "appoint any person to perform functions in the civil administration in East Timor, including the judiciary, or remove such person."[199] Importantly, the Administrator announced that in fulfilling its mandate UNTAET would be constrained by seven widely subscribed human rights instruments.[200] Indonesian law would continue to apply to the extent it was consistent with these instruments, the Security Council mandate and directives issued by UNTAET. Early on, the Administrator rescinded a series of Indonesian security regulations deemed to be inconsistent with human rights standards.[201]

[194] SC Res. 1272 (Oct. 25, 1999). [195] *Ibid.* ¶ 4.

[196] Chopra, *Building State Failure, supra* note 179, at 984.

[197] *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, ¶¶ 18-50, UN Doc. S/2000/738 (2000). See generally Mark Rothert, *Note, UN Intervention in East Timor*, 39 COLUM. J. TRANSNAT'L L. 257 (2000).

[198] SC Res. 1272, *supra* note 194, ¶ 1.

[199] On the Authority of the Transitional Administrator in East Timor, §1.2, UNTAET/REG/1991/1 (1999) (UNTAET Reg. 1). All UNTAET regulations are available at www.un.org/peace/etimor/UntaetN.htm.

[200] The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and its Protocols, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment and the International Convention on the Rights of the Child. *Ibid.* §2.

[201] UNTAET Reg. 1, *supra* note 199, §3.2.

UNTAET's organizational structure came to resemble that of a government, divided into eight ministerial-like portfolios.[202] It set to work filling the void left by Indonesia's departure and the rampaging militias, issuing regulations, establishing numerous governmental entities and functions and staffing these new institutions. UNTAET's reforms included a new procedure to select judges, a judicial system, a central fiscal authority, a public service commission, a currency (the US dollar), a border service, tax and customs regimes, a treasury, procedures for public budgeting and rules covering the representatives of foreign governments in East Timor.[203] Hansjorg Strohmayer describes the scope of just one of these tasks – rebuilding the Timorese judiciary:

> The preexisting judicial infrastructure in East Timor was virtually destroyed. Most court buildings had been torched and looted, and all court equipment, furniture, registers, records, archives, and – indispensable to legal practice – law books, case files, and other legal resources dislocated or burned. In addition, all judges, prosecutors, lawyers, and many judicial support staff who were perceived as being members de facto of the administrative and intellectual privileged classes, or who had been publicly sympathetic to the Indonesian regime, had fled East Timor after the results of the popular consultation were announced. Fewer than ten lawyers were estimated to have remained, and these were believed to be so inexperienced as to be unequal to the task of serving in a new East Timorese justice system.[204]

D. United Nations statehood?

One highly controversial aspect of UNTAET's rule was its relationship to the Timorese themselves, especially its receptiveness to incorporating their views into its reform agenda.[205] The Security Council had emphasized "the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively."[206] And in his first regulation, the Transitional Administrator pledged that

[202] See UNTAET - Background, available at www.un.org/peace/etimor/UntaetB.htm.

[203] See UNTAET/REG/1999/3 (judicial service commission); UNTAET/REG/2000/1 (central fiscal authority); UNTAET/REG/2000/3 (public service commission); UNTAET/REG/2000/7 (currency); UNTAET/REG/2000/9 (border service); UNTAET/REG/2000/12 (tax and customs regimes); UNTAET/REG/2000/20 (treasury); UNTAET/REG/2000/31 (offices of foreign governments).

[204] Hansjorg Strohmayer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 Am. J. Int'l L. 46, 50 (2001).

[205] See Joel C. Beauvais, *Note, Benevolent Despotism: a Critique of U.N. State-Building in East Timor*, 33 NYU J. Int'l L. and Pol. 1101 (2001); Chopra, *The UN's Kingdom*, *supra* note 168.

[206] SC Res. 1272, *supra* note 194, ¶ 8.

the mission would "consult and cooperate closely with representatives of the East Timorese people."[207] The initial vehicle for doing so, the National Consultative Council, did review and endorse all UNTAET regulations, but its views were purely advisory. Even the Transitional Administrator, Sergio Vieira de Mello, later acknowledged that UNTAET had "retained all the responsibility for the design and execution of policy."[208] Although UNTAET made several efforts in 2000 to make its policy-making more inclusive, complaints of autocratic rule persisted throughout its mission.[209]

UNTAET's relation to the Timorese people raises the broader question of how to understand the UN's authority over the territory. Was UNTAET a kind of trustee with legal obligations running directly to the Timorese? Or was it a trustee for another state with latent rights in the territory? Jarat Chopra has argued that UNTAET was wholly unconstrained during its tenure by any residual powers belonging to a dispossessed sovereign,[210] describing the Timor mission as the only example of "UN statehood."[211] In addition to assuming broad legislative authority, UNTAET did act in several ways like the government of a state. When foreigners arrived at the airport in Dili, a UN official put an "UNTAET" stamp in their passports.[212] UNTAET gave itself authority to administer all property in East Timor previously registered to the Republic of Indonesia.[213] Perhaps most significantly, UNTAET entered into a treaty on behalf of East Timor with the World Bank for a local governance project. At the Bank's insistence, Transitional Administrator de Mello signed the agreement not as a UN representative, but as Timor's head of state. The UN sought to reduce the agreement to a memorandum of understanding, thus avoiding the treaty issue, but the Bank refused and insisted that the agreement function as a treaty.[214]

Competitors to plenary UN power are indeed difficult to identify. Indonesia had acknowledged the results of the independence vote and renounced its previous claim to sovereignty.[215] Portugal, as noted,

[207] UNTAET REG. 1, *supra* note 199, §1.1.
[208] Quoted in SIMON CHESTERMAN, YOU THE PEOPLE 138 (2004).
[209] *Ibid.* at 138-40.
[210] Chopra, *The UN's Kingdom*, *supra* note 168, at 29-30.
[211] Chopra, *Building State Failure*, *supra* note 179, at 981.
[212] James Traub, *Inventing East Timor*, FOR. AFF. JULY/AUG. 2000, at 74. The stamp is pictured on the cover of this volume.
[213] UNTAET REG. 1, *supra* note 199, §7.1.
[214] See Chopra, *Building State Failure*, *supra* note 179, at 984-5.
[215] On October 20, 1999 the Indonesian Assembly "recognized the result of the consultation and revoked the law integrating East Timor within the Unitary State of the Republic of Indonesia." SG DECEMBER REPORT, *supra* note 177, ¶ 39.

disclaimed any vestigial colonial powers and designated UNTAET as its successor in interest. The most serious claim to latent sovereignty would have come from the Timorese people themselves, who were never formally decolonized and therefore continued to possess a right to self-determination during UNTAET's tenure.[216] But a self-determining people is not a state. Even for colonial peoples, the right to self-determination functions as an entitlement to *future* independent statehood within a reasonable time period, not to any particular status during the transition process. This point becomes clear if one thinks of the nature of obligations created by the right. The General Assembly elaborated on colonial powers' obligations to non-self-governing territories (of which East Timor was one) in Resolution 1541.[217] The resolution provided that those obligations would be fulfilled when the territories attained "a full measure of self-government." That, in turn, could occur through: (a) emergence as a sovereign independent state; (b) free association with an independent state; or (c) integration with an independent state.[218] Nothing in the resolution prescribed the manner in which these results were to be achieved. Colonial peoples could be fully consulted or wholly ignored: only the outcome was legally significant during the emergence of self-government.

One might argue that UNTAET held a trust-like obligation to ensure the Timorese' future right to independence. But how would it protect such an expectation interest? Certainly UNTAET would be obliged not to prejudice any substantive rights that inhere in statehood, once achieved, such as sovereignty over natural resources or the well-being of the population. But would this version of trusteeship include an affirmative obligation to include the Timorese in the process of political decision-making? To arrive at this conclusion, one would need to link their exclusion to future substantive harms. This is a difficult hurdle, since there appears to be no *a priori* reason why UNTAET could not wholly exclude the Timorese from its administration and still fully respect and preserve future substantive rights. A benevolent despotism to be sure, but the law of self-determination has little history of criticizing such arrangements.

This question, of course, recalls the debate reviewed in Chapter 1 over the UN Trusteeship system's involvement in governance issues. The Charter required trusteeship powers to move their territories toward

[216] The ICJ noted at the very end of its opinion in the *East Timor* case, which never reached the merits, that "for the two Parties [Australia and Portugal], the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination." Case Concerning East Timor, 1995 ICJ 90, 105-6 (June 30).

[217] GA Res. 1541 (XV) (Dec. 15, 1960). [218] *Ibid.* Annex, Principle VI.

self-government, an obligation extended to all colonial powers by Resolution 1514 of 1960. But this obligation became one of result rather than process. The UN never clearly defined how self-government in colonies was to be constructed and Resolution 1514 is generally seen as abandoning this effort in favor of a demand for immediate independence regardless of the governing structures in place. The argument that the Timorese had affirmative rights of participation in UNTAET is also one of process, and would find little support in the events surrounding Resolution 1514.[219]

If the Timorese did not qualify as residual sovereignty holders, then a vacuum of *de jure* authority did exist and Chopra's view of "UN statehood" appears plausible. On the other hand, neither of the foundational documents of the occupation – the May 5 Agreement, which first contemplated a transitional administration, and Resolution 1272, which established UNTAET – speaks directly to the nature of UN authority over East Timor. Perhaps UNTAET is best viewed as a *sui generis* case of papering over gaps in legal authority. The situation is similar to the former Ottoman territories given to mandatory powers, pursuant to agreements with the League, before the Ottomans had renounced sovereignty in the Lausanne Treaty.[220] All concerned understood that an ambiguous situation would soon be clarified and did not pause to dwell on the temporary legal incoherence.

IV. The Eastern Slavonia mission

The final case of humanitarian occupation is the most limited. The United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) was another response to the Yugoslav wars and the mass population displacements brought about by ethnic cleansing.[221] The mission covered a small portion of Croatia – 160 kilometers from north to south with a population of only 190,000. UNTAES had a narrower mandate than the missions to Bosnia, Kosovo and East Timor. But the imperatives driving the Security Council to action were largely

[219] This question is separate, of course, from whether including Timorese was desirable as a matter of good policy. All UN actors agreed that it was.

[220] See the discussion in Chapter 1.

[221] See generally Lessons Learned, United Nations Department of Peacekeeping Operations, The United Nations Transitional Administration in Eastern Slavonia, Baranja and Eastern Sirimum (1998), available at pbpu.unlb.org/pbpu/view/viewdocument.aspx?id=2&docid=351 (UNDPKO Lessons Learned).

the same as in the other cases: a commitment to existing boundaries, a divided population and a need for outsiders to develop inclusive political institutions that would be acceptable to the diverse groups remaining in the territory.

Eastern Slavonia witnessed the heaviest fighting between the Croatian military and the Yugoslav National Army (JNA) following Croatia's declaration of independence in 1991. Late that year, local Serb forces fighting alongside the JNA seized control of the region and declared its independence from Croatia.[222] In the process, 80,000 Croats were displaced into other parts of the country or into Yugoslavia and Hungary.[223] During the same period, some 75,000 Serbs moved in.[224] In the spring of 1995, the same Croatian offensive that spurred parties to the Dayton peace conference overran Serb controlled areas elsewhere in Croatia and threatened Eastern Slavonia. The Croatian army engaged in its own ethnic cleansing of these areas, largely reversing that which had been accomplished earlier by local Serbs, and appeared headed toward doing the same in Eastern Slavonia. As Derek Boothby writes, "Many in Zagreb voiced eagerness to finish the task by one final military action. The prospect loomed of yet another bloodbath and ethnic cleansing, this time of Serbs fleeing Eastern Slavonia."[225]

As in Bosnia, the looming military threat produced diplomatic results. On November 12, the Croatian government and local Serb groups signed the Erdut Agreement, heading off the Croatian offensive and creating a framework to reintegrate Eastern Slavonia back into Croatia. The remarkably brief (fourteen article) agreement called on the Security Council to create a transitional administration, "which shall govern the region during the transitional period in the interest of all persons resident in or returning to the region."[226] During that period, the region would be demilitarized, refugees and displaced persons returned to their homes, normal public services reestablished and a transitional police force created. The transition would culminate in elections for all local governmental bodies. All parties (including the UN) would ensure "the

[222] Chesterman, *supra* note 208, at 70.

[223] UNDPKO Lessons Learned, *supra* note 221, ¶ 1.

[224] *Report of the Secretary-General Pursuant to Security Council Resolution 1025*, at 3, UN Doc. S/1995/1028 (1996) (SG January Report).

[225] Derek Boothby, *The Application of Leverage in Eastern Slavonia*, *in* Leveraging for Success in United Nations Peace Operations, 117, 119 (Jean Krasno, Bradd C. Hayes and Donald C.F. Daniel eds., 2003).

[226] *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium*, Annex, art. 2, UN Doc. A/50/757, S/1995/951 (1995).

highest level of internationally recognized human rights and fundamental freedoms shall be respected in the region."[227]

On January 15, the Security Council authorized UNTAES as the transitional administration, granting it the powers requested in the Erdut Agreement.[228] The Council affirmed Croatia's territorial integrity and that the territories were "integral parts" of the Croatian state, thus laying the foundation for the mission's goal of "peaceful reintegration of the region into the Croatian constitutional system."[229] The transitional administrator was given overall authority over the military and civilian components of UNTAES.[230] Its mandate built on the Erdut Agreement and covered policing, civil administration, public services, return of refugees, organizing and holding elections and economic reconstruction.

Reintegration proved a complex task. As a starting point for economic redevelopment, the Croatian currency and banking system needed to be phased into the region.[231] Private and public actors were brought together to discuss the integration of Croatian state-owned enterprises.[232] Legal integration could not move forward without an assessment of the decisions and documents issued during the period of Serb administration.[233] Postal and telephone services required reconnection.[234] In all, UNTAES set up fifteen Joint Implementation Committees and Subcommittees to oversee the reintegration of these and other public institutions in the region.[235]

Neither side wholly embraced the initiatives. Croatian officials engaged in active and passive obstruction and returning Serbs were fearful of retribution once they were returned to Croatian rule. In response, UNTAES devised a number of strategies to implement the Security Council's regular call for a functional multi-ethnicity in Eastern

[227] *Ibid.* art. 6. [228] SC Res. 1037 (Jan. 15, 1996).
[229] SG JANUARY REPORT, *supra* note 224, ¶ 6.
[230] SC Res. 1037, *supra* note 228, ¶ 2. This was a much debated point in the run-up to Resolution 1037. The UN Secretariat was opposed to UNTAES being structured as a "blue helmets mission" under UN command after the vicious criticism of UNPROFOR in Bosnia and the UN's pointed exclusion from the Dayton negotiations. The Secretary-General initially recommended a force commanded and supplied by member states rather than the UN. But the US and other powerful states favored a UN force, which is what eventually resulted. See BOOTHBY, *supra* note 225, at 120-22.
[231] *Report of the Secretary-General on the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium*, at 6, UN Doc. S/1996/893 (1996).
[232] *Ibid.* at 7. [233] *Ibid.*
[234] UNDPKO LESSONS LEARNED, *supra* note 221, ¶ 115. [235] *Ibid.*

Slavonia.[236] It sought to head off outside support for local obstructionists, so damaging in Bosnia, by consulting regularly with the Yugoslav and Croatian presidents.[237] Elaborate guarantees were obtained from the Croatian government that Serbs would received equal consideration in employment by state-owned entities, including retention of seniority for the time they had fled the region.[238] And the transitional administrator held regular town-hall like meetings to explain reintegration to the public.[239] At the same time, the administrator bluntly told returning Serbs that they would not receive an autonomous region within Croatia and that reintegration was their only option.[240] An important indication that these measures had some success was the holding of elections in April 1997, which had a remarkably high turn-out and no significant disruptions.[241] The return of refugee and internally displaced Serbs – in one sense the most accurate bellwether of how reintegration was perceived in the region – presents a more complex picture, though not an unsuccessful one, with figures varying depending on time-frame and whether total outflow or just those expressing a desire to return are used as the baseline.[242]

To head off retrenchment after its mandate expired, UNTEAS also negotiated twenty-six separate agreements with the Croatian government that would continue its obligations of equal treatment and full integration. Actual compliance was slower in coming. As the Secretary-General summarized in June 1997, "the institutional reintegration of the territory into the region is being finalized, but the reintegration of the

[236] See SC Res. 1037, *supra* note 228, ¶ 12 (stating UNTAES to "promote an atmosphere of confidence among all local residents irrespective of their ethnic origin"); UN Doc. S/PRST/1997/4, at 2 (1997) (providing the Council "stresses that the restoration of the multi-ethnic character of Eastern Slavonia is important to international efforts to maintain peace and stability in the region of former Yugoslavia as a whole"). Late in UNTAES' tenure the Council linked the mission's continuation to the emergence of inter-ethnic tolerance. SC Res. 1120 (July 14, 1997) ("[T]he pace of the gradual devolution of executive responsibility would be commensurate with Croatia's demonstrated ability to reassure the Serb population and successfully complete peaceful reintegration.").

[237] See e.g., *Report of the Secretary-General on the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium*, at 2, UN Doc. S/1996/883 (1996).

[238] Jacques-Paul Klein, *The United Nations Transitional Administration in Eastern Slavonia (UNTAES)*, 97 ASIL Proc. 205, 206-8 (2003).

[239] Boothby, *supra* note 225, at 127.

[240] Klein, *supra* note 238, at 207.

[241] See Richard Caplan, International Governance of War-Torn Territories 124-6 (2005).

[242] *Ibid.* at 75-7, 227.

people has hardly begun."[243] The mission ended in January 1998 with the situation little changed.[244]

V. Conclusions

In Bosnia, Kosovo, East Timor and Eastern Slavonia the international community assumed supreme executive and legislative authority over territory. While details vary, the path taken to acquiring this authority was the same in each case. A series of egregious human rights abuses prompted an international outcry, more appeared imminent, intense pressure was applied to the target governments and other relevant actors, and negotiations eventually produced consent to an international governing presence. The acts of consent, in each case formalized in a treaty or treaty-like instrument, are of course the crucial acts for international law. While each mission was also supported by a Security Council Chapter VII resolution, consent formally moved the missions into the familiar legal territory of governments inviting outsiders to assist in ending wars, rebuilding infrastructure and maintaining order. Even before the end of the Cold War, the ICJ in the *Nicaragua* case had found nothing remarkable about a state voluntarily assuming international obligations concerning the structure of its own government.[245] As noted earlier, the Secretary-General sought to allay unease about UN involvement in governance matters by invoking the transnational security objectives that had for years underpinned consensual peacekeeping missions.

But as the last chapter made clear, many complexities surround the consent in such cases. If a mission followed the end of a civil war, consent of all the warring parties was needed, not just that of the government. If one of those parties withdrew its consent, as in Cambodia and

[243] *Report of the Secretary-General on the Situation in Croatia*, at 12, UN Doc. S/1997/487 (1997).

[244] Shortly before, in October 1997, the Secretary-General expressed deep frustration with the Tudjman government: "no attempt has been made by the Government of Croatia to lead and support a national programme of reconciliation and confidence-building. The political leadership has yet to prepare the population, at a minimum, to coexist peacefully and to begin to rebuild functioning multi-ethnic communities in the region." *Report of the Secretary-General on the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium*, at 12, UN Doc. S/1997/767 (1997).

[245] Military and Paramilitary Activities (*Nicar.* v. US), 1986 ICJ 14, 131 (June 27) ("A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field.").

repeatedly in Angola, a decision had to be made whether to continue the mission (Cambodia) or halt it until the renegade party renewed its consent (Angola). In some cases, consent was obtained from a regime with only a tenuous hold on power. But in most cases, the consent was real and not coerced. And it usually followed robust bargaining among the parties on the nature and scope of the mission's mandate. The problems surrounding consent, in other words, related to the parties from which it was obtained or its ongoing validity in changed circumstances, not to its initial *bona fides*.

The same cannot be said for the humanitarian occupation missions. Consent came only after extraordinary and concerted pressure had been applied to the target state. In each case, except East Timor, this included the use of military force. Coercion was clearest in Kosovo, where the Yugoslavs eventually consented to an arrangement they had explicitly rejected at Rambouillet and repeatedly denounced in multiple international fora. Although the other cases did not involve such blatantly public reversals by targeted parties, similar patterns were followed. The Bosnian Serbs held seventy percent of Bosnian territory on the eve of the Dayton talks and had Sarajevo surrounded; it was only their absence from Dayton and the thinly veiled fiction of Milosevic as their proxy that made their "consent" possible. Indonesia retained control over security in East Timor under its plebiscite agreement with the UN and refused proposals for an outside force in the run-up to the vote. And Croatian forces were well on their way to routing the remaining Serbs out of Eastern Slavonia before the agreement to deploy UNTAET was reached. For realists, that coercion is necessary before states are willing to give up objectives so clearly entwined with core national interests is unremarkable. But for international lawyers, it raises alarms that will be explored in Chapter 6.

Section II Why humanitarian occupation?

4 Rejected models of statehood

Why in the cases of Bosnia, Kosovo, East Timor and Eastern Slavonia has the international community taken the extraordinary step of divesting national governments of authority over their own territories? Chapters 4 and 5 seek to answer that question by situating humanitarian occupation missions in the context of legal principles addressed to the spasmodic civil wars that prompted the missions in the first place. I will suggest that those principles, when considered together, envision a highly particularized model of the state. I will do so in two parts. This chapter describes models of statehood systematically rejected by international law and therefore unlikely to shape the mandates of occupation missions. The next chapter will describe the new, affirmative model that has emerged in a variety of normative settings. The humanitarian occupation missions may be seen as operationalizing that emerging model. Humanitarian occupation is thus a small but remarkably telling part of a much larger project in international law to reimagine the state, and in particular, its core attributes of population, governance and territory.

The historical review of international governance in Chapters 1 and 2 suggests that a link between those initiatives and norms of statehood is not entirely new. The link is weakest in the earliest cases, which arose from unresolved territorial disputes after World War I and which may be explained in fairly straightforward geo-strategic terms. The mandate and trusteeship regimes share an element of that realist explanation; they were, after all, the colonies of defeated states appropriated and distributed by the victorious powers. But these arrangements also introduced a concern for the welfare of colonial peoples, culminating in demands for their independence. Further on, the UN nation-building missions of the 1990s, while not vesting governmental authority in international actors, deeply embedded outsiders in projects of national

reform. Humanitarian occupation completed the move from rewarding outsiders to securing the interests of insiders, placing the international community in the position of architect of national political institutions. With outsiders – primarily the UN Security Council – asserting legal authority to become the ultimate law-giver in target territories, any meaningful distinction between the national and international was effectively eliminated. No domestic function, it seemed, was beyond regulation by international actors.

One might conclude from this historical progression that the humanitarian occupation is simply the culmination of a widely noted trend toward ever-increasing international involvement in the relations between citizens and their governments. With human rights and principles of democratic governance now accepted as legitimate goals of international law, and with the UN unbound from its Cold War shackles, it was simply inevitable, one could argue, that in cases of extraordinary threats to individual welfare the international community would itself impose a set of governing institutions. Those institutions would comport with norms already prescribed by international law for the target state. The argument, in other words, is that humanitarian occupations are substantively unremarkable, or at least new just in degree but not in kind. It is only the remedy that breaks new ground.

In this chapter, I will argue that while human rights and democratic majoritarianism are important normative catalysts for the missions, they cannot be the entire explanation. This is because democracy and human rights do not presuppose their application to any particular geographic units. The institutions of liberal governance have usually emerged from political transitions in existing states, but they might also apply to newly secessionist or partitioned states. The European Court of Human Rights has even applied its jurisprudence on democratic elections to the European Parliament.[1] Liberal governance, moreover, may operate both in existing heterogeneous states or in states made more homogenous through the removal or exchange of minority populations. Many international relations theorists, particularly those seeking to internationalize theories of social justice such as Rawls', have commented on the moral arbitrariness of existing boundaries and populations.[2] Others, writing in a more pragmatic vein, advocate redrawing specific borders in

[1] *Matthews* v. *United Kingdom*, 1999-I Eur. Ct. H. R. 251.

[2] Thomas W. Pogge, Realizing Rawls (1989); Fernando Teson, Humanitarian Intervention: An Inquiry Into Law and Morality (2nd edn, 1997).

order to further liberal principles.[3] If norms of democracy and human rights were the sole impetus for humanitarian occupations, in other words, changes in borders and demographic profiles would be available as means to facilitate those normative ends.

But they are not. Normative commitments to existing state borders and to maintaining demographic pluralism are equally evident features of contemporary international law. I will argue that the statehood espoused as a normative goal and secured by humanitarian occupations is one in which boundaries and populations are taken as a given, not to be altered through force or coercion. The conflicts within existing states – that some may say have resulted from these very characteristics – are to be addressed through the creation of democratic institutions, minority protection regimes and the institutions of tolerant political culture. Humanitarian occupation missions are thus correctly viewed as extraordinary remedial measures designed to give effect to prevalent norms of governance. But the scope of those norms is much broader than generally supposed. They involve preserving existing states and their population but profoundly reforming their governments.

This explanation for humanitarian occupation suggests a rather remarkable role for international law: as intellectual parent of major military interventions and a new class of internationalized territories. The boldness of this claim should immediately give international lawyers pause. Can it really be the case that international norms are the principal catalyst for humanitarian occupations? Many other explanations for the missions are surely available, for example, the instrumental view (often espoused by the Security Council) that democratic politics is the best means of ensuring peace in fragile post-conflict societies.[4] Certainly, legal analysis is not empirical social science; it does not purport to explain events by evaluating various potential causes and pronouncing one the true explanatory variable.

But the claim need not be stated in cause and effect terms. If an examination of relevant norms were to reveal a *preference* for conditions that made humanitarian occupation likely or even essential to achieve desired ends, that would be sufficient to show a close affinity between the state as modeled by law and the state as shaped in practice by the

[3] Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995).

[4] I examine this claim in Gregory H. Fox, *Democratization*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 69 (David M. Malone ed., 2004).

occupation missions. Whether it is the rules themselves or the critical mass of international opinion supporting their emergence that led to the missions, the point is that legal prescriptions for the state now seem to accurately reflect the preferences of policy-makers. Law may not dictate policy, but if policy and law share an idealized conception of the state, it is appropriate to view the two as sharing a common intellectual pedigree.

I. Introducing the policy options

The legal significance of humanitarian occupation emerges from the choices made by international actors. In each of the four cases the international community has been faced with a state rejecting the most basic tenet of the social contract: the security of its citizens. All four of the missions have proceeded from the assumption that such large-scale, violent assaults by governments against their own peoples are unacceptable. And three of the four cases (excluding East Timor, where a transition to independence was already underway) took the state boundaries within which the violence occurred as immutable.

But why should this be so? If these episodes signified the unraveling of the states involved as coherent political communities, or definitive proof that they were never coherent in the first place, why should international society seek to maintain their integrity? After all, "the modern state, since it emerged out of the ashes of the medieval order, has always been a work in progress."[5] Many European states coalesced only after centuries of violent challenges to political loyalties and authority structures. As Mohammed Ayoob notes, "there was no dearth of 'Somalias' and 'Liberias' in seventeenth- and eighteenth-century Europe."[6]

The first response to the suggestion that "history" in these cases should be permitted to run its course is usually a compelling defense of individual rights: whatever the endgame of forces challenging the status quo in existing states, it is claimed, acquiescence to their objectives would come at a terrible human cost. In the twenty-first century, are we prepared to tolerate ethnic cleansing, mass expulsion, secessionist wars, subordination of minority groups and worse on the theory that efforts to restrain these actions would interfere with the emergence of

[5] Jennifer Milliken and Keith Krause, *State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies*, 33 DEV. AND CHANGE 753 (2002).

[6] Mohammed Ayoob, *State Making, State Breaking and State Failure*, in MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 37, 41 (Chester A. Crocker et al. eds., 1996).

a more "authentic" political order? In an era suffused with individual rights, can international organizations accept such tactics as necessary by-products of nationalist or other claims of group entitlement? Or must they respond, as did the Security Council to the warring ethnic factions in Bosnia, that the individual retains its primacy over the group: "all parties are bound to comply with the obligations under international humanitarian law. . .and [ ] persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches."[7]

But the claims of group entitlement challenging these arguments are equally compelling. Asserting ideological, ethnic, religious or other collective identities, they seek to reverse historical injustices said to have been perpetrated by empires, colonizers, rival groups and regional hegemons. Violence in the course of vindicating these interests, it is asserted, is tragic but unavoidable. How else can history be "undone"? To choose from a potentially endless series of examples, one can quote David Ben-Gurion in a 1941 memorandum discussing the necessity of transferring much of the Arab population of Palestine upon the creation of a Jewish state. "Complete transfer without compulsion – and ruthless compulsion at that – is hardly imaginable."[8]

Which claim of right should international law prefer? Even if individual rights are to be preferred, is it self-evident that they are best served by preserving existing borders and populations? Will the rights of Kosovars, for example, be advanced by insisting that they remain citizens of a majority Serb state? Yet these seem to be precisely the assumptions of humanitarian occupation: that international law should be enlisted to oppose the forces of state implosion and uphold existing borders and demographic profiles.

The question of why the international community has embarked on humanitarian occupations is thus inexorably connected to its view of the state. But there is considerable disagreement as to how international law now regards the state.[9] Adopting one perspective or another may lead to widely divergent conclusions about the goals and even necessity of

[7] SC Res. 764, ¶ 10 (July 13, 1992).

[8] Quoted in Benny Morris, Righteous Victims 169 (1999).

[9] See International Law and the Rise of Nations (Robert J. Beck and Thomas Ambrosio eds., 2002); Sovereignty Under Challenge (John D. Montgomery and Nathan Glazer eds., 2002); Jeremy Rabkin, Why Sovereignty Matters (1998); State Sovereignty: Change and Persistence in International Relations (Sohail Hashmi ed., 1997); Brad R. Roth, *Anti-Sovereigntism, Liberal Messianism and Excesses in the Drive against Impunity*, 12 Finnish Y. B. Int'l L. 17 (2001).

the occupation missions. If, as many writers suggest, the state is being marginalized in a world increasingly populated by international organizations, non-governmental organizations, transnational religious communities and various sub-state groupings, many of which assume functions previously exercised only by states, the rationale for humanitarian occupation is unclear. Others, building on Robert Jackson's work, find "the imposition of statehood as a global norm" ill-suited to much of the developing world, leading some regions to adopt the form but not the substance of the Westphalian order.[10] Many, in Jackson's words, are only "quasi-states."[11] Why send missions to preserve an often dysfunctional form of political organization that can no longer claim a monopoly on the coercive use of force or the provision of security and subsistence to its citizens?

Alternatively, the state might retain its favored status but international law could be agnostic on its specific form, in particular its borders, governing structures and population. On this view, humanitarian occupation also appears suspect. While the internal conflicts prompting the occupations may result in secessions, ethnic cleansing or second class status for national minority groups, states of some kind will emerge after the conflicts run their natural course. This highly pragmatic view would hold a state to be a state to be a state and leave matters there.

Finally, international law might take a highly particularistic view of the state. It might favor specific forms of government, certain rights for citizens, existing or newly crafted borders and/or oppose efforts to create demographic homogeneity. Unlike the first two approaches, this third approach would not allow internal conflicts to run their course. To the contrary, it would seek to reverse the anti-assimilationist goals of the combatants. In contrast to the first two models, this conception would hold humanitarian occupation to be essential. A state wracked by civil war, which by definition signals at least a partial failure of governing institutions, simply cannot survive on its own as a coherent political community. Necessarily, such a state would be incapable of achieving the goals espoused by each of the humanitarian occupation missions – retaining existing borders and requiring the previously warring factions to cooperate in the tasks of governing. To expect self-generating, self-sustaining liberal democracy in such circumstances borders on fantasy.

[10] Christoph Clapham, *The Global-Local Politics of State Decay*, in When States Fail 77, 80 (Robert I. Rotberg ed., 2004).

[11] Robert H. Jackson, Quasi-States: Sovereignty, International Relations and the Third World (1990).

Only an outside force, willing to undertake the enormous task of reconciliation, can hope to accomplish those goals.

In this chapter, I will argue that international law has chosen the third, particularistic view of the state. This is not to say the international community has sought liberal institutions for every state in civil disorder. Many civil wars have raged with virtually no external intervention. Others have seen interventions well below the scale of humanitarian occupation, some quite minimal. But neither has the international community articulated any alternative conception of the state in these cases. Since the early 1990s, the Security Council has taken positions on most large-scale civil conflicts and has routinely called on the parties to respect existing borders and pursue democratic solutions to their differences. Whatever its reason for not taking bolder action in these cases, the Council's statements make clear that it is not disagreement with the state model to be described below.

II. Legal constraints on exclusionary nationalism

The particular model of the state I describe emerged only in the second half of the twentieth century. Traditional notions of domestic jurisdiction had ensured that international law was largely indifferent to matters of internal governance. "In consequence of its internal independence and territorial supremacy, a State can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes, and so on. According to this rule. . .all individuals and all property within the territory of a State are under its dominion."[12] Even when such absolute territorialism began to lose its currency, questions of "governance" did not immediately emerge as a discrete normative category. International law first addressed questions of human rights, which prescribe certain government policies or actions against citizens. Norms concerning the selection and structures of a government itself are largely a product of the last decade.[13]

International law also had little to say about territorial change. The absence (prior to the UN Charter) of a legal prohibition on the unilateral use of force meant that collective decisions about the legitimacy

[12] Oppenheim's International Law 255-6 (H. Lauterpacht ed., 1947).

[13] See generally Democratic Governance and International Law (Gregory H. Fox and Brad R. Roth eds., 2000).

of forcible territorial change – annexation, secession and the like – were simply not a regular feature of the legal landscape. Even if a consensus on particular territorial changes were reached, no effective institution existed prior to the UN Security Council to translate the consensus into collective action. Finally, even when governance and territory were occasionally the subject of legal prescriptions (as opposed to one-off political arrangements), they were rarely addressed together. The legal distinction between recognition of states and recognition of governments severely limited opportunities for outsiders to couple support for particular territorial states with prescriptions for governance *within* those states. Thus, states seeking to advance liberal governance would have been forced to choose between, on the one hand, continuing to recognize a non-liberal *heterogeneous* state that denied minority rights and, on the other, recognizing that minority's secessionist movement in the hope it would produce a more liberal *homogeneous* state. The requirement that a new state have *a* government in order to merit recognition, while certainly a traditional element of statehood, did not imply that states have any particular form *of* government.

This agnosticism toward issues of governance and territory is rapidly fading. The acts of exclusionary nationalism that prompted humanitarian occupation are now condemned by international law in all their particulars. The integration of human rights into virtually every corner of inter-state relations has solidified minimum standards of conduct for governments' treatment of their citizens.[14] Norms of physical integrity, equality and political pluralism have replaced indifference toward the more destructive aspects of ethno-nationalism. These norms have fundamentally revised international expectations about the relation between individuals and territory. As Jennifer Jackson Preece writes, whereas the ethno-nationalist view sought to "secure a better fit between boundaries and ethnic identities," the new civic notion of statehood seeks "to foster a shared political identity that could accommodate ethno cultural diversity within pre-existing territorial units."[15] Under the ethno-nationalist

[14] As Judge Weeramantry has observed, "In its ongoing development, the concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. We have reached the stage, today, at which the human rights of anyone, anywhere, are the concern of everyone, everywhere. The world's most powerful States are bound to recognize them, equally with the weakest." *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia) (Preliminary Objections)*, 1996 ICJ 595, 640, 647 (July 11) (separate opinion of Judge Weeramantry).

[15] Jennifer Jackson Preece, *Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms*, 20 HUM. RTS. Q. 817, 842 (1998).

view, the international community might address ethnic conflict by treating borders and national demographic profiles as malleable. Under the civic nationalist view, borders and populations are taken as essentially immutable; it is a government's failure to accord equal rights to all its citizens that is subject to change.

A useful example is the General Assembly's 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, which is addressed directly to the dilemmas of heterogeneous states.[16] The Declaration affirms the validity of pluralism and requires states to construct legal protections to ensure its survival: "the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law."[17] But those rights are to be exercised *within existing states*, as none of the rights affirmed in the Declaration may permit "any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States."[18] Commentary on the Declaration affirms that "minority rights cannot serve as a basis for claims of secession or dismemberment of the state."[19]

Beginning in the 1990s, when the international community began to respond regularly to destructive civil wars, its actions reflected this notion of civic pluralism. Each rejected aspect of the ethno-nationalist view once represented a potential, though often horrific, "solution" to internal conflict. But now, one virtually discredits these options merely by listing them.

A. No legal support for homogeneity achieved through murder, subordination or forcible conversion

Nationalist movements have sometimes attempted to "solve" their minority problems by direct and brutal means. The Nazi party, Rwandan Hutus, Khmer Rouge and others tried to eliminate disfavored groups in their midst through mass murder. Until the mid-twentieth century, international law passed no judgment on such acts. In the midst of Ottoman Turkey's genocide against its Armenian population, for example, American Ambassador Henry Morgenthau noted with frustration, "I had no right to interfere. According to the cold-blooded legalities of

[16] GA Res. 47/135 (Dec. 18, 1992). [17] *Ibid.* preamble. [18] *Ibid.* ¶ 8(4).
[19] *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1 (2000).

the situation, the treatment of Turkish subjects by the Turkish government was purely a domestic affair; unless it directly affected American lives and American interests, it was outside the concern of the American Government."[20] Today such acts are unequivocally condemned by a host of international norms, especially those concerning genocide and extra-judicial killing.[21]

Short of liquidating disfavored groups, other governments have reduced these segments of their populations to permanent subordinate status, the most prominent being the apartheid regimes in South Africa and Southern Rhodesia. International norms of equality now preclude these tactics as well.[22] Still other regimes, faced with groups defined by non-immutable characteristics such as religion or language, have sought to convert these groups forcibly to the dominant national practice. Norms protecting freedom of religion and the integrity of cultural practices forbid such coercive assimilation.[23] The international legal system is now sufficiently infused with a pluralist ethos that no argument of group entitlement or historical injustice can legitimize these practices.

[20] Quoted in SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 8 (2002).

[21] See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; International Covenant on Civil and Political Rights, art. 6(1), Dec. 19, 1966, 99 U.N.T.S. 171 (ICCPR) (no arbitrary deprivation of life); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 (European Convention) (right to life); American Convention on Human Rights, art. 4, Jan. 7, 1970, OEA/Serv. K/XVI/1.1, Doc. 65, Rev. 1, Cor. 1 (American Convention) (right to life); African Charter on Human and Peoples' Rights, art. 4, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5 (African Charter) (no arbitrary deprivation of right to life and integrity of the person).

[22] The Rome Statute of the International Criminal Court designates apartheid as a crime against humanity. Statue of the International Criminal Court, art. 7(1)(j), U.N. Doc. A/CONF.183/9* (2002). See also International Convention on the Suppression and Punishment of the Crime of Apartheid, GA Res. 3068 (Nov. 20, 1973); ICCPR, *supra* note 21, art. 2(1); EUROPEAN CONVENTION, *supra* note 21, art. 14; AMERICAN CONVENTION, *supra* note 21, art. 1, AFRICAN CHARTER, *supra* note 21, art. 2; European Framework Convention for the Protection of National Minorities, Council of Europe, E.T.S. No. 157, Strasbourg 1.II, 1995; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Doc. A/Res/36/55 (Nov. 25, 1981).

[23] ICCPR, *supra* note 21, art. 18; EUROPEAN CONVENTION, *supra* note 21, art. 9; AMERICAN CONVENTION, *supra* note 21, art. 12; AFRICAN CHARTER, *supra* note 21, art. 8; DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE, *supra* note 22.

B. No legal support for secession or partition

1. The argument for separation

Groups facing persecution within states often choose, quite sensibly, to leave. In Kosovo, the option of secession at the outset of the crisis presented an appealing long-term solution: the Kosovars would obtain the legal protections afforded by sovereign statehood and the dislocation involved would arguably be minimal, since the population was already over ninety percent Albanian.[24] Secession would also relieve the international community of ensuring Kosovo's viability as a functioning political community. The ferocity of ethnic violence in the territory, as well as the oft-repeated view that such conflicts are "ancient" or "endemic," led many commentators to deride pluralism as wholly alien to the region.[25] Some observers of the Balkans advocated an internationally sanctioned secession or partition as the most pragmatic solution for states they described, in effect, as dysfunctionally heterogeneous.[26] Others have made the same argument for Africa or for ethnically divided states more generally.[27] Chaim Kaufman argues that distinctive aspects of ethnic civil war - the inflexibility of group loyalties, the necessity of controlling territory in order to deny rival groups a "mobilization base" and the inability of existing state structures to satisfy the groups' mutually inconsistent power demands - require the separation of rivals in order to alleviate the anarchy leading to conflict.[28] According to Kaufman:

[24] Like any other state, an independent Kosovo would enjoy a right of territorial integrity, protecting it against external intervention. UN Charter, art. 2(4). It would also be entitled to exercise a right to self defense, to seek assistance from the Security Council, and, assuming jurisdictional requisites were met, to bring a claim to the International Court of Justice. See UN Charter, art. 51 (states possess inherent right to self-defense); *ibid.* art. 35 (right of member and non-member states to bring issues of peace and security to attention of Security Council); Statute of the International Court of Justice, art. 34(1) ("Only states may be parties in cases before the Court.").

[25] See e.g., ROBERT D. KAPLAN, BALKAN GHOSTS 3-71 (1994) (discussing Yugoslavia's history of ethnic hatred).

[26] See Aleksa Djilas, *A House Divided*, THE NEW REPUBLIC, Jan. 25, 1993, at 38; Thomas L. Friedman, *Is Kosovo Worth It?*, NY TIMES, Mar. 2, 1999, at A19; Chaim Kaufman, *When All Else Fails: Evaluating Population Transfers and Partition as Solutions to Ethnic Conflict*, in CIVIL WARS, INSECURITY AND INTERVENTION 221-60 (Barbara Walter and Jack Snyder eds., 1999).

[27] See PIERRE ENGLEBERT, STATE LEGITIMACY AND DEVELOPMENT IN AFRICA 181-9 (2000); MUTUA, *supra* note 3.

[28] Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, 20 INT'L SEC. 136 (Spring 1996).

Ethnic separation does not guarantee peace but it allows it. Once populations are separated, both cleansing and rescue imperatives disappear; war is no longer mandatory. At the same time, any attempt to seize more territory requires a major conventional military offensive. Thus the conflict changes from one of mutual pre-emptive ethnic cleansing to something approaching conventional interstate war in which normal deterrence dynamics apply.[29]

In the view of its proponents, separation has an unassailable practicality: "State borders should not be seen as permanently fixed if their continuations will do nothing but foster more hatred, oppression and violence."[30]

2. The rejection in practice

Whatever the merits of these claims, international actors have consistently refused to endorse secession as a primary or even secondary policy option. A preference for existing borders is reflected in the critical legal instruments setting out a right to self-determination, the norm most frequently invoked by secessionists.[31] More importantly, virtually without dissent, states and international organizations in the post-colonial era have subordinated claims of self-determination to the principle of maintaining states' territorial integrity. Secessionist movements have repeatedly failed to gain the imprimatur of a legal entitlement to secede during the course of their struggles: groups with short (Biafra, South Yemen),[32]

[29] *Ibid*. at 150.

[30] Daniel L. Byman, Keeping the Peace: Lasting Solutions to Ethnic Conflicts 174 (2002).

[31] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (Oct. 24, 1970) (Friendly Relations Declaration) (describing "peoples" right to self-determination with caveat that "[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"); Declaration on the Granting of Independence to Colonial Countries and Peoples, ¶ 6, GA Res. 1514 (XV) (Dec. 14, 1960) [hereinafter Declaration on Colonial Peoples] ("Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."). For a discussion of the Friendly Relations Declaration, making clear it does not create a generalized exception to its anti-secession principle for non-democratic governments, see Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus*, 16 Mich. J. Int'l L. 733, 740 (1995) (Fox, *Self-Determination*).

[32] See Thomas D. Musgrave, Self-Determination and National Minorities 198 (1997) (Biafra); James Crawford, *State Practice and International Law in Relation to Succession*, 69 Brit. Y. B. Int'l L. 85, 108 (1999) (South Yemen).

medium (Chechnya, Abkazia, Ngorno-Karabakh, Somaliland)[33] and long-standing claims (Cyprus, Eritrea, Quebec, the Basque region, Mayotte)[34] have all failed to garner support from the UN and regional organizations and have only received scant, half-hearted support from individual states.[35] Neither is support evident in interventions under UN auspices, which has never favored secessionist movements.[36] Indeed, the UN virtually drove itself to bankruptcy and constitutional collapse in attempting to prevent secession by the Katanga province of the newly independent Congo in 1960.[37]

[33] See DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 383 (2002) (Abkhazia); *Ibid.* at 375 (Chechnya); Arnen Tamzarian, *Nagorno-Karabagh's Right to Political Independence under International Law*, 24 SW. U. L. REV. 183, 203 (1994) (Nagorno-Karabakh); *Somalia: IRIN Special - A Question of Recognition* (Parts 1 and 2) (July 10, 2001), available at www.reliefweb.int/rw/RWB.NSF/db900SID/OCHA64C6FW?OpenDocument&rc=1&cc=som and www.reliefweb.int/rw/RWB.NSF/db900SID/ACOS-64CKN3?OpenDocument&rc=1&cc=som (quoting UN Special Representative for Somalia as saying that a May 31, 2001 independence referendum in Somaliland was "clearly not an internationally recognised referendum, and the outcome has no validity in the international community").

[34] David Wippman, *International Law and Ethnic Conflict in Cyprus*, 31 TEX. INT'L L. J. 141, 147 (1996) (Cyprus); EYASSU GAYIM, THE ERITREAN QUESTION (1993) (Eritrea); SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED (Anne F. Bayefsky ed., 2000) (Quebec); C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession* in *Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 591 (1999) (Basques); MUSGRAVE, *supra* note 32, at 182--5 (Mayotte).

[35] Two settlements to internal conflicts have provided for the possibility of secession if a majority in the affected territory agrees in a referendum. See Machakos Protocol, July 20, 2002, available at www.usip.org/library/pa/sudan/sudan_machakos07202002_toc.html (potential secession of Southern Sudan); Bougainville Peace Agreement, Aug. 30, 2001, available at www.usip.org/library/pa/bougainville/bougain_20010830.html; (potential secession of Bougainville from Papua New Guinea). But these potentially consensual secessions would not be accomplished pursuant to a legal right asserted against the parent state, but by leave of that state. For a discussion of the distinction between consensual and non-consensual partitions, see text accompanying notes 66--77, *infra*.

[36] While the UN Charter affirms the self-determination of peoples in Articles 2 and 55, the 1945 San Francisco Conference also made clear that self-determination "implied the right of self-government of peoples and not the right of secession." *Summary Report of 6th Meeting of Committee I/1*, 6 U.N.C.I.O. 296 (1945). None of the sixty-one peacekeeping operations mounted by the UN since 1948, nor any of the eleven "political and peace-building" operations have manifest support for secessionists. See Background Note: United Nations Peacekeeping Operations (Aug. 31, 2006), available at www.un.org/Depts/dpko/dpko/bnote.pdf (listing operations); Background Note: United Nations Political and Peace-Building Missions (Aug. 31, 2006), available at www.un.org/Depts/dpko/dpko/ppbm.pdf (same).

[37] See THOMAS M. FRANCK AND JOHN CARREY, THE LEGAL ASPECTS OF THE UNITED NATIONS ACTION IN THE CONGO (1963).

James Crawford has undertaken perhaps the most comprehensive review of state responses to secessionist claims. He reports that since 1945, "no State which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor State." While some states may, episodically, find reasons to support secessionists, every state has an interest in the territorial integrity norm. Thus, "[w]here the government of the State in question has maintained its opposition to the secession, such attempts have gained virtually no international support or recognition, and this has been true even when other humanitarian aspects of the situations have triggered widespread concern and action."[38]

Three cases require more extended analysis. The first is Montenegro's separation from Serbia in June 2006. One might well ask whether Montenegrin independence suggests a counter-trend toward greater acceptance of secessionist claims. The agreement providing for secession was negotiated with the assistance of the European Union. And there was no opposition to Montenegro's successful application for UN Membership.[39] But several factors suggest this case should not be viewed as a significant deviation from the international community's preference for territorial integrity.

First, the EU, which took the diplomatic lead, expressed a clear preference for avoiding secession. As relations between Serbia and Montenegro deteriorated in the late 1990s, Montenegro proposed dissolution of the FRY in the manner of Czechoslovakia's 1993 "velvet divorce." The EU (and the US) rejected the proposal, emphatically so after the 1999 Kosovo intervention when independence for Montenegro might have encouraged pro-independence Kosovars, a result Western powers actively opposed.[40] In 2001, the EU's High Representative Javier Solana declared, "The European Union fully supports a democratic Montenegro within a democratic Yugoslavia. The EU opposes any unilateral steps which could run contrary to the stability of the region."[41] He later expressed "the European Union's strong preference for a genuine reform of the Federal Republic of Yugoslavia" and "warned against completely unfounded

[38] CRAWFORD, *supra* note 32, at 108. [39] See GA Res. 60/264 (July 12, 2006).

[40] See Srdjan Darmanovic, *Montenegro: Dilemmas of a Small Republic*, 14 J. DEMOC. 145, 151 (2003).

[41] Statement by Dr. Javier Solana, EU High Representative for the CFSP, After the Results on the Montenegro Elections (April 23, 2001), available at www.consilium.europa.eu/cms3_applications/applications/solana/details.asp?cmsid=335&BID= 109&DocID= 66158&insite=1.

expectations that an independent Montenegro would be on a fast track to EU membership."[42] The EU even dangled a more certain track to Union membership if a unified FRY pursued necessary reforms.[43]

Second, the separation came not via armed struggle or leveraging for outside recognition, but through a negotiated settlement. The 2002 Belgrade Agreement transformed the FRY into the radically decentralized Serbia and Montenegro, and provided that the union could be dissolved after three years.[44] The EU saw the Agreement as a last effort to hold the FRY together and leaned heavily on Montenegro to accede.[45] But in May 2006, Montenegro exercised its option and held a referendum in which voters overwhelmingly favored independence. The fact that Belgrade agreed to this chain of events substantially diminishes the claim that separation occurred pursuant to an international legal entitlement; as we will see shortly, such consensual separations are better seen as matters of private contract between the two entities. While formal consent to separation may mask coercive pressures on a parent state, that does not appear to have been the case for Montenegro. Serbian officials were in fact somewhat relieved by the clarity the Belgrade Agreement brought to the troubled federation and, according to one report, were content to have the independence question decided by referendum.[46] Their accession to a referendum was almost certainly influenced by the possibility that pro-Serbian forces might prevail, since Montenegrin parties in 2002 were themselves split on the desirability of independence.[47] The Belgrade Agreement, in other words, was not a clear affirmation of secession by either party.

Third, given the turmoil of the fifteen years following the demise of the SFRY, Montenegrin independence is best understood as the final

[42] Press Release, Javier Solana, EU High Representative for the CFSP, Urges Podgorica and Belgrade to Resume Talks Promptly (Nov. 27, 2001), available at www.consilium.europa.eu/cms3_applications/applications/solana/details.asp?cmsid=335&BID=109&DocID=68596&insite=1.

[43] The assurances were given in the 2002 Belgrade Agreement. Agreement on Principles between Serbia and Montenegro within the State Union, March 14, 2002, available at www.usip.org/library/pa/serbia_montenegro/serbia_montenegro_03142002.html. See Nathalie Tocci, *EU Intervention in Ethno-Political Conflicts: the Cases of Cyprus and Serbia-Montenegro*, 9 EUR. FOR. AFF. REV. 551, 562-3 (2004).

[44] *Agreement on Principles between Serbia and Montenegro*, *supra* note 43.

[45] DARMANOVIC, *supra* note 40, at 151; see also International Crisis Group, *Still Buying Time: Montenegro, Serbia and the European Union* (ICG Balkans Report No. 129) (May 7, 2002) ("The agreement was the direct outcome of the European Union's determination to block Montenegrin separatism and keep the two republics together.").

[46] See INTERNATIONAL CRISIS GROUP, *supra* note 45, at 2, 6. [47] *Ibid.* at 12.

stage of that state's dissolution. Montenegro was a constituent republic of the SFRY and as such could have sought independence in the same manner as all the other republics (save Serbia) upon the collapse of the federal government in 1991. It chose federation with Serbia during the mid-1990s, but as early as 1997, dissatisfaction with President Milosevic's autocratic rule led some Montenegrin leaders to embrace pro-independence policies.[48] That this chapter in Yugoslavia's dissolution was delayed for several years and came about through a circuitous route does not place it outside the process of dissolution.[49] Montenegro, on this view, stands on very different footing from secessionists seeking to leave long-established states.

The second case is actually two: the break-ups of the Soviet Union and former Yugoslavia. Because the timing of the dissolutions and subsequent recognitions share critical similarities, they may be considered together. Both are frequently cited as examples of legally sanctioned secession, since the successor states were widely recognized and admitted to the UN. But those recognitions came well after the successors' independence was a legal fait accompli. In Yugoslavia, the first recognitions by Germany and Italy of Slovenia and Croatia on December 23, 1991 came shortly *after* the Badinter Commission had declared on December 7 that the Yugoslav federal state had effectively ceased to function and was "in the process of dissolution."[50] In the case of the Soviet Union, the Baltic states - the first to leave - were recognized by the vast majority of states and international organizations only after President Yeltsin had issued a decree on August 24, 1991, recognizing Latvia and Estonia as independent (the Soviets had already recognized Lithuanian independence in 1990).[51] And the USSR's formal dissolution was described as fully consensual by all its successor states in the Alma Ata Declaration.[52]

[48] European Stability Initiative, Sovereignty, Europe and the Future of Serbia and Montenegro: A Proposal for International Mediation 6-7 (2001), available at www.esiweb.org/pdf/esi_document_id_13.pdf.

[49] The Secretary-General's Special Envoy on the future status of Kosovo took a similar view of that territory's potential independence, describing it as the "last episode in the dissolution of the former Yugoslavia." *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, UN Doc. S/2007/168, at 5 (2007).

[50] Fox, *Self-Determination*, *supra* note 31, at 744-5 (citations omitted).

[51] *Ibid*. at 744.

[52] *Alma Ata Declaration*, UN Doc. A/47 /60 - S/23329 (Annex II) (1991). Actual declarations of independence substantially pre-dated *Alma Ata*, the last being Turkmenistan's on October 27, 1991. Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czeckoslovakia*, 23 Denv. J. Int'l L. and Pol'y 1, 3 and note 6 (1994-1995).

Its dissolution also predated the successors' recognition and admission to the UN.[53] As I have written elsewhere,

> The strongest opinio juris that could have emerged from either break-up would have been statements of an entitlement to self-determination before the fact of independent statehood was clearly evident. Established conceptions of the self have followed this pattern. Resolution 1514 was such a general statement regarding colonial territories, as was the General Assembly's recognition of SWAPO, the ANC, and the PLO as 'legitimate' representatives of peoples well before independence (or majoritarian elections) were presented to the Assembly as a fait accompli. . .Recognition after statehood has been achieved, or after the state resisting independence finally acquiesces, does not necessarily affirm a prior right to seek independence. It may simply constitute a recognition by states or international organizations that according to the prevailing declarative theory, a new state has come into existence and must be dealt with as such.[54]

The third case is Kosovo, which, as discussed in the previous chapter, appears (as of this writing) headed toward Bosnian-style statehood with an international administrator possessing final authority to veto laws and remove elected officials deemed resistant to implementing the final settlement plan.[55] Is Kosovo thus a contrary precedent? Many obstacles exist to implementing the independence plan, most notably a potential Russian veto of a Security Council resolution reversing Resolution 1244's commitment to Serbia's territorial integrity. Even if the obstacles are overcome, 1244 makes clear that independence was hardly the Security Council's preferred outcome. The plan's architects have gone to great lengths to reaffirm this approach by issuing what might be described as negative *opinio juris*. The Secretary-General's Special Envoy declared in his report describing independence that "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts."[56] Similarly, Britain told the Security Council in late 2006, "There is no read across - nor will we let there be any read across - between the settlement of Kosovo's status and that of other countries in the region."[57] In the same meeting, Finland, speaking on behalf of the EU, sought "to make it clear that we see the question of

[53] The United States recognized the former Soviet republics on December 25, the European Community on December 31 and the UN admitted those seeking membership (with the exception of the Baltics, which had been admitted in September, 1991) in 1992. WILLIAMS, *supra* note 52, at 3; Roland Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 E.J.J.L. 36, 44-7 (1993).

[54] Fox, *Self-Determination*, *supra* note 31, at 743.

[55] See the discussion in Chapter 3, pages 95-7 *supra*.

[56] *Report of the Special Envoy*, *supra* note 49, at 4.

[57] UN Doc. S/PV.5588, at 19 (2006).

Kosovo's status as *sui generis*. The outcome of the status process will not set a precedent for other regions."[58] These are careful efforts to avoid rather than create a precedent.

Thus, stated bluntly, with largely academic exceptions at the margins, there is no legal right to secession.[59] While international law does not *prohibit* secession, it generally will not endow groups seeking to dismember existing states a legal entitlement to do so. Some sources maintain that an exception exists in situations of egregious human rights abuses or an inability of a "people" to participate in the government of their parent state.[60] But this "exception" exists largely (if not wholly) in theory, since there are no cases in which individual states or international organizations have endowed groups facing repression or exclusion from national politics with a legal entitlement to secede.[61] Perhaps the exception lingers on in discussions of self-determination in order to save the principle from complete desuetude in a post-colonial era.

Finally, if neither repression nor exclusion has ever been held to trigger an entitlement to secession, then a mere preference for separation certainly cannot. Crawford confirms that there has been "no recognition of a unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory."[62] The lack of any positive international response to the September 2006 independence referendum in Transnistria is illustrative.[63]

3. Procedural limitations and transaction costs

Secessionist groups have received a chilly reception despite compelling histories of conquest and repression. Reversing these acts and restoring a

[58] *Ibid.* at 22.

[59] Ved P. Nanda, *Self-Determination and Secession under International Law*, 29 DENV. J. INT'L L. AND POL. 305, 325 (2001) ("[I]t is fair to conclude that the United Nations and its member states do not support claims for unilateral secession."); Alfred P. Rubin, *Secession and Self-Determination: A Legal, Moral and Political Analysis*, 36 STAN. J. INT'L L. 253 (2000).

[60] See Canadian Supreme Court, Reference re Secession of Quebec, reprinted in 37 INT'L LEG. MAT'L 1340 (1998); AFRICAN COMM'N ON HUMAN AND PEOPLES' RIGHTS, EIGHTH ANNUAL ACTIVITY REPORT OF THE COMMISSION ON HUMAN AND PEOPLES' RIGHTS, ¶ 6, 31st Sess., Case 75/92, *Katangese Peoples' Congress* v. *Zaire* (1995); FRIENDLY RELATIONS DECLARATION, *supra* note 31.

[61] If the purported exception is "taken to mean that unilateral secession is permissible where the government is constituted on a discriminatory basis, it is doubtful whether the proviso reflects international practice." CRAWFORD, *supra* note 32, at 117.

[62] *Ibid.* at 116.

[63] Press Release, US Dep't of State (Sept. 18, 2006) (stating the United States, EU and OSCE all reject the validity of the referendum).

territory's "authentic" autonomy is presented as the essential remedy.[64] In order to accomplish this goal through application of an international norm, however, any rule would need to surmount three problems that, so far, appear beyond the capacities of existing international institutions.

First, if some but not all secessionists are to be granted a legal entitlement, the rule would need criteria to distinguish, in a principled manner, between the legal situations of various peoples. If Chechnya, why not the Basque region, Quebec or Biafra? If the Southern Sudan, why not Ngorno-Karabakh or Abkazia? Attempts to sort the various claims have either put forth a broad range of mutually inconsistent factors or proposed criteria so limiting that virtually no existing claimants could take advantage of the rule.[65] Even if agreement were reached on criteria, no adjudicatory mechanism exists to engage in the actual sorting.

Second, and alternatively, if all secessionists are to be vested with a legal right to leave, how to avoid the slippery slope to an atomized international order? A world of proliferating micro-states would be highly undesirable for a variety of reasons, including the impossibility of reaching consensus on formal agreements and the likelihood that many of the new states would lack essential resources and the economies of scale necessary to economic prosperity.[66]

Finally, the transaction costs of moving from fewer heterogeneous states to many homogeneous states would be enormous. With no orderly means of sorting secessionist claims, and with virtually all being resisted by parent states, prolonged bloody conflict would become the price of realizing the right. Mark Zacher argues that one reason the territorial integrity norm has found such strong support among liberal states -- those most likely to sympathize with secessionists' efforts to cast off the authority of unwanted governments – is because they recognize that "the logical outcome of allowing self-determination for every national group would be continual warfare."[67] Conflict represents a greater threat to liberal ideals than the continued denial of autonomy to national minorities. "Hence, democratic states' fear of major war and their respect for self-determination by juridical states are inextricably interrelated in their support for the territorial integrity norm."[68]

[64] See generally Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).
[65] See the discussion in RAIČ, *supra* note 33, at 308-97.
[66] THOMAS M. FRANCK, THE EMPOWERED SELF 25-9 (1999).
[67] Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215, 239 (2001).
[68] *Ibid*.

To repeat, this "tremendous bias for the continuation of current borders, even in the face of constant unrest and repeated mass killing,"[69] does not mean international law affirmatively prohibits secession. It is neither prohibited nor required. But the effect of refusing to interpret the rights of self-determination, minority protection or cultural integrity to encompass changes in borders, even in cases of severe violation, adds up to an emphatic preference for existing states.

4. Negotiated partition

Forcible secession must be distinguished from negotiated partition, which, although seeking the same territorial objectives as secession, does not raise the specter of dismembering states pursuant to an international legal right. Secession involves territories asserting entitlements to withdraw from unwilling parent states. In a negotiated partition, the parent state gives its consent to withdrawal. Partition may thus be regarded as largely a matter of private contract between the two parties, and not an entitlement created or constrained by public international law. Presumably for this reason, no international objections were raised to the 1993 negotiated partitions of the Czech Republic and Slovakia and Eritrea and Ethiopia.

But despite the presence of formal consent, partition involves other difficulties that likely disqualify it as a legally sound option for addressing internal conflict. First, international law can provide no assurance that division of a territory will lead to a separation of the competing populations, the presumed objective of partition. Recent international law has strongly opposed the idea that individuals may be arbitrarily denied their nationality as a result of border changes,[70] whether or not those changes are consensual.[71] Instead, individuals are given a "right

[69] BYMAN, *supra* note 30, at 174.

[70] In 1999, the International Law Commission adopted its Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, a comprehensive restatement of customary international law on the subject. See *Report of The International Law Commission on the Work of Its Fifty-First Session*, ¶¶ 34–48, UN Doc. A/54/10 (1999) (Succession Draft Articles). The rules vary depending on the type of succession involved, but in each case, "in the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount." *Ibid.* art. 11, cmt. 6. See also *ibid*. art. 16 ("Persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.").

[71] The Succession Draft Articles apply to instances of "state succession," which is defined as "the replacement of one State by another in the responsibility for the international relations of territory." SUCCESSION DRAFT ARTICLES, *supra* note 70, art. 2(a).

of option" to choose nationality of the state in which they habitually reside.[72] In the case of Serb minorities in Bosnia and Croatia, for example, the Badinter Commission held that the right of self-determination would entitle them "to be recognized under agreements between the Republics as having the nationality of their choice."[73] New states emerging from partition, therefore, cannot seek to make themselves ethnically homogenous by denying nationality to those of other ethnicities who are habitually resident in their territories. If individuals choose to become ethnic minorities in the new state, international law will support that choice. History suggests that many will in fact choose to remain put as minorities.[74] Eritrea's consensual separation from Ethiopia in 1993, for example, did not lead all Eritreans to leave Ethiopia. To the contrary, many of those who remained only left when they were forcibly expelled – based solely on their national origin – when the two countries went to war in 1998.[75] The minority problem, in other words, simply replicates itself in the newly partitioned states.

Second, formal consent to partition may mask coercive pressures from the party seeking separation. The human costs of secession flow not from the specific mechanism used to achieve separation, but from the violence and intimidation used to secede by any means possible. If a parent state, exhausted by struggle, ends a secessionist campaign by consenting to the departure of the rebellious territory, the war to achieve that goal will

Thus, "replacement" may occur consensually or non-consensually, with the caveat that the articles will not apply to successions occurring through one state's use of aggressive force against another. *Ibid*. art. 3 ("The present draft articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.").

[72] Article 11 of the Succession Draft Articles provides in relevant part:

> 2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.
> 3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

Succession Draft Articles, *supra* note 70, art. 11. See also *ibid*. arts. 20-26 (specific rules for "Dissolution of a State" and "Separation of Part or Parts of the Territory").

[73] Conference on Yugoslavia Arbitration Commission: Opinion No. 2 on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1488, 1498 (1992).

[74] See Byman, *supra* note 30, at 155 ("Successor states are almost never perfectly homogeneous. They, too, will face the problems of communal mistrust and a lack of cooperation: only the names of the oppressor and the oppressed will change.").

[75] See Human Rights Watch, *The Horn of Africa War: Mass Expulsions and the Nationality Issue* (2003) (75,000 Eritreans forcibly expelled).

have been no less destructive. While the Czech and Eritrean separations were both formalized by consent, focusing on ultimate consent as the legally significant factor would prevent international law from taking account of the reality that the Czech partition was achieved through relatively short and amicable negotiations while the Ethiopian separation followed a thirty-year civil war.[76] Such distinctions should matter. Would-be secessionists will hardly be less emboldened by the possibility that their separation might ultimately be memorialized in an agreement rather than proclaimed unilaterally. With such formalities operating as scant restraint, international law may be unable to draw meaningful distinctions between permissible and impermissible secessions.

Finally, data suggest that partition simply does not accomplish its primary goal of achieving peace between warring groups. This failure is significant because the case for legitimizing partition – and in particular, for overlooking its many attendant human costs – is based solely on its alleged effectiveness in bringing group-based conflict to an end. But partitions "are positively (though not significantly) associated with *recurrence* of ethnic warfare."[77] In reaching this conclusion, Nicholas Sambanis reviewed data from 125 civil wars since 1944, twenty-one of which produced partitions.[78] His examples of failure are compelling:

> Croatia fought a second war with Serbia after it was partitioned in 1991. Ethiopia and Eritrea fought a bitter territorial war in 1999-2000 after being partitioned in 1991. The partition of Somaliland collapsed in a wave of new violence in 1992. India and Pakistan have fought three wars since their partition in 1947. Cyprus was at war again in 1974 after it was effectively partitioned into militarily defensible, self-administered enclaves between 1963 and 1967.[79]

Preventing a recurrence of civil war is instead correlated with other factors, some of which may be influenced by international actors (negotiated settlements, strengthening democratic institutions and national militaries) and some not (GDP per capita and ethnic heterogeneity).[80]

C. No legal support for mass population movements

The Bosnian conflict of the early 1990s, gave birth to the term "ethnic cleansing."[81] The rapid entry of this phrase into popular, diplomatic and

[76] See DAN CONNELL, AGAINST ALL ODDS (1993) (chronicling Eritrean struggle).

[77] Nicholas Sambanis, *Partition as a Solution to Ethnic War: An Empirical Critique of the Theoretical Literature*, 52 WORLD POL. 437, 480 (2000) (emphasis added).

[78] *Ibid*. at 446. [79] *Ibid*. at 464. [80] *Ibid.* at 480-81.

[81] See generally John Quigley, *State Responsibility for Ethnic Cleansing*, 32 U.C. DAVIS L. REV. 341 (1999); Christopher M. Goebel, *Population Transfer, Humanitarian Law and the Use of Ground Force in UN Peacemaking: Bosnia and Herzegovina in the Wake of Iraq*, 25 N. Y. U. J. INT'L L. AND POL. 627 (1993).

legal discourse might suggest the practice was new, if not in occurrence then in scope. But the forcible expulsion of minority groups has been a tool of conflict resolution for millennia.[82] Notably, many expulsions were memorialized in treaties and so received the (at least) implicit imprimatur of international law. In 1919, Greece and Bulgaria ratified forcible relocations in a bilateral agreement that implemented a provision of the peace treaty between Bulgaria and the Allies.[83] In 1923, Greece and Turkey agreed to a mutual exchange of populations that resulted in approximately 2,500,000 persons being forcibly uprooted.[84] In 1937, faced with escalating violence between the Arab and Jewish populations of their Palestine mandate, a British Commission of Inquiry recommended a partition of the mandate territory and a treaty-based transfer of Arabs from the Jewish territory.[85] "The existence of these minorities clearly constitutes the most serious hindrance to the smooth and successful operation of Partition."[86] While the Commission cited the Greco-Turkish agreement of 1923 as a model for Palestine, it warned that "it should be part of the agreement that in the last resort the [population] exchange would be compulsory."[87] For a variety of reasons, the Commission's recommendations were never adopted. In 1938, Yugoslavia and Turkey agreed to relocate as many as 400,000 Kosovar Albanians, but the outbreak of war prevented the agreement from coming into effect.[88]

Finally, after the Second World War, the Allies agreed in the Potsdam Declaration to "recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken."[89] While the Allies stipulated that the transfers "should be affected in an orderly and humane manner,"[90] this can charitably be described as an empty promise. It

[82] See Jean-Marie Henckaerts, Mass Expulsion in Modern International Law and Practice (1995).

[83] Convention Respecting Reciprocal Emigration, art. 1, Gr.-Bulg., Nov. 27, 1919, 1 L.N.T.S. 68; Treaty of Peace Between the Allied and Associated Powers and Bulgaria, art. 56(2), Nov. 27, 1919, 226 Consol. T.S. 332.

[84] Convention Concerning the Exchange of Populations, Gr.-Turk., Jan. 30, 1923, 32 L.N.T.S. 76. See generally Carol Weisbrod, *Minorities and Diversities: The "Remarkable Experiment" of the League of Nations*, 8 Conn. J. Int'l L. 359, 364-72 (1993); Stélio Séfériadès, *L'exchange des Populations*, 24 Recueil des Cours 311 (1928).

[85] Palestine Royal Commission Report 291-95 (1937) [hereinafter Palestine Report].

[86] *Ibid.* at 292. [87] *Ibid.* at 293.

[88] Noel Malcolm, Kosovo: A Short History 285-6 (1998).

[89] *Report on the Tripartite Conference of Berlin*, in Foreign Relations of the United States: The Conference of Berlin (The Potsdam Conference) 1945 1499, art. XII(1960).

[90] *Ibid*.

is estimated that approximately 2,000,000 ethnic Germans died in the expulsions that followed.[91]

The reasons given for these transfers were eminently practical, echoing the contemporary arguments favoring partition in Bosnia and elsewhere. At the Lausanne Conference, for example, Lord Curzon read a statement on behalf of the four victorious powers declaring support for a population exchange between Greece and Turkey:

> to unmix the populations of the Near East will tend to secure the true pacification of the Near East and because they believe an exchange of populations is the quickest and most efficacious way of dealing with the grave economic results which must result from the great movement of populations which has already occurred.[92]

Similarly, the British Palestine Commission argued that homogenizing the Jewish and Arab territories to be created by partition would allow the settlement to be "clean and final."[93]

In the human rights era, international law has long moved past these agreements' view of individuals as passively subject to whatever arrangements parties to a peace agreement may find politically advantageous. Human rights have in fact become a central focus of peace agreements in the post-Cold War era.[94] And recent mass expulsions have met with widespread disapproval. Ethiopia's expulsion of its Eritrean population, for example, was widely condemned.[95] The now-defunct African

[91] ALFRED DE ZAYAS, NEMESIS AT POTSDAM 103-30 (3d edn, 1988). The 1991 German-Polish border treaty recognized "the extreme suffering which resulted" from the expulsions and stated that the event "should not be forgotten and constitutes a challenge to the establishment of peaceful relations between these two peoples and their respective states." Agreement between the Federal Republic of Germany and the Republic of Poland in Relation to Ratification of the Border between Them, Ger.-Pol., Nov. 14, 1990, 31 I.L.M. 1992 (1992).

[92] Quoted in STEPHEN P. LADAS, THE EXCHANGE OF MINORITIES: BULGARIA, GREECE AND TURKEY 338 (1932).

[93] PALESTINE REPORT, *supra* note 85, at 292.

[94] See generally CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (2000).

[95] See e.g., HUMAN RIGHTS WATCH, *supra* note 75; Statement of Susan Rice, Assistant Secretary of State for African Affairs, *The Ethiopian-Eritrean War: U.S. Policy Options*, Testimony to the US House of Representatives International Relations Committee, May 25, 1999, at 3 ("We have made clear that we consider the practice of deportation to be a fundamental violation of individual rights."); Press Release HR/98/88, United Nations, High Commissioner for Human Rights Expresses Deep Concern at Continuing Expulsion of Eritrean Nationals From Ethiopia, July 1, 1998, available at www.unhchr.ch/huricane/huricane.nsf/newsroom (expressing deep concern at "the violation of human rights of Eritrean nations being expelled from Ethiopia, and particularly by the fact that their passports are being stamped 'expelled never to return'").

Commission on Human Rights was particularly blunt in condemning expulsions, seemingly dispelling any notions of cultural particularism.[96] The resounding denounciation of ethnic cleansing in Yugoslavia included statements that the forcible expulsion of minority groups violates fundamental human rights and may even constitute a war crime or a crime against humanity.[97] The Dayton Accords resolving the Bosnian war guaranteed those displaced by ethnic cleansing a right to return, reclaim their property, and to vote for candidates representing their home electoral district.[98] Remarkably, the bulk of the property claims were resolved by 2003.[99] The Security Council also guaranteed a right to return for refugees expelled from East Timor in the aftermath of the August 1999 independence referendum.[100] Thus, not only is forced expulsion an unacceptable means of separating ethnic antagonists, but the Bosnia and East Timor settlements suggest that international law will sometimes be employed to reverse its harshest consequences.[101]

[96] See e.g., Commission Decision Regarding Communication 71/92, Rencontre Africaine pour law Défense et Droites de l'Homme/Zambia, ¶ 20 (noting "the drafters of the [African] Charter [on Human Rights] believed that mass expulsion presented a special threat to human rights").

[97] See *Prosecutor* v. *Milosevic, Milutinovic, Sainovic, Ojdanic and Stojiljkovic*, Case IT-99-37, ¶ 35 (May 24, 1999), available at www.un.org/icty/indictment/english/mil-ii990524e.htm (Yugoslav war crimes tribunal indicts defendants for the "unlawful deportation and forcible transfer of thousands of Kosovo Albanians from their homes in Kosovo"); *Prosecutor* v. *Iljkovic, Blagoje Simic, Milan Simic, Tadic, Todorovic and Zaric*, Case IT-95-9, ¶ 20 (July 21, 1995), available at www.un.org/icty/indictment/english/sim-ii950721e.htm (defendants indicted for "the planning of, and preparation for, the unlawful deportation and forcible transfer of hundreds of Bosnian Croat and Muslim residents, including women, children and the elderly, from their homes in the Bosanski Samac municipality to other countries or to other parts of the Republic of Bosnia and Herzegovina not controlled by Serb forces").

[98] General Framework Agreement for Peace in Bosnia and Herzegorina with Annexes, Annex 7, Dec. 14, 1995, 35 I.L.M. 75, 89 (1996). See Eric Rosand, *The Right to Return under International Law following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091 (1998).

[99] Rhodri C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice*, 37 N.Y. U. J. INT'L L. AND POL. 441, 443 (2005).

[100] In Resolution 1272, the Council affirmed "the need for all parties to ensure that the rights of refugees and displaced persons are protected, and that they are able to return voluntarily in safety and security to their homes." SC Res. 1272, at 2 (Oct. 25, 1999).

[101] This has not occurred in all cases. One study finds that of seventeen settlements of civil wars between 1980 and 1997, refugee repatriation was only "central" to two: Bosnia and Rwanda. Howard Adelman, *Refugee Repatriation*, in ENDING CIVIL WARS 273 (Stephen J. Stedman, Donald Rothchild and Elizabeth M. Cousens eds., 2002).

Because international condemnation of forced expulsion rests, fundamentally, on the right of individuals to choose their states of residence and nationality, a negotiated exchange of populations would likely be viewed as similarly unacceptable. A treaty between national elites may force migration upon unwilling citizens just as much as an eviction by foreign troops.[102] Negotiated expatriation shares the same element of hidden coercion as negotiated partition: it presents a formalized means of rewarding ethnic cleansing to those willing to use (or threatening to use) force. As Haenckerts notes, "Most instances of population exchange operate. . .under the pretext of voluntary migration, but are in fact compulsory."[103] This need to deny any principled distinction between forced and negotiated population transfers simply recognizes that in the inherently coercive environment of war – particularly when ethnic homogeneity is an unabashed war aim – formal ratification carries little independent information about the motives of ratifying governments or the consent of their dispossessed citizens.[104]

III. Conclusion: what remains? the politics of inclusion

Diverse populations within existing borders are thus taken as facts that international law is unwilling to change through grants of legal entitlement. No legal right to non-consensual change exists, and indeed, many acts are affirmatively prohibited. For the most part, it seems, heterogeneous states are here to stay.

This conclusion is easier to accept in its component parts than as a whole. The parts derive from deeply held concerns for human rights

Adelman notes, however, that exclusion of an ethnic subgroup was only an objective of a warring party in four of these cases. *Ibid*. at 284-5. The refugees to be repatriated in the other cases, in other words, had not been subjected to mass and deliberate expulsions in the manner described in the text.

[102] Patrick Thornberry describes the Greek-Turkish population exchange agreement as representing "the crudest expression of State power over individuals and groups." Patrick Thornberry, International Law and the Rights of Minorities 51 (1991) (noting also the transfers "involved appalling human misery").

[103] Henckaerts, *supra* note 82, at 123.

[104] Thus, in a 1986 Declaration, the International Law Association stated: "Compulsory transfer or exchange of population on the basis of race, religion, nationality of a particular social group or political opinion is inherently objectionable, whether effected by treaties or by unilateral expulsion." International Law Association, Declaration of Principles of International Law on Mass Expulsions, Principle 14, adopted at the 62nd ILA Conference, Seoul, Aug. 24-30, 1986.

and the prevention of conflict that is assumed to accompany large-scale border changes. The sum total, however, suggests highly a conservative geopolitics. King Canute-like, it seems to command a halt to the violent forces of nation-building that typified much of the early modern era in Europe and elsewhere. It appears the international community has created a role for itself as guarantor of existing political arrangements, only some of which may be viable or viewed as just by the inhabitants.

Whether this state reconstruction project will succeed, and to what degree, cannot be known. But it is difficult to imagine international law reversing course and coming to accept any of the tactics reviewed above. To do so, ethnic, religious and other group-based claims to a collective territorial destiny would need to trump preferences of individual residents. And given the violence inherent in many of the tactics, such claims would also need to prevail over concern for the inhabitants' physical security. This seems almost unthinkable. Governing elites simply cannot alter their borders or subordinate, transfer or expel citizens in order to further their visions of the collective good. The affected individuals now possess legal personalities separate from those of their states and must, at a minimum, grant their consent to such actions. As Michael Walzer observes, "We tend to deny, today, that individuals are automatically subsumed by the decisions of their governments or the fate of its armies."[105] Occasionally, a change will occur that is truly consensual in all respects. But in the vast majority of cases where it does not, heterogeneous states will remain immune from legally sanctioned disaggregation.

[105] Michael Walzer, Just and Unjust Wars 177-8 (2nd edn, 1992).

5 Constructing the liberal state

The previous chapter set out the first part of the claim that international law has developed a substantive conception of the state. It argued that in reacting against various extreme practices used to dismantle heterogeneous states, the international community has made a commitment, enshrined in law, to preserving existing borders and populations. That chapter described a largely *negative* phenomenon – the type of state international law has come to view as unacceptable. This chapter describes the second part of the claim, which is largely *positive* – a vision of the heterogeneous state in which antagonistic groups are expected to remain and co-exist. The model is both participatory and pluralist: it offers democratic politics as the means by which the groups may secure their political goals, but also sets limits on that politics when it threatens to infringe group and individual rights.

Of course, this model is the familiar one of classical liberalism. But the totality of its vision is not often acknowledged in the literature, which tends to view the liberal policies promoted by international institutions in isolation from each other and not as a coherent vision of national politics. Nor have most authors acknowledged an important systemic consequence of the liberal model: in promoting a state designed to accommodate the concerns of conflicting groups, international law has reaffirmed the state's centrality to the international legal order. Despite sea changes, it is still the essential forum for the practice of politics – political expression, political activism and the exercise of political authority. This view, of course, runs counter to much recent literature predicting the state's slow eclipse by forces of globalization and a host of new transnational actors.

This chapter, then, continues the last chapter's examination of humanitarian occupation's normative roots. The occupation missions were

effectively responses to the rejected aspects of statehood detailed in the last chapter. Each of the missions sought to create the state institutions described in this chapter as emerging in international law. In a very real sense, contemporary norms of statehood have been the blueprint for the occupations' mandates.

I. The stubborn persistence of a state-centered order

Before describing the liberal model itself, we must explore the matter of it being a *state-centered* model. States have earned something of a bad reputation in some international law and international relations circles. Human rights violations, military aggression, group-based discrimination and other objectionable policies have brought forth a frontal assault on normative conceptions of state sovereignty.[1] A separate and more descriptive claim focuses on a "power shift" away from states to alternative sources of international authority.[2] While it might seem obvious that an international legal system promoting a liberal conception of the state would, necessarily, express strong support for the state itself, this assumption is not shared by these writers. To the contrary, Miliken and Krause begin their exhaustive review of the political science literature on this question by describing the state as "under siege."[3]

The state marginalization claim is complex and the literature varies widely in its focus and scope. While I cannot address all its permutations, the claim must be considered in broad terms before describing how international law has developed a particular view of the state. Otherwise, why bother considering the particular form of an entity that is approaching anachronism in all its forms? Of course, an effort to

[1] See PER A. HAMMARLUND, LIBERAL INTERNATIONALISM AND THE DECLINE OF THE STATE (2005); NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: INTERNATIONAL LAW - FROM THE TRADITIONAL STATE ORDER TOWARDS THE LAW OF GLOBAL COMMUNITY: PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM OF THE KIEL INSTITUTE OF INTERNATIONAL LAW, MARCH 25 TO 28, 1998 (Ranier Hofman ed., 1998); MICHAEL ROSS FOWLER AND JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE (1995).

[2] See MARGARET P. KARNS AND KAREN A. MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE (2004); Jessica Matthews, *Power Shift*, 76 FOR. AFF. 50 (1997).

[3] Jennifer Milliken and Keith Krause, *State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies*, 33 DEV. & CHANGE 753, 753 (2002).

promote a liberal state is itself a strong counter to the marginalization view. But the claim is also vulnerable on its own terms.

A. The empirical claim

As noted, reports of the state's demise contain two distinct variations: (1) an empirical claim that the state is in fact being displaced as the central actor in the international community; and (2) a normative claim that tangible benefits are to be found in a non-state centric legal order. Let us first consider the empirical claim. There is certainly no doubt that a host of new actors has appeared on the scene and that traditional notions of sovereignty, bound to the exclusivity of territorial prerogatives, have long passed into history. But does this mean the state has lost its standing as the central consumer, producer and interpreter of international law? Such a dramatic conclusion seems unwarranted for several reasons. First, the sheer number of states has increased dramatically in the last century. A variety of alternative political arrangements might have been pursued to address the perceived shortcomings of the Westphalian model. But the empires dismantled after World War I resulted in new states; the colonial territories of powers defeated in both World Wars were permitted to choose statehood (and virtually all did); the fragmentation of the Soviet Union and the former Yugoslavia in the 1990s produced a host of successor states; and even micro-states, traditionally outsiders to global institutions, have been granted membership in the United Nations.[4] The UN began with 51 member states in 1945 and today has 192. To be sure, sheer quantity says little about the new states' qualitative strength. But during the post-World War II period of rapid state expansion, the legal entitlements granted to new states were also progressively expanded and strengthened: universal membership in international organizations, a guarantee of sovereign equality, a principle of non-intervention, permanent sovereignty over natural resources and the availability of judicial and quasi-judicial fora in which smaller states might bring claims (and receive binding judgments) against more powerful states. All enhanced the standing of the new players relative to their existing and more powerful brethren. These protections for the new states' political autonomy suggest that the legal model of statehood recognized in the post-World War II era was enhanced, and not diminished, relative to earlier periods.

[4] See Jori Doursma, Fragmentation and the International Relations of Micro-states: Self-Determination and Statehood (1996).

Second, the central protection contemporary international law offers the state – that of securing its territorial integrity – has not only been secured in principle by the UN Charter and its doctrinal progeny but, contrary to much conventional wisdom, largely respected in practice. Tanisha Fazal has shown that since 1945 there have been only two cases of violent "state death" – "the formal loss of control over foreign policy to another state" – and neither involved clear and permanent alteration of internationally recognized borders.[5] Mark Zacher's analysis of all inter-state territorial conflicts between 1648 and 2000 shows a progressive decline in the territorial redistributions brought about by aggressive war.[6] "While approximately 80 percent of territorial wars led to re-distributions of territory for all periods prior to 1945, this figure dropped to 30 percent after 1945."[7] The data are equally striking when Zacher controls for the substantial fluctuation in the number of states during this period.[8]

Zacher's data suggest that attempts at forceful alteration of borders have been least successful during the period in which the international legal commitment to preserving state territory has been the strongest.[9] And even the "successful" territorial alterations in the post-1945 UN era fail to impress. Zacher identifies forty territorial conflicts from 1945 to 2000, of which only twelve resulted in a redistribution of territory.[10] Most of the twelve cases "concerned developing states' dissatisfaction with the boundaries they inherited from the colonial powers; but these quarrels are largely coming to an end."[11] A variety of other factors, moreover, cast these incidents as marginal and not seriously challenging states' general acceptance of the legitimacy of existing borders:

[5] Tanisha M. Fazal, *State Death in the International System*, 58 INT'L ORG. 311, 319-20 (2004). The two cases were the Republic of Vietnam, which many regarded as a civil war rather than an international conflict, and Kuwait, whose annexation by Iraq was reversed after six months. *Ibid*. at 320.

[6] Mark W. Zacher, *The Territorial Integrity Norm: Interstate Boundaries and the Use of Force*, 55 INT'L ORG. 215 (2001).

[7] *Ibid*. at 223.

[8] "The figure [of average territorial redistributions per country] for 1816-50 is 0.0032; for 1851-1900, 0.0035; for 1901-50, 0.0073; and 1951-98, 0.0015.40." *Ibid*. at 224.

[9] Obviously, many other factors beyond the territorial integrity norm itself contributed to this trend. But the point is not one of causation, but that post-war international law has not clearly weakened states' territorial integrity.

[10] ZACHER, *supra* note 6, at 234. No successful redistributions have occurred since 1976 when Morocco sent forces into the Western Sahara, a case whose "success" many would contest.

[11] *Ibid*. at 245.

Two of the successful uses of force involved turbulent decolonization processes in 1947 and 1948 in the Indian subcontinent and former British Palestine, and the other ten occurred between 1961 and 1975. Of these ten wars, the UN passed resolutions calling for withdrawal in four of them (Israel-Arab states in 1967, India-Pakistan in 1971, Turkey-Cyprus in 1974, and Morocco-Spanish Sahara in 1975). Another three of the ten (India-Portugal in 1961, Indonesia-Netherlands in 1961-62, and North Vietnam-South Vietnam from 1962 to 1975) were viewed by many countries as stages of the decolonization process. The remaining two involved China's occupation of remote areas - parts of northern India in 1962 and South Vietnam's Paracel Islands in 1974.[12]

Third, the emergence of ever-longer civil wars as a more or less permanent feature of the UN era provides important evidence of support for the weakest and most dysfunctional of states. States mired in civil war would seem the most likely candidates to succumb to anti-statist trends and begin the transition to alternative forms of political organization. Even more, multilateral interventions in such "failing" states presented prime opportunities to begin such a transformative process. But they were opportunities not taken. Instead, the legitimacy of states in conflict has been consistently supported and reinforced by international actors. This claim relies on data newly compiled by Ann Hironaka, who seeks to explain the persistence of civil wars in post-colonial developing states.[13] She begins with the observation that the length of civil wars has increased dramatically since 1945:

> By the 1990s, roughly twenty civil wars were ongoing in the average year. This is approximately ten times the historical average, and reflects a massive new trend in conflict in the modern world. The fact that ongoing civil wars grow more than new wars has only one interpretation: civil wars last much longer than they used to. . .The swelling of ongoing civil wars that occurs towards the end of the century represents a process of accrual. As civil wars get longer, they being to overlap in time with each other such that there are more total wars in the world at any given moment. . .The large number of ongoing civil wars in 1997, therefore, represents the continuation of civil wars begin several years, even decades previously.[14]

[12] *Ibid*. at 234. [13] ANN HIRONAKA, NEVERENDING WARS (2005).

[14] *Ibid*. at 4-5. Hironaka refutes the common attribution of civil war in the 1990s "to an explosion of ethnic conflict enabled by the fall of communism." *Ibid*. at 4. In fact, "[t]here was no 'explosion' of new civil wars after the end of the Cold War: most of the civil wars recorded in 1990 had begun in the 1970s and early 1980s, when the Cold War was in full swing. Indeed, the end of the Cold War actually led to a decrease in civil wars, as those civil wars associated with the Cold War ended within a few years of the fall of the Soviet Union." *Ibid*. at 5.

What might account for ever-longer civil wars becoming a fixture of the UN era? In Hironaka's view, it is the persistence of weak states. Lacking much of the historical pedigree and developmental infrastructure of older Westphalian states, weak states exhibit a number of characteristics that make them particularly susceptible to prolonged conflict: a lack of autonomous bureaucratic structures, weakening their ability to make needed concessions or keep promises to rebel groups; a lack of military capacity to defeat rebellions, usually because governmental resources are scarce; and the fact that many are "so weak that they effectively cede peripheral geographic areas to rebels, who then gain a safe haven for local supporters and recruits, safe bases and lines of supply."[15]

Yet if weak states are so ineffectual that they cannot pacify their own populations, why have they not, as in previous eras, simply imploded, fractured into sub-units or been absorbed by their stronger neighbors? Hironaka argues that the post-World War II international order has sought to protect weak states from extinction – that is, protect their juridical existence – *without regard to their marginal function in practice*:

> After 1945, however, the rules and behavior changed. If one considers the international system as promoting a particular ecology of states, the population of states before 1945 was composed mostly of strong, battle-scarred states that had proven their capacity to withstand both interstate and civil war. Since 1945, most colonies have achieved independence and sovereign statehood not through victory in war, but through the encouragement and support of the international system. Furthermore, international norms and law increasingly discouraged territorial reshuffling through wars of annexation or secession. In the post-1945 era, shifting territorial boundaries became the exception rather than the rule. In a sense, the international system has locked the problems of states into specific territorial arrangements and pervsely created conditions that encourage lengthy civil wars in recently independent states.[16]

The UN era, then, has witnessed both a proliferation of states and a commitment, both legal and empirical, to their continued existence. But as Hironaka's study makes clear, the newer, conflict-ridden states often bear only a fleeting resemblance to the Westphalian ideal. Groups other than governments wield significant power over regions or sectors of the society. Violence, corruption and inefficiency are endemic. And citizens invest little hope or effort in reforming their governments, since national institutions frequently lack the legitimacy born of long historical pedigree. As Rosa Brooks comments, "the state in the developing

[15] *Ibid*. at 74. [16] *Ibid*. at 7.

world has offered its citizens all the violence that accompanied European state formation, and few of the corresponding benefits."[17] Jackson and Rosenberg describe this disjunction between form and function as the difference between the "empirical" and the "juridical" state.[18] They argue that the international community has accomplished little by securing the latter but not the former. Nonetheless, the state persists.

B. The normative claim

If the conclusion from these data is that the international community has succeeded in promoting the juridical state but, in the process, sustained many entities with only weakly functional empirical capacities, have we not simply returned to doubts about the state's inherent worth? This is the second – and normative – part of the state marginalization claim: that states *ought* to recede in importance because they increasingly fail to promote their citizens' welfare. Why seek to preserve the state at all? Why not let forces of implosion and fragmentation run their course and embrace, in Opello and Rosow's words, a "deterritorialized politics"?[19] Why not conclude from Hironaka's data that the utility of the Westphalian state is limited to the historically and geographically contingent circumstances of its origin?

The responses to this normative claim are complex and multifaceted. In part, this is because there is no unified vision of what a "post-statist" world would look like. What would partially or wholly replace the state? Would the new forms be universal or confined to regions where state failure has been most acute? The nature of any transition away from state-centrism is also unclear. Would it be organic or planned? Who would decide the form and function of the new entities? What if conflicts arose over the scope of their authority?

Answering these questions is beyond the scope of this inquiry into whether international law is now demonstrably committed to the state. But there are several responses to the general question of whether promoting the state is desirable at all, each suggesting that given present

[17] Rosa Ehrenreich Brooks, *Failed States, or the State as Failure*, 72 U. CHI. L. REV. 1159, 1159, 1174 (2005).

[18] Robert H. Jackson and Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 WORLD POL. 1, 2 (1982).

[19] WALTER C. OPELLO, JR. AND STEPHEN J. ROSOW, THE NATION-STATE AND GLOBAL ORDER 252-4 (1999); see also Alfred van Staden and Hans Vollaard, *The Erosion of State Sovereignty: Towards a Post-territorial World?*, in STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE 165 (Gerard Kreijen ed., 2002).

circumstances, little would be little gained for individual welfare if the state were to lose its primacy.

First, and most importantly, while one can imagine an endless array of alternatives to the liberal state model, there are no viable candidates evident in contemporary international politics. No entities enjoy the same complement of rights as states and thus cannot act collectively to further the interests of large populations. One need only list a few areas of aggregate legal interest – defending territory, negotiating trade agreements that maximize the national comparative advantage, limiting immigration, etc. – to see why this is essential.[20] As discussed further below, critics of the state often downplay the necessity of leveraging collective interests in these and other circumstances in their (understandable) focus on protecting individuals against state predation or neglect. But individuals can suffer equally or to a greater extent in the absence of a community that serves as their defender and proponent.

What entities might effectively serve the individuals arguably suffering from the deficiencies of existing states? Inter-governmental organizations (IGOs) and non-governmental organizations (NGOs), while increasingly present in all aspects of state reconstruction, are simply not equipped for the daily tasks of governing. Can NGOs really begin collecting garbage, providing electricity and running courts? Can IGOs really mediate the myriad political, commercial and social conflicts addressed by national judiciaries, administrative bodies and political leaders respected in local communities? Beyond such obvious questions of capacity, NGOs and IGOs have primary constituencies far removed from the populations in the developing world they would arguably serve.[21] "Democratic deficits" and, inevitably, legitimacy deficits, are sure

[20] Inter-governmental organizations (IGOs) may acquire certain state-like privileges to the extent these are essential to fulfilling their constitutional functions. Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), 1949 ICJ 174, 178-9 (April 11). But as the ICJ said of the UN, holding it to have these necessary rights "is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State." *Ibid*. at 179. Non-governmental organizations (NGOs), which do not retain IGOs' link to states through their creation by treaty and membership composed of states, have substantially fewer legal entitlements. see Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?*, in STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE, *supra* note 19, at 387 ("The formal status of NGOs under international law is still extremely weak. . .[and there is] little evidence that States will ever allow NGOs to become a serious threat to the inter-State system.").

[21] See Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace*, 18 CARDOZO L. REV. 957, 968-69 (1996).

to follow. It is difficult to imagine Africans, for example, acquiring any sort of loyalty to NGOs that are not only Western-based and funded, but which provide no formal mechanisms of feedback or accountability.[22] To the extent hostility toward the state is fueled by a desire for more "democracy," these alternatives appear even less satisfactory. Marc Plattner argues that even the European Union cannot replicate its members' liberal democratic institutions, which he views as inexorably tied to the territorial state.[23]

Finally, theories predicting IGO or NGO ascendancy relative to the state rest on a crucial fallacy. Existing IGOs and NGOs are taken as models for the future with the most highly functional among them serving as examples of the more diversified international community to come.[24] But marginalizing states would almost certainly undermine the very attributes that typify the most highly performing IGOs and NGOs. Highly functional IGOs are built on the strength of their highly functional member states. These "strong states" supply the political capital, financial resources, opinion mobilization, military muscle and other tools necessary for IGOs to accomplish complex and costly reconstruction operations. It is no coincidence that the most effective contemporary IGO, the EU, is built on the foundation of highly functional states capable of mobilizing vast resources to accomplish collective goals. Similarly, the UN has been at its most effective when operations are supported (politically and financially) by its most politically stable and resource-rich states. The WTO, also highly effective (as measured by rates of compliance), is supported by the world's strongest states. By contrast, IGOs whose member states have much lower levels of resources, domestic legitimacy and functional effectiveness – the African Union and Arab League may be the clearest examples – perform quite poorly. Neither has been a significant presence, for example, in the state reconstruction missions reviewed in Chapter 2.

Similarly, NGOs that contribute in various ways to the growth of liberal politics are overwhelmingly concentrated in highly functional democratic states whose stability and resources make possible the

[22] *Ibid*. at 962-67.

[23] Marc F. Plattner, *Sovereignty and Democracy*, POLICY REV., Dec. 2003 and Jan. 2004, at 3. Plattner believes that "for democracy to work, there must be an overarching political order to which people owe their primary loyalty - in short, a state, with clear boundaries and clear distinctions as to who does and does not enjoy the rights and obligations of citizenship." *Ibid*. at 14.

[24] See MATTHEWS, *supra* note 2, at 52-4, 58-60.

political space and private philanthropy that allow civil society to thrive.[25] Praising NGOs as engines of democratic development treats the groups as context-neutral, pursuing the same objectives regardless of their political setting. But as Omar Encarnación has shown, civil society organizations sometimes pursue quite illiberal objectives when state institutions are weak.[26] "Civil society can only serve as an effective foundation for democracy where there are credible functioning state institutions and strong political parties with deep roots in society."[27] Absent those critical social underpinnings, "civil society, especially an invigorated one, can become a source of instability, disorder, and even violence."[28] The "civil society coup" against President Hugo Chavez in Venezuela in 2002 demonstrates this illiberal potential, as did the civil society organizations in Weimar Germany that made significant contributions to the Nazis' rise to power.[29] The groups themselves, in other words, are not intrinsically pro-democratic. "Civil society can both aid and harm democracy and the key variable determining these outcomes is the health of the political system."[30]

One can well imagine a process of marginalization that degrades national political systems and robs states of many of the attributes now contributing to IGO and NGO success. A drive toward ethnic, religious or other group solidarity may overwhelm existing tolerant pluralism and produce communities that are both homogenous and highly intolerant. Smaller territorial units mean fewer natural resources and economies of scale. The ceding of essential governance functions to non-state actors would also diminish states' political leverage. And the rise of entities competing for citizen loyalty could diminish the legitimacy, and thereby effectiveness, of state institutions. Extrapolations to such a world from the existing state system have little predictive value for the future governing capacities of IGOs and NGOs.

[25] See Thomas J. Ward, *The Political Economy of NGOs*, in DEVELOPMENT, SOCIAL JUSTICE AND CIVIL SOCIETY 8-9 (Thomas J. Ward ed., 2005).

[26] OMAR G. ENCARNACIÓN, THE MYTH OF CIVIL SOCIETY: SOCIAL CAPITAL AND DEMOCRATIC CONSOLIDATION IN SPAIN AND BRAZIL 158-60, 173-4 (2003).

[27] Omar G. Encarnación, *Venezuela's ''Civil Society Coup,"* 19 WORLD POL. J. 38 (Summer 2002).

[28] *Ibid*.

[29] Sheri Berman, *Civil Society and the Collapse of the Weimar Republic*, 49(3) WORLD POL. 401, 412-25 (1997).

[30] ENCARNACIÓN, *supra* note 26, at 46.

Second, given the lack of viable alternatives to the state, its historical successes should not be lost in a focus on its contemporary shortcomings. Strong states – in the sense of being functional and legitimate – have provided authority structures essential to securing individual rights. The connection between strong states and the practice of liberal politics is often obscured in discussions of human rights by an asserted dichotomy between individual interests and state power.[31] Individual rights can only be secured, it is argued, when state power is restrained. But despite the obvious persistence of state-sponsored brutality, the claim is vastly overstated. State power is not monolithic. It is one thing for the state to impose its own conforming vision on a society or to engage in violence against its citizens. It is quite another for the state to establish and preserve the structures necessary for democratic politics to flourish. The European Court of Human Rights, in explaining how "there can be no democracy without pluralism," has described the state as "the ultimate guarantor of the principle of pluralism."[32] This is obviously a distinction between the authoritarian and the liberal state. And just as obviously, the human rights movement struggles mightily to change the former into the latter. But a liberal state is a state nonetheless, with extensive institutional and normative constructs designed to restrain an anarchy that is antithetical to individual liberty.

This is an old idea, embodied in the liberal social contract, but it is worth repeating. As Steven Holmes argues in a remarkable book, "almost all typically liberal institutions can be justified on the grounds that they *strengthen* the state's capacity to govern and solve collective problems."[33] In the classical Hobbesian view, when personal conduct is wholly unconstrained, a natural tendency to pursue self-interest will negate the practice of tolerance and justice.[34] Liberal theory counters with state institutions that identify and defend certain common civic interests in individual liberty, "interests disciplined by the restraints of social coexistence and justice."[35] Holmes argues that this "positive constitutionalism,"[36] which enables the carefully calibrated politics from which tolerance and the rule of law emanate, exists only within the state:

[31] See Hersch Lauterpacht, International Law and Human Rights 80 (1950).
[32] *United Communist Party of Turkey and Others* v. *Turkey*, 1998-I Eur. Ct. h.r. 1, ¶ 44.
[33] Stephen Holmes, Passions and Constraint 20 (1995) (emphasis added).
[34] *Ibid*. at 27. [35] *Ibid*. at 66. [36] *Ibid*. at 102.

Liberal democracy presupposes the existence of the state. The core norms of equality before the law and majority rule cannot be put into practice until territorial borders have been firmly established and the question of who is a member of the community has been clearly answered. In short, philosophers of liberalism must take elementary processes of state building for granted. This is obvious, in a way, for no nation can become liberal unless it is already a nation. The ideal of limited government will never have much popular appeal, moreover, unless political authority has already managed to secure a minimum of social order and protection from mutual violence. For this and other reasons, liberalism cannot be plausibly understood as an ideology deeply opposed to historical processes of centralization and state building.[37]

For Holmes, the notion that rights can flourish in the absence of strong state institutions is belied by contemporary experience:

In a sovereignless condition, rights can be imagined but not experienced. In a society with a weak state, such as Lebanon for the past decade, or with virtually no state, such as Somalia today, rights themselves are nonexistent or underenforced. Statelessness means rightlessness, as stories of migrating Kurds, Vietnamese and Caribbean boatpeople, and many others, have also made abundantly clear.[38]

Third, as states in the developing world have themselves recognized, constructing an alternative international order would come at a terrible human cost. How would existing national territories, or authority thereover, be divided? Many overlapping claims are now made for the same territories. Many are driven by a desire to control valuable natural resources. Many involve problems of infinite regression, as minorities within minorities, energized by calls for group solidarity, seek to break away from the first breakaway territory.[39] These obstacles would arise whether a post-state order was premised on considerations of efficiency, justice, historical authenticity or some other organizing principle. Each is focused on supposed benefits once reordering is achieved, not how that reordering will be accomplished. Once current borders and spheres of authority lose their sanctity in the eyes of international law, however, a peaceful resolution of the many competing demands seems unlikely. Many take the view that in Africa "the Pandora's box of territorial restructuring is better left unopened, lest Africa embark on a

[37] *Ibid*. at 100. [38] *Ibid*. at 19.

[39] See e.g., Gregory Marchildon and Edward Maxwell, *Quebec's Right of Secession under Canadian and International Law*, 32 VA. J. INT'L. L. 583, 616-17 and notes 167-8 (1992).

path of total anarchy, war and disintegration."[40] It was for this reason that the 1963 Charter of the Organization of African Unity asserted a commitment to inherited colonial borders, despite acknowledging their essential illegitimacy.[41]

Even if some claims were resolved short of violence, the sheer number of secessionist conflicts would itself render the problem unresolvable. Thomas Franck estimates that if every group which defines itself according to some coherent characteristic (ethnicity, language, history of persecution, etc.) were to gain independence, the world would be made up of roughly 2,000 states.[42] The conflicts generated by the inevitable resistance to these independence movements would soon overwhelm any collective mechanisms for keeping the peace, which, as noted, might well be in danger of foundering without the strong and resource rich member states that have so far proven essential to their functioning.

In sum, the international community's continuing attachment to the state should not be seen as simple inertia. To the contrary, it is, for now, an essential means of preserving structures that protect personal liberty and security. Once again, the point of this discussion has not been to argue that the legal status of the state has remained unchanged in contemporary international law. That would deny reality. It is rather that good and defensible reasons exist for why states remain at the center of the international legal order. The kind of state envisioned by contemporary norms is our next topic.

II. Norms of governance

A. The mainstreaming of democracy promotion

I would like to argue that international law has now adopted liberal democracy as the preferred model of national governance. This is admittedly a bold claim. It directly challenges the traditional view that any government in effective control of territory is entitled to recognition, regardless of how it attained power.[43] It shunts aside the core of traditional state autonomy principles, which were not only territorial but

[40] Pierre Englebert, State Legitimacy and Development in Africa 181 (2000). Englebert himself disagrees with this view. See *ibid*. at 182–4.

[41] See Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 Am J. Int'l L. 590, 595–6 (1996).

[42] Thomas M. Franck, The Empowered Self 23 (1999).

[43] See Malcolm Shaw, International Law 577 (5th edn, 2003).

functional, viewing the conduct of national politics as the core of a state's protected identity. As Max Huber wrote in the Island of Palmas arbitration, sovereign independence involves the exclusive right to exercise "the functions of a State."[44] And to the extent the claim depends on human rights instruments, it departs from the view that those instruments, drafted largely during the Cold War, were intentionally neutral (or agnostic) on questions involving the legitimacy of political systems. None of the major global human rights instruments, for example, protects "democracy" as an independent right or even proclaims a commitment to political democracy.[45]

There was a substantial debate on these questions in the early and mid-1990s, as commentators wrestled with how new and aggressive multilateral efforts to reform state government could be reconciled with an international legal system that had always assumed a relatively clear demarcation between international and domestic spheres of concern.[46] In the critics' view, externally imposed models of national governance were to be distrusted both on substantive grounds – their conception of democracy was seen as unduly narrow and procedurally formalistic – and because they were regarded as pre-empting organic national processes of political reform.[47] Many saw the "democratic entitlement" (in Thomas Franck's pioneering phrase) as simply the international lawyer's version of post-Soviet Western triumphalism or, in Susan Marks' words, "liberal millenarianism."[48] Legal institutions controlled by dominant Western powers had effectively been gripped by Francis Fukayama's "End of History" thesis and were attempting to codifying it as law.

These critiques were robust and, at the time, demanded serious consideration. But as normative statements they have simply been overtaken by events. As Chapter 2 demonstrates, the UN and many regional organizations have not only monitored elections for over a decade, but are

[44] Island of Palmas Case (*Netherlands. v. US*), 2 R.I.A.A. 831, 838 (1928).

[45] Several instruments allow certain rights to be restricted when recessing in a "democratic society." See Universal Declaration of Human Rights, art. 29(a), GA Res. 217A(III), UN Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, arts. 4, 8(1)(c), Dec. 19, 1966, 993 U.N.T.S. 3; International Covenant in Civil and Political Rights, arts. 14(1), 21, 22(a), Dec. 19, 1966, 999 U.N.T.S. 171.

[46] See the essays collected in DEMOCRACY AND INTERNATIONAL LAW (Richard Burchill ed., 2006); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).

[47] See SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IBIDEOLOGY (2000); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY AND INTERNATIONAL LAW (1999).

[48] MARKS, *supra* note 47, at 45.

involved in virtually all aspects of reconstructing national institutions in post-conflict and post-authoritarian states. In each case, these new institutions have drawn on liberal democratic models. Growing bureaucracies at the UN and regional organizations are now devoted to democracy promotion.[49] And in the realm of stated normative goals – crucial for international law even in the face of contrary practice – the Security Council, General Assembly, Human Rights Committee and Secretary-General of the United Nations all regularly pronounce on the desirability, indeed necessity, of democratic transitions.[50] Democracy is said to underlie a wide variety of other policy objectives of concern to the UN.[51]

Similarly, the EU, the OAS, the African Union, the Commonwealth and other intergovernmental organizations proclaim democracy as a central goal for their member states.[52] The Constitutive Act of the African Union (2000), for example, lists as one of its objectives to "[p]romote democratic principles and institutions, popular participation and good

[49] See ARTURO SANTA CRUZ, INTERNATIONAL ELECTION MONITORING, SOVEREIGNTY AND THE WESTERN HEMISPHERE IDEA (2005); ELECTION OBSERVATION AND DEMOCRATIZATION IN AFRICA (Jon Abbinh and Gerti Hesseling eds., 2000); POSTCONFLICT ELECTIONS, DEMOCRATIZATION, AND INTERNATIONAL ASSISTANCE (Krisha Kumar ed., 1998).

[50] See THE UN ROLE IN PROMOTING DEMOCRACY (Edward Newman and Roland Rich eds., 2004). For a discussion of Security Council practice, see Gregory H. Fox, *Democratization*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 69 (David M. Malone ed., 2004) ("Fox, *Security Council and Democratization*"). In a 2005 report, the Secretary-General declared "the United Nations does more than any other single organization to promote and strengthen democratic institutions and practices around the world." *In Larger Freedom*, ¶ 151, UN Doc. A/59/2005 (2005).

[51] These include national reconciliation, internal security, building governmental infrastructures, regional stability and economic development. See Fox, *Security Council and Democratization*, *supra* note 50, at 76–80.

[52] In the 1993 Copenhagen Criteria, the EU agreed that Eastern and Central European countries seeking membership must have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." European Commission, EU Enlargement - A Historic Opportunity - From Cooperation to Accession, available at europa.eu.int/comm/enlargement/intro/criteria.htm#Accession%20criteria. The Inter-American Democratic Charter, adopted by the OAS in 2001, states that "[t]he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it." Inter-American Democratic Charter, art. 1, AG/RES 1838 (XXXI-O/01) (2001). In the 1991 Harare Declaration, the Commonwealth proclaimed "democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government" as "fundamental political values of the Commonwealth." Commonwealth Heads of Government, Harare Declaration (Oct. 20, 1991), available at www.thecommonwealth.org/Internal/20723/34457/harare_commonwealth_declaration.

governance."[53] ASEAN, which traditionally limited itself to economic and security matters and viewed governance questions as contrary to a rigid notion of territorial sovereignty, changed course in 2003 and took a tentative step by declaring its member states' interest in "a just, democratic and harmonious environment."[54]

More of this practice will be discussed below. Its legal significance, of course, should not be overstated. Democracy promotion regimes are weak or non-existent in some regions of the world and even where democratic norms have been institutionalized, responses to anti-democratic forces have sometimes been tepid and arguably selective. But as we have seen, while some earlier academic commentators found normative stasis in this practice, the international actors themselves have perceived significant forward movement. The longevity of this practice, its integration into the regular business of international organizations, the lack of proffered alternatives, and explanations of prominent refusals to condemn anti-democratic practices (such as in Zimbabwe) that fail to challenge democratic goals themselves, all point toward a normative regime that has planted deep roots in inter-state relations.

B. Procedural versus substantive democracy

But what is the "democracy" being promoted? This definitional question not only raises notoriously contentious issues, but ranges well beyond the discipline of international law. The nature of democracy is a well-rehearsed problem of political theory, where the debate has frequently revolved around whether democracy is understood in a "procedural" sense as relating only to the means for selecting leaders, or whether it suggests a broader range of "substantive" rights guaranteed in law.[55]

[53] Constitutive Act of the African Union, art. 3(g), July 11, 2002, available at www.africa-union.org.

[54] Declaration of Asean Concord II (Bali Concord II) (Oct. 7, 2003), available at www.aseansec.org/15159.htm. Inclusion of the word "democratic" in this passage was hotly debated by member states. Agence France-Presse, "Southeast Asian nations sign key pact with commitment to democracy," (Oct. 7, 2003) available at quickstart.clari.net/qs_se/webnews/wed/ax/Qasean-pact.RUBh_DO7.html. An ASEAN spokesman remarked, "The introduction of the notion of democratic peace sets the standard of political norm in the region. It means that member states subscribe to the notion that democratic processes promote regional security." *Ibid*. The highly tentative nature of this step, however, was underlined by ASEAN's failure to issue any statement, let alone a condemnation, of the military coup in Thailand in September 2006. See *Thai Coup Won't Affect Summit; ASEAN Pacts Set for Signing Won't Be Altered, Diplomat Says*, MANILA BULLETIN, Sept. 28, 2006.

[55] See generally IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2003).

Is democracy a blueprint of the good life itself or simply a framework for achieving the good life? This definitional debate has important consequences for the methodological concerns of international law. These involve the evidence employed to argue for or against a democratic governance norm. Defining "democracy" procedurally would focus attention on a narrow range of practices related to holding competitive elections. A substantive definition would vastly expand the universe of relevant practice to a broad range of social norms – political, economic and relational – that make up a theorist's conception of an equitable domestic order. Susan Marks, for example, criticized accounts of the democratic entitlement in which "democracy appears to be about means, and not also about ends."[56] Since this chapter makes a claim for an emerging liberal democratic model of statehood, clarity on this definitional question is an essential first step.

Where to begin answering this question is far from obvious. "Democracy" norms are but a subset of a larger set of principles concerned with national governance. At the most general level, any international rule that seeks to shape national policy might be described as a norm of "governance." Many rules intend such an effect. But in the sense discussed here, international law addresses governance not when it has a secondary impact on domestic policies in the course of pursuing other objectives, but when it *deliberately seeks to shape the ongoing nature of the relationship between government and citizen*. Rules on the denial of justice to aliens or the use of one state's territory to cause harm to another, for example, have direct and important consequences for domestic policy-making. But they are not norms of governance. Their intended effects on government-citizen relations are decidedly secondary to their intended effects on inter-state relations. By contrast, the Universal Declaration of Human Rights posits a theory of domestic governmental legitimacy as a direct and primary obligation: "the will of the people shall be the basis of the authority of government."[57] It then describes – as would its binding progeny drafted over the course of the next three decades – how popular sovereignty is to be embedded in national political institutions: "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."[58]

[56] Susan Marks, *The ''Emerging Norm": Conceptualizing ''Democratic Governance*," 91 ASIL PROC. 372, 375 (1997).

[57] UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 45, art. 21(3). [58] *Ibid*.

But even within the universe of primary governance rules, one can argue that all of human rights law takes domestic politics as its subject and not just its object. Human rights standards are interposed between governments and those under their jurisdiction. When international law declares individuals entitled to a "right," it describes a preferred way for governments to relate to individuals. Some governmental policies, such as torture, are proscribed altogether. Others, such as the prohibition on "cruel, inhumane or degrading treatment," are flexible and require different policy responses in different circumstances. Still others call for national institutions, such as courts, to follow a particular design. But in the words of the Universal Declaration, each right is to be respected "among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."[59] That is, the relationships subject to protection exist solely within national societies (issues of extraterritoriality aside). Those relationships lie at the heart of national politics.

So the substance versus procedure question must be answered by reference to human rights norms as a whole, which collectively address the structure of national politics. In human rights instruments, articles on electoral processes appear separately from all other rights, thereby segregating difficult questions of governmental legitimacy presented by a right to free electoral choice from more tailored questions about the legality of specific governmental policies.[60] Given that profound differences over the nature of legitimate government lay at the doctrinal heart of the Cold War, this division between participatory and human rights served a useful purpose. It allowed limited progress to be made on the latter without implicating divisive questions of governmental legitimacy lurking in the former. Thus, the slow ascension of human rights issues on to the international agenda in the 1970s and 1980s was not matched by a similar attention to "democracy" issues.

The end of the Cold War changed all that, of course. But the old distinction between "democracy" and "human rights" continued to appear in the work of international organizations. Emblematic is the 1993 Vienna Declaration of the World Conference on Human Rights, which urged the international community to "support the strengthening and

[59] *Ibid*. preamble.

[60] Electoral (or "participatory") rights are addressed in art. 21 of the Universal Declaration, art. 25 of the Covenant on Civil and Political Rights, art. 3 of the First Protocol to the European Convention on Human Rights and art. 23 of the American Convention on Human Rights.

promoting of democracy, development *and* human rights."[61] Democracy and human rights are also discussed as separate ideas in the Secretary-General's broad exposition of UN reform proposals, *In Larger Freedom*.[62] The mandates of recent post-conflict reconstruction missions – to Liberia, Burundi, Côte D'Ivoire and the Democratic Republic of Congo and elsewhere – have addressed human rights and electoral issues separately.[63] In a resolution on the prevention of armed conflict, the Security Council spoke of the need to promote "good governance, democracy, gender equality, the rule of law *and* respect for and protection of human rights."[64] The General Assembly scheduled an agenda item entitled, "The Situation of Democracy and Human Rights in Haiti."[65] Many more examples of such disjunctive usage could be given.[66]

At the same time, the idea that democracy might be more or less limited to competitive elections, and thereby entirely separate from "human rights" questions, is one widely criticized within international organizations. Many within the UN regularly disavow Schumpeterian proceduralist conceptions of democracy. The Human Rights Commission, for example, identifies as "essential elements of democracy" the "respect for human rights and fundamental freedoms."[67] Similarly, the High Commissioner for Human Rights describes such "essential elements of democracy" as "separation of powers, empowerment and strengthening of parliaments, independence of the judiciary, fair and transparent elections, opposition to unconstitutional changes of Government, popular participation, decentralization of power, freedom of the press, freedom of the members of the Bar, and the subsidiary role of the armed forces, the police or the security forces in a democracy."[68] And the

[61] *Vienna Declaration and Programme of Action*, ¶ 8, UN Doc. A/Conf.157/23 (1993) (emphasis added).

[62] *In Larger Freedom*, *supra* note 50, ¶¶ 140-53.

[63] See SC Res. 1509 (Sept. 19, 2003) (Liberia); SC Res. 1545 (May 21, 2004) (Burundi); SC Res. 1565 (Oct. 1, 2004) (Congo); SC Res. 1609 (June 24, 2005) (Côte D'Ivoire).

[64] SC Res. 1625, Annex (Sept. 14, 2005) (emphasis added).

[65] UN Doc. A/60/251, at 2 (2005).

[66] See Gregory H. Fox and Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 46, at 1, 7 and note 24.

[67] *Interdependence between Democracy and Human Rights*, Commission on Human Rights Res. 2003/36.

[68] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, COMPILATION OF DOCUMENTS OR TEXTS ADOPTED AND USED BY VARIOUS INTERGOVERNMENTAL, INTERNATIONAL, REGIONAL AND SUBREGIONAL ORGANIZATIONS AIMED AT PROMOTING AND CONSOLIDATING DEMOCRACY, available at www.ohchr.org/english/law/compilation_democracy/intro.htm.

newly established United Nations Democracy Fund describes democracy as consisting of nine "distinctive, but wholly inter-related components," one of which is human rights.[69]

Are human rights and democracy then coextensive? The Secretary-General, who frequently proclaims a commitment to democratic government and so might be expected to clarify matters, seemed to have it both ways in a 2004 speech:

> Democracy means more than the functioning of effective representative institutions. It means upholding fundamental principles - particularly the rule of law and respect for human rights. The rule of law - and its pre-eminent condition, equality before the law - is the platform upon which the edifice of democracy rests. Respect for human rights is vital for the democratic edifice to stand. In fact, a symbiotic relation exists between the two: human rights necessary for the functioning of democracy, and a functioning democracy is essential to ensure the full enjoyment of human rights.[70]

Recall the *legal* significance of this clash between substantive and procedural approaches is that each suggests a very different type of evidence relevant to a normative commitment to the liberal state. Must international lawyers choose between the two? Certainly, political theorists must do so, as must those wrestling with the policy question often raised by critics of proceduralist democracy of whether outsiders unduly raise expectations when they promise citizens "democracy," but deliver only elections.

Despite the obviously unsettled nature of the question within international organizations, I believe the answer is no. "Democracy" must have a global definition only if it constitutes, or is on its way to constituting, a norm in itself. The term "democracy" is widely used by those commenting on political transitions, and even appears in some exhortative legal texts. But it is not the touchstone for compliance with international expectations about national governance. Rather, following the architecture of human rights treaties, the various component rights of a liberal order are described and protected discretely. As noted, this is especially true for UN missions assisting political transitions, which have frequently established separate units for elections and human rights. The administrative reasons for this division are obvious. But administrative convenience appears to mirror a conceptual division between these two

[69] SITUATING THE UN DEMOCRACY FUND IN THE GLOBAL ARENA, available at www.un.org/democracyfund/XSituatingDemocracy.htm.

[70] Press Release, *Rule of Law and Human Rights Are Vital for Democracy, Especially in Arab World, Secretary-General Says in Message to Regional Conference in Yemen*, SG/SM/9110/L/3054 (Dec. 1, 2004).

aspects of governance. Whether or not one accepts this claim, it appears to have substantial support in practice and will therefore be adopted in the review of practice that follows.

III. Elections

The first area of practice to be considered is elections. The United Nations began monitoring plebiscites and elections in newly independent colonies in the late 1950s.[71] Spurred by the General Assembly's seminal decolonization resolutions, the UN (and in particular the Trusteeship Council) observed thirty elections, referenda, and plebiscites in non-self-governing and trust territories between 1956 and 1990.[72] Not all former colonies held votes on independence or had international monitors present at their first post-independence elections. But the ubiquity of supervision lent an important orderliness to many of these transitions, particularly those in territories with potentially explosive ethnic tensions, such as British and French Togolands (later Togo, Ghana and Benin)[73] and Ruanda-Urundi (later Rwanda and Burundi).[74]

The UN did not begin monitoring elections in independent states until after the process of decolonization was largely completed. Early in its history, the UN had attempted monitoring in Korea and Germany, with Cold War tensions leading to predictably unsatisfactory results.[75] The watershed came with the highly successful mission to Namibia (UNTAG), which capped over thirty years of international efforts to oust South Africa from the territory.

The Namibian operation was ground-breaking in several respects. First, it was the Security Council that established the legal framework for Namibian independence by declaring it "imperative that free elections under the supervision and control of the United Nations be held for the

[71] Portions of the following section are adapted from Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733 (1995).

[72] YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 98 (1994).

[73] See *Report of the United Nations Commission for the Supervision of the Elections in Togoland under French Administration*, UN GAOR, 13th Sess., Annex 1, Add. to Agenda Item 40, at 1, UN Doc. A/3957 (1958); *The Future of Togoland under British Administration: Report of the United Nations Plebiscite Commissioner*, UN TCOR, 18th Sess., 733rd mtg., at 279, UN Doc. T/1258 (1956).

[74] *Report of the United Nations Commissioner for Ruanda-Urundi*, UN GAOR, 16th Sess., Annex 2, Agenda Item 49, at 1, UN Doc. A/4994 (1961).

[75] BEIGBEDER, *supra* note 72, at 120-26.

whole of Namibia as one political entity."[76] Second, to many observers, South Africa's continued administrative control over the territory during the campaign and election, as well as outbreaks of fighting between South African and SWAPO forces, raised substantial doubts as to whether the final results would be accepted by both sides.[77] Yet voting occurred with virtually no violence and a peaceful transition of power took place several months later.[78] Third, the divisive ethnic politics practiced by South Africa during its years of occupation required, in the words of one UNTAG official, "that the holding of elections in Namibia which would be more than only superficially free and fair would require massive intervention by UNTAG to change the political climate in the country."[79] Substantial social engineering, in other words, as opposed to mere passive observation, was required to ensure a successful transition.

To overcome these and other obstacles, UNTAG deployed over 8,000 persons in the territory – an enormous UN undertaking by the standards of 1989 – and insisted that it be involved in every step of implementing the new framework of electoral laws, which it had also painstakingly negotiated with the South African Administrator-General.[80] UNTAG also organized a massive public relations campaign to convince Namibians both that the elections would be conducted fairly and that the results would be respected.[81] Shortly after successful elections were held, the new Namibian Constituent Assembly drafted a remarkably progressive constitution, which it adopted with much ceremony less than one week prior to formal independence.

The Namibian operation produced an enormous sense of optimism in the UN. The next mission was the ONUVEN operation in Nicaragua, which the Secretary-General authorized even before the Namibian elections had taken place. The elections culminated a regional effort to

[76] SC Res. 385 (Jan. 30, 1976).

[77] See Commission on Independence for Namibia, Report of the First Observer Mission of the Commission on Independence for Namibia (1989).

[78] Beigbeder, *supra* note 72, at 161-3.

[79] Cederic Thornberry, The Secretary-General and Namibia 7 (1991) (paper presented to Ralph Bunche Institute Conference, "The Impact of the Changing International Climate on the Role of the United Nations' Secretary-General," Sept. 11-13, 1991).

[80] See Paul C. Szasz, *The Electoral Process*, in The Namibian Peace Process: Implications and Lessons for the Future 143 (Herbert Weiland & Matthew Braham eds., 1994).

[81] *Report of the Secretary-General: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, at 9, UN Doc. A/46/609 (1991).

resolve the *contra* war that had engulfed Nicaragua and its neighbors since the early 1980s. ONUVEN had none of the leverage with the Nicaraguan government that UNTAG was able to muster when negotiating with the South African electoral authorities. Yet, remarkably, it was able to persuade the Sandinista government both to alter laws and cease practices that it found inconsistent with the mission mandate.[82] That mandate might have been interpreted to cast ONUVEN as mere passive observer, but Elliot Richardson, the Secretary-General's Special Representative, argued that ONUVEN's unique ability to legitimize the elections "demanded more than merely recording the process, more than monitoring, and could not stop short of actively seeking to get corrected whatever substantial defects had been discovered."[83] That the incumbent government lost the election and proceeded to leave office (although not without substantial controversy), further reinforced the perceived value of a UN presence.

Still more ground was broken in the Haiti operation, authorized by the General Assembly only seven months after the elections in Nicaragua. Both the Namibian and Nicaraguan elections were part of solutions to conflicts long of concern to the international community; both, for example, had been the subject of opinions by the International Court of Justice.[84] In September 1990, the Secretary-General attempted to codify this practice by announcing that henceforth, large scale UN election monitoring would be restricted to situations with a "clear international dimension."[85] One month later, however, the General Assembly approved the mission to Haiti. The only "international dimension" to Haiti's ongoing political crisis was a steady outflow of refugees, a factor present in virtually all internal crises. After Haiti, the requirement of an international nexus faded from official commentary on UN electoral activities.

Since these early operations, and as described in Chapter 2, the UN and regional organizations have regularly dispatched governance missions to post-conflict states. Discussion among both states and commentators now rarely focuses on the desirability of promoting democratic institutions in these societies. One recent study declares flatly, "National

[82] *First Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, at 6, UN Doc. A/44/642 (1989).

[83] *Fifth Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, at 3, UN Doc. A/44/927 (1990).

[84] *International Status of South-West Africa*, Advisory Opinion, 1950 ICJ 128 (July 11); *Legal Consequences for States of the Continued Presence of S. Africa in Namibia (S.W. Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 6 (Jan. 26); *Military and Paramilitary Activities* (*Nicaragua* v. *US*), 1986 ICJ 14 (June 27).

[85] *Report of the Secretary-General on the Work of the Organization*, at 15, UN Doc. A/45/1 (1990).

elections have become international affairs – and international election monitoring has become an internationalized practice in world politics."[86] Debate centers instead on logistical questions of how and when to intervene and which of the many possible tasks for international reconstruction – security, rule of law, political participation, infrastructure repair, etc. – ought to be attended to first.[87]

This emerging democracy-promotion regime has given rise to an elaborate institutional infrastructure, both at the UN and elsewhere, designed to promote and facilitate democratic transitions.[88] The breadth of these efforts suggests a nascent universalism. Eric Bjornlund reports that "between 1989 and 2002, international election observers were present for 86 percent of the national elections in ninety-five newly democratic or semi-authoritarian countries."[89] Apart from the Middle East and North Africa, which have lagged substantially behind the democratic Third Wave,[90] monitoring levels have been remarkably consistent across regions. According to Bjornlund, 87 percent of national elections in Eastern and Central Europe were monitored by international observers during this period, 89 percent in Sub-Saharan Africa, 88 percent in Latin America and the Caribbean and 77 percent in the Asia/Pacific region.[91] When in 2005 the Security Council referred without elaboration to "international democratic standards," its apparent confidence that those standards were well-understood was grounded in a substantial body of international practice.[92]

In five specific areas, the mechanisms of international law have been engaged to encourage and reinforce the legitimacy of representative

[86] Arturo Santa-Cruz, *Constitutional Structures, Sovereignty, and the Emergence of Norms: The Case of International Election Monitoring*, 59 INT'L ORG. 663, 663 (2005).

[87] See e.g., JANE STROMSETH, DAVID WIPPMAN AND ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006); JACK SNYDER AND EDWARD MANSFIELD, ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR (2005); Thomas Carothers, *The End of the Transition Paradigm*, in CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION 167 (Thomas Carothers ed., 2004); JACK SNYDER, FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT (2000); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule Of Law,"* 101 MICH. L. REV. 2275 (2003).

[88] See BEIGBEDER, *supra* note 72; Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOC. 20 (2001); Christopher Joyner, *The United Nations and Democracy*, 5 GLOBAL GOV. 333 (1999).

[89] ERIC BJORNLUND, BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY 43 (2004).

[90] The phrase is Samuel Huntington's; see SAMUEL HUNTINGTON, THE THIRD WAVE (1991).

[91] BJORNLUND, *supra* note 89, at 44-5.

[92] UN Doc. S/PRST/2005/50 (2005).

institutions.[93] First, when the UN and regional organizations monitor elections, they necessarily pass judgment on candidates or parties claiming a legitimating mandate from the outcomes. In an internationally monitored election, it is not only the nation's voters that confer legitimacy on elected leaders, but international actors as well. In many crucial cases, the converse is more important: when voters *delegitimize* leaders by voting them out of power, only statements by outsider observers on the fairness of the process create the political pressure necessary to compel those leaders to step down. The much vaunted Orange Revolution in the Ukraine, for example, started with the government's attempt to distort its electoral loss and the insistence by the Organization for Security and Cooperation in Europe and other international observers that the elections had been marred by significant fraud and other irregularities.[94]

Second, decisions of human rights bodies have invigorated long-dormant provisions of human rights treaties guaranteeing a right to political participation through periodic and free elections.[95] By condemning military coups, bans on opposition parties, irregularities in ballot tabulation and other distortions of electoral preferences, this jurisprudence has done much to clarify the international legal understanding of democratic processes. Even the comparatively weak organs of the Organization of African Unity joined this trend.[96] Third, bilateral and multilateral recognition of states and governments is increasingly predicated on professed adherence to democratic norms.[97] Several regional organizations now condition membership, or continued membership in good standing, on maintenance of democratic institutions.[98]

[93] The following discussion largely parallels that in Gregory H. Fox and Brad R. Roth, *Democracy and International Law*, 27 REV. INT'L STUD. 327, 327-38 (2001) (Fox and Roth).

[94] See Statement by United States Deputy Permanent Representative Paul W. Jones to the OSCE Permanent Council (Nov. 25, 2004), available at http://osce.usmission.gov/archive/2004/11/ukraine_elections_11_25_04.pdf.

[95] See *Socialist Party and Others* v. *Turkey*, 1998-I EUR. CT. H.R. 45; Human Rights Committee, General Comment 25 (57), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996); Mexico Election Decisions, Cases No. 9768, 9780, 9828, Inter-Am. C.H.R., 97, 108, OEA/Ser.L/V/11.77, doc. 7, rev. 1 (1990). See generally Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW *supra* note 46, at 55.

[96] See Nsongurua J. Udombanal, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT'L L. 1209, 1253-65 (2003).

[97] See Sean D. Murphy, *Democratic Legitimacy and Recognition of States and Governments*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 46, at 123.

[98] This is true for the EU, the OAS, MERCOSUR and the Commonwealth. see FOX & ROTH, *supra* note 93, at 332 note 31.

Fourth, a variety of regimes unrelated to democratization have begun to predicate implementation on popular participation in regulatory processes.[99]

Finally, the law of peace and security has invoked democratization as a tool in the peaceful resolution of disputes.[100] This instrumental use of democratization has taken several forms. Twice (in Haiti and Sierra Leone) the Security Council has deemed the overthrow of an elected government a "threat to the peace" and authorized the use of external force to oust the usurping regime.[101] The Council has also institutionalized the planning, structuring and monitoring of elections as a permanent fixture in UN-brokered transitions from civil war to peacetime normalcy.[102] The Secretary-General explains the UN's perceived link between democratic practice and conflict-avoidance:

> At the center of virtually every civil war is the issue of the state and its power – who controls it, and how it is used. No armed conflict can be resolved without responding to these questions. Nowadays, the answers almost always have to be democratic ones, at least in form.[103]

IV. Human rights

If electoral/democratic rights are the collective face of the liberal state model – expressing an entitlement of the citizenry as a whole to political participation – then "human rights" are its individual face. Human rights need not be individual, of course, as minority protection regimes make clear. And political participation is phrased as an individual right in many treaties, so the distinction is not always clear-cut. But human rights by and large involve entitlements to the bodily, intellectual and cultural integrity of individuals. Electoral rights, even if exercised individually, are meaningless without a process guaranteed to all citizens. The distinction is clearest, of course, when human and democratic rights conflict with each other, as the American debate over majoritarian versus counter-majoritarian rights makes clear.[104]

Concern for human rights is now ubiquitous in inter-state relations. Once confined to weak and politically obscure treaty systems, the

[99] The most prominent example is environmental protection. *See* Jonas Ebbesson, *Public Participation in International Environmental Law*, 8 Y.B. Int'l Env. L. 51 (1997).
[100] See generally Fox, *Security Council and Democratization*, *supra* note 50.
[101] See SC Res. 940 (July 31, 1994) (Haiti); UN Doc. S/PRST/1998/5 (1998) (Sierra Leone).
[102] Fox, *Security Council and Democratization*, *supra* note 50, at 73.
[103] Kofi A. Annan, *Democracy as a Global Issue*, 8 Global Gov. 135, 137 (2002).
[104] See John Hart Ely, Democracy and Distrust (1930).

protection of individual rights has become the motivating force behind sophisticated regulatory systems, exposés of official brutality, civil adjudicatory mechanisms, prosecutions for international crimes, sanctions regimes and military interventions to mention a few of the ways compliance is now monitored and enforced internationally. The extent of state involvement obviously varies by region. Among the democratic states of Europe, a network of treaty obligations mandates respect for a catalogue of well-defined rights. Among non-democratic states (as in the Middle East), human rights are infrequently the subject of transnational discourse. Between these two extremes appears an infinite variation of practice. But as the number of democratic states has grown, the end of the spectrum in which traditional realism dominates policy-making, framing state interests without any reference to individual welfare, has diminished considerably. The point is not to paint a utopian picture in which expressed fidelity to norms eclipses the decidedly more checkered record in practice. It is rather that the same human rights standards appear in virtually all *collective* pronouncements on governmental policy and institutions.

Thus, at the level of stated policy, "everybody seems to be in favour of human rights. That is true for governments that have made it a constituent element of their foreign policy. It is true for global and regional organizations that devote elegant words to it in international treaties and declarations."[105] Indeed, if one premise of the liberal state thesis is that human rights law by its very nature expresses a preference for liberal governing institutions, the discussion might well end here. What other model of the state could possibly emerge from this increasingly dense web of transnational commitments, institutions and enforcement actions?

But the thesis need not rest on aggregating individual human rights to produce an overall model of governance. There are more direct ways in which international organizations and states, acting to secure adherence to human rights standards, have sought to create or reform national governing institutions. Two examples, not involving formal human rights mechanisms, are: (1) the human rights institutions created in post-conflict states; and (2) the lending policies of international financial institutions.

[105] Peter R. Baehr & Monique Castermans-Holleman, The Role of Human Rights in Foreign Policy 129 (3rd edn, 2004).

First, as touched on in Chapter 2, international actors are increasingly involved in drafting and implementing peace agreements to end civil wars, and these agreements almost uniformly import human rights protections into the political architecture of the post-conflict state. Bell and Keenan report that since 1990 over 300 such agreements have been signed by parties in over forty jurisdictions.[106] A variety of common "design features," such as bills of rights, human rights commissions, judicial reform measures and revised criminal codes, address structural human rights issues.[107] Recent agreements with such features include those for Bourgainville (Papua New Guinea),[108] Burundi[109] and the Sudan.[110] That agreements ending conflict in deeply divided societies contain such extensive human rights protections suggests that "mediators and parties to the conflict find the connection between peace and justice persuasive."[111]

One example is Haiti, which, while experiencing less a full-blown civil war than low-grade anarchy, has exhibited many of the governing failures typical of post-conflict societies. The Security Council responded by authorizing a series of human rights reforms that closely resemble those in peace accords. The MINUSTAH mission was authorized under Chapter VII to assist in "monitoring, restructuring and reforming the Haitian National Police, consistent with democratic policing standards," overseeing the re-establishment of the corrections system and developing "a strategy for reform and institutional strengthening of the judiciary."[112] These law reform initiatives were designed to promote the "establishment of a State based on the rule of law."[113] In this, the Council echoed its resolution on Côte D'Ivoire two months earlier in which it authorized the UNOCI mission to assist "in re-establishing the authority of

[106] Christine Bell and Johanna Keenan, *Human Rights Non-Governmental Organizations and the Problem of Transition*, 26 HUM. RTS Q. 330, 331 (2004).

[107] *Ibid*. See William G. O'Neill, *Reform of Law Enforcement Agencies and the Judiciary* (draft paper for the International Council on Human Rights Policy Review Meeting, "The Role of Human Rights in Peace Agreements," March 7-8, 2005), available at www.ichrp.org/paper_files/128_w_09.doc.

[108] See Bourgainville Peace Agreement (Aug. 30, 2001), available at www.usip.org/library/pa/bougainville/bougain_20010830.html.

[109] See Arusha Peace and Reconciliation Agreement for Burundi (Aug. 28, 2000), available at www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html.

[110] See The Implementation Modalities of the Protocol on Power Sharing (May 26, 2004), available at www.usip.org/library/pa/sudan/cpa01092005/implementation_agreement.pdf.

[111] CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 6 (2000).

[112] SC Res. 1242 (April 30, 2004). [113] *Ibid*.

the judiciary and the rule of law throughout Côte d'Ivoire."[114] Peace agreements have thus become an important human rights implementation mechanism: international standards are woven into the architecture of new institutions in states whose political relations have essentially failed. The hope – though not always the reality – is that a more stable and satisfying politics will emerge from these new processes.

Second, international financial institutions have begun to use their substantial leverage over structural reform in developing countries to promote institutional protections of human rights. Regional development banks have been the most explicit in incorporating human rights criteria into lending policies. The European Bank for Reconstruction and Development declares in its founding agreement that the contracting parties are "committed to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics."[115] The Inter-American Development Bank pursues democratic development as part of a comprehensive strategy to "modernize the state."[116] This includes strengthening the judiciary, pursuing law reform and promoting "a culture of tolerance, freedom, participation, accountability and social solidarity."[117] As part of a strategy to promote good governance, the African Development Bank seeks to reform legal and judicial systems in order to promote "rule of law, human rights and private capital flows."[118] The Bank views protection of human rights as promoting social stability and cohesion, which, in turn, avoid disruptions in economic growth and the distribution of resources. "Thus, respect for human rights clearly has a bearing on the ability of borrowers to make productive investment of Bank Group resources and also fulfill their obligations."[119] The Asian Development Bank, while engaging in robust "governance" initiatives, is the least aggressive of the regional banks in focusing on political reforms. Nonetheless, many of its governance

[114] SC Res. 1528 (Feb. 27, 2004).

[115] Agreement Establishing the European Bank for Reconstruction and Development, *in* Basic Documents of the European Bank for Reconstruction and Development 5 (1991).

[116] Inter-American Development Bank, Modernization of the State 12-15 (2003).

[117] *Ibid*. at 15. See also Carlos Santiso, *Towards Democratic Governance: The Contribution of the Multilateral Development Banks of Latin America*, in Democracy Assistance: International Co-operation for Democratization 150, 162 (Peter Burnell ed., 2000).

[118] African Development Bank and African Development Fund, Bank Group Policy on Good Governance 4 (1999).

[119] *Ibid*. at 7.

initiatives have implicit human rights objectives, which might have been overtly classified as such but for regional political sensitivities: government accountability, especially through increased flow of information; legal standards that are regularly and equally enforced; and enhanced participation by civil society groups.[120]

The World Bank has been more reticent, traditionally adhering to a strict reading of its articles of incorporation that precludes involvement in political matters.[121] But movement is evident. As with the regional banks, the World Bank launched a series of governance initiatives in the 1990s, after concluding that problems of state administration were significantly inhibiting economic reform and development.[122] A watershed 1989 report, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, found that "underlying the litany of Africa's development is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs."[123] The Bank decried personalized rule in many African states in which "leadership assumes broad discretionary authority and loses its legitimacy."[124] In the worst situations, "the state becomes coercive and arbitrary."[125] Resisting these trends, the Bank argued, "requires a systematic effort to build a pluralistic institutional structure, a determination to respect the rule of law, and a vigorous protection of the freedom of the press and human rights."[126]

Despite having thereby set a reform agenda for itself, the World Bank's narrow reading of its articles continued to restrain a rather obvious set of policy prescriptions. The Bank acknowledges a limited legal authority to pursue certain human rights reforms, primarily freedom of expression and assembly and popular participation, but only in relation to the specific project being funded.[127] Many of its projects focus both on how government authority is exercised (including rule of law and judicial reform initiatives) and the quality of life for the intended beneficiaries of Bank funds.[128] But the Bank still maintains that these efforts relate

[120] Asian Development Bank, Annual Report 1998 16-18 (1999).

[121] The limitations are contained in Articles III(5)(b) and IV(10).

[122] See Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 Geo. Public Pol'y Rev. 1 (2001) (Santiso, *Good Governance*).

[123] World Bank, Sub-Saharan Africa: From Crisis to Sustainable Growth: a Long-Term Perspective Study 60 (1989).

[124] *Ibid*. at 61. [125] *Ibid*. [126] *Ibid*.

[127] Genoveva Hernandez Uriz, *To Lend or Not To Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 Harv. Hum. Rts. J. 197, 205-6 (2001).

[128] See Santiso, *Good Governance*, *supra* note 123, at 2; John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 Cornell Int'l L. J. 331, 355 (2000).

not to *legitimacy* questions of how governmental authority ought to be used, but *effectiveness* questions of how government policies function in practice.[129]

V. Conclusions

In this chapter, I have argued that international law is coalescing around a liberal model of the state. But is this claim not vulnerable to the rather straightforward reply that virtually all of the practice cited in support of this thesis involves intrusions by *international actors* into national politics? If external actors are now empowered to remake state governments in the myriad ways here detailed, are not *they*, rather than their target states, now the ultimate locus of international legal authority? Can an international system be described as state centric – and centered around a particular version of the state for that matter – when the power to shape national institutions clearly resides beyond any one state's control?

This would be a powerful critique if the argument for a liberal state model had been one of legal competence. If the claim had been that states have retained a sovereign authority to reject changes to their governing institutions purportedly sanctioned by international law, then the many international efforts at democracy-promotion would serve as a powerful counter. But although the claim of retained sovereignty is important, and will be addressed at length in Chapter 6, it is not made here. This chapter has argued instead that states, with substantial help from the international community, have retained primacy in the *practice* of politics. State institutions continue to make social policy, from the mundane to the grandiose. States also bear primary responsibility for their citizens' physical safety, individual liberty and equal treatment. While regional and global institutions are increasingly present in this policy process, it is not only a distinctly distant presence, but it is intended to *reinforce* state primacy. For most people in the world, in other words, the most important politics remains state politics.

The greatest success a state-building mission can claim is that it has made itself irrelevant. Effective local institutions staffed by committed liberal democrats will, it is hoped, make international supervision ultimately unnecessary. There is thus no inconsistency in saying both that international law claims the authority to reform national institutions

[129] Santiso, *Good Governance, supra* note 123, at 5.

along liberal lines *and* that it intends the resulting liberal state to be at the center of political life, the essential forum for policy choice and implementation.

The connection between the emerging liberal conception of the state and humanitarian occupation is now fairly obvious. The occupation missions effectively seek to operationalize the liberal model. Their focus on protecting pluralism, holding elections, securing human rights according to international standards and creating institutions that embody all these goals, are precisely the objectives of democratic and human rights norms. And these reforms occur within borders that the Security Council has declared unalterable, providing a further link to the legal preference for reform of existing states rather than allowing new ones to emerge in the hope they may prove more tolerant.

If the liberal state model is indeed the intellectual parent of humanitarian occupation, then the evolution of international administration would seem complete. The model is composed of norms concerned with the welfare of citizens, and missions to operationalize the model would appear solely concerned with what I have termed the welfare of "insiders." It is certainly quite distant from the European territorial administrations of the 1920s that paid little attention to matters of governance and so could be said to exist for the benefit of "outsiders." We will have more to say in Chapter 6 about whether this distinction is as clear as first appears or whether motives and mission designs are more mixed. But there is little doubt that the early missions could not have pointed to the robust normative pedigree for virtually all the important tasks of humanitarian occupations.

Section III Legal justifications

6 Conventional legal justifications

We now turn from explanations for humanitarian occupations to their legal justifications. What is the legal basis for the Security Council divesting a state of some or all of its governing authority? Two justifications have been given in each of the humanitarian occupation cases to date: (1) consent of the parties (including, but not limited to the state under occupation); and (2) a resolution of the UN Security Council under Chapter VII of the Charter.[1] This chapter will examine these widely cited claims. The next chapter reviews a more novel legal justification based on the international law of occupation, focusing in particular on the United States' occupation of Iraq. There, the United States pursued a series of reforms remarkably similar to those enacted by humanitarian occupiers.

I. First legal framework: consent to humanitarian occupation

A. The coercion problem

Each of the target states formally consented to the humanitarian occupation missions. And in each case except East Timor, consent was also given by sub-state actors such as the Bosnian Serbs and the Kosovar Albanians, who were parties to the recently ended conflict. At first such consent seems perplexing. Why would the governments and non-state actors agree to the missions, especially if their scorched-earth tactics were working? Bosnia, Kosovo, East Timor and Eastern Slavonia each demonstrate that intense international pressure, including the threat or use of military force, may ultimately lead the local partners to

[1] See e.g., Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 Am. J. Int'l L. 76, 83 (2001).

consent. But does consent obtained by coercion have any practical value? Given that each of the missions involved creation of democratic institutions that require mutual tolerance, restraint and reasoned debate among the parties, can one really expect such values to emerge from an externally imposed agreement? If at least some parties resist, as Kosovo, Bosnia and Eastern Slavonia demonstrate they almost certainly will, can the international community maintain the pressure necessary to compel compliance?[2] And will more coercion, as practiced, for example, by the High Representative in Bosnia, produce a real affinity for the implanted democratic institutions? Or might not the diktat of outsiders provide an effective rallying cry for opponents of the new institutions, perhaps in an echo of how the Nazi party exploited resentment of the Versailles Treaty in Weimar Germany?

The challenge of making "consensual" occupations work is enormous. In proceeding with the missions, the international community has evidently concluded that living with implementation problems is an acceptable price of not simply letting the conflicts rage on. At least in these cases, it has rejected Edward Luttwak's provocative argument that unless a civil war is permitted to run its "natural course" to victory by one side or exhaustion for both, the conflict will have ended prematurely.[3] A "premature" end to conflict such as Dayton, in his view, means "no side is threatened by defeat and loss, none has a sufficient incentive to negotiate a lasting settlement; because no path to peace is even visible, the dominant priority is to prepare for future war rather than to reconstruct devastated economies and ravaged societies."[4]

For international lawyers, however, the issue of coercion is relevant less to these problems of implementation than to the validity of the agreements themselves. The international law of treaties, like virtually

[2] As Paul Szasz observed of the Dayton Accords,

> the Dayton Accord, in spite of the fine words spoken at the end of the proceedings. . .was probably destined to fail. This is not because the Accord was concluded in part by 'intermediate sovereigns' but because it was imposed by massive pressures on parties that at best consented imperfectly and thus were unlikely to implement its terms in good faith in spite of their legal obligations to do so *and* because those that exerted the pressure to initial and sign the Dayton Accord did not, and probably never intended to, apply the massive, continuing and long-term force necessary to make the Dayton Accord work.

Paul Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT'L L. J. 759, 768 (1997). Szasz does not believe this pressure undermined the Accords' validity under international law. *Ibid*. at 767. See also Robert M. Hayden, *Bosnia: The Contradictions of "Democracy" without Consent*, EAST EUR. CONST. REV., Spring 1998, at 47.

[3] Edward N. Luttwak, *Give War a Chance*, 78 FOREIGN AFF. 36 (1999). [4] *Ibid*. at 37.

every variant of national contract law, holds that coerced agreements are void *ab initio*.[5] Does this rule apply to the agreements to humanitarian occupation missions? The Bosnia and Kosovo agreements were procured by NATO-led bombing campaigns.[6] The East Timor agreement came only after veiled threats of force as well as intense diplomatic and economic pressure. The Erdut Agreement for Eastern Slavonia headed off a Croatian offensive that had already overrun other Serb-populated areas. If such coercive measures invalidate the subsequent agreements, then humanitarian occupation may face an insurmountable hurdle, for governments must be persuaded to accept foreign occupation forces on their soil but cannot be threatened with the most dire consequences if they do not.

B. The prohibition on coerced treaties

Article 52 of the Vienna Convention on the Law of Treaties provides that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[7] This proposition, while seemingly self-evident, did not enter international law until the use of aggressive military force had itself become a prohibited act.[8] Treaties procured by force thus became the fruit of a poisonous tree. Although some have argued that article 52 is only implicated when a party negotiating a treaty threatens force[9] – a view that would exclude cases in which the UN negotiates an agreement but individual states or groups of states threaten force (or visa-versa) – the language of the article does not support this view. Nor should it, since the article would then have only

[5] IAN M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 95-100 (1973); ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 206-11 (1961).

[6] One US Air Force lawyer described the Kosovo air campaign as an attempt to "bomb Milosevic back to the bargaining table." Jeffrey Walker, Lieutenant Colonel, US Air Force, remarks at panel discussion, "Urban Warfare and the Laws of Armed Conflict: On Whose Hands is the Blood of the Innocent?" at 2002 International Law Weekend (Oct. 26, 2002).

[7] Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 311 (Vienna Convention on Treaties).

[8] As the International Law Commission (ILC) noted in its commentary on Article 52, the absence of an anti-coercion doctrine prior to the UN era "was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes." II 1966 Y.B. INT'L L. COMM'N 246 (ILC Commentary).

[9] See Nigel D. White and Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat Too Far?*, 29 CAL. W. INT'L L.J. 243, 279 (1999).

spotty application to the ad hoc manner in which the collective security system has evolved, with seemingly infinite combinations of actors – states, groups of states, regional organizations and the UN – taking on different roles in different security crises. This narrow reading of article 52 seems a relic of a time when only states were involved in armed conflicts.

The prohibition on aggressive force arose in the immediate post-war era, most prominently through article 2(4) of the UN Charter.[10] The illegality of unilateral force is now widely accepted and considered black-letter law for most international lawyers.[11] Some argue the prohibition has been eroded or was never authoritative in the first place. This claim will be considered below. But whatever the current debate, when the International Law Commission (ILC) completed the Vienna Convention in 1966, it found little dissent from the principles of article 2(4).[12] It is entirely logical, therefore, that article 52 should refer to the Charter in defining the nature of the force that might compel agreement to an invalid treaty.

But a treaty of peace is frequently the product of coercion.[13] Many peace treaties are imposed by victors upon the vanquished after hostilities have ended in surrender. Others are negotiated when a state losing ground in an armed conflict seeks to avoid total humiliation. In drafting article 52, the ILC recognized that it could not require all peace treaties to be negotiated at arm's length. To do so would not only be unrealistic but create a series of undesirable incentives. States at war might forgo negotiations at preliminary stages and continue fighting until unconditional surrender had been obtained. Or they might avoid

[10] Article 2(4) provides that "all members shall refrain in their international relations from the threat or use of force against the territory integrity or political independence of any state, or in any other measure inconsistent with the purposes of the United Nations." The ICJ has found that art. 2(4) also embodies customary law. *Military and Paramilitary Activities* (*Nicar.* v. *US*), 1986 ICJ 14, 99 (June 27).

[11] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 85-116 (4th edn, 2005); MALCOLM N. SHAW, INTERNATIONAL Law 1017-22 (5th edn, 2003); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th edn, 2003).

[12] ILC COMMENTARY, *supra* note 8, at 246 ("The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are to-day of universal application.").

[13] See CLIVE PARRY, *The Law of Treaties*, in MANUAL OF PUBLIC INTERNATIONAL LAW 175, 202 (Max Sørensen ed., 1968) ("[T]erms of peace, presented by victorious belligerents to the vanquished, have often left the latter with no practical alternative to acquiescence in their terms.").

peace treaties altogether, leaving unaddressed many complex post-war arrangements that such treaties usually resolve.

At the same time, the Commission also recognized that certain peace treaties might properly be voided, such as those ratifying the annexation of a previously neutral state. In the view of the ILC's Special Rapporteur, "clearly, there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor."[14] The 1939 Czech-German treaty, giving effect to the Munich agreement, is often cited as a paradigmatic example of a properly voided treaty.[15]

By incorporating a reference to Charter principles on force in article 52, the Commission allowed a distinction to be drawn between these two classes of peace treaties. Treaties that arise from illegal military actions in violation of article 2(4) are void.[16] By contrast, treaties arising out of force used in legitimate self-defense – a right specifically reserved to states by the Charter – would presumably survive.[17] The distinction may become blurred, of course, when it is claimed that a state initially acting in self-defense later became an aggressor or employed disproportionate force in vindicating its defensive rights – the assumption being that the Charter rules on force also include a proportionality requirement. Less drastically, a state acting in self-defense, while not seeking to annex territory, might nonetheless secure more favorable terms of peace by threatening the territory or population of its adversary. But these are shades of gray between two relatively clear polar principles.

C. The humanitarian occupation agreements

Humanitarian occupation, however, involves neither of these variations on the termination of purely state-to-state conflicts, but a third kind of treaty. The occupation agreements have been validated by Security Council Chapter VII resolutions. This has occurred both *ex ante*, by approval of a use of force that compels parties to adopt the treaty, or *ex post*, by the Council approving the treaty itself. The claim that these actions avoid

[14] Humphrey Waldock, Special Raporteur, *Second Report on the Law of Treaties*, UN Doc. A/CN.4/156 (1963), in II 1963 Y.B. INT'L L. COMM. 36, 52 (*Second Report on Treaties*).

[15] See PARRY, *supra* note 13, at 202; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 256 (2000).

[16] ILC COMMENTARY, *supra* note 8, at 246.

[17] Article 51 of the Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

invalidity under Article 52 rests not on the nature of the force or the agreement, but on the Council's special status in international law.

The Council sits atop the collective security apparatus of the United Nations. The Charter's drafters ambitiously sought to transfer ultimate authority for determining the legality of resort to force from individual states to the Security Council.[18] Thus, the Council is given authority to respond to any "threat to the peace, breach of the peace, or act of aggression."[19] Its responses may range from severing diplomatic relations to authorizing the use of retaliatory force, which it has done on several occasions since the end of the Cold War.[20] Article 24 of the Charter endows the Council with "primary responsibility for the maintenance of international peace and security" and UN member states agree that "in carrying out its duties under this responsibility the Security Council *acts on their behalf*."[21] On matters of war and peace, the Council thus articulates the corporate will of UN member states.

Article 52 of the Vienna Convention's reference to "the principles of international law embodied in the Charter of the United Nations" can therefore encompass two types of validating acts by the Security Council. The first occurs when the Council has endorsed a use of force that produces a peace treaty; the endorsement would preclude a claim that the treaty was the result of an illegal use of force. This argument assumes that *any* force endorsed by the Council is *ipso facto* lawful. Although the ILC commentary on article 52 does not speak to Council-sanctioned enforcement actions, late in the drafting process ILC member Robert Ago stated, without contradiction by other members:

> the coercion referred to in article 36 [later to be article 52] should be taken to mean coercion in violation of the principles of the Charter and not coercion employed in conformity with the law. Wars of aggression should be distinguished from wars of defence against aggression, and also from enforcement action by Member States against a State which had flagrantly violated the Charter.[22]

In the case of Bosnia, the Security Council had granted NATO the authority to use force against incursions into so-called "protected areas," which included Sarajevo. The bombing of Serb positions around the city in August 1995, which ultimately led to the Dayton Accords, thus

[18] See Thomas M. Franck and Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 65-70 (1991).
[19] UN Charter, art. 39. [20] *Ibid*. arts. 41-2. [21] *Ibid*. art. 24 (emphasis added).
[22] International Law Committee, 827th mtg., Jan. 10, 1966, I 1966 Y.B. INT'L L. COMM'N, 30, 34 (statement of Mr. Ago).

received Council endorsement.[23] Anthony Aust argues that the Council's similar action in 1994, endorsing the forcible ouster of the Haitian junta in favor of elected President Aristide, nullified any claim that the junta's agreement to leave had been improperly coerced. Although the treaty was signed as "American bombers were on their way to Haiti," Aust argues, "[a]rticle 52 does not apply to the threat or use of lawful force."[24]

The second type of validation is exemplified by Kosovo, where the Security Council endorsed not the use of force but the occupation agreement itself.[25] The claim is that the Council has authority to impose a treaty by fiat *even when* the prior use of force was unilateral and arguably unlawful. Assuming such an imposition is a proper exercise of the Council's Chapter VII powers, the treaty would not derive its legality from a lawful use of force as provided in article 52 but from the legislative power of the Council to override the treaty law consequences of that force.

Whether the Council possesses such power will be discussed in Section II. Here, we must examine the prior question of whether this means of validation even falls within the scope of article 52, for Council validation in these circumstances was not a topic discussed by the ILC. The reason is fairly obvious: the scenario involves a conflict initiated by the unilateral use of force and, later, resolved by the collective endorsement of a peace agreement. The ILC debate took place in the depths of the Cold War when UN enforcement actions were rare and highly contentious. Even if Commission members had envisioned such actions, it seems highly unlikely they would have contemplated a conflict that was collective in its resolution but not in its initiation. The serially ad hoc combinations of unilateral, regional and UN-sponsored actions that now typify collective security operations were unknown at the time. Even today, as the debate surrounding the Kosovo operation suggests, the anomalous marriage of unilateral force and a collective peace agreement is highly controversial. More likely, Commission members would have envisioned collective actions under the original scheme

[23] In Resolution 836, the Council authorized member states to use "all necessary measures, including the use of air power" to support the UN mission then on the ground in and around designated "safe areas." SC Res. 836 (June 4, 1993). While Russia argued after the NATO bombing commenced that necessary consultations had not taken place, no other Council members agreed. See UN Doc. S/PV.3575 (1995).

[24] AUST, *supra* note 15, at 256.

[25] See SC Res. 1203 (Oct. 24, 1998) (endorsing Chernomyrdin/Ahtisaari/Milosevic agreement). In Bosnia, the Council endorsed the Dayton Accords in addition to sanctioning the use of force. See SC Res. 1022 (Nov. 22, 1995).

of the Charter, with UN forces mobilized pursuant to article 43 agreements and a specific Council mandate. Such conflicts, fought collectively, would presumably also have been terminated collectively.[26]

Unless one is a die-hard originalist – a position generally rejected in treaty interpretation[27] – the ILC's silence on the question should not end discussion of Council validation. A non-originalist understanding would read article 52 in tandem with a contemporary sense of the Security Council's powers, which have expanded enormously since the end of the Cold War. There would seem little sense in acknowledging the Council's authority to impose occupation agreements (if that power exists), but refusing to give that authority effect for purposes of article 52; that is, to allow the Council's specific endorsement to be trumped by a general rule of treaty law.

This view is buttressed by article 103 of the Charter, which subordinates competing treaty rights: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." A decision by the Security Council under Chapter VII is an "obligation" under the Charter.[28] A state would thus be precluded from invoking the anti-coercion language of article 52 of the Vienna Convention, which, by virtue of the limitations it places on those seeking to impose treaties, may be seen as

[26] The literature is not helpful in clarifying this form of Council validation. Julius Stone's detailed critique of all the ILC proposals on treaty coercion, for example, contains no reference whatsoever to the Security Council. Julius Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356 (1967-1968). One of the few discussions appears in STUART S. MALAWER, IMPOSED TREATIES AND INTERNATIONAL LAW (1977). Malawer states that international law "allows a treaty to be imposed only upon an aggressor state by the aggrieved state or by the aggrieved state or by collective action, which may include action by the Security Council." *Ibid*. at 155. But if the state is an "aggressor" because it engaged in an armed attack, thereby triggering the target state's right of self-defense, then the Council has no need to impose a treaty by fiat. The force used in response would be lawful and Article 52 would support a coerced treaty, negotiated either by the target state or the Council. Alternatively, if the state is an "aggressor" because it was so designated by the Council, which also licensed the use of retaliatory force, Article 52 would also support a treaty coerced by that response. Neither of these circumstances, however, occurred in Kosovo.

[27] The Vienna Convention consigns prepatory work of the treaty to "supplementary means of interpretation." VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 32. Priority is given to other factors that are not bound to the specific views of the drafters, such as a treaty's object and purpose, subsequent agreements among the parties related to the treaty and relevant subsequent practice. *Ibid*. art. 31(1) & (3).

[28] See UN Charter, art. 48.

an "obligation" under another international agreement. If article 52 conflicts with the Council's determination that an imposed agreement best serves the interests of international security, article 103 grants priority to the Council's decision.

An additional argument supports Council validation of these treaties. Article 75 of the Vienna Convention provides that its other articles shall be without prejudice "to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."[29] The safe harbor of article 52 is thus removed when an "aggressor state" becomes the object of "measures taken in conformity with the Charter." Such measures would include the Council's decision to impose a peace treaty on an aggressor state under Chapter VII. Although the ILC did not tie article 75 to collective action, its text is broad enough to include Council sanctioned treaties.[30]

Finally, an inevitable criticism of this role for the Council must be addressed. The American-led invasion of Iraq in March 2003 – undertaken in the face of clear opposition by several veto-wielding Council members and perhaps a majority of members overall – seems a particularly direct affront to the idea of plenary Council power in matters of peace and security.[31] Asked on the eve of the war whether "the United States might be viewed as defiant of the United Nations if you went ahead with military action without specific and explicit authorization from the U.N.," President Bush replied, "If we need to act, we will act, and we really don't need United Nations approval to do so . . . As we head into the 21st Century. . .when it comes to our security, we really don't need anybody's permission."[32] It is worth pausing to consider whether fallout from the Iraq war has jeopardized the Council's presumed legal monopoly on legitimate force, thereby undermining

[29] VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 75.

[30] A further question is whether a state that commits acts wholly within its own territory, such as the FRY in Kosovo, is an "aggressor state." I will assume that given the Council's rather consistent application of Chapter VII to civil wars, implying that such conflicts constitute a "threat to the peace," this would be a rather formalistic objection.

[31] This was the view expressed by many states at the Security Council meetings of March 26 and 27, 2003. See UN Doc. S/PV.4726 (2003) and UN Doc. S/PV.4726, Resumption 1 (2003). See generally Rainer Hoffman, *International Law and the Use of Military Force against Iraq*, 45 GER. Y.B. INT'L L. 9 (2002).

[32] Press Release, President George Bush Discusses Iraq in National Press Conference (March 6, 2003), available at www.whitehouse.gov/news/releases/2003/03/20030306–8.html.

its presumed authority to validate coerced treaties. The prohibition on coerced treaties, after all, entered international law in necessary tandem with restrictions on the unilateral use of force.

While a legally transformative event may only reveal itself over time, there are several reasons to believe the Iraq war's claimed injury to the collective security system may be overstated. Despite posturing rhetoric, the United States ultimately (and consistently) based its actions not on a legal theory outside of or contrary to Charter principles, but on the breach of prior Security Council resolutions.[33] On the day hostilities commenced, the US ambassador wrote to the Security Council that "[t]he actions being taken are authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991)."[34] In explaining this rationale shortly thereafter, the Legal Advisor to the State Department asked, "Do U.S. actions show a disregard for international law? The answer here is clearly no. Both the United States and the international community had a firm basis for using preemptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time."[35] Other states supporting the war issued virtually identical legal analyses.[36] Moreover, to the extent the US was seen as asserting a right to unilateral action, that claim was not accepted by other states involved in the debate. Virtually every other Council member insisted throughout the crisis that Council approval was required and unilateral action prohibited.

But even if article 2(4) has been eroded, a much more radical shift in collective security would be required in order to change the Council's unique capacity to validate coerced treaties. First, the affirmative grant of legitimating authority to the Council in Chapter VII would need to be compromised. It is one thing to claim that episodes like Kosovo and Iraq

[33] For citations to numerous statements, see Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L. J. 173, 175 n. 12 (2004).

[34] *Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc. S/2003/351 (2003) (US Letter).

[35] William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 563 (2003).

[36] See Statement by Attorney General, Lord Goldsmith, to a Parliamentary Question, 17 March 2003, available at www.ico.gov.uk/cms/DocumentUploads/Annex%20_B_Statement_ by_the_Attorney%20_General_17_3_031.pdf (British legal argument); Memorandum of Advice on the Use of Force Against Iraq, Attorney General's Department and the Department of Foreign Affairs and Trade, March 18, 2003, available at www.smh.com.au/articles/2003/03/19/1047749818043.html (Australian legal argument).

free states from using force *absent* a Council statement; it is another to claim that affirmative Council approval or disapproval has lost its unique legal standing. This might be the case if the law had deteriorated to the point where states had the same discretion to use force as the Charter grants the Council. But the Council's consistent condemnation of unilateral interventions, all adopted unanimously, belies this claim.[37] States even treat Council decisions as binding when they condemn acts not involving military force.[38] It follows that the more serious resolutions condemning force are binding *a fortiori*.

Second, one would need to account for the centrality of Resolution 687 to the Iraq war debate. The entire foundation for Council action against Iraq in the 1990s, cited by the US as justification for its intervention in 2003, was built on Resolution 687, ending the first Gulf War, by which the Council effectively imposed a peace treaty on Iraq.[39] Resolution 687 coerced Iraq into reversing virtually all its acts in the Kuwait war: it imposed a border demarcation on Iraq, forced it to pay compensation to foreign nationals injured in its occupation of Kuwait, required it to renounce several categories of weapons and submit to an intrusive inspection regime – all compulsions of dubious legality absent Council authorization under Chapter VII. Whatever the other differences among Security Council members on Iraq, there was no dissent from the legitimacy of this imposed agreement.[40]

Third, one would also need to account for the United States' consistent sponsorship of resolutions that invoke the Council's power to augment

[37] See SC Res. 1291 (Feb. 21, 2000) (demanding withdrawal of foreign forces from Democratic Republic of Congo); SC Res. 1177 (June 26, 1998) (condemning conflict between Eritrea and Ethiopia); SC Res. 660 (Aug. 2, 1990) (condemning Iraqi intervention in Kuwait). There have been few opportunities for the Council to condemn cross-border interventions since 1989, since "all but three of the major armed conflicts registered for 1990-2001 were internal." Mikael Eriksson, Margareta Sollenberg and Peter Wallensteen, *Patterns of Major Armed Conflicts, 1990-2001*, in 2002 SIPRI Y.B. 63.

[38] For example, voting in favor of a Chapter VII resolution demanding that Iran cease all nuclear enrichment activities, the United States declared that it expected "Iran and all other States Members of the United Nations will immediately act in accordance with the mandatory obligations of this resolution." UN Doc. S/PV. 5500, at 3 (2006); see SC Res. 1696 (July 31, 2006).

[39] SC Res. 687 (April 3, 1991). See HOFFMAN, *supra* note 31, at 18 (detailing instances in which the Council found Iraq in breach of Resolution 687); US LETTER, *supra* note 34.

[40] In Resolution 1441, adopted unanimously on November 8, 2002, the Council declared itself "[*d*]*etermined* to ensure full and immediate compliance by Iraq without conditions or restrictions with its obligations under resolution 687 (1991)." SC Res. 1441 (Nov. 8, 2002) (emphasis in original).

or preempt existing norms. It is precisely that authority at work in legitimizing coerced treaties. Such resolutions have superseded Libya's treaty right to try suspects in the Pan Am 103 bombing,[41] altered an obligation to surrender suspects to the International Criminal Court,[42] and required all member states to cease funding for terrorist groups.[43] The United States could not have achieved the objectives it sought in these resolutions without the Council's Chapter VII trumping authority. In sum, the claim that fallout from the Iraq war dissipated the Council's authority to legitimate coerced treaties is far from clear.

D. Potential complications

If article 52 itself were not sufficiently opaque, several others aspects of humanitarian occupation pose further legal challenges to the coercion claim.

1. The Nature of the coercion

In Bosnia and Kosovo, treaty parties were coerced by actual military force. But in East Timor, the threat was partly economic: in the midst of the Asian economic crisis, the United States, the World Bank and others threatened to cut off the stream of multilateral funds. There were also suggestions that the Security Council would simply authorize the Australian-led advance force under Chapter VII without Indonesian consent. There is no reason to believe that if humanitarian occupation is contemplated in the future, the international community won't resort to an even broader set of coercive tools – such as diplomatic isolation, withholding membership in international organizations, so-called "smart sanctions" against individual leaders, etc. – in order to obtain the target state's "consent." The policy reasons for preferring these options to immediate resort to military force are obvious. The legal problem is that international law has long drawn a bright line between these acceptable forms of pressure and the disfavored threat or use of military force. Is

[41] See SC Res. 748 (March 31, 1992) (ordering Libya, under Chapter VII, to extradite two suspects to the US and UK notwithstanding a right to try the suspects domestically under the Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation).

[42] See SC Res. 1422 (July 12, 2002) (ICC to suspend any proceedings against citizen if state participating in peace operations is not a party to the ICC statute). Although the resolution stated the suspension was permitted by article 16 of the ICC statute, many states disputed this claim. For elaborations of their views, see Chapter 8.

[43] See SC Res. 1373 (Sept. 28, 2001) (setting out detailed Chapter VII obligation of all member states to "prevent and suppress the financing of terrorist acts").

non-military coercion beyond the scope of article 52 and therefore a legitimate means to compel agreement to an occupation?

The answer appears to be a hesitant yes.[44] The primary reason is that article 52 takes its notion of "force" directly from UN Charter Article 2(4), whose scope is limited to military force.[45] The International Law Commission repeatedly avoided a more precise explanation of the "force" necessary to trigger invalidity, and efforts by some members to include an explicit reference to economic coercion were rejected.[46] Other members objected that the contours of economic coercion were impossible to define and any exception would invite a flood of invalidation claims.[47] The Commission ultimately decided "the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter."[48] The subtext of this debate was all too clear, as summarized by Ian Sinclair: acceptance of an economic coercion principle, when combined with claims of "neocolonialism" prevalent during the Convention's drafting, would "invite claims which would put at risk any treaty concluded between a developing and a developed country."[49]

At the 1969 treaty conference, a bloc of developing states sought to amend article 52 to include economic and political pressure as grounds for treaty invalidity. But the amendment failed.[50] As a compromise, the conference adopted a separate resolution, not included in the Convention itself, that condemned

[44] See PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 141 (José Mico and Peter Haggenmacher trans., 1989) ("What the Conventions have in mind from the point of view of treaty invalidity is armed coercion, and perhaps exceptionally unarmed physical coercion of an unmistakable nature.").

[45] AUST, *supra* note 15, at 256. [46] ILC COMMENTARY, *supra* note 8, at 246.

[47] In 1963, Sir Humphry Waldock, then Special Rapporteur, explained in his report to the Commission:

> If coercion were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of coercion are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties.

Second Report on Treaties, *supra* note 14, at 52.

[48] ILC COMMENTARY, *supra* note 8, at 246.

[49] SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 98 (1973).

[50] MALAWER, *supra* note 26, at 133.

the threat or use of pressure in any form, whether military, political, or economic by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.[51]

The general weakness of economic coercion claims is only underscored by the particular circumstances of the East Timor case, where threats were made to cut off loans from the World Bank and IMF. The conditions regularly attached to these loans are frequently criticized as deeply corrosive of developing countries' sovereign prerogatives. Yet there has been no legal (as opposed to political) challenge to structural adjustment programs or other extreme forms of conditionality that, given the dire straits of many international debtors, might well be regarded as coercive.

In addition to economic threats, Indonesia was also told in so many words that unless it reigned in the militias rampaging through East Timor, an international force would be authorized whether it consented or not. Once again, one can imagine such brinksmanship being repeated in the future. The tactic raises the question of which "threatened" uses of military force trigger invalidity under article 52. The conventional answer would be that because the threat was almost certainly of force back by a Chapter VII mandate – which the Australian-led INTERFRET mission in fact received – it was by definition lawful.[52] But future cases may follow the Kosovo template and involve threats of unilateral force.[53] Presumably, a threat to use force would constitute unlawful coercion

[51] UN Conference on the Law of Treaties, UN Doc. A/CONF.39/1/Add.2 (1971). Reuter describes the resolution as giving the sponsoring states "moral satisfaction." REUTER, *supra* note 44, at 141.

[52] See SC Res. 1264 (Sept. 15, 1999). The limits, if any, on the Council's Chapter VII power to authorize humanitarian occupations are discussed later in this chapter.

[53] In its sole opinion discussing coerced treaties, the ICJ gave only opaque guidance on which threats should be regarded as coercive. In the *Fisheries* case, Iceland suggested it had been pressured by Great Britain into signing a 1961 agreement on the breadth of its fisheries zone. While the Court noted coercion was a valid defense to treaty enforcement, it found none on the facts before it:

> It is equally clear that a court cannot consider an accusation of this serious nature on the basis of a vague general charge unfortified by evidence in its support. The history of the negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter.

Fisheries Jurisdiction (*Fed. Rep. Ger.* v. *Iceland*), 1974 ICJ 49, 59 (July 25). To what extent and in what combination "free negotiation", "perfect equality" and "freedom of decision" must be absent in order for coercion to exist are questions the Court did not address.

where the use of force described in the threat would itself constitute coercion. Although this will require some guesswork, threats are by their nature prospective and every such case will require predications about the legality of the situation should the threat be carried out.

Eastern Slavonia raises a final wrinkle: with minor and perhaps outdated exceptions, *jus ad bellum* norms permit states to resolve internal conflicts without normative restraint.[54] This principle is strongest where, as in Eastern Slavonia, a secessionist group threatens a state's territorial integrity. Chapter 4 reviewed international law's profound commitment to preserving national boundaries in the face of such claims. But even where secession is not the rebels' objective, "international law treats civil wars as purely internal matters."[55] A government, in short, may fight a civil war to win. Given this broad discretion, is it nonetheless possible for a government to use force unlawfully in a civil war such that an agreement ending the war would be considered void under article 52?[56]

The strongest argument for such a claim would rest on violations of *jus in bello* rules, such as the requirements of necessity and proportionality or the immunity of non-combatants from direct attack. The means of quelling a civil conflict would trigger the illegality, in other words, and not the fact of it having been undertaken. A state quelling a civil conflict in full compliance with *jus in bello* norms, in this view, could lawfully coerce a peace agreement with rebels.

[54] The only exception would involve claims of self-determination or other forms of struggle against external rule, which the General Assembly has regularly (though not recently) described as legitimate and thus off limits to suppression by the parent state. See Declaration on Principles of International Law Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, Annex, GA Res. 2625 (XXV) (Oct. 24, 1970) (Friendly Relations Declaration) ("Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.").

[55] MALCOLM SHAW, INTERNATIONAL LAW 1040 (5th edn, 2003).

[56] In Eastern Slavonia, the Council did repeatedly urge Croatian forces to desist from attacks. See UN Doc. S/PRST/1995/23 (1995) (Council "demands that the Government of the Republic of Croatia put an end immediately to the military offensive launched by its forces in the area of Western Slavonia"). But the Council regularly calls for ceasefires and peaceful resolution of conflicts regardless of the legal rights of the adversaries. None of its statements suggest Croatia was under a legal obligation to desist. Indeed, the Council regularly affirmed Croatia's right to territorial integrity in its resolutions on Eastern Slavonia. See e.g., SC Res. 1037 (Jan. 15, 1996).

The ILC did not discuss treaties coerced by threatened *jus in bello* violations, but contemporary practice supports a view of such violations as contravening "the principles of the Charter of the United Nations." The Security Council regularly condemns violations of humanitarian law and has established two ad hoc tribunals to punish *jus in bello* violations.[57] As of this writing, it has also referred one such case to the International Criminal Court.[58] Moreover, the Secretary-General has required that all troops under direct UN command abide by "fundamental principles and rules of international humanitarian law, and in doing so made no distinction between civil and international conflicts."[59] If this interpretive bridge is crossed, then in Eastern Slavonia the threatened Croatian offensive could constitute unlawful coercion, notwithstanding that it was to take place wholly on Croatian territory.

There are obviously problems in applying this theory. If a state does not explicitly threaten to violate humanitarian law (and it would be foolish to do so), is that threat coercive or not? The Croatian army had already engaged in many such violations in its campaign and diplomats feared more of the same in Eastern Slavonia. Can such a track record function as a gloss on a threatened use of force such that it is rendered unlawful for article 52 purposes? Or is presuming that a state will conduct a military campaign in violation of the laws of war simply too speculative to pass the article 52 threshold? Contemporary practice provides no answers to these questions.

2. The nature of the agreement

A second complication involves applying the treaty coercion rule to agreements that are not self-evidently "treaties." The Vienna Convention defines a treaty as "an international agreement concluded *between States* in written form and governed by international law."[60] Since most UN post-conflict missions have come in the aftermath of civil wars, whose settlements necessarily involve at least one non-state actor, the nature of the agreements is an important question for the coercion claim. The Dayton Accords are the exception, as all parties were states. The parties to the Ahtisaari/Chernomyrdin/Milosevic agreement for Kosovo were two

[57] See UN Doc. S/PRST/1998/20 (1998) (condemning violations in Democratic Republic of Congo); SC Res. 1076 (Oct. 22, 1996) (condemning violations in Afghanistan); SC Res. 1034 (Dec. 21, 1995) (condemning violations in Bosnia); SC Res. 995 (Nov. 8 1994) (creating Rwanda Tribunal); SC Res. 827 (May 25, 1993) (creating Yugoslav Tribunal).

[58] SC Res. 1593 (Mar. 31, 2005) (Darfur).

[59] Observance by UN Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, §1.1 (1999).

[60] Vienna Convention on Treaties, *supra* note 7, art. 2(1)(a) (emphasis added).

states (the FRY and Russia) and an international organization (the EU). Indonesia's agreement to the East Timor mission was informal, conveyed orally by the Indonesian President to the UN Secretary-General and to a visiting Security-Council special mission. The Erdut Agreement for Eastern Slavonia was signed by a state (Croatia) and a sub-state actor (a representative of the local Serb authorities). Does the presence of non-state parties in these agreements render the anti-coercion principle of article 52 inapplicable?

There is an easy answer for agreements where the non-state party is an international organization. The 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations designates such agreements as "treaties" and contains an anti-coercion provision identical to that in the first Vienna Convention.[61] There is no avoiding a legal debate in these situations and analysis of the Kosovo and East Timor agreements would not change.

The Erdut agreement exemplifies the more difficult case in which a rebel group, a secessionist region or an ethnic minority becomes a party to a peace agreement.[62] A savings clause in article 3 of the Vienna Convention holds out the possibility that such agreements could be subject to the law of treaties:

> The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
>
> a. the legal force of such agreements;
> b. the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
> c. the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.[63]

[61] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, arts. 2(1)(a), 52, Mar. 21, 1986, 25 I.L.M. 543 (1986).

[62] All these groups have signed peace agreements in the last fifteen years. See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 381-3 (2006); David Wippman, *Treaty-Based Intervention: Who Can Say No?*, 62 U. CHI. L. REV. 607, 639 (1995) (Wippman, *Treaty-Based Intervention*).

[63] VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 3. The Dayton Accords tried a different approach. Several agreements annexed to the Framework Agreement were signed by the Republica Srpska and the Muslim-Croat Federation, both non-state

The question posed by article 3 is whether the non-state parties to Erdut-like agreements qualify as "other subjects of international law." If they do, those parties would argue, the peace agreements should be evaluated under the customary law of treaties, including an anti-coercion rule. This claim, of course, assumes the anti-coercion rule has entered customary law governing agreements involving non-state parties. The effect of article 3 is not to make the entirety of the Vienna Convention applicable to such agreements, just not to foreclose their susceptibility to review under custom. The existence of customary rules would need to be proven independently.

Both the groups' status and the existence of a customary anti-coercion rule are extraordinarily complex issues. As to status, one could point out that peace agreements often use mandatory, legalistic language suggesting the state parties expect every party to act as if it were bound by law. One could also point to the many humanitarian law treaties that grant rights to the non-state actors, as well as to the groups' protections in human rights instruments.[64] But this evidence does not indicate full international legal personality for the groups, and even if it suggests they are "subjects of international law" to a more limited degree, whether that status extends to the detailed regulation by the law of treaties is unclear.

In addition, there is a circularity to the arguments based on international agreements. As Christine Bell notes, while the claim "involves examining what rights, powers, duties, and immunities the actors in question are accorded on the international plane, including whether they are permitted to sign treaties or international agreements. . .the main evidence of such permission may be the existence of an internationalized peace agreement itself."[65] More importantly, the traditional doctrine permitting recognition of rebel groups as subjects of international law has been substantially eroded. Under the principle of belligerency, when rebels controlled sufficient portions of state territory and met certain additional criteria, other states might recognize them as co-equal sovereigns and assist their struggle against the government.[66] Such assistance is now likely prohibited by article 2(4)

entities. The FRY "endorsed" these agreements and undertook to "ensure" the Republica Srpska's compliance. If the Republica Srpska's direct obligations were found not to be binding under international law, presumably the FRY's obligations as guarantor would remain in force, thereby achieving the same result. See AUST, *supra* note 15, at 52.

64 See BELL, *supra* note 62, at 379-84.

65 *Ibid*. at 384.

66 SHAW, *supra* note 55, at 1041.

of the UN Charter.[67] For this and other reasons – for example, that the doctrine grants or denies rights to rebels without regard to their democratic legitimacy or commitment to human rights – "[t]he viability of the traditional rules governing civil war became increasingly doubtful after World War II."[68]

On the question of whether customary law includes an anti-coercion rule, the ILC believed article 52 codified then-existing custom.[69] But it was obviously referring to custom for *states*. As the engines of new customary law, those states would have little incentive to expand this rule in order to grant sub-state groups legal grounds for invalidating peace treaties. All states have an interest in ending internal conflicts that may threaten their constitutional structures and existing borders. The international community, as David Wippman argues, also has an interest in resisting such a development. "We should be extremely reluctant to invalidate agreements settling complex internal conflicts on grounds of coercion, particularly when those agreements are internationally brokered by reasonably neutral groups of outside states. In many cases, the only alternative to such agreements may be continued warfare and further injury to the party subject to coercion in the first place."[70] With states, individually and collectively, having much to lose and little to gain from a new rule, there is unsurprisingly no example of a non-state treaty party's claim of coercion being accepted.

In sum, international law has yet to address the two issues central to a coercion claim against an agreement ending a civil war: whether the non-state party is a "subject of international law" for this purpose (as opposed to any other reason), and whether states may coerce rebel groups fighting on their own territory into signing peace agreements.

3. Justifiable force?

A third complication involves the claim that humanitarian occupation without Security Council authorization, as in Kosovo, does not involve

[67] In the *Nicaragua* case, the Court held that arming and training rebel groups in a civil war amounts to an unlawful use of force. *Military and Paramilitary Activities*, 1986 ICJ at 119.

[68] David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 444 (1996) (Wippman, *Intervention in Internal Conflict*).

[69] See ILC COMMENTARY, *supra* note 8, at 246 ("[T]he invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today.").

[70] Wippman, *Intervention in Internal Conflict*, *supra* note 68, at 639.

the use of force "in violation of the principles of international law embodied in the Charter of the United Nations."[71] This argument relies on a right of humanitarian intervention.

Whether states may unilaterally seek to end egregious human rights abuses is a matter of furious debate among international lawyers.[72] Those who support a right point to the generally favorable reception of the Kosovo action, among other episodes, as evidence that an implicit exception to the Charter prohibition has emerged in customary law.[73] But whatever the outcome of this debate – and most leading scholars find unilateralism even in support of human rights to be incompatible with Charter norms[74] – the use of force to halt human rights abuses is analytically separate from force intended to procure an occupation agreement. The latter is directed at a time *after the abuses justifying the intervention have ended*. For policy-makers, intervention and occupation may certainly rest on a single continuum of concern for individual welfare and will likely share the same set of justifications. But given the Charter's deliberate rejection of unilateralism, an additional legal justification is needed for force deployed in pursuit of this separate policy objective. The UN cannot avoid a slippery slope toward self-judging and unaccountable interventions if each asserted goal of the state employing force is not evaluated on its own terms. Otherwise, an exception permitted for a single purpose may end up justifying a multiplicity of

[71] VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 52.

[72] See generally HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS (J. L. Holzgrefe and Robert O. Keohane eds., 2003); SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001); FERNANDO TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (2nd edn, 1997); SEAN MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER (1996).

[73] See W. Michael Reisman, *Kosovo's Antinomies*, 93 AM. J. INT'L L. 860 (1999); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23, 29 (1999).

[74] See MURPHY, *supra* note 72, at 65-82. As the British Foreign Office has summarized:

> the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on prudential grounds, that the scope for abusing such a right argues strongly against its creation.

British Foreign Office, Foreign Policy Document No. 148, reprinted in 57 BRIT. Y.B. INT'L L. 614, 619 (1986).

objectives judged by the acting state alone to be necessary to achieve results.[75] Other states may believe the interveners have gone too far, but having forfeited their opportunity to object by acquiescing to a principle of infinitely expanding mandates, their claims will be of no consequence.

The risk of bootstrapping here becomes clear if one thinks of Vietnam's 1978 invasion of Cambodia. Even if one finds legal justification for Vietnam ousting the murderous Khmer Rouge regime, one would still want to retain grounds for objecting to Vietnam's installation of a puppet government and effective occupation of the country for the next decade.[76] Conflating intervention and occupation would mean giving up this argument.

Does an independent justification for humanitarian occupation exist? Support for a customary right is scant indeed. Virtually all proponents of a right to humanitarian *intervention* call for narrowly-tailored actions that do no more than address the abuses themselves.[77] This limitation is essential to their argument, for neither the Charter nor any other instrument regulating the use of force contains an exception for humanitarian

[75] This is the essential objection to US arguments that its invasion of Iraq in March 2003 was justified by Security Council resolutions authorizing force during the first Gulf War. See US LETTER, *supra* note 34 ("The actions being taken authorized under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991)."). Those resolutions, most notably Resolution 678 (Nov. 29, 1990), provided authorization for the specific purpose of evicting Iraqi forces from Kuwait, the event that brought the matter to the Council's attention in the first place. Neither Resolution 678 nor any subsequent resolutions authorized force for any other purpose; for example, to destroy weapons of mass destruction or to end human rights abuses. The first Council resolution mentioning Iraqi weaponry was not passed until April 1991, four months after Resolution 678. And neither 678 nor 687 makes any mention of human rights or representative government.

[76] See generally NAYAN CHANDA, BROTHER ENEMY: THE WAR AFTER THE WAR (1986).

[77] Most proponents of the right require that "[t]he intervenors should withdraw when the objective of terminating the violations is achieved." LORI DAMROSCH, LOUIS HENKIN, RICHARD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 996 (4th edn, 2001). Antonio Cassese asserts that a right to humanitarian intervention would allow "armed countermeasures for the *exclusive purpose* of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace." CASSESE, *supra* note 73, at 29 (emphasis added). A blue ribbon group of lawyers and policy-makers, writing in the aftermath of the Kosovo intervention, phrased the proportionality requirement in somewhat more permissive but still limited terms:

> The scale, duration and intensity of the planned military intervention should be the *minimum necessary* to secure the humanitarian objective in question. The means have to be commensurate with the ends, and in line with the magnitude of the original provocation. The effect on the political system of the country targeted should be limited, again, to what is *strictly necessary* to accomplish the purpose of the intervention. While it may be a matter for

intervention. The claim that such an exception exists, therefore, must rest on an imperative for military action deduced from the nature of human rights norms themselves, as well as a demonstration that these norms enjoy a co-equal (or even preferred) status to the prohibition against unilateral force. Limiting intervention to humanitarian purposes could be accomplished through the procedural check of the Security Council, but having deemed that unnecessary, the proponents of a unilateral right must demand a strict substantive limitation on an intervention's objectives in order to salvage the normative basis of their claim.

But if the purported exception is expanded to include occupations subsequent to halting the abuses, the argument must move beyond human rights *stricto sensu* to penumbral claims about proper means of enforcement. These will consist of hypotheses as to why an international presence is essential to preventing the acts' reoccurrence. While such arguments may be compelling as a matter of prudent policy-making, they are virtually bereft of normative support.[78] Humanitarian occupation is a phenomenon of the last decade and finds no endorsement in any treaty. More importantly, each mission to date has been supported by a Chapter VII resolution. Even proponents of "instant" custom, which draws primarily on the views of a small group of powerful western states, would have difficulty finding *opinio juris* here.

Some might claim additional support from the law of self-defense, which is sometimes invoked to justify regime change. Both regime change by a state acting in self-defense and humanitarian occupation, it may be argued, are proportional responses to provocations that build on a legitimate *causus belli*. When responding to an armed attack, a state defending itself is obliged to use *only* force that is proportional.[79] Some

> argument in each case what are the precise practical implications of these strictures, the principles involved are clear enough.
>
> INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 37 (2001) (emphasis added).

[78] This does not contradict my claim in Chapters 4 and 5 that norms of human rights and territorial integrity point to humanitarian occupation as virtually the sole effective response to massive human rights violations. I do not claim that humanitarian occupation is legally compelled, but that given the lack of legally sanctioned alternative strategies, as well as occupation's symbiosis with international democracy-promotion efforts, it is the only option that *accords* with this body of norms.

[79] See DINSTEIN, *supra* note 11, at 208-12; Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637-8 (1984).

argue that even after the attack has been repulsed and the aggressor state poses no imminent threat to the victim state, the victim may continue its counter-attack in order to depose the aggressor government.[80] Similarly, it could be argued that a state intervening to stop mass atrocities would not be obliged to leave once the acts were halted, but may depose the offending regime and occupy the country in order to implant local institutions that will protect human rights in the future.

But whatever the appeal of the analogy, the original self-defense claim is itself highly contested. Judge Stephen Schwebel and Kaiyan Kaikobad, for example, examine the same set of historical episodes involving the defensive use of force and come to diametrically opposed conclusions on the legality of regime change.[81] Some writers focus on the proportionality of the force to the initial attack while others focus on proportionality to the threat of renewed attack in the future.[82] This lack of consensus may simply result from the lack of clarity on the nature of proportionality doctrine more generally. It is a notoriously murky concept of seemingly "endless flexibility."[83]

It is true that in many widely cited cases of humanitarian intervention the interveners did not simply halt objectionable practices, but went on

[80] See Stephen M. Schwebel, *What Weight to Conquest?*, 64 AM. J. INT'L L. 344, 345 (1970) ("A state acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure and occupation are necessary to its self-defense.").

[81] See *Military and Paramilitary Activities*, 1986 ICJ at 259, 371-2 (dissenting opinion of Judge Schwebel); Kaiyan Homi Kaikobad, *Self-Defence, Enforcement Action and the Gulf Wars*, 63 BRIT. Y.B. INT'L L. 299, 336-8 (1992).

[82] Those taking a strict view of proportionality, generally barring the overthrow of the aggressor regime if its initial use of force has been countered, include MICHAEL WALZER, JUST AND UNJUST WARS (2nd edn, 1992); Judith Gail Bardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 405 (1993); KAIKOBAD, *supra* note 81, at 315-23; Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The UN's Response to Iraq's Invasion of Kuwait*, 15 SO. ILL. U. L. J. 453, 480 (1991); John P. Rowles, "*Secret Wars*," *Self-Defense and the Charter - A Reply to Professor Moore*, 80 AM. J. INT'L L. 568, 580 (1986). Those claiming proportionality is to be measured against the aggressor state's ultimate desired ends include DINSTEIN, *supra* note 11, at 239-42; *Report of Special Rapporteur Robert Ago, Addendum to the Eighth Report on State Responsibility*, 1980 Y.B. INT'L L. COMM'N 13, 69-70; Josef L. Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 876 (1947). Christopher Greenwood takes an intermediate view. See Christopher Greenwood, *Self-Defense and the Conduct of International Armed Conflict*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOR OF SHABTAI ROSENNE 273, 282 (Yoram Dinstein ed., 1989).

[83] Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 412 (1993).

to oust the incumbent regimes.[84] Such actions might be justified as proportional to the regimes' full integration of human rights abuses into their methods of governing. How else to end the policies of the Khmer Rouge, we have noted, than for Vietnam to oust Pol Pot? But given the high threshold that proponents of humanitarian intervention set for any sort of intervention – the *Responsibility to Protect*'s requirement of "large scale loss of life, actual or apprehended" or "large scale 'ethnic cleansing,' actual or apprehended" is typical[85] – it seems difficult to avoid the conclusion that removal of governments could be justified in virtually *all* such interventions.

E. Conclusion

If humanitarian occupation without a supporting Chapter VII Security Council resolution involves the use of illegal force, and that force (or the threat thereof) precipitates agreement to a treaty by the occupied state, the terms of article 52 of the Vienna Convention will have been met. The treaty is void *ab initio*. This conclusion suggests that coerced agreements with occupied states, such as the Chernomyrdin/Ahtisaari/Milosevic Agreement, provide no independent legal support for the occupation. Rather, the validity of these agreements depends on an endorsement by the Security Council. The Council's authority to rescue the agreements from invalidity is examined in the next section.

II. Second legal framework: Security Council fiat

The Security Council's role in humanitarian occupation need not be limited to ratifying arguably coerced treaties. For instance, the occupied state might refuse to sign any agreement at all. In that case, a Council resolution under Chapter VII would provide the sole legal foundation for the occupation. In most of the interventions, prudent UN diplomats have sought both an agreement and a Chapter VII resolution, a strategy with obvious political appeal that probably does not alter the Council's central validating role. Several regional organizations have launched prolonged interventions in civil conflicts that in some ways resemble humanitarian

[84] This was the case for Tanzania's intervention in Uganda, France's intervention in the Central African Republic, Vietnam's intervention in Cambodia and India's intervention in East Pakistan (Bangladesh). See generally MURPHY, *supra* note 72.

[85] RESPONSIBILITY TO PROTECT, *supra* note 77, at 32.

occupations.[86] The Charter also requires Council approval for regional enforcement operations.[87] Much turns, then, on a legal evaluation of the Council's actions.

A. Limits on Council authority within the Charter

Does international law limit the Security Council's ability to divest a state of authority over its own territory? The question might also be asked from the state's perspective: is the capacity for self-government so integral to the very idea of statehood that without it a state becomes little more than a legal fiction? Like corporations under national law, states are fictional creatures that operate only through their human agents. But if that agency relation is cut, or redirected to outsiders, what remains? Certainly, nothing of the autonomy and sovereign discretion that typify most international legal descriptions of states' birth, function and death. Even in an age in which international law addresses most domestic functions, are there not essential attributes that merit protection?

But most commentators describe the Security Council as a political rather than a legal or quasi-judicial body.[88] The widely cited Responsibility to Protect project, for example, finds "no theoretical limits to the [Council's] ever-widening interpretation of international peace and security."[89] Its capacity to describe any action as a "threat to the peace" – and thereby trigger the broad enforcement powers of Chapter VII of the Charter, including the authority to legitimate an occupation – contains

[86] This is seen notably in Liberia and Sierra Leone. See David Wippman, *Enforcing the Peace: ECOWAS and the Liberian Civil War*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS (Lori Fisler Damrosch ed., 1993). These operations fall short of humanitarian occupation because the intervening forces did not purport to displace national governing authorities, which continued to exercise (often limited) authority and indeed welcomed the interventions.

[87] UN Charter, art. 53(1). In Liberia and Sierra Leone, approval came after the operations began, not before, as the Charter seems to require.

[88] CHARTER OF THE UNITED NATIONS: A COMMENTARY 447 (Bruno Simma ed., 2nd edn, 2002). Or less drastically, the empirical work has not yet been done to prove the contrary. As Steve Ratner notes, "[t]he influence of law on the recent decisions of the Council - as opposed to the reverse - remains unaddressed." Steven R. Ratner, *The Security Council and International Law*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 591, 602 (David Malone ed., 2004).

[89] INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 159 (2001).

no substantive limitations.[90] Nor does the Charter provide for judicial review of Council actions by the International Court of Justice (ICJ).[91] Attempts to convince the Court that it ought to assume review powers *à la Marbury* have met with lukewarm reactions from some judges and vehement opposition from others.[92] European Union courts, perhaps the most robust of any international organization, have declined to review Council determinations under Chapter VII, even when resolutions clash with obligations under EU law.[93]

The sole Charter limitation on the Council's discretion provides that it shall discharge its duties "in accordance with the Purposes and Principles of the United Nations."[94] This is equivalent to no limit at all. The purposes and principles of the Charter, set out in articles 1 and 2, are phrased in broad, preambular terms that provide little guidance for specific cases.[95] Indeed, as Martti Koskenniemi observes, these provisions are so hortatory and open-ended that they appear "no less indeterminate than the concept of a 'threat to the peace'" – the very concept they

[90] Article 39 of the Charter provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

UN Charter, art. 39.

[91] See Jose Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1, 14-21 (1996); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 92-4 (1993).

[92] In his dissenting opinion in the preliminary objections phase of the *Lockerbie* case, Judge Schwebel made a compelling case that judicial review was neither contemplated by the Charter's drafters nor supported by the Court's jurisprudence. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *UK) (Preliminary Objections)*, 1998 ICJ 9 (Feb. 27) (dissenting opinion of President Schwebel). As for the claim that powers of judicial review necessarily inhere in any democratic system of government, Schwebel replied that "[t]he United Nations is far from being a government, or an international organization comparable in its integration to the European Union, and it is not democratic." *Ibid*. at 80.

[93] See Case T-315/01, *Kadi* v. *Council* ¶ 219, 2005 E.C.R. ("determining what constitutes a threat to international peace and security and the measures required to maintain or re-establish them is the responsibility of the Security Council alone and, as such, escapes the jurisdiction of national or Community authorities and courts").

[94] UN Charter, art. 24(2).

[95] Article 1, for example, describes the purposes of the United Nations:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

purport to limit.[96] While the Council occasionally invokes the Charter's purposes and principles to support specific policy objectives, as a legal argument this amounts to little more than boot-strapping. The only Council practice supporting a claim that these resolutions are grounded in the Charter's principles and purposes comes from the resolutions themselves. Perhaps this circularity is inevitable in a system of auto-interpretation by each UN organ, but it is still a weak argument in conventional legal terms.

Alternatively, one might argue that the Council's repertoire of practice should be understood as a body of jurisprudence, comprising an interpretive gloss on broad Charter language.[97] "Constitutional" limits could be said to reside here. The Council has indeed passed many resolutions since 1989 that invoke Chapter VII and set out an increasingly expansive understanding of a "threat to the peace," the only language in its triggering authority that could plausibly apply to matters not involving inter-state aggression. The Council has found "threats to the peace" in civil wars, imminent famine, the overthrow of elected governments, the need to punish individuals violating international criminal norms, and the failure to extradite suspects wanted in connection with sabotaging a commercial airliner.[98]

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

UN Charter, art. 1.

[96] Martti Koskenniemi, *The Place of Law in Collective Security: Reflections on the Recent Activity of the Security Council*, in BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE 35, 48 (Albert J. Paolini, Anthony P. Jarvis & Christian Reus-Smit eds., 1998).

[97] See Michael Bothe & Thilo Marauhn, *UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in KOSOVO AND THE INTERNATIONAL COMMUNITY: A LEGAL ASSESSMENT 217, 230-35 (Christian Tomuschat ed., 2002) (exploring limits on international administration of territory in Security Council jurisprudence and the Charter system generally).

[98] See SC Res. 788 (Nov. 19, 1992) (Liberian civil war); SC Res. 746 (Mar. 17, 1992) (humanitarian situation in Somalia); SC Res. 841 (June 16, 1993) (overthrow of elected regime in Haiti); SC Res. 827 (May 25, 1993) (creation of criminal tribunal for the former Yugoslavia); SC Res. 748 (March 31, 1992) (Libya's failure to extradite two suspects wanted in Lockerbie bombing case).

These resolutions span such a broad range of state and non-state action that they suggest not discernible legal limits but highly pragmatic responses to crises that, for reasons unrelated to law, have sprung to the forefront of the international agenda. There is no reason to believe the Council's assertions of broad powers in their resolutions were also intended to define *limits* on those powers. The Council's steady expansion of its Chapter VII powers in fact suggests the opposite. It is equally difficult to divine from this practice what a "threat to the peace" does *not* mean, since only two of the thirteen resolutions vetoed since the end of the Cold War invoked Chapter VII, and the reasons for those vetoes lay in political objections unrelated to how the Council's coercive authority was being construed.[99]

Perhaps more problematic than the lack of normative coherence in Council actions is the difficulty of discerning any explicitly normative *intentions* on the part of its members. The Council's debates on Chapter VII resolutions contain scant attempts at Charter interpretation. Legal standards appear as decidedly secondary considerations in the reasons put forward by member states for supporting or opposing a course of action. Instead, political considerations predominate, such as resource limitations, fear of exposure to similar actions in the future and concern over so-called "mission creep". A scholarly abstraction of legal standards from these discussions would result in a taxonomy of norms that is not only *post hoc* (and therefore only speculatively related to the views of Council members themselves), but wholly external to the decision-making process it purports to constrain. It is not unusual in common law systems for commentators to discern normative patterns in case-law and, later, for courts to adopt the commentators' views as law.[100] But there

[99] See the list of vetoed resolutions (ending in July 2006) at www.globalpolicy.org/security/membship/veto/vetosubj.htm. The Russian Federation vetoed a Chapter VII resolution on December 2, 1994 concerning the transport of humanitarian aid to the Bihac region of Bosnia. See UN Doc. S/1994/1358 (1994). The Council had declared the situation in the former Yugoslavia a threat to the peace on numerous prior occasions and Russia had supported those resolutions. The Russian veto stemmed from efforts to promote the interests of the Bosnian Serbs. See Alessandra Stanley, *Conflict in the Balkans: the Russians*, NY TIMES, Dec. 4, 1994, at 21. On June 30, 2002 the US vetoed a Chapter VII resolution renewing the UN peacekeeping mission to Bosnia. See UN Doc. S/2002/712 (2002). The US had previously supported the mission and many other Chapter VII resolutions on Bosnia. The veto came after other Council members refused to include a provision exempting UN peacekeepers from jurisdiction of the International Criminal Court. See Serge Schmemann, *U.S. Vetoes Bosnia Mission, Then Allows 3-Day Reprieve*, NY TIMES, July 1, 2002, at A3.

[100] One example in the United States is the enormously influential article by von Mehren and Trautman on personal jurisdiction, describing the categories of general and

is an important difference between that sort of interaction between two actors decidedly committed to an enterprise of legal standard-setting and, in the case of the Council, legal scholarship that urges normativity upon an essentially alegal body.

B. Limits on Council authority outside the Charter: jus cogens

A more useful discussion involves potential constraints on Council action from outside the UN system.[101] This claim originates in the law of treaties, which applies to the Security Council by virtue of the UN Charter being the world's preeminent treaty.[102] Treaty law is often analogized to national contract law, which addresses not only the dynamics of contractual relations, but public policy limitations on the subject-matter of enforceable agreements. So too in the law of treaties: certain acts are deemed so contrary to the international *ordre publique* that states cannot invoke international law to facilitate their commission through the vehicle of a treaty. The doctrine of *jus cogens* or "peremptory norms" deems certain outlying treaties contrary to international public policy and for that reason void *ab initio*. Article 53 of the Vienna Convention on the Law of Treaties provides that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." A common example is that two states could not agree by treaty to commit genocide in a third state because the prohibition on genocide is by consensus considered a *jus cogens* norm.[103]

1. The self-determination claim

If a state under humanitarian occupation were to make a *jus cogens* argument challenging a Chapter VII resolution, its claim would likely proceed as follows. First, the state would assert rights under a peremptory norm concerned with principles of state autonomy and political

specific jurisdiction. These were later adopted by the Supreme Court. See Arthur von Mehren and Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); *Burger King Corp.* v. *Rudzewicz*, 471 US 462, 472-3 and note 15 (1985).

101 See generally Vera Gowland-Debbas, *The Functions of the United Nations Security Council in the International Legal System*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 277 (Michael Byers ed., 2000).

102 See VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 5 ("The present Convention applies to any treaty which is the constituent instrument of an international organization.").

103 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702, cmt. n (1987).

independence. This is not an easy task. The nature of *jus cogens* norms is both obscure and highly contested.[104] Questions about their origins and function abound. The ICJ did not explicitly recognize the principle until 2006 and then did so only in passing.[105] And perhaps most importantly for grounding a proposed *jus cogens* norm in state practice, "[t]here are no reported instances of articles 53 or 64 [of the Vienna Convention], as such, being invoked."[106] This indeterminacy has produced significant disagreement over which norms have achieved *jus cogens* status.[107] The first task for the occupied state, then, is to ask which (if any) *jus cogens* norms are implicated by its subordination to international authority.

Article 53 of the Vienna Convention defines a peremptory norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[108] On all accounts, this describes a very short list.[109] Both the ILC and states attending the Vienna Convention drafting conference made reference to slave trading, the use of force other than in self-defense and genocide. The ICJ affirmed genocide as *jus cogens* in its 2006 *Armed Activities in Congo* opinion. The Restatement (Third) of Foreign Relations lists a series of human rights norms as *jus cogens*, in addition to the unauthorized use of force.[110] A range of other norms has been suggested by commentators and a few international tribunals.[111]

Given this lack of an authoritative list – which would, in any case, be effectively precluded by the open-ended language of article 53 – there is room for innovative claims.[112] This is important, since the normative

[104] See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291 (2006).

[105] See *Armed Activities on the Territory of the Congo* (*Dem. Rep. of Congo* v. *Rwanda*), 2006 ICJ 1, para. 64 (Feb. 3) (stating the prohibition on genocide is "assuredly" a *jus cogens* norm).

[106] AUST, *supra* note 15, at 258. Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 64.

[107] AUST, *supra* note 15, at 257.

[108] VIENNA CONVENTION ON TREATIES, *supra* note 7, art. 53.

[109] See SINCLAIR, *supra* note 5, at 110-31.

[110] RESTATEMENT, *supra* note 103, §102, cmt. k; §702, cmt. n.

[111] SHELTON, *supra* note 104, at 303.

[112] The ILC stated that its language was designed to "leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals." II 1966 Y.B. INT'L L. COMM. 248 (1966).

strands implicated by humanitarian occupation do not fit any clear doctrinal niche. The state would make a claim for autonomous decision-making being the essence of sovereign statehood. Such a claim also implicates the integrity of the national community and the necessity, in a Kantian sense, of safeguarding its meaningful existence in the face of wholesale subordination to external notions of the good. The most likely candidate would be self-determination.[113] The target state would argue that self-determination has achieved *jus cogens* status because of its integral role in shaping the legal architecture of the contemporary international community: it has facilitated the dissolution of colonial empires, bolstered the fundamental Charter principle of juridical equality among states, and endowed weak states with legal rights against hegemonic intervention in their internal affairs.[114] In the *East Timor* case, the ICJ described self-determination as "one of the essential principles of contemporary international law."[115] An ILC special rapporteur concluded in 1980 that "today no one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*."[116]

Much of the support for self-determination's normative status relates to its "external" face, notably the right of colonial territories to choose independent statehood.[117] But another facet, often described as "internal" self-determination, provides that "all peoples have the right freely to determine, without external interference, their political status

[113] Although, as noted, the ILC chose not to list examples of *jus cogens* norms in its commentary to Article 53, self-determination was mentioned as an example of a peremptory norm by several Commission members. See *Ibid*.

[114] On the many meanings of self-determination, See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL (1995); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (1990); THE RIGHTS OF PEOPLES (James Crawford ed., 1988).

[115] *East Timor (Port.* v. *Austr.)*, 1995 ICJ 90, para. 29 (June 30).

[116] Hector Gros Espiell, *Report on the Right of Self-Determination*, at 12, UN Doc. E/CN.4/Sub.2/405/rev.l (1980), quoted in JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 159 (1987). See also *Barcelona Traction, Light, and Power Company Limited (Belgium* v. *Spain)*, 1970 ICJ 3, 287, 304 (Feb. 5) (separate opinion of Judge Ammoun) ("The principle of equality and that of non-discrimination on racial grounds which follows therefrom, both of which principles, like the right of self-determination, are imperative rules of law.").

[117] See Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), 2001 ICJ 575, 652-8 (Oct. 23) (separate opinion of Judge *ad hoc* Franck) (concluding that decolonization imperative of self-determination is "anchored in universal treaty law, State practice and *opinio juris*").

and to pursue their economic, social and cultural development."[118] This aspect of the norm addresses the state's political autonomy; its ability to choose institutions, norms and practices for its own population without suffering an erosion of its juridically equal status for having done so. The claim can draw upon autonomy principles long-embedded in legal conceptions of independent statehood. The standard definition of a state includes the existence of a government and the capacity to enter into foreign relations.[119] More recent criteria have specified a representative democratic government.[120] Requiring a state to exhibit these functional attributes presumably ensures that important national decisions – most notably those engaging the international legal responsibility of the state – are taken by a regime with some tangible connection to the state's citizens. If such decisions are imposed externally, citizens may find themselves bearing the consequences of obligations they had no role in assuming.

The target state's claim that its governing prerogatives are protected by a *jus cogens* norm of internal self-determination would not depend on which aspects of domestic governance are encompassed by the norm. Human rights, including those related to democratic majoritarianism, have obviously made untenable any claim that self-determination insulates *all* aspects of domestic governance from international scrutiny. But because humanitarian occupation potentially vests *every* governmental function in an international administration, or subjects *every* local decision to an international veto, this view of internal self-determination would be violated regardless of how one defines the scope of its coverage. Whether internal self-determination reserves twenty, thirty or forty percent of domestic governance questions to the state is immaterial: a humanitarian occupation potentially vests one hundred percent of such

[118] Friendly Relations Declaration, *supra* note 56. See Allan Rosas, *Internal Self-Determination*, in The Modern Law of Self-Determination 225 (Christian Tomuschat ed., 1993); Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in *ibid*. at 101.

[119] Convention on the Rights and Duties of States (Montevideo Convention), Dec. 26, 1933, 49 Stat. 3097.

[120] The Badinter Commission, applying criteria developed by the EU in the aftermath of Yugoslavia's break-up, added respect for the rights of minorities and democratic governing structures. The US required similar attributes of the new states of the former Soviet Union. See Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, in Democratic Governance and International Law 123-54 (Gregory H. Fox and Brad R. Roth eds., 2000); Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 Mich. J. Int'l. L. 733, 737-47 (1995).

decisions in international actors. No understanding of a self-determining polity, the occupied state would assert, could apply to a state bereft of *all* political autonomy. Oscar Schachter has invoked related principles to make the same point:

> [T]he principles of the Charter require respect for 'sovereign equality' and the right of a state to political independence and territorial integrity. These principles and the related Charter purposes may be considered to limit the authority of the Council to impose a regime on the defeated aggressor, even if the leaders responsible for aggression and war crimes might be subject to prosecution by victim states. The people of the country would still be entitled to self-government and basic political rights.[121]

The second step of the *jus cogens* claim would address the consequences of violating the norm. Although article 53 states that a treaty violating *jus cogens* is void, the target state could not plausibly assert that the result here should be to void the entire UN Charter.[122] The Charter merely establishes the organ capable of passing the offending resolution, but does not itself dictate the decision. Rather, the effect of a violation should be to divest the Security Council of any Charter-based authority to pass such a resolution.

This last step requires extending the limiting force of *jus cogens* norms beyond the blunt instrument of invalidity. One could argue that such a role is necessary given the proliferation of treaty-based bodies endowed with policy-making authority. Like the Security Council, these bodies

[121] Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 468 (1991). See also Terry D. Gill, *Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L L. 33, 75 (1995) ("The UN - including the Security Council - cannot by means of invoking the enforcement provisions of the Charter, impose a particular form of government upon a majority or significant segment of a population of any State or non-self governing territory); Matthias J. Herdegen, *The Constitutionalization of the UN Security System*, 27 VAND. J. TRANS. L. 135, 156 (1994) ("An international order demanding a state to sacrifice its own existence or to suffer the complete erosion of vital options regarding the management of its territory would overstrain legitimate expectations of compliance, and by such excessive imposition, undermine its own normativity.").

[122] As the ILC notes in commentary on its Draft Articles on State Responsibility,

> one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen.

JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 187 (2002) (ILC Draft Articles).

are given broad mandates that allow them to make decisions necessary to implement a treaty's goals, though no particular courses of action are required by the treaty texts. Voiding specific decisions rather than an entire treaty would have the obvious benefit of avoiding a constitutional crisis at the UN. But it also seems consistent with the essential function of *jus cogens* norms, which is to prevent states from accomplishing indirectly by contract what they could not accomplish directly by unilateral action. The Vienna Convention appears less concerned with the form a contract might take - the treaty itself or the decision of a treaty organ - than delimiting the outer bounds of contractual lawmaking as a category of obligation.

In his 1993 opinion in the *Genocide* case, Judge Lauterpacht described such a selectively preemptive role for *jus cogens*.[123] At the outset of the Yugoslav wars, the Security Council imposed an arms embargo on all the former republics, including Bosnia, hoping to quell the conflict.[124] In an application for provisional measures to the ICJ, Bosnia argued that the embargo deprived it of the means necessary to defend itself against Serb aggression and effectively aided the commission of genocide. Because the prohibition of genocide is a *jus cogens* norm, Bosnia argued, the Council's action should be voided. Lauterpacht found some merit in this claim:

> the inability of Bosnia-Herzegovina sufficiently strongly to fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of the genocidal activity of the Serbs and in this manner and to that extent to act contrary to a rule of *jus cogens*.[125]

[123] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro) (Provisional Measures)*, 1993 ICJ 325 (April 8) (*Genocide Case*).

[124] See SC Res. 713 (Sept. 25, 1991).

[125] *Genocide Case*, 1993 ICJ at 441 (separate opinion of Judge Lauterpacht). Lauterpacht equivocated, however, when it came to pronouncing the resolution invalid. On the one hand, he asserted that the Charter's normal trumping authority over inconsistent treaties (by virtue of article 103) "cannot - as a matter of simple hierarchy of norms - extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposition proposition thus - that a Security Council resolution may even require participation in genocide - for its unacceptability to be apparent." *Ibid*. On the other hand, he described as a "debatable

2. Difficulties with *jus cogens* limitations

By raising a *jus cogens* objection, an occupied state would advance debate by refocusing analysis from unhelpful claims of Charter-based limitations on Security Council authority. But the argument has its own problems. First, the *jus cogens* status of a generalized right of internal self-determination is questionable. While the exercise of political autonomy cannot be disengaged from legal conceptions of independent statehood, it is not clear that autonomy is always valued for its own sake. To the contrary, the complex web of norms seeking to preserve existing borders and populations, reviewed in Chapter 4, may be understood as responding to states effectively committing normative suicide. That is, they act in profound opposition to the liberal model of statehood implicit in those norms. One can well argue that international law does not support state autonomy when it would undermine the kind of state the law has been working so hard to encourage. On the other hand, the proposition that a state retains equal juridical standing in the international community at a time when it is: (1) incapable of autonomous decision-making; and (2) (potentially) burdened with state responsibility for acts it has not initiated, appears to challenge a host of assumptions about states as essential constituents of the international legal order. These assumptions are so basic to received ideas of statehood that a shortage in episodes of supporting practice is not necessarily fatal to the *jus cogens* claim.

Second, and more fundamentally, acute definitional problems arise when the object of a *jus cogens* objection is a Chapter VII resolution. Article 53 of the Vienna Convention requires that a *jus cogens* norm be "accepted and recognized by the international community of States as a whole," a remarkably high standard requiring something close to unanimous consent. Although some commentators still maintain that *jus cogens* norms originate in natural law conceptions of justice and right reason, the Vienna Convention's focus on "acceptance" and "recognition" by states – manifestations of actual consent – reflect the ILC's view that *jus cogens* share the same positive law origins of every other

link" in this argument the proposition that "a resolution which becomes violative of *jus cogens* must then become void and legally ineffective." *Ibid*. Unwilling to make a firm commitment, Lauterpacht instead suggested "the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court's order, so that the Security Council may give due weight to it in future reconsideration of the embargo." *Ibid*.

international law source recognized in contemporary practice.[126] The last ILC special rapporteur on the law of treaties told the Vienna Convention drafting conference that the Commission "had based its approach to the question of *jus cogens* on positive law much more than on natural law."[127] Thus, *jus cogens* norms arise from affirmative acts of recognition by "the international community of States as a whole."

But is such a norm heirarchically superior to a decision of the Security Council under Chapter VII? Every state in the world is now a member of the United Nations and the UN Charter designates the Council as the organ empowered to speak for the membership on matters of peace and security. As article 24 provides, "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." Article 25 makes those decisions binding.[128] The Council frequently draws upon this preeminent station to act in the name of the international community as a

[126] SHELTON, *supra* note 104, at 299-301. A non-consensual view of *jus cogens* would assume a highly mature international legal system with deeply ingrained communal values and central voices of authority capable of articulating those values. See A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 15 (1995).

[127] United Nations Conference on the Law of Treaties, 1st Sess., Vienna, March 26 - May 24, 1968, at 327, quoted in G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 216 (1993).

[128] *Ibid*. In the *South-West Africa* case, the ICJ emphasized the far-reaching consequences of this obligation for member states in light of the Security Council's declaration that South Africa's continued presence in South West Africa was illegal:

> It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. . . Thus when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.

Legal Consequences for States of the Continued Presence of S. Africa in Namibia (S.W. Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 ICJ 16, 52-4 (June 21) (*South-West Africa Advisory Opinion*).

whole.[129] For example, it designated certain crimes so offensive to all states that criminal prosecutions in national courts could be preempted in favor of international criminal tribunals.[130]

When acting under Chapter VII, therefore, the Council is assumed to speak for all UN members and command plenary authority on the subject-matter of those resolutions. *But to argue that the Security Council may violate jus cogens, one must assert that its decisions under Chapter VII lack the degree of universality necessary to support a jus cogens norm*. If the support accorded both is roughly equivalent the proposition becomes a non-sequitor, for the international community cannot unequivocally condemn an action it has just endorsed through the Council. To argue otherwise, as Mark Weisburd has noted, "is to suggest that one can exclude the Security Council's membership from the international community as a whole."[131]

The legislative history of the Vienna Convention supports this reading. The ILC evidently assumed that a widely ratified treaty could not, by definition, conflict with *jus cogens*. Commenting on possible changes in peremptory norms, the Commission observed that "a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty." For this reason, "the Commission thought it desirable to indicate that such a treaty would fall outside the scope of this article."[132] A general multilateral treaty, in other words, would serve as the primary vehicle for creating (or altering) a *jus cogens* norm. Necessarily, therefore, it could not also fall afoul of a peremptory rule. Given that the Chapter VII powers of the Security Council emanate from such a treaty, the ILC's logic would dictate that Council decisions *not* be subject to the trumping authority of *jus cogens*. There is simply too great an equivalence in their normative force, or too little disparity in positions they occupy in the hierarchy of international norms, to permit one rule to preempt the other.

[129] See e.g., UN Doc. S/PRST/2006/41 (2006) (warning North Korea of consequences should it "ignore call of the international community" not to conduct a nuclear test); SC Res. 1189 (Aug. 13, 1998) ("*reaffirming* the determination of the international community to eliminate international terrorism in all its forms and manifestations"); SC Res. 917 (May 6, 1994) ("*reaffirming* that the goal of the international community remains the restoration of democracy in Haiti"); SC Res. 897 (Feb. 4, 1994) ("*reaffirming* the commitment of the international community to assist the Somali people to attain political reconciliation and reconstruction").

[130] See SC Res. 955 (Nov. 8, 1994) (creating tribunal for Rwanda); SC Res. 827 (May 25, 1993) (creating tribunal for the former Yugoslavia).

[131] WEISBURD, *supra* note 126, at 36.

[132] ILC COMMENTARY, *supra* note 8, at 248.

3. An alternative methodology: implied consent

Is this argument fatal to a target state invoking internal self-determination as a *jus cogens* norm? The few discussions of *jus cogens*' relation to the Council do not pursue the problem.[133] Most commentators simply assert that certain human rights or humanitarian norms have achieved *jus cogens* status and that contrary Security Council resolutions are void by virtue of the conflict.[134] Even the ICJ in its 1971 *South-West Africa* decision simply asserted that Security Council resolutions imposing sanctions on the Namibian apartheid regime could not contravene "certain general conventions, such as those of a humanitarian character," because to do so would violate the rights of the sanctioned population under those conventions.[135] If the Security Council faces no meaningful Charter-based limitations on its authority, and its status as preeminent spokesman for the international community on matters of peace and security places its Chapter VII resolutions on a co-equal plane with *jus cogens* rules, where is one to find normative limitations? Is Council authority to sanction humanitarian occupation beyond effective limitation by international law?

One potential explanation for the Council's trumping authority would be a theory of implied consent. The ILC notes in commentary on its Draft Articles on State Responsibility that while foreign military intervention in a state would normally run afoul of a *jus cogens* norm, the state "may validly consent to a foreign military presence on its territory for a lawful purpose."[136] The question of whether a state may consent to a violation

[133] See Jeremy I. Levitt, *Illegal Peace?: An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa*, 27 MICH. J. INT'L L. 495, 526 note 175 (2006) (noting conflict between Council resolutions and *jus cogens* is "a fertile area of research in need of deep exploration").

[134] Herdegen writes, for example: "There are some iron rules, however, that restrain even action under Chapter VII. For example, the humanitarian standards of customary law on armed conflicts leave no room for modification by the Security Council. An absolute embargo based upon Article 41 that extends to the affected population's access to medicine would violate peremptory human rights law." HERDEGEN, *supra* note 121, at 156. See also Susan Lamb, *Legal Limits to United Nations Security Council Powers*, in THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOR OF IAN BROWNLIE 361, 372-4 (Guy S. Goodwin-Gill and Stefan Talmon eds., 1999); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 590 (1998); Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509, 562 (1996); Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility*, 43 INT'L AND COMP. L.Q. 55, 93 (1994).

[135] *South West Africa Advisory Opinion*, 1971 ICJ at 55.

[136] ILC DRAFT ARTICLES, *supra* note 122, art. 26, cmt. 6.

of a *jus cogens* norm is the subject of vigorous debate.[137] Rather than taking a detour to engage this ultimately inconclusive discussion, let us assume there are some circumstances in which consent may be appropriate. Here, the consent would need to cover not only intervention, but also the far more intrusive humanitarian occupation. The claim would be of consent not to the specific operation – in most cases coerced, as discussed above, and only salvageable if ratified by a Chapter VII resolution – but to general Security Council authority to legitimize an occupation. One would argue that in ratifying the UN Charter, the occupied state accepted a Security Council that exercises both plenary authority in matters of peace and security and unbounded discretion to choose the appropriate means of addressing each breach of or threat to the peace. Because no state joining the UN would (or in fact has) explicitly consented to full divestiture of its domestic governing authority, the consent would need to be implied.[138]

[137] Brad R. Roth, *The Illegality of "Pro-Democratic" Invasion Pacts*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 120, at 328; Wippman, *Treaty-Based Intervention*, *supra* note 62. The ILC's own position on this issue is less than clear. Its black letter rule, set out in Article 26, provides that consent (along with all other "circumstances precluding wrongfulness" of a state act) cannot excuse violation of a *jus cogens* norm. *Ibid*. art. 26 ("Nothing in this Chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of international law."). In commentary on this article, the Commission notes specifically that "[o]ne State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty or otherwise." *Ibid*. Yet in the next sentence the Commission states that "in applying some peremptory norms the consent of a particular State may be relevant." *Ibid*. It then gives the example of valid consent to foreign military occupation. *Ibid*. Is consent to the violation of a peremptory norm permissible or not? The Commission may be suggesting that consent in such circumstances is relevant not to waiving objections to an otherwise illegal act but to the illegality of the act in the first place. In the case of military intervention, for example, the UN Charter prohibits the use of force against the "territorial integrity or political independence of any state." UN Charter, art. 2(4). A consensual intervention may not run afoul of these prohibitions. If this is indeed the Commission's view, it has necessarily returned to substantive questions, as noted below in the text. Alternatively, other parties' interests may be involved. In the case of genocide, for example, since the right-holders are arguably individual citizens rather than states themselves, the peremptory right against genocide may not be the state's to waive.

[138] The law of state responsibility, at least in the ILC's view, has arguably foreclosed this option:

> certain modalities need to be observed for consent to be considered valid. Consent must be freely given and clearly established. It must be actually expressed by the State rather than merely presumed on the basis that the State would have consented if it had been asked.

ILC DRAFT ARTICLES, *supra* note 122, art. 20, cmt. 6.

The case of Iraq provides an example of this reasoning. At the close of the 1991 Gulf War, the Security Council imposed a laundry list of highly intrusive sanctions and conditions on Iraq.[139] Iraq objected vehemently, deeming the impositions a violation of its sovereignty.[140] Council members correctly rejected Iraq's protests. If a state subject to enforcement actions could withdraw its consent to Chapter VII powers, the Council would lose any authority to enforce its most important decisions. Thus, rather than engage the substance of Iraq's claims about the reach of Council authority, Council members were able to treat its arguments as a challenge to the fundamental rule that treaty obligations must be obeyed.[141] Such a claim, of course, was easily rejected.

Unfortunately, such consent arguments turn out to be procedural detours that return us, inevitably, to the substantive validity of Security Council actions. The occupied state will surely reply that while it may have consented to certain Council prerogatives upon ratifying the Charter, it did not consent to *this* – the wholesale loss of its sovereign authority. The Charter text, as we have seen, is no help in evaluating this argument, since it contains no substantive limits on Council authority. Drawing on the Iraq example, one could reply that the occupied state consented to *any and all* enforcement measures the Council deems appropriate to restore the peace. But in making this claim one must be prepared to defend substantially more extreme Council actions, such as resolutions calling for the mandatory exchange of minority populations or enforcing economic sanctions to the point of mass starvation. It is untenable to argue that a state had consented to such acts. Yet any backtracking from support for such measures moves one from the realm of procedure to the realm of substance, for one would then be asking what *kind* of remedial authority is included in the Council's Chapter VII powers. And in so doing, one necessarily abandons the argument that ratifying the UN Charter functions as a blank check from member states to the Council. Consent, it appears, is also a dead end.

[139] SC Res. 687 (April 3, 1991).

[140] In a letter to the Council, Iraq protested the resolution as impairing its sovereignty and imposing "a boundary line which deprive[d] it of its right to establish its territorial rights in accordance with the principles of international law." *Identical letters dated 6 April 1991 from the Permanent Representative of Iraq to the United Nations addressed respectively to the Secretary-General and the President of the Security Council*, ¶ 1, UN Doc. S/22456 (1991).

[141] Vienna Convention on Treaties, *supra* note 7, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed in good faith.").

III. Conclusion

I argued in the first part of this chapter that agreements supporting humanitarian occupation missions are likely valid only because of supporting Security Council resolutions. These can either authorize the force used to coerce the agreement or validate the agreement itself. The Council's ability to legitimize the occupations under Chapter VII, therefore, becomes the central legal justification whether or not an agreement on occupation is reached. In turn, the validity of these resolutions depends on whether any other category of norms can effectively limit the scope of Chapter VII.

None of the arguments for limiting the scope of Chapter VII has shown much promise. The principles and purposes of the Charter are sufficiently vague that they can be read to encompass both arguments for a robust Security Council authority to remake states through humanitarian occupation and opposing arguments for preserving national political autonomy. *Jus cogens* limitations encounter the problem of normative equivalence, standing in stark contrast to the situation of normative hierarchy in which *jus cogens* are usually assumed to operate. A theory of implied consent either implausibly argues that UN member states have granted the Security Council a blank check under Chapter VII, including authority to unleash a parade of destructive horribles against their territories, or deems such acts outside the boundaries of the states' consent, in which case one is returned to claims about why some Security Council actions are legitimate but not others.

These weaknesses emerge more from logical cul-de-sacs in the arguments than from their actual rejection by states. None has grounding, either positive or negative, in substantial state practice, let alone in formal adjudication by an international court or tribunal. This gives the arguments a decidedly tentative cast. But they are not encouraging for those seeking a home for humanitarian occupation in conventional legal justifications. Some may find reassurance in a Security Council with unlimited authority to impose agreements and dictate the architecture of national politics. But this can only be a short-term solution. Inevitably, the shortcomings and contradictions highlighted here will emerge and require resolution. The next Chapter will explore an unconventional legal justification that may provide an easier fit.

7 The international law of occupation

The third legal argument for international administration rests on the international law of occupation.[1] Occupation law governs the acts of states in temporary control of foreign territory.[2] This argument asserts that multilateral humanitarian occupiers are in essentially the same position as individual occupiers and should enjoy the same prerogatives, as well as the same restrictions. Specifically, it asserts that occupation law permits the kind of democratic political and legal reforms pursued by humanitarian missions. The American occupation of Iraq – during which Iraqi legal, political and economic institutions were thoroughly reshaped to more closely resemble those of western developed states – is the central example of unilateral actions proving a model for multilateral occupiers.

Professor John Yoo has been the most forceful proponent of an expansive reading of occupation law. Testifying shortly after the Iraq occupation began, Professor Yoo argued that occupiers have broad discretion to reform the occupied state, both to institutionalize democracy and human rights protections and to ensure the occupier's own security.[3]

[1] Some of the discussion in this chapter is adapted from Gregory H. Fox, *The Occupation of Iraq*, 36 Geo. J. Int'l L. 195 (2005).

[2] See Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Regulations) ("[T]erritory is considered occupied when it is actually placed under the authority of the hostile army."); United States Dep't of the Army, Army Field Manual 27-10: The Law of Land Warfare §§ 351-448 (1956) (US Army Field Manual). See generally Eyal Benvenisti, The International Law of Occupation 3-6 (1993); Lord McNair and A. D. Watts, The Legal Effects of War 367-72 (1966); Gerhard von Glahn, The Occupation of Enemy Territory 7-23 (1957).

[3] John Yoo, Testimony before the Subcommittee on the Constitution Committee on the Judiciary, United States Senate Hearing on "Constitutionalism, Human Rights, and the

"Occupying nations possess the authority to dismantle institutions that pose a threat to domestic or international peace and order, such as the Nazi regime in Germany. Commentators have also construed state practice to include all of the legitimate purposes of war, such as the promotion of democracy and the protection of fundamental human rights."[4] Applying these principles to Iraq, Professor Yoo argued that "[i]n order for the United States to fulfill its obligations [under occupation law], maintain an orderly government, and protect its national security as well as the security of its armed forces while occupying Iraq, it almost certainly will be necessary for the United States to change Iraqi law to dismantle current Iraqi government institutions and create new ones to take their place."[5] Such prescriptions could easily describe the liberalizing agenda of humanitarian occupations.

This proposition at first appears self-evident. Of course foreign occupiers should be free to create democratic institutions and ensure the legal protection of human rights. International law requires them to do so at home, and there seems little justification for applying lower standards when they forcibly assert control over a foreign population. But applying this claim to humanitarian occupation rests on a series of novel propositions. These result from occupation law being applied in three unusual ways: first, to the acts of an international organization, as opposed to those of individual states; second, to justify significant changes in the occupied territory, as opposed to maintaining the *status quo ante bellum*; and third, to justify the recourse to force rather than the conduct of parties once force has been initiated. All three defy conventional understandings. The generally accepted view is that occupation law does not apply to nation-building missions because the UN lacks the essential attributes of statehood necessary to comply with the law's many obligations.[6] Secondly, occupation law is thought to serve as a restraint against occupiers assuming the powers of the displaced sovereign, most importantly its legislative authority.[7]

Rule of Law in Iraq" (June 25, 2003), available at judiciary.senate.gov/testimony.cfm?id=826&wit_id=2352. This testimony was later reprinted as John Yoo, *Iraqi Reconstruction and the Law of Occupation*, 11 U. C. DAVIS J. INT'L L. AND POL'Y 7 (2004). Subsequent citations will be to this published version. Professor Yoo addressed only unilateral occupations and did not apply his conclusions to forces authorized by the Security Council.

[4] YOO, *supra* note 3, at 17. [5] *Ibid.* at 22.

[6] See David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INTI'L L. 842, 852 (2003).

[7] Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EUR. J. INT'L L. 661, 671 (2005).

Third, occupation law is used in this argument to justify UN missions themselves, as opposed to tactics employed by the missions. Unlike the justifications explored in the previous chapter, the international law of occupation is not a doctrine of *jus ad bellum*. Those justifications – consent by the occupied state and a Chapter VII resolution of the Security Council – invoke *jus ad bellum* arguments for initiating war. Occupation law, by contrast, is a species of *jus in bello* – the law governing conduct in war regardless of the reasons for its initiation.[8] A state resisting humanitarian occupation would argue that whatever rights occupation law may grant international actors once they are in effective control of its territory, that law does not address the actors' entitlement to obtain control in the first place.

But this oversimplifies the matter. Occupation law plays a more subtle role in the regulation of armed conflict than the strict division between *jus ad bellum* and *jus in bello* might imply. It is true that occupation law does not address the legality of the force leading to an occupation. But it does address the central goal of most such actions: control over territory. This is no less true in the debate over humanitarian occupation, which is focused not on the fact of international actors' being present in a state but on their appropriation of governmental functions once they arrive. The objections of diminished state and sovereign equality explored in the previous chapter derive from this loss of control over public policy, an event that need not accompany victory in war. An international actor might intervene to end human rights abuses and depart immediately thereafter, a course of action, one might note, prescribed by most supporters of unilateral humanitarian intervention.[9] Thus, *jus in bello* norms, addressing how an occupier exercises its de facto power, speak directly to the legal objections to the missions.

If the occupation law claim succeeds, and occupiers may step directly into the shoes of ousted sovereigns and exercise all governmental functions without limit (apart from limits applicable to all governmental acts, such as protection of human rights), then the objections will have been answered without reference to *jus ad bellum* norms. This will be

[8] Geneva Convention [No. 4] Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287 (GC IV) (stating the Convention applies to "*all* cases of declared war or of any other armed conflict which may arise between two High Contracting Parties") (emphasis added).

[9] See SEAN D. MURPHY, HUMANITARIAN INTERVENTION 385 (1996) ("Most lists of criteria [for humanitarian intervention] favor no long-term effect on the political independence of the target state, which includes the prompt withdrawal of the intervening forces.").

true whether the initial use of force was lawful or unlawful, since *jus in bello* rules govern *all* occupations. Even an entirely legitimate occupier must provide an independent *jus in bello* justification for governing acts in the territory. The US occupiers in Iraq, for example, justified their extensive reform agenda not by arguments about the legality of the intervention itself (which the US made at length in other settings), but by reference to occupation law and Security Council resolutions passed after the intervention.[10] The objection that occupation law does not supply a justification for an occupier's presence in the first place, then, is not a persuasive reason for discarding it as legal justification.

This does not mean, of course, that a state's compliance (or noncompliance) with *jus ad bellum* will not have *jus in bello* consequences. A state using illegal force to commence an occupation may be prevented from governing if other states react with sufficient resolve. Iraq's attempt to administer Kuwait as its own province in 1990–1991 was thwarted by a Council-authorized coalition. Similarly, if an intervention for purposes of restoring order is properly authorized, a subsequent occupation to accomplish that goal will likely be authorized as well. The Security Council granted such dual authorizations for Bosnia, East Timor and Eastern Slavonia, and they appeared in the agreements negotiated for Kosovo as well. But these are political rather than normative connections between the two bodies of law.

In order for the occupation law argument to succeed, all three of these novel applications must be addressed. Having examined the third, the discussion will proceed as follows. First, we will ask whether the law of occupation properly regulates the acts of international organizations. Second, we will review the traditional understanding of an occupier's capacity to legislate political and legal change for a territory of the kind pursued by humanitarian occupiers. Third, because that traditional understanding appears unhelpful, we will consider several claims for an alternative understanding of occupation law that would be substantially

[10] The US argued the intervention was justified by a revival of Security Council Resolution 678, triggered by Iraq's alleged breach of Resolution 687. See Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/350 (March 20, 2003). The Coalition Provisional Authority, by contrast, began every regulation, order and memorandum it issued by declaring it was acting pursuant to "relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. . ." See e.g., Coalition Provisional Authority Regulation No. 1, CPA/REG/16May2003/01 (May 16, 2003), available at www.iraqcoalition.org/regulations/20030516_ CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

more hospitable to democratic reforms. Finally, we will ask whether two occupations frequently described as "transformative" – in Germany and Iraq – may be seen as altering the traditional restrictions on an occupying power's legislative authority.

I. Applicability of occupation law to multilateral humanitarian occupations

At first glance, the law of occupation would seem to be a good fit for humanitarian occupations. Occupation law regulates the conduct of states taking effective control over foreign territory during or just after an armed conflict.[11] With a foreign power in residence, the state's government will generally cease to function. During this time – before final disposition in a peace treaty or other arrangement – the occupying power becomes the temporary *de facto* power in the territory. It assumes no *de jure* title as sovereign.[12] All four of the humanitarian occupations to date appear to satisfy these criteria. In each, an outside power has been in effective control of foreign territory. The Security Council has made clear that neither the UN nor any other entity has divested the target state of sovereignty over its territory. And all four occupations contemplate a final disposition of some sort – with varying degrees of certainty and precision – that render the occupations temporary states of affairs. Given these similarities, should the UN be considered an "occupying power" in any or all of these cases?

An important caveat is necessary before attempting to answer this question: to conclude that occupation law "applies" to UN authorized forces does not necessarily mean it will constrain their actions. Article 103 of the UN Charter arguably permits the Security Council to free its forces from constraints imposed by humanitarian law treaties: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." But if the Council were to trump the constraints of occupation law – and some argue it did in Iraq[13] – then the legal basis for a reform agenda would not be occupation law, but the Council's Chapter VII diktat. That justification was considered in Chapter 6. For

[11] See HAGUE CONVENTION, *supra* note 2, art. 42.
[12] VON GLAHN, *supra* note 2, art. 42.
[13] See Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721, 735 (2005) (discussing the effects of Resolutions 1483 and 1500).

the present discussion, then, I will assume the Council has not explicitly renounced any of occupation law's limitations and that arguments for their application may be considered on their own terms.[14]

A. UN ratification of humanitarian law treaties

The modern law of occupation is set out in the Fourth Geneva Convention of 1949 ("GC IV"), which updates but does not supersede the Hague Regulations Respecting the Laws and Customs of War on Land of 1907 ("Hague Regulations"). Like all four Geneva Conventions, GC IV governs the conduct of the treaty's "High Contracting Parties."[15] To date, these have been limited to states. Neither the UN nor any other international organization has even attempted to ratify GC IV.[16] The Conventions' drafters would have considered this state-centrism unremarkable, for the international organizations of 1949 were both limited in number and, even in the case of the UN, had not been parties to "declared war or. . .any other armed conflicts," the threshold for applying the Convention.[17] For the International Committee of the Red Cross ("ICRC"), the lack of international organizations as parties is not mere happenstance. The ICRC takes the rather extreme position that non-state actors are *incapable* of becoming parties to the Conventions: "[o]nly States may become party to international treaties, and thus to the Geneva Conventions and their Additional Protocols."[18] This takes matters too far, since international organizations are fully capable of ratifying treaties and have done so in great numbers since World War II.[19] The question, therefore, is not whether the UN can ratify any treaty but whether it can ratify this one.

The UN's capacity to ratify GC IV turns on whether it possesses the constitutional competence to carry out its obligations.[20] The EU, for

[14] The alternative scenario, in which the Council does address these limitations, is discussed briefly in text accompanying note 199.

[15] Article 2 provides that the Convention applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." GC IV, *supra* note 8, art. 2.

[16] Sassòli, *supra* note 7, at 687.

[17] GC IV, *supra* note 8, art. 2.

[18] International Committee of the Red Cross, International Humanitarian Law: Answers to Your Questions 12 (2002).

[19] See Anthony Aust, Modern Treaty Law and Practice 54 (2000). There is an entire treaty governing such agreements, though it is not yet in force. Vienna Convention on The Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, 25 I.L.M. 543 ("Vienna Convention on International Organizations' Treaties").

[20] The Vienna Convention on International Organizations' Treaties provides that "[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization." Vienna Convention on International

example, lacks the many institutions of local government necessary to implement treaty-based human rights obligations. As a result, the European Court of Justice has held it constitutionally incapable of ratifying the European Convention on Human Rights.[21] But whatever the outcome of this functional analysis, formal ratification by the UN is not a promising solution to the applicability problem.

First, inquiring into the UN's capacity to implement GC IV will inevitably resurrect many of the highly complex questions surrounding the legality of humanitarian occupation itself. Since international organizations' capacity for implementation will depend on their "powers to enforce (a treaty's provisions) in the territory of their member states,"[22] the inquiry would necessarily delve into the legal basis for the occupation. As we have seen, these are murky waters that will inevitably cloud an analysis of UN implementing capacity.

Second, some object that formal UN adherence to humanitarian law treaties would render the organization a party to any armed conflict in which such treaties were applicable.[23] This could raise a host of problems – compromising UN neutrality in conflicts whose resolution requires cooperation with all the parties, and turning its troops into "combatants," legitimately subject to attack by enemy forces.[24] Finally,

ORGANIZATIONS' TREATIES, *supra* note 19, art. 6. This contingent ability to contract stands is in contrast with a *per se* rule for states: "*[e]very* State possesses capacity to conclude treaties." Vienna Convention on the Law of Treaties, art. 6, May 23, 1969, 1155 U.N.T.S. 331 (emphasis added).

[21] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-01759.

[22] AUST, *supra* note 19, at 54.

[23] The US Army Field Manual states that the question of whether the law applies to multilateral peace operations "hinges on whether the peace operations forces undertake a combatant rule." So far, the US, UN and NATO believe that their forces have not become combatants, despite carrying out defensive-type operations. US Army Field Manual FM 3-07, Appendix B-3, at 165 (2003).

[24] See the thorough discussion of these issues in Richard D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Forces*, 17 MICH. J. INT'L L. 53, 73-8 (1995). As a committee of the American Society of International Law argued in 1952:

> Whatever the definition of war may be, this much of it would be generally accepted, that war is conflict between states, between units of equal legal status; whereas the United Nations, acting on behalf of the organized community of nations against an offender, has a superior legal and moral position as compared with the other party to the conflict. A war is fought by a state for its own national interest; United Nations enforcement action is on behalf of order and peace among nations.

Committee on Study of Legal Problems of the UN, *Should the Laws of War Apply to United Nations Enforcement Actions?*, 46 PROC. AM. SOC'Y INT'L L. 216, 217 (1952).

given the ICRC's position against ratification and the demonstrated unwillingness of any international organization even to attempt to do so, ratification appears largely an exercise in wishful thinking.

B. The UN and the customary law of occupation

There is another approach to arguing that humanitarian law should apply to UN forces. This view would acknowledge that institutional limitations may prevent the UN from fully complying with the Geneva Conventions.[25] Instead of focusing on the Conventions themselves, this approach argues that "Geneva law" has both entered into customary international law and been enlarged in scope to limit any gaps in coverage for persons victimized by armed conflict.[26] If the UN acts like a party to armed conflict, one would claim, customary humanitarian law should impose restrictions on its conduct and bestow rights on the objects of its actions. In an age of conflicts that involve a constantly shifting cast of unilateral, regional and global actors, such flexibility is essential. Deriving UN obligations from custom thus allows a more flexible approach than the wholesale application of comprehensive treaty mandates. On this view, the special characteristics and limitations of international organizations will play a role in determining the nature of their legal obligations.

That the Geneva and Hague regimes have become customary international law is now a common holding of international tribunals.[27] Less frequently noted is their slow accretion to encompass conflicts,

[25] For this reason, the common claim that UN forces are bound by humanitarian law because individual troop contributing states are so bound misses the mark. See DEREK W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 504 (1964). The *lacunae* in UN competence are inherent in its corporate structure - its lack of a judicial system, for example - and do not derive from the legal obligations of troops under its command or authority.

[26] Professor Meron has summarized much of this thinking. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000) (Meron, *Humanization*).

[27] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, 257 (July 8) ("the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."). See also *Prosecutor* v. *Delalić*, No. IT-96-21, ¶ 112 (Feb. 20, 2001) (Celebici Appellate Opinion). For a review of older decisions, see Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348 (1986). The Nuremburg Tribunal held that the Hague Regulations of 1907 had entered customary law by the end of the 1930s. Trial of German Major War Criminals, 1946, Cmd. 6964, Misc. No. 12, at 65.

individuals and acts previously unregulated by humanitarian law. The historical paradigm for humanitarian law was a war fought between the standing armies of two sovereign states in which the distinction between combatants and civilians was clearly evident. Deviations from this model produced lower levels of protection for participants, particularly in the case of civil wars. But in recent years, deviations have become the norm as civil and guerilla wars now make up the majority of armed conflicts of interest to the international community. From 1990 to 2005, all but four of the world's major armed conflicts were internal.[28] Professor Meron has detailed how the rise of human rights law in the post-World War II era focused attention on the human cost of distinctions between traditional and new types of conflict. A heightened human rights consciousness raised difficult questions as to why entire classes of individuals ought to be wholly or partially exempt from the full protection of humanitarian norms, and why groups fighting in much the same manner as state armies ought not to be held to the same standards of conduct as those forces.[29]

States and international tribunals have responded by filling many of these gaps. Recent practice has sought to apply the protections of humanitarian law "to as broad a category of persons as possible;"[30] for example, by diminishing the importance of citizenship to status as a "protected person,"[31] expanding the potential victim class in war crimes

[28] Lotta Harbom and Peter Wallensteen, Patterns of Major Armed Conflicts, 1990-2005, in Stockholm International Peace Research Institute (SIPRI) Y.B. 2006 108 (2006). The SIPRI dataset counts 57 conflicts overall during this period. *Ibid.*

[29] See Meron, *Humanization*, *supra* note 26.

[30] *Prosecutor* v. *Delalić*, No. IT-96-21, ¶ 263 (Nov. 16, 1998) (Celebici Trial Opinion).

[31] In the *Celebici* case, Bosnian Croat and Muslim defendants before the Yugoslav Tribunal challenged their prosecution for violations of GC IV on the grounds that the Bosnian Serb victims were not "protected persons" under that Convention. "Protected persons" are defined as "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals." GC IV, *supra* note 8, art. 4(1). The defendants argued that because both victims and perpetrators in the case were Bosnian nationals, GC IV simply did not apply. The Appellate Chamber rejected this claim, holding that a strict understanding of nationality was inappropriate in a conflict where the defining affiliation was ethnicity. The Convention's drafters, the Chamber held, "did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal national link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law." *Celebici* Appellate Opinion, *supra* note 30, ¶ 79. The central objectives of the Convention would be defeated "if undue emphasis were placed on formal legal bonds" of nationality. *Ibid*. ¶ 81.

prosecutions,[32] requiring a lesser degree of intervention by other states to "internationalize" an internal conflict,[33] and asserting jurisdiction by human rights bodies to interpret and apply humanitarian law instruments.[34] Customary law has thus maintained its relevance to the evolving nature of warfare by fostering a human rights-inspired jurisprudence

[32] Neither the Geneva Conventions nor their 1977 Protocols require prosecution of individuals violating provisions related to internal civil wars. There are no internal equivalents to the "grave breaches" provisions of all four of the main Conventions, which require individual prosecutions for certain egregious acts. In creating the International Criminal Tribunal for Rwanda, however, the Security Council eliminated this distinction by criminalizing violations of the Conventions' articles related to internal conflict - common article 3 and Protocol II. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art. 17, SC Res. 955, Annex (Nov. 8, 1994), reprinted in 33 I.L.M. 1602 (1994). The International Criminal Court also follows this approach, setting out a laundry list of prosecutable acts committed in purely internal conflicts. Rome Statute of the International Criminal Court, art. 8(2)(e), July 17, 1998, 2187 U.N.T.S. 3.

[33] In cases of war crimes, the Yugoslav Tribunal is limited to prosecuting violations of grave breaches of the Geneva Conventions. Designating an armed conflict international as opposed to internal is thus crucial to any such prosecution. In the Bosnian conflict, the question turned on whether Bosnian Serb forces were acting independently (internal) or whether they were subject to external control by Serbian Serbs (international). The leading test to determine the degree of external control necessary for this purpose appeared in the ICJ's *Nicaragua* decision, where the Court required "(i) a Party not only be in effective control of a military or paramilitary group, but that (ii) the control be exercised with respect to the specific operation in the course of which breaches may have been committed." *Prosecutor* v. *Dusko Tadic*, IT-94-1, para. 100 (July 15, 1999). The Yugoslav Tribunal rejected this test as overly restrictive, requiring instead a showing of "*overall* control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations." *Ibid.* ¶ 145 (emphasis in original). With this holding, Bosnian Serb defendants could henceforth be prosecuted for grave beaches.

[34] On March 13, 2002, the Inter-American Commission on Human Rights, responding to a request for provisional measures, requested that the US allow the status of foreign nationals detained at Guantanamo Bay, Cuba to be "determined by a competent tribunal." Letter from Juan E. Méndez, President, Inter-American Commission on Human Rights (March 13, 2002) (on file with author). See also Inter-American Commission on Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba) (Mar. 12, 2002), 41 ILM 532 (2002) (IAC Detainee Decision). This requirement and indeed the phraseology used by the Commission, is taken directly from article 5 of the Third Geneva Convention, which provides for such determinations in cases of doubt concerning the detainees' status as prisoners of war. Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 75 U.N.T.S. 135. Although the Commission's formal mandate in the case ran only to interpreting and applying the American Declaration on the Rights and Duties of Man (the US had not ratified the more recent American Convention on Human Rights), the Commission observed that "in situations of armed conflict, the protections under

within the humanitarian law framework. These decisions have answered Professor Meron's call for "[t]he parameters of humanization. . .[to] be drawn so that it can be related to the reality of armed conflicts."[35]

Under this evolving approach, does the "reality" of humanitarian occupation present a case for expanding the law of occupation to protect persons subject to the authority of international organizations rather than states? Certainly advances in occupation law have mirrored international law's broader embrace of individualism over state-centrism.[36] The most prominent case of occupation in the post-War era – the Israeli presence in Palestinian territories – unleashed a torrent of *opinio juris* focusing on individual rights.[37] But general conclusions on the malleability of occupation law are difficult given the few acknowledged cases of occupation in the post-War era.[38] Especially problematic is the UN's unwillingness to describe its own forces' prolonged presence in territory – either under its direct command or via national contingents

international human rights and international humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity." IAC DETAINEE DECISION, *supra*, at 533.

[35] Meron, *Humanization*, *supra* note 26, at 241.

[36] BENVENISTI, *supra* note 2, at 210 ("While the nineteenth-century law of occupation concentrated primarily on the interests of ruling elites, the twentieth-century law shifted its attention to the concerns of the indigenous population subject to foreign rule.").

[37] The ICJ found the Israeli occupation to violate a broad range of human rights treaties. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ 136 (July 9). Previously, in SC Res. 605 (Dec. 22, 1987), the Security Council "strongly deplore[d] those policies and practices of Israel, the occupying Power, which violate[d] the human rights of the Palestinian people in the occupied territories." In 1975, the General Assembly established a Committee on the Exercise of the Inalienable Rights of the Palestinian People, which produced a series of reports and resolutions on human rights conditions in the territories. See GA Res. 3376 (XXX) (Nov. 10, 1975).

[38] See REPORT BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS MEETING OF EXPERTS, GENERAL PROBLEMS IN IMPLEMENTING THE FOURTH GENEVA CONVENTION 4 (1998) ("[R]efusal to recognize the Fourth Convention's applicability is that instrument's major weak point: when confronted with situations in which the Convention should be applied, the states party to it almost invariably cite some grounds or other on which, in their view, it is not applicable."). States have offered a variety of explanations short of describing their presence on foreign territory as an occupation: the intervention came in response to a local invitation (Afghanistan, Grenada, Panama, Cambodia); outright annexation of the territory was justified by historic title or otherwise (Kuwait, East Timor, the Western Sahara); the intervention sought to effectuate self-determination by a local group (Bangladesh, Northern Cyprus); and the occupation was for a limited purpose (Northern Iraq, Southern Lebanon). BENVENISTI, *supra* note 2, at 150-82.

authorized by the Security Council – as an occupation under GC IV. Although multilateral forces in the Congo, Cambodia, Somalia, Liberia, Bosnia, Kosovo, Eastern Slavonia and East Timor have exercised a variety of governmental and quasi-governmental functions, neither the UN nor troop-contributing states described any of these missions as an occupation.[39] The number of "non-occupation" cases could be expanded further if UN involvement in local law enforcement matters were included.[40]

A more useful approach focuses not on the nature of conflicts but on the UN forces themselves. Because UN missions are undertaken for the explicit purpose of upholding foundational international norms, the organization cannot very well be held to a *lower* standard of conduct than the forces of High Contracting Parties engaged in ordinary warfare. The Charter's vision of collectively legitimized force underlines this point. If the unilateral use of force is now highly suspect, it would be anomalous to limit humanitarian law to an ever-diminishing realm of illegal unilateral actions. The UN was surely not designed to promote legality of one kind (diminishing unilateral aggression) at the expense of legality of another (rules governing conduct in warfare).

This logic has largely prevailed in practice. In 1999, the UN Secretary-General issued a Bulletin declaring that UN forces would abide by a generalized set of humanitarian norms "when in situations of armed

[39] See FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 60-76 (1966) (Congo); Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1 (1993) (Cambodia); F.M. Lorenz, *Rules of Engagement in Somalia: Were They Effective?*, 42 NAVAL L. REV. 62 (1995) (Somalia); REGIONAL PEACEKEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS 106-7 (Marc Weller ed., 1994) (quoting the President of Nigeria, who led a regional peacekeeping force into Liberia, as stating of the intervention force, "It is not an army of conquest or occupation"); Cotonou Peace Agreement, art. B(2), July 25, 1993 (stating that the parties to the first Liberian peace treaty, which included the UN, agree to recognize "neutrality" of the regional intervention force); General Framework Agreement for Peace in Bosnia and Herzegovina With Annexes, Annex A, Dec. 14, 1995, 35 I.L.M. 75 (1996) (General Framework Agreement) (describing role and functions of multinational military implementation force in Bosnia, "IFOR"); SC Res. 1031 (Dec. 15, 1995) (approving creation and deployment of IFOR); SC Res. 1272 (Oct. 25, 1999) (approving creation and deployment of East Timor mission); SC Res. 1244 (June 10, 1999) (Kosovo mission); SC Res. 1037 (Jan. 15, 1996) (Eastern Slavonia mission).

[40] See Michael J. Kelly, *Responsibility for Public Security in Peace Operations*, in THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 141, 143-8 (Helen Durham and Timothy L.H. McCormack eds., 1999) (describing UN involvement in policing matters in Rwanda, Mozambique and Burundi).

conflict they are actively engaged therein as combatants."[41] Moreover, when status of forces agreements are concluded between the UN and host states, "the United Nations undertakes to ensure that the force shall conduct its operations with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel."[42] A model agreement between the UN and states contributing personnel to peace-keeping missions provides that missions will observe and respect the four Geneva Conventions.[43]

C. The nature of UN customary law obligations

These commitments support the view that UN forces may be bound by the customary law of occupation to the extent they are capable of compliance. But recall that adaptations in the customary law of war have been driven by the evolving nature of armed conflict. Change has been driven by realistic assessments of whether law can enhance individual welfare. Given this realist premise, we therefore return to the question of how the requirements of occupation law may be pragmatically adapted to the nature of the United Nations. Is the UN capable of assuming the obligations of an occupier?

Occupation is generally understood to commence when territory "is actually placed under the authority of the hostile army."[44] Each of the humanitarian occupations has involved the UN assuming *de facto* authority over territory. While, as noted, the UN did not describe any of these missions as an occupation, neither the Hague Regulations nor the Geneva Conventions requires a formal declaration of occupation. The onset of occupation is widely understood to be a factual determination not dependent on legal formalities.[45]

[41] *Observance by United Nations Forces of International Humanitarian Law*, § 1.1, UN Doc. ST/SGB/1999/13 (1999). See generally Paul C. Szasz, *UN Forces and International Humanitarian Law*, in INTERNATIONAL LAW ACROSS THE SPECTRUM OF CONFLICT 507 (Michael N. Schmitt ed., 2000). The Bulletin contains no guidelines specific to occupation, though the protection of civilians ("protected persons" under GC IV) is emphasized.

[42] *Observance by United Nations Forces of International Humanitarian Law*, *supra* note 41, § 3.

[43] *Draft Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations*, Annex, ¶ 28, UN Doc. A/46/185 (1991).

[44] This language is from article 42 of the HAGUE REGULATIONS, *supra* note 2, and is widely accepted. See Adam Roberts, *What is a Military Occupation?*, 5 BRIT. Y.B. INT'L L. 249, 256 (1984) (Roberts, *Military Occupation*).

[45] HILAIRE MCCOUBREY AND NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 280 (1992).

Once an occupation has commenced, GC IV imposes a myriad of obligations and restrictions on occupying powers.[46] Since restrictions on conduct do not implicate the UN's ability to comply with the treaty in the same manner as a High Contracting Party (any occupier is capable of *not* doing something), the inquiry must focus on *obligations*. The most important obligation imposed by GC IV is maintaining order in the territory. Most of the other obligations concern the provision of basic services: education and child care, availability of food, medical supplies and medical care, courts and other institutions of justice operating under standards of due process, and humane prison conditions.[47] Still others deal with the status of aliens on the territory of a party to a conflict.[48]

Some writers argue that the UN may not possess the capacity to fulfill these obligations,[49] a position the UN Office of Legal Affairs itself adopted prior to the post-Cold War explosion in peacekeeping operations.[50] But such categorical statements simply do not address the enormous range of competences now evident in UN peace operations. Some, such as UNPROFOR in Bosnia, were given ambitious mandates but virtually no means of implementing them.[51] Others have assumed limited domestic functions out of a necessity to maintain a secure environment.[52] The UNTAC mission to Cambodia in effect created a shadow government that supervised indigenous officials but did not

[46] See the concise summary in HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 198-205 (2d edn, 1998).

[47] GC IV, *supra* note 8, arts. 50, 55-6, 59, 64-77. [48] *Ibid.* arts. 35-46.

[49] "Any rule which presumes, for example, that the State applying it has territory of its own, or which depends on the application of a State's own national standards, would create a difficulty because the United Nations lacks these characteristic features of statehood." Roberts, *Military Occupation*, *supra* note 44, at 290.

[50] In a 1972 opinion the Office stated:

> The United Nations is not substantively in a position to become a party to the 1949 Conventions, which contain many obligations that can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces [of the United Nations], or administrative competence relating to territorial sovereignty. Thus, the United Nations is unable to fulfill obligations which for their execution require the exercise of powers not granted to the Organization, and therefore cannot accede to the Conventions.

Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims (June 15, 1972), reprinted in 1972 UN JURID. Y.B. 153.

[51] See Barry Ashton, *Making Peace Agreements Work: United Nations Experience in the Former Yugoslavia*, 30 CORNELL INT'L L.J. 769 (1997).

[52] See Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations and the Use of Force*, 27 DENV. J. INT'L L. AND POL'Y 239, 259-60 (1999).

assume their functions.[53] And in the four cases of humanitarian occupation, the UN assumed full legislative, judicial and executive authority and created the institutions necessary to implement those functions.

One might conclude that these widely disparate mandates preclude any general conclusions about the organization's capacity to comply with humanitarian norms. Certainly, the institutional capacities of state treaty parties do not ebb and flow in this manner. But to focus on this admitted inconsistency in UN practice is to return to the kind of formalism that arguments for the application of customary humanitarian law were designed to avoid. Customary humanitarian law now seeks to protect individuals to the extent possible in particular circumstances. While we have examined variations in that law turning on the nature of the actor or the conflict, there is no reason why variation cannot continue when the same actor assumes different roles or functions at different times. If the touchstone of these norms is the sanctity of protected persons, then the UN should be understood to assume *as much of the burden imposed by occupation law as it is capable of fulfilling in any given case*.[54] In a full-on humanitarian occupation such as Kosovo, this may well involve all of the obligations contained in GC IV. It would certainly be inconsistent with humanitarian values to leave civilians under any given UN-authorized occupation wholly *unprotected* by customary norms simply because a single rule of conduct cannot be formulated for all UN peace missions.

But caution is essential here. The UN suffered mightily in the 1990s when its forces were thrust into conflicts with neither the mandate nor the logistical capabilities to perform effectively. Humiliating and tragic episodes such as the Rwandan genocide, UNPROFOR soldiers being used as human shields and the massacre at Srbernicia contributed to a perception of the UN as weak and inept. Demanding the UN adhere to legal standards designed for states, in situations where it is demonstrably incapable of meeting those standards, risks repeating those damaging episodes. For this reason, viewing the UN as an occupying power may not be an optimal or long-term solution. In the next chapter, I will suggest a normative framework that more directly engages the unique characteristics that distinguish the UN from states.

[53] See Nhan T. Vu, *The Holding of Free and Fair Elections in Cambodia: the Achievement of the United Nations' Impossible Mission*, 16 MICH. J. INT'L L. 1177 (1995).

[54] As noted, the US military does not view the law of war as applicable to its participation peace operations. But it will never the less comply "to the extent 'practicable and feasible.'" US ARMY FIELD MANUAL, *supra* note 23, at B-7. This echoes the argument made in the text.

II. Is humanitarian occupation fundamentally inconsistent with occupation law?

If the customary law of occupation may apply to some or all aspects of humanitarian occupation, a threshold question of characterization will have been answered. Among potentially relevant legal categories, occupation law may be viewed as an appropriate (though not the only) regulatory regime. The next question is substantive: can occupation law legitimize the actions of humanitarian missions? Here we encounter a fundamental problem. Occupation law is usually understood as prohibiting wholesale changes in the legal and political institutions of the occupied territory. Yet the very purpose of humanitarian occupation is to remake those institutions along liberal democratic lines. Traditional law views occupiers as trustees, preserving the *status quo ante bellum*. Humanitarian occupiers, by contrast, are agents of political and social change. Can the two co-exist?[55] If not, little purpose will be served in characterizing these missions as "occupations."

A. The prohibition against altering legal and political institutions in the occupied territory: the conservationist principle

Historically, the typical occupation lasted for only a short time. A belligerent power seized enemy territory, hostilities came to an end through a cease-fire or armistice, and a peace treaty was negotiated, providing for the return of the occupied territory to its original sovereign, its cession to the victorious power or for some other final disposition.[56] But these short periods could be horrific, with "rape and pillage" being the harsh but common tactic of occupying forces.[57] Occupation law emerged in the late eighteenth century as a humanizing trend in the law of war, modifying a state's previously unencumbered right to subjugate

[55] See Steven R. Ratner, *Foreign Occupation and International Territorial Administration*, 16 EUR. J. INT'L L. 719 (2005)

[56] For a discussion of the legal termination of war, see YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 34-50 (4th edn, 2005).

[57] See THE RIGHT HON. EARL OF BIRKENHEAD, INTERNATIONAL LAW 253 (Ron W. Moelyn-Hughes ed., 6th edn, 1927). As Oppenheim recounts:

> In former times, enemy territory occupied by a belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants. He could devastate the country with fire and sword, appropriate all public and private property therein, and kill the inhabitants, or take them away into captivity, or make them take an oath of allegiance. He could, even before the war was decided, and his occupation was definitive, dispose of the territory by ceding it to a third State.

L. OPPENHEIM, 2 INTERNATIONAL LAW 294 (Arnold D. McNair ed., 4th edn, 1926).

conquered foreign territories.[58] Vattel and others began to suggest that because sovereignty over territory acquired in war was not final until the execution of a peace treaty, a conquering power ought not to exercise full dominion until its territorial rights had been formalized.[59] Holding full sovereignty in abeyance would delay the right to subjugate until the occupier had perfected its rights. Hopefully for the inhabitants, the peace treaty would return the territory to the ousted sovereign and the occupant's rights would never be exercised. Early articulations of occupation rules in the nineteenth century gave detail to the principle that "belligerent occupation is in essence a temporary condition in which the powers of the belligerent occupant are not without limit."[60] As John Marshall wrote in 1828, "the usage of the world is, if a nation be not entirely subdued to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace."[61]

When the law of war coalesced in the nineteenth century, there were few reasons why a temporary occupying power would seek to intervene in daily life in the territory, apart from reasons of security. Warfare was mostly a matter for professional armies, and the European monarchical states of the time played only a minimal role in the economic lives of their own citizens.[62] This essential commonality of interests among the dominant states provided few incentives to treat occupation as an opportunity for social engineering. The final codifications of occupation law adhered to this minimalist conception of the occupier's role. The 1907 Hague Regulations provide in article 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 [civil life], while respecting, *unless absolutely prevented*, the laws in force in the country.[63]

GC IV of 1949 built upon article 43 in its article 64:

[58] See generally Oppenheim's International Law 432-3 (H. Lauterpacht ed., 7th edn, 1952).

[59] E. de Vattel, 3 The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns 386, §§197-8 (Joseph Chitty ed., T. and J. W. Johnson 1852) (1758).

[60] Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 Harv. Int'l L.J. 65, 87 (2003); See also Sharon Korman, The Right of Conquest 109-11 (1996).

[61] *Am. Ins. Co.* v. *Canter*, 26 US 511, 542 (1828). [62] Benvenisti, *supra* note 2, at 26-7.

[63] Hague Regulations, *supra* note 2, art. 43 (emphasis added).

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.[64]

These central treaty pillars of occupation law impose two primary obligations on occupying powers. The first is that they not acquire (or attempt to acquire) sovereignty over the territory. An assertion of *de jure* authority through annexation is fundamentally at odds with the temporary nature of occupation.[65]

The second obligation is to leave the legal and political structures of the occupied territory intact. Article 43 of the Hague Regulations requires occupiers to respect laws in force "unless absolutely prevented" from doing so. Article 64 of GC IV focuses specifically on the continuity of penal laws. This may be referred to as the *conservationist principle*. This principle flows naturally from the prohibition on annexation as "[t]he powers of occupation authorities are limited precisely by the presumed temporary nature of the occupation regime and in particular by the need to avert creeping annexation through the imposition of the legal regime and administrative structure of the enemy power."[66] The occupier thus assumes only as much of the displaced sovereign's authority as

[64] GC IV, *supra* note 8, art. 64. According to authoritative commentary by the International Committee of the Red Cross, article 64 merely sets out "in a more precise and detailed form, the terms of article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented'." INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 335 (Jean S. Pictet ed., Ronald Griffin and C. W. Dumbleton trans., 1958) (PICTET).

[65] PICTET, *supra* note 64, at 275 ("The occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied Power of neither its statehood nor its sovereignty; it merely interferes with its power to exercise its rights.").

[66] MCCOUBREY AND WHITE, *supra* note 45, at 283.

is necessary to administer the territory, but no more.[67] General legislative competence remains with the displaced regime as the continuing *de jure* authority over the territory.[68] Thus, "[g]enerally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws of the occupied territory, or to set aside the rights of the inhabitants."[69] The legitimate sphere of an occupier's concern, in other words, is limited to pragmatic tasks of orderly administration. As the British Attorney General advised on the eve of the Iraq war:

> Article 43 of the Hague Regulations imposes an obligation to respect the laws in force in the occupied territory 'unless absolutely prevented.' Thus, while some changes to the legislative and administrative structures of Iraq may be permissible if they are necessary for security or public order reasons, or in order to further humanitarian objectives, more wide-ranging reforms of governmental and administrative structures would not be lawful.[70]

The conservationist principle may be seen as an allocation of decision-making competence between the occupier and the ousted sovereign. This allocation rests on "the contrast between the fullness and permanence

[67] In the words of the US Army Field Manual:

> Being an incident of war, military occupation confers upon the invading force the means of exercising control for the period of occupation. It does not transfer sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity of maintaining law and order.

US ARMY FIELD MANUAL, *supra* note 2, ¶ 358.

[68] See NEW ZEALAND DEFENCE FORCE, INTERIM LAW OF ARMED CONFLICT MANUAL 13-7, ¶1304(1) (1992) (N. Z. ARMED CONFLICT MANUAL) ("The authority of the Occupying Power is of a provisional nature and it should only take measures which are necessary for the purposes of the war, the maintenance of order and safety, and the proper administration of the occupied territory.").

[69] CANADIAN OFFICE OF THE JUDGE ADVOCATE GENERAL, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS 12-2, ¶ 1205 (2001) (CANADIAN LAW OF ARMED CONFLICT). See also THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 254 (Dieter Fleck ed., 1995) (FLECK) (providing commentary on regulations for German armed forces, developed through collaboration between scholars and German government, and stating that "[t]he authority to pass laws is unquestionably an attribute of sovereignty. Thus the lawful authorities alone - even if absent from the country and in exile - can make laws for the occupied territory").

[70] Memorandum from the Right Hon. Lord Goldsmith, QC to the Prime Minister (March 26, 2003), reprinted in John Kampfner, *Blair Told it would be Illegal to Occupy Iraq*, NEW STATESMAN, May 26, 2003, at 16-17 (Goldsmith).

of sovereign power and the temporary and precarious position of the Occupant."[71] The occupying power is competent to legislate to maintain security and to fulfill the obligations under occupation law that secure basic rights for the local population. But the occupier possesses no local legitimacy or necessary stake in the welfare of the territory after it departs and it is not competent to enact reforms that fundamentally alter governing structures in the territory or create long-term consequences for the local population.

This traditional view of the conservationist principle is clearly incompatible with the reform agenda of humanitarian occupation. Legitimation must be found elsewhere in occupation law or in claims for limiting its application.

B. Limited exceptions to the conservationist principle

Even *de facto* powers face circumstances that will require change to local laws. Occupation law thus recognizes two practical and limited exceptions to the conservationist principle: military necessity and obligations imposed by GCIV.

1. Military necessity

Professor Yoo invokes the first, that of "military necessity," in his defense of Iraqi reforms. Necessity justifications arise from legitimate security concerns and involve the preservation of public order and implementation of other obligations of the occupying forces.[72] These may include suspending civil liberties such as freedom of speech and assembly, or prohibiting the carrying of firearms. Professor Yoo argues that the occupier enjoys an "expansive authority to alter laws, including government institutions, in order to maintain the security of its military forces, preserve its military gains, and maintain domestic order."[73] Because the Ba'athist regime in Iraq posed a threat to the United States, in his view, it was "necessary for Iraqi law to be changed so that these government institutions are dismantled."[74]

This broad description of the necessity justification swallows the conservationist rule and is not supportable. One can make political

[71] Julius Stone, Legal Controls of International Conflict 694 (1954).
[72] See e.g., von Glahn, *supra* note 2, at 139-41 (discussing censorship, control of public meetings, travel restrictions, limits on private ownership of munitions and other actions as justified by needs of orderly administration).
[73] Yoo, *supra* note 3, at 19. [74] *Ibid*. at 18.

theory arguments about why liberal governing institutions further social stability, and, conversely, why authoritarian institutions breed disorder, though the chaos in many post-authoritarian societies might lead to the opposite conclusion. But such an attenuated connection to the pragmatic needs of maintaining order would leave little of the general prohibition on changing existing law. Any liberal democratic reform could be justified on these grounds. Occupation law contemplates a much narrower understanding of necessity and public order, one which do not encompass subjective views on the part of the occupier that politics in the territory ought to be different.[75] A "necessity" claim is just that: changes must be necessary for strategic military purposes, not the desirable social model an occupier might create if it were drawing on a blank slate. The preeminent goal of traditional occupation law is not justice but peace: "[t]he law of belligerent occupation is an attempt to substitute for chaos some kind of order, however harsh it may be."[76] Top to bottom changes of the kind occurring in Iraq, Bosnia, Kosovo and East Timor further many goals, both short and long term, but they cannot be justified as "necessary" to public order.

2. Obligations imposed by the Fourth Geneva Convention

A second limited exception cited by Professor Yoo is that occupiers may change local law when necessary to comply with obligations imposed by occupation law itself.[77] Articles 27-34 and 47-78 of GC IV require occupiers to protect the rights of local inhabitants. Collectively, these provisions have been described as a "bill of rights for the occupied population."[78] For a UN force assuming control over a territory that has experienced officially sanctioned mass murder, ethnic cleansing, group-based discrimination and other atrocities, the rights-based clauses of the Convention would seem to establish minimum standards of governance. An occupier that *preserved* existing laws in such circumstances would presumably violate the Convention, notwithstanding a claim that the laws presented no obstacle to maintaining order or pursuing military objectives. Further, because the Convention's protections focus on the

[75] McCoubrey and White, *supra* note 45, at 283 ("It was certainly the intention of those who framed the Hague Convention that the occupier's law-making powers could be exercised only where it was a matter of military necessity that they should and not merely where the occupier considered it expedient to do so."), quoting P. Rowe, Defence: The Legal Implications 184 (1987).

[76] Mcnair and Watts, *supra* note 2, at 371.

[77] Yoo, *supra* note 3, at 20-21.

[78] Benvenisti, *supra* note 2, at 105.

condition of a territory's inhabitants, such an occupier could not rest on the claim that it had not itself enacted the offending laws.[79] The occupier would be under an affirmative duty to substitute new laws that would ensure actual respect for rights. This view finds support in Article 64's proviso that an occupier may "subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention."

This argument would seem to apply with particular force to humanitarian occupations. Acting on behalf of all member states for the explicit purpose of vindicating human rights, UN missions could not very well fail to enforce those rights once they took on the tasks of governance. Human rights norms, after all, primarily address the conduct of governments. In a short but prescient 1953 paper, Richard Baxter noted that proposed changes to the laws of war made to account for the then-new UN should not "remove legal restraints and duties but actually impose further obligations upon both the United Nations forces and the opposing belligerent."[80] He predicted that "the occupation of enemy territory by United Nations forces will give rise to a fiduciary obligation to rehabilitate the area concerned so that it may resume its rightful place in the international community."[81] This has generally been the experience to date: the Kosovo, Bosnia and East Timor missions explicitly adhered to international human rights standards as a constitution-like framework to guide their institution building.[82]

The influence of human rights concerns on the Convention is clear. And there is no doubt occupiers adhering to these obligations will often expand the quantity and quality of human rights. But do these obligations license the wholesale replacement of governing institutions? Professor Yoo argued in 2003 that given "the Iraqi government's abysmal

[79] In typical phraseology, Article 27 provides that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." GC IV, *supra* note 8, art. 27.

[80] Richard R. Baxter, *The Role of Law in Modern Warfare*, 47 AM. SOC'Y INT'L L. PROC. 90, 97 (1953).

[81] *Ibid*.

[82] UNMIK Reg. 2001/9, art 3.2 (May 15, 2001) (listing human rights treaties to be observed by Kosovo's provisional governing institutions); GENERAL FRAMEWORK AGREEMENT, *supra* note 39, art. II(2) (stating that the European Convention for Human Rights shall have priority over all other Bosnian laws); UNTAET Regulation No. 1999/1 On the Authority of the Transitional Administration in East Timor (Nov. 27, 1999), available at www.un.org/peace/etimor/untaetR/etreg1.htm ("In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards.").

record in the area of human rights, the United States cannot fulfill its obligations under GC IV without replacing the institutions of the Hussein regime."[83] This claim goes too far.

First, the rights guaranteed in GC IV are generally limited to instances of egregious misconduct: discrimination (art. 27), impositions on honor and dignity (art. 27), physical or moral coercion (art. 31), physical suffering (art. 32), collective punishments (art. 33), intimidation, retribution, the taking of hostages or pillage (arts. 33–4), limitations on internment (art. 42), mass or individual forced transfers (art. 49), compulsion to serve in the occupant's armed forces (art. 51), destruction of personal property (art. 53), infringements on the free exercise of religion (art. 58), nonretroactivity of laws (arts. 67 and 70), executing those under eighteen years old (art. 68), due process rights in criminal proceedings (arts. 71–5) and inhumane conditions in detention (art. 76). All the humanitarian occupations to date have gone well beyond this list, as did the United States civil administrations in Iraq. Many UN and US reforms address different subjects altogether, most notably creating democratic political institutions, which has become the central focus of UN missions. Because occupation law by its nature contemplates rule by the occupying power, political participation is not a protected right. Designing and monitoring elections, therefore, could not be justified by Convention obligations.

Second, the human rights argument for reform assumes that deficiencies in local law are responsible for the forms of abuse prohibited by the Convention. If, instead, the enumerated rights were violated through informal practices or the predilections of particularly brutal officials, sweeping legal reform would not be a necessary response. Given that occupation law creates a presumption of normative continuity, changes in existing law cannot be the path of first resort. Yet in order to remain consistent with the conservationist principle, one would need to make the dubious claim that humanitarian occupiers are *unable* to refrain from violating each right protected by the Convention without broad legal and institutional reform.

Finally, and perhaps most importantly, such an approach ignores the need to resolve conflicting policies within the body of occupation law. On the one hand, existing institutions are to be preserved; on the other, an occupier cannot step into the shoes of a *de jure* sovereign whose

[83] Yoo, *supra* note 3, at 21.

laws and institutions violate human rights. While human rights concerns may dictate that any accommodation between these imperatives err towards choices that best protect individuals, as an interpretive lens they cannot read one of the alternatives out of the law altogether. But that would be precisely the result if the policy were used to legitimize humanitarian occupation, for the missions do not simply replace existing laws and institutions ad hoc, but substitute an *entirely new* political and legal order in the occupied territory.[84] Bosnia, Kosovo and East Timor each received a new constitution (or constitution-like document) as a result of their occupation. In such circumstances, little if any room remains for the preservationist ethic still at the heart of occupation law.

Missions that did not engage in wholesale reform efforts might have a better claim to legitimacy under an occupation law informed by human rights, although such cases would need to fall well short of the missions to date. But such hypotheticals are unhelpful to the present task, since it is difficult to imagine the Security Council authorizing the occupation of a state whose laws and institutions are broadly inclusive and egalitarian. One might argue that a balance between the two policies would still exist across the spectrum of *all* occupations, of which humanitarian occupation is the only portion in which the conservationist policy is wholly displaced. But this would render occupation law virtually irrelevant to most aspects of humanitarian occupation, for those missions would exist as blanket exceptions to central provisions of the law. Little clarity would be gained, therefore, by holding the missions "subject" to occupation law. They would, instead, be subject to an exception about which the law provides little elaboration or guidance.

[84] Thus, Christopher Greenwood concludes:

> Existing administrative and legislative structures and the political process may be suspended for the duration of the occupation but an occupant will exceed its powers if it attempts, for example, to create a new State, to change a monarchy into a republic or a federal into a unitary government. An occupant may, therefore, suspend or bypass the existing administrative structure where there is a legitimate necessary of the kind discussed. . .but any attempt at effective permanent reform or change in that structure will be unlawful.

Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES: TWO DECADES OF ISRAELI OCCUPATION 241, 247 (Emma Playfair ed., 1988).

C. Broader challenges to the conservationist principle

The two arguments just reviewed do not directly challenge the conservationist principle itself. They claim that other obligations in occupation law – military necessity and respect for the human rights provisions of GC IV – may temper its application when more compelling objectives are at stake. The next two arguments are more ambitious. The first looks to developments in international law that parallel the reforms of humanitarian occupations. If states are legally constrained to apply certain norms to their own citizens, this claim asserts, international law could not very well sanction a different model when those states become legally responsible for the welfare of citizens in an occupied territory. Otherwise, a population deprived of its *de jure* government by the actions of a foreign occupier could become, through no fault of its own, subject to a lesser set of protections than existed before the occupation.

The second argues there is little sense in preserving the legacy of an ousted regime in a war whose entire purpose was to bring about regime change. Hague and Geneva law, on this view, embody an anachronistic conception of occupying powers as having little interest in the governments or laws of states they defeat in war. Since this assumption is less true for contemporary wars generally and not at all true for the recent Iraq war, this claim directly challenges the ongoing relevance of the conservationist principle.

1. A reformist reading of occupation law

a. Looking to international standards

This claim seeks to modify the conservationist principle in order to account for recent developments in cognate areas of international law. The argument begins with the view, described in part above, that Geneva law "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."[85] The Geneva drafters, meeting in the shadow of Nazi atrocities in occupied Europe, effectively codified the Allies' recent denazification efforts. Most commentators agree that thereafter occupation law would grant no protection to the laws and institutions of an ousted sovereign that fell below minimally

[85] PICTET, *supra* note 64, at 274.

acceptable standards of humanity.[86] This is also the view of the US Army.[87]

The claim does not end with human rights provisions of the Convention itself – which forms the basis for the previous argument – but takes those provisions as a means of assimilating progressive developments in international human rights law. This resort to external sources is necessary because the rights enumerated in the Convention are basic and do not reflect the full range of protections now contained in human rights treaties. As we have noted, rights essential to political participation, such as voting and freedoms of speech, press and conscience, are omitted. The rights of children and ethnic minorities are also not explicitly protected. In addition, the Convention does not require an infrastructure of rights protection. All these obligations, however, can be found in contemporary human rights law.

Linking GC IV to trends in human rights law can be justified on two grounds. First, treaty obligations may be understood in their larger normative context in order to assimilate developments in international law

[86] See L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 249 (1993) (an occupier may "remove from the penal code any punishments that are 'unreasonable, cruel or inhumane' together with any discriminatory racial legislation"); PICTET, *supra* note 64, at 336 (an occupier may "abolish courts or tribunals which have been instructed to apply inhumane or discriminatory laws"); GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 195 (1968) (an enemy who has "relapsed into a state of barbarism" may "make unavoidable the exercise of the occupant's legislative powers for the double purpose of destroying the legal foundations of such a barbarous system and restoring a minimum of civilised life in the occupied territory"); VON GLAHN, *supra* note 2, at 115 ("[A]n occupant should be able to set aside the operation of laws opposed to the humanitarian concepts of the convention . . . "); R. Y. Jennings, *Government in Commission*, 1946 BRIT. Y.B. INT'L L. 112, 132 note 1 (1946) (Hague article 43 does not require an occupier "to respect the laws in force in the country to the extent of respecting laws which are contrary to natural justice").

[87] The US Army Field Manual on the Law of Land Warfare, after setting out Hague and Geneva standards on the inviolability of local laws and institutions, nonetheless provides:

> The occupant may alter, repeal, or suspend laws of the following types:
>
> a. Legislation constituting a threat to its security, such as laws relating to recruitment and the bearing of arms.
> b. Legislation dealing with political process, such as laws regarding the rights of suffrage and of assembly.
> c. Legislation the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination.

US ARMY FIELD MANUAL, *supra* note 2, ¶ 371.

that elucidate and update their meaning.[88] Second, the link may rest on an occupier's own human rights treaty obligations. While the extraterritorial application of those treaties is not uncontroversial, it enjoys broad support, including from the ICJ.[89] This is the view that human rights must be observed not only within a state party's own territory and in regard to its own citizens, but, in the words of the International Covenant on Civil and Political Rights, wherever persons are "subject to their jurisdiction."[90] That is certainly the case in an occupation.[91]

[88] Together with context, a treaty may be interpreted by reference to "any relevant rules of international law applicable in the relations between the parties." VIENNA CONVENTION ON THE LAW OF TREATIES, *supra* note 20, art. 31(3)(c). See also *Legal Consequences for States of the Continued Presence of S. Africa in Namibia (S.W. Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 16, 31 ("[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.").

[89] See *Construction of a Wall Advisory Opinion*, 2004 ICJ 136, 178-80 (holding Israel's obligations under the International Covenant on Civil and Political Rights to apply outside its territory, explaining that "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory"). See also Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. AND POL'Y 171 (2004); Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995). But see Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119 (2005).

[90] Article 2(1) of the Covenant provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

International Covenant on Civil and Political Rights, art. 2(1), Dec. 19, 1966, 999 U.N.T.S. 171 (ICCPR). The Human Rights Committee, established by the Covenant, has interpreted art. 2(1) to require a State Party "to respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State Party, even if not situated within the territory of the State Party." As an example of state "power and effective control" the Committee cites "forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." Office of the UN High Commissioner for Human Rights, *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, UN Doc. CCPR/C/74/CRP.4/Rev. 6 (2004).

[91] The European Convention on Human Rights has been applied on a number of occasions to the Turkish occupation of northern Cyprus. See Loukis G. Loucaides, *The Protection of the Right to Property in Occupied Territories*, 53 INT'L AND COMP. L. Q. 677, 683-5 (2004). In the *Loizidou* case, for example, the European Court of Human Rights held:

> [T]he responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to

Triggering human rights obligations in this manner is consistent with applying occupation law whenever a belligerent power exercises "effective control": both tests turn not on the formal question of whether a state has acquired *de jure* authority over a territory but on the factual question of whether it exercises powers of government on the ground. If it has, minimum protective standards for the affected population apply. If both bodies of law are triggered by the same factual circumstances, it makes little sense to interpret the scope of occupation obligations without taking into account an occupier's human rights obligations as well.

Must occupying powers, then, apply the full range of their human rights obligations to territories they administer? If this were the case, the conservationist principle would cease to apply to human rights reforms. Human rights and humanitarian law obligations would effectively become fused: with the exception of actual combat and other exigent circumstances of warfare, which may justify the suspension of certain guarantees, governments would be held to a single set of human rights obligations whether they were at war or peace and whether or not the individual right-holders were their own citizens or aliens over whom they exercise temporary jurisdiction.

This goes well beyond how national militaries have interpreted Hague and Geneva law for their own forces' conduct. These views are contained in national military manuals.[92] The US manual allows for the repeal of laws "the enforcement of which would be inconsistent with the duties of the occupant, such as laws establishing racial discrimination."[93] The New Zealand manual is identical.[94] The German manual gives only the

> secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through subordinate local administration.

Loizidou v. *Turkey (Preliminary Objections)*, 310 Eur. Ct. H.R. (ser. A) at 24 (1995).

[92] Military manuals have played an important role in diffusing and explicating international humanitarian law. See W. Michael Reisman and William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 4-7 (Horace B. Robertson, Jr. ed., 1991) (describing the role of manuals in the transmission of law). They have also served as direct *sources* of law. The Yugoslav Tribunal has regularly cited national military manuals as evidence of customary international law. See *Prosecutor* v. *Galić*, Case No. IT-98-29, ¶ 31 note 50 (2003), available at www.un.org/icty/galic/trialc/judgement/gal-tj031205e.pdf.

[93] US ARMY FIELD MANUAL, *supra* note 2, ¶ 371.

[94] NZ ARMED CONFLICT MANUAL, *supra* note 68, ¶ 2(c).

examples of racially discriminatory laws and those violating *jus cogens* norms.[95] The British manual refers to laws that "shock elementary conceptions of justice and of the rule of law."[96] Nazi-era laws are the only examples given. The Canadian manual refers to repealing laws if "the welfare of the population" so requires.[97] The French manual is silent on any exceptions to the conservationist principle.[98]

Abandoning the constraints of the conservationist principle in this fashion also goes further than scholars who seek to "humanize" the role of an occupier administering a formerly totalitarian state. Their descriptions of repealable laws seem to emerge directly from the Nazi experience. The authors speak of a nation having "relapsed into a state of barbarism," "inhumane or discriminatory laws," and laws "which are contrary to natural justice."[99] This is a high threshold and does not include every right arguably protected by human rights instruments.

Four additional factors counsel a restrained application of human rights obligations to occupiers. First, a reform agenda legitimized solely on the grounds that it is supported by human rights norms would radically skew the delicate balance of conflicting policies inherent in reconciling human rights imperatives with the conservationist principle. An occupier might go so far as to impose a new constitution, wholly rewrite civil and criminal laws or secularize public institutions. All these actions could be justified by contemporary human rights standards. But that would not be an accommodation between humanitarian law and human rights but a full substitution of the latter for the former. This may well be the result of Security Council action under Chapter VII. But for a single occupier, it is simply cherry-picking between equally binding treaty obligations.[100]

[95] FLECK, *supra* note 69, at 255.

[96] BRITISH COMMAND OF THE ARMY COUNCIL, MANUAL OF MILITARY LAW, THE LAW OF WAR ON LAND 143, note 1 (1958) (BRITISH MILITARY LAW MANUAL).

[97] CANADIAN LAW OF ARMED CONFLICT, *supra* note 69, ¶ 1209.

[98] MINISTÈRE DE LA DÉFENSE SECRETARIAT GENERAL POUR L'ADMINISTRATION, MANUEL DE DROIT DES CONFLITS ARMES 69 (1999), available at www.defense.gouv.fr/portal_repository/752609292__0001/FICHIER/getData (FRENCH ARMED CONFLICT MANUAL).

[99] See SOURCES CITED *supra* note 86.

[100] It is not even clear this result would obtain, as the International Court of Justice has suggested that in the event of a conflict between certain humanitarian and human rights law, the former ought to govern as the *lex specialis*. *Nuclear Weapons Advisory Opinion*, 1996 ICJ at 240.

Second, there is affirmative value in some domestic norms and institutions emerging from the politics of a post-occupation society. While democratic political theory now largely rejects the view that political majorities may subordinate individual rights to collective notions of "the good," this view does not require bypassing majoritarian politics on all issues arguably affecting human rights. Some questions of political architecture, legal policy and social ordering are legitimately open to debate and collective national decision-making. Utilitarian conceptions of democracy, in fact, regard deliberative politics as essential to the long-term viability of liberal institutions.[101] This *societal* autonomy principle underlies the still-vital doctrine in international law of internal self-determination, the view that "[e]ach State has the right freely to choose and develop its political, social, economic and cultural systems."[102] At its core, the conservationist principle seeks to preserve this decision-making capacity by preventing, as McDougal and Feliciano put it, "the active transformation and remodeling of the power and other value processes of the occupied country."[103] This is not to support the continuation of laws that clearly violate core human rights. But at a certain point, an occupier's reforms may become so sweeping and far-reaching that inhabitants lose the opportunity to make important choices about the nature of their own society. Deferring sweeping reforms until the return of an indigenous government allows both objectives to be served: core human rights obligations would be respected through narrowly tailored reforms enacted during occupation, while self-determination would remain meaningful for the post-occupation society by prohibiting overbroad systemic changes.

Third, the commentators who argue for a human rights exception to the conservationist principle do so in order to allow for the *repeal* of offensive laws. None speaks of replacement legislation. And none speaks of creating entire bodies of rules or new governmental entities in areas where none existed before. Finally, none speaks of monitoring or enforcement mechanisms. An unadulterated application of human rights law might well require all of these affirmative steps. But

[101] This is Mill's argument, for example. See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 48-74 (Gateway ed., 1962) (1861).

[102] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN, GA Res. 2625 (XXV) (Oct. 24, 1970).

[103] MYRES S. MCDOUGAL AND FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR 768 (1994).

in occupation law, they must be balanced with the presumption against institutional change. Allowing the repeal of clearly offending laws but not permitting the enactment of new ones, except when necessary to avoid incoherence or confusion, seems an appropriate accommodation.

Finally, occupation norms, like all humanitarian law, take considerations of military necessity into account in describing the rights of "protected persons."[104] Human rights law does not. This difference stems from the assumption that human rights principles would operate largely in peace-time. But if they are to operate in an occupation when, as we have previously discussed, military necessity provides an affirmative grant of power to the occupiers, "applying" human rights norms becomes highly problematic. If a military necessity exception is read into those norms as well, they would become indistinguishable from the humanitarian law doctrine already in effect. If no such exception is interpolated, then a conflict may well arise between the occupier's obligation to maintain order and the inhabitants' human rights to be free from certain coercive acts. An accommodation between the two may well be reached, for example by selective derogations from human rights obligations. But the danger of human rights principles facing either conflict or irrelevance counsels for restraint in urging their full application.

If, for these reasons, occupiers should be held to a more limited set of human rights obligations, what are their particulars? The preceding discussion suggests a series of guideposts. First, by definition, the rights involved must unquestionably be protected by international law. Second, any pre-existing laws that *require* occupiers to violate well-established human rights may (and probably must) be repealed. This follows from the widespread reaction against the discriminatory laws of Nazi Germany, as well as from the affirmative obligations of GC IV. If, on the other hand, the laws in force cannot plausibly be identified as a cause of human rights violations, then repeal would not be justified.[105] Third, in the absence of laws clearly violating human rights, if the very lack of legal protection itself appears to contribute to rights being denied in practice, an occupier may enact new laws tailored to the particular violations. This follows both from the Convention's focus on the *condition* of rights in the territory and from a restrained understanding of human

[104] See Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 AM. J. INT'L L. 1, 9-10 (2004).

[105] Most human rights treaties require state parties both to refrain from violations and to enshrine rights protection in law. The standard set out in the text would only require the latter if necessary to ensure the former.

rights treaty obligations. Fourth, if rights violations appear to result from a lack of supervisory institutions or review mechanisms, those may be created as well. The degree of permissible legal reform is thus linked to the actual experience of citizens in the territory. Reforms based on mere efficiency considerations or projections of potential future violations in the post-occupation era would remain subject to the conservationist principle.

Even if one is persuaded by this argument in regard to occupying states, the claim does not translate automatically to a UN humanitarian occupation. If an occupier's human rights obligations are premised on extraterritorial treaty obligations, they do not apply to the UN since it is not a party to human rights treaties. One could make a rather attenuated claim that the UN is bound by customary human rights law and that law applies extraterritorially. But because the UN does not possess territory of it's own, this argument runs into further conceptual problems. These problems do not affect the other basis for applying human rights law, namely assimilation through a broad reading of GC IV's own human rights provisions.

b. Consistency with international human rights norms

This formulation of the human rights claim is clearly more supportive of humanitarian occupation than military necessity. Whether it supports every aspect of reform will be a highly case-specific question, though it would appear to fall short in a variety of areas, most notably the creation of enforcement mechanisms.

2. Is the conservationist principle an anachronism?

The final source of legitimacy for humanitarian occupation involves a direct challenge to the conservationist principle. When occupation law was first codified in the late nineteenth and early twentieth centuries, wars among major western states were primarily undertaken for geopolitical advantage, not to affect the quality of governance in other states. "Misrule" by a defeated regime was only rarely of concern to victorious occupying powers.[106] Misrule by occupiers, on the other hand, occurred with regularity and was reason for emergence of the conservationist principle. Thus, while the conservationist principle prevents an occupier from violating rights of the local population through

[106] See Simon Chesterman, Just War or Just Peace?: Humanitarian Intervention and International Law 42-3 (2001).

punitive or discriminatory laws, neither Hague nor Geneva law directly addresses an occupier who seeks to *enhance* their rights through *protective* legislation.

In the UN era, by contrast, and particularly since the end of the Cold War, military interveners have increasingly proclaimed changes in domestic governance as a war aim. Humanitarian intervention, both unilateral and as authorized by the Security Council, has gained a significant currency. Although a unilateral right is still highly controversial among states and commentators, it is noteworthy that virtually all the post-1945 cases usually cited in support of a unilateral right resulted in regime change.[107] The Council-authorized actions embody the ultimate expression of collective concern with the quality of national governance. The Security Council has twice approved the use of armed force to oust regimes having deposed elected leaders.[108] The elimination of regimes viewed by traditional occupation law as legitimate *de jure* governments, in other words, has itself become a war aim, albeit in a limited number of conflicts. Adam Roberts has written of "transformative occupations" – "those whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule."[109]

The claim, then, is that maintaining a distinction between the legitimate prerogatives of a *de jure* government and the limited legislative capacities of an occupier makes little sense when a war is undertaken precisely to remake the political and legal institutions of the target state. If the war aim is itself legally sanctioned, then implementing

[107] Excluding pre-1945 cases is necessary because only then did the UN Charter prohibit most instances of unilateral intervention, creating the legal question of whether an exception exists for humanitarian actions. The oft-cited cases of this period are India's 1971 intervention in East Pakistan, resulting in the new state (and government) of Bangladesh; Vietnam's 1978 intervention in Cambodia, ousting the Khmer Rouge; Tanzania's 1979 intervention in Uganda, ousting Idi Amin; France's 1979 intervention in the Central African Republic, ousting Jean-Bedel Bokassa; the United States' 1983 intervention in Grenada, ousting leaders of a coup; and the United States' 1989 intervention in Panama, ousting and arresting Manuel Noriega. See The International Commission on Intervention and State Sovereignty, The Responsibility to Protect (Supp.) 47-77 (2001).

[108] SC Res. 1162 (April 17, 1998) (commending forceful ouster of the junta in Sierra Leone); SC Res. 940 (July 31, 1994) (authorizing the use of force to restore elected government of Haiti); for discussion of these cases, see Brad R. Roth, Governmental Illegitimacy in International Law 366-87, 394-8 (1999).

[109] Adam Roberts, *Transformative Military Occupations: Applying the Laws of War and Human Rights*, 100 Am. J. Int'l L. 1 (2006).

that aim during occupation should logically follow. In these circumstances, where international actors seek to enhance human rights in the territory, the obstructing conservationist principle is simply an anachronism.

While this claim is superficially appealing, the conservationist principle has substantially deeper roots than an appeal to pro-democratic war aims might suggest. The principle is integral to how occupation law is understood by military lawyers in the major powers. While national military manuals allow limited exceptions in the case of laws sanctioning extreme violations of human rights, they uniformly reaffirm the principle itself.[110] And the manuals are among the most probative evidence of *opinio juris* on this question.[111]

More broadly, abandoning the principle would have profound consequences elsewhere in international law, suggesting a variety of reasons why the claim should be rejected. First, abandoning the conservationist principle under any circumstances would dangerously blur the line between occupation and annexation. Occupiers enjoy limited legislative authority precisely because they do not assume the sovereign rights of the ousted regime. Restrictions on their governing powers are indicia of their temporary, custodial status. But that status exists only as a legal construct: "an occupier does not acquire the rights of a sovereign in occupied territory, but *only those limited military rights allowed to him under the international law of belligerent occupation*."[112] If the most important legal marker distinguishing *de jure* from *de facto* regimes were erased, the status of an occupied state would be wholly altered. And if the two were largely indistinguishable, then the act that *de facto* status was intended to prevent – annexation – would effectively be accomplished. Annexation is, of course, profoundly condemned by contemporary international law.

Second, principles of state autonomy that largely entered international law after the Geneva Conventions form an independent foundation for restraining an occupier's legislative authority. The autonomy

[110] See *supra* notes 93-8 and accompanying text.

[111] See Colloquium, *National Implementation of International Humanitarian Law: Proceedings of an International Colloquium at Bad Homburg, June 17-19, 1998*, at 215 (Michael Bothe ed., 1990); Reisman and Lietzau, *supra* note 92, at 1, 4-7.

[112] US Dep't of State, *Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez*, Oct. 1, 1976, reprinted in 16 I.L.M. 733, 734 (1977) (emphasis added).

principles find various doctrinal expressions – state equality, internal self-determination and non-intervention being the most common.[113] All were championed by the newly-independent states of the post-colonial era, who insisted on legal recognition of autonomy in national political processes and fundamental decisions of domestic political architecture. They form the basis for the *jus cogens* challenge to Council-authorization for humanitarian occupations discussed in the previous chapter. To be sure, human rights norms and other standards directed at states' treatment of their own citizens substantially circumscribe this autonomy. But these norms limit specific *acts* or *modes* of governance. They do not divest states of *all* authority to legislate on matters of political and economic infrastructure. The conservationist principle thus finds new life as a concomitant to the view that no conception of political autonomy is compatible with completely divesting a state of the capacity to make fundamental policy decisions.

Third, an occupier unconstrained by the conservationist principle would face no barriers to enacting legislation that could trigger the international responsibility of the occupied state. A state incurs international responsibility for its wrongful acts when it breaches an international obligation and the breach is attributable to the state.[114] Legislation enacted in defiance of the conservationist principle could breach the occupied state's obligations in any number of ways: it could violate its pre-existing treaty obligations; it could repudiate debts owed by the state; or it could discriminate against aliens in ways that constitute "denials of justice," thereby creating compensatory rights in the alien's state of nationality. Attributing an occupying power's breach to the state is a more complex matter. Because states, rather than governments, incur international legal obligations, any entity properly acting on behalf of the state may incur its responsibility.[115] These agency

[113] See Ian Brownlie, *The Rights of Peoples in Modern International Law*, in THE RIGHTS OF PEOPLES 1, 5 (James Crawford ed.,1988) (describing the core of the self-determination principle as "the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives").

[114] Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 2, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. 10, Nov. 2001, UN Doc. A/56/10 (2001).

[115] *Ibid*. at 59, 80 ("[T]he general rule is that the only conduct attributable to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State.").

principles largely focus on relationships created by national rather than international law.[116] Because the legal status of an occupying power is determined by the latter rather than the former, the capacity of an occupier to act on the state's behalf is not entirely clear.

Given this doctrinal uncertainty, prudence dictates that occupiers should not be given discretion to incur legal obligations for the post-occupation regime. This is not to suggest that occupiers will always act rashly and impose such burdens. But if they did, the injured states could bring claims for compensation against an entirely innocent post-occupation regime. The conservationist principle creates an important barrier to liability of this kind.

There are, in addition, more basic doctrinal reasons to preserve the conservationist principle. Primary among them is that the principle is set out in binding treaties whose force cannot be dissipated by unilateral action.[117] Israel's legislative acts in occupied Palestine, often cited as evidence of the principle's demise, have been consistently criticized and thus carry low precedential value.[118]A common danger highlighted by all these objections is that of sanctioning self-help on the part of occupiers. International law generally discourages states from taking unilateral enforcement actions, even in response to violations of fundamental rights.[119] It does so by erecting other normative regimes that protect national decision-making against external intervention. Despite harmony in a variety of substantive areas, international law still vigorously

[116] *Ibid.* at 82.

[117] While a treaty can lose its normative status by falling into "desuetude" through disuse, the necessary conditions do not exist here. Obsolescence must be manifest in conduct of the parties. AUST, *supra* note 19, at 250-1; LORD MCNAIR, THE LAW OF TREATIES 516 (1961). But the general validity of the Hague and Geneva instruments has been reaffirmed not only in recent judicial decisions but by the Security Council during the Iraqi occupation itself.

[118] The Security Council has condemned Israel's introduction of its own laws into the territories and affirmed the application of GC IV to its actions. See SC Res. 904 (Mar. 18, 1994); SC Res. 607 (Jan. 5, 1988); SC Res. 497 (Dec. 17, 1981) ("The Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect."); SC Res. 465 (March 1, 1980) (condemning as a "flagrant violation of the Geneva Convention. . .all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967").

[119] Certain "counter-measures" are permitted, but their scope is severely limited. Most notably, they cannot involve armed force in violation of the UN Charter or contravene human rights. See DRAFT ARTICLES ON STATE RESPONSIBILITY, *supra* note 114, art. 50(1)(a).

protects states' autonomous capacity to make (even illegal) policy choices without incurring unilateral intervention by self-appointed enforcers.[120] Even an evident need for legal reform in an occupied state does not automatically vest a unilateral occupier (as opposed to one possessing a Security Council mandate) with discretion to enact "remedial" legislation.

Taken together, these factors suggest the conservationist principle is not simply a relic of warfare between European monarchies, or of an international order uninterested in democracy and social justice. It is instead a vibrant emblem of the limits international law still imposes on coercive unilateral action. A commitment to preserving the principle, it must be emphasized, does not mean occupying powers must respect the laws of ousted authoritarian regimes. Humanitarian occupation missions show that the Security Council is usually willing to endorse reformist agendas, even where it had not endorsed the use of force preceding the occupation.[121] Such collective actions not only remove (most of) the legal cloud surrounding "transformative" occupations but, as the Iraq debacle demonstrates, bring sorely needed experience to the administration of highly divided societies. As long as occupation reforms

[120] In the *Nicaragua* case, the US argued that the Sandinista regime had refused to fulfill promises made to the Organization of American States to liberalize its governing institutions, including the holding of free and fair elections. See *Military and Paramilitary Activities (Nicar.* v. *US*), 1986 ICJ 14, 130-31 (June 27). The Court held that even if this claim were true, it could not justify the use of force by the US as a measure of unilateral self-help. *Ibid.* More generally, the Court refused to sanction "the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system." *Ibid*. at 133.

[121] In the case of Iraq, Professor Roberts argues that "[a]fter the Council divided so bitterly on the use of force in the months leading up to the war, that it could have given more extensive support for the reform efforts in Iraq than it actually did [in Resolution 1483] is hardly imaginable . . . " Roberts, *Transformative Occupations*, *supra* note 109, at 613-14. But members of the Security Council were quite willing to sanction reform as long as it was done under UN auspices. At an April 2003 meeting, the Russian, French and German leaders called "the political, economic, humanitarian and administration reconstruction of Iraq. . .a matter for the UN and for it alone." David M. Malone, The International Struggle Over Iraq: Politics in the UN Security Council 1980-2005, 206 (2006). After a Council meeting debating a draft of the resolution, the German ambassador told reporters that "[t]he important issues are how the political process is being organized. . .[t]he cosponsors said that the UN should have a vital role. Now we have to add substance to this." Felicity Barringer, *Aftereffects: Security Council; U.N. Vote on Iraq Authority is Due Next Week, US Says*, NY Times, May 15, 2003, at A24.

can be collectively legitimized, there seems little reason to argue for the demise of the conservationist principle in order to grant single nations a free hand at social engineering.

III. Two transformative occupations: challenging the conservationist principle

In Germany in 1945 and Iraq in 2003, occupying powers engaged in wide-ranging reforms that closely resemble contemporary humanitarian occupations. These two cases present the most direct challenges to the conservationist principle. Do they provide concrete evidence of a receptiveness to reformist occupations?

A. The occupation of Germany

On May 9, 1945, the post-Hitler German Government, led by Admiral Dönitz, signed a Final Act of Unconditional Surrender with the Allies.[122] This was followed on June 5 by the Berlin Declaration, in which the Allies set out their principles for governing Germany. The Berlin Declaration stated that there was "no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers."[123] It therefore announced:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany.[124]

Authority was to be exercised by the Allied Control Council, which would coordinate the actions of individual national authorities in four

[122] *Act of Surrender by Germany, Signed at Berlin, May 8, 1945*, reprinted in DOCUMENTS ON GERMANY 1944-1985, at 14 (US Dep't of State edn, 1985).

[123] *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, Signed at Berlin, June 5, 1945*, reprinted in DOCUMENTS ON GERMANY, *supra* note 122, at 33.

[124] *Ibid*.

separate zones of occupation.[125] A wide-ranging program of "denazification" was an early and central aim of the occupation.[126] At Yalta, the Allies had agreed to "destroy German militarism and Nazism" and to "wipe out the Nazi Party, Nazi law, organizations and institutions."[127] Accordingly, Control Council Law No.1 repealed a core of Nazi laws and implementing measures and provided that no discriminatory legislation would be enforced.[128] Other provisions, such as those related to High Treason, were repealed by Control Council Law No. 11.[129] Control Council Law No. 2 abolished the Nazi Party and affiliated organizations and declared them henceforth illegal.[130] A parallel process was undertaken to identify, arrest and ban from public life the individuals most closely associated with Nazi policy and institutions.[131] As Wolfgang Friedmann observes, the Allies were confronted with "the penetration of Nazism into all parts of German life, public and private."[132] The denazification program "was dictated by the desire to reverse the process as far as humanly possible."[133]

What was the legal basis for the allied actions? Article 43 of the Hague Regulations, then in force, presented a formidable obstacle to justifying the reforms. As Friedmann wrote:

> [E]ven the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping changes in the territorial and constitutional structure of Germany within the rights of belligerent occupation. These are symbols of

[125] Theodor Schweisfurth, *Germany, Occupation after World War II*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 582, 584 (1995).

[126] Elmer Plischke, *Denazification Law and Procedure*, 41 AM. J. INT'L L. 807 (1947). At the Potsdam Conference in August 1945, the Allies declared, "All Nazi laws which provided the basis of the Hitler regime or established discrimination on grounds of race, creed, or political opinion shall be abolished. No such discriminations, whether legal, administrative or otherwise, shall be tolerated." *Report on the Tripartite Conference of Berlin*, reprinted in 2 FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCE OF BERLIN (THE POTSDAM CONFERENCE) 1945, at 1499, 1503 (US Dep't of State edn, 1960).

[127] *Communiqué Issued at the End of the Conference*, reprinted in FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT MALTA AND YALTA 1945, at 968, 970 (US Dep't of State edn, 1955).

[128] PLISCHKE, *supra* note 126, at 810-11.

[129] *Ibid*. at 811. [130] *Ibid*. at 810. [131] *Ibid*. at 811.

[132] W. FRIEDMANN, THE ALLIED MILITARY GOVERNMENT OF GERMANY 112 (1947).

[133] *Ibid*.

sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.[134]

Given this inconsistency, allied international lawyers faced a stark choice: concede they had violated occupation law or produce arguments as to why that law did not apply to their actions. Unsurprisingly, virtually all chose the latter path.[135] Some argued that the Allies had effectively conquered Germany, and the old doctrine of *debellatio* allowed the Allies to govern the state.[136] But not only was this view inconsistent with the contemporaneous prosecution of Nazi leaders at Nuremberg for their annexation of Poland, but the Berlin Declaration itself explicitly denied that an annexation had been effected.[137] Others asserted that the German state had wholly ceased to exist and that the territory had become *res nullius*, which under traditional international law meant that it was available for acquisition by any power asserting effective control and claiming title.[138] But the formality of surrender and the continued functioning of at least some local governmental units belied this claim, as did the lack of any mention of state dissolution in the Potsdam Agreement setting out the Allies' post-war objectives. Moreover, if the Allies had disclaimed taking steps to annex the German state they presumably had not taken the much more drastic step of extinguishing it altogether.

By far the most influential theory was that put forth by Robert Jennings.[139] Jennings recognized that "the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism."[140] The anachronism arose because the Allies had neither annexed Germany nor terminated the state of warfare through a peace

[134] *Ibid*. at 65. See also *US* v. *Tiede*, 86 F.R.D. 227, 230 (US Ct. Berlin 1979) ("The Allies' objectives in occupied Germany went far beyond an ordinary belligerent occupation of enemy territory.").

[135] See SCHWEISFURTH, *supra* note 125, at 587-8 (summarizing various legal theories).

[136] See Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518, 520 (1945).

[137] See *Declaration Regarding the Defeat of Germany*, *supra* note 123, at 33.

[138] See MICHEL VIRALLY, L'ADMINISTRATION INTERNATIONALE DE L'ALLEMAGNE 26 (1948).

[139] See ROBERTS, *supra* note 109, at 269 (describing Jennings' article as "authoritative").

[140] JENNINGS, *supra* note 86, at 136. The British government came to agree with Jennings. The 1958 edition of its military manual, citing his article, states, "The position in Germany after the unconditional surrender has given rise to much controversy. It was probably not governed by the Hague Rules 42-56." BRITISH MILITARY LAW MANUAL, *supra* note 96, at 140, ¶ 499 note 2.

treaty (which was never in fact concluded).[141] The assumption that occupation would be a temporary event awaiting one of these two outcomes was therefore absent. But in Jennings' view, the Allies could have subjugated and annexed Germany, thereby acquiring title to the state and, as sovereigns (perhaps in condominium), the right to make whatever changes they desired to national laws and institutions. That they chose not to pursue this course did not mean they could not engage in a lesser form of subjugation, one that would also confer powers of governance:

> [I]f as a result of the Allied victory and the German unconditional surrender Germany was so completely at the disposal of the Allies as to justify them in law in annexing the German state, it would seem to follow that they are by the same token entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in the annexation, the difference being only in the mode, purpose, and duration of their exercise, the declared purpose of the occupying Powers being to govern the territory not as an integral part of their own territories but in the name of a continuing German state.[142]

In Jennings' view, the Allies had annexed the German government, but not the state, and that annexation was sufficient to avoid their assuming the status of belligerent occupants.

This was clearly an essential conclusion for allied international lawyers. But if Jennings was correct that the right to subjugate a state *a fortiori* created a right to subjugate its government, then *any* occupation following an unconditional surrender could fall into this "third category" at the discretion of the victors. Such a victor's actions would thereby fall beyond the reach of the Hague Regulations. Moreover, as Friedmann pointed out, if the Allies had stepped into the shoes of the German government and, in the absence of a peace treaty, the state of war with Germany continued, the conclusion must be that "the allies are at war with themselves."[143] This would have required the Control Council, an allied institution, "to assert rules of warfare on behalf of Germany against the allied governments."[144]

Beyond these incoherencies, two post-war developments have made Jennings' reasoning virtually impossible to replicate for contemporary

[141] The Berlin Declaration remained in effect until it was terminated in 1990 by the agreement on German reunification. See Treaty on the Final Settlement with Respect to Germany, art. 7, Sept. 12, 1990, 1696 U.N.T.S. 123.

[142] JENNINGS, *supra* note 86, at 137.

[143] FRIEDMANN, *supra* note 132, at 66.

[144] *Ibid.*

occupations. First, GC IV applies occupation law to "*all* cases of partial or total occupation of the territory of a High Contracting Party."[145] This includes occupations following surrender.[146] Jennings' "anachronistic" category of territory neither annexed nor subject to a peace treaty simply does not exist under Geneva law. Second, the illegality of state annexation under Article 2(4) of the UN Charter, even in a war of self-defense, renders Jennings' *a fortiori* argument untenable. The sanctity of existing borders has been one of the cornerstones of post-Cold War international practice. This is no less true for states under humanitarian occupation, whose territorial integrity the Security Council has consistently reaffirmed.

Those in the Realist school might conclude that the Allies' actions in Germany were simply breaches of occupation law perpetrated, without recourse, by victors upon the vanquished. Given the nature of the War, one could not imagine them acting otherwise. As a matter of international law, this might lead one to conclude that the Hague regime had been so blatantly ignored as to have suffered irreparable damage. But this view helps little in understanding the law today. For one thing, the Hague Regulations were emphatically reaffirmed and substantially expanded just a few years later in GC IV. And, as discussed below, early in the Iraq occupation both the US and the Security Council affirmed that both Hague and Geneva law governed the occupiers' actions.

B. The Iraq occupation

The second case is Iraq. None of the historical anomalies surrounding the German occupation apply to Iraq, which obviously took place subject to all contemporary law on the use of force and human rights. The extensive political reforms enacted by the occupiers provide the strongest case for a convergence between occupation law and the objectives of humanitarian occupation.

1. Social engineering in Iraq

The occupation of Iraq followed a short conflict that capped more than a decade's confrontation between President Saddam Hussein and

[145] GC IV, *supra* note 8, art. 2 (emphasis added).

[146] The ICRC Commentaries focus on the need to apply occupation law in the absence of a final peace treaty, a circumstance crucial to Jennings' analysis. "An armistice suspends hostilities and a capitulation ends them, but neither ends the state of war, and any occupation carried out in wartime is covered by paragraph 1 [of article 2]. It is, for that matter, when a country is defeated that the need for international protection is most felt." PICTET, *supra* note 64, at 22.

the UN.[147] The occupation, which like the conflict, was not under UN control, lasted approximately fourteen months.[148] The US and the UK announced the creation of their civil administrative body, the Coalition Provisional Authority (CPA), on May 8, 2003.[149] Shortly thereafter, the CPA issued its first decree, Regulation No. 1, which defined the scope of its powers:

> The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.[150]

In order to exercise these "powers of government," the CPA was to be "vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war."[151] The CPA's directives would "take precedence over all other laws and publications to the extent such other laws and publications are inconsistent."[152]

The CPA used its legislative authority to enact a set of reforms so broad that it is no exaggeration to describe them as a social engineering project. Iraqi political, legal, economic, and regulatory institutions were remade to accord with models generally found in western developed states. Inconsistent Iraqi law was repealed. Virtually all components of a political system dominated by one-party rule and an economy characterized by central planning and ownership were swept aside. Iraq even

[147] See Bardo Fassbender, *Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq*, 13 EUR. J. INT'L L. 273, 279 (2002).

[148] The occupation can be said to have begun on April 9, 2003 when US forces entered Baghdad, and ended on June 28, 2004, when the Coalition Provisional Authority was disbanded.

[149] Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/538 (May 8, 2003).

[150] Coalition Provisional Authority Regulation No. 1, CPA/REG/16May2003/01 (May 16, 2003), available at www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

[151] *Ibid*. §1(2). [152] *Ibid*. §3(1).

received a new traffic code.[153] As the CPA declared in a mid-term review, "the ultimate goal for Iraq is a durable peace for a unified and stable, democratic Iraq that is underpinned by new and protected freedoms and a growing market economy."[154]

The CPA reforms can be broadly grouped into six areas: "de-Ba'athification", military and security, human rights, criminal law and procedure, economic regulation and good governance. While the entire corpus of reforms cannot be detailed here, two areas are representative. The first is de-Ba'athification. On the same date it announced its own creation, the CPA issued Order No. 1 on the "De-Ba'athification of Iraqi Society."[155] The Ba'ath Party was formally "disestablished" by "eliminating the Party's structures and removing its leadership from positions of authority and responsibility in Iraqi society."[156] Both junior and senior members of the party were removed from governmental positions and barred from future employment in the public sector.[157] Several days later, the CPA extended the scope of these purges by ordering the dissolution of governmental entities used "to oppress the Iraqi people and as institutions of torture, repression and corruption."[158] The dissolved entities comprised seven ministries or governmental divisions, two cadres of Saddam Hussein's bodyguards, eight military organizations, four paramilitaries, and seven other organizations.[159]

[153] *Traffic Code*, Coalition Provisional Authority Order No. 86, CPA/ORD/19May2004/86 (May 19, 2004), available at www.iraqcoalition.org/regulations/20040520_CPAORD86_Traffic_Code_with_Annex_A.pdf.

[154] Coalition Provisional Authority, *An Historic Review of CPA Accomplishments*, at 4, available at www.cpa-iraq.org.

[155] *De-Ba'athification of Iraqi Society*, Coalition Provisional Authority Order No. 1, CPA/ORD/16May2003/01 (May 16, 2003), available at www.iraqcoalition.org/regulations/20030516_CPAORD_1_ De-Ba_athification_of_Iraqi_Society_.pdf.

[156] *Ibid*. The party's removal from public life was total. All images of Saddam Hussein and other "readily identifiable" members of the Ba'ath party, as well as symbols of the party itself, were banned from display in government buildings or public spaces. *Ibid*. § 1(4).

[157] *Ibid*. § 1(1)-(3).

[158] *Dissolution of Entities*, Coalition Provisional Authority Order No. 2, CPA/ORD/23May2003/02 (May 23, 2002), available at www.iraqcoalition.org/regulations/20030823_CPAORD_2_ Dissolution_of_Entities_with_Annex_A.pdf.

[159] *Ibid*. Annex. The ministries were those of Defense, Information, and State for Military Affairs. The military organizations were the Iraqi Army, Air Force, Navy and Air Defense Force, the Republican Guard and the Special Republican Guard. Other organizations included the Presidential Secretariat, the Revolutionary Command Council, the National Assembly and the Revolutionary, Special and National Security Courts. *Ibid*.

The second is economic reform. Early on, CPA Administrator Paul Bremer announced that reorganizing the Iraqi economy was the coalition's "most immediate priority."[160] He described the Ba'athist-era economy as a "closed, dead-end system."[161] The CPA spoke of the need for a "transition from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector," as well as "the need to enact institutional and legal reforms to give it effect."[162] New law extensively reformed banking, taxation, foreign trade and investment, private economic transactions, securities regulation, regulatory reforms and state-owned enterprises.

The changes indeed radically altered the Ba'athists' model of central economic planning. The CPA promulgated a foreign investment law for Iraq "that would make the country one of the most open in the world."[163] Foreigners could own up to 100% of any Iraqi enterprise except "natural resources. . .involving primary extraction and initial processing" (meaning oil), banking (addressed separately), and insurance.[164] Iraqi corporate law was extensively reformed, with many provisions suspended and others added.[165] Notably, foreign persons and corporations became eligible to serve as Iraqi corporate founders, shareholders and partners.[166] Substantial changes were made to Iraqi bankruptcy law.[167] Intellectual property laws were also extensively overhauled.[168] An Interim Law on

[160] Ambassador L. Paul Bremer III, Chief Administrator in Iraq, Address at the World Economic Forum (June 23, 2003), available at www.weforum.org/site/homepublic.nsf/Content/Address+by+Ambassador+L.+Paul+Bremer+III,+Chief+Administrator+in+Iraq#top.

[161] *Ibid*.

[162] *Foreign Investment*, Coalition Provisional Authority Order No. 39, CPA/ORD/19September2003/39 (Sept. 19, 2003), available at www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf.

[163] United Nations/World Bank Joint Iraq Needs Assessment 11 (2003).

[164] CPA Order No. 39, *supra* note 162, §§ 4(2), 6(1).

[165] *Amendment to the Company Law No. 21 of 1997*, Coalition Provisional Authority Order No. 64, CPA/ORD/29February2004/64 (Feb. 29, 2004), available at www.iraqcoalition.org/regulations/20040305_CPAORD64_Amendment_to_the_Company_Law_No._21_of_1997_with_Annex_A.pdf.

[166] *Ibid*. § 1(14).

[167] *Facilitation of Court-Supervised Debt Resolution Procedures*, Coalition Provisional Authority Order No. 78, CPA/ORD/19April2004/78 (Apr. 19, 2004), available at www.iraqcoalition.org/regulations/20040420_CPAORD_78__Facilitation_of_Court-Supervised_Debt_Resolutio_.pdf.

[168] *Amendment to the Trademarks and Descriptions Law No. 21 of 1957*, Coalition Provisional Authority Order No. 80, CPA/ORD/26April2004/80 (Apr. 26, 2004), available at www.iraqcoalition.org/regulations/20040426_CPAORD_80 _Amendment_to_the_Trademarks_ and_Descriptions_Law_No._21_of_1957.pdf; *Patent, Industrial Design,*

Securities Markets did away with the existing Baghdad Stock Exchange and created a new Iraqi Stock Exchange.[169] To supervise the Exchange, an Interim Iraq Securities Commission was created.[170] An Iraqi Communications and Media Commission was created to license and regulate all forms of media, including print, radio, and telecommunications.[171]

2. Did the Security Council endorse a "transformative occupation"?

I argued earlier that when the Security Council overrides the conservationist principle, its Chapter VII authority displaces occupation law as the legal basis for any actions it prescribes. But there is another view of how Council actions on Iraq relate to occupation law. Eyal Benvenisti describes Resolution 1483, its central statement on the occupation, not as displacing occupation law, but as a central contribution to that law's contemporary meaning. The resolution, in his view, "grants a mandate to the occupants to transform the previous legal system" and contributed to occupation law emphasizing "respect to popular sovereignty not to the demised regime."[172] Benvenisti argues that the Council did not grant the CPA a reformist mandate it would not otherwise have enjoyed but, instead, confirmed that its actions were consistent with a contemporary move away from the conservationist principle and toward obligations to respect human rights and facilitate the creation of representative institutions.[173]

Undisclosed Information, Integrated Circuits and Plant Variety Law, Coalition Provisional Authority Order No. 81, CPA/ORD/26April2004/81 (Apr. 26, 2004), available at www.iraqcoalition.org/regulations/20040426_CPAORD_81_Patents_Law.pdf; *Amendment to the Copyright Law*, Coalition Provisional Authority Order No. 83, § 1, CPA/ORD/29April2004/83 (Apr. 29, 2004), available at www.iraqcoalition.org/regulations/20040501_CPAORD_83_Amendment_to_the_Copyright_Law.pdf

169 *Interim Law on Securities Markets*, Coalition Provisional Authority Order No. 18, preamble, CPA/ORD/18April2004/74 (Apr. 18, 2004), available at www.iraqcoalition.org/regulations/20040419_CPAORD_74_Interim_Law_on_Securities_Markets_.pdf.

170 *Ibid*. §12.

171 *Iraqi Communications and Media Commission*, Coalition Provisional Authority Order No. 65, CPA/ORD/20March2004/65 (Mar. 20, 2004), available at www.iraqcoalition.org/regulations/20040320_CPAORD65.pdf.

172 BENVENISTI, *supra* note 2, at xi.

173 Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 in Historical Perspective*, 1 IDF L. REV. 19, 35-8 (2003). Professor Roberts, while providing great detail of how human rights law has come to encompass many aspects of armed conflicts, including occupation, does not share Professor Benvenisti's views on the demise of the conservationist principle. The evolution of occupation law in his view "does not amount to a general recognition of the validity of transformative policies impacted by occupants." Roberts, *Transformative Occupation*, *supra* note 109, at 622. Any validation could come only via a Chapter VII resolution or amendment to GC IV. *Ibid*.

This is an important claim by a leading scholar. It rests on two assumptions about the Iraq resolutions. The first is that the Council shared this narrowed view of the conservationist principle. This assumption is crucial because the resolutions repeatedly declared that the US and UK were bound by occupation law. If Council members instead held a traditional view of article 43, its invocation would constrain, rather than ratify, CPA actions. Second, the claim assumes Resolution 1483 in fact approved of the CPA's broad reform agenda.

Both assumptions are open to question. Resolution 1483 called on the occupiers "to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,"[174] as did other contemporaneous resolutions.[175] The first assumption requires understanding these repeated calls for fidelity to international standards as excluding the conservationist principle. No state made this claim in debate over Resolution 1483. To the extent member states' views can be extrapolated from their own codifications of occupation law, the exclusion is wholly absent. The military manuals of many leading powers adopt a uniformly narrow view of occupiers' legislative powers.[176] The British manual, for example,

[174] SC Res. 1483 (May 22, 2003). See also *ibid*. preamble (referring to "the specific authorities, responsibilities, and obligations under applicable international law of these states [the United States and the United Kingdom] as occupying powers under unified command").

[175] See SC Res. 1511 (Oct. 16, 2003) (affirming the CPA's "specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in Resolution 1483"); SC Res. 1472 (March 28, 2003) (requesting "all parties concerned to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations").

[176] US Army Field Manual, *supra* note 2, ¶ 370 (American manual) (providing that with limited exceptions for "restoring public order and safety, the occupant will continue in force the ordinary civil and penal (criminal) laws of the occupied territory"); Fleck, *supra* note 69, at 254 (German manual) (noting that while exceptions exist, "[t]he authority to pass laws in unquestionably an attribute of sovereignty. . .The occupying power must administer the occupied territory within the context of its existing legislation"); NZ Armed Conflict Manual, *supra* note 68, ¶ 1304(1) (New Zealand manual) ("Generally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws of the occupied territory, or to set aside the rights of the inhabitants."); Canadian Law of Armed Conflict, *supra* note 69, ¶ 1205 (Canadian manual) ("Generally speaking, the occupant is not entitled to alter the existing form of government, to upset the constitution and domestic laws of the occupied territory, or to set aside the rights of the inhabitants."); French Armed Conflict Manual, *supra* note 98 (providing that conduct of French occupying forces is controlled by GC IV). Admittedly, only four of these states (France, Germany, the US and the UK) were on the Council at the time. The military manuals of the other Council members, if they exist, do not appear to be publicly available.

provides that an occupant "is not entitled, as a rule, to alter the existing form of government, to upset the constitution and domestic laws of the territory occupied, or to set aside the rights of the inhabitants."[177] As noted, the British Attorney General reaffirmed this view just prior to the invasion.[178] And if member states accepted the views of the International Committee of the Red Cross, they would also have affirmed the conservationist principle.[179] It is of course possible to read silence at the Council as an endorsement of the CPA reforms. But because any efforts in the Council to limit the CPA's discretion would have been futile – as demonstrated all too vividly by the futility of opposition to the war itself – that silence can be equally understood as simple acquiescence to political reality.

There is more evidence concerning the second assumption that Resolution 1483 granted the CPA a reformist mandate. Here, the political context is important. When the resolution came before the Council on May 22, 2003, just two months after the US invasion, many Council members were still angry that the US had acted in defiance of majority sentiment on the Council. Those members sought to grant the UN primary responsibility for Iraqi reconstruction. When it became clear the US was unwilling to cede political authority to the UN during the occupation, a secondary position emerged: that the CPA relinquish power to an elected Iraqi government at the earliest opportunity.[180] This view prevailed early on: beginning with Resolution 1483, the Council began to call for a swift end to the occupation.[181] One reason mentioned by several member states was to ensure that Iraqis, and not outsiders, set the

[177] BRITISH MILITARY LAW MANUAL, *supra* note 96, at 143, ¶ 511.

[178] See GOLDSMITH, *supra* note 70. Beyond his general reaffirmation of the conservationist principle, the Attorney General advised specifically that it applied "equally to economic reform, so that the imposition of major structural economic reforms would not be authorized by international law." *Ibid*.

[179] In a document posted on its website on April 15, 2003, the ICRC stated that an occupying power "must uphold the criminal laws of the occupied territory and may suspend them only when they constitute a threat to the occupying power or an obstacle to the application of international humanitarian law." International Committee of the Red Cross, *FAQ: What Are Some of the Specific Legal Aspects of Occupation?*, available at www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lmm37?opendocument.

[180] See, e.g., UN S.C.O.R., 58th Sess., 4761st mtg., at 3-6, UN Doc. S/PV.4761 (2003) (statements of the French, German, and Mexican ambassadors).

[181] SC Res. 1483, *supra* note 174, preamble ("expressing resolve that that the day when Iraqis govern themselves must come quickly"); SC Res. 1511, *supra* note 175, ¶ 6 (calling upon the CPA "to return governing responsibilities and authorities to the people of Iraq as soon as practicable").

course of reform for a post-Ba'athist era.[182] The Council's evident desire for the CPA to make an early exit and leave a light footprint seems incompatible with an assumption that the Council had also granted the CPA unlimited legislative authority.

On the other hand, Resolution 1483 appealed to member states "to assist the people of Iraq in their efforts to reform their institutions and rebuild their country."[183] Paragraph 4 elaborated, calling upon the CPA:

> consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.[184]

Paragraph 8 of the resolution called for the appointment of a Special Representative of the Secretary-General ("SRSG"), whose responsibilities included coordinating among UN and other international agencies "engaged in humanitarian assistance and reconstruction activities in Iraq."[185] The SRSG was also to coordinate with the CPA in "assisting the people of Iraq" in addressing an extensive list of rebuilding tasks.[186] A

[182] See e.g., UN Doc. S/PV.4761, *supra* note 181, at 6 (statement of Spanish ambassador) (describing the "fundamental principle" that "the Iraqis alone are the owners of their political future and their economic resources"); UN Doc. S/PV.4844, at 3 (2003) (statement of Russian ambassador) (stating that Resolution 1511 "unambiguously stresses the Iraqi people's right to determine its own political future and manage its own natural resources").

[183] SC Res. 1483, *supra* note 174, ¶ 1. [184] *Ibid*. ¶ 4. [185] *Ibid*. ¶ 8.

[186]

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

number of these goals arguably supported CPA reforms. And Resolution 1483's goal of promoting "the welfare of the Iraqi people" and assisting in efforts to "reform their institutions and rebuild their country" might be read as a kind of prospective blank check by which the Council authorized any reforms the CPA believed would advance these broad objectives.

Despite this language, Resolution 1483 should not be read as a clear endorsement of the CPA agenda. First, the resolution was a compromise document that accommodated conflicting views among Council members about whether the US or the UN should lead in post-war Iraq.[187] While one may find implicit support for the former in Council debate, no member state clearly described the resolution as providing the CPA with a legal basis to act beyond the parameters of occupation law.[188] Indeed, many members coupled their references to CPA authority with exhortations that it strictly comply with humanitarian law obligations.[189] The resolution itself echoes this schizophrenia, espousing both a

(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.

Ibid.

[187] See UN Doc. S/PV.4761, *supra* note 180, at 3 (France) ("The resolution we have just adopted is not perfect."); *Ibid*. at 5 (Germany) ("This resolution is a compromise reached after intensive and sometimes difficult negotiations."); *Ibid*. at 6 (Mexico) ("The text of this resolution is undoubtedly a compromise text."); *Ibid*. at 7 (Russia) ("Definitely - and many colleagues stressed this point - there was compromise.").

[188] At most, members made vague allusions to reconstruction. See *ibid*. at 3 (United States) ("[T]he Security Council has provided a flexible framework. . .for the coalition provisional Authority [and others]. . .to participate in the administration and reconstruction of Iraq and to assist the Iraqi people in determining their political future, establishing new institutions and restoring economic prosperity to the country."); *Ibid*. at 4 (France) ("[T]he resolution. . .attributes to the occupying Powers broad authorities in the area of international humanitarian law and the necessary means to exercise those authorities."). UN Doc. S/PV.4761, *supra* note 180, at 5 (Germany) ("A process of political and economic reconstruction will be started."); *Ibid*. at 7 (Spain) (discussing "the process of Iraq's reconstruction, which starts with this resolution"); *Ibid*. at 11 (Pakistan) ("[Pakistan] has agreed, due to the exigencies of the circumstances, to the delegation of certain powers by the Security Council to the occupying Powers, represented by the Authority.").

[189] *Ibid*. at 5 (United Kingdom) ("[Resolution 1483] gives a sound basis for the international community to come together, in the interests of the Iraqi people, consistent with international law."); *Ibid*. at 7 (Russia) (noting that one basis for Iraq settlement in resolution is "the observance by the occupying Powers of international humanitarian law"); *Ibid*. at 11-12 (Pakistan) ("[T]he powers delegated by the Security Council under this resolution are not open-ended or unqualified. They should be exercised in ways that conform. . .especially. . .with the Geneva Conventions and the Hague Regulations.").

commitment to reform *and* fidelity to international law within a single paragraph.[190] The Secretary-General himself expressed support for market-oriented economic reforms in his report on implementation of Resolution 1483.[191] But he also urged the CPA "to ensure Iraqi ownership of the political process."[192] None of the circumstances surrounding Resolution 1483, in other words, suggests an open-ended reform mandate for the CPA.

Second, and more specifically, the resolution's list of reformist tasks was directed not to the CPA but to the SRSG. The distinction is not merely semantic. Many Council members opposed to the war were prepared to authorize the UN to assist Iraqis with tasks they would not explicitly delegate to the CPA.[193] In his first comprehensive report on progress in implementing Resolution 1483, the Secretary-General made no mention of a Council mandate for the CPA, but instead described a largely identical set of tasks as "the focus of *United Nations action* in Iraq."[194]

Third, the studied ambiguity of Resolution 1483 stands in stark contrast to previous resolutions in which the Security Council has directly authorized international actors to undertake wide-ranging reforms in post-conflict states. Those resolutions were clear and detailed in setting out reformist mandates. In Bosnia, the Council welcomed the Dayton Agreement and its creation of the High Representative, who would oversee implementation of an entirely new constitutional structure for the country.[195] In Kosovo, the Council created a civil administration for the

[190] SC Res. 1483, *supra* note 174, ¶ 4 (calling upon "the Authority, consistent with the Charter of the UN and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory. . ."). The next paragraph calls 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." *Ibid*. ¶ 5.

[191] *Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483*, ¶ 90, UN Doc. S/2003/715 (2003) (SG July Report) (expressing the need for "institutional and legal reforms" to "establish a market-oriented environment").

[192] *Ibid*. ¶ 21.

[193] Even the US representative did not describe the CPA as alone setting a reform agenda, but instead told the Council that it had "provided a flexible framework under Chapter VII for the coalition provisional Authority, Member States, the United Nations and others in the international community to participate in the administration and reconstruction of Iraq." UN Doc. S/PV.4761, *supra* note 180, at 3.

[194] SG July Report, *supra* note 191, ¶ 98 (emphasis added).

[195] SC Res. 1031, *supra* note 39. The Council declared that "the High Representative is the final authority in theatre regarding interpretation of Annex 10 on the civilian implementation of the Peace Agreement." *Ibid*. ¶ 27.

territory that would be responsible for "[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections."[196] And in East Timor, the mission was endowed with "all legislative and executive authority" in the territory and was empowered to "establish an effective administration," "assist in the development of civil and social services," "support capacity-building for self-government," and perform other tasks.[197]

While equivalent language for Iraq would have authorized reforms undertaken by an occupier rather than a UN-created mission, that is not a significant difference. Each is an external actor confronting domestic laws and institutions in need of change. In either instance, when the Council seeks to remake national politics along liberal democratic lines it has a decade's worth of precedent from which to draw. None of that experience seems to have informed the wording of the three major Iraqi resolutions, all of which lack the clarity and forthrightness of the prior documents. Given the Council's simultaneous insistence on fidelity to Hague and Geneva law, a much clearer mandate, directed explicitly to the CPA, would have been required.

3. Resolution 1483 as precedent

My arguments against the second assumption of a reformist mandate are, of course, equally applicable to the view that the Council did not simply affirm one view of occupation law, as Professor Benvenisti suggests, but rather invoked its Article 103 powers to override that law completely. While we noted that such a reading shifts the discussion to an entirely separate justification for the CPA reforms (the Council's Chapter VII powers), it is worth noting why that reading is equally undesirable. For reasons that are fairly self-evident, in a post-colonial and post-imperial age, the transformation of a state's political and economic infrastructure by outsiders must remain a multilateral task. If Resolution 1483 is seen as such a collective action, then it was one done on the cheap and very badly: there was no debate over the nature of Iraqi reforms, virtually no multilateral presence in the highest ranks of CPA decision-makers and certainly no accountability to the Council or other body representing the international community. One only need imagine debate in the Council over, for example, the world's most liberal foreign investment law, which the CPA enacted in Iraq, to appreciate

[196] SC Res. 1244, *supra* note 39. [197] SC Res. 1272, *supra* note 39.

the difference genuine deliberation over the reform agenda would have made. If we instead read Resolution 1483 as simply muddled and ultimately agnostic on the specifics of CPA actions, it is less likely to be invoked as precedent by future occupiers, who while also acting without explicit Security Council guidance may have very different ideas about reform.

Finally, let us assume that even this argument fails and Resolution 1483 is eventually accepted by international lawyers as having endorsed a transformative occupation in Iraq. Should the resolution then be viewed as a crucial act of interpretation? That is, should occupation law thereafter hold all the CPA's reforms open to occupying powers? Scholars have long noted the Security Council's role as an international lawmaker.[198] But it would be precisely the fact of Council authorization that should foreclose this conclusion. The essential attributes of multilateralism would be absent if reforms in a collectively endorsed occupation were taken as permitting the same reforms in a unilateral occupation. A focus on the reforms themselves misses the essential role of Council legitimation. If anything, a conclusion that the Council has shown itself capable of authorizing occupation reforms in such a politically divisive environment should be a strong argument *against* licensing individual occupiers to disregard the conservationist principle.

IV. Conclusions

Unlike the first two justifications for humanitarian occupation, consent and a Chapter VII resolution, an argument for occupation law must answer a threshold category question: whether it applies to acts of an international organization not a party to an armed conflict? I have suggested that the answer should turn on two considerations. First, it should follow a trend, led largely by international criminal tribunals, of disregarding formal categories in humanitarian law when those classifications fail to protect vulnerable civilian populations. Coverage should instead reflect the "reality" of warfare. Here, the UN adopts temporary governing authority over territory in much the same manner as belligerent occupiers. The civilians under its authority may come within Hague and Geneva law as a consequence of this reality. Second, in humanitarian occupations the UN may be assumed to possess the capacity to

[198] See José E. Alvarez, International Organizations as Lawmakers (2005); Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations (1963).

comply with the obligations of occupation law. The same may not be true for other UN operations, but when the UN acts in virtually the same manner as a occupying state it cannot be said to lack the essential qualities of such a state. Within existing law, occupation law is thus an appropriate framework to analyze the missions.

The Iraq war looms large in the substantive analysis that follows. The conservationist principle, still prominent in leading powers' military manuals, clearly forbids the extensive reforms that typify humanitarian occupations. Notwithstanding the expansive readings of Professor Yoo, this view of occupation law was widely accepted prior to the Iraq war. Iraq posed a direct challenge to the principle not only because the CPA invoked precisely the sorts of legislative powers an occupier had been denied under the traditional view, but because it presented a compelling case for reform. Ba'athist Iraq, after all, was hardly a model of liberal governance and fell short of international standards on multiple fronts even beyond its human rights record.

But we should resist the glib conclusion that because the CPA was able to act legislatively it was legally justified is doing so. First, neither of the textually permissible exceptions in occupation law – military necessity and fulfillment of human rights-like obligations of the Fourth Geneva Convention – justifies either the CPA's broad reform agenda or the similar mandates of humanitarian occupations. Military necessity supports acts minimally necessary to maintain order and to allow occupiers to govern effectively. It does not license optimal visions of how the host state could best be governed, notwithstanding claims that reforms may also serve military needs. The Geneva Convention's human rights obligations are far more limited, crucially omitting electoral and other rights of political participation at the heart of the CPA and humanitarian occupations' agendas.

Three non-textual claims also fail to make a case for reading the conservationist principle out of occupation law. First, international human rights law, applied either as an expansive reading of rights in GCIV or as an extraterritorial obligation of the occupying powers, does not support the full panoply of human rights treaty obligations. Second, the claim that humanitarian interventions designed to change regimes render the conservationist principle an anachronism comes perilously close to allowing occupiers the right to annex states, an outcome favored by no one. The "anachronism" claim assumes all unilateral occupiers will devise their reforms only according to international standards and will effectively replicate the dedication to these principles shown by the UN

in its post-conflict missions. The claim must assume this high mindedness on the part of occupiers, and not the pursuit of their self-interest, for it makes no provision for Security Council approval of a reform agenda or oversight of its implementation. The anachronism claim thus provides no answer to the concern that states investing billions of dollars and immeasurable political capital in an invasion might seek to further their own interests in a subsequent occupation. Though Iraq is the central case for the anachronism claim, it graphically demonstrates the validity of this concern.

Finally, it is argued that Security Council Resolution 1483, by granting the US an effective blank check in Iraq, moved occupation law further toward a similar measure of discretion for all occupiers. This argument overreads Resolution 1483 for a substantially bolder proposition than its vague and internally inconsistent language can support. More importantly, even if the resolution stood for the asserted proposition, the US would have received its legislative discretion not from occupation law but from the Chapter VII authority of the Security Council.

There is much superficial appeal to the view that all nation-building operations are alike, whether unilateral or multilateral, and that all should be permitted to pursue the goal of creating liberal democracies. But they are not alike; the dangers of unilateralism in this setting are the same as in every other: without collective debate and oversight, one can only guess whether a state will pursue high-minded collective goals or its own narrow self-interest. This is the most fundamental reason occupation law provides little help in seeking to understand humanitarian occupation. A reformist occupation is only truly legitimate when it is approved by the Security Council. But this entire inquiry seeks a legal foundation for Security Council actions. In the end, one is left with the nonsensical conclusion that Security Council approval legitimizes Security Council approval. These important missions surely require a firmer legal grounding.

8 Reforming the law: the Security Council as legislator

It is difficult to avoid concluding that the three existing legal frameworks for humanitarian occupation have reached the limits of their explanatory powers. Consent, a Security Council Chapter VII resolution and the law of occupation all contain important shortcomings or incoherencies. Is this problematic? Is a definitive legal explanation really necessary this early in the life of a new phenomenon? While it may be true, as Adam Watson observes, that "legitimacy usually lags behind practice" – perhaps counseling patience on the part of international lawyers eager for doctrinal tidiness – he is equally correct that "a conspicuous and growing gap between legitimacy and practice causes tension and the impression of disorder."[1] Effectively resigning oneself to *non liquet* in this important area, at least for the moment, raises troubling questions about the completeness of the international legal system. Humanitarian occupation purportedly seeks to vindicate the international community's most fundamental interests, ambitiously seeking to establish democracy, human rights and territorial stability in post-conflict states. The humanitarian occupation missions have certainly been described in such portentous terms by their sponsors.[2] Yet is it correct that the

[1] Adam Watson, The Evolution of International Society 322 (1992), quoted in Rein Mullerson, Ordering Anarchy: International Law in International Society 15 (2000).

[2] For example, the Brazilian ambassador said of the Kosovo mission: "The Security Council and the entire United Nations system are now presented with a historic opportunity to demonstrate their unique capacity for legitimate joint action to promote reconciliation and stability, and to promote peace on the basis of international law." UN Doc. SPV/4011, at 17. The Slovenian ambassador stated: "The success of the international effort in and around Kosovo would show that the IOs involved in this undertaking are capable of ensuring the essential humanity of the people concerned as well as the preservation of international order and stability, in accordance with the purposes and principles of the United Nations Charter." *Ibid*. at 11.

Council has pursued these important goals in ways that international law cannot adequately explain? If so, trouble awaits. As Hersh Lauterpacht observed, "[t]he completeness of law. . .is an *a priori* assumption of every system of law."[3] Most international lawyers believe (with some vigorous dissent) that "law is essentially an imperative system that either *prohibits* its subjects to perform an action (or not perform that action) or *permits* its subjects to do so."[4] Allowing humanitarian occupation to languish as normatively unexplained or unexplainable would run directly counter to these assumptions. It could well vindicate the most cutting positivist critiques that international law is little more than a set of malleable and ungrounded moral prescriptions.

So it is worth continuing to look for an appropriate legal framework. In this chapter, I argue that humanitarian occupation can be evaluated under a neutral and coherent normative framework scheme. In doing so, I reject both the existing legal justifications for humanitarian occupation and the possibility of *non liquet*.

I. Transcending state-centric norms

To address a collective undertaking like humanitarian occupation using existing normative categories is misguided from the start. It is misguided because regimes such as *jus cogens*, humanitarian law and self-determination were conceived to govern a community of states acting unilaterally and often in mutual hostility. No one state, by virtue of the principle of juridical equality, possesses the authority to transcend these normative categories. By contrast, when states act collectively through international organizations ("IOs"), the logic of norms regulating an anarchic, decentralized and highly competitive community of states is absent. My argument is that actions of the Security Council need not fall victim to an ill-fitting tyranny of state-centric categories.[5] This claim for

[3] Hersh Lauterpacht, The Functions of Law in the International Community 64 (1933).

[4] Ige F. Dekker and Wouter G. Werner, *The Completeness of International Law and Hamlet's Dilemma: Non Liquet, the Nuclear Weapons Case and Legal Theory*, in On the Foundations and Sources of International Law 5, 15 (Ige F. Dekker and Harry H.G. Post eds., 2003) (emphasis in original; footnote omitted).

[5] Thus, Christian Tomuschat concludes:

> It would be utterly unreasonable to conclude that the Security Council is bound by all the rules which govern inter-State relationships. Not even all the rules of *jus cogens* draw intransgressible limits to its actions. Under Chapter VII, the Council is not only entitled, but also called upon, to take the necessary

liberating the Security Council from norms designed for states emerges from examining the *origins* of contemporary state-centric norms, their *reciprocal* nature, the *collective security agenda* they seek to promote here and the absence of *adjudicatory mechanisms* for disputes involving international organizations.

A. Normative origins

Every legal system must begin by defining the community of actors it purports to regulate. For the modern international legal system, whose origins are generally identified with the 1648 Treaties of Westphalia, those actors were secular sovereign states.[6] Their nature dictated the norms to which they became subject. The Westphalian system developed as a reaction against the pan-European religious wars of the Reformation and posited the defined boundaries of secular states as barriers to external intervention. With the rise of the absolutist state, this territoriality came to encompass notions of exclusive domestic jurisdiction. The rise of positivism in the eighteenth and early nineteenth centuries affirmed the state as not only the principal *subject* but the sole *author* of international norms.[7] By the mid-nineteenth century, in Sir Robert Jennings' words,

> there was virtually no place for any kind of IO. On the contrary, the law assumed a completely decentralized society in which each separate state was free to decide what the law was in its own case, and where self-help was the remedy for breach of it.[8]

Not surprisingly, the Westphalian legal system developed around certain assumptions about the nature of its subjects. These assumptions reflect qualities possessed by states but not IOs. The notion of exclusive territorial jurisdiction, designed to safeguard national decision-making, has no application to organizations that control no territory. The assumption that states have the capacity to enter into international

> measures for the maintenance and restoration of international peace and security. In order to reach that purpose, it may be necessary to encroach deeply upon the sovereign rights of a State.

Christian Tomuschat, *Yugoslavia's Damaged Sovereignty over the Province of Kosovo*, in STATE, SOVEREIGNTY AND INTERNATIONAL GOVERNANCE 323, 340 (Gerard Kreijen ed., 2002).

[6] See Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT'L L. 20 (1948).

[7] WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 343-62 (Michael Byers trans., 2000); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 164-85 (1954).

[8] ROBERT Y. JENNINGS, THE PROGRESS OF INTERNATIONAL LAW 6-7 (1960).

relations does not automatically apply to IOs, but varies substantially from organization to organization. Very few organizations have the capacity to engage into all the external relations open to states.[9] The presumption that states retain full discretion to act absent regulation by an international norm does not apply to IOs.[10] Instead, IOs' founding treaties generally commit them to particular substantive goals and courses of action. And each state is assumed to have a sufficiently developed political infrastructure to allow it to comply with international norms.[11] As discussed in the previous chapter in regard to occupation law, IOs frequently lack the capacity to comply with complex regulatory norms. Although a persuasive argument exists that humanitarian law should evolve and account for new actors taking on tasks traditionally confined to states, we warned in the last chapter of the tentative and thus fragile nature of this conclusion.

The differences between states and IOs are matters of degree rather than absolutes. In the twentieth century, active and multifunctional IOs, such as the UN, the EU and others, began acquiring some state-like qualities. Most crucially, as the International Court of Justice held, IOs possess that degree of international personality necessary to fulfill their functions.[12] Because these appear ever-expanding, IOs have acquired the legal capacity to perform a wide range of tasks.[13] These include entering into treaties, establishing tribunals, becoming members of other international organizations, engaging in the settlement of disputes and conducting military operations.[14] At the same time, some foundational assumptions about states, such as exclusive territorial jurisdiction, have

[9] See ANTONIO CASSESE, INTERNATIONAL LAW 138 (2d edn, 2005).

[10] *The SS Lotus (France* v. *Turkey*), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

[11] See Gregory H. Fox, *Strengthening the State*, 7 INDIANA J. GLOB. LEG. STUD. 35 (1999).

[12] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, 1949 ICJ 174, 179 (April 11). The Court was careful to note that this "is not the same thing as saying that it [the United Nations] is a State, which is certainly is not, or that its legal personality and rights and duties are the same as those of a State." *Ibid*. It continued: "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." *Ibid*. at 180.

[13] See Daniel L. Neilson and Michael J. Tierney, *Delegation to IOs: Agency Theory and World Bank Environmental Reform*, 57 INT'L ORG. 241, 243 (2003) ("[M]ost multinational cooperation now takes place within the context of IOs, the number of IOs is growing rapidly, and IOs seem to be exercising more authority than they ever have in the past.").

[14] C.F. AMERASINGHE, PRINCIPLES OF THE LAW OF INTERNATIONAL ORGANIZATIONS 100-4 (1996).

been significantly eroded by norms such as human rights. But the vast majority of international norms still reflect the assumptions of their state-centric origins, as made plain by the fact that "it is highly unusual for international law – from human rights instruments to general rules of custom – to address international organizations as subjects."[15] Occupation law is an example of doctrine that few have even *attempted* to apply to IOs, or IOs to themselves.

What are the consequences of this history? State centric norms appear ill-suited to the very different nature of international organizations. First, to apply state-centric norms to IOs often requires reasoning by analogy. Several examples may illustrate:

i. State governments - the agents that assume legal obligations on behalf of a state - may be analogized to an organization's chief administrative officer (such as the UN Secretary-General), its executive body (in some, but not all cases the Security Council for the UN) or its member states. Plausible arguments could be made for each. Yet chaos would certainly ensue if more than one were considered agents, given the very different interests of each. This ambiguity over who functions as an IO's agent has important consequences for holding an organization responsible for internationally wrongful acts.[16] For example, if member states are not seen as agents of an organization, and are held to be legally separate entities, could the organization invoke the members' refusal to authorize compliance with a legal obligation as a basis for claiming compliance was impossible (and thus legally excused)?[17]

[15] José Alvarez, *International Organizations: Accountability or Responsibility?*, at 14, Address to the Canadian Council of International Law, 35th Annual Conference on Responsibility of Individuals, States and Organizations (Oct. 27, 2006), available at www.asil.org/aboutasil/documents/CCILspeech061102.pdf (Alvarez Speech).

[16] José Alvarez raises this question in objecting to the International Law Commission's suggestion that the UN's failure to act in Rwanda could constitute an internationally wrongful omission:

> should the UN as a whole really be held responsible or only the Security Council? Or should responsibility really lie with the UN Secretary-General as an individual for failing to act despite clear notice? Or should the responsibility lie with those states on the Council (for example, the United States) that were in a position to lead but did not?

Ibid. at 19-20.

[17] A *force majeure* argument might be available to a state in similar circumstances as grounds for precluding the wrongfulness of its non-compliance. Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 23, UN Doc. A/56/10 (2001). As of this writing, Article 20 of the ILC's Draft Articles on the Responsibility of International Organizations also provides such a *force majeure* argument. See *Report of the International Law Commission on the work of its fifty-eighth session 1 May-9 June and 3 July-11 August 2006*, at 259, UN Doc. A/61/10 (2006) (ILC Report 58th Session).

ii. A state's internal law governs its citizens. To whom does the "internal" law of IOs apply? Employees of an organization? Individuals under their effective control (as in humanitarian occupations)? Member states?

iii. The law of state responsibility provides that compliance with a state's internal law cannot serve as an excuse for failure to perform international obligations. But as Alvarez notes, "the rules of an organization are simultaneously 'internal law' *and* international law."[18] Thus, "it is not at all clear whether an organization that acts in accord with its rules - e.g. the Security Council, which in accord with standard voting procedures, refuses to act in Rwanda because of the veto or an IMF decision taken in accord with its voting rules that refuses to extend a nation-saving loan - should or can be found to have acted "wrongfully."[19]

iv. What of the pervasive realist assumption that states view legal regimes through the lens of their national interests? Who calculates the "interests" of an IO? Its administrators? Its executive body? All its member states? Sub-groups of member states concerned with a particular issue?

These rather imprecise parallels call into question the legitimacy of extending rules for states to such radically different entities. As Hersh Lauterpacht warned of analogies from private law, they "assume, rather prematurely, the existence of a legal regulation where, in fact, no such regulation yet exists."[20] The desire to apply state-centric norms to IOs derives not from state practice or codification in the area under regulation but from concerns that absent "regulation by analogy," international law will say little about certain acts of IOs. International law already has one set of such interstitial rules - general principles - and precisely because they lack a clear grounding in state consent they are usually confined to less important procedural questions.[21] The analogies described above, however, cover highly contested substantive matters.

The second consequence of norms' state-centric origins concerns the autonomy of regulated actors. If the Westphalian model has worked to free states from involuntary external controls, thereby guaranteeing their political autonomy, how should Westphalia address IOs, whose

[18] Alvarez Speech, *supra* note 15, at 22. [19] *Ibid*. at 23.

[20] Hersh Lauterpacht, Private Law Sources and Analogies of International Law 86 (1927).

[21] Bin Cheng, General Principles of Law: as Applied by International Courts and Tribunals 24-6 (1987).

autonomy is subordinated in multiple ways to the views of their member states? Doctrinally this question translates into the degree of international legal personality accorded IOs: to what extent may organizations act independently of their member states in forging external relations? As José Alvarez has shown, despite the long shadow cast by the ICJ's decision in the *Reparations for Injuries* case, much of the doctrine and rationale for legal personality remains in dispute.[22] While Michael Barnett and Martha Finnemore observe that IOs are increasingly exhibiting signs of agency, a consequence of their bureaucratized nature and the tendency to develop functions not envisioned by their founders, this is far from saying the organizations are functionally autonomous.[23] The International Law Commission has recently sought to quell at least some of the debate by identifying circumstances in which member states may be held responsible for acts of their IOs, thereby returning some areas of responsibility to their statist origins.[24] But this effort has been bitterly criticized by Alvarez and others.[25] Legal responsibility implies a *capacity* to be responsible; that is, to fulfill obligations. This is precisely what IOs lack in many circumstances.

B. The reciprocal nature of state-centric norms

A second reason for questioning whether state-centric norms constrain Security Council actions is their reciprocal nature. The state-centric regimes seek to balance a carefully calibrated set of entitlements and protected prerogatives. On the one hand, most norms require states to take affirmative steps to secure collective ends. On the other, they seek to protect states' freedom of action in a mirror-image set of principles that guard against regulatory overreaching. Occupation law provides an example: it endows the occupier with the right to maintain order in the

[22] José Alvarez, International organizations as Law-Makers 129-39 (2005).

[23] Michael Barnett & Martha Finnemore, Rules for the World: IOs in Global Politics (2004).

[24] As of this writing, Article 25 of the ILC's Draft Articles on the Responsibility of IOs provides:

> A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) The act would be internationally wrongful if committed by that State.

ILC Report 58th Session, *supra* note 17, at 26.

[25] Alvarez Speech, *supra* note 15.

occupied territory, but this is balanced by the co-equal entitlement of the occupied state to its territorial integrity and essential legal infrastructure. Elsewhere, an obligation to protect the environment is balanced by states enjoying sovereignty over natural resources within their territories.[26] State officials' vulnerability to prosecution for violation of international criminal law is balanced by principles of immunity, which are driven by the need for those officials to act on behalf of the state even when they are stigmatized as international pariahs.[27] Similarly, the prohibition on offensive military force is paired with a robust right of self-defense that in some circumstances may allow quite far-reaching operations against menacing foes.[28]

In most international legal disputes, therefore, the states involved usually claim justification in an opposing set of norms. The outcome in such circumstances is likely to be zero-sum.[29] A gain for environmental protection comes only at the expense of a target states' plenary control over its natural resources. This is especially true when the conflicting states claim rights in different treaty regimes, since the law of treaties does not engage the substance of a conflict between two instruments but provides strict rules of priority that select one or the other treaty in its entirety.[30] These rules resolving treaty conflicts are similar to "jurisdiction selecting" choice of law rules that mechanically selected one legal

[26] See Rio Declaration on Environment and Development, Principle 2, UN Doc. A/CONF.151/26 (1992) ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").

[27] See Arrest Warrant of 11 April 2000 (*Dem. Rep.* of *Congo* v. *Belgium) (Merits)*, 2002 ICJ 3, 29-30 (Feb. 14).

[28] See UN Charter, arts. 2(4) and 51.

[29] Judge Higgins alluded to this dynamic in her dissent in the *Nuclear Weapons* case:

> The corpus of international law is frequently made up of norms that, taken in isolation, appear to pull in different directions - for example, States may not use force/States may use force in self-defence; *pacta sunt servanda*/States may terminate or suspend treaties on specified grounds. It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another is to be preferred in the particular case.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ 226, 592 (July 8) (dissenting opinion of Judge Higgins). I am grateful to David Wippman for bringing this passage to my attention.

[30] Article 30 of the Vienna Convention on the Law of Treaties provides that in a conflict between treaties on the same subject matter where the parties to the earlier instrument are also parties to the later, the later treaty will control in the event of a conflict. Vienna Convention on the Law of Treaties, art. 30, May 23, 1969, 1155

system or another without engaging with the jurisdictions' actual laws or interests in the dispute.[31] Compromise is of course possible in any dispute, as well as a decision by adjudicators that deliberately avoids preferring one set of norms to the other.[32] But these possibilities do not change the fact that the legal framework itself is dichotomous and will produce a zero-sum result if it guides the final outcome.[33]

By contrast, the Security Council has the capacity to resolve disputes in a manner that most would regard as positive sum. In part, this is simply the result of a larger number of states being involved: if the Security Council's fifteen members support collective action against a single state under Chapter VII, then only the prerogatives of that target state would potentially be at risk. Similarly, the need to forge a consensus among quite diverse Council members, not to mention among troop-contributing states who are frequently not members of the Council, works to avoid polarizing outcomes.[34]

U.N.T.S. 331. Another interpretive approach, that of preferring the specific rule to the general (*lex specialis*), also avoids the substance of any conflict. See generally Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 (2005).

[31] Strictly territorial approaches to choice of law dominated American jurisprudence in the first half of the twentieth century. Rules of decision were chosen by conflicts principles that automatically connected a dispute to a particular jurisdiction where rights "vested," such as the place of making a contract. In a famous article, David Cavers observed that an exclusive focus on connections to territory made the content of any territory's law "logically irrelevant." David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933). "[S]o long as the court was in search of a 'foreign created right', it would seek an appropriate jurisdiction, not an appropriate substantive rule, for metaphorical consistency demands that the creation or non-creation of rights be attributed only to states and not to their legal rules." *Ibid*. For Cavers, this deliberate refusal to consider the substantive matters in conflict was unacceptable. "The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?" *Ibid*. at 189.

[32] An example of the latter would be the International Court's decision in the *Gabcíkovo-Nagymaros* case, in which it ordered Hungary and Slovakia to negotiate a resolution to their dispute. *The Gabcíkovo-Nagymaros Project (Hungary* v. *Slovakia*), 1997 ICJ 39 (Sept. 25).

[33] Another deviation from zero-sum outcomes may occur when the junction between the two regimes is unclear. The relation between *jus cogens* and Security Council Chapter VII authority is one such murky normative intersection.

[34] As Doyle and Sambanis observe, Council authorization for peace missions

> requires the affirmative vote of nine states, including no negative votes from the five permanent members (the P5) and four positive votes from the ten elected members. Such a vote would have to incorporate representatives of a variety of cultures, races, and religions. It would always include representatives of large and small countries, capitalist and socialist economies, and democratic and nondemocratic polities. If the mandated operation is UN directed and if

More broadly, insights of the Institutionalist school of international relations theory suggest that the very process of collective deliberation, repeated over time within a stable normative framework, can make states more inclined to accept cooperative action.[35] If this hypothesis is correct, states in an IO setting are more likely to view their interests as aligned and will be less in need of norms designed to protect their divergent interests. They are more likely, that is, to find positive sum solutions to their disputes.

Institutionalists focus on the dynamics of participation in IOs to argue that by altering the anarchic "conditions of conflict that force States to concentrate on the quest for power, institutions can facilitate the achievement of common ends."[36] Institutionalists write largely in reaction to Realists, for whom states exist in perpetual competition. Realists discount arguments that IOs may achieve gains for all participating states, since states in unregulated competition seek only to gain relative to their rivals. The fear of relative loss, argue Realists, leads states to avoid vesting IOs with real authority, since at best they promise only absolute gains for all states involved.[37]

Institutionalists respond not by denying the existence of relative power concerns but by asserting that such fears can be dissipated by four aspects of institutional bargaining and decision-making.[38] First, by establishing a well-developed set of rules for behavior, institutions help stabilize expectations, reducing the uncertainty that may foster instability in a relationship or become a source of decision-making stress for the participants.[39] Second, by enhancing the quality and quantity of

> troops and funding are required, many other troop contributing states will be needed, and they can say no in practice. The combination makes for a genuinely international impartial intervention and hence 'clean hands.'
>
> MICHAEL W. DOYLE AND NICHOLAS SAMBANIS, MAKING WAR AND BUILDING PEACE 9 (2006).

[35] See generally ROBERT O. KEOHANE, AFTER HEGEMONY (1984); Robert O. Keohane, *International Institutions: Can Interdependence Work?*, For. Pol. 82 (Spring 1998) (Keohane, *International Institutions*); Kenneth W. Abbott and Duncan Snidal, *Why States Act through Formal IOs*, 42 J. CONFLICT RES. 3 (1998).

[36] Anne-Marie Slaughter, *International Law and International Relations*, 285 RECEUIL DES COURS 11, 38 (2000). While formal IOs are one example of the "institutions" central to this argument, the claim is much broader, encompassing informal "regimes" with few standing bodies or rules.

[37] JOSEPH LEPGOLD AND MIROSLAV NINCIC, BEYOND THE IVORY TOWER: INTERNATIONAL RELATIONS THEORY AND THE ISSUE OF POLICY RELEVANCE 148-50 (2001).

[38] Keohane, *International Institutions*, *supra* note 35, at 86.

[39] LEPGOLD AND NINCIC, *supra* note 37, at 152.

information about potential opponents, international fora help reduce uncertainty about the intentions of negotiating partners and whether cooperative agreements will be honored.[40] Third, institutions can help enforce rules by identifying violators and cycling the fact of their illegal actions into future collective deliberations from which they stand to benefit.[41] Finally, institutions can enhance compliance with international norms in a variety of ways that need not involve coercion.[42] If institutions in fact orient states' decision-making calculus more toward cooperation, then the Realist assumptions of an obsession with relative gains and zero-sum outcomes for every conflict need not hold. The need to apply norms that reflect those assumptions, therefore, should also diminish.

In an age often described as unipolar and hegemonic, one must ask whether this socializing effect of IOs still holds. Is the US, or a dominant regional power, likely to behave in the manner described by Institutionalists? Or does a hegemon's capacity to dominate an IO, with few impediments to achieving its goals, suggest that contemporary IOs do not produce positive sum outcomes? If that is the case, are state-centric norms still necessary to protect states' interests? I would like to argue that for two reasons, the institutionalist argument likely retains its value even in an age of hegemony. First, as Abbott and Snidal argue, hegemonic powers are in fact drawn to IOs for their capacity to "launder" controversial policies. "[A]ctivities that might be unacceptable in their original state-to-state form become acceptable when run through an independent, or seemingly independent IO."[43] This legitimizing function has benefits for all involved. The hegemon receives benediction for actions that satisfy core national interests, while other states benefit from the degree of autonomy the hegemon grants the organization as the price of legitimating authority.[44]

Second, hegemons are likely to act in ways destructive to IOs only when their substantive goals in particular cases diverge from those

[40] *Ibid*. at 153-54. [41] *Ibid*. at 154.

[42] Slaughter argues that institutions bolster compliance in several ways, from "reducing incentives to cheat and enhancing the value of reputation to establishing legitimate standards of behavior for states to follow and facilitating monitoring, thereby creating the basis for decentralized enforcement founded on the principle of reciprocity." Slaughter, *supra* note 36, at 36 (internal quotations and citations omitted).

[43] Abbott and Snidal, *supra* note 35, at 18.

[44] The authors cite collective security as one example: "UN peacekeeping allows powerful states to support conflict reduction, without being drawn into regional conflicts and discourages other powers from taking advantage of their inaction." *Ibid*. at 19.

of other member states. "The more incompatible policymakers expect their substantive goals and norms to become over time, the more competitive their international strategy will be, and vice-versa."[45] Where a broad agreement on goals exists, the incentive to cooperate and receive a legitimating imprimatur is much stronger. One explanation for why the United States (unsuccessfully) sought Security Council approval for its 2003 Iraq intervention, for example, is because it perceived its goals as broadly compatible with those of current and previous Council members, as expressed in twelve years of resolutions.[46] US arguments for an authorizing resolution were all phrased in terms of acting on shared assumptions about the Iraqi regime.[47] One may argue that those assumptions were not in fact shared, or that the US extended limited assumptions about Iraqi noncompliance to a degree not shared by other states. But this does not alter the hypothesis that when common goals *do* exist, states are *less* likely to fear the relative erosion of national interests seen as fundamentally competitive rather than coterminous. Recall the general question here is whether state-centric norms should govern the Council when it *does* act. In those cases, it is likely hegemons will have seen the potential to sway other states by appealing to widely shared objectives.

In sum, decision-making in the Security Council differs markedly from states' decisions outside an institutional setting. This difference in dynamics, it is hypothesized, will lead states to calculate their interests differently, and in particular to be less apprehensive about seeking cooperative rather than zero-sum solutions. This is not an argument that state interests will themselves change; that claim is explored below. It is rather that states will find their existing interests less endangered when information, ground rules and mutual trust are all enhanced. If this hypothesis is correct, there is less need to subject the Council to state-centric norms that are predicated upon an *incompatibility* in state interests.

[45] Lepgold and Nincic, *supra* note 37, at 162.

[46] The Legal Advisor to the US Department of State wrote of the 2003 invasion that "[b]oth the United States and the international community had a firm basis for using preemptive force in the face of the past actions by Iraq and the threat that it posed, as seen over a protracted period of time. Preemptive use of force is certainly lawful where, as here, it represents an episode in an ongoing broader conflict initiated - without question - by the opponent and where, as here, it is consistent with the resolutions of the Security Council." William H. Taft IV and Todd Buchwald, *Preemption, Iraq and International Law*, 97 Am. J. Int'l L. 557, 563 (2003).

[47] See e.g., Colin L. Powell, *Remarks to the United Nations Security Council* (Feb. 5, 2003), available at www.whitehouse.gov/news/releases/2003/02/20030205-1.html.

C. State-centric norms and a collective agenda

The third distinguishing feature of Security Council action is the necessary presence of a communal interest. Disputes governed by state-centric norms have no necessary consequences for other states – even, in many cases, neighboring states. For an issue to fall under the Council's Chapter VII jurisdiction, by contrast, it must present a "breach of the peace, a threat to the peace or an act of aggression."[48] The Council has obviously construed these provisions in vastly broader terms than were contemplated by their drafters. Still, because most states, all things being equal, value decision-making autonomy, it seems unlikely states would attempt to cast disputes as Chapter VII problems when they believe they are capable of resolution without Council involvement. Similarly, where the states directly concerned have not brought the matter to the Council, but other states believe collective action is necessary, those other states are unlikely to refrain from seeking collective action.[49] In other words, where unilateral resolution is not possible, either for logistical or political reasons, the issue is, by definition, the sort of collective action problem to which Council action is uniquely suited.

This third argument focuses on how interests are shaped when states participate in formulating and acting on these communal interests. Constructivist scholars have shown how patterns of behavior seemingly embedded in international politics – such as the "security dilemma" – are nonetheless contingent, varying with how systemic structures and individual state agency are constituted.[50] This observation links to constructivists' broader claim that state interests are not fixed and somehow

[48] UN Charter, art. 39.

[49] In recent UN practice, even active opposition by some states to Security Council involvement, such as in the cases of Sudan, Myanmar, Israel/Palestine and elsewhere, has not stopped others from seeking Council action. In some cases compromise resolutions have been crafted; in other cases vetoes have been cast. In the former cases the broad collective interest is evident in the resolution, with differences remaining over the pungency of condemnations and implementation mechanisms. In the latter cases, the vetoing states were either largely isolated in finding no collective interest in action or disagreed with quite specific aspects of the draft resolutions. See e.g., UN Doc. S/PV.5619, at 2-3, 6 (2007) (Myanmar: China, Russia, and South Africa vetoed, finding no external threat to the peace); UN Doc. S/PV.5488, at 3 (2006) (Israel/Palestine: US vetoed, rejecting the draft resolution because it lacked language acknowledging that Israel's military actions were in response to rocket attacks).

[50] The constructivist literature as it relates to this discussion is well summarized in Christian Reus-Smit, *The Politics of International Law*, *in* THE POLITICS OF INTERNATIONAL LAW 14, 21-4 (Christian Reus-Smit ed., 2004). For a constructivist response to the security dilemma argument, see Alexander Wendt, *Constructing International Politics*, 20 INT'L SEC. 71 (1995).

outside or prior to politics, but are shaped by participation *in* politics. "Interests flow from a constructed identity and the identities of all actors in international relations fluctuate either through different associations with others (as through participation in an IO) or though changing self-perceptions (which can also be influenced through the normative activity of IOs)."[51] Of particular relevance to Council decisions, constructivists argue that processes of argumentation and justification themselves may shape states' perceptions of their interests. As Christian Reus-Smit summarizes:

> A reason is both an individual or collective motive (the reason why NATO bombed Serbia) and a justificatory claim (the reason NATO gave for bombing Serbia). Reasons thus have internal and external dimensions, or private and public aspects. Normative and ideational structures are constitutive of actors' reasons in both dimensions: through processes of socialisation they shape actors' definitions of who they are and what they want; and through processes of public justification they frame logics of argument.[52]

Constructivism helps clarify the nature of Security Council action. A decision by Council members to act will likely result from a perception of value in Council, as opposed to unilateral, action. Or as Evan Luard puts it, "collective intervention is undertaken for collective purposes."[53] If so, an additional substantive review of Council action under state-centric norms would seem superfluous. States acting outside the Council primarily seek to vindicate their own interests. State-centric norms are therefore necessary to determine whether those actions are consistent with policies reflecting collective interests. But in the case of the Security Council, the sorting of self-interested actions from actions consistent with community interests will have largely taken place *en route* to a final Council decision. The constructivist view of states being socialized through this sort of interaction, of course, in no way guarantees a consensus to act in any given case. But the point is not that there will always be agreement; there will not. It is rather that any Council action that does occur will have been preceded by the elaboration of a collective agenda.

D. Lack of adjudicatory mechanisms

The last distinction is the absence of adjudicatory mechanisms. When disputes arise over the interpretation or application of state-centric

[51] ALVAREZ, *supra* note 22, at 44. [52] REUS-SMIT, *supra* note 50, at 22.
[53] Evan Luard, *Collective Intervention*, *in* INTERVENTION IN WORLD POLITICS 158 (Hedley Bull ed., 1984).

norms, a variety of dispute resolution mechanisms exist. These range from negotiation to mediation to inquiry to arbitration to formal litigation.[54] In most cases, recourse to the processes is optional. But their mere existence has important consequences for the substantive norms in dispute. First, if a problem calls for aggressive standards requiring substantial changes in state behavior, the risk of non-compliance will be high. Without a means of redressing non-compliance there is little reason to draft the rules so stringently. A means of redress, even as mild as negotiation or public shaming, may thus be essential to stringent regulatory standards. Second, and in contrast, a problem may call for general standards that specify few compliance benchmarks. Such an approach may be the result of necessary political compromises or incomplete information about the best means of addressing a problem. But standards so general that they make determinations of compliance prohibitively difficult also require mechanisms to apply rules to specific cases and, ideally, to develop a jurisprudence that refines and clarifies the rules.[55] Again, not all disputes involving these normative categories find their way to a settlement procedure. Thus, in many cases the influence of such procedures on the substantive norms can only be in the nature of an expectation, not a guarantee.

But this expectation stands in stark contrast to disputes between the Security Council and individual states in which there is no dispute resolution mechanism available. Since only states may be parties to cases before the International Court of Justice, direct adjudication is unavailable. In the Provisional Measures phase of the *Lockerbie* case, moreover, the Court declined to adjudicate claims against individual Council members who had voted for a legislative Chapter VII resolution.[56] Indirect review of Council Chapter VII determinations by international tribunals is quite rare and, so far, has involved claims not by

[54] See J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (4th edn, 2005); JOHN COLLIER AND VAUGHN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW (1999).

[55] Thomas Franck discusses similar categories of norms, which he terms "idiot rules" (general) and "sophist rules" (specific) in The POWER OF LEGITIMACY AMONG NATIONS 67-90 (1990). Franck posits that the norms' "indeterminancy can only be rectified by adding a credible interpreter to supply process-determinancy." *Ibid*. at 87. He suggests that while universally based systems of interpretation such as the ICJ or the General Assembly are ideal, "even a forum of limited, but more compatible, multilateral membership. . .would be a more credible interpreter. . .than the foreign office of a single self-interested state." *Ibid*. at 88.

[56] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya* v. *US) (Provisional Measures)*, 1992 ICJ 3 (April 14) (*Lockerbie Provisional Measures*).

states but individuals.[57] One might argue that an adjudication of sorts is undertaken when the Secretary-General or one of his Special Representatives meets with officials of states targeted for Council action. But the Secretary-General and his ambassadors are hardly agents of the Council, and indeed the Secretary-General has frequently guarded his independence from UN political organs in order to pursue diplomacy as an alternative to Council enforcement actions.[58] Finally, Council members often conduct their own diplomatic initiatives in order to further Council goals, but the interplay between national and collective agency and interests in such cases is often subtle and notably lacking in transparency. Even though such initiatives are sometimes successful, there is little information available that would allow us to describe them as instances of neutral dispute resolution.

If the assumptions about dispute resolution of at least some state-centric norms are inapplicable to the Security Council, then a mismatch exists between those rules and their intended subjects. Broadly phrased rules will not receive the jurisprudential gloss needed to develop meaningful standards of conduct for the Council. And strict rules that risk noncompliance will have no assurance of enforcement against the Council. Both scenarios capture important aspects of the rules' intended functioning. Neither vision of how particular rules will function is applicable to the Council.

II. Security Council legislation

Takes together, these four distinctions suggest that state-centric norms are ill-suited to regulating actions of the Security Council. How, then, should its normative framework be defined? This section argues that in authorizing humanitarian occupation missions, the Council has effectively changed the governing law. This involves the Council acting *legislatively* – deeming certain acts no longer within either the regulatory ambit of conflicting international norms or the protected sphere of states' domestic jurisdiction. In this way, the missions have given rise to a new model of enforcement action that transcends existing legal categories.

[57] See decisions by the European Court of First Instance in Case T-306/01, *Yusuf and Al Barakaat Int'l Foundation* v. *Council and Commission* 2005 E.C.R.; Case T-315/01, *Kadi* v. *Council and Commission* 2005 E.C.R.; Case T-253/02, *Ayadi* v. *Council*, 2006 E.C.R.

[58] See Javier Pérez de Cuéllar, *The Role of the UN Secretary-General*, in UNITED NATIONS, DIVIDED WORLD 125 (Adam Roberts & Benedict Kingsbury eds., 2nd edn, 1993).

A. A distinct competence

On this view, humanitarian occupation is seen not as a creature of subject-specific regimes - human rights, humanitarian law or law on the unilateral use of force - but as emanating from the unique authority of the Council to secure peace between and within states. While the means available to the Council may or may not coincide with legal categories designed for states acting autonomously, by acting legislatively, the Council makes clear that its actions are qualitatively different from those of individual states. This is not an argument that the Council exists above the law; the Council is a creature of international law and is necessarily situated within it. The claim is rather that given the Council's (still) plenary authority to legitimate the use of force, international law must define the scope of its powers by reference to the purposes for which that plenary authority was granted. That power cannot be challenged by invoking the separate body of state-centric norms that exists, in many ways, in contradistinction to the Council's broad authority.

The Council's broad discretion substantially exceeds the Charter's specific limits on unilateral action. Whereas states may only use force defensively in response to an "armed attack," the Council may act in response to a "threat to the peace, breach of the peace, or act of aggression."[59] Using these open-ended provisions, the Council has identified "threats to the peace" that are limited to human suffering and could not conceivably qualify as armed attacks.[60] It is probably correct that a single state could not, for example, forcibly intervene to end a famine.[61] Yet the Security Council employed Chapter VII to take precisely that step

[59] UN Charter, art. 39.

[60] See, e.g. SC Res. 788 (Nov. 19, 1992) (Liberian civil war); SC Res. 746 (March 17, 1992) (humanitarian situation in Somalia); SC Res. 841 (June 16, 1993) (overthrow of elected regime in Haiti); SC Res. 827 (May 25, 1993) (creation of criminal tribunal for the former Yugoslavia); SC Res. 748 (March 31, 1992) (Libya's failure to extradite two suspects wanted in Lockerbie bombing case).

[61] This assumes one does not accept a right to unilateral humanitarian intervention. While not undisputed among scholars, the claim is generally not accepted by states. See Report of the Secretary-General, *In Larger Freedom*, at 33, UN Doc. A/59/2005 (2005) (affirming the Security Council's legal monopoly over the use of force for humanitarian purposes); *Report of the Panel on United Nations Peacekeeping Operations*, UN Doc. A/55/305 - S/2000/89 (Aug. 21, 2000) (same). Recently, at least 133 states have issued statements opposing any right to unilateral humanitarian intervention. *See, e.g.*, Declaration of the South Summit, Havana, Cuba, Apr. 10-14, 2000, ¶ 54, available at www.g77.org/doc/docs/summitfinaldocs_english.pdf ("We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law."); Movement of the Non-aligned Countries, XIII Ministerial Conference, Cartagena, Colombia, Apr. 8-9, 2000, Final

in Somalia.[62] Even where a state may legitimately respond to an armed attack, the Charter allows the Council to terminate that right upon taking measures "necessary to maintain international peace and security."[63]

In addition, Chapter VII allows the Council to prescribe remedial actions in response to such threats that would be forbidden to states by Charter principles of territorial integrity and reserved domestic competence. The Council may take "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[64] In so doing, the Security Council is permitted to intrude upon "matters which are essentially within the domestic jurisdiction of any states."[65] By definition, such matters are secured against unilateral intervention. The Charter thus grants to the Council both reactive and prescriptive authority not available to individual states. This substantive legal space, unique to the Council, provides the foundation for legislative action.[66]

B. Council legislation in practice

In pursing its collective goals, the Security Council has frequently altered preexisting legal rules or imposed broad new obligations on member states. This practice of altering international law in order to achieve specific policy objectives is an exercise of a legislative function.[67] The

Document, ¶ 263, available at www.nam.gov.za/xiiiminconf/index.html (same). For contrasting views of the NATO intervention in Kosovo, compare Richard A. Falk, *Essay: Kosovo, World Order, and the Future of International Law*, in *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824, 850 (1999) (concluding that "NATO's recourse to war was legally unacceptable without explicit authorization from the UN Security Council, and that NATO could not validly act on its own in this setting") with Ruth Wedgwood, *Essay: NATO's Campaign in Yugoslavia*, in *ibid*. at 828 (viewing NATO's Kosovo intervention as "mark[ing] the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognize as a responsible multilateral organization and the Security Council does not oppose the action").

[62] In Resolution 794, the Council declared that "the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security." SC Res. 794 (Dec. 3, 1992).

[63] UN Charter, art. 51. [64] *Ibid*. art. 42.

[65] *Ibid*. art. 2(7) (providing after the language quoted in the text that "this principle shall not prejudice the application of enforcement measures under Chapter VII").

[66] See Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175 (2005).

[67] Stefan Talmon would limit the category of Council legislative acts to obligations of a "general and abstract character," thus excluding modifications of individual states' obligations. TALMON, *supra* note 66, at 176.

Council, in effect, substitutes its binding Chapter VII authority for the individualized opt-in process by which states normally accept the constraints of new international rules.[68] As discussed in Chapter 6, while one may imply consent to Council-generated norms by pointing out that all UN member states have agreed to the Council exercising its Chapter VII powers on their collective behalf,[69] this is a legal fiction that conflates two quite dissimilar scenarios. On the one hand, states normally accept legal obligations only after a process of deliberation, either prior to signing treaties or opining (or not) on nascent customary norms. This not only allows for a fully informed decision, but allows states the opportunity to alter or reserve from aspects of the emerging rules. On the other hand, the Council acts quickly under Chapter VII and in response to specific crises. Surely, few states ratifying the Charter believed the latter scenario would supplant the former, even under limited circumstances. Stefan Talmon is thus correct in describing support for Council legislation as "revolutionary statements."[70]

One can find many broadly worded pronouncements that the Security Council lacks authority to legislate. In his separate opinion in the *South-West Africa* case, Judge Dillard rejected the view that "the United Nations is endowed with broad powers of a legislative or quasi-legislative character."[71] An extended debate on the question occurred in 2002 after the US proposed that the Security Council exempt its citizens serving in peacekeeping operations from the jurisdiction of the International Criminal Court (ICC).[72] Many states argued the action was not permissible under the ICC Statute and that the Council could not, by resolution, modify rights and obligations under an existing treaty. Switzerland found it

[68] Louis Henkin, International Law: Politics and Values 26-8 (1995) ("State consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy.").

[69] See UN Charter, art. 24(1). [70] Talmon, *supra* note 66, at 175.

[71] *Legal Consequences for States of the Continued Presence of S. Africa in Namibia (S.W. Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 16, 138 (June 21) (separate opinion of Judge Dillard).

[72] In July 2002, the United States proposed a resolution, ultimately adopted as SC Res. 1422 (July 12, 2002), by which the Security Council would request the ICC not to initiate prosecutions against individual UN peacekeepers whose states had not ratified the treaty establishing the Court. The resolution stated that the request was being made pursuant to article 16 of the treaty, which allows the Security Council to defer prosecutions for twelve months. Many state parties to the ICC argued that article 16 was not intended to function as a permanent exemption for any class of defendants, and that the proposed resolution would effectively rewrite the ICC treaty by doing so. See generally Neha Jain, *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*, 16 Eur. J. Int'l L. 239 (2005).

"alarming to see the Council attempting to legislate in contravention of an existing valid treaty. . .[since] the Security Council did not have competence to adopt rules of law which ran counter to a treaty when that treaty was in compliance with the United Nations Charter."[73] Mexico declared "[t]he Security Council did not have the power to amend treaties."[74] Venezuela stated that "[i]f such a decision [the proposed US resolution] were adopted, the Security Council would be exceeding the competence granted to it, which was limited to the maintenance of international peace and security."[75]

But the recurring problem of identifying the source of this prohibition haunts these objections. The source cannot be another treaty, as the ICC parties claimed, for if the scope of Council prescriptive authority were limited by the terms of other treaties, states would have compelling incentives to insulate their actions from Chapter VII enforcement measures by enshrining "defensive" obligations in other agreements. The Charter anticipates this strategy in Article 103, which provides that obligations under the Charter prevail over contrary treaty obligations.[76] Chapter VII resolutions are Charter-based obligations and the ICJ (in a preliminary ruling) found that this "trumping" authority applied to treaties that both pre and postdate the Charter.[77]

Since the end of the Cold War, the Council has superseded a variety of pre-existing normative limits, some treaty-based and others grounded in general international law.[78] In October 2006, North Korea announced that it had conducted an underground nuclear test. This was especially worrying to the Council given that in January 2003 North Korea

[73] Press Release, United Nations, Preparatory Commission for International Criminal Court 'Deeply Concerned' at Security Council Developments Regarding Court and Peacekeeping, at 2-3 (July 3, 2002).

[74] *Ibid*. at 3.

[75] *Ibid*. at 5. Côte d'Ivoire also stated, "The Vienna Convention on the Law of Treaties stipulated that treaties could be changed using procedures they themselves elaborated. . .Therefore, the Statute [of the ICC] could only be amended in the way it had decided, with the full agreement of States parties." *Ibid*. The Democratic Republic of Congo stated, "A United Nations body could not give itself the right to change the Statute." *Ibid*.

[76] "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN Charter, art. 103.

[77] *Lockerbie Provisional Measures*, 1992 ICJ at 14. See also II THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1292-1302 (Bruno Simma ed., 2nd edn, 2002).

[78] See generally Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002).

had withdrawn from the Nuclear Non-Proliferation Treaty (NPT), which both prohibited it from acquiring nuclear weapons and, pursuant to a separate Safeguards Agreement, provided for outside monitoring.[79] In response to the test, the Council passed Resolution 1718, which demanded that North Korea retract its withdrawal from the NPT and the Safeguards Agreement.[80] The Council "decided" that North Korea shall "abandon all nuclear weapons and existing nuclear programmes," and, more remarkably, that it "shall act strictly in accordance with the obligations applicable to parties under" the NPT and the Safeguards Agreement.[81] The Council further decided that North Korea must provide the International Atomic Energy Agency "transparency measures extending beyond these requirements, including such access to individuals, documentation, equipments and facilities as may be required and deemed necessary by the IAEA."[82] Whether one reads Resolution 1718 as directly imposing the disclaimed treaty obligations on North Korea or creating its own "NPT-like" obligations based not on the treaties themselves but a parallel regime constructed under Chapter VII,[83] North Korea was thereafter bound by obligations it believed it had freely disclaimed.[84]

In Resolution 1593, the Council referred the situation in Darfur to the International Criminal Court.[85] Sudan was not a party to the ICC statute, however, and was therefore under no obligation to cooperate with ICC investigators. To fill this gap, the Council decided that "the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution."[86] This resolution effectively subjected Sudan to the ICC statute's broad obligations to cooperate with investigations, trials and extradition requests.[87]

[79] See Assia Dosseva, *North Korea and the Non-Proliferation Treaty*, 31 YALE J. INT'L L. 265 (2006).

[80] SC Res. 1718 (Oct. 14, 2006). [81] *Ibid*. ¶ 6. [82] *Ibid*.

[83] See Andreas L. Paulus and Jőrn Műller, *Security Council Resolution 1718 on North Korea's Nuclear Test*, ASIL Insights (Nov. 3, 2006), available at www.asil.org/insights/2006/11/insights061103.html.

[84] Article 10 of the NPT allows parties to withdraw from the treaty if "extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." Treaty on the Non-Proliferation of Nuclear Weapons, art. 10, March 5, 1970, 729 U.N.T.S. 161. Notice must be given that describes those events. North Korea did so, citing threats to its security from the United States. See Frederic L. Kirgis, *North Korea's Withdrawal from the Nuclear Nonproliferation Treaty*, ASIL INSIGHTS (Jan. 2003), available at www.asil.org/insights/insigh96.htm.

[85] SC Res. 1593 (March 31, 2005). [86] *Ibid*. ¶ 2.

[87] Rome Statute of the International Criminal Court, arts. 86-102, July 17, 1998, 2187 U.N.T.S. 3.

Responding to the events of September 11, 2001, the Council required "all states" to end financing for terrorist groups, an obligation contained in the International Convention for the Suppression of the Financing of Terrorism, which at that point had been ratified by only four states.[88] In a similar vein, the Council decided that "all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery."[89] Since this resolution goes well beyond regulating the proliferation of such weapons themselves – broadly forbidding "any form of support" to groups that seek weapons – it imposes obligations not contained in the multilateral agreements restricting chemical, biological and nuclear weapons. These terrorism-related resolutions arguably built on Resolution 687, ending the 1991 Gulf War, which contained a host of legislative obligations. Resolution 687 obligated Iraq to accept a border it had previously rejected, adhere to treaties it had not ratified and submit to inspection regimes substantially more intrusive than those contained in treaties it had ratified.[90]

Further, the Council compelled Libya to extradite two terrorism suspects even though it was party to a multilateral convention that offered the option of national prosecution, which Libya had offered to undertake.[91] Israel has been ordered to observe the terms of the Fourth Geneva Convention in the occupied Palestinian territories, despite its argument that the Convention does not apply.[92] And in creating the International Criminal Tribunal for Rwanda, the Council authorized the prosecution of a host of Geneva Convention violations that, under the Conventions themselves, do not give rise to individual culpability during civil wars such as Rwanda's.[93] In short, the Council has been an active lawmaker.

C. Legitimating legislative acts

If Council legislation is to be the source of legitimacy for humanitarian occupations, what is the nature of its legislative powers? Are all

[88] SC Res. 1373 (Sept. 28, 2001); International Convention for the Suppression of the Financing of Terrorism, Annex, Dec. 9, 1999, GA Res. 54/109, reprinted in 39 I.L.M. 270 (2000). See Szasz, *supra* note 78, at 903.

[89] SC Res. 1540 (Apr. 28, 2004).

[90] See Lawrence D. Roberts, *United Nations Security Council Resolution 687 and its Aftermath*, 25 N.Y.U. J. Int'l L. & Pol. 593 (1993).

[91] SC Res. 748 (March 31, 1992).

[92] See SC Res. 904 (March 18, 1994); SC Res. 607 (Jan. 5, 1988); SC Res. 465 (March 1, 1980).

[93] See L.J. van den Herik, The Contribution of the Rwanda Tribunal to the Development of International Law 200-14 (2005).

humanitarian occupations assumed to further communal objectives, regardless of their scope or duration? If so, having freed the Council from state-centric norms, is the Council then unbound by law of any kind? The prospect of the Council acting wholly outside international law prompted the discussion in Chapter 6 of *jus cogens* limitations on Council powers, which proved ultimately inconclusive. The problem is not so much viewing the Council as a political rather than legal body – a widely accepted conclusion. Rather, it is that states targeted by Council action would retain rights under state-centric rules but be unable to vindicate those rights because they would be acted upon by a body unencumbered by any reciprocal legal obligations.[94] In isolation, this might not be much of a problem. But if the Council legislates regularly, in each case rending the norms it supersedes effectively worthless, a toll will be taken on the legitimacy of both the norms and the Council.

I would like to argue for a different approach. Because few useful direct constraints exist on Council authority, I suggest an indirect approach that nonetheless seeks to capture the felt authority of norms and institutions related to Council action. The approach may be described as *taking account of the Council's normative environment* rather than *subjecting it directly to* normative restraints. Boundaries on the Council will emerge not from the four corners of binding obligations but from the process of Council law-making and the context in which that process occurs. This approach has two elements.

1. Subjective element: norms and state interests

The first element is subjective, drawing on the institutionalist and constructivist claims previously discussed about how states calculate their interests in formal settings such as the Security Council. Institutionalists argue that IOs enhance the quality of information available to participants and stabilize discussions within agreed rule frameworks in a way that can dissipate fears of opponents' relative gains. Decisions reached in institutional settings, in other words, are perceived as both more grounded in accepted facts and more accurately reflecting fellow states' intentions than those reached in uncertain, non-institutional

[94] This is a somewhat different problem than that posed by the Council's trumping power under article 103 of the Charter, which embodies a hierarchically superior norm, rather than an opt-out from normative restraints altogether. Many of the Council's past legislative acts would indeed draw on article 103 to avoid contrary treaty obligations. But article 103 does not purport to trump other limitations on Council power, especially the Charter's Purposes and Principles in article 2 and *jus cogens* – the two limits usually cited by commentators.

settings. In calculating the risks of collective action, states will be less concerned that their decisions will be based on misperceptions about the intentions of potential opponents, a problem frequently captured in the quandary of the security dilemma.[95] The security dilemma predicts that when states see others arming, and they are unable to determine whether it is for offensive or defensive purposes, in the absence of effective supranational institutions they will assume the worst and begin arming themselves. In this way, uncertainty produces fear which produces preparation for conflict. But as Paul Roe notes, this dynamic "suggests that the parties involve could both be secure if only they could come to see the nature of the situation they are in."[96] Institutionalists predict such enhanced clarity when decision-making is collective and formalized.[97]

This process-based legitimacy connects to normative restraints by paralleling the state consent at the heart of all international law. Consent symbolizes both a state's satisfaction with the information it has received about a norm and a calculation that the norm comports with its national interest. Institutionalists certainly describe the former as a feature of collective decision-making: states receive more and better information in settings such as the Council. Institutionalists do not clearly predict the latter. But their hypothesis that calculations of national interest tend toward points of commonality in collective settings suggests that states are more likely to find their interests satisfied for the simple reason that the range of interests to be met will have been narrowed. The clearest example would be a collective realization of a single interest, such as the need to authorize the use of force to end egregious human rights abuses. Not all Security Council decisions attain this degree of unanimity, of course. But states consenting to treaties or rules of custom are not always fully invested in the norm; it only need advance their national interest on balance. Certainly, more decisions in the Council will parallel consent's comportment with state interest than would occur in non-collective settings.

[95] See Robert Jervis, *Cooperation under the Security Dilemma*, 30 WORLD POL. 167 (1978).

[96] Paul Roe, *The Instrastate Security Dilemma: Ethnic Conflict as a ''Tragedy''*, 36 J. PEACE RES. 183, 184 (1999).

[97] Importantly, this is not an argument predicting the outcome of any disputes submitted to the Council. An improved process may or may not lead to more agreement on substantive matters. Instead, it is a claim that when the Council *does* reach agreement it will carry the imprimatur of reliability conferred by an informed process.

Of course, as we have noted, the nature of consent in the negotiation of a treaty or emergence of custom is quite different from the consent to a Chapter VII resolution. The former take time and involve fully informed deliberations; the latter occurs quickly and may involve little opportunity for thinking through or debating implications. These differences may be persuasive for some: pre-existing norms can only be altered, one may argue, through a process that is at least as open, inclusive and deliberative as that which created the norms in the first place. In many instances this would mean another treaty.

But this argument would be more persuasive if the entire pre-existing norm were being altered. In the cases of humanitarian occupation and most other instances of Council legislation so far, norms are altered only for particular states in connection with particular crises.[98] Not only are the implications of such resolutions substantially more limited than norms of general application, but Council members need not evaluate the impact of the new norm on *them*. Only the target state's obligations are altered. One might counter that resolutions have precedential value, but this does not undercut the point that the primary purpose of Council action is substantially narrower than that of the original norm. A more tailored process, therefore, can be justified on the grounds that there is less for a state to consent *to*. Moreover, consent to Chapter VII resolutions can be revisited or partially revised much more easily than consent to general norms. If, for this reason, one thinks of consent in the Council as occurring over the lifetime of a crises rather than prior to only one resolution, the differences narrow even further.

The constructivist notion of state interests as products of their environment and experience provides a second, though somewhat different means of supporting the subjective element of the claim. Institutionalists assume that state interests are fixed. Their focus is on how IOs change assessments of those interests. For constructivists, state identities and interests are social constructs and therefore ever changing.[99] In particular, ideas play a crucial role in shaping state preferences: "From a constructivist perspective, international structure is determined by

[98] The exception among legislative acts to date would be the post-September 11 resolutions on terrorist financing and transferring weapons of mass destruction to non-state actors. These would be more vulnerable to the challenge that they lack actual state consent.

[99] See John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855 (1998).

the international distribution of ideas. Shared ideas, expectations, and beliefs about appropriate behavior are what give the world structure, order, and stability."[100] IOs provide an ideal venue for such a contextual shaping of identities. As Anthony Arend observes, "if states participate in a legal regime, the very act of participation can actually change how states see themselves and what they define as their particular interests."[101] The structures and animating ideas of the organization shape the relations between participants in a way that more closely aligns with organizational goals. Arend uses the Charter's prohibition on the use of force as an example: there was little meaningful participation during the Cold War, but in its aftermath, many states became involved in the multiple initiatives to resolve conflicts and stop the use of inappropriate military force. Inevitably, these repeated affirmations of a core collective principle affected the states' self-perceptions. "The nonuse of force could thus become a major part of the identities of states."[102]

Again, this is not a prediction of particular outcomes in the Council. States may participate in only the most formalistic way, as Arend notes of the Cold War protagonists. And the UN may (and certainly does) face competition from other socializing forces that may have opposing effects on state identity formation. But constructivist insights suggest the normative and cooperative ethos that lies at the heart of the Council's mission will exert some influence on how participants understand their proper relation to each other. As a result, decisions taken in conformity with Charter values will, virtually by definition, be uncontroversial and unlikely to give rise to controversy about the validity of the norm itself (though a norm's application to a particular actor is a different matter). Finnemore and Sikkink argue that certain norms may become so widely accepted that they are "internalized" by actors in a way "that makes conformance with the norm almost automatic."[103] One need not suggest that any of the norms at issue in the humanitarian occupation debate have reached this level in order to accept the larger point that prolonged participation in a norm-rich environment will lead, not surprisingly, to states that recognize the power of norms. The need for an external normative check, such as that provided by *jus cogens*, becomes substantially less compelling in these circumstances.

[100] Martha Finnemore and Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 Int'l Org. 887, 894 (1998).

[101] Anthony Clark Arend, Legal Rules and International Security 131 (1999).

[102] *Ibid*. at 132. [103] Finnemore and Sikkink, *supra* note 100, at 904.

I have used the institutionalist and constructivist claims to support an argument about the normative effect of collective deliberations. None of those claims will have value, however, if the deliberative process in the Council is degraded. Many have criticized the Security Council as increasingly insular and exclusionary, with resolutions drafted by a few permanent members and then presented as unalterable propositions to the larger body. The two theories are already taken to the edge of their predictive value in this argument, since most writers in the two camps focus on more inclusive settings than the Security Council. A process that shares little information, operates *ad hoc* rather than according to shared expectations and limits authorship of pronouncements on behalf of all UN members to the same few states will have little effect on states' interests. Much has been written about needed change in this area, and much of this argument requires that at least some proposals for more openness be heeded.[104]

2. Objective element: supportive practice

The second part of the claim is objective. It asks whether Council action is consistent with relevant norms, practice and statements emanating from elsewhere in the international community. These may be supportive treaty provisions or customary norms, resolutions of the General Assembly, resolutions or other statements by regional organizations, support or condemnation by individual states, etc. These objective indicators allow us to capture several normative aspects of Council decisions not covered by the subjective element. First, by looking to the views of the broad community of states, this indicator bypasses the legal fiction of Charter Article 24 that, in addressing issues of peace and security, the Council "acts on their behalf." Instead it asks whether this is actually true. This empirical inquiry into consent to Council actions parallels the consensual nature of state-centric norms, though here the Council would be addressed directly. Statements in other fora, moreover, may help to further mitigate the differences in deliberation we have noted between adoption of state-centric rules and Council legislation under Chapter VII. By including statements of support or opposition

[104] See e.g., David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552 (1993) (evaluating proposals for reform of Council due to perceptions of its dominance by a few states); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 86 (1993) (noting the growing concern that Council decisions are ultimately made "by a small group of states separately meeting in secret").

both before and after the Council acts, this analysis both broadens the time permitted for deliberation and deepens the content of debate, since the different fora will have broached the question from different perspectives (human rights, regional concerns, economic regulation, etc.).

Second, moving the inquiry beyond the Council creates an opportunity to check overreaching by powerful states. We have just noted the disproportionate influence of the Permanent Five on Council deliberations. As Nico Krisch points out, the institutionalization of legal decision-making into smaller bodies with broadly defined jurisdiction may have come at the expense of a formal equality in law-making.[105] This is obviously true for institutions like the Council, where unequal status is embedded in its structure. Broadening the scope of inquiry to organizations without formal inequalities and to statements and actions by states in their individual capacities may help mitigate the most blatant skewing of the law-making process in favor of major powers. In a system that still values the formal equality of states, this is no small value added to the legitimacy of Council law-making.

Finally, resort to "data points" outside the Council may create a positive feedback loop that could be an important step in democratizing the law-making process. If Council members (and in particular the Permanent Five) understood that expressions of opinion in other fora will be used to judge the legitimacy of their actions, they would be more likely to engage in broad and genuine consultations. Normative "hotspots" would need to be identified – for example, regional organization in the area addressed by a proposed legislative resolution – and their participants courted and concerns addressed. Of course, Council members aware that proposed actions might be viewed unfavorably in these other settings might also choose not to consult. But they would do so with

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> In classical international law, norms were created directly by States, and as such were implemented and their implementation supervised. In such a system, a formally equal footing at the basic level of law creation might have seemed sufficient to fulfill at least the most elementary demands of the promise of equality: even though the factual influence on lawmaking and implementation different, at least formally, the appearance of equality could be upheld. It is doubtful, however, whether formal equality in law creation can fulfill the same function in a system that has transferred the creation, implementation, and enforcement of the law to international institutions.

Nico Krisch, *More Equal than the Rest? Heirarchy, Equality and U.S. Predominance in International Law*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 151-2 (Michael Byers and Georg Nolte eds., 2003).

full knowledge of the cost to the legitimacy of their legislative acts, thus making subsequent challenges more potent.

How would the objective element work in practice? Let us examine Kosovo, the most far-reaching example of humanitarian occupation. What external indicators bear on the normative legitimacy of Resolution 1244, which established the interim administration? First, the Council grounded its actions in human rights norms of unquestionably foundational status. To the claim that the Council also disregarded foundational norms of territorial integrity and self-determination, one could respond that trends in the 1990s have clearly struck the balance between those concerns and norms of democratic governance in favor of the latter. There are few aspects of domestic politics that are not now the subject of prescriptive norms. That the state-centric framework elaborated in the *jus cogens* claim of self-determination might, nevertheless, find some still-extant autonomy rights for the target state is not dispositive in this situational analysis. The point is not to find clear validation for the occupation within state-centric rules; if such validation existed, then no resort to this indirect means of legitimation would be necessary. The point is rather that in exercising the discretionary enforcement powers granted by the Charter, the Council chose one side in that difficult debate. It is the basis of that choice, in other words, not the choice itself, that objectively grounds the resolution in an accepted normative framework.

Second, the Kosovo operation was supported by other international bodies. The General Assembly passed a resolution endorsing Security Council Resolution 1244 by an overwhelming majority and the Human Rights Commission did so by consensus.[106] President Milosevic was indicted by the Yugoslav War Crimes Tribunal for the acts in Kosovo that prompted the Council to divest Serbia of its control over the territory.[107] And regional European organizations – which took a particular

[106] GA Res. 54/183 (Feb. 29, 2000) (adopting 108-4-45) (General Assembly "*underlines* the obligations of the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro) to abide by the terms of Security Council Resolution 244 (1999) and the general principles on the political solution to the Kosovo crisis adopted on 6 May 1999 and annexed to that resolution"); HRC Res. 2000/26 (adopted by consensus) (Human Rights Commission "*calls upon* representatives of all communities [in Kosovo] to participate fully in the joint administrative structures established by the Special Representative of the Secretary-General. . .in conformity with the objectives set out in Security Council Resolution 1244 (1999)").

[107] See *Prosecutor* v. *Milosevic, Milutinovic, Sainovic, Ojdanic and Stojiljkovic*, Case IT-99-37, ¶ 35 (May 24, 1999), available at www.un.org/icty/indictment/english/mil-ii990524e.htm.

interest in the plight of Kosovars as well as the autonomy claims made by Serbia - endorsed the occupation *more* forthrightly than UN organs, since NATO authorized and carried out the bombing campaign that led to the Council-authorized occupation.[108] The European Union, the Council of Europe and the Organization for Security and Cooperation in Europe each condemned Serbian actions in Kosovo prior to the occupation and lent personnel and material support to the occupation once it commenced.[109]

Third, the Council and other international actors had taken similar actions in the past. The establishment of the High Representative for Bosnia/Herzegovina was the most direct precedent, subordinating autonomy claims to a transnational decision-maker. The Council has consistently supported the High Representative in even his most ambitious actions, such as removing elected leaders from office and imposing legislation on the national parliament. Less ambitious but still consistent are the many Council-authorized nation-building missions. These are grounded in the same three normative pillars that underlie the Kosovo mission: the immutability of national borders, ethnic, religious

[108] See NATO Press Release, Statement to the Press by the Secretary General (Oct. 13, 1998), available at www.nato.int/docu/speech/1998/s981013a.htm; William Drozdiak, *NATO Approves Airstrikes on Yugoslavia*, WASH. POST, Oct. 13, 1998, at A1.

[109] See Declaration of the European Union on Kosovo, 8658/99 (Presse 172) (May 31, 1999), available at europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PESC/99/53}0}RAPID&lg=EN (stating the EU gives "full support" to efforts "to exert strong pressure on the Belgrade authorities to reverse their course of action in Kosovo"); The European Union: Our Commitment to Kosovo - Foreword by the Rt. Hon. Chris Patten, Commissioner for External Relations (noting since 1999, the EU has "been working day in, day out towards that goal [of stability in Kosovo], and to implement fully the terms of UN Security Council Resolution 1244, on which international efforts in Kosovo are based"); Council of Europe Committee of Ministers, Declaration on the Kosovo Crisis, Dec-07.05.99/2 (May 7, 1999), available at https://wcd.coe.int/ViewDoc.jsp?ip=448311&BackColorInternet=9999CC&BackColorInternet=FFBB55&BackColorLogged=FFAC75 ("Today, all basic human rights and fundamental freedoms are massively violated in the conflict related to Kosovo"); Final Communique of the 105th Session of the Committee of Ministers of the Council Of Europe (Nov. 4, 1999), available at https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=100860&SecMode=1&Admin=0&Usage=4&InstranetImage=139734 (stating the Council of Europe's Council of Ministers "reiterated their support for the action undertaken by the Council of Europe in cooperation with UNMIK to implement UN Security Council Resolution 1244"); Vienna Declaration on the Role of the OSCE in South-Eastern Europe (Nov. 27--28, 2000), available at www.osce.org/documents/mcs/2000/11/4170_en.pdf (detailing OSCE contribution to international efforts in Kosovo within the framework of Resolution 1244).

or other demographic pluralism as a fact of national life not to be altered, and the necessity of building democratic institutions in the territory.[110] The notion of civic nationalism underlying these efforts, with its rejection of ethnic particularism as an organizing principle of statehood, is grounded in a consistent practice of global and regional organizations.

III. Conclusions

The Security Council is an odd duck in the international order. It is charged with upholding the core rights of states and individuals reflected in the Charter, but it does not clearly owe reciprocal obligations under those same norms. In some circumstances, the international community has recognized the problems posed by this asymmetry. Chapter 7, for example, detailed how some obligations of humanitarian law have been applied to the UN. I argued that the law of occupation might apply to humanitarian missions if due account were taken of ways in which the UN is unable to fulfill certain obligations directed at states. But apart from these discrete cases of adapting statist norms to an entity with few characteristics of a state, international law has largely failed to address the nature and origin of restrictions on Security Council action. With the normative category question unanswered, it is not surprising that each of the possible limitations we have examined – principally, the law of treaties and *jus cogens* – have unresolved (and perhaps unresolvable) problems of "fit." Hence the need for alternatives and the suggestion in this chapter of indirect constraints that take account of the uniquely collective nature of Council goals and deliberations.

Both the analysis of how the Council departs from several crucial assumptions of state-centric law and the proposal of evaluating the normative environment for the Council's actions draw heavily on international relations theory. That discipline's insights into the nature of state behavior in institutional, as opposed to anarchic, settings has much to add to the search for an appropriate normative category. But the theories are obviously only as persuasive as their predictions of state behavior. Future scholars will hopefully put those predictions to the test of hard data. Until that happens, we can only rely on the their hypotheses to move beyond normative categories that have been bent to the breaking

[110] See the discussion in Chapter 2.

point. Many international lawyers have internalized these hypotheses as fact: *of course* participation in collective regimes results in decisions that more accurately reflect states' interests and *of course* states change the calculus of their interests when seeking collective goals. But it is important to make these assumptions explicit and recognize their fragility when in uncharted legal waters.

Conclusions

Humanitarian occupation is a new phenomenon in international law and presents a powerful challenge to traditional notions of state autonomy. This book has asked two questions about the occupations: why have they been undertaken and what is the legal basis for doing so? The answer to the first question encountered a conventional wisdom about the vitality of the state in contemporary international law: the view that globalization and accretions of authority to new international actors have marginalized the state. I argue to the contrary that humanitarian occupations mirror an important normative trend to *strengthen* the state. This trend is manifest in human rights norms that seek to preserve ethnic, religious and other forms of demographic diversity. It is also present in norms favoring retention of existing state borders. The legal conception of borders is "conservative" in the sense that it rejects alternatives to existing states. But its conception of national politics is liberal (in the nineteenth century sense) in that it is a view of the state that finds value in heterogeneity and inclusive political processes. Thus, it is not the state *per se* that is being marginalized in the eyes of international law but the politically illiberal state.

Humanitarian occupations seek to remake the occupied state in ways that mirror this particularist conception. The occupations in Kosovo, East Timor, Bosnia and Eastern Slavonia – as well as the UN nation-building missions that are their direct antecedents – all initially affirmed the borders of the states involved and sought to build democratic institutions. The enormity of these tasks should command our attention to the occupations as pivotal normative events. Alternatives such as partition, secession, population exchange or even tolerating milder forms of discrimination against minority groups would have been much easier for the international actors involved. After all, each alternative had been

part of the historical process of state-building, with one (population exchange) still being enabled by international legal instruments into the mid-twentieth century. Yet the most difficult option was chosen: to remake states just emerging from civil war in ways that require cooperation, understanding and tolerance among their citizens. Humanitarian occupation thus stands as a remarkable affirmation of those values as normative building blocks of the state in contemporary international law.

Seen in this constructive light, humanitarian occupation also marks important limits on the trends many claim are working to marginalize the state. International law will indeed prescribe changes of constitutional dimension in target states but not for the purpose of permanently subordinating national institutions to external sources of authority. Rather, the occupations envision national institutions, emerging after reform is complete, that are robust, perceived as legitimate by citizens and essentially self-policing. A legal authority remains for international actors to return if some or all of these goals fail. In Bosnia, for example, the constitution drafted at Dayton permanently intertwines national legal institutions with regional and global human rights regimes. As of this writing, a similar arrangement is envisioned for Kosovo. But the occupations' objective is that *in practice* citizens will continue to experience politics primarily at the national level – hopefully a more robust and inclusive politics. The fail-safe provided by occupations should not obscure the absence of any intention to make territories like Bosnia or Kosovo permanent wards of the international community.

The very ambitiousness of these reforms sets a formidable challenge for answering the second question: the legal basis for the occupation missions. Three conventional justifications exist: an agreement with the occupied state, a resolution passed by the Security Council under Chapter VII of the Charter and the prerogatives of an occupying power under Hague and Geneva law. Each has notable shortcomings. The agreements supporting the missions to date were coerced by the threat or use of force, rendering them void *ab initio*. Those agreements may be rescued from invalidity by a Chapter VII resolution. But such resolutions encounter the objection that an essential core of the occupied state's autonomy has been abrogated in violation of a *jus cogens* norm of internal self-determination. No conception of the independent state, the argument goes, can account for a complete subjugation of its political autonomy. If one accepts the peremptory status of this norm – a controversial question – the objection is a substantial one. This is despite the

problem that a conflicting Chapter VII resolution and *jus cogens* norm would *both* purport to express a consensus of the international community on the legality of occupation.

Finally, GC IV and the Hague Regulations impose restrictions on occupying powers that are inconsistent with the reformist mandate of humanitarian occupations. The claim that occupation law will permit changes of constitutional scope when necessary to promote human rights would relegate humanitarian occupation to "regulation" under a broad and uncertain exception to the conservationist principle. It would be an exception unbounded by text that would render a central pillar of occupation law virtually useless in evaluating the missions' legitimacy. And the claim that the Iraq occupation fundamentally altered occupation law encounters numerous difficulties. The argument, for example, that the Security Council approved the American-led reforms in Resolution 1483 proves not that occupation law itself is pro-reform but that the Security Council can authorize democratic reform under its Chapter VII powers. After more than a decade of post-conflict missions this is an unremarkable conclusion.

An important assumption underlying these three regimes is that they regulate state actors. The reasons for subjecting states to exacting and highly restrictive norms are deeply rooted in the history and structural assumptions of international law. But an entirely different perspective is in order when norms are invoked to constrain the UN Security Council. One may be tempted to avoid this step and retain a state-centric perspective by crafting broad exceptions to existing rules that account for the presence of a collective will in Security Council actions. This is an understandable impulse in the case of humanitarian occupations, since the Council authorized the missions in response to egregious human rights abuses and prescribed eminently sensible solutions. Chapter 6 made such an effort using occupation law. But one is then left with a dangerously result-oriented jurisprudence that damages the coherence, and therefore legitimacy, of the norms themselves. The solution proposed here is to account for the essential role of the Security Council in matters of war and peace by judging its actions according to different standards – those appropriate to its collective identity. This model envisions the Council acting legislatively to prescribe needed action. The normative standing of Council legislation would be judged by its consistency with other indicia of legitimacy: the norms and values promoted by Council action, how states have responded to similar actions in the past and the degree of support from other international actors. It would

also take into account the very different way states calculate risks and benefits to their national interests in multilateral settings. On all these fronts the Kosovo occupation – the most intrusive to date – appears to be on firm ground.

Of course, still more legal issues remain. Does the occupied state, still the *de jure* sovereign, retain ultimate prescriptive authority for the occupied territory? In the case of Kosovo if, in final status negotiations, the United Nations were to propose that Serbia amend its constitution to accept Kosovo's "substantial autonomy" as permanent, would Serbia retain a legal prerogative to refuse? Or could the Security Council adopt a resolution *ordering* Yugoslavia to amend its constitution? More radically, could the Council order Serbia to allow Kosovo to secede? Another question involves limits on the state responsibility incurred by international administrators. If occupation of an entire state continued for many years, could international administrators assume some or all of its foreign policy functions? Could ambassadors be appointed? Alliance treaties signed? Troops sent to war? If not, how would the state continue to function in the international community?

Answers can profitably draw on the approach to fundamental questions of legitimacy employed here. Those questions are inevitably of a dual nature. On the one hand, seeking legal justifications for entirely new initiatives will produce opaque and unsatisfying conclusions. On the other hand, because the goals being pursued by the new institution of humanitarian occupation are widely shared and largely noncontroversial, justifications built on those substantive goals will take center stage. Can laudable results justify even more fundamental changes in relations between the international and national spheres? For the questions addressed in this book the answer given has been affirmative: temporarily suspending a state's autonomy is appropriate when a liberal and autonomously self-sustaining state is the evident goal. Whether even more intrusive or more permanent international control over states can be justified on this basis is a question well worth pursuing.

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