The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation

Michael Ottolenghi
NOTE

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INTRODUCTION

The hoisting of the stars and stripes onto the statue of Saddam Hussein in Baghdad’s al-Fardos Square on April 9, 2003,1 was both a signal of the beginning of the end of the military conquest of Iraq and a sign of things to come. President Bush officially announced the end of “major combat operations” on May 1,2 and although fighting and casualties continued thereafter,3 the Anglo-American coalition turned to administering the territory they had conquered.

To this end, on May 6, 2003, President Bush named Paul Bremer, a diplomat and former head of the Counter-Terrorism Department at the United States State Department, as the Administrator of the Coalition Provisional Authority (“CPA”).4 On May 16, Bremer

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4. Press Release, Office of the Press Secretary, President Names Envoy to Iraq: Remarks by the President in Photo Opportunity After Meeting with the Secretary of Defense (May 6, 2003), available at http://www.whitehouse.gov/news/releases/2003/05/iraq/20030506-3.html; see also Ambassador L. Paul Bremer, Administrator of the Coalition Provisional Authority, at http://www.cpa-
promulgated the first CPA regulation, which enumerated the powers of the CPA, including the temporary exercise of government powers to "provide for the effective administration of Iraq during the period of transitional administration." The stated goals of the CPA include restoring security and stability, creating conditions in which the Iraqi people can freely determine their political future, and facilitating economic recovery and reconstruction. The United States consequently vested the CPA with exclusive executive, legislative, and judicial authority over Iraq, and required all CPA regulations or orders to be approved by the Administrator. United Nations Security Council Resolution 1483 of May 22, 2003, recognized this organizational framework by calling upon "the Authority" to "promote the welfare of the Iraqi people through the effective administration of the territory," and for the creation of an "Iraqi interim administration" to be run by Iraqis. On July 13, Bremer recognized the creation of a Governing Council of Iraqis as "the principal body of the Iraqi interim administration." United Nations Security Council resolution 1511 of October 16 invited Bremer to "return governing responsibilities and authorities to the people of Iraq," and to provide the Security Council with a timetable for doing so.

As these actions illustrate, the U.S.-led coalition has laid out a framework for the governance of Iraq in the post-war period. Since major combat operations have officially ended, the international legal issues raised by the occupation of Iraq by U.S.-led forces have come to center stage. Those issues involve, at the formal doctrinal level, debates over the extent to which the governance of post-conflict Iraq is controlled by a subset of the laws of war pertaining to occupation, or by a more amorphous body of rules and experiences which this Note shall call the "United Nations governance" model.


6. Id.
7. Id.
11. According to a spokesperson from the Coalition Press Information Center in Baghdad, as of December 13, 2003, the following countries had contributed troops to Operation Iraqi Freedom and its aftermath: Albania, Australia, Azerbaijan, Bulgaria, Canada, the Czech Republic, Denmark, the Dominican Republic, El Salvador, Estonia, Georgia, Honduras, Hungary, Italy, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, the Netherlands, New Zealand, Nicaragua, Norway, Poland, Portugal, Thailand, the Philippines, Romania, Slovakia, South Korea, Spain, Ukraine, and the United Kingdom. Telephone interview with Spokesperson for the Coalition Press Information Center in Baghdad, Iraq (Jan. 7, 2004).
The law of belligerent occupation was originally codified almost one hundred years ago, and it is clearly a product of its time in its assumption that occupation is a temporary situation following a war between two sovereign states. This assumption has not been significantly modified since its inception. Although the Fourth Geneva Convention of 1949 addressed the same issue, the law of occupation has rarely been invoked in the post Second World War period. Thus, the dormant nature of the law of occupation leads to questions about its scope, application, and relevance to a modern occupation situation. This is true in an abstract sense, but the practical example of the occupation of Iraq presents new challenges and raises important questions about this body of law.

Despite its apparent fall from favor since the Second World War, the law of occupation has made a comeback in Iraq. In a joint letter to the United Nations Security Council on May 8, 2003, the United States and United Kingdom affirmed that they would "strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq." While this language does not seem by itself to signify an acceptance of the obligations imposed by the formal law of belligerent occupation, the joint letter was noted in Security Council Resolution 1483, which recognized (albeit not in the operative part of the resolution) the "specific authorities, responsibilities, and obligations under applicable international law of these states [the U.S. and U.K.] as occupying powers." Additionally, in the operative part of the resolution, the

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12. There is no accepted definition of the law of belligerent occupation, and no agreement as to whether the laws of belligerent occupation should be distinguished from "military occupation," or even simply "occupation," despite the efforts of some scholars. See generally Raymond Robin, Des Occupations Militaires en Dehors des Occupations de Guerre (Carnegie Endowment for International Peace trans., 1942) (1913). One scholar has attempted to create sub-classifications within the law of "military occupation." Adam Roberts, What is a Military Occupation?, 55 Brit. Y.B. Int'l L. 249 (1985). For the purposes of this Note, the terms "belligerent occupation" and "laws of occupation" refer to the codification of the rights and obligations of occupants as established first in the Hague Regulations and then in the Geneva Convention. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations]; Geneva Convention (IV) for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].


14. See infra notes 41-45 and accompanying text.


18. S.C. Res. 1483, supra note 8, at 2. This language seems to be reinforced in the operative part of Security Council resolution 1511, which "[r]eaffirms ... the temporary nature of the exercise by the Coalition Provisional Authority ... of the
Security Council called 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."\(^{19}\)

While some commentators have welcomed this development in the United States' attitude towards international law,\(^{20}\) it remains unclear what implications the law of occupation will have in Iraq. Given the evolution in the rationales for different occupations since the Hague Regulations of 1907, is the law of occupation flexible enough to allow the occupant, for example, to fashion a new constitution and extract oil from the occupied country? Or is the law of occupation outdated and unsuited to the needs of both the occupant and the occupied people? Perhaps an alternative model, and a different body of law, would better serve the aims of the occupying powers in Iraq, while at the same time safeguarding the rights of the local population.

Part I.A. of this Note describes the law of occupation as codified in the Hague Regulations of 1907\(^{21}\) and the Geneva Convention of 1949,\(^{22}\) and explores both the assumptions it is based on and the limitations it imposes on occupants in practice. Part I.B. explores an alternative model of post-conflict governance that has emerged from the experiences of the United Nations in Kosovo and East Timor, "United Nations governance."\(^{23}\) Part II evaluates the problems that may arise in applying the law of occupation as it currently stands in Iraq, stemming from the differences in rationales behind the law of occupation generally, and the occupation in Iraq specifically. Additionally, these problems are considered through the alternative perspective of the United Nations governance model, including what additional advantages or disadvantages such a model may provide. Part III argues that the law of occupation as it stands is too vague and outdated to be applied to Iraq. Instead, the alternative model would allow more flexibility, as well as provide greater political and international legitimacy for the transitional regime of the occupied state.

I. THE LAW OF POST-CONFLICT SOCIETIES

Two distinct, albeit overlapping, categories of legal rules govern different types of post-conflict situations. Under the provisions of the

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Hague Regulations, an occupation exists when, following a war between states, territory "is actually placed under the authority of the hostile army." Thus, on a theoretical level, an occupation follows a military defeat, be it total or partial, and the assumption of control by a hostile army. The applicable law in such a situation is the international law of occupation, derived from the famous Lieber Code of 1863 for the Union Army in the Civil War, which recognized the necessity of mitigating the severity of war on local populations. These concerns, as well as regulations regarding the power and responsibility of the occupying power were first codified by the international community in the Hague Regulations.

In contrast, what may be labeled United Nations governance of post-conflict societies arises following a finding by the United Nations Security Council of a "threat to the peace, breach of the peace, or act of aggression" pursuant to Article 39 of the U.N. Charter, and an ensuing decision to adopt "measures not involving the use of armed force" to address such a situation under Article 41. This was, for example, the framework used to establish the United Nations Mission in Kosovo ("UNMIK") and the United Nations Transitional Authority in East Timor ("UNTAET"). The applicable law in such a situation is "United Nations law derived from the powers of that organisation," meaning both Security Council Resolutions and regulations adopted by its representatives in the administered...

25. Adjt Gen.'s Office, War Dept., Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, reprinted in Richard Shelly Hartigan, Lieber's Code and the Law of War 45 (1983). The Code was written by Dr. Francis Lieber, a Professor of Modern History, Political Science and International, Civil and Common Law at Columbia College. Lieber's objective, under the guidance of the War Department, was to "attempt a revision and systematization of all the rules that had governed land warfare." Hartigan, supra, at 14-15. As such, the Code is mainly a military manual detailing the legal norms of warfare, but one of its ten sections covers the treatment of enemy property, and the Code also refers to civilians, stating that "the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit." Adjt Gen.'s Office, supra, at 49. Although the Lieber Code, strictly speaking, addressed occupation in a "domestic" civil war, its principles have inspired the laws of war including those pertaining to occupations in international settings. L.C. Green, The Contemporary Law of Armed Conflict 256 (2d ed. 2000); see also Burrus M. Carnahan, Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity, 92 Am. J. Int'l L. 213 (1998).
28. Id. art. 41.
territory, which have focused on the reconstruction of the governed territory.

Such United Nations governance theoretically could follow a war between states and create an area of overlap with the law of occupation, because the Security Council could declare a war between states a "threat to the peace, breach of the peace, or act of aggression," thus opening the door for United Nations governance. However, in practice, the use of United Nations governance has been limited to situations of internal and inter-ethnic conflict within states and their resulting humanitarian consequences, an area outside the theoretical scope of the law of occupation.

The assumptions behind these two formal (albeit in the latter case rather amorphous) bodies of law are completely different, as the law of occupation presumes a pre-existing fully-functioning sovereign state has lost a war and that thereafter the status quo must be restored, whereas the United Nations governance model presumes that a state has failed in some way and that the outcome sought is not a return to the status quo, but rather the political and economic reconstruction of the state. Consequently, these two bodies of law impose different obligations and levels of authority on the occupant or territorial administrator, a fact which may result in important differences on the ground in the occupied country or U.N.-governed territory.

A. The Law of Belligerent Occupation

1. Assumptions and Codification

The law of belligerent occupation, as understood today, has two principal codified sources: the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949, both of which have been ratified by the United States and the United Kingdom. Professor Eyal Benvenisti argues that the Hague Regulations reflect the attitudes of

32. See infra notes 40-45 and accompanying text.
33. See infra notes 165-70, 190-200 and accompanying text.
36. Hague Regulations, supra note 12, 36 Stat. at 2277; Geneva Convention, supra note 12, 6 U.S.T. at 3516, 75 U.N.T.S. at 287. The Hague Regulations are now clearly considered binding even on non-signatories, for they have been declared to be customary international law, whereas the Geneva Conventions, insofar as they build upon concepts embodied in the Hague Regulations, are also considered to be customary international law. Benvenisti, supra note 16, at 8, 98; Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l L. 348, 364 (1987).
its framers with regard to the laws of conflict and its aftermath. These attitudes were the culmination of a long process of change in the concept of occupation, which until the eighteenth century comprised the notion that the occupant "could do what he liked with [the occupied territory] and its inhabitants." This clearly was no longer the case during the first Hague Peace Conference of 1899 and its 1907 successor. Indeed, with regard to occupation, the Hague Conferences emphasized restricting the power of the occupying power in a number of areas, from the use of natural resources to the treatment of the occupied population. In sum, the occupying power now faced specific post-conflict rights and responsibilities.

The prevailing European attitude toward war at the time of the Hague Conferences included two core beliefs. First, as expressed in the Rousseau-Portales Doctrine, war was considered a contest between sovereign governments and their military forces, not an affair of civilians. Second, because war was understood as essentially a struggle between sovereigns, an ensuing occupation of territory by the victorious power was perceived as temporary, with no permanent transfer of sovereignty to the occupying power. Rather, the occupying power exerted only temporary political and military authority over the occupied territory, in the manner of a trustee, pending a return of the legitimate sovereign. It followed that the

39. See id. at 433. The first Hague Peace Conference was convened following a diplomatic circular from Russian Foreign Minister Count Mouravieff in August 1898, and addressed such issues as the pacific settlement of international disputes and the codification of the laws and customs of war on land. With respect to the latter issue, Convention II was motivated by a "desire to diminish the evils of war, so far as military requirements permits." Jörg Manfred Mössner, Hague Peace Conferences of 1899 and 1907, in 3 Encyclopedia of Public International Law 204, 205-08 (Rudolf Bernhardt et al. eds., 1995) (citations omitted). The Second Hague Conference, in 1907, adopted Convention IV on the Laws and Customs of War on Land, which was nearly identical to Convention II of 1899. Id. at 208-11. For further discussion of the genesis of the Hague Conferences, see Gerhard von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation 7-15 (1957).
40. See Oppenheim, supra note 38, at 433-34.
42. Benvenisti, supra note 16, at 27. Benvenisti notes an eloquent expression of this doctrine by King William of Prussia who stated on August 11, 1870, "I conduct war with the French soldiers, not with the French citizens." Id.
43. Oppenheim, supra note 38, at 433-34.
44. See id. Von Glahn points out that the agreement among international scholars has been that "the legitimate government of the territory retains its sovereignty but that the latter is suspended during the period of belligerent occupation." Von Glahn,
occupying power was understood to be under an obligation to protect a number of interests during its period of temporary rule: its own military interests, the sovereign rights of the ousted government, and the interests of the local population against the occupant.45

These assumptions are clearly reflected in the provisions of the Hague Regulations. Occupation is defined as territory "actually placed under the authority of the hostile army."46 The major article governing occupations, Article 43, states the duties of the occupying power succinctly:

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.47

There is no transfer of sovereignty here, only an acceptance of the reality that the legitimate power is temporarily displaced.48 This is reinforced by Article 45 of the Hague Regulations, which forbids the occupant from compelling the inhabitants of occupied territory "to swear allegiance to the hostile Power."49

Once the authority of the legitimate power has passed to the occupant, the Regulations impose certain limitations on the power of the occupant, consistent with the fundamental premise that the occupier does not gain full sovereignty. The occupying power must, for example, "take all the measures in his power to restore and ensure, as far as possible, public order and [civil life]."50 While the premium is placed on public order, "restore" and "ensure" indicate the desire of the drafters to maintain the status quo ante, a concern further expressed by the admonition to respect the "laws in force in the country."51 The importance of upholding the established legal

45. See Benvenisti, supra note 16, at 28; Oppenheim, supra note 38, at 434, 436-37.
47. Id. art. 43, at 2306. Schwenk usefully points out that the unofficial English translation of the original French is deficient with respect to the expression "public order and safety," which is not a correct translation of the French "vie publique," better rendered as "civil life." Schwenk, supra note 41, at 393 n.1. This Note uses Schwenk's translation.
48. See Michael Bothe, Occupation, Belligerent, in 4 Encyclopedia of Public International Law 64, 65 (Rudolf Bernhardt et al. eds., 1982) ("International law does not grant rights to the occupying power, but limits the occupant's exercise of its de facto powers.").
50. Benvenisti, supra note 16, at 9 (alteration in original).
51. Hague Regulations, supra note 12, art. 43, 36 Stat. at 2306.
order in the occupied territory is also expressed elsewhere in the Regulations, in provisions on tax collection,\textsuperscript{52} requisitions,\textsuperscript{53} and respect for private property.\textsuperscript{54} Additionally, the extent of the powers conferred on the occupant depends on the interpretation of the terms "unless absolutely prevented,"\textsuperscript{55} and many of the rights granted to the occupant are limited to the "needs of the army of occupation."\textsuperscript{56}

Article 55 of the Hague Regulations, which deals with State property, illustrates both the temporary nature of occupations and the limited rights conferred upon the occupier: "[T]he occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."\textsuperscript{57}

The occupant does not gain title to state property, but merely obtains possession, and the rules of usufruct prevent using the property in a wasteful or negligent manner,\textsuperscript{58} as the occupant "is not entitled to exercise the rights of sovereignty."\textsuperscript{59} Legal commentators have held that Article 55 applies to "immovable" public property.\textsuperscript{60} Immovables are understood to include "land, permanent structures on land, buildings, and other appurtenants to the real estate,"\textsuperscript{61} including oil, which is of particular importance in Iraq.\textsuperscript{62} The leading case concerning the seizure of oil resources during the Second World War classified oil in the ground as "immovable" for the purpose of Article

\textsuperscript{52} Id. art. 48, at 2307. This section states:

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of administration of the occupied territory to the same extent as the legitimate Government was so bound.

\textit{Id.}

\textsuperscript{53} Id. art. 52, at 2308. Requisitions are not to be demanded from "municipalities or inhabitants except for the needs of the army of occupation." \textit{Id.}

\textsuperscript{54} Id. art. 56, at 2309. All seizure, destruction, or willful damage to private property, historic monuments, and works of art and science "is forbidden, and should be made the subject of legal proceedings." \textit{Id.}

\textsuperscript{55} Id. art. 43, at 2306.

\textsuperscript{56} Id. art. 52, at 2308. This is also the case with regard to the seizure of State cash, arms, means of transport, stores and supplies. \textit{Id.} art. 53, at 2308.

\textsuperscript{57} Id. art. 55, at 2309.

\textsuperscript{58} Oppenheim, \textit{supra} note 38, at 398.

\textsuperscript{59} Wheaton's Elements of International Law 539 (Coleman Phillipson ed., Stevens & Sons Ltd. 1916) (1836) [hereinafter Wheaton].

\textsuperscript{60} See \textit{id.}; Feilchenfeld, \textit{supra} note 41, at 52; Oppenheim, \textit{supra} note 38, at 397.


\textsuperscript{62} See \textit{infra} notes 244-57 and accompanying text.
Because of the usufructuary clause in Article 55, an occupant's power over immovable state property "is measured not by his own needs but by the duty to maintain integrity of the corpus." The Nuremberg Tribunal recognized that the usufruct provision of Article 55 restricted the taking of immovable property to the military needs of the army of occupation, and commentators have concurred with this view.

While the Hague Regulations addressed the authority of the occupying power, their provisions on the protection of the occupied population were confined to "family honour and rights, the lives of persons, and private property, as well as religious convictions and practice." Oppenheim argued that the complete failure of the Axis powers to abide by these humanitarian guarantees during the Second World War indirectly led to the provisions relating to the protection of civilian populations in the Fourth Geneva Convention of 1949, the second major codified source of the law of occupation. Indeed, the focus of the Convention seems to be less on restrictions of the actions of government than on the protection of the local population. This was an important departure from the preservation of the sovereign interests of the occupied state enshrined in the Hague Regulations, made necessary by both the disregard of the humanitarian provisions by the Axis powers during the war, and the ongoing Allied occupations of Germany and Japan.

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64. Julius Stone, Legal Controls of International Conflict 714 (1954).
65. United States v. Flick, 6 Trials of War Criminals Before the Nuernberg Military Tribunals 1187, 1204 (1947). The court found that, with regard to the seizure of Soviet arms factories:

- No single one of the Hague regulations above quoted is exactly in point, but, adopting the method used by IMT, we deduce from all of them, considered as a whole, the principle that state-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy.

Id. at 1210.
68. Oppenheim, supra note 38, at 448-53.
69. See Benvenisti, supra note 16, at 99.
70. During the Second World War, there were many occupations which did not respect the sovereign rights of the losing state, most notably the abolition of Czechoslovakia as a State in 1939, the use of "puppet" governments in Norway, and in Asia, the granting of "independence" by the Japanese to, for example, Burma. See Benvenisti, supra note 16, at 60-62, 64-66; Roberts, supra note 12, at 252-54.
71. In the occupations of Germany and Japan, the Allies invoked the doctrine of debellatio, or subjugation, which arises after an unconditional surrender, or the complete defeat of the opposing power, in order to gain authority to alter the existing laws in those countries. Roberts, supra note 12, at 267-68. Whether this is a justified exception to the Hague Regulations or not, it is clearly outside their scope, because the Regulations impose respect for the laws in force, and seemingly had not
Hence, Article 47 of the Fourth Geneva Convention committed itself to a greater protection of the rights of the occupied population by stating that “[p]rotected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory.”

Article 47 simultaneously provided greater protection to the occupied population, while not explicitly pronouncing any changes to the institutions of government of the occupied territory illegal. Other articles of the Convention went into more detail about the treatment of the inhabitants of the occupied territory, by forbidding mass transfers or deportations, detailing certain working conditions for the population, ensuring provision of food and medical supplies, and allowing for religious freedom. In addition to these humanitarian provisions, Article 64 of the Convention allows the occupying power to “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” and “to maintain the orderly government of the territory.” Article 64 also states that the “penal laws” of the occupied territory would remain in force, unless they threatened the security of the occupying power or the application of the Convention. Finally, Article 154 of the Fourth Geneva Convention provides that for states that are parties to both the Hague Regulations and the Fourth Geneva Convention, the Convention is “supplementary to” the Hague Regulations, creating an area of overlap between the two sources of the law of occupation.

2. The Law of Occupation: Interpretation and Application

As the previous allusions to the Second World War indicate, the application of the laws of occupation has been “perennially problematical.” For example, Article 43 of the Hague Regulations, which outlines the general rights and obligations of the occupant has envisioned such a situation. Oppenheim, supra note 38, at 446-47; see also infra notes 112-18 and accompanying text.

74. Id. art. 49, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.
75. Id. art. 51, 6 U.S.T. at 3550-52, 75 U.N.T.S. at 320-22.
76. Id. art. 55, 6 U.S.T. at 3552-54, 75 U.N.T.S. at 322-24.
77. Id. art. 58, 6 U.S.T. at 3554, 75 U.N.T.S. at 324.
78. Id. art. 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328.
79. Id.
80. Id. art. 154, 6 U.S.T. at 3620, 75 U.N.T.S. at 390; see also infra notes 267-72 and accompanying text.
81. Roberts, supra note 12, at 249.
been interpreted in various conflicting ways. Two important examples come from the First World War.

Germany occupied most of Belgium from 1914 until 1918 and established a “Government General” to run the occupied areas in accordance with the Hague Regulations of 1907. One important preliminary issue concerned the authority of the Government General to legislate and the concurrent power of the ousted Belgian sovereign to do the same. The German Government General interpreted Article 43’s transfer of “authority” to the occupant as signifying the transfer of legislative power for the duration of the occupation. Consequently, the Government General proceeded to legislate in a number of areas.

After the occupation had ended, the Belgian courts strongly contested this interpretation of the Hague Regulations. The most famous examples were a series of decisions regarding a German Order of August 8, 1918, prohibiting the sale of vegetables before they had been gathered. In a challenge to the German order by parties who had already bargained for this type of exchange, the Court of Appeal of Liege, citing the Belgian Court of Cassation, reaffirmed the principle that “the orders of the occupying Power are not laws, but simply commands of the military authority of the occupant.” The Liege Court rejected the contention that the Hague Regulations conferred upon the occupant the “positive right to legislate.” The German order was held to have “no legal value.”

The Hague Regulations were also applied immediately following the First World War, during the armistice occupation of the Rhineland, from December 1918 to January 1920, by the allied powers.

82. Adolf Solansky, German Administration in Belgium 15-18 (1928).
83. See Benvenisti, supra note 16, at 32-33.
84. The problem was exacerbated by the actions of the Belgian King, who continued to issue “decree-laws” while he was in exile, creating significant difficulties for the Belgian courts, both during the occupation itself and once the Germans had left. See Auditeur Militaire v. G. Van Dieren, 1 Ann. Dig. 445 (Council of War Brabant, Belg. 1919) (holding that a decree-law issued by the Belgian government during the occupation was applicable to Belgian citizens then residing under the occupation because national sovereignty subsisted in the occupied land during the occupation).
85. See Benvenisti, supra note 16, at 33; James Wilford Garner, 2 International Law and the World War 62-63 (1920); J. Pirenne & M. Vauthier, La Législation et L'administration Allemandes en Belgique 4-5 (1925); Solansky, supra note 82, at 18-22.
86. See Pirenne & Vauthier, supra note 85, at 21-32, 33-36; Solansky, supra note 82, at 23-25.
87. See Bochart v. Comm. of Supplies of Corneux, 1 Ann. Dig. 462 (Ct. App. Liège, Belg. 1920); De Brabant v. T. & A. Florent, 1 Ann. Dig. 463 (Ct. App. Brussels, Belg. 1920); Mathot v. Longuë, 1 Ann. Dig. 463 (Ct. App. Liège, Belg. 1921).
88. Mathot, 1 Ann. Dig. at 464.
89. Id.
90. Id.
of France, the United Kingdom, the United States and Belgium. The supreme commander of the operation, Marshal Foch, acknowledged the applicability of the Hague Regulations to the occupied Rhineland. Despite this explicit acknowledgment, however, the economic situation in the area after the devastation of war meant that the occupying powers took it upon themselves to regulate the economy of the Rhineland, by imposing trade restrictions with the rest of Germany and regulating customs duties, with the effect of allowing the free flow of goods from the Rhineland to France and Belgium.

The occupations of Belgium and the Rhineland illustrate the presence of conflicting interpretations of Article 43 of the Hague Regulations. In the case of Belgium, for example, while the Belgian courts largely adopted the absolutist position noted above, international legal scholars seemed to agree that the occupant did have a limited power to legislate under conditions of absolute necessity, treating the German practice in Belgium as an aberration. In the Rhineland, the Hague Regulations' provisions on the legislative powers of the occupier were not respected. As Professor Benvenisti argues, these occupations illustrated the incompatibility of the reality of occupation with the rationale behind the Hague Regulations. While both of these occupations did end up as temporary affairs, neither occupying power restricted their actions to what commentators have viewed as absolute necessity.

Beyond the general limitation to respect the “laws in force in the country,” the Hague Regulations are silent regarding fundamental constitutional change by the occupying power. The Fourth Geneva Convention, for its part, sidesteps the issue by focusing on the treatment of the local population, without passing judgment on “any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory.” However, because the occupying power does not gain sovereignty by occupation, a change in fundamental institutions does not seem to be envisioned by the Hague Regulations. This interpretation was not followed by

91. See Benvenisti, supra note 16, at 48.
92. Id. at 49.
93. Id. at 50-52.
94. For an overview of these scholars' views, see Schwenk, supra note 41, at 400. Another scholar limits the right of abrogating existing laws or promulgating new ones to the “exigencies of war.” Greenspan, supra note 66, at 224.
95. Benvenisti, supra note 16, at 46; Feilchenfeld, supra note 41, at 22 n.2; 2 Garner, supra note 85, at 88-89.
97. Id. at 57.
98. See supra note 94.
100. Geneva Convention, supra note 12, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318.
101. See Feilchenfeld, supra note 41, at 89; Stone, supra note 64, at 698-99.
Germany during its occupation of Belgium, when it tried to alter the political structure of the country by increasing the power of the Flemish speaking population, culminating in the division of Belgium into two separate administrations, with Brussels becoming the capital of Flanders.\textsuperscript{102}

While Article 43 of the Hague Regulations is the "miniconstitution" of the law of occupation,\textsuperscript{103} Article 55 is a far more specific provision dealing with public property in the occupied territory, which the occupier must administer according to the rules of usufruct.\textsuperscript{104} But this Article, and its extension to "immovable" public property, including natural resources, has similarly competed with the reality of the actions of occupying powers.\textsuperscript{105}

During the occupation of Belgium, the German Governor General established the Central Coal Office, which set prices and organized distribution, mainly to the benefit of the German war effort,\textsuperscript{106} while prewar coal production in Belgium had been inadequate to even provide for internal Belgian demand.\textsuperscript{107} During the Second World War, the Japanese seized oil resources throughout the East Indies, and a Singapore court found that seizure of oil "not merely for the purpose of meeting the requirements of an army of occupation but for the purpose of supplying the naval, military and civilian needs of Japan, both at home and abroad" violated the laws of war.\textsuperscript{108}

Moreover, when Israel occupied the Sinai peninsula following the 1967 war, it exploited several oil fields and increased their production substantially, partly for domestic consumption.\textsuperscript{109}

\textsuperscript{102} Pirenne & Vauthier, supra note 82, at 87-93 (outlining the progression of German policy by instituting language reforms in the higher education system before separating Flanders and Wallonia administratively); Solansky, supra note 85, at 166-81.

\textsuperscript{103} Benvenisti, supra note 16, at 9.

\textsuperscript{104} Hague Regulations, supra note 12, art. 55, 36 Stat. at 2309.

\textsuperscript{105} Stone, supra note 64, at 727-32.

\textsuperscript{106} Solansky, supra note 82, at 83-86.

\textsuperscript{107} Pirenne & Vauthier, supra note 85, at 43.

\textsuperscript{108} N.V. de Bataafsche Petroleum Maatschappij v. War Damage Comm’n, 23 I.L.R. 810, 821 (Ct. App., Sing. 1956).

\textsuperscript{109} Cummings, supra note 61, at 534-35. The legality of this oil exploitation has been the subject of a debate about the application of Article 55 of the Hague Regulations. Allan Gerson has argued that Israel’s use of oil was not contrary to the usufructuary provisions of Article 55 of the Regulations, for it in fact increased the value of the Sinai peninsula. Allan Gerson, Note, Off-Shore Oil Exploration By a Belligerent Occupant: The Gulf of Suez Dispute, 71 Am. J. Int’l L. 725, 732-33 (1977). A contrary view is expressed by Clagett and Johnson, who argue that Israel violated Article 55, and that such a violation could not be justified by the costs of occupation. Brice M. Clagett & O. Thomas Johnson, Jr., May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?, 72 Am. J. Int’l L. 558, 584-85 (1978). The consensus seems to be the position taken by Cummings, that “an occupying power does not have a right to exploit from an area . . . where oil resources were not exploited prior to commencement of the occupation.” Cummings, supra note 61, at 533; see also R. Dobie Langenkamp & Rex J. Zedalis,
Commentators have struggled with the problems associated with the application of the Hague Regulations in this context after the Second World War. All the major powers failed to respect the laws of occupation during that conflict, but what was perhaps most striking was the exception to the Hague Regulations invoked by the Allies during their post-war occupations in Japan and Germany. During military operations, the Allied powers openly stated their objectives as the "unconditional surrender" of Nazi Germany and Imperial Japan, which was understood as the "destruction of a philosophy in Germany... and Japan which is based on the conquest and subjugation of other peoples." Such an objective required fundamental political and institutional changes, which are clearly not within the scope of Article 43 of the Hague Regulations.

The Allies adopted the view that the Hague Regulations did not apply to the occupations of Germany and Japan. They based this view on the customary international law theory of *debellatio*, or subjugation, which refers to a situation in which a party to the conflict has been defeated to the extent that it has essentially ceased to exist. In such a situation, the territory of the previous state is not "occupied," and the Hague Regulations do not apply, because they apparently did not envisage this sort of stateless situation. Although by no means uncontested in academic literature, this was the view adopted at the time by Allied courts in Germany and national courts elsewhere. This view permitted the Allies to make fundamental

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110. See Roberts *supra* note 12, at 249; Michel Veuthey, Guérilla et Droit Humanitaire 355 (2d ed. 1983).


116. For a comprehensive overview of the legal debate on this matter, see Theodor Schweisfurth, *Germany, Occupation After World War II*, in 3 Encyclopedia of Public International Law 191, 196-98 (1982).

117. See, e.g., *In re* Alstotter, 14 Ann. Dig. 278 (U.S. Mil. Trib., Nuremberg, Germany 1947) (finding that because of the complete breakdown of government, industry, agriculture and supply, the Hague Convention and its restrictions did not apply, as the occupying powers were under an imperative humanitarian duty outside the scope of the Regulations); *In re* Bauerle, 15 Ann. Dig. 292 (Ct. App. Colmar, Fr. 1948) (holding that the German capitulation deprived Germany of sovereignty); Dalldorf v. Dir. of Prosecutions, 16 Ann. Dig. 435, 437-38 (Control Comm'n Ct. App., British Zone of Germany 1949) (noting that the Hague Regulations do not apply to the occupation of Germany because of the complete collapse of the German government in May 1945); *In re* Flesche, 16 Ann. Dig. 266, 267-68 (Special Crim. Ct., Amsterdam, Neth. 1949) (holding that the end of the war by *debellatio* signified that the Allies had assumed "supreme authority" over Germany).
changes to German and Japanese political, institutional and economic organization, clearly outside the ambit of the Hague Regulations. The cases of Germany and Japan were thus theoretically placed outside the area occupied by the Hague Regulations. Since the Second World War and the promulgation of the Geneva Conventions, occupying powers have not adhered to either the Hague Regulations' or the Fourth Geneva Convention's provisions on the law of occupation. As Benvenisti points out, the Israeli occupation of territories following the 1967 war was the only instance in post-Second World War history where an occupying power actually established a military government for occupied territories, in accord with the provisions of the law of occupation. In contrast, other instances of what may informally be called "occupations" in the post-1945 world have been justified on a number of grounds, all outside the scope of the law of occupation. Thus the Indonesian takeover of East Timor in 1975, the Moroccan annexation of Western Sahara in the mid 1970s, and the Iraqi invasion of Kuwait in 1990 were all conducted as annexations, and were not treated by those powers as occupations. Other cases, such as the Vietnamese occupation of Cambodia in 1978, the Soviet intervention in Afghanistan in 1979, and the U.S. actions in Grenada in 1983 and Panama in 1989 were conducted under the guises of assistance to the indigenous governments. In none of these cases did the occupants view themselves as a formal occupying power, and none of them attempted to apply either the Hague Regulations or the Geneva Conventions, or

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118. See Schweisfurth, supra note 116, at 192-96.
121. Id. at 149.
125. See Benvenisti, supra note 16, at 149; Peter Wallensteen, Global Patterns of Conflict and the Role of Third Parties, 67 Notre Dame L. Rev. 1409, 1411 (1992).
129. See Amstutz, supra note 127, at 42-49; Hilaire, supra note 128, at 127.
even appeal to an exception thereto, such as the customary international law doctrine of *debellatio*.130

**B. United Nations Governance**

An alternative model for the governance of post-conflict societies that has emerged much more recently than the law of occupation is that of United Nations governance of territories. The absence of a clear corpus of formal international law to govern such a situation may account for the recent emergence of this trend, although undoubtedly certain geopolitical factors stemming from the end of the Cold War emboldened the United Nations to expand the application of its Charter's Chapter VII powers. Another important impetus for the rise of this alternative model was the phenomenon of decolonization, by which candidate states for occupation themselves became unstable states with novel claims to sovereignty,131 replacing the traditional Hague model of established sovereign states.132

Chapter VII of the United Nations Charter addresses action with respect to threats to the peace, breaches of the peace, and acts of aggression.133 Under Article 39, any action by the Security Council under Chapter VII is based on a determination of "any threat to the peace, breach of the peace, or act of aggression."134 The Security Council enjoys a certain amount of discretion in determining which actions fall under Article 39.135

Once this threshold requirement has been satisfied, the Security Council may take action under the other articles of Chapter VII, including provisional measures, measures "not involving the use of armed force,"136 or action by "air, sea, or land forces."137 Article 41 is the most pertinent with regard to the governance of post-conflict situations, as it empowers the Security Council to take measures "not involving the use of armed force" to give effect to its decisions, and details that these measures "may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."138 It is clear from the wording, and

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130. See Benvenisti, supra note 16, at 182.
132. See supra notes 41-45 and accompanying text.
133. U.N. Charter ch. VII.
134. Id. art. 39.
137. Id. art. 41.
138. Id. art. 42.
139. Id. art. 41.
Further established by usage, that this list of measures is not exhaustive, and Article 41 has been used, for example, to create international criminal tribunals. Furthermore, Article 48 permits delegation of the action to be carried out under Chapter VII by the Security Council to "some" members of the United Nations, opening up the possibility of delegating "action" to a few member states or a regional organization. Despite the clear breadth of powers granted to the United Nations under Article 41, however, these powers were exercised only twice during the Cold War period, for obvious geopolitical reasons. Most importantly, U.N. governance did not emerge as a viable option without the consent of the state in question until the 1990s.

U.N. governance of post-conflict societies may be broadly categorized according to the manner in which such governance was legally justified. Thus, a first category is restricted to actions under the international trusteeship system of Chapter XII of the Charter, which entails the granting of a trusteeship for a specific territory to fully developed States acting as trustees. The territories concerned were essentially non-self-governing and administered temporarily as trusteeships under U.N. auspices. A second category of U.N. governance is based on the consent of the parties, either sovereign states or factions within sovereign states. The third category of U.N. governance is that based on Chapter VII powers of the United Nations, more specifically an expansive interpretation of Article 41's measures not involving the use of armed force.

The United Nations organized certain trusteeships for residual League of Nations mandates, territories "detached from enemy states as a result of the Second World War," and territories "voluntarily

140. 1 Charter Commentary, supra note 135, at 740.
141. Id. at 743.
142. U.N. Charter art. 48. The Article reads in full:
   (1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
   (2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Id.
143. 1 Charter Commentary, supra note 135, at 777.
144. The exercise of power occurred during the embargo on Southern Rhodesia in 1966 and during the arms embargo on South Africa in 1977. Id. at 738.
146. U.N. Charter arts. 75-85.
147. 2 Charter Commentary, supra note 135, at 1099.
148. See Ruffert, supra note 30, at 616.
149. 1 Charter Commentary, supra note 135, at 743.
placed” under the trusteeship system.\textsuperscript{150} However, its role did not include governance, which was left to the state granted the trusteeship.\textsuperscript{151} Trusteeship has since been shelved, and the trusteeship council suspended,\textsuperscript{152} mainly because of the provision in Article 78 that the trusteeship system cannot apply to members of the United Nations,\textsuperscript{153} which now numbers 191 countries, compared to the 51 Charter members of the United Nations in 1945.\textsuperscript{154} The first cases of direct U.N. governance of a territory were thus based on the consent of the parties involved, which did not require a Chapter VII determination of a threat to international peace or security.\textsuperscript{155}

The first direct U.N. governance of a territory was the United Nations Temporary Executive Authority (“UNT EA”), which governed Irian Jaya, the western half of New Guinea, for seven months in 1962-1963, during its transition from Dutch to Indonesian rule.\textsuperscript{156} This U.N. administration was created pursuant to an agreement between Indonesia and the Netherlands, which included each nation’s consent to a temporary U.N. administration.\textsuperscript{157} Under the Dutch-Indonesian agreement, the head of UNTEA was given general powers, or “full authority under the direction of the Secretary-General to administer the territory.”\textsuperscript{158}

In practice, for the short period of U.N. administration, U.N. officials replaced Dutch officials before power was handed over to Indonesia.\textsuperscript{159} This experience was not used as precedent until thirty years later, when the United Nations was handed significant powers of civil administration over Cambodia after the demise of the Khmer Rouge regime.\textsuperscript{160} This authority came within the scope of the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia.\textsuperscript{161} The agreement created a representative institution of

\textsuperscript{150} U.N. Charter art. 77.
\textsuperscript{151} See, e.g., 2 Charter Commentary, supra note 135, at 1099.
\textsuperscript{152} Id. at 1129.
\textsuperscript{153} U.N. Charter art. 78.
\textsuperscript{154} For a review of the members of the United Nations from 1945 to the present day see http://www.un.org/Overview/growth.htm (last visited Feb. 17, 2004).
\textsuperscript{155} See Matheson, supra note 23, at 77; Ruffert, supra note 30, at 616.
\textsuperscript{157} See Franck, supra note 156, at 79.
\textsuperscript{158} Agreement Concerning West New Guinea (West Irian), supra note 156, art. V.
\textsuperscript{159} Franck, supra note 156, at 79-82.
\textsuperscript{160} See Michael W. Doyle, UN Peacekeeping in Cambodia: UNTAC’s Civil Mandate 16-24 (1995).
the four major warring factions, the “Supreme National Council,” which delegated certain important functions to the United Nations Transitional Authority in Cambodia (“UNTAC”). These functions included UNTAC’s direct control over all “administrative agencies, bodies and offices” acting in the field of “foreign affairs, national defence, finance, public security and information,” “supervision or control” over any other governmental bodies which “could directly influence the outcome of elections,” and the right to investigate other bodies. Importantly, the authority of the U.N. in this instance was based on the consent of the Cambodian factions, not on Chapter VII powers.

By contrast, U.N. governance in Kosovo and East Timor was based explicitly on the United Nations exercising its Chapter VII powers. In Kosovo, following the NATO campaign in 1999, the economic and social outlook was bleak at best. The displacement of hundreds of thousands of refugees, vast material destruction, continuing ethnic resentment, and the abandonment of Kosovo by Serb authorities had left the province on the edge of collapse. The international community reacted to the situation with a series of diplomatic meetings that culminated in the Security Council adopting Resolution 1244, which was binding under Chapter VII of the U.N. Charter. The Resolution authorized deployment of both “international civil and security presences” under U.N. auspices, following a finding that the situation in the region constituted a “threat to international peace and security.” The rationale behind the exertion of these Chapter VII powers was the fulfillment of the “purposes” and “principles” of the U.N. Charter, concern for the humanitarian tragedy in Kosovo, and the reaffirmation of the need for “substantial autonomy and meaningful self-administration for Kosovo.”

While the mission of the international security presence corresponded with previous U.N. deployments charged with restoring

162. Ratner, supra note 161, at 9-12.
163. Cambodia Conflict, supra note 161, art. 6, at 184-45.
164. See Ratner, supra note 161, at 9.
167. The Kosovo Report, supra note 166, at 5-9; Report of the Secretary-General on Kosovo, supra note 166.
169. Id. at 2.
170. Id.
order and enforcing a ceasefire,171 the international civil presence was charged with a more complex—and unprecedented—task, justified under Article 41 of the Charter’s language concerning “measures not involving the use of armed force.”172 This was institutionalized by the request, in the resolution, for the Secretary-General to appoint a Special Representative to “control the implementation of the international civil presence.”173 The Secretary-General then created the United Nations Interim Administration Mission in Kosovo (“UNMIK”), which was led by the Special Representative.174

The structure of UNMIK was unique, in that different functions were under the supervision of different international bodies including non-U.N. institutions albeit under general U.N. auspices, as permitted by Article 48 of the Charter.175 Civil administration was led by the United Nations, with powers over public administration, police, and judicial affairs;176 the promotion of democratization and institution building was led by the Organization for Security and Co-operation in Europe (“OCSE”);177 the humanitarian component was led by the U.N. High Commissioner for Refugees178 and the reconstruction component was headed by the European Union.179

The powers of the Special Representative over the administration of Kosovo were detailed in the first UNMIK regulation, which stated that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.”180 The applicable laws in Kosovo were the domestic “laws applicable in the territory of Kosovo prior to 24 March 1999... insofar as they do not conflict with” UNMIK’s mandate or any UNMIK regulations.181 The Special Representative repealed certain portions of previous legislation covering property and housing182 that

175. See supra notes 142-43 and accompanying text.
176. See Report of the Secretary-General on Kosovo, supra note 166, at 9.
177. Id.
178. Id.
179. Id.
181. Id.
were found discriminatory, and made new laws on subjects ranging from banks and currency use to conditions for the importation of petroleum products.

The experience of UNMIK in Kosovo was replicated in East Timor. East Timor had been under Portuguese rule until 1975, when it was annexed by Indonesia. In 1999, after years of fruitless negotiations, the Portuguese and Indonesian governments asked the United Nations Secretary-General to conduct a referendum of the East Timorese, with the choices being either independence, or autonomy within Indonesia. Following the rejection of autonomy within Indonesia, militia groups initiated a campaign of violence and destruction that created large numbers of refugees.

The United Nations response was twofold. First, under its Chapter VII powers, it authorized the deployment of a multinational force, the

183. Id.

The budgets, financial records and accounts of all physical and legal persons, including private enterprises, public bodies, agencies or institutions and UNMIK shall be made in a currency or currencies designated in accordance with an administrative direction promulgated by the Special Representative of the Secretary-General . . .

Id.
186. UNMIK, Regulation on the Importation, Transport, Distribution and Sale of Petroleum Products (Petroleum, Oil and Lubricants or POL) for and in Kosovo, UNMIK/REG/1999/9 (Sept. 20, 1999) (providing that “[a]ny person or enterprise engaging in the importation, transport, distribution and sale of any or all petroleum products . . . for and in Kosovo, will be required to obtain a license from the Special Representative of the Secretary-General”), available at http://www.unmikonline.org/regulations/1999/reg09-99.htm.
188. Matheson, supra note 23, at 81-83; East Timor-UNTAET Background, supra note 187; see also S.C. Res. 1246, U.N. SCOR, 4013th mtg., U.N. Doc. S/Res/1246 (1999). The resolution decided to establish until 31 August 1999 the United Nations Mission in East Timor (UNAMET) to organize and conduct a popular consultation, scheduled for August 8, 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 . . .

Id. at 2.
International Force for East Timor, to restore order and ensure humanitarian assistance.\textsuperscript{190} Second, influenced by the "grave humanitarian situation" and the existence of a "threat to peace and security," the Security Council adopted Resolution 1272, which established, pursuant to Chapter VII powers, the United Nations Transitional Administration in East Timor ("UNTAET").\textsuperscript{191} The Resolution gave UNTAET "overall responsibility for the administration of East Timor," including "all legislative and executive authority, including the administration of justice."\textsuperscript{192} Much like in Kosovo, UNTAET was led by a Special Representative of the Secretary-General,\textsuperscript{193} who, once appointed, promulgated a regulation reaffirming his powers and establishing that existing domestic law would apply in East Timor unless it conflicted with Resolution 1272 or UNTAET regulations.\textsuperscript{194} Additionally, the Special Representative repealed a series of Indonesian security laws,\textsuperscript{195} abolished capital punishment,\textsuperscript{196} and subsequently exercised his vast legislative powers in areas including taxation,\textsuperscript{197} currency,\textsuperscript{198} the appointment of judicial officers,\textsuperscript{199} and telecommunications regulation.\textsuperscript{200}

United Nations governance in Kosovo and East Timor therefore allowed the Representative of the Secretary-General rather broad

\begin{itemize}
\item \textsuperscript{190} S.C. Res. 1264, U.N. SCOR, 4045th mtg., U.N. Doc S/Res/1264 (1999). The Resolution authorized the establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations.
\item \textsuperscript{191} S.C. Res. 1272, supra note 29, at 2.
\item \textsuperscript{192} Id.
\item \textsuperscript{194} Id. § 3.1.
\item \textsuperscript{195} Id. § 3.2.
\item \textsuperscript{196} Id. § 3.3.
\end{itemize}
powers compared to the restrictions imposed on an occupying power by the law of occupation. This observation has important consequences in present-day Iraq, where the application of either body of law could potentially create different outcomes during the occupation or possible U.N. governance.

Thus, Part II of this Note will analyze the application of both the law of occupation and the U.N. governance model in Iraq, by focusing on the rationales behind these bodies of law and the stated objectives of the U.S.-led occupation in Iraq. Two objectives will be of particular concern: the rebuilding of the oil industry, and the establishment of democratic institutions.

II. APPLYING THE LAW IN IRAQ

Both the law of occupation and any potential United Nations governance scheme would face unique challenges in their application in Iraq, where U.S. and allied forces currently occupy the country. Certainly, the application of these bodies of law would be problematic in any environment, but the situation in Iraq provides a contemporary example of specific problems that the potential application of such laws may face.

The first challenge stemming from the application of the law of occupation in Iraq involves the fundamental discrepancy that exists between the rationales and assumptions underlying the law of occupation as codified, and the stated goals of the American-led occupation in Iraq, namely the restoration of sovereignty to the Iraqi people. While the law of occupation is ancillary to the laws of war and predicated on the temporary transfer of authority to the occupant pending the return of the defeated sovereign, the current occupation of Iraq is explicitly aimed at changing the fundamental nature of the Iraqi state.

Beyond such theoretical concerns, however, lies the challenge of understanding how the application of the law of occupation as currently understood would allow the CPA to achieve its goals—rebuilding the oil industry and allowing the Iraqi people to freely determine their political future—given the restrictions imposed on the occupying power by the Hague Regulations, notably in Articles 43


202. See supra notes 51-80 and accompanying text.


204. See supra notes 41-45 and accompanying text.

205. See infra notes 211-13 and accompanying text.
The alternative model presented here, that of United Nations governance, would have to face an inquiry as to the application of Chapter VII of the United Nations Charter to the situation in Iraq, and then a determination of how much power such a scheme would need to create democratic institutions in Iraq. Each body of law would provide a different set of rights and responsibilities for the occupant or territorial administrator, which in the specific case of Iraq would result in different implications for the achievement of the present occupation’s stated goals.

A. Problems of Applying the Law of Occupation in Iraq

The stated aims of the CPA in Iraq have led certain scholars to question the relevance of the law of occupation to such post-conflict circumstances. Indeed, as Benvenisti and other commentators have argued, the law of occupation seems to have been honored primarily by its breach, and the sudden resurrection of this body of law by the United Nations raises specific questions about how it can be used to fulfill the United States’ aims in Iraq.

These aims have been clearly set out by both the Bush administration and the CPA. President George W. Bush, in his address aboard the American aircraft carrier Abraham Lincoln on May 1, 2003, stated that there remained “difficult work” to do in Iraq, and signaled that one of the overriding concerns for that country would be “the transition from dictatorship to democracy.” This goal has been the central aspect of President Bush’s pronouncements on Iraq, reaffirmed in a joint declaration with British Prime Minister Tony Blair on November 20, 2003, which stated that “[t]he United States and United Kingdom stand ready to support the Transitional

206. See supra notes 47-67 and accompanying text.
207. See Ruffert, supra note 30, at 617 (arguing that “peace” for the purposes of Chapter VII may be related to the security situation within a state).
208. See Sabel, supra note 119; David J. Scheffer, Beyond Occupation Law, 97 Am. J. Int’l L. 842 (2003). Scheffer’s is perhaps the most damning indictment of the law of occupation in Iraq, arguing that it cannot adequately deal with the political, economic, and humanitarian challenges present in Iraq. Id. at 858-59.
209. Eyal Benvenisti, The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective, 23 Isr. Def. Forces L. Rev. 1, 17 (2003). Benvenisti adopts a position that appears contrary to that of Scheffer, as he argues that the law of occupation has retained its efficiency despite serious challenges, although he acknowledges the important changes to the law of occupation that were necessary to its application in Iraq, including the provisions of Security Council Resolution 1483. Id. at 21-22; see also Sabel, supra note 119.
210. S.C. Res. 1483, supra note 8, at 1; see supra notes 8-10 and accompanying text.
Administration in its task of building a new Iraq and its democratic institutions.”

While the White House has pushed the transition to democracy, the CPA has dealt with the more practical aspects of the occupation. In his first regulation as leader of the CPA, Ambassador Bremer stated that the goals of the CPA included restoring security, facilitating economic recovery and reconstruction, as well as allowing the Iraqi people to freely determine their political future. To further this mission, and pursuant to the vesting of all executive, legislative, and judicial authority in the CPA, Bremer has issued orders regarding the management and use of Iraqi public property, the status of coalition forces and their contractors, the liberalization of trade policy, and the establishment of a ministry of science and technology.

Both the general aims and the specific measures outlined above are seemingly reinforced by United Nations Security Council Resolution 1483, which explicitly calls on the CPA “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

212. Press Release, Office of the Press Secretary, Declaration on Iraq by President George W. Bush and Prime Minister Tony Blair (Nov. 20, 2003), available at http://www.whitehouse.gov/news/releases/2003/11/20031120-1.html. The declaration further stated that “[i]t is right that Iraqis are making these decisions and for the first time in generations determining their own future. We welcome the Governing Council’s commitment to ensuring the widest possible participation in the Transitional Assembly and constitutional process.” Id.


214. Id.

215. Coalition Provisional Authority, Order Number 9, CPA/ORD/08 June 2003/09, available at http://www.cpa-iraq.org/regulations/CPAORD9.pdf. The order applies to the occupancy, use, management, and assignment of public property by the CPA, Iraqi ministries, as well as property temporarily made available to private individuals or organizations, including commercial enterprises, all of which have to be entered into the Register of Public Property of the CPA. Id.

216. Coalition Provisional Authority, Order Number 17, CPA/ORD/26 June 2003/17, available at http://www.cpa-iraq.org/regulations/CPAORD17Status_of_Forces.pdf. The order immunizes CPA personnel, coalition forces, their property, funds, and assets from the Iraqi legal process and also extends this immunity to contractors with respect to contractual claims. Id.


Iraqi people can freely determine their own political future.\textsuperscript{219} The CPA quoted this language almost verbatim in its first regulation,\textsuperscript{220} and has used it as a basis of authority to promulgate subsequent orders and regulations.\textsuperscript{221} Resolution 1483, however, in its very next operative paragraph, calls upon all the concerned parties to comply fully with their obligations under international law, “in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”\textsuperscript{222} It is therefore unclear whether Resolution 1483 was intended to confer authority on the CPA beyond that available under the laws of occupation.\textsuperscript{223}

On a theoretical level, Professor David Scheffer has argued that the law of occupation appears to be particularly “unsuited” for the radical changes envisioned by both the United Nations Security Council and the CPA in Iraq.\textsuperscript{224} Indeed, as discussed in Part I.A. of this Note, the law of occupation is based on certain assumptions drawn directly from the experience of the late nineteenth century,\textsuperscript{225} including the key understanding that because war is a conflict solely between two sovereigns,\textsuperscript{226} any resulting occupation should be a temporary situation, without any transfer of sovereignty to the occupying power or even to a new regime in the occupied state.\textsuperscript{227} The Hague Regulations embody these assumptions and codify them into a set of specific restrictions and responsibilities for the occupying power.\textsuperscript{228} Most notably, Article 43 of the Hague Regulations imposes upon the occupying power the responsibility to “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.”\textsuperscript{229} The laws of the occupied state therefore cannot be changed, unless the occupier is “absolutely prevented” from doing so.\textsuperscript{230} Furthermore, the Hague Regulations appear to be the final

\textsuperscript{219} S.C. Res. 1483, supra note 8, at 2.
\textsuperscript{221} See, e.g., Coalition Provisional Authority, Order Number 24, CPA/ORD/13 August 2003/24, available at http://www.cpa-iraq.org/regulations/20030901_024_Min_of_Science_Technology_24AUG03.pdf. Practically all CPA orders and regulations signed by Ambassador Bremer include a paragraph in their preamble claiming legitimacy “[p]ursuant to my authority as Administrator of the Coalition Provisional Authority . . . and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolution 1483.” Id. (emphasis omitted).
\textsuperscript{222} S.C. Res. 1483, supra note 8, at 2.
\textsuperscript{223} See infra notes 273-81 and accompanying text.
\textsuperscript{224} Scheffer, supra note 208, at 853.
\textsuperscript{225} See supra notes 37-45 and accompanying text.
\textsuperscript{226} See supra notes 41-42 and accompanying text.
\textsuperscript{227} See supra note 43 and accompanying text.
\textsuperscript{228} Hague Regulations, supra note 12, 36 Stat. at 2277.
\textsuperscript{229} Id. art. 43, at 2306.
\textsuperscript{230} See supra note 94 and accompanying text.
word because the Fourth Geneva Convention of 1949 does not address the issue, but instead focuses on treatment of the civilian population. With respect to natural resources, including oil, the occupier must act solely as an administrator and usufructuary, and "must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

Scheffer has argued that these restrictions on the occupier, as well as the essentially humanitarian responsibilities imposed by the Fourth Geneva Convention, would not, in theory, allow the United States to pursue its stated goals in Iraq, especially when one considers the responsibility to respect the "laws in force in the country" unless "absolutely prevented." The radical transformation pursued by the CPA in Iraq, including the desire to allow the Iraqi people to determine their own future was "never contemplated" by the law of occupation because it assumed that the defeated sovereign would return following a temporary occupation. It therefore appears that, on the theoretical level, there is a large divergence in rationales between the law of occupation and the stated aims of the occupation of Iraq.

Furthermore, the cases of the Allied occupations of Germany and Japan following the Second World War, where the Allies did not apply the law of occupation and fundamentally changed local institutions, are of no guidance in Iraq for a number of reasons. Benvenisti argues that the debellatio doctrine invoked in justification of the German and Japanese occupations is no longer applicable following the Fourth Geneva Convention of 1949, because sovereign rights are no longer the exclusive domain of states. According to this argument, sovereign rights lie in a people as a whole, not a political elite, and the fact that the national army has been defeated cannot "divest" the rest of the population of this sovereignty. Scheffer concurs in this argument and also points out that it was the unconditional surrender of Germany that fortified the Allied argument, a situation that has not occurred in Iraq.

231. Geneva Convention, supra note 12, art. 47, 6 U.S.T. at 3548, 75 U.N.T.S. at 318; see also supra note 80 and accompanying text.
233. Scheffer, supra note 208, at 849.
234. See supra notes 69-78 and accompanying text.
235. Hague Regulations, supra note 12, art. 43, 36 Stat. at 2306.
236. Scheffer, supra note 208, at 849.
238. See supra notes 114-18 and accompanying text.
240. Id.
Beyond theoretical analyses of the rationales behind the law of occupation in general and the occupation of Iraq in particular, two issue-specific aspects of the occupation of Iraq are of particular interest. The first is the use of the rich Iraqi oil reserves, and the second is the stated goal of creating a democratic Iraq with a new constitution. The United States has consistently affirmed that Iraq's oil will be "protected and used for the benefit of the Iraqi people," and the CPA has stated as one of its central objectives that oil will be "dedicated to the well-being of the Iraqi people." Furthermore, United Nations Security Council Resolution 1483 provides for all proceeds from oil sales to be deposited into a "Development Fund for Iraq" until a representative Iraqi government is formed. The law of occupation with regard to the use of oil emanates from Article 55 of the Hague Regulations, which states that the occupier can act solely as an administrator and usufructuary of immovable state property. However, one critical question in Iraq, as Langenkamp and Zedalis have posed it, is whether the production of oil may be increased by the occupying power under Article 55 of the Hague Regulations. The leading case on Article 55 of the Hague Regulations suggests that a usufructuary cannot increase levels of production, and some commentators analyzing the Israeli exploitation of oil in Sinai have agreed with this conclusion. Langenkamp and Zedalis, however, take the opposite view, arguing that as long as the belligerent occupant does not damage the reservoirs wherein the oil is found and operates within the "band of reasonable production," Article 55 is not violated.

here looks at the various theories that were presented in favor of the Allies' conduct in Germany and Japan, and concludes that none apply to the situation in Iraq. Id. at 18-19.

242. Iraq's oil reserves have been estimated at approximately 112 billion barrels. International Petroleum Encyclopedia 99 (2002).

243. See supra notes 211-13 and accompanying text.

244. Letter to the President of the Security Council, supra note 17.


246. S.C. Res. 1483, supra note 8, at 6.

247. Hague Regulations, supra note 12, art. 55, 36 Stat. at 2309; see also supra notes 58-66 and accompanying text.


249. See Admin. of Waters & Forests v. Falk, 4 Ann. Dig. 563, 563 (Fr. Ct. of Cass. 1927) (holding that the cutting of state-owned trees in excess of the provisions of the Forest Code by an individual acting under a contract with the occupying military authority violated the rules of usufruct in Article 55 of the Hague Regulations).

250. Clagett & Johnson, supra note 109, at 574-76 ("[T]he extraction of state-owned oil from occupied territory by means of new wells constitutes an impermissible taking of the capital of property protected by Article 55 whether or not the oil taken is newly discovered.").

251. Langenkamp & Zedalis, supra note 109, at 429; see also Gerson, supra note 109, at 731 (arguing that exploitation is forbidden only when its practice is marked by "wanton dissipation" of the resources).
The most pertinent problem created by Article 55, however, is how oil resources may be used. Here, courts and scholars seem to agree that revenues must be used solely to provide for the expense of the occupation. The leading case involving seizure of oil resources (albeit privately owned) during the Second World War held that the exploitation of oil may not exceed the demands of the occupant, which has been defined as the military needs of the army of occupation. Stone has noted that the occupant's power over immovable state property "is measured not by his own needs, but by the duty to maintain the integrity of the corpus." Both the restriction on the levels of production and on the use of oil revenue could conflict with U.S. extraction of oil in Iraq, as Langenkamp and Zedalis note, although they argue for an expansive interpretation on both issues.

The stated goals of creating democratic institutions in Iraq and allowing the Iraqi people to determine their own political future create a second problematic issue from the perspective of the law of occupation. In addition to these general pronouncements, it appears that the CPA has been seriously and concretely pursuing the goal of establishing a new Constitution for Iraq, complete with a timetable for its writing and ratification. This is consistent with the requirements of Security Council Resolution 1483, which calls on the CPA to create conditions in which the Iraqi people can "freely determine their own political future." As noted by Sabel, however, the objective of changing the regime in Iraq is not sanctioned by the law of occupation, particularly the provisions of Article 43 of the Hague Regulations, which require compliance with the "laws in force in the

252. See supra notes 65-66 and accompanying text.
254. United States v. Flick, 6 Trials of War Criminals Before the Nuernberg Military Tribunals 1187, 1210 (1947).
255. Stone, supra note 64, at 714.
256. Langenkamp & Zedalis, supra note 109, at 434-35.
257. Id. at 429, 433.
258. See supra note 212 and accompanying text.
259. See supra note 213 and accompanying text.
260. Constitutional Development, at http://www.cpa-iraq.org/government/Nov-15-GC-CPA-Final_Agreement-post.htm (last visited Feb. 25, 2004). This document on the CPA website outlines a five-stage process for the future political institutional framework of Iraq, including the writing of the "Fundamental Law," agreements with the Coalition on security, the selection of a Transitional National Assembly, the restoration of Iraq's sovereignty, and a process for the adoption of a permanent constitution. Id. This seems to be in line with the public pronouncements of Ambassador Bremer. See, e.g., Bremer, supra note 203.
262. Sabel, supra note 119.
country" unless the occupier is "absolutely prevented" from doing so. 263

The most relevant precedent regarding the reform of the institutional frameworks of occupied countries is the division of Belgium into two separate administrative zones under German occupation during the First World War. 264 Both the Belgian courts 265 and international legal scholars 266 saw this division as a clear violation of the Hague Regulations. The reform of political institutions in Iraq may therefore be difficult to justify by the law of occupation, 267 although some commentators have argued that the concept of post-colonial self-determination which has emerged in international law following the Second World War may supply a justification for such changes. 268 This argument is based on provisions of Article 64 of the Fourth Geneva Convention of 1949, which appears to afford the occupying power a limited right to alter national laws 269 and which, according to Benvenisti, has superseded Article 43 of the Hague Regulations with regard to the "prescriptive powers" of the occupation administration. 270 Other scholars, 271 however, have rejected this view, relying instead on Article 154 of the Fourth Geneva Convention, which declares that the Convention is "supplementary

263. Hague Regulations, supra note 12, art. 43, 36 Stat. at 2306.
264. See Pirenne & Vauthier, supra note 85, at 85-105; Solansky, supra note 82, at 170-81.
265. Belgian courts after the war contested any German legislation as prohibited by the Hague Regulations. See supra notes 87-90 and accompanying text.
266. Benvenisti, supra note 16, at 44-46; Feilchenfeld, supra note 41, at 89; 2 Garner, supra note 85, at 79; Pirenne & Vauthier, supra note 85, at 94 ("[L]es réformes dépassaient de beaucoup les measures administratives conservatoires admises par la Convention de La Haye." ("These reforms far exceeded the conservative administrative measures authorized by the Hague Convention." (author's translation))).
267. Scheffer, supra note 208, at 844-45.
269. Geneva Convention, supra note 12, art. 64, 6 U.S.T. at 3558, 75 U.N.T.S. at 328.
270. Benvenisti, supra note 16, at 100, 103-04 n.176. But see Hans-Peter Gasser, Protection of the Civilian Population, in The Handbook of Humanitarian Law in Armed Conflicts 209, 246 (Dieter Fleck ed., 1995) ("Not only should the legal status of the territory remain unaltered by the occupying power, but its political institutions and public life in general should also be allowed to continue with as little disturbance as possible.").
to" the Hague Regulations,\textsuperscript{272} which remain in force.

The restrictions that the law of occupation may impose on the occupying forces in Iraq seem, however, to have been somewhat altered by Security Council Resolution 1483.\textsuperscript{273} Indeed, the Resolution calls explicitly for the application of both the Hague Regulations and the Geneva Conventions.\textsuperscript{274} At the same time, however, it demands that revenues from oil sales be deposited in a fund for the benefit of the future Iraqi government, and that the Iraqi people be allowed to determine their own future.\textsuperscript{275} It is unclear whether Security Council Resolution 1483 was meant to confer authority on the CPA beyond that available under the traditional laws of occupation,\textsuperscript{276} as the authority of a United Nations Security Council Resolution to interpret a previous treaty has not been precisely delineated.\textsuperscript{277}

There exists a significant legal debate about the rights of an occupier to implement either of the specific demands of the Resolution under the law of occupation,\textsuperscript{278} and disagreement among scholars has extended to the interpretation of Resolution 1483.\textsuperscript{279} Benvenisti sees Resolution 1483 as a much-needed "overhaul" of the law of occupation in the light of new circumstances,\textsuperscript{280} whereas Scheffer has argued that the aims of Resolution 1483 cannot be achieved by the law of occupation alone, however "liberally it may be construed,"\textsuperscript{281} because of the restrictions that the provisions of that law imposes on the occupier.

Regardless of the details of these academic debates, however, it seems relatively clear that the achievement of the aims of the current occupation of Iraq may be difficult to reconcile with the law of occupation as presently understood. The alternative model presented

\begin{itemize}
\item \textsuperscript{272} Geneva Convention, \textit{supra} note 12, art 154, 6 U.S.T. at 3620, 75 U.N.T.S. at 390.
\item \textsuperscript{273} S.C. Res. 1483, \textit{supra} note 8.
\item \textsuperscript{274} \textit{Id.} at 2.
\item \textsuperscript{275} \textit{Id.} at 2, 6.
\item \textsuperscript{277} \textit{See generally} Restatement (Third) of the Foreign Relations Law of the United States § 325(2) (1986) ("Any subsequent agreement between the parties regarding the interpretation of the agreement, and subsequent practice between the parties in the application of the agreement, are to be taken into account in its interpretation."); Michael C. Wood, \textit{The Interpretation of Security Council Resolutions}, 2 Max Planck Y.B. of U.N. L. 73, 88-95 (1998) (arguing for a case-by-case contextual interpretation of Security Council Resolutions and their interactions with other norms of international law, including treaties).
\item \textsuperscript{278} \textit{See supra} notes 224-72 and accompanying text.
\item \textsuperscript{279} \textit{Compare} Benvenisti, \textit{supra} note 209, at 21, \textit{with} Scheffer, \textit{supra} note 208, at 844-45.
\item \textsuperscript{280} Benvenisti, \textit{supra} note 209, at 21.
\item \textsuperscript{281} Scheffer, \textit{supra} note 208, at 844-45.
\end{itemize}
here, that of a system of United Nations governance, poses a different set of challenges in its implementation.

B. United Nations Governance

While the rationale behind the law of occupation may seem "unsuited" to the present situation in Iraq, the reasoning behind the deployment of U.N. civil administrations in Kosovo and East Timor represent an alternative regime, developed in recent years, with different implications when compared to the law of occupation. While the stated objectives of the CPA in Iraq can be broadly summarized as the construction of a new democratic Iraq respectful of the rule of law, the U.N. civil administrations in Kosovo and East Timor were attempting to achieve similar objectives, in addition to responding to grave humanitarian concerns. Security Council Resolution 1244, which established UNMIK, stated the goals of that administration as "overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo." Similarly, Security Council Resolution 1272 defined UNTAET's mission as providing security and an effective administration, as well as "[t]o support capacity-building for self-government." The objectives of UNMIK, UNTAET, and the CPA are broadly comparable. Therefore, assuming a United Nations procedure could be implemented, the precedents of Kosovo and East Timor may better allow for the fulfillment of CPA aims in Iraq, as opposed to the use of the law of occupation.

The legal procedure for the unprecedented United Nations governance of territory in Kosovo and East Timor was relatively clear. First, there was the threshold requirement that the Security Council was acting under its Chapter VII powers, following its finding of a "threat to the peace, breach of the peace or act of aggression" under Article 39 of the Charter. Once this threshold was achieved, the Security Council outlined its objectives for the territory to be administered in the resolution, and proceeded to facilitate the

282. Id. at 853.
283. See supra notes 211-18, 242-45 and accompanying text.
286. U.N. Charter ch. VII.
287. Id. art. 39.
288. Resolution 1244, in authorizing the creation of an international civil presence in Kosovo, states that the objectives of such a presence will be to "provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo." S.C. Res. 1244, supra note 29, at 3. Similarly, Resolution 1272 includes as the "elements" of the mandate of UNTAET "to provide security and maintain law and order throughout the territory of East Timor," as well as "to support capacity-building for self-government." S.C. Res. 1272, supra note 29, at 2-3.
attainment of these objectives by vesting all executive, legislative, and judiciary power for the territory in the Secretary-General’s Special Representative.  

Applying such a scenario to present-day Iraq, the Security Council would first analyze the situation under Article 39, and then outline its objectives in a resolution authorizing a civil presence, possibly in a framework of delegation of power to a number of United Nations members. The main inquiry of this Note, however, does not concern the objectives of the Security Council, but rather whether the mechanism of United Nations governance would serve the stated aims of the CPA in Iraq, particularly those pertaining to a transition to a self-governing democracy and to the use of local oil resources for the purpose of funding the reconstruction in a satisfactory manner.

As Professor Matthias Ruffert has recently noted, the U.N. Security Council interpretation has become more expansive regarding “acts of aggression” or “threats to the peace” under Article 39 of the Charter, extending beyond the traditional inter-state conflict to include internal threats to the peace. Although this is partly a political determination, it also flows from the broad discretion which the Security Council enjoys in making determinations regarding the existence of any “threat to the peace, breach of the peace, or an act of aggression.” This discretion has been particularly prominent in the interpretation of “threats to the peace,” which have included numerous situations, from the invasion of a neighboring state to post-conflict situations such as those which existed in Kosovo or East Timor. In Kosovo and East Timor, the existence of a “threat to the  

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290. See supra notes 142-43 and accompanying text.

291. See Coalition Provisional Authority Regulation Number 1, CPA/REG/16 May 2003/01 (stating the goals of the CPA to include restoring security, facilitating economic recovery and reconstruction, and allowing the Iraqi people to freely determine their future), available at http://www.cpa-iraq.org/regulations/REG1.pdf.

292. See Ruffert, supra note 30, at 617 “‘Peace’ in the sense of Chapter VII is thus far more than the absence of war between two or more States. It may be related to the security situation within States.”


294. See also 1 Charter Commentary, supra note 135, at 720-21.

295. See White, supra note 145, at 23-27.

296. 1 Charter Commentary, supra note 135, at 719.

297. See White, supra note 145, at 42-47 (describing the Security Council’s use of the “threat to the peace” language of Article 39 in situations including the Arab-Israeli conflict, Southern Rhodesia, South Africa and Cyprus).

298. The Security Council determined, with respect to Kosovo, that “the situation in the region continues to constitute a threat to international peace and security,” in Resolution 1244, which created UNMIK. S.C. Res. 1244, supra note 29, at 2. The
peace" was justified by arguing that the end of a military conflict does not remove the danger of the recurrence of hostilities. 299

This justification would seem particularly transferable to Iraq, where the official end of hostilities has not coincided with an actual end to violent activities. 300 It is therefore possible that a situation such as that currently occurring in Iraq could be categorized by the Security Council as a "threat to the peace," 301 triggering other Chapter VII powers to address the situation. That such a determination is unlikely at present does not detract from the possibility that, after a military conflict such as the one in Iraq, the United Nations, acting through the Security Council, could potentially step in to impose a post-conflict regime, much as it did following the NATO air strikes against Kosovo in 1999. 302

As noted in Part I.B., the finding by the Security Council of a "threat to the peace" can lead to a variety of measures by either the United Nations or some of its members under U.N. auspices. 303 This is particularly true under an expansive interpretation of the United Nations Charter Article 41, which allows the Security Council to employ measures "not involving the use of armed force." 304 This justification was used in both Kosovo and East Timor to impose a system of United Nations governance. 305 The powers that the administration in a regime of United Nations governance receives are extremely broad, as the regulations on the authority of both UNMIK and UNTAET make clear, since both place "[a]ll legislative and executive authority . . . including the administration of the judiciary," within the power of UNMIK and UNTAET. 306 This vast grant of

Security Council determined that the "continuing situation in East Timor constitutes a threat to peace and security" in Resolution 1272, which authorized the creation of UNTAET. S.C. Res. 1272, supra note 29, at 2.

299. 1 Charter Commentary, supra note 135, at 723.

300. See supra note 3 and accompanying text.

301. See Matheson, supra note 23, at 83 ("I believe that any situation—even if occurring within a singe state—that threatens the peace through such elements as cross-border violence, substantial refugee flows, serious regional instability, or appreciable harm to the nationals of another state could lawfully form the basis for a determination by the Council under Chapter VII.").

302. Id. at 78; Ruffert, supra note 30, at 619.


304. Id. art. 41.

305. 1 Charter Commentary, supra note 135, at 743-45.

306. The relevant sections read as follows: "All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General." UNMIK, Regulation on the Authority of the Interim Administration of Kosovo, UNMIK/REG/1999/1 (1999), available at http://www.unmikonline.org/regulations/1999/reg01-99.htm. "All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator. In exercising these functions the Transitional Administrator shall consult and cooperate closely with representatives of the East Timorese people." UNTAET,
power was merely a means to achieve the overall objectives of the missions of UNMIK and UNTAET, which were the stabilization of the area and the implementation of a system of democratic governance (and self-determination), as expressed in Security Council Resolutions 1244 and 1272. In addition to these vast grants of power, however, some important safeguards exist with respect to the operation of the U.N. All U.N. forces conducting operations under U.N. command and control are bound by international humanitarian law. Furthermore, the first regulation issued by both UNMIK and UNTAET proclaimed their observance of a series of international human rights conventions in the administration of Kosovo and East Timor. While a strong current of academic literature has criticized


307. See Beauvais, supra note 189, at 1111 (pointing out that the “strategic objective” of UNTAET was independent statehood for East Timor).

308. S.C. Res. 1244, supra note 29, at 3; S.C. Res. 1272, supra note 29, at 2-3; see also supra note 288.


310. The UNMIK regulation text on this point reads:

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.


In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:

The Universal Declaration on Human Rights of 10 December 1948;
The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols;
The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979;
The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;

UNTAET, Regulation on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, available at http://www.un.org/peace/etimor/untaetR/etreg1.htm. Criticism of the application of these provisions has emerged recently. Bongiorno, supra note 309 (arguing that the lack of formal structures for monitoring and accountability with regard to human rights obligations illustrates that UNTAET was not conceived as an entity with human rights
the records of UNMIK and UNTAET recently, these commentators have focused on the way in which those administrations actually worked, not on the legal right of the United Nations Administration to participate in the creation of these institutions. Given the broad powers provided both to UNMIK and to UNTAET by the Security Council acting under Chapter VII powers which are binding on all member states, the legislative and institution-building power of the U.N. administrations has not been seriously doubted.

Under the broad powers of previous U.N. civil administrations, the stated aims of the CPA in Iraq could well be achieved, as Scheffer has recently argued. Certainly, the transition to a self-governing democracy and the crafting of a new constitution for Iraq, two of the clearly stated aims of the CPA, would be within the powers of the Special Representative of the Secretary-General under a system of U.N. governance like that set up in Kosovo and East Timor. The experience of UNMIK and UNTAET attest to the vast legislative and institutional power held by the U.N. administration, for example in the reconstruction of judiciary systems in both Kosovo and East Timor after their complete collapse. Additionally, in both Kosovo and East Timor, the implementing Security Council Resolutions vested institution-building power in the hands of UNMIK and UNTAET. Such precedents would seem to allow a similar institution-building capacity in a situation such as the current

311. See, e.g., Jarat Chopra, Building State Failure in East Timor, 33 Dev. & Change 979 (2002) (arguing that UNTAET failed in East Timor because it did not decentralize its power while excluding the local population from the equation); Paulo Gorjão, The Legacy and Lessons of the United Nations Transitional Administration in East Timor, Contemp. Southeast Asia, Aug. 2002, at 313 (arguing that UNTAET was neither a complete success nor a complete failure and that the main problem affecting UNTAET in East Timor was a lack of efficiency coupled with problems of accountability).

312. See supra note 211 and accompanying text.

313. Matheson, supra note 23, at 85; Ruffert, supra note 30, at 622; 1 Charter Commentary, supra note 135, at 744.

314. See supra note 291 and accompanying text.

315. Scheffer, supra note 208, at 853.

316. See supra notes 211-13 and accompanying text.


occupation of Iraq, as Scheffer has argued.\textsuperscript{319} Similarly, with respect to another major objective of the CPA in Iraq, the use of oil resources for the "well-being of the Iraqi people,"\textsuperscript{320} the vesting of all executive and legislative powers in the United Nations authority would certainly seem to allow for such measures.

This Note therefore argues that a system of U.N. governance, such as those created in Kosovo and East Timor, appears to be well-suited to perform precisely the tasks of building democratic institutions and achieving economic reconstruction that the CPA has stated as its objectives in Iraq. Such a model would also be a more propitious framework for the achievement of such objectives than the more restrictive exigencies of the law of occupation.

III. TOWARDS A NEW APPROACH TO THE LAW OF POST-CONFLICT SOCIETIES

In contrast to the system of U.N. governance outlined in Part II.B., the law of belligerent occupation is clearly unsuited for the present situation in Iraq. Originally codified during the American Civil War, its notions of occupation following conventional warfare between two state sovereigns no longer satisfy the purpose of modern occupations.\textsuperscript{321} Since the Second World War, the law of occupation has been essentially dormant, mostly because occupying powers realized what significant restrictions the label of "occupier" would imply under the Hague Regulations and the Fourth Geneva Convention.\textsuperscript{322} When the occupier completely transformed the institutional, economic, and political makeup of the occupied country, such as in Germany and Japan after the Second World War, the law of occupation was abandoned by resorting to customary international law.\textsuperscript{323}

In addition to the general historical differences between the early twentieth century and the present occupation of Iraq, the law of occupation suffers from its own misuse. Indeed, while some commentators have argued for the introduction of concepts of self-determination into the law of occupation, this has never been achieved in practice during the past fifty years.\textsuperscript{324} While the law of occupation was created to ensure against massive transformations by the occupier, the current situation in Iraq is a perfect example of the irrelevance, more than the potential use, of the law of occupation.

The arguments between Benvenisti and Scheffer regarding the

\textsuperscript{319} Scheffer, \textit{supra} note 208, at 853.
\textsuperscript{320} Coalition Provisional Authority Regulation Number 2, CPA/REG/10 June 2003/02, at 1, \textit{available at} http://www.cpa-iraq.org/regulations/REG2.pdf.
\textsuperscript{321} See \textit{supra} notes 25, 34-45 and accompanying text.
\textsuperscript{322} See \textit{supra} notes 119-30 and accompanying text.
\textsuperscript{323} See \textit{supra} notes 112-18 and accompanying text.
\textsuperscript{324} See \textit{supra} notes 268-72 and accompanying text.
interpretation of Security Council Resolution 1483,\textsuperscript{325} and its influence on the law of occupation, indicate that a new direction has been created for the law of occupation in Iraq. While Benvenisti holds that the Resolution was an "overhaul" of the law of occupation,\textsuperscript{326} it seems that the resolution itself merely resuscitated the law of occupation without acknowledging its full implications. The resolution calls simultaneously for the respect of the Hague Regulations of 1907 and the Geneva Conventions of 1949, and also for the members of the United Nations "to assist the people of Iraq in their efforts to reform their institutions and rebuild their country."\textsuperscript{327} While certainly a desirable objective, it does not seem to be achievable through the restrictions imposed on the occupier by the laws of occupation. It would seem particularly hard to reform institutions, rebuild the country, and create a democracy if one is bound to respect the "laws in force in the country," as required by Article 43 of the Hague Regulations.\textsuperscript{328}

Although some scholars have argued that notions of self-determination and Article 64 of the Fourth Geneva Convention have altered the restrictions of Article 43 of the Hague Regulations,\textsuperscript{329} the text of the Fourth Geneva Convention does not seem to support this view. Indeed, as Article 154 of the Fourth Geneva Convention states, the Convention is "supplementary to" the Hague Regulations\textsuperscript{330} and the Convention's Article 64 does not address general legislation\textsuperscript{331} in the same way that Article 43 of the Hague Regulations does.\textsuperscript{332} Rather, it addresses certain justifications for a change in the penal law under an occupation.\textsuperscript{333} The Hague Regulations remain the fundamental text with regard to the powers and obligations of the occupying power, while the Fourth Geneva Convention is more concerned with the protection of the civilian population and other humanitarian provisions. Therefore, Article 43 of the Hague Regulations essentially prohibits the institutional reform pursued by the CPA in Iraq.

With respect to the use of oil resources in Iraq, while Resolution 1483 calls for the creation of a Development Fund wherein oil revenues should be deposited for a number of different purposes,
including the economic reconstruction of Iraq, the law of occupation imposes restrictions on the levels of production and the use of oil revenues that may well prove incompatible with the requirements of the Resolution.

Since Resolution 1483 seems to define the objectives of both the United Nations and the CPA in Iraq (the CPA has essentially adopted much of the language of the Resolution in its Regulations), it is even more surprising to have recourse to a body of law which has nothing to do with these objectives, and that in fact was specifically established to impede anything but a temporary transfer of de facto authority pending a return of the defeated sovereign. Benvenisti's arguments about the "overhaul" of the law of occupation would sound more persuasive had this law not been dormant across the world in the second half of the twentieth century. Rather, given the large and evident discrepancy in rationales between the law of occupation as codified and the situation in Iraq where important structural changes have been deemed necessary by both the United Nations and the CPA, a more analogous and recent legal mechanism could be used.

As noted in Part II.B. above, the model of U.N. governance was developed to deal with situations strikingly similar to the one in Iraq: territories in need, for different reasons, of a complete overhaul, both economically and politically. That was certainly the case for Kosovo and East Timor, and UNMIK and UNTAET were empowered to perform these tasks by the vesting in them of vast powers: legislative, executive, and judicial.

A potential political obstacle is introduced because of the threshold requirement that the United Nations Security Council find the existence of a "threat to the peace" under Article 39 in order to authorize the deployment of civil administration under Article 41 (or to delegate this responsibility under Article 48 to certain U.N. member states). Assuming that such a political obstacle is overcome, however, the model of United Nations governance established from the experiences of UNMIK and UNTAET seems a far more satisfactory way to achieve the stated aims of both the CPA and the United Nations (as stated in Security Council

334. See supra notes 242-46 and accompanying text.
335. See supra notes 247-57 and accompanying text.
336. See supra notes 220-21 and accompanying text.
337. See supra notes 41-45 and accompanying text.
338. See supra notes 119-30 and accompanying text.
339. See supra notes 224-41 and accompanying text.
340. See supra notes 211-23 and accompanying text.
341. See supra notes 282-85 and accompanying text.
342. See supra notes 180-200 and accompanying text.
343. See supra notes 286-91 and accompanying text.
344. See supra notes 211-13 and accompanying text.
Resolution 1483) in Iraq. The vesting of specific institution-building powers, in addition to all legislative, executive and judicial power, would allow a United Nations administration to proceed along the road to Iraqi self-government under a democratic constitution of their choosing, without any restrictions concerning the "laws [currently] in force" in the country.\textsuperscript{345} Similarly, with regard to oil resources, a U.N. governance model would replace the restrictions of the Hague Regulations\textsuperscript{346} with the simple mandates of a Security Council resolution. Furthermore, the one aim of the law of occupation that still holds some importance in the context of modern combat and occupations, the protection of civilian populations, would theoretically be covered by the human rights conventions and humanitarian law that binds United Nations personnel.\textsuperscript{347}

Outside these academic reflections, however, Security Council Resolution 1483 has created what can only be described as a hybrid between the objectives of a system of governance as it existed in Kosovo and East Timor (in the exhortation to "assist the people of Iraq in their efforts to reform their institutions and rebuild their country"),\textsuperscript{348} and the restrictions of the law of occupation. These objectives cannot be pursued within the framework of the law of occupation and therefore the law of occupation continues to be honored by its breach\textsuperscript{349} as the CPA pushes forward with its plans to transform Iraq. Security Council Resolution 1483, therefore, has not contributed to the resuscitation of the law of occupation, but instead should be seen as a starting point in a debate regarding the modern direction of legal frameworks for post-conflict societies where the law of occupation was once the only option.

What can the experience of Iraq, from the hoisting of the American flag in al-Fardos square to the invocation of the law of occupation, teach us for the future of the law of occupation, or for future occupations? First, the law of occupation was created for specific reasons that may well reoccur but that no longer characterize the common form of conflict and post-conflict realities.\textsuperscript{350} Nonetheless, the law of occupation is not relegated to irrelevance. It is still possible to imagine conflicts occurring within the traditional form envisioned by the framers of the Hague Regulations, that is, a conflict between two fully sovereign states where one state occupies the other immediately following the conflict. In such a situation, the law of occupation should apply, as it could ensure the sovereignty of the

\textsuperscript{345} Hague Regulations, supra note 12, art. 43, 36 Stat. at 2306; see also supra notes 260-72 and accompanying text.
\textsuperscript{346} See supra notes 57-66 and accompanying text.
\textsuperscript{347} See supra notes 309-10 and accompanying text.
\textsuperscript{348} S.C. Res. 1483, supra note 8, at 2.
\textsuperscript{349} See supra note 209.
\textsuperscript{350} See supra notes 121-32 and accompanying text.
defeated state and the protection of the 'defeated' population.  

Today, however, conflicts are rarely contests between sovereign governments and their military forces with civilians relegated to passive roles which necessitate protection. Therefore the law of occupation as currently understood should not apply to these conflicts.

Second, the law of occupation has not adapted to new situations, largely because it was ignored by occupants in the modern era of warfare. Benvenisti may argue that the Fourth Geneva Convention's recognition of the sovereignty of the people defeated the existence of any *debellatio* exception to the law of occupation, and that Security Council Resolution 1483 is a vindication of this position, but a vacuum of more than fifty years separates the two events, a period during which the law of occupation was largely forgotten. It is not an exception to the law of occupation that was vindicated by Security Council Resolution 1483, but rather the law of occupation as a whole was shown to be inadequate for the task at hand. The historians can celebrate as the practitioners mourn.

Third, while the experience of occupations may have outgrown the formalities of the law of occupation, with new realities come new legal frameworks. The existence of a United Nations governance model to replace the law of occupation is precisely such a framework. This model may not fit into the myriad categories of occupations that may occur during armed conflicts, and it depends not on the recognition by the occupier of its application, but on a determination that the model applies by the United Nations Security Council. Once this determination is made, however, the U.N. governance can be fine-tuned according to the stated goals of the mission, all the while respecting humanitarian law and major human rights conventions. While the introduction of decision making at the political level of the United Nations Security Council may seem to some to be a high price to pay to create such a framework for U.N. governance, such decision making provides greater legitimacy and allows for the creation of better legal tools to achieve such a mission.

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351. See supra notes 41-49 and accompanying text.
352. See supra notes 121-30 and accompanying text.
353. See supra notes 239-40 and accompanying text.
354. See supra notes 300-06 and accompanying text.
355. See supra notes 309-10 and accompanying text.