
Foreign Occupation and International Territorial Administration: The Challenges of Convergence

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Abstract

International organizations have increasingly joined states as occupiers of territory. Yet international law doctrine and policymakers have regarded occupation by states and administration by international organizations as distinct legal and political phenomena. The stigma associated with state occupation has translated into an assumption that the two operations are governed by different norms and their tactics for asserting control subject to different standards of legitimacy. This article rejects that dichotomy and the doctrinal parsing that comes with it. It emphasizes the common traits and challenges of these occupations and argues for a joint legal and political appraisal. From the legal perspective, the two sorts of missions operate under common legal frameworks; those managing both need to find the proper balance among international humanitarian law, international human rights law, local law, and any mandate from an international organization. As a political matter, each encounters resistance from those in the territory opposed to its presence, leading to coercive responses whose legitimacy will be questioned from within and outside the territory. The article concludes with some modest thoughts on how each sort of occupier might learn something from the other.

Occupation of foreign territory continues to have an ambiguous posture in international law. If it results from an illegal use of force, occupation is clearly unlawful;¹ yet international humanitarian law (IHL), including law developed since the United

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¹ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (hereinafter *Friendly Relations Declaration*), principle 1, para. 10, GA Res. 2625 (XXV), 24 Oct. 1970.

Nations Charter, both contemplates and regulates occupation, regardless of its underlying legality. States engaged in occupation face demands by international actors for withdrawal from the territory, decent treatment of its residents, or both. Even for governments convinced of the legality or the importance of their occupations, it remains an embarrassment of sorts. That discomfiture is particularly acute for a liberal democracy, where a government committed in principle to human rights, political participation, and the rule of law for its own people imposes a system on occupied peoples falling far short of these standards. The autocratic state occupying territory will, one assumes, experience fewer reservations about denying to the occupied population that which they deprive their own. Indeed, liberal democracies in Europe managed to reconcile these practices during the colonial era.

Over the last decade, a new set of occupiers has increasingly administered territory – international organizations. Although their operations are rarely termed occupations, international organizations have deployed significant civilian and military presences to undertake many of – in some senses, more than – the activities of occupying forces in terms of control and governance. These occupations vary in their level of intrusiveness, with direct territorial administration as the apogee of their power. Observers have pointed out the similarities between such administrations and old-fashioned colonialism, with Roland Paris perceptively referring to them as ‘an updated version of the *mission civilisatrice*’.² Whether such de facto UN conservatorship is wise policy or simply a dressed up version of colonialism remains a subject of great debate.³ If the expansion in the scope of territorial administration by international organizations over the last decade is any indication of governmental and popular attitudes, it would appear that the tar of colonialism is not sticking. Whether because of the delegitimization of racial superiority, the absence of an exploitative economic motive, or the commitment to self-determination by international organizations, territorial administrations have not lived up to the fears of those seeking colonial analogies.⁴ Indeed, some of the more successful operations – in Namibia, Cambodia, and East Timor – have been part of a process of decolonization or emergence from foreign occupation.

The analogy between administration by international organizations and occupations by states, however, retains much traction. Both missions can resemble each other in the eyes of those living in the occupied or administered territory and face many of the same challenges to acceptability, both within the territory and by actors outside it. Yet the word occupation remains threatening to international organizations for the same reason it does to democracies: just as liberal states cannot practise what they preach in occupied territories, so international organizations dedicated to a similar set of values – even though many members do not practise them at home – do

² Paris, ‘International Peacebuilding and the “Mission Civilisatrice”’, 28 *Rev Int’l Stud* (2002) 637, at 651.

³ Compare Helman and Ratner, ‘Saving Failed States’, 89 *Foreign Policy* (1992–1993) 3 and Fearon and Laitin, ‘Neotrusteeship and the Problem of Weak States’, 28 *Int’l Security* (2004) 5 with Gordon, ‘Saving Failed States: Sometimes a Neocolonialist Notion’, 12 *Am U J Int’l L & Policy* (1997) 903.

⁴ Paris, *supra* note 2, at 652–653.

not wish to be seen as sacrificing them when they govern territory. To avoid the stigma of being seen as occupiers, they have developed their own legal and political coping mechanism. They have, I believe, assumed that the approval of these missions by the organization's competent organs insulates them from the problems of occupiers and have refused to apply the term to these missions. International law doctrine, for its part, endorses this differentiation. It deploys the term occupation to cover, as Adam Roberts crystallized it, only operations involving '*the armed forces of a State* exercising some kind of domination or authority over inhabited territory' outside its borders.⁵

This sort of cognitive dissonance – the disconnect between the ways international law and organizations have conceptualized occupations and territorial administrations and the ways these missions are actually carried out – is no longer tenable. In fact, the two sorts of operations share a great deal, and lines separating them, adopted by international elites and reflected in international law, are disappearing. Although numerous works have examined state occupations *or* international administrations separately, my claim here is that only an understanding of them together will enable both lawyers and policy-makers to develop optimal doctrine and operating procedures – optimal in that they improve the functioning of these missions, in particular by mitigating the harms that arise when foreign forces control territory and exert significant power over its occupants.

I focus on what I regard as the two most critical areas of convergence: the legal frameworks governing the conduct of both types of missions and the legitimacy of coercion employed by them. The two issues are distinct but complementary insofar as the first is of particular interest to international lawyers, while the second is of a more political and operational nature. My approach to them is both analytic and normative – to show the shortcomings of various attempts to differentiate between the missions; and to suggest various ways in which governments, international organizations, and international law can coherently manage the common issues. At the same time, my goal is not to provide some detailed doctrinal solution to these issues. In particular, the question of the relationship of international human rights and humanitarian law to situations of occupation, addressed in Section 2 below, has proven enormously complex and the subject of numerous other legal works. My contribution to that effort is to show how any doctrinal approach, legal or political, must take account of the commonalities of these missions.

Before beginning, the reader should note that I will frequently deploy the word 'occupation' in a functional sense to describe control of territory by outside entities.⁶

⁵ Roberts, 'What is a Military Occupation?', 55 *BYBIL* (1984) 249, at 300 (emphasis added). To his credit, Roberts did include occupation by international organizations in his typology of occupations: *ibid.*, at 289–292.

⁶ Others have proposed a broad functional meaning that emphasizes the lack of consent of the sovereign. See, e.g., E. Benvenisti, *The International Law of Occupation* (1993), at 4; Vité, 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales', 853 *Int'l Rev Red Cross* (2004) 9, at 14. My definition is broad enough to cover situations where consent from the territorial sovereign was given (e.g., the Federal Republic of Yugoslavia for the missions in Kosovo), as well as where the state giving consent was not clearly the lawful sovereign (e.g., Indonesia for the missions in East Timor).

Though off-putting to some readers, it reflects my point that the divergence between the legal and functional meanings of occupation is not tolerable.

1 Distinguishing Two Forms of Occupation

At one level, occupations by states and by international organizations vary in significant respects. First, with respect to their *causes* and *legal bases*, states typically occupy territory during and after armed conflict between the would-be occupier and another state, usually the state whose land is occupied. The occupier may have used force in self-defence or even pursuant to UN authority, in which case its occupation is more likely, at least for a while, to be considered by key elites as an appropriate response to aggression; or it may have used force aggressively, in which case the occupation itself will typically be regarded as illegal. Either way, occupation by states is essentially non-consensual.⁷ International organizations, on the other hand, occupy and administer territory pursuant to resolutions of their organs, such as the UN Security Council. Most such recent occupations have been authorized under Chapter VII of the UN Charter – Bosnia (by NATO – IFOR and then SFOR – and UNMIBH),⁸ Kosovo (by NATO and UNMIK) and East Timor (by UNTAET) – though the EU’s administration of Mostar followed from a decision of the EU Council under its Common Foreign and Security Policy.⁹ Other, somewhat less intrusive, administrations have followed Council resolutions under Chapter VI, e.g., Cambodia (by UNTAC) and El Salvador (by ONUSAL). Though scholars have examined whether the Council has the power to establish the most intrusive forms, the practice of the UN and its members leaves little doubt as to its legality.¹⁰

Even when international organizations have entered a territory under Chapter VII, they have first obtained the consent of the nominal government, although, as Simon Chesterman importantly notes, they often lack the consent of the population or at least key power centres within it.¹¹ That consent can come about through a political settlement, whether a provisional one like a ceasefire (Kosovo or Northern Iraq) or a permanent peace accord (Bosnia or Cambodia); or it can be given while the conflict still rages (Somalia or East Timor).¹² Either way, this consent differs from the non-consensual basis for occupation by states.

⁷ For a differentiation among 15 types of occupation, 13 of them by states, see Roberts, *supra* note 5, at 260–293.

⁸ Chief responsibility for civilian administration rests with the High Representative, whose mandate was established in the 1995 Bosnia peace agreement and has since been elaborated by the 55-state Peace Implementation Council. Other international organizations such as the OSCE and EU are also involved. See generally www.ohr.int.

⁹ Bull. EU, 1994/6, at 84.

¹⁰ See, e.g., Bothe and Marauhn, ‘UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration’, in C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (2002), at 217, 230–235.

¹¹ See S. Chesterman, *You, the People: The United Nations, Territorial Administration, and State-Building* (2004), at 152, 239.

¹² See, e.g., SC Res. 1244 (1999), preambular para. 9 (‘welcoming . . . the acceptance by the Federal Republic of Yugoslavia’ of the Kosovo interim administration plan); SC Res. 1264 (1999), preambular para. 10 (‘[w]elcoming the statement by the President of Indonesia . . . in which he expressed the readiness

Second, the scenarios for the *termination* of an occupation can differ, though some overlap emerges. International organizations have pursued three models to date. (1) The occupied territory is reintegrated or integrated into a state, typically after the resolution of a dispute between two states over its future. Historical precedents include the Saar's return to Germany in 1935 following a League of Nations administration and plebiscite, Irian Jaya's integration into Indonesia in 1963 following UN administration, Eastern Slavonia's reintegration into Serbia in 1997–1998 following UN administration, and Mostar's reintegration into Bosnia following EU administration in the 1990s.¹³ With the exception of Irian Jaya, all the territories reverted to the state recognized as the lawful sovereign prior to the occupation. (2) The occupied territory becomes a new state or something close to it; examples are Danzig between the World Wars, East Timor since 2002, perhaps one day Western Sahara, and the aborted post-World War II plans for an internationalized Trieste and Jerusalem. The Kosovo mission could end in either of these two scenarios. (3) The territory, which remains an independent state during the occupation, is eventually governed by its own leaders, typically following elections. This has been the pattern with second-generation peacekeeping missions, and it remains the UN's goal with respect to Bosnia.

As for states, they can follow model (1) above, as Israel withdrew from the Sinai under the 1979 Egypt-Israel peace treaty and Libya from northern Chad following the 1994 ruling of the International Court of Justice (ICJ) on the Aouzou strip.¹⁴ They can implement model (2) above, as India's invasion of East Pakistan ended in the creation of a new state and, in the view of Turkey, so did its occupation of northern Cyprus. They can also carry out a variant of (3) in allowing restoration of control by the domestic government, but this form of termination has not uniformly been accompanied by elections, or even by full withdrawal of the occupier's military, as has happened with the end of UN missions. Thus, the Allies ended the occupation of Germany and Japan after World War II (while keeping troops there), the Soviet Union withdrew from Afghanistan in 1989, and Vietnam from Cambodia in 1989. In the eyes of the Security Council and the United States government, occupation has already terminated in Afghanistan and Iraq.¹⁵

of Indonesia to accept' UNTAET). The EU's mission that governed Mostar was set up under a 1994 agreement between the members of the EU and WEU, on the one hand, and the government of Bosnia and various related entities, on the other, more than a year before the General Framework Agreement terminating the war in Bosnia: Memorandum of Understanding on European Union Administration of Mostar, 5 July 1994 (on file with the author).

¹³ See generally Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', 95 *AJIL* (2001) 583; R. Caplan, *A New Trusteeship? The International Administration of War-torn Territories*, Adelphi Paper No. 341 (2002).

¹⁴ *Case Concerning the Territorial Dispute (Libya/Chad)*[1994] ICJ Rep 6.

¹⁵ See Press Statement by Security Council President on Handover of Sovereignty to Iraq, 28 June 2004, Press Release No. SC 8136 (Council members 'welcome the handover of full responsibility and authority for governing Iraq to the fully sovereign and independent Interim Government of Iraq, thus ending the occupation. . . .').

States have also terminated occupations according to a fourth model, one not capable of implementation by international organizations: integration into the territory of the occupier. After World War II, the Soviet Union annexed some occupied territories in Eastern Europe and Japan. Absorption remains the goal of many in India regarding Kashmir and the de facto policy of the Moroccan government regarding Western Sahara; it also describes Israel's policy toward East Jerusalem and, in the hopes of some Israelis, most of the West Bank.

Third, the mandates for *governance* differ between the two sets of occupiers. When states occupy foreign territory, the occupier is supposed to operate under the international law regarding occupation, in particular the Fourth Geneva Convention and the regulations under Hague Convention IV of 1907. Modern occupation law operates within the framework of the fundamental principle of the illegality of acquisition of territory by force.¹⁶ Under this framework, the watchword is maintenance of the legal status quo while protecting the basic welfare of the population, pending a final disposition of the territory, typically a withdrawal from it. Occupation is meant to be temporary and minimalist in terms of its impact on the population.¹⁷ This prophylactic concept aims to protect the population from exploitation by the occupier, and in particular from acts that might lead to the integration of the territory into the occupier's state. At the same time, occupiers have tried to alter the status quo and evade applying the Hague and Geneva Conventions.¹⁸ One way to attempt a clean slate was through the installation of civilian puppet regimes, as was done by Turkey in Northern Cyprus, the Soviet Union in Afghanistan, and Vietnam in Cambodia.

In the case of occupation by international organizations, the competent organ of the organization, following negotiations among the domestic and foreign parties, sets forth whatever mandate to which they and the UN have agreed. For East Timor or Namibia, the Council's mandate was to foster the transition to independence; for Irian Jaya and Eastern Slavonia, the General Assembly and the Council, respectively, set up mandates foreseeing eventual integration into the territory of one of the parties; and for Bosnia, it is to assist in fostering a unified state out of the Federation of Bosnia-Herzegovina and the Republika Srpska. In these cases, the goal of the missions was to prepare and ease the transition to those endpoints, not to maintain the status quo. Even in the case of Kosovo, whose final status is undetermined, NATO and UNMIK are undertaking significant efforts to alter the pre-March 1999 situation (when it was no longer an autonomous province within Serbia). In a word, for international organization missions, the status quo is a problem to be overcome, not a situation to maintain.

¹⁶ *Friendly Relations Declaration*, *supra* note 1, principle 1, para. 10; see also Gasser, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), at 209, 242.

¹⁷ See, e.g., Geneva Convention IV, Arts. 49, 53, 54, 64, 67; Hague Convention IV Regulations, Arts. 42–56; see also Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', 84 *AJIL* (1990) 44.

¹⁸ See Benvenisti, *supra* note 6, at 91–98; Roberts, *supra* note 5, at 267–271.

These contrasting mandates map onto differing entities running the operations. For state occupations, the military is in charge on the ground. For international organizations, the competent organ appoints a civilian administrator, a Special Representative of the Secretary-General (SRSG) in the case of the UN Secretary-General (under authority of the Security Council), or the High Representative in the case of the Peace Implementation Council set up after the Bosnia peace agreement.¹⁹ He or she heads the mission and works through civil administration components to govern or assist in governing the territory. The military is relegated to keeping the territory secure, but is not charged with governance.²⁰

The status quo/transition dichotomy does not, however, correspond to an obvious distinction between the intrusiveness of the operations into the lives of the populace. Indeed, judging from the occupations by Israel and the United States, military occupiers seem more likely to disrupt everyday life than international organization occupiers despite the *prima facie* limitations on their lawful authority to do so. The average Palestinian has experienced a greater negative interference in his life from the Israeli military than has the average resident of Kosovo, Eastern Slavonia, or Mostar from the UN or EU administrators.

Lastly, the structures for *oversight* differ between the two forms of occupation. When democracies occupy territory, the occupying forces are supposed to be accountable to the state's domestic institutions, whether senior executive leaders, the legislature, the courts if they deem the legal issues justiciable, and eventually the population as a whole. (Non-democratic occupiers do not face this form of internal accountability, although the Soviet experience in Afghanistan shows how deaths of soldiers during the occupation can create pressures to terminate the operation.) The structures for accountability at the international level are, however, much less formal. The International Committee of the Red Cross (ICRC), international organizations, or NGOs can shed light on the practices of the occupation (in the case of the ICRC, a very confidential light), and each has ways to exert pressure on the occupier whose policies it opposes; but only the Security Council, or conceivably the ICJ, can issue a binding directive to an occupying state.

When the UN occupies territory, military contingents within the mission are accountable domestically. Thus, abuses by Canadian peacekeepers led to investigations at home, and the Netherlands spent many months evaluating the conduct of its peacekeepers at Srebrenica.²¹ Moreover, governments donating troops have demanded changes in the missions and have even withdrawn their troops. UN missions are subject to clearer lines of accountability at the international level than are state occupiers, as military and civilian personnel are in principle accountable to

¹⁹ See General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 10, Art. 1. In practice, the Security Council has endorsed the PIC's choice of High Representative. See, e.g., SC Res. 1396 (2002), para. 1.

²⁰ See S. R. Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War* (1995), at 41–50.

²¹ See, e.g., Netherlands Institute for War Documentation, *Srebrenica: a 'safe' area*, available at www.srebrenica.nl/en/a_index.htm.

the Secretary-General and the Security Council.²² But, as discussed further below, Member States may wash their hands of the situation, turning formal accountability into practical non-involvement. NGOs may conduct investigations of the activities of international organization forces and civilians in administered territories, but there seems to be less oversight of such operations than of state occupations. (The ICRC, for its part, has repeatedly visited detainees held by multinational peace operations.²³)

2 The Convergence of Legal Frameworks

State and international organization occupations thus differ in key respects. Indeed, from the perspective of the international lawyer appraising the powers of and constraints upon these operations, the distinctive paradigms of governance – status quo under the law of occupation vs. transformation under the mandate from a competent organ – seem particularly important and worth preserving.²⁴ Yet in two respects, the legal frameworks governing these two types of operations have witnessed significant convergence. As a result, it becomes more difficult to see them as governed by separate sets of norms.

A The International Law Framework: The Human Rights/ Humanitarian Law Divide

Governments and international organizations have tended to see international humanitarian law (IHL), and the Hague Regulations and Fourth Geneva Convention in particular, as offering a nearly comprehensive regime for state occupations; whereas for international organization operations, they view international human rights law as the core set of governance norms beyond the textual mandate of the operation – which itself will typically refer to the need for the parties to respect human rights. This vision of two governing regimes stems in part from the third distinction noted above; that is, IHL should govern state occupations because it is minimalist, while human rights law should govern international organizations missions because it is ambitious.

Yet in my view this dichotomy principally results from the different sorts of bureaucracies placed in charge of each type of mission. For state occupiers, because the military controls the operation, it seems natural to them, and their lawyers in particular, to work under the framework of – if not always comply with – the laws of war. Thus, for example, US officials have repeatedly defended (or occasionally admitted failures in) their conduct in Iraq with reference principally to occupation law.²⁵ US

²² Ratner, *supra* note 20, at 56–71.

²³ Aeschlimann, 'Overview of Protection Issues in Contexts of Multinational Peace Operations', in A. Faite and J.L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations* (2004), at 23, also available at [www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5UPD5E/\\$File/Report_Multinat_Peace_Ops_TOGO.pdf](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5UPD5E/$File/Report_Multinat_Peace_Ops_TOGO.pdf).

²⁴ See, e.g., Scheffer, 'Beyond Occupation Law', 97 *AJIL* (2003) 842, at 851, 859 ('occupation law should be returned to the box from which it came'); Fox, 'The Occupation of Iraq', 36 *Geo J Int'l L* (2005) 195 at 262–269.

²⁵ See, e.g., G. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, at 11–15, available at www4.army.mil/ocpa/reports/ar15-6/AR15-6.pdf.

Secretary of State Powell's letter to the Security Council describing the arrangements between the United States and Iraq concerning the presence of US forces after 30 June 2004, states that the forces 'are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions,'²⁶ making no reference to human rights obligations. The Council itself endorsed the centrality of IHL to the occupation of Iraq immediately after the conquest of Iraq, in Resolution 1483 of 22 May 2003.²⁷ The Israeli Supreme Court's key decisions on the occupied territory have been guided by IHL – whether the Hague Regulations or, more recently, the Geneva Conventions.²⁸

On the other hand, civilians supervise international territorial administrations. Their greater familiarity with human rights law as well as, I believe, their aversion to seeing themselves as occupiers leads to a clear preference for invoking human rights law. Thus, UNMIK's first regulation states that '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. . . .'²⁹ The absence of any reference to IHL might be justified on the ground that only KFOR (and not UNMIK itself) has any military units. Yet several months later, UNTAET, which included its own military component, issued a similar regulation, citing seven major human rights instruments, but including no reference to IHL.³⁰ This pattern follows that of other multidimensional peacekeeping operations, which seem to have left matters of IHL to individual military contingents and have seen themselves principally operating according to human rights norms. Such missions have set up human rights components, though their mandates have focused on ensuring observation of human rights by local actors rather than by their own personnel.³¹

At the policy-making levels, for many years the United Nations, its Member States, and its lawyers clung to the distinction between occupation, on the one hand, and UN peacekeeping or peace enforcement, on the other. As David Scheffer has recently pointed out, none of the Security Council resolutions creating key UN peacekeeping missions, including those with sizeable military components, makes reference to the law of occupation.³² At best, the UN conceded in various regulations and status of forces agreements with host countries that its forces were bound by the 'principles

²⁶ SC Res. 1546 (2004), Annex.

²⁷ SC Res. 1483 (2003), para. 5. The Council did direct the Special Representative to assist in promotion of human rights, *ibid.*, para. 8(g). Though governments have tended to emphasize the applicability of international humanitarian law alone, UN bodies have proved highly inconsistent in their practice, Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005) 119, at 120–121.

²⁸ See *Beit Sourik Village Council v Government of Israel*, HCJ 2056/04, 43 *ILM* (2004) 1099. As David Kretzmer has pointed out to me, the key UN human rights covenants did not enter into force until nearly 9 years into the Israeli occupation, which could account for the reliance on IHL as well.

²⁹ UNMIK Regulation 1991/1, 25 July 1999, available at www.unmikonline.org.

³⁰ UNTAET Regulation No. 1999/1, 27 Nov. 1999, para. 2, available at www.un.org/peace/etimor/UntaetN.htm.

³¹ See, e.g., Agreement on a Comprehensive Settlement of the Cambodia Conflict, Annex 1, Section E, 1663 *UNTS* 56, 75.

³² Scheffer, *supra* note 24, at 852 and note 48.

and spirit' of IHL.³³ This position has a remarkable parallel to the Israeli government's traditional approach to the Fourth Geneva Convention with respect to the occupied territories, and, more recently, the refusal of the US government to apply the Geneva Conventions to certain aspects of the conflict in Afghanistan.³⁴

Yet both international law and the realities of such operations undermine claims to distinguish the two forms of occupation based on this ground. First, and most obvious, the state occupying territory cannot evade the framework of international human rights law. There is no longer any doubt that human rights law applies during occupations. As the International Court of Justice confirmed in the *Nuclear Weapons Case*, IHL does not operate to the exclusion of human rights law in situations where the former applies.³⁵ The ICJ's opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, despite its other flaws in analysis, reiterates the continued applicability of human rights law, including, for example, its conclusion that the wall violated the liberty of movement guaranteed under the International Covenant on Civil and Political Rights (ICCPR).³⁶ Michael Dennis has recently noted important inconsistencies between this doctrine, on the one hand, and both the negotiating record of and state practice under the ICCPR, on the other; but it seems that key authoritative interpreters of the ICCPR now accept, at a minimum, that IHL does not simply displace international human rights law in situations of occupation.³⁷

More importantly, those affected by an occupation within the territory, within the occupying state, and outside them, will make claims against the occupier based on human rights law. These include demands regarding freedom of speech and assembly, respect for the privacy of the home, due process of law, and, of course, self-government. They will not limit themselves to obtaining only the protections granted to occupied populations in the Hague Regulations and Fourth Geneva Convention. NGOs realized this quite a while ago; Amnesty International's statements of concern regarding US actions in Iraq have, for instance, invoked both international humanitarian law and human rights law.³⁸ As a result, states engaged in occupations must both understand human rights law and be prepared to implement it.

³³ Szasz, 'UN Forces and International Humanitarian Law', in M. Schmitt (ed.), *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday* (2000), at 507; see also Tittmore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations', 33 *Stanford J Int'l L* (1997) 61, at 83–92.

³⁴ See, e.g., *Fact Sheet, Status of Detainees at Guantanamo Bay*, available at www.whitehouse.gov/news/releases/2002/02/20020207-13.html.

³⁵ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 66, at para. 25. See also Kretzmer, 'Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 *EJIL* (2005) 171.

³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep., at paras. 105–113, 127–134.

³⁷ Dennis, *supra* note 27.

³⁸ See, e.g., Amnesty International, *Iraq: Human Rights Protection and Promotion Vital in the Transitional Period*, 28 June 2004, AI Doc. No. MDE 14/030/2004.

Second, and less obviously, international organizations engaged in the occupation and administration of territory can no longer relegate IHL to an afterthought. As a doctrinal matter, UN forces – either Blue Helmets or ‘coalitions of the willing’ – must follow IHL, as has been considered in a number of careful scholarly studies. The status of that law *vis-à-vis* the overall mandate set by the Security Council may be up for some debate (e.g., whether the Council has the power to override certain aspects of IHL), but the basic applicability of the law of war to UN forces remains clear.³⁹ More importantly, the scope of UN missions in the last decade has made the integration of IHL into peacekeeping imperative. In the 1990s, forces under UN command became increasingly involved in combat operations; in dealing with insurgents opposed to the UN presence, military components needed to use force, and human rights law, premised generally on a stable domestic order, typically lacks legal criteria for decision-making. The principles of distinction and proportionality, for example, are norms of humanitarian law, not human rights law (which after all bans extrajudicial killing).⁴⁰ The UN has needed to take advantage of the prerogatives that IHL gives an occupier rather than simply pretend that armed conflict is over.⁴¹

Indeed, the UN itself has recognized the need for a shift in its thinking. Under prodding from the ICRC, Secretary-General Annan promulgated in August 1999 a bulletin entitled *Observance by United Nations forces of international humanitarian law*.⁴² Though the document avoids stating that UN forces are directly bound by the Geneva Conventions, it turns the earlier ‘principles and spirit’ formula into a statement that the ‘principles and rules’ of IHL apply to UN forces. It then elaborates rules for UN forces that restate the core norms of IHL found in the Geneva Conventions and Protocols. These include protection of the civilian population, limitations on means and methods of combat, and treatment of persons *hors de combat*.

Yet the effect of this directive remains unclear and will turn on whether the Secretary-General seeks to enforce it through oversight of UN forces or leaves it up to states donating troops. The Department of Peacekeeping Operations’s 2004 *Handbook on UN Multidimensional Peacekeeping Operations* contains only the briefest examination of IHL in discussing the military components of peacekeeping, while devoting an entire chapter to human rights issues; the 2000 Brahimi Report at least notes the need for

³⁹ See, e.g., R. Kolb, *Droit humanitaire et opérations de paix internationales* (2002); M. J. Kelley, *Restoring and Maintaining Order in Complex Peace Operations* (1999), at 145–181; Greenwood, ‘International Humanitarian Law and United Nations Military Operations’, 1 *YB Int’l Human L* (1998) 3. For studies of specific missions see, e.g., Irmscher, ‘The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation’, 44 *German YB Int’l L* (2001) 353, at 374–395; Cerone, ‘Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo’, 12 *EJIL* (2001) 469. For a view that IHL should be applied *de facto* but not *de jure*, a distinction I find somewhat baffling, see Vité, *supra* note 6. Most earlier studies of UN multi-dimensional peacekeeping, including my own, neglected the relevance of international humanitarian law.

⁴⁰ For more on this issue see Doswald-Beck and Vité, ‘International Humanitarian Law and Human Rights Law’, 293 *Int’l Rev Red Cross* (1993) 94.

⁴¹ Though human rights critics of the UN operations are certainly prepared to assume the conflict is over and that derogations from the ICCPR are not permitted. See, e.g., *infra* notes 84–88.

⁴² 6 Aug. 1999, UN Doc. ST/SGB/1999/13.

further study of the issue.⁴³ Equally significant, the 1999 directive does not cover forces that do not operate under UN command and control, but are only delegated authority by the Security Council – e.g., NATO in Kosovo (KFOR) and Afghanistan (ISAF), or Australia in the early phases of the East Timor mission (INTERFET).⁴⁴

B *The Domestic Legal Framework: The Status of Prior Law*

A second area of convergence between occupations and international territorial administrations concerns the extent to which an occupied territory's extant domestic law should remain in place. The Hague Regulations require the occupier to 'restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country', while under the Fourth Geneva Convention, the penal laws are to remain in force, subject to a rather broad exception (if the laws are a threat to the occupier's security or an obstacle to implementing the Convention), and non-penal laws can be changed in order to enable the occupier to fulfil its Convention obligations, maintain orderly government, and ensure its security.⁴⁵ While the two treaties create general presumptions in favour of the status quo, the texts can easily be read to provide the occupier with discretion to modify certain (especially non-penal) laws.⁴⁶

In practice, in the West Bank, the pre-1967 Jordanian law has been supplemented by security enactments promulgated by Israeli officials; Israel has also applied much Israeli law to the territories.⁴⁷ The United States government, for its part, faced the same issue after its conquest of Iraq. Within weeks of the start of the occupation of Iraq, the Coalition Provisional Authority repealed parts of the Iraqi penal code.⁴⁸ In July 2003, it suspended the Saddam-era law on free assembly and free expression as inconsistent with human rights.⁴⁹ Some scholars claimed these alterations to the legal status quo were scarcely consistent with IHL.⁵⁰ But as Eyal Benvenisti has noted, this practice has significant precedent in the Allies' approach to fascist-era laws after they occupied Italy – which was also at odds with the conservative reading by some scholars of the Hague Regulations.⁵¹

As UN peace operations have become increasingly intrusive, culminating in administration for Kosovo and East Timor, they have had to make critical determinations

⁴³ UN Department of Peacekeeping Operations, Peacekeeping Best Practices Unit, *Handbook on UN Multidimensional Peacekeeping Operations* (2003), at 58, 101–112; *Report of the Panel on United Nations Peace Operations* (hereinafter *Brahimi Report*), 21 Aug. 2000, paras. 6(e), 41, 58, 81, UN Doc. A/55/305-S/2000/809.

⁴⁴ For the Australian position that IHL applies to occupation by UN-mandated forces, see Kelly, McCormack, Muggleton, and Oswald, 'Legal Aspects of Australia's Involvement in the International Force for East Timor', 841 *Int'l Rev Red Cross* (2001) 101.

⁴⁵ Hague Convention IV Regulations, Art. 43; Geneva Convention IV, Art. 64.

⁴⁶ See Vité, *supra* note 6, at 14–19.

⁴⁷ See generally Benvenisti, *supra* note 6, at 123–144.

⁴⁸ CPA Order No. 7, 10 June 2003, available at www.cpa-iraq.org.

⁴⁹ CPA Order No. 19, 10 July 2003, available at www.cpa-iraq.org.

⁵⁰ See Scheffer, *supra* note 24, at 854–856; Fox, *supra* note 24, at 240–245.

⁵¹ Benvenisti, *supra* note 6, at 84–86.

regarding the status of extant law. Operations from UNTAG in Namibia through UNMIK have promulgated regulations that override or supplant existing law. In Cambodia, for instance, the status of the criminal code was so uncertain that the staff of the SRSG drafted a new law enacted by the Supreme National Council, Cambodia's *de jure* governing body.⁵² In Somalia, the SRSG brought back into force Somalia's 1962 Penal Code.⁵³ With full territorial administration in Kosovo and East Timor, and the importance of distancing the UN regime from that of the prior rulers, the UN has become quite proficient at suspending existing laws and enacting new ones. In Kosovo, this has meant abrogation of numerous pre-1999 discriminatory laws and promulgation of complex regulations in the areas of criminal law and procedure, media regulation, and the private economy.⁵⁴ The SRSG in East Timor enacted a lengthy set of transitional rules of criminal procedure in September 2000.⁵⁵ These determinations have overlapped with decisions regarding the first issue above, namely the applicability of human rights and humanitarian law.⁵⁶

Thus, states and international organizations have changed the status quo significantly and have justified it as necessary to carry out their duties as occupier. As discussed below, I do not suggest that all these actions have equal legal validity; some might well be illegal under IHL because the occupier is ignoring or misinterpreting the Hague or Geneva law. But what is most significant is that both states and international organizations have been making those interpretations in the same direction – in favour of the permissibility of significant changes to existing law. In effect, the occupier's justifications for changing laws under the Hague Regulations and Fourth Geneva Convention, i.e., to fulfil its obligations to the population under those treaties, resemble those of the UN mission, i.e., to carry out its mandate from the Security Council.⁵⁷

C *The Limits of Normative Convergence*

The foregoing discussion shows that four bodies of law potentially apply in the two types of occupation: international humanitarian law, international human rights law, local law, and the mandate from or decisions by an international organization, which by implication would include the constitutive law of that organization.⁵⁸ (The fourth applies to state occupations to the extent that a competent organ of an

⁵² Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, 10 Sept. 1992, available at www.cdpcambodia.org/untac/asp.

⁵³ See Chesterman, *supra* note 11, at 85–86.

⁵⁴ See, e.g., UNMIK Regulations 1999/10, 13 Oct. 1999 (repealing discriminatory housing laws); 1999/24, 12 Dec. 1999 (setting 22 Mar. 1989 as date after which all local laws are presumptively invalid), both available at www.unmikonline.org; Irmscher, *supra* note 39, at 357–362, 392–394.

⁵⁵ UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, 25 Sept. 2000, available at www.un.org/peace/etimor/UntaetN.htm.

⁵⁶ The Brahimi report devoted one section to this important issue. See *Brahimi Report*, *supra* note 43, paras. 79–82.

⁵⁷ See, e.g., SC Res. 1272 (1999), para. 4 (authorizing UNTAET 'to take all necessary measures to fulfill its mandate').

⁵⁸ I exclude the domestic law of the occupying state or contributor to the international mission.

international organization, e.g., the Security Council, makes decisions relevant to the occupation, as was at least attempted in the Council's resolutions on Iraq since 2003.⁵⁹) But to say that a body of law 'applies' masks numerous interpretive questions for occupiers and their lawyers regarding the interrelationship among those norms. Chief among these is which should control in the event that there is a conflict between them – when one source of law requires action A alone and another requires action B alone.⁶⁰ One obvious case is in the detention of civilians, where IHL and human rights law give significantly different prerogatives to governing authorities.⁶¹ Another concerns the permissibility of changing local law, where a Security Council mandate of a UN force (or a resolution requiring certain conduct by state occupiers) and IHL point in different directions. If we argued that the occupier can comply with both the Council's authorization for change in the status quo and the limitations on such change under IHL only by changing local law up to the point permitted by IHL, then the practice of the UN in Kosovo and East Timor, or of the High Representative in Bosnia, would in many ways conflict with IHL.⁶²

The search for a suitable approach, let alone a legal doctrine, to the relative priority of these areas of law for occupying forces remains a formidable task for international organizations, governments, and their lawyers. Some have suggested the need for a major adjustment in the law. Adam Roberts wrote 15 years ago about the shortcomings of IHL as applied to long-term occupations such as those in the West Bank.⁶³ More recently, in light of the Iraq experience, he and others have noted the limits of occupation law to so-called 'transformative occupations', where the occupier does not seek to return control to the prior government but is engaged in creating a new regime. Scheffer has gone so far as to suggest a new category of law for occupations following the removal of atrocious regimes preferably, though not necessarily, pursuant to Security Council authorization.⁶⁴ But the values that IHL upholds in terms of the illegitimacy of territorial acquisition by force suggest that simply displacing it in favour of a new regime would probably do more harm than good. Others have

⁵⁹ See, e.g., SC Res. 1483 (2003), para. 4 ('Calls upon the Authority . . . to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;'); 1500 (2003), para. 1 ('Welcomes the establishment of the broadly representative Governing Council of Iraq . . . as an important step towards the formation by the people of Iraq of an internationally recognized, representative government. . . .'); 1546 (2004), para. 1 ('Endorses the formation of a sovereign Interim Government of Iraq . . . which will assume full responsibility and authority by 30 June 2004 for governing Iraq. . . .').

⁶⁰ Compare the majority and dissenting opinions in *Hartford Fire Insurance Co v California*, 509 US 764 (1993), on the notion of a conflict between domestic laws of two states.

⁶¹ Compare ICCPR, Arts. 9–10, with Geneva Convention IV, Arts. 5, 41–43, 68, 78, and generally 79–135.

⁶² See, e.g., Irmscher, *supra* note 39, at 391–393.

⁶³ Roberts, *supra* note 17.

⁶⁴ Scheffer, *supra* note 24, at 851 ('liberating armies that operate with international authority, advance democracy, and save civilian populations from atrocities should be regulated by a modern occupation regime that can be created under the UN Charter.'). *ibid.* at 859. See also Roberts, 'The End of Occupation: Iraq 2004', 54 *ICLQ* (2005) 27, at 36.

proposed more modest forms of reconciliation by building on the common purposes of IHL and human rights law and interpreting one consistently with the other.⁶⁵ Yet these approaches examine only the problem of occupation by states.

My purpose here is not to offer a doctrinal solution, in part because it is beyond the scope of this paper but also in part because I am dubious about the practicality for occupiers of a detailed doctrinal web of obligations as opposed to some general principles that would need to be fleshed out in practice. Rather, I wish to posit that any doctrinal and operational approaches that occupiers and their lawyers devise must take into account the *common aspects* of state occupations and international territorial administrations. Both fall along a spectrum in terms of the amount of resistance to the operation.⁶⁶ Thus, at one end, either form may confront a strong adversary, and at the other, the operation may not need to use much coercion at all. The resistance witnessed by the United States in parts of Iraq, by Israel at least since the first Intifada, and by the UN in Somalia fall at one end; the cooperative, even welcomed, local response to the US occupation of Kurdish areas of Iraq and the UN operation in East Timor fall at the other. They will also fall along a spectrum in terms of the suitability of the existing domestic law for protecting the welfare of the population. This suitability can be a subjective question, as occupiers can disagree with others (within the occupied population as well as outside it) on whether certain domestic laws promote or undermine that welfare, e.g., laws that discriminate based on gender or that curtail freedom of speech and the press.

In light of this spectrum, any approach to reconciling the four areas of law would need to respect the following principles common to both sets of missions:

- (1) The Security Council has a special role in addressing situations of occupation or administration of territory, including authority under Articles 25 and 103 to override other international and domestic norms.⁶⁷
- (2) International human rights law, as the fundamental set of norms protecting basic human dignity, should govern in situations of foreign occupation or international administration of territory to the maximum extent feasible.⁶⁸
- (3) International humanitarian law, as the law designed to address situations of armed conflict, will need to displace human rights law to the extent that the occupier's control over territory is seriously challenged through armed resistance.

⁶⁵ See, e.g., Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict', 98 *AJIL* (2004) 1; Ben-Naftali and Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', 37 *Israel L Rev* (2003–2004) 17, and in particular their discussion at 103–109; Fox, *supra* note 24, at 270–278; Frowein, 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation', [1998] *Israel YB Hum Rts* 1.

⁶⁶ I appreciate this insight from David Wippman.

⁶⁷ The legality of a Council attempt to override *jus cogens* norms seems not particularly pertinent to this debate.

⁶⁸ For an eloquent defence of the idea of human rights as the 'normal order of things' see Ben-Naftali and Shany, *supra* note 65, at 41–42.

- (4) Any foreign or international occupation must respect the core norm of international law that renders illegal both the acquisition of territory by force as well as the forcible removal of another state's government.⁶⁹

These principles common to both sets of operations can help determine how far their governing normative frameworks should converge. At a minimum, I would propose four general conclusions:

- (1) Where the Security Council has acted under Chapter VII and decided that an occupying force (of either kind) should undertake certain actions to protect the population, that authority should override potentially inconsistent provisions of IHL, human rights law, or extant local law – or perhaps more charitably, should control the interpretation of that law. As a practical matter, because the Council will always issue such directives in the case of international territorial administrations but not uniformly in the case of state occupations, international organizations will and should have a special sort of authority compared to state occupiers. For example, UNMIK and UNTAET would have plenary authority to change local law despite the constraints of IHL, while Israeli forces in the West Bank would lack such special authority. The mixed signal sent by the Security Council to the states occupying Iraq – endorsing change while also calling for the occupiers to comply with international humanitarian law – would represent a middle case.⁷⁰
- (2) Where the occupation faces serious security threats and domestic institutions within the territory are incapable of addressing them, both sets of occupiers should be able to rely upon the prerogatives of – but must also comply with the constraints of – international humanitarian law. In other aspects of the occupation, each should comply with human rights law to the maximal extent feasible. For example, both the United States as the chief occupying power in Iraq and UN missions such as UNMIK may equally treat those resisting the missions through force as combatants and respond accordingly. But in other aspects of their mission, such as treatment of common criminals, they should comply with human rights law.
- (3) All other things being equal, the greater the incompatibility of extant domestic law with the basic human rights of the population, the greater should be the ability of occupying forces to change the status quo as a means of carrying out its duties to protect that population. This would mean that international humanitarian law should be interpreted to give leeway to both sorts of occupying forces to amend local law that is particularly harmful to human rights,⁷¹ but . . .
- (4) Because the risk of acquisition of territory by force by an international organization is less than the risk by a state occupier, the former should be afforded more

⁶⁹ *Friendly Relations Declaration*, *supra* note 1, principle 1, para. 10. I leave aside the possibility that a government can be removed by a state acting in self-defence, by a decision of the Security Council, or even through unauthorized humanitarian intervention in exceptional circumstances.

⁷⁰ Compare SC Res. 1483 (2003), para. 5 (calling for compliance with IHL) with paras. cited in *supra* note 59.

⁷¹ This is close to the positions of Gasser, *supra* note 16, at 255, Benvenisti, *supra* note 6, at 167 and Fox, *supra* note 24, at 270–278.

leeway than the latter in changing the status quo in a manner protective of human rights.⁷² State occupiers will thus have fewer liberties under international humanitarian law to undertake major changes to the status quo as part of their duty to protect the welfare of the population. Thus international humanitarian law would constrict Israel's approach to local law in the West Bank more than it would UNMIK's approach to law in Kosovo.

3 The Legitimacy of Coercion

Beyond the convergence of legal frameworks, foreign occupations and international territorial administrations are facing a joint political and operational challenge, as each faces criticism of their use of coercive tactics against the local population. Until quite recently, governmental, intergovernmental, and non-governmental elites seemed to have contrasting views about the legitimacy of such coercion. They have always been quite wary of state occupiers using force against restive occupied populations (even if those measures are *prima facie* justifiable under the law of occupation).⁷³ On the other hand, the use of force by UN operations has been seen as legitimate, whether through a direct mandate from the Security Council or through rules of engagement allowing force for the defence of the mission and not merely for immediate unit self-defence.⁷⁴

This view about coercion stems from a larger vision about the United Nations as impartial and trustworthy compared to its self-interested Member States. At the core of this perception – and self-perception – of the United Nations is the concept of multinationality. Though Article 101 requires that the Organization take only 'due regard' of geographical distribution during recruitment, that principle, along with Article 100's rule mandating the independence of UN civil servants, is the basis for the concept (some would say myth) of the UN's impartiality – and is indeed often more controlling in practice than Article 101's requirement of competence.⁷⁵ With respect to peace operations, Hammarskjöld's original vision stressed multinationality (as well as non-participation by directly affected states and the Permanent Five) as the basis for impartiality.⁷⁶ From this perspective, state occupiers, even so-called 'coalitions of the willing,' lack the broad multinationality of the UN; they are in a confrontational

⁷² I appreciate thoughts on this idea from David Kretzmer.

⁷³ One obvious example was the opposition of the UN Secretary-General to the US offensive in Falluja in late 2004. See Filkins and Glantz, 'All Sides Prepare for American Attack on Falluja', *NY Times*, 6 Nov. 2004, A2.

⁷⁴ See, e.g., *Brahimi Report*, *supra* note 43, para. 49 ('United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect. . . .'); see also Chesterman, *supra* note 11, at 103–112.

⁷⁵ See B. Simma (ed.), *Charter of the United Nations* (2nd edn., 2002), ii, at 1273–1274.

⁷⁶ First report of the Secretary-General on the plan for an emergency international UN Force requested in resolution 998 (ES-I) adopted by the General Assembly on 4 November 1956, 4 Nov. 1956, UN GAOR, 1st Emergency Special Sess., Annex, Agenda Item 5, at 14, UN Doc. A/3289. More recently, the General Assembly has bristled at the number of gratis personnel donated by member states as upsetting the geographical balance of Organization's personnel. See, e.g., GA Res. 51/243, 15 Sept. 1997.

relationship with the population, self-interested, and in need of reining in. In contrast, the UN, thanks to its multinationality, can only be working for loftier goals to benefit the population; thus its operations cannot be termed occupations. This informed its views on the application of IHL as well.⁷⁷

A second factor, related to multinationality, also seems at work in these perceptions – namely the *jus ad bellum* rationale for the occupier's presence in the first place. States whose initial use of force is unilateral will have a harder time than those contributing to the Blue Helmets convincing outsiders of the legality of their actions under the law of armed conflict. To differentiate further using both multinationality and *jus ad bellum* rationales as independent variables, I suspect that the acceptability of occupational tactics falls along a range, with (1) the actions of UN peacekeeping operations seen as most legitimate, followed by (2) those of states authorized by the UN, followed by (3) those of states occupying territory as a result of using force in self-defence, followed by (4) those of occupiers holding territory after using force aggressively. Each of these four, even the last, may conduct its occupation (or at least aspects of it) in accordance with Geneva and Hague Conventions; but the extent of any *jus ad bellum* endorsement of its presence in the territory by an international organization, as well as the multinationality of the force, will clearly affect attitudes on the *jus in bello* legality of its occupational tactics. This pattern of judging legitimacy is clearly at odds with the sacrosanct doctrinal separation of *jus ad bellum* and *jus in bello*, though it is not the only breach of that principle.⁷⁸

But the distinction between international organizations and states – between category 1 and possibly 2, on the one hand, and categories 3 and 4, on the other – regarding the legitimacy of their coercive tactics is now under stress. It is not that occupation by states, even democracies, is coming to be seen as more legitimate – on the contrary, in light of impatience with the occupations in Iraq and the West Bank – but that international territorial administration is proving more difficult than anticipated. As discussed earlier with respect to the application of humanitarian and human rights law, both forms of occupation operate across a spectrum of environments with respect to the resistance they face and the coercion – even violence – they will deploy. From a position in which international organizations were seen as the agents for human rights and progress in post-conflict societies – whether in Namibia, Cambodia, El Salvador, Guatemala, or Mozambique – they are now discovering that they may need to limit civil liberties; and some audiences – local and international – are objecting to this trend.⁷⁹ As James Fearon and David Laitin write:

⁷⁷ As Paul Szasz crystallized the UN view, 'it was considered somewhat unseemly to suggest that the United Nations might be "a party" to a military conflict'; Szasz, *supra* note 33, at 511.

⁷⁸ See Ratner, 'Revising the Geneva Conventions to Regulate Force by and Against Terrorists', 1 *Israel Defense Forces L Rev* (2003) 7. Dicta in the ICJ's *Wall Case* about the *jus ad bellum* legality of the Israeli occupation of the West Bank suggest the spillover between *jus ad bellum* and *jus in bello*, see *Wall Case*, *supra* note 36, paras. 75, 117.

⁷⁹ Use of force by peacekeeping operations of course dates back to the Congo operation in 1960–1964 and has played a role in other operations as well, though the demand for robust peacekeeping has clearly increased since the Somalia operation of 1993. See generally T. Findlay, *The Use of Force in UN Peace Operations* (2002).

The reality of state weakness means that peacekeepers need to foster state building if there is to be any hope for exit without a return to considerable violence. This Hobbesian logic applies whether the forces are UN troops, ad hoc international coalitions, or the U.S. military in Afghanistan or Iraq. . . . The reality of insurgency and immediate post-war disorder suggest that a dominant military force will often be essential to lead an effective PKO.⁸⁰

As a result, UN missions confront similar objections to their administration, and to the resultant employment of coercion, as do state occupations. In East Timor, the Australia-led INTERFET force ended up detaining some two dozen people on suspicion of committing offences, without any plans for trial.⁸¹ Despite UNTAET's overall positive reputation among governmental and intergovernmental elites, Amnesty International harshly criticized its 2000 transitional rules of criminal procedure for allowing lengthy pre-trial detention.⁸² It also noted that many detainees in East Timorese prisons had been denied their right to counsel.

In Kosovo, the actions and reactions have been more pronounced. Most significant has been the practice by UNMIK and KFOR of preventive, security-related (i.e., not pre-trial) detentions. Both UNMIK and KFOR have asserted the authority to detain individuals outside of any judicial process as part of their mandate under Security Council Resolution 1244 to 'ensur[e] public safety and order until the international civil presence can take responsibility for this task'.⁸³ KFOR has detained over 3,500 people in its Bondsteel camp (operated by the US contingent in KFOR) since the end of the 1999 war; UNMIK detained far smaller numbers in its first few years but ceased the practice in 2001, though it retains the power to do so.⁸⁴ Typically, neither the SRSG nor the commander of KFOR has publicly stated the grounds for the arrests.

Criticism of this practice has emanated from five principal sources: the Commissioner for Human Rights of the Council of Europe; the OSCE Mission in Kosovo; the independent Ombudsperson Institution created in June 2000 by UNMIK to promote human rights in Kosovo and to receive and address individual complaints regarding violations;⁸⁵ the UN Human Rights Commission's Special Representative for Bosnia and Yugoslavia; and NGOs, principally Amnesty International. In a series of reports beginning in 2000, all five argued that these detentions violated the European Convention on Human Rights.⁸⁶ In response to early concerns expressed by the OSCE

⁸⁰ Fearon and Laitin, *supra* note 3, at 21, 23.

⁸¹ Chesterman, *supra* note 11, at 117–118.

⁸² Amnesty International, *East Timor: Justice Past, Present and Future* (July 2001), at 21–22, AI Index No. ASA 57/001/2001; for one harsh academic critique, see Bongiorno, 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor', 33 *Columbia Human Rts L Rev* (2002) 623.

⁸³ SC Res. 1244 (1999), para. 9(d).

⁸⁴ OSCE Mission in Kosovo, *Kosovo: Review of the Criminal Justice System (March 2002–April 2003)* (hereinafter 2003 OSCE Mission Report), 20 May 2003, at 33–34, available at www.osce.org/kosovo.

⁸⁵ On the Ombudsperson, see Nilsson, 'UNMIK and the Ombudsperson Institution in Kosovo: Human Rights Protection in a United Nations "Surrogate State"', 22 *Neth Hum Rts Quarterly* (2004) 389.

⁸⁶ See, e.g., *Kosovo: The Human Rights Situation and the Fate of Persons Displaced in their Homes: Report by Mr. Alvaro Gil-Robles*, 16 Oct. 2002, CoE Doc. CommDH(2002)11; OSCE Mission in Kosovo, *Kosovo: A Review of the Criminal Justice System 1 September 2000–28 February 2001*, 28 July 2001, available at

mission, UNMIK created a detention review commission for those detained based on the SRSG's orders. Yet that commission must uphold a detention order as long as there is a fear that 'a threatened criminal act will be committed', and it is not the sort of judicial review prescribed in human rights treaties. Moreover, it applies only to those detained by UNMIK, not by KFOR.⁸⁷ KFOR reacted to this criticism by establishing a formal policy on detentions in an October 2001 directive (which also gave KFOR regional commanders the authority to detain people for up to 72 hours without informing the commander of KFOR); but the outside entities argued that KFOR detentions were unnecessary in light of the progress in constructing the Kosovo judiciary and constituted a violation of the detainees' rights.⁸⁸ KFOR has thus far refused to allow for judicial review of its practices, arguing in part that much of the information on which detentions are based is classified and can only be revealed to NATO officials.

Detentions are not, of course, the only source of criticism of UNMIK's work – it has been roundly attacked by NGOs for slowness in developing new governance institutions, protecting the Serb minority, and other problems, in particular after the outbreak of violence against Serbs and UNMIK in March 2004.⁸⁹ But those criticisms, typical of all peacekeeping operations, seek a more assertive mission in the face of lack of cooperation by local actors. In the case of detentions, however, the complaint is that the organization is going too far in asserting its plenary administrative power (short of the use of force) – that the international organization is acting most like an occupier by detaining security threats. Indeed, the Ombudsperson has complained about numerous occupation-like actions by UNMIK, less severe than detentions. These include accusations of abuse by UNMIK police or KFOR forces, demolition of property, unacceptable prison conditions, uncompensated confiscations, and the presence (or in some cases the absence) of security checkpoints.⁹⁰

The detentions and reactions thereto in Kosovo, and to a lesser extent in East Timor, demonstrate three new realities of international territorial administration. First, the multinational character of the mission did not prevent it from doing at least some of the things that occupiers do. Just like state occupiers, international organizations and their members have their own particular interests, and to the extent that individuals get in

www.osce.org/kosovo; Ombudsperson Institution in Kosovo, *Special Report No. 3*, 29 June 2001, available at www.ombudspersonkosovo.org; *Situation of Human Rights in Parts of South-Eastern Europe: Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia*, Jose Cutileiro, 8 Jan. 2002, paras. 86–94, UN Doc. E.CN.4/2002/41; Amnesty International, *Federal Republic of Yugoslavia (Kosovo): International Officials Flout International Law*, Sept. 2002, AI Index No. EUR 70/008/2002. See also Chesterman, *supra* note 11, at 148–151.

⁸⁷ UNMIK Regulation 2001/18 on the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders, 25 Aug. 2001, s. 6.1.c, available at www.unmikonline.org.

⁸⁸ See, e.g., OSCE Mission in Kosovo, *Kosovo: Review of the Criminal Justice System September 2001–February 2002*, 29 Apr. 2002, available at www.osce.org/kosovo; 2003 OSCE Mission Report, *supra* note 84; Nilsson, *supra* note 85, at 403–407.

⁸⁹ See, e.g., International Crisis Group, *Collapse in Kosovo*, 22 Apr. 2004, at 27–30, ICG Europe Report No. 155.

⁹⁰ See the Ombudsperson's letters and reports available at www.ombudspersonkosovo.org.

the way of those interests, the organization will limit individual liberties. The interests themselves may be more legitimate in the case of the international organization administration insofar as they are reflected in a decision of its competent organ, some political settlement, or consent of the parties; but the actions to carry out those interests come to resemble each other. The UN can become as much of an adversary toward local groups as the state occupier, causing them to accuse it of breaching its impartiality, the *sine qua non* of all international peacekeeping.

Second, the multinational character of the operation did not wholly insulate the operation from international criticism for human rights violations. This may not be surprising in the case of Amnesty International, but it is significant that components of the Council of Europe, the OSCE, or the UN – institutions comprised of states – published critical reports about UNMIK and KFOR. At the same time, the criticism primarily emanated from the human rights community: the Council of Europe High Commissioner, the OSCE Mission, the Ombudsman, the UN Special Representative, and Amnesty International each have an explicit human rights agenda. The comparative silence of other actors can be explained by the lack of major casualties caused by UNMIK operations due to the simple absence of any major insurgency. UNMIK leaders and non-human rights constituencies seem prepared to accept some relatively minor infractions of human dignity by UNMIK if that means carrying out its mission more effectively – a very utilitarian approach to the problem.⁹¹ Should casualties increase, criticism of its work will, I suspect, move beyond human-rights-oriented international organizations and NGOs. Yet I also believe, on balance, that the factors of multinationality and *jus ad bellum* discussed above have not wholly dissipated – that outside actors are still likely to tolerate coercion by international occupiers more than by state occupiers.

Finally, the Kosovo episode says something about the accountability of international organizations and their civil servants compared to those of state occupiers. As noted in Section 1 above, formal oversight differs between the two sorts of operations at both the domestic and international levels. Since 1999, the Secretary-General has reported to the Council quarterly on UNMIK's activities and monthly on KFOR's work, including operations by both missions such as reconnaissance, seizure of weapons, and individual detentions. He has occasionally broached issues of accountability, including the creation of the detention review commission.⁹² Nonetheless, neither the Secretary-General nor the Council appears to have expressed any concern – at least in public reports, statements, or resolutions – about KFOR's and UNMIK's detentions and other subjects of the various critical reports. The actions of the Council suggest that Member States of NATO and the UN are content to leave these matters to the

⁹¹ See Chesterman, *supra* note 11, at 149–151 (on position of UNMIK officials).

⁹² *Report of the Secretary-General on the United Nations Interim Administration in Kosovo*, 2 Oct. 2001, UN Doc. S/2001/926, para. 48 (regulation provides 'additional procedural protection and enhances transparency to ensure that my Special Representative's executive powers are exercised only when justifiable and absolutely necessary').

forces on the ground, relegating individual complaints to the Ombudsperson, who can make only recommendations.

This pattern extends to the individual accountability of members of the mission. Foreign UNMIK personnel and all KFOR personnel, like all deployed UN personnel and UN-authorized forces, are immune from arrest and detention by local authorities as well as legal action in local courts.⁹³ The Ombudsperson, working from a very different perspective, has found this immunity incompatible with European human rights law in light of UNMIK's function as the government of Kosovo.⁹⁴ Nonetheless, and not at all surprisingly, neither organization has budged on the overall principle of immunity, nor has it waived jurisdiction in any cases to Kosovo courts for alleged abuses of local citizens. Instead, it has apparently disciplined individuals for misconduct through administrative means.⁹⁵ If the Security Council's members have discussed these matters, it has not been in any public way.

Transitional administration and their administrators thus remain formally accountable – to their international organization or to the donating states – but those with sanctioning authority have not exercised close oversight. Certainly part of the reason is, as noted, that transitional administrations have not faced the massive resistance that would lead them to use large amounts of force, akin to state occupiers like the United States in Iraq. But beyond the different factual contexts are more systemic reasons. First, the limited number of personnel at the headquarters of international organizations – in particular the UN – makes it impossible to keep the operations on a close leash. Second, the governments of states contributing troops, civilians, or money, or sitting on the Security Council remain disinterested in the details of the operation, unless it is resulting in danger to their personnel or a serious deterioration of the mission. And third, the equation between the multinational character of the occupying force and perceptions of impartiality seems to translate into limited need for accountability as well – as if multinationality were itself a form of or substitute for accountability.

This dynamic suggests the somewhat subversive possibility that democratic occupiers face greater accountability regarding their occupying forces than do international institutions. Certainly, state occupiers can face intense international scrutiny of their tactics, as can be seen by sustained criticism of the tactics of the US and Israel in their occupations (though other occupations have been more immune to criticism for political reasons). Domestically, US forces in Iraq and Israeli forces in the occupied territories are accountable to elected governments and thus the people of these states. The criminal convictions and demotions of some participants in the Abu Ghraib prison abuse episode shows the possibilities for such accountability.⁹⁶ US domestic reaction to the abuses by US forces suggests how strong this accountability can be – once the abuses are revealed, of course. In the case of Israel, the possibility of review of

⁹³ UNMIK Regulation 2000/47, 18 Aug. 2000, available at www.unmikonline.org.

⁹⁴ See, e.g., *Ombudsperson Special Report No. 1*, 26 Apr. 2001, available at www.ombudspersonkosovo.org.

⁹⁵ See Nilsson, *supra* note 85, at 401–404.

⁹⁶ See Reid, 'Guard Convicted in the First Trial from Abu Ghraib; Garner Faces 15 Years for Abusing Iraqis', *Washington Post*, 15 Jan. 2005, A1.

Israeli army actions by the judiciary, even though the Supreme Court often sides with the government, provides some individual remedy in a manner stronger than the recourse to the Kosovo Ombudsperson.

This analogy has its limits, of course, insofar as officials and citizens in democracies may choose to remain unaware of abuses by their personnel or tacitly approve them once they do, as is seen in the apparent immunity of more senior US military and civilian officials from political or bureaucratic responsibility for detainee abuses.⁹⁷ Moreover, it should not be mistaken for a claim that occupations by states are more benign than those by transitional administrations. Indeed, the closer scrutiny of occupying troops by individual democratic governments compared to that of transitional administrators is a response to the increased likelihood of abuse when only one state is in charge of an occupation. As both those favouring and opposing multinational coalitions compared to single actor military operations have long understood, efficacy and the possibility for abuses are two sides of the same coin.⁹⁸ So while transitional administrations receive less scrutiny than occupations, they probably need it less.

4 Lessons for the Future

My analysis has examined two ways in which states and international organizations stand on common ground as they occupy territory: in finding the best approach to applying multiple, sometimes competing, legal frameworks to their operations; and in managing their use of coercion in a way that outside actors regard as not merely legal, but legitimate. In this final section, I offer some concrete policy recommendations to these two sets of occupiers and their lawyers. Before beginning, one must note that the future of international territorial administration is somewhat obscure. Though generally effective in East Timor, Eastern Slavonia, and Mostar (though the mission's legacy appears quite shortlived), the continued unrest within Kosovo leaves room for doubt as to the viability of this mechanism of conflict resolution. After the US invasion of Afghanistan and ouster of the Taliban government in 2001, the UN's members rejected a UN transitional administration or major governance role in favour of the so-called 'light footprint' approach.⁹⁹

States can improve their legitimacy and effectiveness as occupiers by heeding two key lessons from international organizations, each associated with one of the two issues in this paper. First, with respect to legal frameworks, one of the comparative advantages that international organizations continue to have over state occupiers is their acceptance of the central role of human rights law in the mission. For reasons

⁹⁷ See Schmitt and Shanker, 'Posts Considered for Commanders After Abuse Case', *NY Times*, 20 June 2005, A1.

⁹⁸ See, e.g., 'Agora: The Gulf Crisis in International and Foreign Relations Law, Continued', 85 *AJIL* (1991) 506, 516 (contributions by Rostow and Weston).

⁹⁹ See *The Situation in Afghanistan and its Implications for International Peace and Security: Report of the Secretary-General*, 18 Mar. 2002, para. 98, UN Doc. A/56/875-S/2002/278.

already noted, states continue to show resistance to the application of human rights law. Were they to act a bit more like international organizations, they might well discover that their mission, however long it lasts, proves more acceptable internally and externally, though of course the occupied population will always regard the state occupier as foreign. The willingness of the occupier to comply with human rights and limit its prerogatives under humanitarian law to exceptional circumstances can improve the condition of occupier and occupied alike.

Second, with respect to the legitimacy of coercion, as explained above, the internationalization of an occupation will not eliminate security threats to it. An occupied population will not suddenly view foreign troops as liberators simply because they hail from a number of countries or are wearing blue helmets or berets. The Bosnia war demonstrated this reality with respect to combat, and the attitudes of many Serbs and Albanians within Kosovo confirm it with respect to occupation. But the continued special legitimacy of international organization missions suggests that internationalization of an occupying force will limit criticism of the mission when it needs to take security measures. Criticism will not, of course, disappear – especially by NGOs – nor should it. Indeed, the work of the OSCE and the Ombudsperson in Kosovo shows how international organizations can constructively open themselves up to intelligent criticism (although those models can also be seen as a public relations strategy for NATO and the UN while the Member States continue to give the operations significant discretion to maintain security).

The most obvious target of this lesson is the United States in Iraq. Even had the Iraqi population responded to an invasion and occupation by a broad-based coalition with UN approval exactly the same way as it did to the US/UK force, outside elites would still have rightly viewed the presence of the former as more legitimate. Any human rights and humanitarian law violations it might commit in the course of its mission would receive greater tolerance internationally. Even where a state will not share occupational responsibilities (e.g., Israel in the West Bank), both these lessons might be achieved by the presence of foreign observers closely embedded with occupying troops. Occupiers would be confronted with outsiders more concerned about human rights law, thus deterring abuses. Impartial observers will also certainly find themselves agreeing from time to time with *some* occupational tactics, thus increasing outside tolerance for them. Other governments may also accept (some quite cynically) the occupation because monitors might prevent or at least uncover the worst abuses. Of course, this proposal faces significant obstacles: occupying states continue to see independent observers as threats to their mission; and international monitors will fear a sacrifice in their independence if they need to rely upon the occupiers for their movement and safety.

But can international organizations learn anything from states to improve their performance on these two issues? Some caution is called for, as state occupations continue to have a stigma not associated with UN missions, and most recent state occupations have resulted in greater abuses against the local population than have those of international organizations. But UN missions would, I believe, benefit from studying the experiences of democratic state occupiers like Israel or the United States.

Disapproval of these occupations should not blind policy-makers to studying both the approaches they took to legal frameworks and the reactions of others to their use of coercion. The interlocking legal frameworks, the need to maintain basic security, the inherent limitations on the occupiers' ability to control civilian life, and the best forms of accountability over personnel are just some of the concerns shared by states and international organizations. An examination of states' negative occupational experiences is likely to prove useful to those involved in future UN administrations, just as a study of the British colonial failures in Mesopotamia is important for understanding the current morass in Iraq.

Nonetheless, it may be unrealistic to expect such an inquiry of international organizations. It seems unlikely that the Lessons Learned Unit within the UN's Department of Peacekeeping Operations would examine state occupations for the reason mentioned above – the UN and its members simply do not conceive of their operations as occupations in law or in fact. Perhaps the willingness of the Secretary-General to formally accept core rules of IHL for UN peacekeepers suggests a change in this position, but the aversion by most Member States to the idea of occupation remains strong. At the very least, international organization forces can be encouraged to accept oversight of their operations from the ICRC or other international organizations.

Though occupation should remain at best a short-term response to disruptions of international peace, self-defence or threats to the peace of a particular region make certain occupations inevitable. Though international organizations enter occupied territories with a special cloak of legitimacy unavailable to most state occupiers, the two have much in common. As long as citizens of occupied territories oppose foreign occupation – and, as both Kosovo and Iraq demonstrate, even those who welcome the occupiers at first will come to tire of them soon enough – both must conduct their occupations with a coherent approach to the relevant international and domestic law and be able to justify any coercive actions. Such a commitment would represent a modest step for these two sorts of occupiers in distancing their actions from the more typical occupations imposed on conquered peoples.

