

## ARTICLES

### RESPONSIBILITY FOR REGIME CHANGE

*Jay Butler\**

*What obligations does a state have after it forcibly overthrows the regime of another state or territory? The Hague Regulations and the Fourth Geneva Convention provide some answers, but their prohibition on interfering with the governing structure of the targeted territory is outmoded. Based on a careful examination of subsequent practice of the parties to the conventions, this Article asserts a new interpretation of these treaties and argues that regime changers are now under positive obligations in the postwar period and beyond.*

*Through their conduct and evaluation of modern regime-change missions, states, both individually and acting collectively through international organizations, have manifested revised understandings of obligations in the postconflict phase of military operations. Accordingly, this Article argues that regime-changing states now not only have Geneva-based direct obligations to establish security in the territory, promote representative local government, protect the human rights of the local population, assist with postconflict reconstruction, and safeguard minority groups while exercising control over the territory, but also that such states must ensure that the successor regime—whose installation their initial military intervention facilitated—is one that respects international human rights law.*

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\* Visiting Associate Professor of Law, George Washington University Law School. I must first thank Lea Brillmayer, a true mentor and friend. I am also immensely grateful to Michael Reisman, Sean Murphy, Ralph Steinhardt, Peter Smith, and Eleanor Marie Brown for their insightful comments and suggestions. Erica Carr provided excellent research assistance. This project would not have come to fruition without the support and encouragement of my family and friends. All errors are entirely my own.

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## INTRODUCTION

Regime change is at a crossroads.<sup>1</sup> International law presents formal barriers to unilateral military intervention,<sup>2</sup> but political leaders have shown an increasing willingness to discuss forcible regime change as a legitimate policy instrument to be deployed with or without the requisite authorization of the United Nations Security Council.<sup>3</sup> Moreover, states

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1. In this Article, “regime change” is defined as the use of military force by a state or states to overthrow the *de facto* or *de jure* government of another state or to enforce the secession of foreign territory.

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

3. See, e.g., Press Release, General Assembly, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 GA/9596 (Sept. 20, 1999)

once diametrically opposed to outside regime change have since found that the humanitarian justifications that often underlie such operations may provide a convenient excuse to initiate military missions that advance their own strategic objectives.<sup>4</sup> Indeed, some states have expressed grave concern that humanitarianism may well be used as a pretext for neocolonial interference.<sup>5</sup>

Amidst furor over the justifications for and conduct of military intervention, the postconflict obligations of states are often overlooked. International humanitarian law, comprised principally of the Hague Regulations and Geneva Conventions, applies during periods of occupation by foreign military forces.<sup>6</sup> However, this body of law formally pre-

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(“If, in those dark days and hours leading up to the [Rwandan] genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?”); see also Address to the Nation on the Situation in Libya, 2011 Daily Comp. Pres. Doc. 1, 3–4 (Mar. 28, 2011) (“Some nations may be able to turn a blind eye to atrocities in other countries. The United States of America is different. And as President, I refused to wait for the images of slaughter and mass graves before taking action.”); Jeremiah Goulka, *Why Does Mitt Romney Want to Bomb Iran?*, Nation (Nov. 5, 2012), <http://www.thenation.com/article/171023/dogs-war-are-barking> (on file with the *Columbia Law Review*) (discussing Mitt Romney’s avowed support for U.S. military intervention to effect regime change in Iran); Barack Obama, David Cameron & Nicolas Sarkozy, Op-Ed., *Libya’s Pathway to Peace*, N.Y. Times (Apr. 14, 2011), <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html> (on file with the *Columbia Law Review*) (arguing, while Security Council mandate covers protection of civilians, Qaddafi regime must be removed); Newt Gingrich, Address at Florida International University (Jan. 25, 2012), available at <http://miami.cbslocal.com/video/6673072-web-extra-newt-gingrich-speech-at-fiu/> (on file with the *Columbia Law Review*) (urging United States to consider military intervention in Venezuela).

4. See, e.g., Interview by BBC with Sergey Lavrov, Minister of Foreign Affairs, Russ., in Moscow, Russ. (Aug. 9, 2008), transcript available at [http://www.mid.ru/bdomp/b rp\\_4.nsf/e78a4807f128a7b43256999005b5bb3/f87a3fb7a7f669ebc32574a100262597](http://www.mid.ru/bdomp/b rp_4.nsf/e78a4807f128a7b43256999005b5bb3/f87a3fb7a7f669ebc32574a100262597) (on file with the *Columbia Law Review*) (“According to our Constitution there is also responsibility to protect—the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of the other regions. But [Georgia] is not Africa to us, [it] is next door.”); see also Quentin Peel, *Russia’s Reversal: Where Next for Humanitarian Intervention?*, Fin. Times (Aug. 22, 2008, 7:49 PM), <http://ft.com/cms/s/0/e06e25fc-7076-11dd-b514-0000779fd18c.html> (on file with the *Columbia Law Review*) (observing while Russia justified 2008 attack on Georgia as “humanitarian intervention,” others saw attack as “deliberate exercise to reassert effective Russian control over former Soviet territory”).

5. Security Council delegates from China, Brazil, South Africa, and Nicaragua have each voiced grave concerns that the protection of civilians could be used, in the words of the Brazilian representative, “as a smokescreen for intervention or regime change.” U.N. SCOR, 66th Sess., 6531st mtg. at 11, 17–18, 20, 34, U.N. Doc. S/PV.6531 (May 10, 2011) (describing remarks, respectively, from representatives of Brazil, South Africa, China, and Nicaragua).

6. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Hague Convention Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations].

scribes that, unless absolutely prevented, the occupying state ought to interfere only minimally with the governing structure of the occupied state.<sup>7</sup> Consequently, where the objective of the use of force is to transform the government of the occupied state, these conventions appear to provide little guidance.<sup>8</sup>

A clear framework of legal obligations with which intervening states must comply in regime-change missions is developing, but has yet to be articulated fully.<sup>9</sup> This legal ambiguity concerning responsibility during the postconflict phase and for the installation of a successor regime may further reinforce the willingness of political officials to engage in regime-change operations. If politics is a short-term game, regime change is a short-term solution—erase the problem of the targeted, pernicious regime, bask in the glory, and leave the aftermath to the marooned population without any apparent legal consequence.<sup>10</sup>

This Article argues that a different approach is now required. Guided by certain general principles of international law and the increasing recognition of the importance of representative government and the universality of human rights, international actors have, through their recent practice of transformational international administration, updated and modified the original minimalist orientation of the Hague and Geneva framework. According to the general rule on treaty interpretation laid down in Article 31 of the Vienna Convention on the Law of

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7. Fourth Geneva Convention, *supra* note 6, art. 64; Hague Regulations, *supra* note 6, art. 43.

8. See, e.g., David J. Scheffer, *Beyond Occupation Law*, 97 *Am. J. Int'l L.* 842, 849 (2003) (“Occupation law was never designed for such transforming exercises.”); Carsten Stahn, ‘Jus Ad Bellum’, ‘Jus In Bello’ . . . ‘Jus Post Bellum’?—Rethinking the Conception of the Law of Armed Force, 17 *Eur. J. Int'l L.* 921, 928 (2006) (“The law of occupation, the only branch of the *jus in bello* which deals explicitly with post-conflict relations, is ill-suited to serve as a framework of administration.”).

9. See, e.g., Kristen E. Boon, *Obligations of the New Occupier: The Contours of a Jus Post Bellum*, 31 *Loy. L.A. Int'l & Comp. L. Rev.* 57, 57 (2009) (noting coalescence around necessity of building representative institutions, but claiming there is “no uniform legal framework regulating transitions from conflict to peace”); see also Eric De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* 99–100 (2009) [hereinafter De Brabandere, *Post-Conflict Administrations*] (noting possibility of “*emerging* customary obligation” but arguing there is insufficient practice “to establish a customary legal obligation relative to the application of human rights to transitional administrations”); Gregory H. Fox, *Humanitarian Occupation 197–98* (2008) [hereinafter Fox, *Humanitarian Occupation*] (arguing customary international law does not yet support right to humanitarian occupation); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 *Am. J. Int'l L.* 580, 621 (2006) [hereinafter Roberts, *Transformative Military Occupation*] (“[C]ustom with respect to the law on occupations has undergone significant evolution.”).

10. See, e.g., W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 *Am. J. Int'l L.* 516, 522–23 (2004) (“[O]nce a regime has been ejected and the territory controlled, the regime changers cannot say ‘mission accomplished’ and fly off.”).

Treaties, this subsequent practice establishing the agreement of the parties indicates the emergence of a twofold obligation.<sup>11</sup>

First, regime change triggers a legal obligation on the intervening state or states to establish security in the host territory, promote representative local government, ensure the protection of human rights, assist with postconflict reconstruction, and safeguard minority groups. Second, the interveners must also ensure that the successor regime, whose installation their military intervention and subsequent exercise of control over the territory facilitated, respects international human rights law.

Critics may well argue that the first part of the obligation attempts to impose rigid legal responsibility onto operations that are inherently context-specific and that the second raises questions of attribution and the proper focus (whether on the intervening states or the successor regime) of responsibility for repression.<sup>12</sup>

These objections may be addressed here in a preliminary fashion. Though the acts by which the intervening state discharges the obligation may well shift to take account of the demands of the particular context,

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11. Vienna Convention on the Law of Treaties art. 31(3)(b), opened for signature May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The International Law Commission (ILC) made clear in its commentaries on the Draft Articles on the Law of Treaties that “subsequent practice in the application of the treaty . . . constitutes objective evidence of the understanding of the parties as to the meaning of the treaty.” Reps. of the Int’l Law Comm’n, 2d part of 17th Sess., Jan. 3–28, 1966, & 18th Sess., May 4–19, 1966, at 52, U.N. Doc. A/6309/Rev.1; GAOR, 21st Sess., Supp. No. 9 (1966) [hereinafter Commentaries on Draft Articles]. Further, the Commission noted that every state party need not have engaged in the practice and instead “it suffices that it should have accepted the practice.” *Id.* at 52–53. In its more recent consideration of the topic, the ILC has observed that subsequent practice under Article 31(3)(b) “consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.” Rep. of the Int’l Law Comm’n, 65th Sess., May 6–June 7, July 8–Aug. 9, 2013, at 31, U.N. Doc. A/68/10; GAOR, 68th Sess., Supp. No. 10 (2013). This subsequent conduct

includes not only official acts at the international or at the internal level which serve to apply the treaty, including to respect or to ensure the fulfillment of treaty obligations, but also, *inter alia*, official statements regarding its interpretation, such as statements at a diplomatic conference, statements in the course of a legal dispute, or judgments of domestic courts.

*Id.* at 35–36. Finally, the Eritrea-Ethiopia Boundary Delimitation Commission has concluded that “the effect of subsequent conduct may be so clear in relation to matters that appear to be the subject of a given treaty that the application of an otherwise pertinent treaty provision may be varied, or may even cease to control the situation, regardless of its original meaning.” *Eritrea v. Fed. Democratic Republic of Eth.*, 25 R.I.A.A. 83, 110–11 (Eri-Eth. Boundary Comm’n 2002).

12. See, e.g., Jane Stromseth et al., *Can Might Make Rights?: Building the Rule of Law After Military Interventions* 91, 95 (2006) (noting postconflict rule of law missions must be context-specific); Oisín Tansey, *Regime-Building: Democratization and International Administration* 3 (2009) (“[I]t is domestic actors that determine final regime outcomes.”).

the overriding obligation itself does not.<sup>13</sup> Thus, in international environmental law, for example, an environmental impact assessment is now recognized as an essential component of any major transboundary construction project that may cause harm.<sup>14</sup> Yet, it is also clear that the content of any such report will depend on the context of the terrain, the nature of the project, and the magnitude of the risks.<sup>15</sup> The obligation articulated in this Article requires a similar endeavor on the part of the intervening state or international organization when it is administering territory and attempting to facilitate the installation of a successor regime. Indeed, an assessment of the promotion of the objectives identified in this study as common to international territorial administration missions ought to be conducted not only before military intervention is initiated but also throughout the course of administration with regard to exit planning and succession.<sup>16</sup> Further, any such assessment must be car-

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13. On obligations that may take account of context, see, e.g., *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976) (leaving states “margin of appreciation” to mold European Convention on Human Rights to own national context).

14. E.g., *Pulp Mills on River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 204 (Apr. 20) (“[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”); see also *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, 11 ITLOS Rep. 10, ¶ 145 [hereinafter *Responsibilities and Obligations of States*] (“It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.”); *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, with Commentaries, Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, ch. V art. 7, U.N. Doc. A/56/10 [hereinafter *Draft Articles on Transboundary Harm*]; GAOR, 56th Sess., Supp. No. 10 (2001), reprinted in [2001] 2 Y.B. Int’l L. Comm’n 370, U.N. Doc. A/CN.4/SERA/2001/Add.1 (pt. 2) (“Any decision in respect of the authorization of an activity within the scope of the present articles, shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment.”).

15. The International Court of Justice (ICJ or “the Court”) has made it clear that it should be left to each individual state “to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case.” *Pulp Mills on River Uruguay*, 2010 I.C.J. ¶ 205. In doing so, the state must “hav[e] regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.” *Id.*

16. For discussion of this point in the context of transboundary environmental harm and the necessity of a due diligence assessment, see *Draft Articles on Transboundary Harm*, supra note 14, ch. V art. 3, at 393, which states that “[i]n the context of the present articles, due diligence is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures in timely fashion, to address them.” Those *Draft Articles* would create “an obligation to take unilateral measures to prevent significant transboundary harm or at any event to minimize the risk thereof arising out of activities within the scope of article 1,” which covers lawful activities in international law that nonetheless involve a

ried out with diligence and care for the population with whose temporary management the intervening power has been entrusted.<sup>17</sup>

The second objection concerning the attribution of bad acts of the successor regime combines questions of control and appropriate policy. As will be explained later in more detail, occupation law, the law of state responsibility, and international criminal law each affirm that a state or individual need not directly cause the injury to which liability is attached if it exercises control over the wrongful actor or substantially contributes to the wrongful act.<sup>18</sup> A showing that the intervening state or administering international organization did not adequately discharge its obligation to ensure the installation of a suitable successor regime is based on the state or international organization's control over the territory in question.

Further, because of contemporary negative connotations associated with 'occupation,' states are increasingly either handing administration in postconflict settings to domestic transitional administrations (over which the intervening state retains significant control) or to international organizations.<sup>19</sup> Even though postconflict administration is not always openly exercised solely by the intervening state, that state often retains a sufficiently high level of control to justify the attachment of responsibility for the actions of the successor regime.<sup>20</sup> As the degree of control lessens, so too does the extent of responsibility. However, irrespective of the level of control exercised, the intervening state still may be held liable for wrongful acts of the successor regime in which the intervening state is complicit.<sup>21</sup>

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risk of causing significant transboundary harm. Id. This obligation could be met by "first, formulating policies designed to prevent significant transboundary harm or to minimize the risk thereof and, second, implementing those policies." Id.

17. See, e.g., *Pulp Mills on River Uruguay*, 2010 I.C.J. ¶ 204 ("[D]ue diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river . . . did not undertake an environmental impact assessment on the potential effects of such works."); *Responsibilities and Obligations of States*, supra note 14, ¶ 117 (noting "standard of due diligence has to be more severe for the riskier activities"); Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. Davis J. Int'l L. & Pol'y 23, 53 (2004) ("[A] state which elects to intervene forcibly for humanitarian purposes is subject to a duty of care not to make the situation worse than it would have been.").

18. *Infra* Part IV (discussing theories of state responsibility).

19. See, e.g., *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 40–41, at 316–17 (Dec. 19) (separate opinion of Kooijmans, J.) (noting occupying states "feel more and more inclined to make use of arrangements where authority is said to be exercised by transitional governments or rebel movements").

20. See *infra* Part IV.B.3 (discussing Russia's decisive influence over authorities of Transdnistria territory and imputation of responsibility accordingly).

21. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, ch. IV, U.N. Doc. A/56/10 [hereinafter ARSIWA]; GAOR, 56th Sess., Supp. No. 10 (2001),

With these preliminary objections addressed, the path of the argument will proceed along the following course. Part I briefly discusses the original minimalist orientation of international humanitarian law and highlights its ultimate inadequacy for the supervision of interventions whose objective is the transformation of the governing structure of the occupied state. However, to say that international actors have gone beyond the scope of the formal law of occupation does not establish a framework of accountability for actions taken in this regard.

Instead, Part II posits that the development of the law of postconflict responsibilities has been guided by various general principles of international law as well as by the permeation of international human rights law throughout international law.<sup>22</sup> This Part discusses the legal relationship between intervener and host population and the obligations derived therefrom as incorporating elements of several legal formulations: trusteeship, a positive obligation to ensure respect for international law or to prevent violations, and the responsibility to rebuild within the doctrine of the responsibility to protect.

Part III examines several recent regime-change missions as evidence of the crystallization of an obligation (not merely an option) to do more than is demanded by the express terms of the Hague and Geneva regimes. In this Part, particular occupation and international transitional administration projects are examined and the commonalities among them highlighted. This state practice is then combined with expressions of international support to show the emergence of an evolving treaty obligation in this area.

Part IV considers whether the intervener's responsibility for acts of the successor regime may comport with understandings of third party obligations in general international law and the extent to which such responsibility may be limited by the control or influence that the intervening state or international organization exercises.

Finally, Part V discusses the implications of the twofold obligation posited herein and the extent to which such concerns are reconcilable or represent ongoing normative conflicts in the practice of international law.

It may also prove useful to note what will not appear in these pages. This Article is not a discourse on the lawfulness, legitimacy, or fairness of intervention or regime change writ large. Instead, this Article focuses on the aftermath of the regime-change operation and argues that the obligations of the intervening state or states under international law must be

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reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SERA/2001/Add.1 (pt. 2) (listing limited situations in which one state is responsible for direct acts of another state).

22. General principles of law are a well-established source of international law. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 (stating ICJ "shall apply . . . general principles of law").



further articulated in order to ensure accountability and decision processes through which international officials are forced to consider the long-term costs and consequences of such operations.

Several decades ago, Tom Franck drew attention to the erosion of the U.N. Charter as an absolute barrier to the use of force by asking, "Who killed Article 2(4)?"<sup>23</sup> While Franck's position remains hotly contested, it is clear from the number of military interventions that appear to lack formal authorization that states may regard Article 2(4) as something less than an unbending ban. In this context, the precise articulation of legally binding obligations of reconstruction and administration that states must discharge may well prove a useful step in further debiasing overly optimistic political officials who seek to advance strategic ambitions through quick regime change.<sup>24</sup>

### I. MINIMALIST OCCUPATION IN INTERNATIONAL HUMANITARIAN LAW

Commentators have long regarded major changes to the form or structure of government of an occupied state as expressly forbidden by the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949.<sup>25</sup> These international agreements are together expressive of customary international law.<sup>26</sup> The Hague Regulations reflect the understanding that the authority of the occupant to govern is less legitimate than that of the local administration of the occupied state. Therefore, its Article 43 declares:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures

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23. Thomas M. Franck, Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States, 64 *Am. J. Int'l L.* 809, 809 (1970); see also *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 *I.C.J.* 161, ¶ 6, at 328 (Nov. 6) (separate opinion of Simma, J.) ("[O]utside the courtroom . . . legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force.").

24. See, e.g., Interview by Tim Russert with Dick Cheney, Vice President, on Meet the Press (NBC television broadcast Mar. 16, 2003), transcript available at <https://www.mtholyoke.edu/acad/intrel/bush/cheneymeetthepress.htm> (on file with the *Columbia Law Review*) (asserting, with regard to United States-led invasion of Iraq in 2003, "my belief is we will, in fact, be greeted as liberators").

25. See, e.g., Christopher Greenwood, The Administration of Occupied Territory in International Law, in *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip* 241, 247 (Emma Playfair ed., 1992) (stating both Hague Regulations and Fourth Geneva Convention prohibit changes in law of occupied territory "unless they are required for the legitimate needs of the occupation").

26. See, e.g., *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 *I.C.J.* 226, ¶ 75 (July 8) (noting both agreements embody customary international humanitarian law); *Partial Award: Central Front—Ethiopia's Claim 2 (Eri. v. Eth.)*, 26 *R.I.A.A.* 155, 157 (Eri.-Eth. Claims Comm'n 2004) (noting "customary international law of armed conflict" is "exemplified" by both agreements).

in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>27</sup>

Consequently, occupying states that attempt to change the constitution or political form of the occupied state merely by virtue of the former's superior military strength exercise more power than is granted them by the express terms of the treaty law of occupation.<sup>28</sup>

Despite this apparent prohibition, states have, at times, relied on Article 43's "unless absolutely prevented" exception to make changes to a governing structure that is either at odds with the humanitarian ethos of the law of occupation or that might conflict directly with the requirement that they reestablish public order. Yet, such attempts have not always been accepted universally. Indeed, although the Allied Powers relied on the impossibility of continuing the inherently discriminatory legislation and repressive forms of government common to the Axis states that they occupied at the end of the Second World War to justify the sweeping reforms introduced, contemporary commentators alleged that the implementation of such changes exceeded the formal bounds of the Hague Regulations.<sup>29</sup>

Cognizant of the formal limitations in the law of occupation and eager to move the transformative ideals of the postwar reformatory occupations out of the realm of exceptions and into standard practice authorized explicitly by future treaty arrangements concerning occupation, the U.S. delegation to the conference negotiating the Geneva Conventions recommended a change that would have expanded the occupant's role in the transformation of the governing structure of the occupied territory.<sup>30</sup> The Soviet Union strongly opposed this suggestion, noting that it "gave the Occupying Power an absolute right to modify the penal legislation of the occupied territory" and that "[s]uch a right greatly exceeded the limited right laid down in the Hague Regulations."<sup>31</sup> The Mexican

27. Hague Regulations, *supra* note 6, art. 43.

28. See, e.g., 4 Int'l Comm. of the Red Cross, Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War 273 (Jean S. Pictet ed., 1958) [hereinafter ICRC Commentary on Convention (IV)] (noting such changes "were incompatible with the traditional concept of occupation (as defined in Article 43 of the Hague Regulations of 1907) according to which the occupying authority was to be considered as merely being a *de facto* administrator").

29. *Id.* (noting Allied occupations during World War II violated Article 43 of the 1907 Hague Regulations' prohibition on interference by an occupying power); see also R.Y. Jennings, Government in Commission, 1946 Brit. Y.B. Int'l L. 112, 136 (noting attempt to apply law of belligerent occupation to occupied territories post-World War II "would be a manifest anachronism" because "whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany").

30. 2A Final Record of the Diplomatic Conference at Geneva of 1949, at 670 (1950) (noting U.S. attempt to amend convention to give occupying powers greater ability to overturn laws of occupied territory); 3 *id.* at 139 (providing amendment text).

31. 2A *id.* at 670; see also *id.* at 671 (noting argument, by delegate of Monaco, that U.S. proposal "would not hold good as a general rule," and observation, by delegate of

delegation put forward a compromise solution that the occupant “could only modify the legislation of an occupied territory if the legislation in question violated the principles of the ‘Universal Declaration of the Rights of Man,’”<sup>32</sup> but the Conference did not approve this formulation.

Thus, the text of the Fourth Geneva Convention largely mirrors the minimalist approach of the Hague Regulations. Occupants are to change as little concerning the applicable domestic law and government of the territory as possible.<sup>33</sup> Article 64 of the Fourth Geneva Convention therefore affirms that “[t]he penal laws of the occupied territory shall remain in force” and that “the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”<sup>34</sup> The emphasis is on the continuity of the legal system as a whole, such that the explicit reference to “penal laws” does not allow by inference the occupant to interfere with the civil law of the occupied state.<sup>35</sup> However, Article 64 expands upon the “unless absolutely prevented” exception to Article 43 and declares that the occupant may make alterations where not doing so would “constitute a threat to [the Occupying Power’s] security or an obstacle to the application of the present Convention.”<sup>36</sup>

The Hague and Geneva regimes also include many provisions for the protection of the civilian population of the occupied territory and for the satisfaction of their basic humanitarian needs. Occupiers must not only refrain from pillage and forced military service; they must also provide medical care and basic education for the civilian population.<sup>37</sup> Indeed, Eyal Benvenisti has gone so far as to describe the Hague and Geneva framework as “a rudimentary bill of rights for the occupied population.”<sup>38</sup>

This Article, however, is less about these well-established obligations and more concerned with shifts in international practice concerning the alteration of the governing structure of the occupied state. In recent years, states have consistently moved beyond the express terms of the Hague and Geneva regime to introduce sweeping reforms in the after-

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Norway, that it would be “retrogressive step” as “it gave the impression that the Occupying Power could change the legislation of the occupied territory as it thought fit”).

32. *Id.*

33. See, e.g., ICRC Commentary on Convention (IV), *supra* note 28, at 335 (“Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country ‘unless absolutely prevented.’” (quoting Hague Regulations, *supra* note 6, art. 43)).

34. Fourth Geneva Convention, *supra* note 6, art. 64.

35. Cf. ICRC Commentary on Convention (IV), *supra* note 28, at 335 (arguing desire for continuity applies with equal force to civil laws and “there is no reason to infer” interference with civil law is allowed under convention).

36. Fourth Geneva Convention, *supra* note 6, art. 64.

37. *Id.* arts. 50–51, 56; Hague Regulations, *supra* note 6, art. 47.

38. Eyal Benvenisti, *The International Law of Occupation* 12 (2d ed. 2012).

math of military intervention.<sup>39</sup> The coalescence and general approval (perhaps not in the run-up to intervention, but certainly at the conclusion of hostilities) of these expansive reform projects have now come to represent not merely an option to undertake restructuring beyond the formal confines of the law of occupation but an international obligation to do so.

Accordingly, the next Part considers how the turn from strict minimalism has been affected by the permeation of human rights throughout international law and the recognition of certain general principles of international law that have guided understandings of the law in this area.

## II. HUMAN RIGHTS, REPRESENTATIVE GOVERNMENT, AND GENERAL PRINCIPLES OF INTERNATIONAL LAW

Although the Mexican proposal to allow occupiers to amend legislation of the occupied state that violated international human rights standards was rejected at the negotiating conference for the Geneva Conventions,<sup>40</sup> international law in the last several decades has increasingly embraced the universality and ever-presence of international human rights law. Indeed, the Inter-American Court of Human Rights has recognized that the State “has the obligation, at all times, to apply procedures that are in accordance with the law and to respect the fundamental rights of each individual in its jurisdiction,”<sup>41</sup> and the International Court of Justice (ICJ or “the Court”) has affirmed that human rights guarantees obtain even in times of armed conflict.<sup>42</sup> Further, the ICJ has made clear that in situations of occupation, the occupier has a duty to ensure the protection of the human rights of the occupied population.<sup>43</sup>

Concurrently, the international community has increasingly recognized representative government or democracy as an international ideal.<sup>44</sup> Secretaries-General of the United Nations have, for the past

39. See, e.g., *infra* Part III.B (describing examples of military intervention in Iraq, Afghanistan, Kosovo, East Timor, and Libya).

40. See *supra* text accompanying notes 30–32 (detailing United States, Soviet Union, and Mexico proposals during negotiations).

41. *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 174 (Nov. 25, 2000).

42. E.g., *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9) [hereinafter *Consequences of Construction*, ICJ Advisory Opinion] (“[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict . . .”).

43. E.g., *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶¶ 179–180, 211 (Dec. 19) (finding Uganda did not meet obligations to ensure human rights in territory it occupied).

44. See, e.g., Fox, *Humanitarian Occupation*, *supra* note 9, at 154 (“[I]nternational law has now adopted liberal democracy as the preferred model of national governance.”); see also *Promoting and Consolidating Democracy*, G.A. Res. 55/96, at 1, U.N. Doc.

twenty years, consistently promoted democracy as the mode of governance most compatible with international peace,<sup>45</sup> and, in recognition of this conclusion, states agreed following the 2005 World Summit to the establishment of the U.N. Democracy Fund to promote and build domestic democratic institutions.<sup>46</sup> Thus, even while the initial use of force remains controversial and though many states may not number within this democratic category, it is clear that the preferred outcome in the postwar period (when local administration must be rebuilt) is a stable, democratic administration for the occupied territory.<sup>47</sup>

This Part considers how certain general principles of international law have developed in a manner so as to support the reorientation of postconflict responsibilities away from the administrative minimalism of the express Hague and Geneva text and toward a modern system that obliges international actors engaged in military intervention to promote the international ideals of human rights and representative government. Part III then illustrates the application of these general principles through the consideration of recent practice.

International courts and tribunals have long accepted that the precise meaning of treaty terms may, according to the prevailing legal context, shift over time.<sup>48</sup> Indeed, the ICJ has declared that “the Court must

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A/RES/55/96 (Feb. 28, 2001) (recognizing link between protection of human rights and democracy).

45. E.g., U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*: Rep. of the Secretary-General, ¶ 151, U.N. Doc. A/59/2005 (Mar. 21, 2005) (“The United Nations does more than any other single organization to promote and strengthen democratic institutions and practices around the world . . .”); U.N. Secretary-General, Letter dated Dec. 17, 1996 from the Secretary-General addressed to the President of the General Assembly, ¶ 17, U.N. Doc. A/51/761 (Dec. 20, 1996) (observing “[d]emocratic institutions and processes . . . minimiz[e] the risk that differences or disputes will erupt into armed conflict or confrontation” and “[i]n this way, a culture of democracy is fundamentally a culture of peace”).

46. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 136, U.N. Doc. A/RES/60/1 (Sept. 16, 2005) [hereinafter 2005 World Summit Outcome].

47. Thus, for example, even though states castigated the United States for its invasion of Iraq in 2003 as an unlawful use of force, it was not suggested that the United States and its allies simply allow the Ba’athists to return to power. See, e.g., *infra* Part III.C (discussing general consensus of need to aid in rebuilding new governments in Afghanistan and Iraq).

48. E.g., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999) [hereinafter *Right to Information*, IACHR Advisory Opinion] (“[H]uman rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.”); *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 26 (1995) (characterizing Convention for the Protection of Human Rights and Fundamental Freedoms as “living instrument”); see also Special Rapporteur on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, Int’l Law Comm’n, ¶¶ 36–39, U.N. Doc. A/CN.4/660 (Mar. 19, 2013) (by Georg Nolte) [hereinafter *Special Rapporteur on Treaties*] (describing various courts’ approach to interpretation of treaties in light of Vienna Convention).

take into consideration the changes which have occurred in the supervening half-century,” that “its interpretation cannot remain unaffected by the subsequent development of law,” and that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>49</sup> Further, the court has stated that “where the parties have used generic terms in a treaty, the parties necessarily [have] been aware that the meaning of the terms was likely to evolve over time,” and that “where the treaty has been entered into for a very long period or is ‘of continuing duration’, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.”<sup>50</sup> Similarly, the Inter-American Court of Human Rights has affirmed that “when interpreting a treaty, not only the agreements and instruments formally related to it should be taken into consideration (Article 31.2 of the Vienna Convention), but also the system within which it is (inscribed) (Article 31.3).”<sup>51</sup>

It is through this method of “evolutive interpretation,” as the Inter-American Court has termed it, that this Article considers developments in international law subsequent to the conclusion of the Hague and Geneva agreements that have operated to modify understandings concerning their requirements.<sup>52</sup>

#### A. *Trusteeship*

States and international organizations have, for many decades, used trusteeship as a legal device through which to administer a territory and, on occasion, prepare its institutions for full independence.<sup>53</sup> Yet, trustee-

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49. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 53 (June 21).

50. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶ 66 (July 13).

51. “Street Children” (Villagran-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 192 (Nov. 19, 1999) (quoting Right to Information, IACHR Advisory Opinion, *supra* note 48, ¶ 113).

52. *Id.* ¶ 193 (quoting Right to Information, IACHR Advisory Opinion, *supra* note 48, ¶ 114).

53. See, e.g., U.N. Charter ch. XII (establishing requirements, procedures, and goals for establishing trusteeships under U.N. authority); League of Nations Covenant art. 22 (establishing rules and procedures for League-mandated trusteeship). See generally Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (2008) [hereinafter *Wilde, Territorial Administration*] (discussing policy considerations behind international administration of territories); W. Michael Reisman, Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate, and Trusteeship Obligations, 10 *Mich. J. Int’l L.* 231 (1989) (describing state trusteeship responsibilities); Ralph Wilde, *From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers*, 31 *Loy. L.A. Int’l & Comp. L. Rev.* 85 (2009) (comparing trusteeship with other forms of administration of territory by “foreign and international actors”).

ship has fallen out of favor in the postcolonial period with many states that were once colonies viewing the legal construct as an excuse for continued imperialism. The U.N. Trusteeship Council that once supervised the administration of trust territories is now defunct.<sup>54</sup> Further, Article 78 of the Charter expressly forbids the application of the United Nations's trusteeship system to any U.N. member.<sup>55</sup> Yet, the strong similarities to trusteeship in the aftermath of regime-change operations, wherein foreign officials are tasked with the administration of territory and claim to act in the interests of the local population, require that the principle be considered. Indeed, Adam Roberts, in a comment that could equally be applied to international transitional administration, has observed that "the idea of 'trusteeship' is implicit in all occupation law."<sup>56</sup>

Under the former trusteeship system, states took on the responsibilities of trusteeship voluntarily. Chapter XII of the U.N. Charter provided for the conclusion of a trusteeship agreement between the administering state and the Trusteeship Council.<sup>57</sup> The application of trusteeship to regime-change operations may, therefore, be constructive insofar as the act of toppling the foreign regime triggers the imposition on the intervening state of certain duties toward the affected population.<sup>58</sup> The descriptor "constructive" is also appropriate given the important role of the Security Council in mandating (through Chapter VII binding resolution) the duties to be fulfilled by modern occupation or international administration operations.<sup>59</sup> Indeed, many of the duties imposed by the Security Council reflect those applicable in trusteeship arrangements as specified in Article 76 of the Charter—namely, the furtherance of international peace and security, promotion of political and economic advancement, and respect for human rights and fundamental freedoms.<sup>60</sup> As such, the duties to promote human rights, ensure security, establish democratic institutions, and assist in reconstruction that states and inter-

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54. See, e.g., 2005 World Summit Outcome, *supra* note 46, ¶ 176 (proposing deletion of Chapter XIII of Charter and any reference to Trusteeship Council in Chapter XII). But cf. Saira Mohamed, Note, From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council, 105 *Colum. L. Rev.* 809, 812 (2005) (calling for revival of trusteeship system).

55. U.N. Charter art. 78.

56. Adam Roberts, What Is a Military Occupation?, 1985 *Brit. Y.B. Int'l L.* 249, 295.

57. U.N. Charter arts. 77, 79, 81.

58. See, e.g., Kristen E. Boon & Philip M. Moremen, Foreword to Symposium, When the Fighting Stops: Roles and Responsibilities in Post-Conflict Reconstruction, 38 *Seton Hall L. Rev.* 1233, 1247 (2008) ("It is generally accepted that actors engaged in governance functions in post-conflict reconstruction have fiduciary-like duties to the occupants.").

59. See, e.g., *infra* Part III (examining recent regime change missions as evidence of crystallization of obligations to go beyond express legal constraints of Hague and Geneva regime).

60. U.N. Charter art. 76 (stating basic objectives and guiding principles of trusteeship system); see also *infra* Part III (discussing relevant Security Council resolutions).

national organizations have assumed in the wake of forcible, external regime change seem to demonstrate a sense of obligation toward the beneficiary population akin to the principle of trusteeship.

*B. Obligation to Ensure and Obligation to Prevent*

States are under an obligation in several areas of international law not merely to perform certain functions but also to promote compliance with those obligations by other states and nonstate entities.<sup>61</sup> Thus, Common Article 1 of the Geneva Convention declares that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>62</sup> Further, Common Article 1 of the Genocide Convention states that “[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”<sup>63</sup>

Obligations to ensure also apply when states are transferring territory or individuals to the control of another entity. Thus, shortly before the United Kingdom (a party to the International Covenant on Civil and Political Rights (ICCPR)) was due to return administration of Hong Kong to the People’s Republic of China (not a party to the ICCPR), the United Kingdom and China concluded agreements through which China pledged that the Covenant would be observed in Hong Kong even after the handover.<sup>64</sup> Noting this agreement and the responsibility of the United Kingdom in this regard, the Human Rights Committee urged the United Kingdom “to take all necessary steps to ensure effective and continued application of the provisions of the Covenant in the territory of Hong Kong in accordance with the Joint Declaration and the Basic Law [concluded between the United Kingdom and China].”<sup>65</sup>

Similarly, in the individual context, the European Court of Human Rights held in the case of *Al-Saadoon & Mufdhi v. United Kingdom* that the United Kingdom had violated Article 3 of the European Convention on Human Rights when U.K. troops in Iraq surrendered the complainants, Iraqi nationals in U.K. custody, to Iraqi authorities without proper assur-

61. See, e.g., Christine Chinkin, *The Continuing Occupation?: Issues of Joint and Several Liability and Effective Control*, in *The Iraq War and International Law* 161, 164 (Phil Shiner & Andrew Williams eds., 2008) (noting example of states “accept[ing] positive obligation to ensure the application of the treaty standards by another state”).

62. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

63. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

64. U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (Hong Kong)*, ¶ 5, U.N. Doc. CCPR/C/79/Add.69 (Nov. 8, 1996).

65. *Id.* ¶ 7; see also Benvenuti, *supra* note 38, at 88 (discussing this incident).



ances that the complainants would not be put to death.<sup>66</sup> The Court rejected the United Kingdom's argument that the United Kingdom had an overriding obligation to surrender Iraqi nationals in Iraq to the government of Iraq by virtue of Iraq's sovereignty.<sup>67</sup> Instead, the Court affirmed that "the respondent State's armed forces, having entered Iraq, took active steps to bring the applicants within the United Kingdom's jurisdiction, by arresting them and holding them in British-run detention facilities" and that under such circumstances "the respondent State was under a paramount obligation to ensure that the arrest and detention did not end in a manner which would breach the applicants' rights."<sup>68</sup>

While the exact content of these obligations to ensure or to prevent remains uncertain, it is clear at the very least that they require that states cannot aid, encourage, or otherwise positively contribute to violations by others of the Conventions listed. Thus, in the *Paramilitary Activities Case (Nicaragua v. United States)*, the ICJ held that the obligation to ensure respect derives "from the general principles of humanitarian law," which mandate that the respondent state was "under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions."<sup>69</sup> Further, in the *Wall* advisory opinion, the Court wrote that Common Article 1 required that "every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with."<sup>70</sup> Consequently, the Court advised that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory," that "[t]hey are also under an obligation not to render aid or assistance in maintaining the situation created by such construction," and that "the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."<sup>71</sup>

With regard to the Genocide Convention's obligation to prevent genocide, the Court held that "the obligation in question is one of conduct and not one of result" and that "the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent

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66. 2010-IV Eur. Ct. H.R. 59.

67. *Id.* at 57.

68. *Id.* at 58 (citation omitted).

69. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 220 (June 27).

70. *Consequences of Construction*, ICJ Advisory Opinion, *supra* note 42, ¶ 158.

71. *Id.* ¶ 159.

genocide so far as possible.”<sup>72</sup> The Court found that a determination of whether “a State has duly discharged the obligation concerned” will depend on “the capacity to influence effectively the action of persons likely to commit, or already committing, genocide” and that this capacity to influence would in turn depend on “the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.”<sup>73</sup>

Thus, the obligation to ensure respect appears to require that states not take positive actions to contribute to the violation of the provisions of international law in question and that this obligation is a general duty on all states, regardless of whether that state is a party to the particular conflict or is in some other special position. Further, this obligation also applies when one state is required to obtain assurances that the rights guarantees previously in place will continue to be observed by the successor entity. On the other hand, the obligation to prevent is to be imposed only on a state that has some special connection or influence over the actor that stands ready to commit a violation, and this obligation requires the state in such a special position to take all measures reasonably available to it to prevent the violation.

In the context of contemporary regime-change operations, each principle may apply to the international community of states as a whole or simply to the intervening state.<sup>74</sup> Indeed, the obligation to ensure respect may encompass a duty on all states either to deny support to successor regimes that are oppressive or to take measures to ensure that international organizations administering territory act in ways that are in compliance with obligations to ensure respect that their member states have undertaken. Conversely, an obligation to prevent human rights violations may be incumbent upon the intervening state because of its special influence over the regime that it installs in the formerly occupied state or territory.

### *C. Responsibility to Rebuild*

The responsibility to rebuild, as formulated by the International Commission on Intervention and State Sovereignty, requires that where military intervention has been undertaken “there should be a genuine commitment to helping to build a durable peace, and promoting good

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72. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26).

73. *Id.*

74. See, e.g., Benvenisti, *supra* note 38, at 57, 87 (discussing occupying force’s obligations to civilian population to ensure continuation of “public order and civil life”).

governance and sustainable development.”<sup>75</sup> In addition to peace building, the Commission’s final report highlights the reestablishment of basic security,<sup>76</sup> the facilitation of transitional justice and reconciliation,<sup>77</sup> and the promotion of development as essential features of this new notion of a responsibility to rebuild.<sup>78</sup> The report also advocates the “constructive adaptation of Chapter XII of the U.N. Charter,” which laid down the rules of the international trusteeship system, so as to “enable reconstruction and rehabilitation to take place in an orderly way across the full spectrum, with the support and assistance of the international community.”<sup>79</sup>

Though the 2005 World Summit Outcome does not mention the responsibility to rebuild explicitly, it does recommend the formation of a U.N. Peacebuilding Commission to oversee postconflict transitional arrangements and endorses the establishment of a U.N. Democracy Fund in order to support initiatives aimed at strengthening democratic governance worldwide.<sup>80</sup> In this manner, the international community institutionalized the promotion of stable government and gave the support of the United Nations to such endeavors. Indeed, the establishment of these two organizational mechanisms may be viewed as evidence of states’ implicit adoption of a general responsibility to rebuild in post-conflict situations.

### III. SUBSEQUENT PRACTICE, TRANSFORMATIVE OCCUPATION, AND INTERNATIONAL TERRITORIAL ADMINISTRATION

Throughout the Cold War, a number of occupations subsequent to military intervention deviated significantly from the minimalist understandings of the Hague and Geneva regime. However, each sparked an international outcry from one grouping of states or another for reasons of geopolitical contestation and purported violations of the right of self-determination of the occupied population. Thus, the Soviet Union’s military intervention in Hungary, through which it replaced one government with another more friendly to Soviet interests, was decried by the U.N. General Assembly, with a Special Committee of the General Assembly labeling the Soviet invasion an act of aggression contrary to international law.<sup>81</sup> Similarly, the international community criticized the

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75. Int’l Comm’n on Intervention & State Sovereignty, *The Responsibility to Protect*, ¶ 5.1 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (on file with the *Columbia Law Review*).

76. *Id.* ¶ 5.8.

77. *Id.* ¶ 5.13.

78. *Id.* ¶ 5.19.

79. *Id.* ¶ 5.22.

80. 2005 World Summit Outcome, *supra* note 46, ¶¶ 97–105, 136.

81. Rep. of the Special Comm. on the Problem of Hung., ¶¶ 366–367, 785, 1957, U.N. Doc. A/3592; GAOR, 11th Sess., Supp. No. 18 (1957) (finding Soviet Union guilty of aggression); see also Sean D. Murphy, *Humanitarian Intervention: The United Nations in*

Soviet intervention in Afghanistan, whereby the Soviet Union sought to impose its own model of governance on Afghan society.<sup>82</sup> American attempts at regime change in various states, particularly in Latin America, also met with international criticism.<sup>83</sup> Moreover, the occupation projects initiated and sustained by American allies throughout the Cold War—namely, Israel in the West Bank and Gaza Strip, Turkey in Northern Cyprus, and Morocco in Western Sahara—were each labeled in turn unlawful and contrary to the right of self-determination of the population of each occupied state or territory.<sup>84</sup>

Since the end of the Cold War, however, states and international organizations have engaged in occupations that have attempted to bring about governmental reforms in occupied territories that stretch far beyond the formal bounds of the Hague and Geneva Conventions, and the international community as a whole has largely commended such actors for doing so.<sup>85</sup> This Part of the Article, therefore, first defines the

an Evolving World Order 89 (1996) (describing Soviet reason for intervention as “not convincing” because “[e]ven if an invitation by Hungarian government existed,” consent was eventually withdrawn); Brad Roth, Governmental Illegitimacy in International Law 265–66 (1999) (describing events surrounding intervention in Hungary and General Assembly’s response to intervention).

82. See, e.g., G.A. Res. ES-6/2, ¶ 2, U.N. Doc. A/RES/ES-6/2 (Jan. 14, 1980) (noting General Assembly “[s]trongly deplores the recent armed intervention in Afghanistan, which is inconsistent” with principle of “respect for the sovereignty, territorial integrity and political independence of every State”); Benvenisti, *supra* note 38, at 179 (describing international criticism of Soviet invasion).

83. See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 268 (June 27) (“[T]he protection of human rights . . . cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. . . . [T]he preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States . . .”).

84. See, e.g., Consequences of Construction, ICJ Advisory Opinion, *supra* note 42, ¶ 120 (concluding Israeli settlements in occupied territories “have been established in breach of international law”); G.A. Res. 37/253, at 49, U.N. Doc. A/RES/37/253 (May 13, 1983) (“*Deploring* the fact that part of the territory of the Republic of Cyprus is still occupied by foreign forces . . .”); Benvenisti, *supra* note 38, at 171–72 (describing international criticism of Moroccan occupation of Western Sahara).

85. This Part considers both state occupation and postconflict territorial administration by international organizations. Both have begun to advance important transformational objectives and thus are treated together. In support of this approach, see Steven R. Ratner, Foreign Occupation and International Territorial Administration: The Challenges of Convergence, 16 *Eur. J. Int’l L.* 695, 697 (2005), which argues that the “disconnect” between how “occupations and territorial administrations” have been conceptualized and the “ways these missions are actually carried out” is collapsing because the “two sorts of operations share a great deal, and lines separating them, adopted by international elites and reflected in international law, are disappearing.” The United Nations is not a party to the Hague or Geneva treaties, but it has voluntarily committed to observe international humanitarian law. U.N. Secretary-General, Secretary-General’s Bulletin: Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) (describing U.N. commitment to abide by international humanitarian law). Further, by virtue of its international legal personality, the United Nations is bound to act in accordance with the treaties to the extent that such

terms of Article 31(3)(b) of the Vienna Convention on the Law of Treaties and then uses this provision as a basis to assert that states have collectively renovated the minimalist obligations of the Hague and Geneva framework through their recent practice of transformative occupation.

*A. Article 31(3)(b) of the Vienna Convention on the Law of Treaties*

Article 31(3)(b) provides that treaty obligations are to be interpreted taking into account “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>86</sup> The International Law Commission’s (ILC) Special Rapporteur on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation has defined “subsequent practice” as “conduct, including pronouncements, by one or more parties to the treaty after its conclusion regarding its interpretation or application.”<sup>87</sup> Further, the ILC previously affirmed that, in order to establish general agreement to a revised interpretation, all parties to the relevant treaties (here, the Hague and Geneva agreements) need not have undertaken the practice themselves, so long as the parties have acquiesced in that subsequent practice.<sup>88</sup> Thus, the ICJ has made clear that “the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties.”<sup>89</sup>

States may undertake this practice or indicate their agreement either individually or collectively through international organizations. Indeed, Rosalyn Higgins has affirmed that “the practice of states comprises their collective acts as well as the total of their individual acts” and that “[c]ollective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law.”<sup>90</sup>

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instruments embody customary international law. E.g., Interpretation of Agreement of 25 March 1951 Between WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73, ¶ 37 (Dec. 20) (“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”).

86. Vienna Convention, supra note 11, art. 31(3)(b).

87. Special Rapporteur on Treaties, supra note 48, ¶ 118.

88. Commentaries on Draft Articles, supra note 11, at 53 (“[The Commission] omitted the word ‘all’ merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.”).

89. Dispute Regarding Navigational and Related Rights (*Costa Rica v. Nicar.*), Judgment, 2009 I.C.J. 213, ¶ 64 (July 13); see also Special Rapporteur on Treaties, supra note 48, ¶¶ 58–60 (“[A]ll judges in *Costa Rica v. Nicaragua* supported the conclusion that an evolutive interpretation is possible if it is accompanied by a common subsequent practice of the parties.”).

90. Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* 2 (1963).

Similarly, Ian Brownlie has termed international organizations “forums for state practice” and described General Assembly resolutions and Security Council decisions as practice that “provides evidence of the state of the law,”<sup>91</sup> while José Alvarez has noted that international organizations “provide shortcuts to finding custom.”<sup>92</sup>

As such, changes in the conduct of states and the acquiescence of other states to that modified conduct, whether demonstrated individually or collectively through international organizations, may lead to a shift in the meaning of treaty terms by operation of Article 31(3)(b) of the Vienna Convention. It is with this understanding that this Part examines recent practice for commonalities from which obligations may be derived. It then highlights state acquiescence in this revised interpretation of the responsibilities under the Hague and Geneva framework for states that carry out regime-change operations.

### B. *Subsequent Practice*

1. *Iraq*. — After the conclusion of the initial phase of hostilities in Iraq, when it was clear that the United States-led coalition had toppled the Ba’athist regime of Saddam Hussein, the United States and United Kingdom undertook to establish and support a Coalition Provisional Authority (CPA) to exercise administrative functions in Iraq temporarily.<sup>93</sup> Led by American diplomat Paul Bremer, and largely staffed by American personnel, the CPA appointed itself to govern Iraq for the duration of the occupation.<sup>94</sup> In response, the Security Council adopted Resolution 1483, wherein it took note of this development and mandated that the law of occupation, “in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,” was to apply to “all concerned” (namely, the foreign occupation forces in Iraq).<sup>95</sup>

However, the CPA implemented a series of reforms that stretched far beyond anything allowed by the formal text of the Conventions refer-

91. Ian Brownlie, *Principles of Public International Law* 691–92 (2008).

92. José E. Alvarez, *International Organizations as Law-Makers* 592 (2005); cf. Stefan Talmon, *The Security Council as World Legislature*, 99 *Am. J. Int’l L.* 175, 192 (2005) (observing, in theory, “[l]egislation by the Security Council is a powerful instrument for the maintenance of international peace and security,” but “[i]n practice . . . , Council legislation is fraught with problems, the most significant being the lack of clarity of the legislative acts and the question of implementation”).

93. Permanent Reps. of the United Kingdom and United States to the U.N., Letter dated May 8, 2003 from the Permanent Reps. of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003).

94. E.g., Regulation No. 1, § 1 (May 16, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government] (“The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration . . .”).

95. S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2003).

enced by the Security Council.<sup>96</sup> The CPA immediately sought to excise from the administration of Iraq the policies and personnel of the Ba'ath party regime. Order 1 of the CPA dissolved the party, removed senior party members from government positions, and banned them from future employment in the public sector.<sup>97</sup> Order 2 dissolved various institutions of the Iraqi government, including the Ministry of Defense, Ministry of Information, Ministry of State for Military Affairs, Army, Navy, Air Force, and National Assembly.<sup>98</sup> The CPA then promulgated significant revisions to the Iraqi Penal Code (suspending, *inter alia*, the use of the death penalty, prohibiting torture, and modifying sentences for other offences),<sup>99</sup> modified Iraq's taxation structure (mandating that the top tax rate not exceed fifteen percent),<sup>100</sup> overhauled its banking system,<sup>101</sup> implemented a new traffic code,<sup>102</sup> amended its copyright law in line with "current internationally-reconized standards of protection,"<sup>103</sup> reformed its laws concerning the management of public finances,<sup>104</sup> and imposed an extraordinarily liberal new regime to open Iraq to foreign investment.<sup>105</sup> In order to promote further governance reforms, the CPA also established a new Ministry of Human Rights tasked with the promotion

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96. See, e.g., Fox, *Humanitarian Occupation*, *supra* note 9, at 260 (observing CPA "enact[ed] a set of reforms so broad that it is no exaggeration to describe them as a social engineering project"); Adam Roberts, *The End of Occupation: Iraq 2004*, 54 *Int'l & Comp. L.Q.* 27, 36 (2005) ("[I]t is evident that some legal pronouncements of the CPA go far beyond what is envisaged in the law of The Hague and Geneva.").

97. *De-Ba'athification of Iraqi Society*, Order No. 1 (May 16, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government].

98. *Dissolution of Entities*, Order No. 2 (May 23, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government].

99. *Modifications of Penal Code and Criminal Proceedings Law*, Order No. 31 (Sept. 10, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government]; *Penal Code*, Order No. 7 (June 10, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government].

100. *Tax Strategy of 2004*, Order No. 49 (Feb. 19, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government]; *Tax Strategy for 2003*, Order No. 37 (Sept. 19, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government].

101. *Banking Law of 2004*, Order No. 94 (June 7, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government]; *Central Bank Law*, Order No. 56 (Mar. 6, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

102. *Traffic Code*, Order No. 86 (May 20, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

103. *Amendment to the Copyright Law*, Order No. 83 (May 1, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

104. *Financial Management Law and Public Debt Law*, Order No. 95 (June 4, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

105. *Foreign Investment*, Order No. 39 (Sept. 23, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government]; see also United Nations & World Bank, *United Nations/World Bank Joint Iraq Needs Assessment*, ¶ 2.47 (2003), available at <http://siteresources.worldbank.org/INTIRAQ/Overview/20147568/Joint%20Needs%20Assessment.pdf> (on file with the *Columbia Law Review*) (noting new Order concerning foreign investment "would make the country one of the most open in the world").

of fundamental freedoms and the prevention of rights violations<sup>106</sup> and established an Electoral Commission to oversee national elections during the transition period before the conclusion of the occupation.<sup>107</sup> Further, the CPA promulgated the Electoral Law, through which it imposed a system of proportional representation to protect minority groups and outlined the qualifications necessary to vote in elections for a new National Assembly from which would be derived the Iraqi Transitional Government.<sup>108</sup> Finally, before it returned the powers of governance to an Iraqi Interim Government on June 30, 2004, the CPA promulgated the “Law of Administration for the State of Iraq for the Transitional Period” through which the CPA entrenched a series of legal provisions concerning the governance of Iraq during the period from June 30, 2004 until the adoption of a permanent constitution.<sup>109</sup>

Throughout the CPA’s exercise of these extensive powers of government in Iraq, officials of the CPA maintained that such actions were designed for the benefit of the Iraqi people.<sup>110</sup> To be clear, this Article does not take a position for or against the desirability of such a transformative enterprise in the context of Iraq or elsewhere. However, before the occupation, even the United States’ lead coalition partner, the United Kingdom, expressed some doubt as to the legality of the expansive powers of reform later asserted by U.S. administrators. In March of 2003, U.K. Attorney General Lord Goldsmith wrote to advise Prime Minister Tony Blair to argue that “a further Security Council resolution is needed to authorize imposing reform and restructuring of Iraq and its Government” because the law of belligerent occupation comprising the Hague and Geneva Conventions would not be a sufficient basis in international law for such an operation.<sup>111</sup> After the United States and United Kingdom secured the adoption of Resolution 1483, internal U.K. government correspondence confirmed the officially held view that the mandate in operative paragraph 8 of the resolution for the Secretary-General’s Special Representative to work “in coordination with the Authority” to assist the people of Iraq to establish representative government and to reform the Iraqi legal and judicial system provided implicit

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106. Ministry of Human Rights, Order No. 60 (Feb. 22, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

107. The Independent Electoral Commission of Iraq, Order No. 92 (May 31, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

108. The Electoral Law, Order No. 96 (June 15, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

109. Law of Administration for the State of Iraq for the Transitional Period (Mar. 8, 2004) (Coalition Provisional Authority) [The Interim Iraqi Government].

110. See, e.g., Coal. Provisional Auth., An Historic Review of CPA Accomplishments 2–3 (2004) (listing four directives of CPA: “Security, Essential Services, Economy, Governance”).

111. Letter from Lord Goldsmith, Att’y Gen., U.K., to Tony Blair, Prime Minister, U.K. (Mar. 26, 2003), available at <http://www.iraqinquiry.org.uk/media/46487/Goldsmith-advice-re-occupying-powers-26March2003.pdf> (on file with the *Columbia Law Review*).



support for the activities of the CPA taken in pursuit of these objectives.<sup>112</sup> Indeed, Cathy Adams of the Legal Secretariat conveyed the view of the Attorney General, noting that “the Attorney considers that OP8 does appear to mandate the Coalition to engage in activity going beyond the scope of an Occupying Power.”<sup>113</sup> Further, the Security Council repeatedly endorsed various measures that the CPA undertook to transform Iraqi legal and political institutions.<sup>114</sup>

Whether the Security Council’s mandate for, and apparent endorsement of, the United States-led coalition’s transformative measures in Iraq may be viewed as a precedent authorizing future practice of transformative occupation has been a matter of some controversy in the scholarship.<sup>115</sup> Clearly, though, this Article’s argument that states have effected a revision of the Hague and Geneva framework through their subsequent practice cannot rest on one example alone. Therefore, other instances of regime-change missions are now considered in order to buttress this contention.

2. *Afghanistan*. — In response to the attacks of September 11, 2001, the United States and various international coalition partners combined with the forces of the Afghan Northern Alliance to overthrow the de facto Afghan government (the Taliban).<sup>116</sup> The United States regarded the Al Qaeda network, which had organized the attacks, and the Taliban as “virtually indistinguishable” and sought to eradicate both.<sup>117</sup> Whether

112. Letter from Cathy Adams, Legal Secretariat, Att’y General’s Chambers, to Huw Llewellyn, Legal Counselor, Foreign & Commonwealth Office ¶ 3 (June 6, 2003), available at <http://www.iraqinquiry.org.uk/media/43692/document2010-01-27-101000.pdf> (on file with the *Columbia Law Review*).

113. *Id.* ¶ 12.

114. E.g., S.C. Res. 1546, ¶ 4, U.N. Doc. S/RES/1546 (June 8, 2004) (endorsing timetable for democratic elections laid down by CPA); S.C. Res. 1511, ¶ 14, U.N. Doc. S/RES/1511 (Oct. 16, 2003) (encouraging “Member States to contribute” to assist stability and security under Resolution 1483); S.C. Res. 1500, ¶ 1, U.N. Doc. S/RES/1500 (Aug. 14, 2003) (endorsing CPA’s establishment of Governing Council drawn from cross-section of Iraqi society as step toward “representative government”).

115. E.g., Benvenisti, *supra* note 38, at 270 (“There are strong indications that Resolution 1483 . . . signals an endorsement of a *general* view that regards modern occupants as subject to enhanced duties toward the occupied population and therefore also having the authority to fulfill such duties.”). But see Roberts, *Transformative Military Occupation*, *supra* note 9, at 622 (arguing Resolution 1483 “does not amount to a general recognition of the validity of transformative policies impacted by occupants”).

116. Throughout the Taliban’s time in power, the international community instead recognized the de jure government of the Council of Ministers, led by President Burhanuddin Rabbani, as the legitimate representative of the Afghan people. Rüdiger Wolfrum & Christiane E. Philipp, *The Status of the Taliban: Their Obligations and Rights Under International Law*, 2002 Max Planck Y.B. United Nations L. 559, 575–77.

117. George W. Bush, Address by President George W. Bush (Nov. 10, 2001), *in* *United States Participation in the United Nations for 2001*, at 163, 165 (2003); see also Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001)

the overthrow of the Taliban constituted a lawful invocation of the right of self-defense may be questioned,<sup>118</sup> but it is clear that the United States-led military campaign created a political and administrative void that the international community was eager to ensure was filled appropriately.<sup>119</sup>

However, the conduct of postwar operations presented a particular challenge. Afghanistan had been riven by civil war for decades, and its history of fervent resistance to foreign invasions and weak prewar state institutions meant that an extensive program to rebuild administrative capacity would be required and that this program had to appear to be led by Afghan officials.<sup>120</sup> Therefore, on November 13, 2001 (barely a month after the launch of United States-led combat operations on October 7, 2001), the Special Representative of the Secretary-General for Afghanistan, Lakhdar Brahimi, outlined the urgency of reestablishing an Afghan-led government and of “seeking to legitimize a transition through a *Loya Jirgah*” (or representative assembly).<sup>121</sup> Further, the Secretary-General noted, in a report from March 2002 concerning the work of the United Nations Assistance Mission in Afghanistan (UNAMA), that the Mission ought to boost Afghan governmental capacity while relying on “as many Afghan staff as possible . . . [,] thereby leaving a light expatriate ‘footprint.’”<sup>122</sup>

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(arguing September 11 attack was “made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [Al Qaeda] as a base of operation”).

118. See, e.g., *Consequences of Construction*, ICJ Advisory Opinion, *supra* note 42, ¶ 139 (July 9) (implying inherent right of self-defense embodied in Article 51 of U.N. Charter only applies when there is armed attack by one state against another). But see Institut de Droit International, *Present Problems of the Use of Armed Force in International Law: Self-Defence*, Res. 10A, ¶ 10 (Oct. 27, 2007) (“In the event of an armed attack against a State by non-State actors, Article 51 of the Charter as supplemented by customary international law applies as a matter of principle.”).

119. Then-Secretary-General Kofi Annan stated that “the rapid march of events on the ground requires that we focus on the challenge we will face in a post-Taliban period. This means taking urgent action so as to avoid a political and security vacuum.” U.N. SCOR, 56th Sess., 4414th mtg. at 2, U.N. Doc. S/PV.4414 (Nov. 13, 2001). This sentiment was echoed by the Chinese government. *Id.* at 19 (“We should encourage all parties and factions in Afghanistan to intensify political dialogue with a view to reaching agreement on the composition of the transitional administration and avoiding the occurrence of a power vacuum.”). The concern over a “security vacuum” was also expressed by Bangladesh. *Id.* at 21 (“There is an urgent need for what [the Secretary-General] called action to avoid a security vacuum. . . . Ensuring respect for human rights and international humanitarian law will be critical for sustaining the new political dispensation in Afghanistan.”).

120. See, e.g., Ebrahim Afsah & Alexandra Hilal Guhr, *Afghanistan: Building a State to Keep the Peace*, 2005 Max Planck Y.B. United Nations L. 373, 376, 381, 441 (exploring effect of historical weaknesses of Afghan state on rebuilding efforts).

121. U.N. SCOR, 56th Sess., 4414th mtg. at 4, U.N. Doc. S/PV.4414 (Nov. 13, 2001).

122. U.N. Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security*, ¶ 98(d), U.N. Doc. A/56/875-S/2002/278 (Mar. 18, 2002).

In pursuit of this “light footprint” approach, the postconflict project in Afghanistan differed in certain formal respects from others before or since. Whereas the Security Council entrusted U.N. missions with full powers of government for a transitional period in Kosovo and East Timor, and the United States-led CPA claimed similar powers of government in Iraq,<sup>123</sup> the *de jure* right to govern remained in Afghan hands throughout the period of transition. Indeed, because the international community had never recognized the *de facto* rule of the Taliban,<sup>124</sup> the settlement agreement between the various factions of Afghan society negotiated under the auspices of the U.N. in the fall of 2001 instead simply provided for the transfer of power from the *de jure* (though wholly ineffective) government of President Rabbani and the pre-Taliban Council of Ministers to an interim authority.<sup>125</sup>

Despite the formalities of such *de facto/de jure* distinctions, the international community has played a key role in the post-Taliban era, requiring democratization and the guarantee of human rights for its continued support of the successor regime. From the very outset of its consideration of the overthrow of the Taliban, the Security Council emphasized the primacy of human rights in the period of transition and the necessity of assembling a broadly representative new government. Security Council Resolution 1378 called on forces operating in Afghanistan “to adhere strictly to their obligations under human rights and international humanitarian law,” declared that a transitional administration ought to be “broad-based, multi-ethnic and fully representative of all the Afghan people,” and recommended that such an administration ought to “respect the human rights of all Afghan people, regardless of gender, ethnicity or religion.”<sup>126</sup> Subsequently, the Bonn Agreement mandated that “[a]ll actions taken by the Interim Authority shall be consistent with Security Council resolution 1378”<sup>127</sup> and pledged to establish an independent human rights commission responsible for the “investi-

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123. See S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (establishing transitional administration in East Timor); S.C. Res. 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999) (authorizing establishment of transitional administration in Kosovo); Regulation No. 1 (May 16, 2003) (Coalition Provisional Authority) [The Interim Iraqi Government] (“The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration . . .”).

124. See *supra* note 116 (noting international community’s recognition of *de jure* government of President Rabbani).

125. U.N. Secretary-General, Letter dated Dec. 5, 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement] (containing Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions).

126. S.C. Res. 1378, ¶¶ 1–2, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

127. Bonn Agreement, *supra* note 125, art. V(5).

gation of violations of human rights, and development of domestic human rights institutions.”<sup>128</sup>

The Bonn Agreement laid out the basic path for the reform of elected bodies and the restoration of representative government in Afghanistan. An interim authority was to convene an Emergency Loya Jirga, which would in turn select a transitional authority to administer Afghanistan until such time as elections could be held and a Constitutional Loya Jirga would meet to adopt a new constitution.<sup>129</sup> The rewritten Afghan constitution was adopted in January of 2004,<sup>130</sup> and the Bonn process culminated in national elections held to select a National Assembly on September 18, 2005.<sup>131</sup> Though questions have been raised concerning the extent to which the delegates who negotiated the Agreement truly represented Afghanistan as a whole,<sup>132</sup> it is clear both from the language of the Agreement and its commendation by the Security Council thereafter in Resolutions 1383 and 1419 that respect for human rights and the entrenchment of democratic governance were recognized as essential requirements for the transition period.<sup>133</sup>

Further, those international actors tasked with assisting the Afghan authorities in their efforts to rebuild the country have continually espoused the view that commitment to human rights must orient such efforts. Indeed, when the Security Council granted Chapter VII authorization for the International Security Assistance Force (ISAF) to take “all necessary measures” in support of the transitional Afghan government,<sup>134</sup> the Security Council also stressed “that all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law.”<sup>135</sup> Moreover, in its redrafting of the Afghan code of criminal procedure (which resulted in the Interim Criminal Code for Courts adopted by presidential decree in 2004), the Italian mission in Afghanistan at-

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128. *Id.* art. III(C)(6).

129. *Id.* art. I.

130. The Afghanistan Compact, at 4, Jan. 31–Feb. 1, 2006, Permanent Rep. of Afghanistan to the U.N., Annex to the letter dated Feb. 9, 2006 from the Permanent Rep. of Afghanistan to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2006/90 (Feb. 9, 2006) [hereinafter *Afghan Compact*].

131. E.g., U.N. Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security: Emergency International Assistance for Peace, Normalcy and Reconstruction of War-Stricken Afghanistan*, ¶ 3, U.N. Doc. A/60/712-S/2006/145 (Mar. 7, 2006) [hereinafter U.N. Secretary-General, *Report of Mar. 7, 2006*].

132. See, e.g., Stromseth et al., *supra* note 12, at 119 (“At the outset, the political process launched with the Bonn agreement was not representative of Afghan society as a whole.”); Afsah & Guhr, *supra* note 120, at 375 (describing Bonn Agreement as “consensus of the elite”).

133. S.C. Res. 1419, U.N. Doc. S/RES/1419 (June 26, 2002); S.C. Res. 1383, U.N. Doc. S/RES/1383 (Dec. 6, 2001).

134. S.C. Res. 1386, ¶ 3, U.N. Doc. S/RES/1386 (Dec. 20, 2001).

135. *Id.* at 2.

tempted to ensure that detention and trial procedures comported with international human rights standards.<sup>136</sup> Additionally, the Afghan Human Rights Commission that the Bonn process established and UNAMA have been instrumental in vetting candidates for high administrative office, particularly with regard to reform of the Afghan National Police, “to exclude human rights violators.”<sup>137</sup>

Given Afghanistan’s continued financial dependence on the sponsoring states that have supported its post-Taliban reconstruction, it is also significant that such states have felt it necessary to tie aid to Afghanistan’s continued observance of the international human rights standards to which it committed itself in Article 7 of the postwar Constitution.<sup>138</sup> Thus, in the Afghan Compact of 2006, concluded between the Afghan government and fifty participating countries, ten participating organizations, and fourteen observer states and organizations (referred to collectively in the Compact as the “international community”<sup>139</sup>), the parties “reaffirm[ed] their commitment to the protection and promotion of rights provided for in the Afghan constitution and under applicable international law,”<sup>140</sup> and the Afghan government pledged that its security and law enforcement agencies would “adopt corrective measures including codes of conduct and procedures aimed at preventing arbitrary arrest and detention, torture, extortion and illegal expropriation of property with a view to the elimination of these practices.”<sup>141</sup> Similarly, in the most recent round of international monetary pledges (through which states committed \$16 billion to the continued reconstruction efforts), the donor states explicitly linked the provision of such funds to Afghanistan’s continued commitment to building a representative government and respecting international human rights law.<sup>142</sup>

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136. E.g., Matteo Tondini, *The Role of Italy in Rebuilding the Judicial System in Afghanistan*, 45 *Military L. & L. War Rev.* 79, 93–97 (2006).

137. U.N. Secretary-General, Report of Mar. 7, 2006, *supra* note 131, ¶ 16.

138. Constitution of Afghanistan, Jan. 3, 2004, ch. 1, art. 7 (“The United Nations Charter, inter-state agreements, . . . and the Universal Declaration of Human Rights shall be respected.”).

139. Afghan Compact, *supra* note 130, at 4.

140. *Id.* at 6.

141. *Id.* at 11.

142. See *The Tokyo Declaration: Partnership for Self-Reliance in Afghanistan from Transition to Transformation*, ¶ 12, Jul. 8, 2012, Permanent Rep. of Afghanistan to the U.N. & Charges d’affaires a.i. of the Permanent Mission of Japan to the United Nations, Letter dated July 9, 2012 from the Reps. of Afghanistan and Japan to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/867-S/2012/532 (July 12, 2012) (“The Participants shared the view that the International Community’s ability to sustain support for Afghanistan depends upon the Afghan Government delivering on its commitments as part of this renewed partnership.”). In return for aid, the Afghan government committed to “continue to reflect its pluralistic society and . . . build a stable, democratic society, based on the rule of law, effective and independent judiciary and good governance,” as well as “affirm[] that the human rights and fundamental freedoms of its

Even though Afghanistan presents something of a unique example because full powers of governance never passed into the hands of another state or international mission, the understanding that the actions of the successor regime would have to comply with international human rights standards in order to receive international support is evident. Moreover, the decisive influence of various international actors throughout the period of transition ought to be clear from the significant troop presence and immense financial support. Thus, in Afghanistan, the international community clearly manifested the view throughout the transition process that the actions of states and international institutions involved in rebuilding must promote the establishment of a representative, rights-friendly regime in Afghanistan in order to receive continued international support.

3. *Kosovo*.<sup>143</sup> — The North Atlantic Treaty Organization's (NATO) use of force against the Federal Republic of Yugoslavia (FRY) on the basis of humanitarian intervention in Kosovo in 1999—and the legality of Kosovo's unilateral declaration of independence in 2008—have each been debated rigorously in scholarly fora and elsewhere.<sup>144</sup> This Article will not rehearse the various arguments for and against those two occurrences presented by others. Instead, this section discusses the international administration of Kosovo, and the promotion of representative government and respect for human rights during that period, as further indicia of subsequent practice that evidences an emerging obligation in the sphere of postconflict territorial administration.

Though countries involved in negotiations to end Serbia's campaign of violence against Kosovar Albanians in the lead-up to NATO's military intervention purposefully left the territory's final status ambiguous, they clearly envisioned some enhanced autonomy for the people of Kosovo as the preferred outcome. Thus, while the Contact Group representatives (from Russia, the United States, the United Kingdom, France, Germany, and Italy) that led negotiations with the FRY and the Security Council each affirmed that a final solution must respect the sovereignty and terri-

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citizens, in particular the equality of men and women, are guaranteed under the Constitution and Afghanistan's international human rights obligations." Id.

143. This Article considers Kosovo and East Timor as instances of "regime change" insofar as foreign coercion effected the secession of these territories and placed their administration in the hands of a different actor in the international system.

144. See generally Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 1999 *Finnish Y.B. Int'l L.* 141, reprinted in *Essays on War in International Law* 593 (2006) (discussing controversy surrounding NATO involvement in Kosovo and arguing involvement was justified); W. Michael Reisman, *Kosovo's Antinomies*, 93 *Am. J. Int'l L.* 860 (1999) (arguing exigencies of moment necessitated NATO's use of force); Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, 10 *Eur. J. Int'l L.* 1 (1999) (discussing legality of NATO's threat of armed force).

torial integrity of the FRY, each body also declared that Kosovo ought to be granted some “meaningful self-administration.”<sup>145</sup>

Consequently, the Rambouillet Agreement, which the Contact Group proposed in January of 1999 as an accord to end the conflict between the FRY and Kosovar Albanians, suggested an entirely new framework of government for Kosovo. The Agreement proposed a new constitution for Kosovo, which enshrined democratic government and respect for human rights, and through which Kosovo would be elevated to the status of a republic within the FRY with its own elected president.<sup>146</sup> Its terms proved unacceptable to the Serb delegation and, in March 1999, NATO initiated a bombing campaign against the FRY in order to secure a ceasefire and to compel the FRY’s assent to the Rambouillet Agreement.<sup>147</sup> This military campaign finally concluded in June 1999 when the FRY agreed to withdraw its military and police personnel from Kosovo and concluded the Military-Technical Agreement with the NATO-led Kosovo International Security Force (KFOR).<sup>148</sup>

The Security Council then adopted Resolution 1244, authorizing the deployment of the KFOR (which later also came to include Russian troops) to establish a secure environment in the territory and formed the U.N. Interim Administration Mission in Kosovo (UNMIK) to exercise the functions of transitional administration until a democratic Kosovar autonomous authority could be formed.<sup>149</sup> The Secretary-General then appointed a Special Representative as the highest civilian official in

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145. S.C. Res. 1160, ¶ 5, U.N. Doc. S/RES/1160 (Mar. 31, 1998); accord Deputy Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the U.N., Letter dated Mar. 11, 1998 from the Deputy Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, Annex ¶ 9, U.N. Doc. S/1998/223 (Mar. 12, 1998) (“We support neither independence nor the maintenance of the status quo. . . . We support an enhanced status for Kosovo within the Federal Republic of Yugoslavia which a substantially greater degree of autonomy would bring and recognize that this must include meaningful self-administration.”).

146. Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, Mar. 18, 1999, Permanent Rep. of France to the U.N., Letter dated June 4, 1999 from the Permanent Rep. of France to the United Nations addressed to the Secretary-General, U.N. Doc. S/1999/648 (June 7, 1999); see also *Indep. Int’l Comm’n on Kos., The Kosovo Report: Conflict, International Response, Lessons Learned Annex 3* (2000) (summarizing Rambouillet Agreement).

147. See, e.g., *Indep. Int’l Comm’n on Kos.*, *supra* note 146, at 85–86 (recounting “NATO assumption . . . that a relatively short bombing campaign would persuade Milosevic to come back to sign the Rambouillet agreement”).

148. Military-Technical Agreement Between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, June 9, 1999, U.N. Secretary-General, Letter dated June 15, 1999 from the Secretary-General addressed to the President of the Security Council, Annex, U.N. Doc. S/1999/682 (June 15, 1999).

149. S.C. Res. 1244, *supra* note 123, ¶¶ 5, 7, 10 (authorizing establishment of security presence to provide interim administration in Kosovo).

Kosovo, exercising the plenary powers of local government vested in UNMIK by Resolution 1244.<sup>150</sup>

Resolution 1244 tasked UNMIK with eleven “main responsibilities.”<sup>151</sup> These included “[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including . . . elections,” gradually transferring administrative responsibility to local Kosovar authorities, supporting the reconstruction of infrastructure, maintaining law and order, and “protecting and promoting human rights.”<sup>152</sup> UNMIK set about to discharge these “responsibilities” from the very outset of the mission. UNMIK Regulation 1999/1, similar to initial prescriptions in East Timor, Iraq, and Afghanistan, preserved the laws applicable in Kosovo before NATO’s military intervention in March 1999, but mandated that such laws would continue to be valid only insofar as they did not conflict with the duties of public officials to “observe internationally recognized human rights standards” or discriminate against categories of individuals on impermissible grounds.<sup>153</sup> In reaction to local outcry against the continuation through Regulation 1999/1 of a body of law (existing in 1999) that had progressively decreased the autonomy of Kosovo within the constitutional structure of the FRY, UNMIK eventually specified that the applicable law would instead revert to that existing prior to 1989 (the year in which Slobodan Milosevic revoked the level of autonomy that Kosovo had previously enjoyed).<sup>154</sup> However, even this seeming reversion expanded the human rights obligations of the interim administration, specifying a list of international human rights instruments that public officials had to observe rather than the vaguely formulated “internationally recognized human rights standards” terminology of the earlier regulation.<sup>155</sup> Further, in order to ensure compliance with international

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150. U.N. Secretary-General, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, ¶¶ 3, 39, 44, U.N. Doc. S/1999/779 (July 12, 1999) [hereinafter U.N. Secretary-General, Report of July 12, 1999].

151. S.C. Res. 1244, *supra* note 123, ¶ 11.

152. *Id.*

153. U.N. Mission in Kos., Reg. No. 1999/1, On the Authority of the Interim Administration in Kosovo, §§ 2–3, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999); see also Hansjörg Strohmeyer, Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor, Fletcher F. World Aff., Summer 2001, at 107, 112 (noting practical difficulty of having to examine existing local law against international human rights standards).

154. U.N. Mission in Kos., Reg. No. 1999/24, On the Law Applicable in Kosovo, § 1.1(b), U.N. Doc. UNMIK/REG/1999/24 (Dec. 12, 1999) [hereinafter UNMIK, Reg. No. 1999/24]; see also Stromseth et al., *supra* note 12, at 316–18 (discussing historical context of Regulation 1999/24).

155. UNMIK, Reg. No. 1999/24, *supra* note 154, § 1.3. The Regulation required that public officials observe “internationally recognized human rights standards, as reflected in” a number of specified human rights treaties: the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the International Covenant on Civil and Political Rights; the International



human rights standards and the creation of democratic institutions, in just the first year of its administration UNMIK invalidated as discriminatory certain property laws that had been adopted under the FRY regime;<sup>156</sup> criminalized “publicly incit[ing] or publicly spread[ing] hatred, discord or intolerance between national, racial, religious, ethnic or other such groups living in Kosovo;”<sup>157</sup> provided for the establishment of an ombudsperson to investigate human rights violations and promote ethnic reconciliation;<sup>158</sup> supervised elections to municipal assemblies whose meetings were to be held in both Albanian and Serbian;<sup>159</sup> and established an Administrative Department for Democratic Governance and Civil Society to ensure respect for human rights and democratic processes in the work of “other Administrative Departments, local administration, and any emerging self-governing structures.”<sup>160</sup> Thus, even though the structure and governance practices of UNMIK itself have been criticized as undemocratic and, in some instances, responsible for the perpetration of human rights violations,<sup>161</sup> its efforts to ensure representative governance and the establishment of local institutions that respect human rights should be clear.

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Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and the International Convention on the Rights of the Child. *Id.*

156. U.N. Mission in Kos., Reg. No. 1999/10, On the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property, U.N. Doc. UNMIK/REG/1999/10 (Oct. 13, 1999) (repealing two property laws as “discriminatory in nature” and “contrary to international human rights standards”).

157. U.N. Mission in Kos., Reg. No. 2000/4, On the Prohibition Against Inciting to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance, § 1.1, U.N. Doc. UNMIK/REG/2000/4 (Feb. 1, 2000).

158. U.N. Mission in Kos., Reg. No. 2000/38, On the Establishment of the Ombudsperson Institution in Kosovo, U.N. Doc. UNMIK/REG/2000/38 (June 30, 2000).

159. U.N. Mission in Kos., Reg. No. 2000/45, On Self-Government of Municipalities in Kosovo, U.N. Doc. UNMIK/REG/2000/45 (Aug. 11, 2000) (“Meetings of the Municipal Assembly and its committees and public meetings shall be conducted in both the Albanian and Serbian languages.”); U.N. Mission in Kos., Reg. No. 2000/39, On the Municipal Elections in Kosovo, U.N. Doc. UNMIK/REG/2000/39 (July 8, 2000) (establishing municipal election process).

160. U.N. Mission in Kos., Reg. No. 2000/40, On the Establishment of the Administrative Department for Democratic Governance and Civil Society, § 2.2(b), U.N. Doc. UNMIK/REG/2000/40 (July 10, 2000).

161. See, e.g., Ombudsperson Inst. in Kos., Special Rep. No. 4, ¶ 24 (2001), available at [http://www.ombudspersonkosovo.org/repository/docs/E4010912a\\_633702.pdf](http://www.ombudspersonkosovo.org/repository/docs/E4010912a_633702.pdf) (on file with the *Columbia Law Review*) (criticizing UNMIK detention procedures as incompatible with European Convention on Human Rights); Ombudsperson Inst. in Kos., Special Rep. No. 1, ¶¶ 23–24 (2000), available at [http://www.ombudspersonkosovo.org/repository/docs/E4010426a\\_86354.pdf](http://www.ombudspersonkosovo.org/repository/docs/E4010426a_86354.pdf) (on file with the *Columbia Law Review*) (deploring UNMIK’s grant of immunity to itself and its personnel as contrary to rule of law and asserting it “paves the way for the impunity of the state”).

Indeed, in addition to these initial actions, in 2001 UNMIK promulgated the Constitutional Framework for Kosovo, which prepared the path for the territory's self-government within a representative, democratic structure.<sup>162</sup> The Framework established the Provisional Institutions of Self-Government (an assembly, president, government, courts, and various other bodies listed in the Framework) and mandate that they observe the individual human rights guarantees set forth in a number of international agreements (an expanded list of instruments from that set out in UNMIK Regulation 1999/24).<sup>163</sup>

Further, the Constitutional Framework evidences the necessity of balancing the majoritarianism of elections as the procedure for composing democratic institutions with the necessity of ensuring that the rights of minority communities will be respected. As such, the Framework set forth that the Assembly would be selected through secret ballot based on universal adult suffrage, but reserved twenty of the 120 seats in the Assembly for representatives of "non-Albanian Kosovo Communities."<sup>164</sup> Similarly, the presidency would consist of seven members of the Assembly, with two from the party having received the highest number of votes, two from the party with the second highest, one from the party with the third highest, one from the Kosovo Serb Community, and the remaining member from the "non-Kosovo Albanian and non-Kosovo Serb Community."<sup>165</sup> Indeed, this principle of distributive representation to ensure a voice to minority communities is remarkably similar to that undertaken in other postconflict transitions detailed in this Article.<sup>166</sup>

Perhaps most crucially for this analysis, in 2003, the Security Council endorsed "Standards for Kosovo," a short document containing eight areas of optimal government performance that the Provisional Institutions of Self-Government of Kosovo were required to attain before the territory's final status could be settled.<sup>167</sup> These categories for improvement included functioning democratic institutions, the rule of law, and the rights of communities, with many specific goals articulated

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162. U.N. Mission in Kos., Reg. No. 2001/9, On a Constitutional Framework for Provisional Self-Government in Kosovo, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001).

163. *Id.* chs. 1–3. In addition to those agreements listed in *supra* note 155, the Framework also recognized the European Charter for Regional or Minority Languages and the Council of Europe's Framework Convention for the Protections of National Minorities. *Id.* ch. 3.

164. *Id.* ch. 9.

165. *Id.*

166. See, e.g., *supra* text accompanying note 108 (discussing similar system imposed by CPA in Iraq).

167. U.N. Mission in Kos., Standards for Kosovo (2003) [hereinafter UNMIK, Standards for Kosovo], available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20Standards.pdf> (on file with the *Columbia Law Review*); see also S.C. Pres. Statement 2003/26, U.N. Doc. S/PRST/2003/26 (Dec. 12, 2003) ("The Security Council supports the "Standards for Kosovo" presented on 10 December 2003.").

within each category.<sup>168</sup> The pursuit of these goals came to be known as a policy of “standards before status” through which the international community conditioned negotiations on Kosovo’s final status (whether as an autonomous entity within Yugoslavia or otherwise) on the extent to which Kosovo’s domestic institutions complied with international standards of human rights and democracy.<sup>169</sup> The Security Council made clear that a comprehensive review would evaluate the performance of Kosovo’s Provisional Institutions of Self-Government against the Standards and that “further advancement towards a process to determine future status [sic] of Kosovo in accordance with resolution 1244 (1999) will depend on the positive outcome of this comprehensive review.”<sup>170</sup> This review was undertaken in 2005, and the Security Council decided that sufficient progress had been made to initiate negotiations over the territory’s final status.<sup>171</sup> Before talks could be concluded, Kosovo unilaterally declared its independence. However, a significant international presence remains (with many government support functions transferred from UNMIK to a deployment of the European Union, EULEX).<sup>172</sup>

Kosovo, therefore, provides an important illustration of the responsibility for proper administration that international actors have adopted in the practice of international territorial administration. Indeed, the Security Council not only mandated the promotion of human rights and the establishment of democratic institutions as “main responsibilities” of the international civil presence,<sup>173</sup> but also required that Kosovar institutions of local government be deemed to have fulfilled such requirements in their administrative practice before allowing negotiations over autonomy to proceed.

4. *East Timor*. — The status of East Timor had been a matter of international dispute since the invasion and occupation of the

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168. UNMIK, Standards for Kosovo, *supra* note 167. The other categories were freedom of movement, the economy, property rights, dialogue (with Belgrade), and the Kosovo Protection Corps. *Id.*

169. See, e.g., Press Release, Security Council, Implementing ‘Standards Before Status’ Policy Core Political Project for UN Kosovo Mission, Security Council Told, U.N. Press Release SC/7999 (Feb. 6, 2004) (recounting U.K. representative’s position that Standards embodied “only way forward towards final status”).

170. S.C. Pres. Statement 2003/26, *supra* note 167 (internal quotation marks omitted).

171. U.N. Secretary-General, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, ¶ 2, U.N. Doc. S/2006/45 (Jan. 25, 2006) (noting Security Council decided after review “to launch a political process designed to determine Kosovo’s future status”).

172. E.g., U.N. Secretary-General, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, ¶ 23, U.N. Doc. S/2008/692 (Nov. 24, 2008) (describing international presence and transfer of policing and other responsibilities from UNMIK to EULEX).

173. See *supra* notes 151–152 and accompanying text (discussing eleven responsibilities outlined in Resolution 1244).

Portuguese colony by Indonesia in 1975.<sup>174</sup> In May of 1999, Portugal and Indonesia concluded an agreement with the United Nations to allow the people of East Timor to decide through referendum whether to remain part of Indonesia or become independent.<sup>175</sup> The United Nations already had an established civilian mission in East Timor and the Secretary-General anticipated that a vote against remaining part of Indonesia would necessitate a period of U.N. administration of East Timor to supervise the territory's transition to full independence.<sup>176</sup> However, when a large majority of East Timorese actually voted to sever ties with Indonesia, pro-Indonesian militias unleashed a wave of violence against civilians and international personnel that attracted widespread condemnation.<sup>177</sup> Under growing international pressure, the Indonesian government consented to the deployment of an international peacekeeping force in East Timor to restore order.<sup>178</sup>

In response, the Security Council authorized the deployment of a peacekeeping force as a binding enforcement action under Chapter VII despite Indonesia's consent<sup>179</sup> and then established the U.N. Transitional Administration in East Timor (UNTAET), also under Chapter VII, "to exercise all legislative and executive authority, including the administration of justice."<sup>180</sup> The Security Council empowered a Transitional Administrator of East Timor (to be appointed by the Secretary-General as his Special Representative) "to enact new laws and regulations and to amend, suspend or repeal existing ones."<sup>181</sup> The Security Council also urged the new mission to develop democratic institutions and an independent East Timorese human rights body so as to ensure adequate consultation with the local population.<sup>182</sup> As such, plenary legislative and administrative power was entrusted to a U.N. administrator who was tasked by the Security Council with reform of the East Timorese legal

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174. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶¶ 13–15 (June 30).

175. U.N. Secretary-General, *Question of East Timor: Report of the Secretary-General*, Annex I, U.N. Doc. A/53/951-S/1999/513 (May 5, 1999) (containing Agreement Between Republic of Indonesia and Portuguese Republic on Question of East Timor).

176. See *id.* ¶ 7 (allowing voluntary contributions from nations so U.N. presence in East Timor may be established quickly in anticipation of being needed after election).

177. E.g., U.N. SCOR, 54th Sess., 4043d mtg. at 2–3, U.N. Doc. S/PV.4043 (Sept. 11, 1999); U.N. Secretary-General, *Report of the Secretary-General on the Situation in East Timor*, ¶ 3, U.N. Doc. S/1999/1024 (Oct. 4, 1999).

178. See, e.g., Fox, *Humanitarian Occupation*, *supra* note 9, at 101 (describing circumstances surrounding Indonesia's grant of consent); Tansey, *supra* note 12, at 65 (same).

179. S.C. Res. 1264, ¶ 3, U.N. Doc. S/RES/1264 (Sept. 15, 1999).

180. S.C. Res. 1272, *supra* note 123, ¶ 1.

181. *Id.* ¶ 6.

182. *Id.* ¶ 8.

and administrative system and its turn toward democratic independence.<sup>183</sup>

In fulfillment of these purposes, UNTAET promulgated Regulation 1999/1, which mandated that public officials be bound by a host of international human rights treaties and that Indonesian law be retained to the extent compatible with these treaties until amended by the Transitional Administrator or future democratic institutions of East Timor.<sup>184</sup> The Administration's first regulation identified six laws that it deemed *prima facie* incompatible with the human rights instruments listed and which it therefore declared invalid.<sup>185</sup> The Administration's second regulation attempted to give a credible veneer of local participation to the U.N. regime through the establishment of a National Consultative Council broadly reflective of East Timorese society and the results of the independence referendum (insofar as the majority of Timorese seats on the Consultative Council were to be drawn from representatives of the pro-independence National Council of East Timorese Resistance).<sup>186</sup> The Consultative Council could advise the Transitional Administrator and "make policy recommendations on significant executive and legislative matters," but the Transitional Administrator remained the ultimate decisionmaker within the territory.<sup>187</sup> Indeed, Consultative Council Members had to swear an oath to uphold democratic institutions, human rights and nonviolent political expression, and the Transitional Administrator could remove any member for an apparent violation of the principles of that oath.<sup>188</sup> Accordingly, both international and local actors pledged from the very beginning of the Transitional Administration to ensure the promotion of human rights and the establishment of democracy in the regime-building project in East Timor, even though such processes were to be carried out under the ultimate authority of an international official.

The international mission in East Timor may therefore be described as an attempt to balance the authoritativeness thought necessary for international officials to build new, human rights-based institutions with respect for the right to self-determination of the local population. International officials pursued the latter objective through the gradual

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183. U.N. Transitional Admin. in East Timor, Reg. No. 1999/1, On the Authority of the Transitional Administration in East Timor, § 1.1, U.N. Doc. UNTAET/REG/1999/1 (Nov. 27, 1999) ("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.").

184. *Id.* §§ 2–3.

185. *Id.* § 3.

186. U.N. Transitional Admin. in East Timor, Reg. No. 1999/2, On the Establishment of a National Consultative Council, §§ 1–2, U.N. Doc. UNTAET/REG/1999/2 (Dec. 2, 1999).

187. *Id.* § 3.

188. *Id.* §§ 6–7.

integration of local representatives into the processes of government until full independence was achieved. UNTAET, like UNMIK in Kosovo, has been criticized for its autocratic style of governance,<sup>189</sup> but it did gradually increase the involvement of East Timorese representatives in the governing process. In July 2000, approximately nine months after the establishment of the interim U.N. administration, Regulation 2000/23 created a cabinet, which came to be divided evenly between East Timorese and international officials, to formulate policies for the Administration, supervise various departments, and make regulatory recommendations to the Transitional Administrator.<sup>190</sup> Regulation 2000/24, promulgated on the same day, then replaced the National Consultative Council with an enlarged National Council appointed by the Transitional Administrator to serve as “a forum for all legislative matters” through the initiation or modification of draft regulations.<sup>191</sup> The next year, Regulation 2001/2 replaced the National Council with an elected Constituent Assembly tasked with writing a new constitution,<sup>192</sup> and Regulation 2001/28 replaced the Cabinet with a Council of Ministers composed wholly of Timorese officials.<sup>193</sup> Finally, East Timor declared independence on May 20, 2002, completing the transition process from colony to occupied territory to independent state.<sup>194</sup>

While democratic institution-building was a paramount concern to international administrators throughout the transition period, it should also be noted that UNTAET sought to transcend the simple majoritarian domination associated with some democratic systems of governance. The Revolutionary Front for an Independent East Timor (FRETILIN), the leading Timorese group in the resistance to Indonesian occupation, stood almost certain to win large majorities in elections because of its

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189. See, e.g., Jarat Chopra, *The U.N.'s Kingdom of East Timor*, *Survival*, Autumn 2000, at 27, 30–33 (criticizing authoritarian style of governance and discussing deleterious impact on East Timorese population).

190. U.N. Transitional Admin. in East Timor, Reg. No. 2000/23, *On the Establishment of the Cabinet of the Transitional Government in East Timor*, §§ 1–2, 4, U.N. Doc. UNTAET/REG/2000/23 (July 14, 2000).

191. U.N. Transitional Admin. in East Timor, Reg. No. 2000/24, *On the Establishment of a National Council*, § 1, U.N. Doc. UNTAET/REG/2000/24 (July 14, 2000); see also Wilde, *Territorial Administration*, *supra* note 53, at 2 n.2 (noting regulation followed calls for greater participation by local government).

192. U.N. Transitional Admin. in East Timor, Reg. No. 2001/2, *On the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor*, § 1.1, U.N. Doc. UNTAET/REG/2001/2 (Mar. 16, 2001).

193. U.N. Transitional Admin. in East Timor, Reg. No. 2001/28, *On the Establishment of the Council of Ministers*, § 1, U.N. Doc. UNTAET/REG/2001/28 (Sept. 19, 2001).

194. See Press Release, Security Council, Council Endorses Proposal to Declare East Timor's Independence 20 May 2002, U.N. Press Release SC/7192 (Oct. 31, 2001) (noting Security Council recommendation of East Timorese independence); cf. S.C. Res. 1414, U.N. Doc. S/RES/1414 (May 23, 2002) (recommending admission of East Timor as member of United Nations).

widespread recognition among the Timorese population.<sup>195</sup> Yet, UNTAET sought to establish a system of proportional representation that would ensure that FRETILIN's huge popularity did not translate into the ability to amend the agreed-upon constitution at will or crush smaller opposition factions.<sup>196</sup> Thus, balance in the approach—between the desire for majoritarian democracy and the enforcement of international will to ensure that the institutions left behind would last in a broadly representative fashion—was a hallmark of the U.N. Transitional Administration in East Timor.

5. *Libya*. — NATO's military intervention in Libya, first to protect civilian populations in Eastern Libya and then to assist in the ouster of the Gaddafi regime, may not at first appear to fit easily within the framework of responsibilities incumbent upon regime changers that this Article has set about to define. Indeed, Security Council Resolution 1973, as a concession to those members of the Security Council haunted by the ghosts of Iraq and consequently fearful (perhaps justifiably so) that the authorization to protect civilians might creep into a full scale regime-change operation, explicitly "exclud[ed] a foreign occupation force of any form on any part of Libyan territory."<sup>197</sup> As such, it may well be thought that such a pronouncement freed those states intervening militarily from any obligation toward the people of Libya or toward the restructuring of a stable, democratic, human rights-friendly regime.

Yet, contemporaneous statements issued by international leaders concerning the military intervention would seem to indicate a different understanding. Thus, addressing the General Assembly in 2011, President of the European Council Herman Van Rompuy made clear not only that, through NATO's intervention in Libya, "[t]he principle of 'responsibility to protect' was put into action [] with perseverance and success," but also that "[n]ow there is a responsibility to assist the new Libya with the political transition, reconciliation and reconstruction of a united country."<sup>198</sup> Echoing these comments, Spain's Minister for Foreign Affairs and Cooperation, Trinidad Jiménez, declared "We now have an obligation to continue to help the Libyan people in the reconciliation and reconstruction processes,"<sup>199</sup> and Belgium's Deputy Prime Minister and Minister of Foreign Affairs, Steven Vanackere, affirmed that "the international community has a responsibility to help in the reconstruc-

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195. See, e.g., Tansey, *supra* note 12, at 87 ("[I]t was widely, and correctly, believed that most of the district representatives would ultimately be from Fretilin.").

196. See, e.g., *id.* at 86 (arguing UNTAET's push for proportional representation "reflected a desire . . . to make sure that Fretilin's already strong position was not exaggerated by a majoritarian system").

197. S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

198. U.N. GAOR, 66th Sess., 15th plen. mtg. at 28, U.N. Doc. A/66/PV.15 (Sept. 22, 2011).

199. U.N. GAOR, 66th Sess., 24th plen. mtg. at 12, U.N. Doc. A/66/PV.24 (Sept. 24, 2011).

tion of Libya” and referred to that responsibility as “an integral part of the responsibility to protect.”<sup>200</sup>

Furthermore, even though no provision was made for plenary administration of the sort authorized in Kosovo or East Timor, or for any foreign occupation force of the sort sanctioned in Iraq and Afghanistan, the Security Council still manifested this responsibility to assist in Libya’s postconflict transition through the establishment of the U.N. Support Mission in Libya (UNSMIL).<sup>201</sup> The Security Council created UNSMIL through a binding Chapter VII resolution, which obviated the necessity of the new Libyan regime’s consent for the duration of the mandate. Resolution 2009 instructed UNSMIL to “assist and support” Libyan authorities to restore public safety, initiate a “constitution-making and electoral process,” “promote and protect human rights,” and “extend state authority” by “strengthening emerging accountable institutions.”<sup>202</sup> Extending UNSMIL’s mandate for a further twelve months in March 2012,<sup>203</sup> again in March 2013,<sup>204</sup> and against in March 2014,<sup>205</sup> all three times under Chapter VII, the Security Council called upon Libyan authorities “to take all steps necessary to prevent violations of human rights” and affirmed the mission of UNSMIL to assist in the democratic transition, attainment of public security and promotion of human rights in Libya.<sup>206</sup>

Despite this demonstration of accumulated practice, in order to substantiate the Article’s argument that a revised obligation has emerged, it must be shown that this practice has also established the agreement of the parties to this revised interpretation of the Hague and Geneva regime. It is to this task that the Article now turns.

### C. *Establishing the Agreement of the Parties*

When the General Assembly endorsed a modified version of the “Responsibility to Protect” doctrine in 2005, it did not explicitly mention the “Responsibility to Rebuild” component of the International Commission on Intervention and State Sovereignty’s (ICISS) formulation.<sup>207</sup> Yet, states have increasingly recognized an obligation to assist in postconflict reconstruction and stabilization. For example, the comments of the French Foreign Minister, Dominique de Villepin, in his 2002

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200. *Id.* at 5.

201. S.C. Res. 2009, ¶ 12, U.N. Doc. S/RES/2009 (Sept. 16, 2011).

202. *Id.*

203. S.C. Res. 2040, ¶ 6, U.N. Doc. S/RES/2040 (Mar. 12, 2012).

204. S.C. Res. 2095, ¶ 7, U.N. Doc. S/RES/2095 (Mar. 14, 2013).

205. S.C. Res. 2144, ¶ 6, U.N. Doc. S/RES/2144 (Mar. 13, 2014).

206. S.C. Res. 2040, *supra* note 203, ¶ 4.

207. 2005 World Summit Outcome, *supra* note 46, ¶¶ 138–139 (mentioning only responsibility to protect “from genocide, war crimes, ethnic cleansing and crimes against humanity”).



address to the General Assembly concerning Afghanistan—wherein he affirmed that “[w]e must now rebuild[,] we must help the Afghan people, maintain our efforts over the long term, and continue our work to bring about stability and democracy”<sup>208</sup>—have been echoed by multiple other state representatives who each have drawn attention to their state’s own efforts to assist in the reconstruction of Afghanistan and the obligation of members of the international community to lend support to such efforts. China, Estonia, Finland, France, Germany, Iceland, India, Iran, Ireland, Italy, Japan, Kazakhstan, Luxembourg, Malaysia, the Netherlands, Norway, Pakistan, Qatar, Republic of Korea, Romania, Slovenia, Tajikistan, Thailand, Turkey, and Uzbekistan have made statements in which they have endorsed international reconstruction efforts, highlighted their own contribution in that regard, and/or, in several cases, appeared explicitly to affirm the obligatory nature of such commitments to rebuilding and representative transitional administration.<sup>209</sup>

Similarly, even though many states opposed the United States-led invasion of Iraq in 2003, the statement of the President of Latvia to the General Assembly seems to have been indicative of the general understanding that the international community must lend its support to the transitional administration. The President of Latvia noted, with regard to both Afghanistan and Iraq, that “the military measures undertaken by the United States and its allies will have to be followed by comprehensive international efforts to help those countries rebuild their societies and their economies,” and that “most of us would agree on the need for reconstruction and security regardless of our opinion about the foreign military presence in these two countries.”<sup>210</sup> Indeed, the President of Brazil, urging the United Nations to take a leading role in supervising the reestablishment of security and the postwar Iraqi political process, declared that “[w]e must not shy away from our collective responsibilities.”<sup>211</sup> Moreover, leaders from Australia, Austria, Bahrain, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Cambodia, Canada, Croatia, Dominica, East Timor, Egypt, El Salvador, France, Gambia, Honduras, Iceland, India, Italy, Japan, Jordan, Kuwait, Macedonia, Malaysia, Mauritius, Morocco, Nicaragua, the Philippines, Poland, Portugal, Qatar, the Republic of Korea, Romania, Russia, San Marino, Spain, Slovenia, Sri Lanka, Thailand, the United Arab Emirates, the United States, and Vietnam have each pledged their support for and, in some cases, their active contribution to, rebuilding operations and transitional efforts to

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208. U.N. GAOR, 57th Sess., 3d plen. mtg. at 28, U.N. Doc. A/57/PV.3 (Sept. 12, 2002).

209. See *infra* Appendix 1 (listing relevant General Assembly statements of U.N. member states).

210. U.N. GAOR, 58th Sess., 8th plen. mtg. at 2, U.N. Doc. A/58/PV.8 (Sept. 23, 2003).

211. U.N. GAOR, 58th Sess., 7th plen. mtg. at 5, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).

ensure representative political institutions.<sup>212</sup> While states have expressed concern over and disagreed about the proper actor to discharge this responsibility to rebuild, with several noting that the United Nations and not national occupation forces ought to have been in charge of such postconflict operations, those states that have made public statements on questions of reconstruction and transitional administration have nevertheless expressed the position that such functions ought to be undertaken.

The foregoing examination of recent practice and the acquiescence of states has shown that time and again states and international organizations entrusted to administer territory in post-regime-change settings have acted not only to ensure the security of the local population and the reconstruction of infrastructure damaged in the conflict, but also to establish representative local government, protect human rights, and safeguard the interests of minority communities. Further, states and international organizations carrying out such functions have also taken on the responsibility of doing what they can to facilitate the installation of a successor regime that would be democratic, respect basic rights, and abjure the persecution of minority groups. States and international organizations have discharged these tasks at the insistence of other states—the statements of bystander states in support of the missions described indicate a general agreement to the revision of the minimalist Hague and Geneva framework. This finding raises several other questions of international law, however, which must be addressed before a final conclusion may be reached.

#### IV. RESPONSIBILITY AND CONTROL

If it is accepted first that states conducting regime-change operations now have certain postconflict obligations toward the population of the host state and, second, that states or the international organizations that take charge of international transitional administration projects may bear responsibility for the subsequent bad acts of a successor regime whose installation they facilitated or failed reasonably to prevent, some consideration must be given to whether general international law supports the imposition of such responsibility and what legal limits may apply. This Part therefore examines the extent to which the imposition of responsibility for the acts of another finds support in international law and discusses varying doctrines of attribution based on the level of control exercised by the accused actor that may constrain the responsibility of states or international organizations for the consequences of those acts or omissions.

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212. See *infra* Appendix 2 (listing U.N. statements of parties regarding Iraq).

*A. Responsibility for the Conduct of Another State*

A state must not contribute to the unlawful acts of another state.<sup>213</sup> The ICJ made clear in the advisory opinion concerning South Africa's unlawful occupation of Namibia that states have a duty not to recognize or contribute to illegal situations in international law.<sup>214</sup> Moreover, the ILC has confirmed that complicity in the illegal acts of another state may engage the international responsibility of the complicit state.<sup>215</sup> Given the prominent involvement of international organizations in missions of territorial administration and reform, it is important to note that the ILC has also identified complicity as a basis upon which to engage the international responsibility of an international organization.<sup>216</sup> Further, in its study of customary international humanitarian law, the International Committee of the Red Cross (ICRC) has asserted as a "rule" that "[a] State is responsible for violations of international humanitarian law attributable to it, including . . . violations committed by persons or entities it empowered to exercise elements of governmental authority."<sup>217</sup> As such, the basic position is that with regard to an internationally wrongful act committed by another, a state or international organization that assists knowingly (in the ILC's formulation) or simply contributes through empowering the entity that commits the violation to exercise elements of government authority (the ICRC's position) may be held responsible.

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213. See, e.g., Helmut Philipp Aust, *Complicity and the Law of State Responsibility* 191 (2011) [hereinafter *Aust, Complicity and Responsibility*] (finding "general rule on complicity has entered the corpus of customary international law"); Lea Brilmayer & Isaias Yemane Tesfaldet, *Third State Obligations and the Enforcement of International Law*, 44 *N.Y.U. J. Int'l L. & Pol.* 1, 5 (2011) (arguing states "are under a legal obligation not to contribute to another State's violation of international law"); Helmut Philipp Aust, *Complicity in Violations of International Humanitarian Law* 22 (Dec. 20, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=2136885> (on file with the *Columbia Law Review*) ("It is today firmly accepted that aiding or assisting another state in the commission of internationally wrongful acts entails the responsibility of the helping state/international organisation if certain conditions are met.").

214. *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 119 (June 21).

215. ARSIWA, *supra* note 21, art. 16 (holding states responsible for aiding and assisting wrongful acts of another state); see also Vaughan Lowe, *Responsibility for the Conduct of Other States*, 101 *Kokusaiho Gaiko Zassi [J. of Int'l L. & Dipl.]* 1, 3–8 (2002) (Japan) (discussing "responsibility of one State for the unlawful conduct of another State").

216. *Draft Articles on the Responsibility of International Organizations*, Rep. of the Int'l Law Comm'n, 63d Sess., Apr. 26–June 3, July 4–Aug. 12, 2001, art. 14, at 54, U.N. Doc. A/66/10 [hereinafter *DARIO*]; GAOR, 66th Sess., Supp. No. 10 (2011) (holding international organizations responsible for aiding and assisting wrongful acts of another state or international organization).

217. 1 Jean-Marie Henckaerts & Louise Doswald-Beck, *Int'l Comm. of the Red Cross, Customary International Humanitarian Law*, r. 149, at 530 (2009).

Whether responsibility for acts of another ought somehow to depend on the nature of the wrongful act or the relationship between the international bystander and the injured or injurer is not yet settled law. Indeed, though the ICJ declined to decide the merits of *East Timor (Portugal v. Australia)* on the basis that an indispensable third party (Indonesia) was not present,<sup>218</sup> Judge Weeramantry made clear in his dissenting opinion that the erga omnes nature of the right in question (the right of the people of East Timor to self-determination) must give rise to a corresponding erga omnes duty to respect that right on the part of all states.<sup>219</sup> As such, the international responsibility of Australia could be engaged because Australia's conclusion of a treaty with Indonesia (purporting to act on behalf of East Timor) constituted recognition of Indonesia's unlawful occupation of East Timor in violation of the Timorese people's right to self-determination.<sup>220</sup> Further, Judge Weeramantry asserted that, as the de jure administering power of East Timor by virtue of trusteeship arrangements concluded before the Indonesian invasion, Portugal had a special duty to vindicate its rights as trustee of the people of East Timor and that "Portugal would be in violation of that basic obligation if, while being the administering Power, and while claiming to be such, it has failed to take such action as was available to it in law for protecting the rights of the people of East Timor."<sup>221</sup> As such, the combination of the erga omnes quality of the right in question and the special position of Portugal as the administering power required that Portugal take action against violations of such rights perpetrated by Australia. Had Portugal not done all it could to prevent such violations, the international responsibility of Portugal itself could be engaged.

Similarly, in the context of the present inquiry, it may be argued that the intervening state has, by virtue of its military intervention, placed itself in a special position in relation to the host state, which has in turn placed upon the intervening state a special obligation to ensure that the successor regime in the territory in which it intervened respects the fundamental rights of the inhabitants. Where the successor regime violates such rights and the intervening state has not done as much as it lawfully should to prevent such violations, the responsibility of the intervening state may be engaged. While the ICJ declined to decide the question of whether certain states are put in a special position of enforcement in relation to obligations erga omnes, as advanced in Belgium's pleadings in the *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*,<sup>222</sup> the Court's recognition in the case of the prohibition of torture as a norm of jus cogens, and its earlier specification that a state's

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218. 1995 I.C.J. 90, 102 (June 30).

219. *Id.* at 209 (Weeramantry, J., dissenting).

220. *Id.* at 221–22.

221. *Id.* at 217.

222. Judgment, 2012 I.C.J. 422, ¶¶ 66, 70 (July 20).

capacity to influence may determine the content of its obligation to prevent under the Genocide Convention, may indicate some enhanced duty on states positioned to prevent or curtail the violation of such rights.<sup>223</sup>

In this regard, the Kosovo Human Rights Advisory Panel's recent decision in the case of *S.C. v. UNMIK* may be instructive.<sup>224</sup> There, the complainant alleged that her husband and son were abducted and killed by soldiers of the Kosovo Liberation Army (KLA) and that UNMIK's failure to investigate these forced disappearances and murders constituted a violation of Article 2 of the European Convention on Human Rights (a human rights instrument with which UNMIK had itself bound all of its officials to comply).<sup>225</sup> While the Special Representative of the Secretary-General (the respondent in the case) acknowledged that, by virtue of Security Council Resolution 1244, "UNMIK was responsible for the security and safety of persons living in Kosovo," he alleged that the special circumstances of the delayed deployment of security personnel constituted special circumstances that might excuse responsibility.<sup>226</sup> The Panel, however, affirmed that UNMIK's unique position did not diminish the necessity of respecting human rights and that UNMIK had failed to carry out basic investigative actions as required under the procedural component of Article 2 of the Convention.<sup>227</sup> As such, even though the violation concerned the failure of UNMIK itself to act, the decision is also important for establishing responsibility for the actions of another actor because the violation at the root of the claim concerned UNMIK's failure to protect the complainant's relatives from the actions of a third party (the KLA) when UNMIK had overall responsibility for ensuring security.

Finally, the recently finalized Arms Trade Treaty may indicate the increasing acknowledgment of states concerning their obligation to avoid complicity in internationally wrongful acts.<sup>228</sup> While the United States, United Kingdom, and France jointly declared their intention in 1950 to export arms only to states that had committed not to initiate any act of aggression,<sup>229</sup> the new Arms Trade Treaty broadens this sort of commitment. The treaty requires that states, before exporting arms, undertake

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223. *Id.* ¶¶ 66, 99.

224. *S.C. v. UNMIK*, Human Rights Advisory Panel, Case No. 02/09 (Dec. 6, 2012); see also U.N. Mission in Kos., Reg. No. 2006/12, On the Establishment of the Human Rights Advisory Panel, U.N. Doc. UNMIK/REG/2006/12 (Mar. 23, 2006) (setting out purpose and procedure of Human Rights Advisory Panel).

225. *S.C. v. UNMIK*, ¶¶ 22–28, 48.

226. *Id.* ¶¶ 63–66.

227. *Id.* ¶¶ 77, 88, 97–102.

228. Final United Nations Conference on the Arms Trade Treaty, Mar. 18–28, 2013, Draft Decision, Annex, U.N. Doc. A/Conf.217/2013/L.3 (Mar. 27, 2013) [hereinafter Arms Trade Treaty].

229. Tripartite Declaration Regarding Security in the Near East, 22 Dep't St. Bull. 886, 886 (1950), quoted in Aust, Complicity and Responsibility, *supra* note 213, at 130.

an assessment of whether such arms “could be used to commit or facilitate a serious violation of international humanitarian law” or “to commit or facilitate a serious violation of international human rights law.”<sup>230</sup> And the treaty requires that states also apply these criteria with regard to the export of arms to nonparties to the treaty.<sup>231</sup> Thus, while it does not entirely ban the sale of arms, the draft treaty makes clear that states are to undertake a responsible assessment of their contribution to abuses and avoid these wherever possible. The second part of the obligation concerning the installation of a successor regime proposed in this Article might operate in a similar fashion. States or international organizations administering territory would be expected to undertake an assessment as to the likelihood that the administration whose rise they facilitated might perpetrate significant abuses of human rights before withdrawing the mission or lending further military aid thereafter. This responsibility is thus a manifestation of the obligation to ensure and the obligation of due diligence already outlined.<sup>232</sup>

### B. *Control*

One of the most pressing questions implicated in the identification and apportionment of responsibility on the part of states and international organizations in post-regime-change situations is that of control. Contemporary military operations of this sort are often multilateral exercises through which a coalition of states (as was the case with the United States-led invasion of Iraq in 2003) or an international organization (as occurred with NATO in Kosovo) initiates military action (sometimes in conjunction with local rebel forces, as was the case in Afghanistan and Libya).<sup>233</sup> Further, arrangements for the administration of the territory or state in question may well encompass some distribution of responsibilities between various states and international institutions. Thus, for example, following the capitulation of the Taliban regime in Afghanistan, the United States took lead responsibility for the reform of the Afghan National Army, Germany for the Afghan police, the United Kingdom for anti-drug trafficking operations, Italy for the reform of the Afghan justice system, and Japan for disarmament of local paramilitaries and the reinte-

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230. Arms Trade Treaty, *supra* note 228, art. 7(1)(b)(i)–(ii).

231. *Id.* art. 23.

232. See, e.g., *supra* Part II.B (detailing obligation to ensure or prevent); *supra* notes 15–17 and accompanying text (outlining due diligence responsibility of states).

233. On the point of the multilateralism of military occupation, see generally Grant T. Harris, *The Era of Multilateral Occupation*, 24 *Berkeley J. Int'l L.* 1 (2006). Concerning the role of Polish troops in Iraq, see Agnieszka Jachec-Neale, *International Humanitarian Law and Polish Involvement in Stabilizing Iraq*, in *Testing the Boundaries of International Humanitarian Law* 221, 232–34 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006), which argues Polish troops, though not formally in occupation of Iraq in same way as U.S. and U.K. troops, must by virtue of Security Council Resolution 1438's address to “all concerned” still respect the law of occupation as articulated in the Hague Regulations and Fourth Geneva Convention.

gration into civil society of ex-combatants.<sup>234</sup> Similarly, in Kosovo, while UNMIK, by virtue of Security Council Resolution 1244, retained overall control of the administration of the territory, it delegated various functions to other international actors.<sup>235</sup> Consequently, the Kosovo Mission was divided into four pillars, with the United Nations itself responsible for civil administration, the U.N. High Commissioner for Refugees for humanitarian affairs, the Organization for Security and Cooperation in Europe for institution-building, and the European Union for reconstruction.<sup>236</sup>

This phenomenon of dividing functions poses several challenges to an attempt to assign responsibility. The obligation laid out in this Article encompasses two parts. The first part concerns the responsibility of the intervening international actor for actions directly attributable to those acting under its control. The second concerns the indirect liability of international actors for actions in violation of human rights undertaken by the successor regime installed by such international actors based on theories of complicity and obligations *erga omnes*. The division of functions in transitional administration poses more of a challenge to the second part of this responsibility than to the first. Indeed, where a state or international organization is tasked with the function directly analogous to a component of responsibility (for example, where an actor must ensure security, which itself is a component of the overall responsibility laid out in this Article) then the attribution of responsibility is somewhat more clear. As such, in Afghanistan, it is ISAF (the multinational force authorized by the Security Council to provide security in Afghanistan) and not UNAMA (the United Nations's civilian administrative support mission) that pays claims for compensation resulting from damage inflicted during security operations.<sup>237</sup> Even in this first category, though,

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234. Cf. De Brabandere, *Post-Conflict Administrations*, *supra* note 9, at 44 (“The reconstruction efforts were based on a ‘lead-nation approach’, leaving the responsibility for certain areas to a specific country . . .”).

235. See, e.g., Fox, *Humanitarian Occupation*, *supra* note 9, at 93 (discussing how various “components” of UNMIK were each “controlled by a different international entity”).

236. U.N. Secretary-General, *Report of July 12, 1999*, *supra* note 150, ¶ 43.

237. Press Release, ISAF Joint Command-Afg., *Kandahar Governor Says Loss Reports Are Far from Reality* (Jan. 14 2011), <http://www.isaf.nato.int/article/isaf-releases/kandahar-governor-says-loss-reports-are-far-from-reality.html> (on file with the *Columbia Law Review*) (quoting Major General James Terry, Commander of ISAF's Regional Command South, saying, “[i]f we damage something, it is our obligation and responsibility to compensate for it”). For specific instances in which ISAF has paid compensation for injuries caused by joint Afghan-international forces action, see Press Release, ISAF Joint Command-Afg., *Individual Killed in Operation in Wardak Province* (Mar. 21, 2010), <http://www.isaf.nato.int/article/isaf-releases/individual-killed-in-operation-in-wardak-province.html> (on file with the *Columbia Law Review*), and Press Release, ISAF Joint Command-Afg., *Three Civilians Accidentally Killed During Operation Moshtarak* (Feb. 16, 2010), <http://www.isaf.nato.int/article/isaf-releases/three-civilians-accidentally-killed-during-operation-moshtarak.html> (on file with the *Columbia Law Review*).

norms of agency and delegation may challenge such an account. Even if the actor is tasked with some clearly distinguishable function, its role as subordinate to another may complicate attribution. For example, in Kosovo, UNMIK retained ultimate authority, and in turn the Security Council exercised supervisory authority over UNMIK's mandate even though KFOR had been tasked with ensuring security.<sup>238</sup> As to the second part of the responsibility, the failure of one division may well result in the problematic nature of the successor regime, but the delineation of responsibility in this category may be less straightforward.

International courts and tribunals have embraced two main standards of control: effective control and overall control. However, the European Court of Human Rights has, of late, begun to articulate what may become a third standard: decisive influence. This Part examines each and considers their pertinence to the broader responsibility identified in this Article.

1. *Effective Control*. — An internationally wrongful act need not have been perpetrated by an organ of a state itself for that state's international responsibility for the wrongful act to be engaged. According to both the ICJ and the ILC, international responsibility for wrongful acts not perpetrated by an organ of the accused state may arise if the actor carried out the wrongful acts under the effective control of the accused state. The ILC adopted the effective control standard in Article 8 of its Articles on Responsibility of States for Internationally Wrongful Acts (a provision that the ICJ has since recognized as representative of customary international law),<sup>239</sup> and effective control also formed the basis of the rule of attribution of conduct in Article 7 of the ILC's Draft Articles on the Responsibility of International Organizations.<sup>240</sup>

The ICJ endorsed the effective control standard in the *Paramilitary Activities Case (Nicaragua v. United States)*.<sup>241</sup> After rejecting the applicant's argument that Nicaraguan militia supported by the United States were organs of the respondent state, the Court held that the international responsibility of the United States for actions of Nicaraguan paramilitaries could be engaged if it were established that the United States "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."<sup>242</sup> In order to uphold such a claim, the Court concluded that "it would in principle have to be proved that that State had effective control of the military or paramilitary

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238. See, e.g., *Behrami v. France*, App. No. 71412/01, Eur. Ct. H.R., ¶¶ 132–141 (2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830> (on file with the *Columbia Law Review*) (discussing Security Council control over Kosovo).

239. ARSIWA, *supra* note 21, art. 8.

240. DARIO, *supra* note 216, art. 7.

241. 1986 I.C.J. 14, ¶ 115 (June 27).

242. *Id.*



operations in the course of which the alleged violations were committed.”<sup>243</sup>

The Court affirmed its effective control holding in the *Genocide Convention Case (Bosnia & Herzegovina v. Serbia & Montenegro)* and clarified that effective control required “that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”<sup>244</sup> The Court rejected the applicant’s contention that a *lex specialis* of attribution applied in the context of genocide and instead required, for attribution to the respondent state, that the wrongful acts in question “were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.”<sup>245</sup>

Yet, neither case involved a situation of occupation, wherein *lex specialis* as to attribution appears to apply. Thus, where the Court has considered the responsibility of an occupying state, its pronouncements implicated a wider set of acts than the limited range carried out at the direct instantiation of the state required in the cases just discussed. Indeed, the ICJ made clear in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* that an occupant has a responsibility by virtue of that status “to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.”<sup>246</sup> The Court made the stringency of this requirement clearer when it affirmed that Uganda could be held responsible not only for actions of its own military forces but also “for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.”<sup>247</sup> Moreover, the Court held that, as the occupying power, Uganda was under an obligation to prevent looting and that such a duty “extends . . . to cover private persons in this district and not only members of Ugandan military forces.”<sup>248</sup> The Court thus concluded that Uganda’s status as an occupant made it responsible for acts in violation of international humanitarian law and international human rights law that occurred in the occupied territory because Uganda had an obligation to ensure that these did not occur. Consequently, even acts not

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243. *Id.*

244. Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43, ¶ 400 (Feb. 26).

245. *Id.* ¶ 401.

246. *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 178 (Dec. 19).

247. *Id.* ¶ 179.

248. *Id.* ¶ 248.

undertaken at the direction of the Ugandan state or by persons under its control engaged Uganda's international responsibility because it had failed to exercise sufficient vigilance to prevent such acts.<sup>249</sup>

2. *Overall Control*. — Though rejected explicitly by the ICJ in the *Genocide Convention Case*,<sup>250</sup> the overall control standard for the determination of state responsibility has been adopted by both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of Human Rights. In *Tadić*, the ICTY held, where a wrongful act had been perpetrated by “an organised group,” that “for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.”<sup>251</sup> The Court declared that if the state's overall control of the accused group had been proved, “it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State.*”<sup>252</sup>

Similarly, in situations of occupation by a foreign state and territorial administration by an international organization, the European Court of Human Rights has affirmed the applicability of an overall control theory for the attribution of conduct and the imputation of liability. In *Loizidou v. Turkey*,<sup>253</sup> the applicant, a Greek Cypriot, alleged that the refusal by the Turkish Republic of Northern Cyprus (TRNC) (a breakaway entity formed after Turkey invaded and occupied the northern part of the island) to allow her to access her property located in northern Cyprus constituted a violation of the European Convention on Human Rights attributable to Turkey. The Court held that “[i]t is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the ‘TRNC’” because “[i]t is obvious from the large number of troops engaged in active duties in northern Cyprus . . . that her army exercises effective overall control over that part of the island.”<sup>254</sup> Consequently, “[s]uch control . . . entails her responsibility for the policies and actions of the ‘TRNC.’”<sup>255</sup> Thus, the European Court of Human Rights's ruling that a determination of “detailed control over the policies and actions of the authorities” is not required stands in direct contrast to the ICJ's position in the *Genocide Convention Case* that attribution requires a showing that the accused state gave instructions “in

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249. *Id.* ¶ 179 (holding Uganda responsible for “lack of vigilance” in preventing violations by other groups, “including rebel groups acting on their own account”).

250. Application of Convention on Prevention and Punishment of Crime of Genocide, 2007 I.C.J. ¶¶ 402–403.

251. Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶ 120 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

252. *Id.* ¶ 122.

253. 1996-VI Eur. Ct. H.R. 2216.

254. *Id.* at 2235.

255. *Id.* at 2235–36.

respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions.”<sup>256</sup>

Further, in *Behrami*, the Kosovar applicants (the family of children killed and injured by unexploded cluster bombs that French KFOR troops had been aware of but had failed to clear and a detainee held by UNMIK police on orders of the Norwegian Commander of KFOR) alleged violations of the European Convention on Human Rights by France and Norway, respectively. With regard to the attribution of the acts of KFOR, each respondent government asserted that “[t]he security presence acted under U.N. auspices and action was taken by, and on behalf of, the international structures established by the [Security Council]” and, as such, the Security Council retained ultimate control for purposes of attribution.<sup>257</sup> The court agreed, rejecting the applicants’ contention that responsibility ought to attach to the contributing countries of KFOR because of their effective control of ground operations and instead observing that “the key question is whether the UNSC retained ultimate authority and control so that operational command only was delegated.”<sup>258</sup> On this basis, the court found that the impugned acts of KFOR were attributable to the United Nations rather than to the respondent states.<sup>259</sup>

3. *Decisive Influence*. — Effective and overall control are two measures of varying stringency that may determine the attribution of impugned acts. The ICJ’s holding in *Armed Activities on the Territory of the Congo* indicates that during times of occupation, the occupying power may be held liable for violations perpetrated by private individuals or groups outside of the occupant’s control.<sup>260</sup> Yet, the European Court of Human Rights has expanded responsibility for human rights violations even further through its jurisprudence concerning Transdniestria.

Transdniestria is a breakaway region of Moldova able to retain its autonomy through the financial and military support of Russia, but which the international community has failed to recognize as a state in its own right since it declared independence in 1991.<sup>261</sup> While Russia exer-

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256. Compare *id.*, with Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶¶ 400, 402–403 (Feb. 26).

257. *Behrami v. France*, App. No. 71412/01, Eur. Ct. H.R., ¶ 91 (2007), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80830> (on file with the *Columbia Law Review*).

258. *Id.* ¶ 133.

259. *Id.* ¶ 141.

260. See, e.g., *supra* notes 246–249 and accompanying text (discussing case).

261. *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 198–227.

cises a significant influence over Transdniestrian affairs, Russia is not in occupation of the territory.<sup>262</sup>

In *Ilaşcu*, the applicants (four Moldovan nationals) brought an action against both Russia and Moldova for alleged breaches of the European Convention on Human Rights that occurred in Transdniestria and were perpetrated by officials of the breakaway entity (the Moldovan Republic of Transdniestria).<sup>263</sup> The Court found for the applicants, but the Court's conclusions as to attribution and the apportionment of responsibility are particularly noteworthy.

As to attribution generally, the Court held that "detailed control over the policies and actions of the authorities in the area situated outside its national territory" is not required to find that the responsibility of the respondent state has been engaged but that instead "overall control of the area" is sufficient.<sup>264</sup> Further, overall control would be an adequate basis of attribution not merely of acts of the state's own forces, but also of acts of the local authorities over which the respondent state exercised overall control.<sup>265</sup> With regard to Moldova, "the only legitimate government" of Transdniestria, the Court found that although Moldova "does not exercise authority" in the region, Moldova had a positive obligation to take "diplomatic, economic, judicial or other measures" in accordance with international law "to secure to the applicants the rights guaranteed by the Convention."<sup>266</sup>

With regard to Russian responsibility for the impugned acts, the Court observed that Transdniestria was "under the effective authority, or at the very least under the decisive influence, of the Russian Federation" and that this basic showing of "decisive influence," when combined with the fact that Russia did not take any action to put an end to or prevent the violations complained of by the applicants, was sufficient to engage Russia's international responsibility for wrongful actions of the Transdniestrian authorities.<sup>267</sup> Although the Court recently modified its approach to the situation in Transdniestria in *Catan v. Moldova* (wherein it considered Russia's decisive influence a factor in the determination of jurisdiction rather than responsibility),<sup>268</sup> the Court still found that Russia's international responsibility had been engaged by violations of

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262. See, e.g., *id.* at 314–15 (Ress, J., dissenting in part) ("In the present case there is no occupation of the Transdniestrian territory, even though there is a rebel regime and the Russian Federation exercises a decisive influence and even control in that territory.").

263. *Id.* at 191–92 (majority opinion).

264. *Id.* at 263 (citing *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216, 2235–36).

265. *Id.*

266. *Id.* at 266.

267. *Id.* at 282. In apportioning liability to pay pecuniary and nonpecuniary damages, the Court adjudged Moldova liable for approximately one-third of the total and Russia for the remainder. *Id.* at 305–06 (dispositif).

268. App. No. 43370/04, Eur. Ct. H.R., ¶ 115 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114082> (on file with the *Columbia Law Review*).

the applicants' rights by a policy of the Transdniestrian authorities that Russia had itself sought to have changed.<sup>269</sup>

Yet, the facts cited by the Court to support its inference of decisive influence (for example, Russian monetary payments to the government and population of Transdniestria, favorable provision of natural gas to Transdniestria by Gazprom, a deployment of 1,500 Russian troops) are not very different from those persisting during the immediate aftermath, and often for some time thereafter, of regime-change operations. Indeed, both U.S. financial aid to, and troop presences in, Iraq and Afghanistan remain substantial, and the question of the United States' decisive influence (though perhaps now on the wane) could very well have been akin to that of Russia in Transdniestria.

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The extent and scope of responsibility for failure to discharge the obligations identified in this Article may well depend not only on the factual scenario in question but also on the doctrine of control that is to be preferred. While the most restrictive of these—effective control—would still support the first part of the responsibility for regime change proposed when an intervening state actually establishes such control, the second part of the responsibility (that concerning subsequent bad acts of the successor regime installed) may well depend on the attribution of such acts on the basis of decisive influence. While it is not for this Article to reconcile the inconsistencies in the jurisprudence of international responsibility, the foregoing discussion ought to illustrate that the extent of responsibility may vary depending on the doctrine of attribution applied.

## V. IMPLICATIONS

The present study and the postconflict obligations of regime change articulated herein have many further implications and may give rise to myriad other issues. This Part highlights a few of these as matters for future consideration and research. Some of the questions raised present ongoing challenges not simply in this particular field, but also in general international law.

### A. *Pluralism*

The first part of the obligation proposed in this study requires that regime changers not only reestablish security and assist in postconflict reconstruction, but also promote representative local government, ensure the protection of human rights, and safeguard minority groups. These last three duties raise particular challenges. Indeed, representative government is often used interchangeably here, and in the various inter-

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269. *Id.* ¶¶ 149–150 (finding Russia “exercised effective control” over Transdniestria even though it sought to change policies that violated applicants’ rights).

national legal pronouncements cited, with democracy. However, as the U.N. General Assembly recognized in Resolution 55/96 on promoting and consolidating democracy, “[T]here is no one universal model of democracy.”<sup>270</sup> The resolution calls on states to promote and consolidate democracy by promoting pluralism, protecting human rights, maintaining free and fair electoral systems, enabling wide participation from civil society, and working toward the broader attainment of economic, social, and cultural rights.<sup>271</sup> Yet, the fact that no state voted against the resolution (despite the fact that the governing structure of some states would appear to embody the very antithesis of the principles adopted) is perhaps an indication of the lack of consensus over the true content of democracy.

Similarly, with regard to the protection of human rights, the question of “which rights?” pertains. For example, Security Council resolutions concerning Afghanistan regularly mandate the equality of women, but the exact meaning of this notion in the domestic context may be debated. Though UNMIK decided that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would apply in Kosovo,<sup>272</sup> the United States’ persistent refusal to ratify the Convention is well known.<sup>273</sup> Moreover, the apparent tension between peace with the Taliban insurgency in Afghanistan and the protection of women’s rights persists.<sup>274</sup>

It may be remarked briefly on the protection of minority communities that in many cases these are the groups most closely affiliated with the regime toppled by the intervening state. In this connection, one recalls the Sunnis in Iraq, Serbs in Kosovo, and perhaps eventually the Alawites in Syria as examples of this phenomenon. Such groups frequently have entrenched political and economic interests obtained through connections with the old regime, and their perceived links to

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270. G.A. Res. 55/96, *supra* note 44, at 2; see also Marc Cogen & Eric De Brabandere, *Democratic Governance and Post-Conflict Reconstruction*, 20 *Leiden J. Int’l L.* 669, 670 (2007) (describing evolution of how democracy is understood by United Nations).

271. G.A. Res. 55/96, *supra* note 44, at 2.

272. UNMIK, Reg. No. 1999/24, *supra* note 154, § 1.3.

273. Cf. Convention on the Elimination of All Forms of Discrimination Against Women, United Nations Treaty Collection, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (on file with the *Columbia Law Review*) (last visited Feb. 7, 2014) (listing signatories to CEDAW).

274. See, e.g., Hamid Karzai Under Fire on Afghan Women’s Rights, *Telegraph* (U.K.) (Mar. 8, 2012, 9:38 AM), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/9130508/Hamid-Karzai-under-fire-on-Afghan-womens-rights.html> (on file with the *Columbia Law Review*) (reporting accusations of dismissing women’s rights to woo Taliban); Dan Murphy, *Karzai Says Taliban No Threat to Women, NATO Created ‘No Gains’ for Afghanistan*, *Christian Sci. Monitor* (Oct. 7, 2013), <http://www.csmonitor.com/World/Security-Watch/Backchannels/2013/1007/Karzai-says-Taliban-no-threat-to-women-NATO-created-no-gains-for-Afghanistan> (on file with the *Columbia Law Review*) (noting ongoing concern for women’s rights in Afghanistan).

the former rulers may make respect for their interests less palatable to the newly empowered majority.<sup>275</sup>

Those involved in international missions of the sort detailed here may well be viewed as “human rights imperialists.”<sup>276</sup> Yet, whether the alternative of leaving the existing laws of the occupied state in force or of adopting only those human rights norms universally agreed upon is preferable may be contested.

### B. *Self-Determination*

It may be objected that the obligations identified in this Article require the long-term presence of the intervening state or administering organization and that, because of the unrepresentative quality of such foreign overseers, the application of such obligations will, in practice, contravene the right of self-determination of the local population. Often populations wish such foreign officials to leave long before the actual withdrawal occurs.<sup>277</sup> Yet, an unplanned and overly hasty withdrawal that leads to chaos or intercommunal bloodshed is an inherently undesirable result.<sup>278</sup>

One possible amendment to existing procedure might be a requirement that a local consultation exercise of some sort (perhaps a referendum) be held at the earliest opportunity to determine whether the population wishes for the occupying force to stay or leave. There are many practical and logistical constraints in this approach, but a result in either direction might serve as sufficient justification for the actions (whether the discharge of the obligations outlined here or exit) of the foreign force. Constructing a question that captures nuances of preference is difficult, but, to the extent that such an exercise is possible, it may serve to defuse concerns over respect for the right of self-determination.

However, the objection to privileging such an exercise of early self-determination is that many of these military interventions have either ex

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275. See, e.g., Stromseth et al., *supra* note 12, at 97 (describing problems in transitional process for minority groups such as Sunnis in Iraq).

276. E.g., *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R., ¶ 38 (2011) (Bonello, J., concurring), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606> (on file with the *Columbia Law Review*).

277. See, e.g., Tansey, *supra* note 12, at 78–79 (describing East Timorese dissatisfaction with level of Timorese representation within UNTAET by early 2000 as “crisis of legitimacy” (internal quotation marks omitted)); Rajiv Chandrasekaran & Jon Cohen, *Afghan Poll Shows Falling Confidence in U.S. Efforts to Secure Country*, Wash. Post (Dec. 6, 2010, 6:02 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/06/AR2010120601788.html> (on file with the *Columbia Law Review*) (“Nationwide, more than half of Afghans interviewed said U.S. and NATO forces should begin to leave the country in mid-2011 or earlier.”).

278. See, e.g., U.N. Secretary-General, *No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*: Rep. of the Secretary-General, ¶ 26, U.N. Doc. S/2001/394 (Apr. 20, 2001) (emphasizing importance of planned, orderly end to peacekeeping missions).

ante or post hoc received the approval of the Security Council, acting under Chapter VII of the Charter. As such, the Security Council will have made a determination that the situation presents a threat to, or breach of, the peace, such that the international presence is necessary to accomplish some broader objective related to international peace and security. Indeed, while Article 2(7) of the Charter excludes matters of domestic jurisdiction from the purview of the United Nations, this provision does not affect the powers of the Security Council to order enforcement measures.<sup>279</sup> Regarding whether the Security Council deems it appropriate to curtail the right of self-determination of the state in question through authorizing an international administration mission, and the extent to which such a decision is intra or ultra vires, the Security Council's powers under the Charter would require further examination.

### C. *Set-Offs and Incentives*

Regime changers may well claim, at least when they are removing an autocratic government, that they are doing a service to the formerly oppressed population and to the international community at large. As such, so this sort of argument might proceed, states that undertake regime change successfully ought to be compensated for the good that their intervention has done or to claim this good as a set-off against any claim for damage incurred through such operations.<sup>280</sup> Though this position may have some intuitive appeal (particularly for those seeking incentives to convince reluctant states to accept the “responsibility to protect” principle), two objections, one policy and the other legal, persist. First, offering a reward for regime change is likely only to enhance the significant optimism-bias of political officials, whose failure to appreciate the long-term and often deleterious consequences of such military operations is on full display when other targets for regime change are freely bandied about.<sup>281</sup>

Second, international law operates in a manner similar to the common law “Good Samaritan” rule.<sup>282</sup> As such, states must pay compensa-

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279. U.N. Charter art. 2, para. 7.

280. See, e.g., Zach Carter & Joshua Hersh, Bachmann: Iraq Should ‘Fear’ America, Reimburse War Costs, Huffington Post (VIDEO) (Oct. 23, 2011, 5:12 AM), [http://www.huffingtonpost.com/2011/10/23/bachmann-iraq-should-fear\\_n\\_1027116.html](http://www.huffingtonpost.com/2011/10/23/bachmann-iraq-should-fear_n_1027116.html) (on file with the *Columbia Law Review*) (quoting U.S. Representative Michele Bachmann’s assertion, “Iraq should reimburse the United States fully for the amount of money that we have spent to liberate these people”); Matt Wells, Donald Trump’s Remedy for America: Oil from Iraq to ‘Pay Ourselves Back,’ *Guardian* (Mar. 15, 2013, 11:05 AM), <http://www.theguardian.com/world/2013/mar/15/donald-trump-cpac-speech-republicans-iraq> (on file with the *Columbia Law Review*) (describing statement urging retrieval of oil from Iraq to resolve U.S. economic crisis).

281. See, e.g., *supra* note 3 (listing recent examples of proposals for military intervention).

282. See, e.g., Saira Mohamed, Omissions, Acts, and the Security Council’s (In)actions in Syria, 31 *B.U. Int’l L.J.* 413, 425 (2013) (noting “there is no general duty to



tion for damage caused by their activities that otherwise may well be beneficial. Thus, when a Russian satellite crashed in Canadian territory, Russia paid Canada compensation for the damage.<sup>283</sup> It was not for Russia to object that the satellite had served some scientific purpose for which it ought to be compensated or, at the very least, the benefit of which ought to be taken into account in reducing the amount of compensation owed. Similarly, states undertaking military intervention and postconflict administration must do so with care and, whether these activities confer benefits on the local population or not, a failure to discharge such an obligation may engage the international responsibility of the states or international organizations in question.

#### D. *Legality of the Entry*

Theories of *jus post bellum* that describe postconflict responsibilities have been criticized as an attempt to revive pre-Charter doctrines of just war. Indeed, Eric De Brabandere has argued that the imposition of postconflict responsibilities on the basis of such theories merely distracts from the defined bases for the use of force in the Charter.<sup>284</sup>

The position laid out in this Article is agnostic in this respect. The orientation of the present inquiry is that, leaving aside questions of the justness or legality of various military interventions, international lawyers cannot help but realize that states are both using force and administering occupation projects in ways that extend beyond the black letter of international law. It is therefore preferable to discern and articulate some legal framework in the face of such developments than simply to wring one's hands at apparent gaps in the law. Indeed, in a similar vein, the European Court of Human Rights noted in *Loizidou* that the responsibility of a state that is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms "may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory."<sup>285</sup> The Court affirmed that the obligation to secure the rights of the Convention "derives from the fact of such control."<sup>286</sup>

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rescue" but "bystander takes on a legal duty when she voluntarily assumes care of a victim and isolates the victim from other help").

283. Protocol in Respect of the Claim for Damages Caused by the Satellite "Cosmos 954," Can.-U.S.S.R., Apr. 2, 1981, 1470 U.N.T.S. 269; Canada: Claim Against the Union of Soviet Socialist Republics for Damages Caused by Soviet Cosmos 954, Can.-U.S.S.R., Annex A, Jan. 23, 1979, 18 I.L.M. 899.

284. Eric De Brabandere, *The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept*, 43 Vand. J. Transnat'l L. 119, 134–37 (2010) ("Under the existing exceptions to the prohibition on the use of force, the advocated connection of post-conflict responsibilities is problematic.").

285. *Loizidou v. Turkey* (Preliminary Objections), 310 Eur. Ct. H.R. (ser. A) at 23–24 (1995) (declaring judgment on preliminary objections).

286. *Id.*

Likewise here, the argument presented concerning the twofold obligation of regime changers is not dependent on a determination that the foreign presence is lawful or otherwise. Moreover, even where the initial use of force has been criticized as a violation of the Charter, as with the U.S. invasion of Iraq in 2003,<sup>287</sup> the eagerness of the international community and the Security Council, in particular, to bring postconflict administration under the supervision of the United Nations illustrates the adjustments that states sometimes make in the face of factual realities.

*E. Abuse, Enforcement, and the Security Council*

There is a very real possibility that the recognition of the obligations proposed here may lead to abuse, with states using these as an excuse for prolonged occupations or the installation of puppet regimes. Moreover, given that two of the cases for breach of international trusteeship obligations lodged at the ICJ did not proceed to the merits and the third took many decades to resolve, it may be observed that avenues for judicial enforcement in this respect are limited.<sup>288</sup>

The supervisory role of the Security Council is therefore essential. The Security Council has proven its willingness previously to take action against, and even impose an obligation of compensation for, an unlawful occupation (namely that of Iraq against Kuwait).<sup>289</sup> Moreover, even when the impugned occupation is perpetrated by one of the Security Council's permanent members (making punitive sanction by the Security Council unlikely), states' desire for legitimation by the Security Council means that any of the permanent members or a sufficient majority of the non-permanent members may act to deny such legitimation as a means of supervision or enforcement.<sup>290</sup> Further, even if the Security Council does

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287. See, e.g., Carmen Gentile, *Brazil, Other LatAm Leaders Denounce War*, UPI (Mar. 18, 2003, 4:20 PM), [http://www.upi.com/Business\\_News/Security-Industry/2003/03/18/Brazil-other-LatAm-leaders-denounce-war/UPI-94031048022449/](http://www.upi.com/Business_News/Security-Industry/2003/03/18/Brazil-other-LatAm-leaders-denounce-war/UPI-94031048022449/) (on file with the *Columbia Law Review*) (quoting President Lula of Brazil as saying U.S. demand for regime change in Iraq "disrespects the United Nations").

288. See, e.g., *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240, ¶ 6 (June 26) (noting Nauru's allegations of maladministration of territory against Australia); *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, Judgment, 1966 I.C.J. 6, ¶ 99 (July 18) (finding applicants had no legal right or interest in claims before court); *Northern Cameroons (Cameroon v. U.K.)*, Preliminary Objections, Judgment, 1963 I.C.J. 15, 38 (Dec. 2) (holding case should not proceed to merits in part to preserve judicial function of court). With regard to Nauru, the case was discontinued after Australia agreed to pay Nauru a cash settlement of 107 million Australian dollars. *Agreement Between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, Austl.-Nauru*, Aug. 10, 1993, 32 I.L.M. 1474.

289. S.C. Res. 687, ¶ 16, U.N. Doc. S/RES/687 (Apr. 3, 1991).

290. See, e.g., Alvarez, *supra* note 92, at 188–89 (noting Council's importance as body for collective legitimation).

not act, states may refuse to recognize the entity established or the government installed by the foreign force, as has been the case concerning the nonrecognition of Transdniestria or the Turkish Republic of Northern Cyprus.<sup>291</sup>

It is therefore unfortunate that, in a recent article, Gregory Fox obscures the sanctioning power of the Security Council and the collective nonrecognition of other states as checks to ensure the effective implementation of transformative occupation.<sup>292</sup> Transformative occupation missions are expensive and time consuming. Consequently, the articulation of postconflict obligations beyond the minimalism to which Fox clings<sup>293</sup> may well make states more reluctant (rather than less, as Fox claims) to initiate transformative military projects. The barrier of cost and the erosion over time of political will ought to point in favor of the imposition of transformative obligations on states for anyone who, like Fox, is concerned at the erosion of Article 2(4) as an effective prohibition on states' unilateral use of force absent Security Council authorization. The present Article merely acknowledges the reality that states have used force to initiate regime-change operations without Security Council authorization and asserts that to ignore the significant reforms that occupiers have introduced at the urging of the international community would allow the perfect to become the enemy of the good.

#### CONCLUSION

Regime change does not come without responsibility. This responsibility is not merely political or moral, but legal. It is consequently binding on the state or international organization that has undertaken such a mission.

The responsibility entails a twofold obligation concerning administration of the territory while exercising control and ensuring that the successor regime thereafter will respect the rights of the population. These obligations extend beyond the formal text of the Hague and Geneva agreements relative to occupation. Yet, the increasing promotion of human rights and representative government has, supported by certain general principles of international law, led states to undertake subsequent practice in the application of these treaties through which states

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291. On the collective nonrecognition of the TRNC, see S.C. Res. 541, ¶ 7, U.N. Doc. S/RES/541 (Nov. 18, 1983), which calls on member states not to recognize TRNC. On the collective nonrecognition of Transdniestria, see *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179, 192, which notes that Transdniestria “is not recognised by the international community.”

292. Gregory H. Fox, *Transformative Occupation and the Unilateralist Impulse*, 94 *Int'l Rev. Red Cross* 237 (2012).

293. *Id.* at 241 (“Enshrining transformative occupation into doctrine threatens to reverse [collective governance’s] hard-won legitimacy, for its only consequence would be to empower *unilateral* state occupiers.”).

have manifested their agreement to this revised understanding of the laws of occupation and international territorial administration.

In July of 2004, then-state Senator Barack Obama declared that the United States had “an absolute obligation” to remain in Iraq until the regime-change mission initiated was completed.<sup>294</sup> This Article has given some specificity to this “absolute obligation” and weighed the implications of its recognition in international law. Political officials considering regime-change missions ought now to be made aware of the significant and ongoing legal obligations that such actions trigger.

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294. Farah Stockman, *Obama Stance on Iraq Shows Evolving View*, *Bos. Globe* (Mar. 8, 2008), [http://www.boston.com/news/nation/articles/2008/03/08/obama\\_stance\\_on\\_iraq\\_shows\\_evolution\\_view/](http://www.boston.com/news/nation/articles/2008/03/08/obama_stance_on_iraq_shows_evolution_view/) (on file with the *Columbia Law Review*).

## APPENDIX 1: AGREEMENT OF THE PARTIES (AFGHANISTAN)

State	Speaker	Quote	Source
China	Minister of Foreign Affairs Jianxuan	"We will continue to work constructively for lasting peace in Afghanistan and its post-war rehabilitation," and "[w]e support the important role of the United Nations in this regard."	U.N. GAOR, 57th Sess., 5th plen. mtg. at 16, U.N. Doc. A/57/PV.5 (Sept. 13, 2002).
Estonia	President Ilves	"It is important to settle conflicts in other places as well, such as Afghanistan. We need to increase the presence and visibility of the United Nations there, which would be an encouraging sign for the local population and would also send a signal to other international aid organizations and non-governmental organizations that they should increase their activities. The United Nations should also assume a greater role in coordinating the reconstruction effort in Afghanistan."	U.N. GAOR, 62d Sess., 5th plen. mtg. at 34–35, U.N. Doc. A/62/PV.5 (Sept. 25, 2007).
Finland	Minister for Foreign Affairs Tuomoja	"In Afghanistan we are now faced with the need to use a full range of civilian crisis management capabilities, as well as with the need for a long-term commitment to reconstruction and the development of a stable and drug-free economy, and to enable democracy and respect for human rights to take root in a country that has suffered from war and strife for decades. And Afghanistan is only one of many places in today's world where such a commitment from the international community is needed."	U.N. GAOR, 57th Sess., 6th plen. mtg. at 24, U.N. Doc. A/57/PV.6 (Sept. 14, 2002).
France	Minister of Foreign Affairs de Villepin	"We must now rebuild; we must help the Afghan people, maintain our efforts over the long term, and continue our work to bring about stability and democracy, but also to dismantle the drug economy and the trafficking it fuels."	U.N. GAOR, 57th Sess., 3d plen. mtg. at 28, U.N. Doc. A/57/PV.3 (Sept. 12, 2002).

State	Speaker	Quote	Source
Germany	Deputy Chancellor and Minister for Foreign Affairs Fischer	“The implementation of the provisions of the Bonn Conference agreement began with the formation of a legitimate Interim Administration. . . . For the first time in years, the Afghan people have the chance to lead a life of dignity based on self-determination. . . . The commitments of the donor countries must materialize in the form of concrete projects.”	U.N. GAOR, 57th Sess., 6th plen. mtg. at 18, U.N. Doc. A/57/PV.6 (Sept. 14, 2002).
Iceland	Minister for Finance and Acting Minister for Foreign Affairs and External Trade Haarde	“We must maintain an ongoing commitment to Afghanistan, where serious challenges to the rebuilding of the country continue to be faced. Iceland has demonstrated its support and has assumed the leading role in running the Kabul international airport, under the auspices of the NATO-led International Security Assistance Force.”	U.N. GAOR, 59th Sess., 10th plen. mtg. at 49, U.N. Doc. A/59/PV.10 (Sept. 24, 2004).
India	Prime Minister Singh	“India’s assistance to Afghanistan’s reconstruction and development will continue.”	U.N. GAOR, 59th Sess., 7th plen. mtg. at 15, U.N. Doc. A/59/PV.7 (Sept. 23, 2004).
Iran	Minister for Foreign Affairs Kharrazi	“The Islamic Republic of Iran is continuing its close cooperation with the Transitional Government of Afghanistan, especially in the context of spending the \$50 million in assistance earmarked for small-scale reconstruction projects in Afghanistan during the Iranian fiscal year 1381, which began on 21 March 2002.”	U.N. GAOR, 57th Sess., 9th plen. mtg. at 21, U.N. Doc. A/57/PV.9 (Sept. 15, 2002).
Ireland	Minister of Foreign Affairs Cowen	“The sustained and wholehearted support of the international community remains essential . . . if progress is to be maintained. For its part, Ireland has been active in the Security Council, particularly in highlighting the humanitarian situation.”	U.N. GAOR, 57th Sess., 5th plen. mtg. at 30, U.N. Doc. A/57/PV.5 (Sept. 13, 2002).

State	Speaker	Quote	Source
Italy	President of the Council of Ministers Berlusconi	Noting Italy's continued support for "the process of democratization also through assistance to the reconstruction of the country."	U.N. GAOR, 58th Sess., 7th plen. mtg. at 34, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).
Japan	Prime Minister Koizumi	Declaring that "Japan attaches great importance to extending post-conflict assistance for the consolidation of peace and nation-building to prevent the recurrence of conflicts," highlighting Japan's efforts to collect funds for rebuilding in Afghanistan through convening the International Conference on Reconstruction Assistance to Afghanistan in Tokyo, and affirming Japan's continued contribution "to regional reconstruction by developing an assistance project for the resettlement of refugees and displaced people in such areas as Kandahar."	U.N. GAOR, 57th Sess., 4th plen. mtg. at 18, U.N. Doc. A/57/PV.4 (Sept. 13, 2002).
Kazakhstan	Secretary of State and Minister for Foreign Affairs Tokaev	"Together with all interested States and parties, our country supports the key role of the United Nations in the post-conflict peace-building in Afghanistan."	U.N. GAOR, 57th Sess., 6th plen. mtg. at 9, U.N. Doc. A/57/PV.6 (Sept. 14, 2002).
Luxembourg	Deputy Prime Minister and Minister for Foreign Affairs and External Trade Polfer	"The effort made by the international community in Afghanistan must, as we know, be continued over time to insure the establishment and functioning of a stable democratic and fully representative State."	U.N. GAOR, 57th Sess., 7th plen. mtg. at 6, U.N. Doc. A/57/PV.7 (Sept. 14, 2002).

State	Speaker	Quote	Source
Malaysia	Deputy Prime Minister Badawi	“We are pleased that Afghanistan is now on the threshold of becoming a viable, progressive and democratic State. However, many impediments to national unity and cohesion remain. These must be overcome through sustained international support and, more importantly, through the political will and commitment of the people of Afghanistan themselves. Such support should take the form of increased infusion of development funds and other forms of assistance and, more urgently, the promotion of a more secure environment in the whole country. We owe it to the long-suffering Afghan people to assist in the rehabilitation of their country and to ensure that the circumstances that led to their civil strife are removed and that they will not be abandoned once the immediate task of removing terrorist elements in Afghanistan is completed.”	U.N. GAOR, 57th Sess., 7th plen. mtg. at 8, U.N. Doc. A/57/PV.7 (Sept. 14, 2002).
Norway	Prime Minister Bondevik	“As the country holding the chairmanship of the Afghan Support Group, we have focused on the need for both humanitarian assistance and long-term reconstruction aid. A sustained international presence is essential.”	U.N. GAOR, 57th Sess., 3d plen. mtg. at 22, U.N. Doc. A/57/PV.3 (Sept. 12, 2002).
Pakistan	Foreign Secretary Khan	“The international community . . . has an important responsibility to help Afghanistan with a Marshall Plan-like programme for reconstruction.”	U.N. GAOR, 62d Sess., 14th plen. mtg. at 33, U.N. Doc. A/62/PV.14 (Oct. 2, 2007).



State	Speaker	Quote	Source
Qatar	First Deputy Prime Minister and Minister for Foreign Affairs Al-Thani	"[W]e have a special programme in Afghanistan that assists in the rebuilding of that country; the programme's cost has amounted to \$62 million thus far."	U.N. GAOR, 58th Sess., 14th plen. mtg. at 10, U.N. Doc. A/58/PV.14 (Sept. 26, 2003).
Republic of Korea	Minister of Foreign Affairs and Trade Sunghong	Highlighting the challenges of terrorism, lack of good governance, and international marginalization and noting that "[w]e are now working with other countries to contribute to the rehabilitation of Afghanistan."	U.N. GAOR, 57th Sess., 5th plen. mtg. at 17, U.N. Doc. A/57/PV.5 (Sept. 13, 2002).
Romania	Minister of Foreign Affairs Geoana	"The intense effort that the United Nations has embarked upon in the democratic and physical reconstruction of the country is commendable. Romania believes that this commitment must be maintained as long as the dangers of a serious renewal of violence exist. Romania has already made a solid financial contribution to the international aid effort and is ready to offer further assistance, according to the requirements of the Afghan Government."	U.N. GAOR, 57th Sess., 6th plen. mtg. at 14, U.N. Doc. A/57/PV.6 (Sept. 14, 2002).
Slovenia	President Drnovšek	"We should not allow the focus on the most visible crises and on the fight against terrorism to lead to the neglect of other dangers to global peace and security. A single example of that would be the areas of Africa that require assistance in both ending conflicts and tackling the root causes of such unrest. Even Afghanistan, where so recently all eyes were focused, has faded from our minds. Yet there is clear danger that the chronic instability of that country could revert to devastating civil war."	U.N. GAOR, 58th Sess., 13th plen. mtg. at 2, U.N. Doc. A/58/PV.13 (Sept. 26, 2003).

State	Speaker	Quote	Source
Tajikistan	Minister for Foreign Affairs Nazarov	“In this connection, Tajikistan believes that it is absolutely essential that Afghanistan share in the multifaceted process of regional cooperation. We expect our region’s leading international partners to provide appropriate support for that process. Indeed, that issue could be considered by the new United Nations Peacebuilding Commission.”	U.N. GAOR, 60th Sess., 15th plen. mtg. at 24, U.N. Doc. A/60/PV.15 (Sept. 20, 2005).
Thailand	Minister for Foreign Affairs Sathirathai	“For its part, Thailand remains firmly committed to supporting United Nations reconstruction and peace-building efforts, as we have done in the past in Timor-Leste and Afghanistan.”	U.N. GAOR, 58th Sess., 17th plen. mtg. at 23, U.N. Doc. A/58/PV.17 (Sept. 30, 2003).
The Netherlands on behalf of the European Union	Minister for Foreign Affairs Bot	“In a similar vein, the process of securing stability, reconstruction and democratization in Afghanistan must remain an international priority.”	U.N. GAOR, 59th Sess., 3d plen. mtg. at 30, U.N. Doc. A/59/PV.3 (Sept. 21, 2004).
Turkey	Deputy Prime Minister and Minister for Foreign Affairs Gürel	Noting Turkey’s command of the International Security Assistance Force in Afghanistan and urging “we must rapidly embark upon real and tangible development efforts in Afghanistan. . . . Likewise, efforts to build the Afghan national army and the police force as well as solidarity and unity among the ethnic groups are of crucial importance.”	U.N. GAOR, 57th Sess., 5th plen. mtg. at 26, U.N. Doc. A/57/PV.5 (Sept. 13, 2002).

State	Speaker	Quote	Source
Uzbekistan	Minister for Foreign Affairs Safoev	<p>“We believe that the resources of the international community, major international organizations and donor nations, as well as the capabilities of neighbouring countries, should be more intensely engaged, as they are essential to post-conflict reconstruction. Afghanistan should become a harmoniously integrated part of Central Asia, and this will positively contribute to the enhancement of stability and security in the country and region. In view of the exceptional importance of the socio-economic rehabilitation of Afghanistan, Uzbekistan is rendering assistance to the Afghan people in the reconstruction of damaged roads and the construction of new ones, as well as supplying electricity to the northern provinces of Afghanistan. Uzbek specialists have built eight large bridges along the road from Mazari Sharif to Kabul. Uzbekistan is also delivering humanitarian assistance to Afghanistan. More than 1 million tonnes of humanitarian cargo have been shipped through our country’s territory. We will continue to cooperate with international organizations, foremost with the United Nations, in this regard.”</p>	U.N. GAOR, 58th Sess., 18th plen. mtg. at 12, U.N. Doc. A/58/PV.18 (Sept. 30, 2003).

## APPENDIX 2: AGREEMENT OF THE PARTIES (IRAQ)

State	Speaker	Quote	Source
Australia	Minister for Foreign Affairs Downer	“Of the \$100 million Australia has committed to humanitarian and reconstruction assistance in Iraq, much has been directed through United Nations agencies.”	U.N. GAOR, 58th Sess., 9th plen. mtg. at 32, U.N. Doc. A/58/PV.9 (Sept. 24, 2003).
Austria	Minister for Foreign Affairs Ferrero-Waldner	“In line with the human security approach, Austria was among the first to offer humanitarian aid. In Austrian hospitals we provided urgent medical assistance for children in critical condition. Furthermore, Austria participates in the ‘Adopt a Hospital’ programme and is about to equip two hospitals in Nazariyah. Together with Slovenia and Jordan, we are preparing the establishment, south of Baghdad, of a centre for war-traumatized children. These are efforts aimed at providing relief for the weakest and most vulnerable members of Iraqi society.”	U.N. GAOR, 58th Sess., 12th plen. mtg. at 36, U.N. Doc. A/58/PV.12 (Sept. 25, 2003).
Bahrain	Deputy Prime Minister and Minister for Foreign Affairs Al-Khalifa	“The upcoming stage requires that a vital and effective role be played by the international community, represented by the United Nations, which will bear the heavy burden of supporting the interim Iraqi Government and helping it fulfill the tasks required of it under Security Council resolution 1546 (2004). Bahrain has on more than one occasion expressed its support for efforts to maintain peace and security in Iraq, and to create the conditions for the reconstruction of the country and the maintenance of its unity. It also reaffirmed its willingness to participate in Arab and international efforts to rebuild Iraq and to maintain its unity, sovereignty and territorial integrity.”	U.N. GAOR, 59th Sess., 9th plen. mtg. at 26, U.N. Doc. A/59/PV.9 (Sept. 24, 2004).

State	Speaker	Quote	Source
Bangladesh	Minister for Foreign Affairs Khan	“We stand ready to take part in the reconstruction and rebuilding of Iraq in the true spirit of brotherhood that characterizes the relationship between our two nations and peoples.”	U.N. GAOR, 58th Sess., 16th plen. mtg. at 12, U.N. Doc. A/58/PV.16 (Sept. 29, 2003).
Belgium	Deputy Prime Minister and Minister for Foreign Affairs Michel	“But it is now necessary to contribute to the re-establishment of stability and ensure Iraq’s reconstruction. That is the responsibility of us all, for it concerns a region neighbouring Europe, and we cannot tolerate, if only for the sake of our own security, increased instability or the persistence of an uncontrolled spiral of violence that feeds resentment towards the international community, which, as history has taught us, constitutes the principal breeding ground for terrorism.”	U.N. GAOR, 58th Sess., 8th plen. mtg. at 33, U.N. Doc. A/58/PV.8 (Sept. 23, 2003).
Bosnia and Herzegovina	President Tihić	“With a view to helping the people of Iraq and contributing to the establishment of peace there, Bosnia and Herzegovina has sent a unit to Iraq to destroy mines and unexploded devices.”	U.N. GAOR, 59th Sess., 5th plen. mtg. at 3, U.N. Doc. A/59/PV.5 (Sept. 22, 2004).
Brazil	President da Silva	“We must not shy away from our collective responsibilities.”	U.N. GAOR, 58th Sess., 7th plen. mtg. at 5, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).

State	Speaker	Quote	Source
Cambodia	Deputy Prime Minister and Minister for Foreign Affairs and International Cooperation Hor	"Concerning the situation in Iraq, I believe that the current, unending violence there has not created an environment conducive to national reconciliation and peace. It is my view that the United Nations and the international community must do everything possible to restore peace, security and political stability to Iraq so that the Iraqi people will have a chance to choose, in a sovereign manner, their own leaders and their own Government. I believe that democracy can never be exported or imported; it is a state of mind and must be learned."	U.N. GAOR, 59th Sess., 12th plen. mtg. at 4, U.N. Doc. A/59/PV.12 (Sept. 27, 2004).
Canada	Prime Minister Chrétien	"In Iraq, we have also joined the international effort to help the Iraqi people. We have decided to contribute 300 million Canadian dollars, one of the largest single-country pledges we have ever made."	U.N. GAOR, 58th Sess., 8th plen. mtg. at 22, U.N. Doc. A/58/PV.8 (Sept. 23, 2003).
Croatia	President Mesić	"Croatia is still dealing with the consequences of the war imposed on it and does not have the economic resources to participate as a donor in the action for the reconstruction of Iraq. However, Croatia stands ready to offer its wealth of experience in post-war reconstruction, especially in construction work, as well as the knowledge and operative capacities required for dealing with post-war confidence-building, strengthening the country's stability, normalizing life, and mending the tears left by the war in the fabric of civil society. I am thinking in particular of the knowledge and experience acquired in civil police training and activities."	U.N. GAOR, 58th Sess., 7th plen. mtg. at 27, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).

State	Speaker	Quote	Source
Dominica	Prime Minister Charles	“The return of peace and stability to Iraq has now become the responsibility of all States members of the international community. If the international community must accept and shoulder this important responsibility, then we must commit to a greater role for the United Nations.”	U.N. GAOR, 58th Sess., 12th plen. mtg. at 13, U.N. Doc. A/58/PV.12 (Sept. 25, 2003).
Egypt	Minister for Foreign Affairs El Sayed	“Egypt affirms its readiness to contribute to the reconstruction process, in accordance with the wishes and needs of the Iraqi people and in cooperation with the rest of the international community, under the aegis of the United Nations.”	U.N. GAOR, 58th Sess., 15th plen. mtg. at 18, U.N. Doc. A/58/PV.15 (Sept. 29, 2003).
El Salvador	President González	“[T]he Government of El Salvador has decided to respond to the United Nations appeal by participating in the work of reconstruction and humanitarian assistance in Iraq. By its very nature, our presence in Iraq deserves an additional explanation. We are not there for military reasons. Ours is a considered response to the appeal launched by this Organization for the international community to help in the transition phase leading to the full establishment of authority based on the free will of the Iraqi people, with absolute respect for its territorial integrity, its own culture and its unquestionable right to define its own destiny. . . . El Salvador reiterates its firm and resolute support for peace-building and peace-keeping operations, above all because we have enjoyed the benefits of such an operation, but also, of course, because of their positive results in various regions of the world.”	U.N. GAOR, 59th Sess., 6th plen. mtg. at 13–14, U.N. Doc. A/59/PV.6 (Sept. 22, 2004).

State	Speaker	Quote	Source
France	Minister for Foreign Affairs Barnier	"Neither today nor tomorrow will [France] commit itself militarily in Iraq. However, it reaffirms its willingness, with its European partners, to assist the Iraqi people in rebuilding their country and in restoring their institutions."	U.N. GAOR, 59th Sess., 7th plen. mtg. at 29, U.N. Doc. A/59/PV.7 (Sept. 23, 2004).
Gambia	President Jammeh	"Even if we believe that the war was wrong, it is the responsibility of the entire human race to help put an end to the suffering of the Iraqi people."	U.N. GAOR, 59th Sess., 8th plen. mtg. at 5, U.N. Doc. A/59/PV.8 (Sept. 23, 2004).
Honduras	President Maduro Joest	"Despite our modest resources, we have responded to Security Council resolutions by sending a clearly humanitarian mission, comprised of a contingent from the Honduran armed forces, to Iraq in order to contribute to the reconstruction, stability and democratization of a friendly people."	U.N. GAOR, 58th Sess., 13th plen. mtg. at 4, U.N. Doc. A/58/PV.13 (Sept. 26, 2003).
Iceland	Minister for Foreign Affairs and External Trade Ásgrímsson	"Iceland, along with many other Member States, is contributing to Iraq's reconstruction and will continue to do so. The situation will demand all our resourcefulness and a concerted effort at cooperation by all parties in the Security Council to ensure that the people of Iraq are assured the destiny they deserve. This destiny should encompass peace and democracy, affording equal rights and justice to all Iraqi citizens."	U.N. GAOR, 58th Sess., 14th plen. mtg. at 27, U.N. Doc. A/58/PV.14 (Sept. 26, 2003).
India	Prime Minister Singh	"Consistent with our longstanding ties of friendship with the Iraqi people, India will contribute to Iraq's humanitarian and economic reconstruction."	U.N. GAOR, 59th Sess., 7th plen. mtg. at 15, U.N. Doc. A/59/PV.7 (Sept. 23, 2004).



State	Speaker	Quote	Source
Italy	President of the Council of Ministers Berlusconi	“The upcoming donors conference in Madrid provides a welcome opportunity for all those who share our concern for Iraq’s future to make a positive contribution to the political and economic regeneration of Iraq.”	U.N. GAOR, 58th Sess., 7th plen. mtg. at 34, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).
Japan	Minister for Foreign Affairs Koumura	“To build peace, it is essential for the international community to ensure a seamless and comprehensive effort to fulfill tasks ranging from resolving conflicts to assisting reconstruction.”	U.N. GAOR, 62d Sess., 11th plen. mtg. at 55, U.N. Doc. A/62/PV.11 (Sept. 28, 2007).
Jordan	Minister for Foreign Affairs Muasher	“The eyes of all Iraqis are now set on the international community in the hope of receiving every possible assistance that would enable them to lay a solid foundation for building a promising future that would include reconstructing their country and regaining its status as an active member in the Organization and of the international community.”	U.N. GAOR, 58th Sess., 16th plen. mtg. at 27, U.N. Doc. A/58/PV.16 (Sept. 29, 2003).
Kuwait	Deputy Prime Minister and Minister for Foreign Affairs Al-Sabah	“We look forward to the international community playing its vital role in helping Iraq to fulfill its political and economic obligations within the context of the International Compact with Iraq.”	U.N. GAOR, 62d Sess., 8th plen. mtg. at 31, U.N. Doc. A/62/PV.8 (Sept. 27, 2007).
Latvia	President Vike-Freiberga	“In the case of Afghanistan and Iraq . . . the military measures undertaken by the United States and its allies will have to be followed by comprehensive international efforts to help those countries rebuild their societies and their economies. I am certain that most of us would agree on the need for reconstruction and security regardless of our opinion about the foreign military presence in these two countries.”	U.N. GAOR, 58th Sess., 8th plen. mtg. at 2, U.N. Doc. A/58/PV.8 (Sept. 23, 2003).

State	Speaker	Quote	Source
Macedonia	President Crvenkovski	“Building peace and democracy in [Iraq and Afghanistan] remains a key challenge both for the international community and for the Iraqis and Afghans themselves.”	U.N. GAOR, 62d Sess., 4th plen. mtg. at 29, U.N. Doc. A/62/PV.4 (Sept. 25, 2007).
Malaysia	Prime Minister Badawi	“The international community has a clear responsibility to assist the people of Iraq to achieve peace and stability, so that the unity of Iraq as a nation is preserved, and the territorial integrity of Iraq as a State is not compromised.”	U.N. GAOR, 62d Sess., 10th plen. mtg. at 13, U.N. Doc. A/62/PV.10 (Sept. 28, 2007).
Mauritius	Prime Minister Ramgoolam	“With regard to Iraq, where innocent civilians are falling victim to violence on a daily basis, it is imperative that necessary support be provided to ensure the creation of an environment in which the Iraqi people can live in peace and security.”	U.N. GAOR, 60th Sess., 13th plen. mtg. at 10, U.N. Doc. A/60/PV.13 (Sept. 19, 2005).
Morocco	Minister for Foreign Affairs and Cooperation Benaissa	“Moreover, the international community must help the Iraqi people to overcome the ongoing crisis by creating the conditions necessary for peace and stability.”	U.N. GAOR, 60th Sess., 16th plen. mtg. at 5, U.N. Doc. A/60/PV.16 (Sept. 20, 2005).
Nicaragua	President Bolaños Geyer	“We are now taking part in the purely humanitarian mission involving mine clearance and the provision of medical support for the civilian population of Iraq.”	U.N. GAOR, 58th Sess., 9th plen. mtg. at 6, U.N. Doc. A/58/PV.9 (Sept. 24, 2003).

State	Speaker	Quote	Source
Philippines	Minister for Foreign Affairs Romulo	“The world should continue to support the people of Iraq in their valiant effort to create a democratic, free, pluralistic and secure nation. The Philippines stands ready to assist in implementing Security Council resolution 1546 (2004) on Iraq, which was unanimously adopted during our presidency of the Council last June. The United Nations has a significant role to play in Iraq in the political process leading to the elections scheduled for January next year, and it deserves the full support of the international community in its efforts to build a stable and peaceful Iraq.”	U.N. GAOR, 59th Sess., 11th plen. mtg. at 17, U.N. Doc. A/59/PV.11 (Sept. 27, 2004).
Poland	Minister for Foreign Affairs Cimoszewicz	“I believe that the United Nations should be a key factor in post-war Iraq’s transition to the rule of law, democracy and independence. The tremendous task of the reconstruction and rehabilitation of Iraq should be shared by the entire international community.”	U.N. GAOR, 58th Sess., 12th plen. mtg. at 34, U.N. Doc. A/58/PV.12 (Sept. 25, 2003).
Portugal	Prime Minister Lopes	“Iraq needs the support of the international community. The Iraqi people, ravaged by decades of dictatorship and war, deserve such support. And we should give the United Nations the necessary means to fulfil in its entirety the mandate provided by the Security Council.”	U.N. GAOR, 59th Sess., 6th plen. mtg. at 34, U.N. Doc. A/59/PV.6 (Sept. 22, 2004).
Qatar	Emir Al-Thani	“[W]e will spare no effort in supporting the reconstruction of Iraq, and we affirm our position of principle regarding the need to safeguard its independence, sovereignty and territorial integrity and non-interference in its internal affairs.”	U.N. GAOR, 59th Sess., 3d plen. mtg. at 14, U.N. Doc. A/59/PV.3 (Sept. 21, 2004).

State	Speaker	Quote	Source
Republic of Korea	Minister for Foreign Affairs and Trade Ban	“We have also pledged to contribute \$260 million to that end, focusing on areas such as health, education, capacity-building, job creation and the provision of electricity.”	U.N. GAOR, 59th Sess., 9th plen. mtg. at 27, U.N. Doc. A/59/PV.9 (Sept. 24, 2004).
Romania	Minister for Foreign Affairs Ungureanu	“Strong international support is needed if the Iraqi people are to succeed in achieving lasting stability and in going back to work for the country’s prosperity. Technical and financial support is also badly needed. It is essential not to weaken the international presence in Iraq, without which the progress made thus far would be put at risk.”	U.N. GAOR, 61st Sess., 17th plen. mtg. at 38, U.N. Doc. A/61/PV.17 (Sept. 22, 2006).
Russia	Minister for Foreign Affairs Lavrov	“A resolution in Iraq will be possible only through concerted efforts. That requires the involvement in the political process of all major Iraqi interests and the implementation of the plans of that country’s Government to reach genuine national accord, with the concerted support of the international community, including all of Iraq’s neighbours.”	U.N. GAOR, 61st Sess., 15th plen. mtg. at 29, U.N. Doc. A/61/PV.15 (Sept. 21, 2006).
San Marino	Minister for Foreign and Political Affairs Stolfi	“In line with its tradition of solidarity, and as demonstrated in recent years through its support of humanitarian projects in Bosnia and Herzegovina, Kosovo, the Middle East and in several African countries, often in the context of ad hoc programmes and United Nations special missions, my country will be pleased to contribute to the reconstruction process in Iraq. For the achievement of this objective, the forthcoming conference on the reconstruction of Iraq is particularly interesting.”	U.N. GAOR, 58th Sess., 14th plen. mtg. at 29, U.N. Doc. A/58/PV.14 (Sept. 26, 2003).

State	Speaker	Quote	Source
Slovenia	President Drnovšek	“The complexity of the post-conflict reconstruction and revitalization of Iraq demands the widest possible support from the international community and Iraqis themselves. The United Nations is the only body capable of serving as the embodiment of such support. Its role in Iraq must become more active while retaining its autonomy. Only a strong United Nations with a broadly defined mandate will be able to fulfill the role we require of it, namely, to serve as a factor for stability in Iraq and in the entire region.”	U.N. GAOR, 58th Sess., 13th plen. mtg. at 2, U.N. Doc. A/58/PV.13 (Sept. 26, 2003).
Spain	President Aznar	“Thus, we are committed to security, stability and the reconstruction of Iraq. We also are committed to returning sovereignty to the Iraqi people. We spare no effort and do not wish to dwell on the past. We believe that successful results in Iraq will be due to the efforts of the entire international community.”	U.N. GAOR, 58th Sess., 8th plen. mtg. at 36, U.N. Doc. A/58/PV.8 (Sept. 23, 2003).
Sri Lanka	President Kumaratunga	“As the Secretary-General’s Special Representative for Iraq recently pointed out, security measures alone will not suffice to end violence and create stability and peace. Political consensus-building, reconciliation, rehabilitation and the promotion of the rule of law are essential for democracy to take root. Equally important in today’s interdependent, increasingly globalized world is the commitment of the international community to remain engaged and to ensure that Iraq does not become further plagued by violence and fragmented along ethnic or religious lines.”	U.N. GAOR, 59th Sess., 3d plen. mtg. at 22, U.N. Doc. A/59/PV.3 (Sept. 21, 2004).

State	Speaker	Quote	Source
Thailand	Minister for Foreign Affairs Sathirathai	“Thailand has already contributed \$250,000 to Iraq through the International Committee of the Red Cross and is committed to providing another \$500,000 for dried halal food. Military construction engineers and medical personnel are also being dispatched to Iraq to provide further humanitarian assistance.”	U.N. GAOR, 58th Sess., 17th plen. mtg. at 23, U.N. Doc. A/58/PV.17 (Sept. 30, 2003).
Timor-Leste	Minister for Foreign Affairs and Cooperation Ramos-Horta	“The international community and, in particular, the neighbouring countries, have a special duty to provide all necessary support to the brave peoples of Afghanistan and Iraq in their struggle to consolidate their hard-won freedoms . . . .”	U.N. GAOR, 60th Sess., 16th plen. mtg. at 27, U.N. Doc. A/60/PV.16 (Sept. 20, 2005).
United Arab Emirates	Minister for Foreign Affairs Al-Noaimi	“The United Arab Emirates, which is deeply concerned about the continued suffering of the brotherly Iraqi people and the deterioration of their humanitarian, security, social, economic and environmental conditions, reaffirms that the restoration of security and stability in Iraq and the country’s return to the international community will not be achieved without the collective efforts of the regional and international community to help the Iraqi people reform their constitutional and developmental institutions and to enable them to manage their internal affairs and external relations with their neighbours and other countries so that they can play their responsible and historic role in the region.”	U.N. GAOR, 58th Sess., 14th plen. mtg. at 17, U.N. Doc. A/58/PV.14 (Sept. 26, 2003).
United States	President Bush	“The people of Lebanon and Afghanistan and Iraq have asked for our help, and every civilized nation has a responsibility to stand with them. Every civilized nation also has a responsibility to stand up for the people suffering under dictatorship.”	U.N. GAOR, 62d Sess., 4th plen. mtg. at 8, U.N. Doc. A/62/PV.4 (Sept. 25, 2007).

State	Speaker	Quote	Source
Vietnam	Minister for Foreign Affairs Dy Nien	“The United Nations should continue its worthy, active role in resolving the Iraqi issue and in reconstructing the country. In that regard, Viet Nam has decided to contribute humanitarian assistance to the Iraqi people.”	U.N. GAOR, 58th Sess., 14th plen. mtg. at 23, U.N. Doc. A/58/PV.14 (Sept. 26, 2003).

