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THE HUMANITARIAN BAILMENT OF FOREIGN POSSESSED TERRITORIES:
A PROACTIVE METHOD OF LEGAL ANALYSIS

A Thesis
Presented to
The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either the Judge Advocate General's School, the United States Army, or any government agency.

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44TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
April 1996

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ABSTRACT: During the last two centuries international law has shifted its focus from the regulation of governing elites and the power relationships between such elites to concern for the rights of individuals and peoples. As a result, the right of a state to use force dwindled from an absolute right to a right only for self or collective defense. Additionally, to avoid acknowledgment of *de facto* armed conflicts, states have made the armed conflict threshold a legal question. This thesis posits that a judge advocate using a bailment view of foreign possession operations will be able to apply the correct law to those operations regardless of where the operations fall on the permissive entry to belligerent occupation continuum.

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THE HUMANITARIAN BAILMENT OF FOREIGN POSSESSED TERRITORIES:

A PROACTIVE METHOD OF LEGAL ANALYSIS

MAJOR JOHN B. ALUMBAUGH

*As states change their nature, so will their policy change and so will their wars.*¹

I. Introduction

This thesis posits that a judge advocate² using a bailment view of foreign possession operations³ will be able to apply the correct law to those operations regardless of

¹ MICHAEL HOWARD, WAR IN EUROPEAN HISTORY, 76 (1976) [hereinafter HOWARD] (paraphrasing CARL VON CLAUSEWITZ, ON WAR 399-410 (Anatol Rapoport ed., Penguin Books 1982) (1832)).

² In the strict sense of the term, a judge advocate is a commissioned officer of the armed forces appointed in the Judge Advocate General's Corps. See, e.g., DEP'T OF ARMY, REG 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-1.a.(4) (3 Feb. 1995) [hereinafter AR 27-1]. Judge advocates must have earned a J.D. or LL.B degree from an American Bar Association accredited law school and be a member in good standing of a bar of the highest court of a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a Federal court. *Id.* at ¶ 13-2.g & h. See also 10 U.S.C. § 3037 (1995). This thesis applies to a civilian or military lawyer of any nation who gives legal advice to the military.

³ A state exerts foreign possession when it violates the territorial integrity of another state regardless of its legal status.

where the operations fall on the permissive entry⁴ to belligerent occupation continuum.

During the last two centuries, international law has shifted its focus from the regulation of governing elites and the power relationships between such elites to concern for the rights of individuals and peoples. As a result, the right of a state to use force dwindled from an absolute right to a right only for self or collective defense. Additionally, to avoid acknowledgment of *de facto* armed conflicts, states have made the armed conflict threshold a legal question. Due to legal questions rarely having clear or simple answers, modern militaries are employing judge advocates to help with the planning and execution of military operations.⁵

⁴ Permissive entry is the unopposed lawful entry of foreign troops into the territory of another sovereign. For example, the entry of coalition forces into Haiti during operation Uphold Democracy was a semi-permissive entry. CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995, LESSONS LEARNED FOR JUDGE ADVOCATES 16 (11 Dec. 1995) [hereinafter CLAMO, HAITI].

⁵ The judge advocate is acting in the lawyer role of "counselor," and occasionally "conscience" as opposed to the more familiar roles as "advocate," or "judge." See Matthew E. Winter, "Finding the Law"--The Values, Identity, and Function of the International Law Advisor, 128 MIL. L. REV. 1, 14 (1990) (defining the above mentioned roles).

In the area of foreign possession operations, judge advocates frequently render advice on operations that move along a continuum between permissive entry to belligerent occupation. The decision as to the exact descriptions of these operations occur after the completion of the operations. The judge advocate needs a method to ensure that the action taken will survive after the fact legal scrutiny. The problem is determining what body of law will control this scrutiny: the law of peace or the law of occupation. If the judge advocate views his government as a bailee of the territory for the bailor sovereign, the judge advocate can efficiently and accurately determine the controlling law.

This thesis begins by examining the problem faced by a proactive military commander's legal advisor. It will then explain how the problem developed by tracing the evolution of foreign possession operations. Beginning with nineteenth century roots in belligerent occupation, foreign possession operations evolved to the current practice of finding legitimate exceptions to the law of occupation to justify an undisclosed political end. It will solve the problem by showing how bailment analogies permit the judge advocate to arrive at practical and legal solutions. Finally, due to hypothetical scenarios' inability to accurately predict the

future, I will examine historical foreign possession incidents of the twentieth century to show that the bailment view would have passed international law scrutiny.

II. The Problem

A commander receives a phone call in the middle of the night notifying him to muster his unit. After attending a briefing, the commander knows his unit will participate in a military operation authorized by the proper domestic law authorities. The operation will involve taking and maintaining possession of foreign territory for an indeterminate amount of time. The operation plan that the commander will develop must comply with his military's doctrine and international law. During the planning phase, it is unlikely that the proper national authorities will have disseminated the international legal basis for the action.⁶ In making the determination that his plan conforms with international law, the commander will rely heavily on the advice of his staff officer, a judge advocate.⁷ The judge

⁶ See, e.g., *infra* note 457 (concerning the lack of State Department guidance for the American occupations in North Africa and Italy).

⁷ Judge advocates are serving in field unit headquarters and Army doctrine will reflect this practice. See DEP'T OF ARMY, DRAFT FIELD MANUAL 27-100, LEGAL OPERATIONS.

advocate's role is to advise his commander on "the principles and purposes of the law and to advocate forcefully for the rule of law."⁸

The judge advocate, operating within this environment of time and resource constraints, must quickly sort through developing plans to spot issues and develop possible solutions. The judge advocate should be able to quickly recognize areas with minimal legal concerns and allow their development without his participation. In the prioritized areas deserving of judge advocate attention, he must quickly analyze potential problems and recommend legal courses of actions capable of practical implementation. Later the judge advocate-endorsed, commander-approved, and soldier-executed plans will have to withstand the legal scrutiny of international media, foreign nations, nongovernmental

⁸ Edward D. Williamson, *International Law and the Role of the Legal Adviser in the Persian Gulf Crisis*, 23 N.Y.U. J. Int'l L. & Pol. 361, 371 (1991) [hereinafter Williamson] (comparing a corporate lawyer to his businessperson client and an international legal advisor to his commander). "After articulating the applicable domestic and international legal stricture, I must leave the policy judgments to my clients." *Id.* "The rule of law is merely a lofty abstraction without two things: first, legal references; and second, operational lawyers capable of living, moving, and communicating in a field environment well enough to explain the contents of those references." CLAMO, HARTI *supra* note 4, at 158.

organizations (NGOs), and legal scholars. The state conducting the foreign possession exercise will also be subject to claims brought by the local nationals, ousted government entities, third party countries, regional and international organizations, and NGOs.

Until the possession of the foreign country ends by the withdrawal of his unit, the judge advocate must continually assess responses to unanticipated situations and changes in military plans. He must perform a refined analysis of existing plans and orders, despite the physical depravities of field conditions and the further reduction of legal resources that have dwindled to whatever books the judge advocate can carry in his field pack.⁹ Again, his analysis will be subject

⁹ See

There is an . . . impact on legal operations when, for the first three weeks of the operation, everybody (lawyers included) are eating nothing but [prepackaged Meals Ready to Eat], fighting for scarce water supplies, scrounging for a place to sleep, not having electricity, digging slit trenches, wearing full battle dress (flak vest, Kevlar [helmet], and locked and loaded weapons), and otherwise concerned with survival while trying to also provide legal services.

Facsimile Message from Staff Judge Advocate, 10th Mountain Division and Fort Drum, AFZS-JA, to Deputy Director, Center for Law and Military Operations, subject Draft Lessons Learned--Haiti of 13 Oct. 1995 reprinted in CLAMO, HAITI *supra* note 4, at 33.

to heavy monitoring and scrutiny by outside parties. Although after the fact scholarly and judicial analysis will have the benefit of ample time, resources, and physical accommodations; the judge advocate's inadequate time or resources will provide no defense or excuse for any illegal actions taken by his clients.

The military foreign possession operation is more than the prepositioning of military forces in a foreign country pursuant to a mutual status of forces agreement.¹⁰ After the

The forward deployed judge advocate receives support from his legal technical chain of assistance at higher headquarters. These judge advocates assist the forward deployed judge advocate by researching issues beyond the deployed judge advocate's abilities and advising the deployed judge advocate of their findings. "[Judge advocate] officers receive technical legal supervision from [The Judge Advocate General] and from the [Staff Judge Advocates] of superior commands." AR 27-1 supra note 2, at para. 3-2.b. The deployed judge advocate must be able to spot potential legal issues prior to the issue's becoming a problem and analyze the advice from his technical chain in relation to the actual situation in the combat area. Even with the advances in modern military communications, there will still be times when unanticipated legal problems will need immediate resolution by the local commander and immediate advice from the deployed judge advocate without time for further research.

¹⁰ For example, the stationing of German Luftwaffe units in the United States military installation at Fort Hood, Texas or of American Army units at Campbell Barracks in the German city of Heidelberg pursuant to a North Atlantic Treaty Organization status of forces agreement is not an exercise of military possession over a foreign territory because the military units are lawful guests of their host nations and not interacting

fact, the proper domestic authorities of the country taking possession will determine whether the operation was: an occupation, defense assistance to a local government, or defense assistance to a local state.¹¹ Regardless of the legality of the ends, the possessing military will confront the needs of individuals, peoples and communities. Individuals demand respect for their human rights. Peoples demand self-determination and self-rule which can either validate the possessing country's actions, conflict with the assisted sovereign, or fracture territorial integrity. Communities depend on their centralized government assistance for their growing economic and social well-being.

Even if the judge advocate is relatively new to the international humanitarian and human rights field, he can quickly arrive at legally correct solutions by applying a bailment model. He should view the operation as a bailment with the territory and populace being the object of the bailment, the possessing country being the bailor and the

with the local population or government without the express permission of the host nation.

¹¹ The other possibility of an annexation was consistently declared illegal by the United Nations since the 1970s. See *infra* notes 486-518 and accompanying text.

absent sovereign as the bailee. Bailment is a legal concept taught at most law schools and generally understood by all lawyers.

Changing the legal view of the foreign possession operation does not require the codification of new laws.¹² Instead, the bailment view allows for an efficient analysis that conforms to modern international law practices and will survive future legal scrutiny under either the tenets of peacetime or occupation law. By applying the bailment view, the judge advocate knows his analysis will conform with the rule of law rather than becoming a mere political rationalization for military actions disguised in a legal cloak. Additionally, the judge advocate's commander can confidently gauge the reactions of either the international monitoring community or legal enforcement tribunals.

¹² More codified foreign possession laws only make the state with illegal possession more resolute in defiance of international obligations and needlessly increases the cost of nations desiring to legitimately help others for humanitarian or human rights reasons. The tenets of international law are fixed, even if the tenet's application changes to reflect changes in the international society. Even if international law was enforced, some states would hide behind the letter of codified law instead of the spirit of customary law when acting in a novel way that was not codified when custom had provided adequate notice the action was clearly illegal.

III. The Traditional View

Analysis of foreign possession operations has historically followed the international customary and treaty law of occupation. Before delving into twentieth century law, one needs to understand some aspects of nineteenth century international law to better appreciate the humanitarian benefits of twentieth century law. Also, the reader will then be able to recognize incorrect international legal justifications based on the anachronistic nineteenth century approach. Adding to the customary international law of the twentieth century, the Hague Regulations, the Fourth Geneva Convention, and the United Nations Charter have codified certain aspects of occupation law.

A. *Nineteenth Century Occupation*

Elites represented states in the nineteenth century. The armed conflicts between the elites did not impact much on or concern the civilians.

1. War and Occupation Were Legitimate Means of Gaining Territory

The international concept of occupation did not exist until the late eighteenth century.¹³ During the nineteenth century, war was a legitimate means to achieve national goals.¹⁴ This was consistent with the prevailing political theory of Social Darwinism wherein the stronger party defeated the weaker and less fit party.¹⁵ Occupation was a short,

¹³ "A line of demarcation between real acquisition and mere occupation by the armed forces of a belligerent made its appearance during the second half of the eighteenth century." GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY*, 7 (1957) [hereinafter VON GLAHN, *OCCUPATION*]. The author, a noted international law scholar, assisted in the administration of post World War II occupied Germany.

¹⁴ See, e.g.,

. . . in his third annual message to Congress on December 7, 1847, more than eight weeks before the conclusion of the Mexican war President Polk suggested that New Mexico and California which had been completely occupied by American troops for many months, and where all Mexican resistance has ceased, should be annexed immediately.

DORRIS A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914*, 40 (1949) [hereinafter GRABER]. "Conquest of enemy territory was generally regarded as establishing annexation to the conqueror's realm, . . ." VON GLAHN, *OCCUPATION*, *supra* note 13, at 7.

¹⁵ The "survival of the fittest" theory of Social Darwinism is named after Charles Darwin who introduced his theory in the 1859 book entitled *On the Origin of the Species by Means of Natural Selection, or The Preservation of Favored Races in the*

transitory period between hostilities and the peace treaty,¹⁶ in which the conquering state exchanged its war victories for territorial concessions from the defeated state. For example, Prussia occupied French territory after Prussian military victories in the 1870-1871 Franco-Prussian War until the

Struggle for Life. RICHARD L. RUBENSTEIN, *THE AGE OF TRIAGE* 217 (1983).

[T]he real radicals are those who do not know the difference between a genuine human community and a jungle. Survival of the fittest may indeed be the law of the jungle, but a human community is not a jungle. Human beings have banded together to create an artificial space in which decency and civility can govern the relations between them. When advocates of . . . Social Darwinism naturalize the human condition and claim that, as with all animals, the fundamental law of human existence is the survival of the fittest; they are in reality insisting that even in civil society the condition of mankind is one of war of all against all.

Id. at 228.

¹⁶ "The validity of the old principle of the common law that 'a conquered country forms immediately part of the King's Dominions' was in fact asserted as late as 1814 by Sir William Scott in the case of *The Fortina* . . ." VON GLAHN, *OCCUPATION*, *supra* note 13, at 7. "Territory is considered occupied when it is actually placed under the authority of the hostile army. The Occupation extends only to the territory where such authority has been established and can be exercised." Article 42 of Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277, 205 Consol. T.S. 277(539), 1 Bevans 63 including the regulations thereto [hereinafter Hague Regulations].

French conceded a portion of this territory to Prussia in the 1871 peace treaty.¹⁷

2. *Civilians Not Involved In War*

Governments fought wars with their armies.¹⁸ Civilians did not accompany the military or participate in the military decision making.¹⁹ As much as possible, the military did not physically or economically interfere with or harm civilians.²⁰

¹⁷ MORTIMER CHAMBERS ET AL., *THE WESTERN EXPERIENCE* 823 (2d ed., 1979) [hereinafter CHAMBERS] (noting that the ceding of Alsace-Lorraine and paying an indemnity of five billion francs by France assured the enmity between France and German as a central fact of international relations).

¹⁸ HOWARD, *supra* note 1, at 72 (reflecting that armies to the civilians were "symbols of state power").

¹⁹ See *Id.* (noting that concerning military affairs, civilians "took little interest and were not encouraged to do so").

²⁰

Under the Doctrine Rousseau-Portales, war is directed against sovereigns and armies, not against subjects and civilians . . . all of the technical thinking was devoted to the drawing of distinctions between public laws, persons, rights, and interests on the one side and those of a private character on the other . . . The Doctrine Rousseau-Portales found a clear expression in the pronouncement of King William of Prussia on August 11, 1870: "I conduct war with the French soldiers, not with the French civilians."

ERNST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 12 (1942) [hereinafter FEILCHENFELD].

This practice followed the prevailing economic theory of the European powers, laissez-faire.²¹ Laissez-faire implied minimal government intervention in the economy.²² Therefore, the occupant retained the ousted government's existing structure and law subject to the occupant's security concerns.

23

3. *Elites Retain Power Before, During, and After War and Occupation*

In theory, the occupant protected both the rights of the ousted sovereign government and the rights of the population from exploitation.²⁴ In practice, the sovereign government's

²¹ CHAMBERS, *supra* note 17, at 621 (explaining the doctrine of "laissez faire la nature," meant "let nature take its course" in *The Wealth of Nations* (1776) by Adam Smith and by French physiocrats).

²² "Historically, the main duty of the state was first and primarily seen to lie in its security functions. Internal and external security (the protection of the country against a hostile menace from abroad and the maintenance of public order within) have traditionally been viewed as the prime tasks of the state." ABRAM DE SWAAN, *IN CARE OF THE STATE* 4-5 (1988) [hereinafter DE SWAAN].

²³ For example, during the Franco-Prussian War, the Prussians pledged to France and abided by their pledge to restore the prewar order in the occupied territory and not to modify existing legislation unless required by military necessity. GRABER, *supra* note 14, at 268-70.

²⁴ Jennings, *Government in Commission*, 23 BRIT. Y.B. INT'L LAW 112, 135 (1946) [hereinafter Jennings].

rights took precedence over those of the population.²⁵ The occupant filled the void created by the ousted government by maintaining the basis of the ousted government's power until the mutually agreed on return of the ousted government.²⁶ The social and economic elite represented the ousted government. The elite's private property holdings ultimately determined their social and economic standing.²⁷ As long as the ousted elite maintained their property interests, they maintained their high standing. To avoid a loss of standing should the next war result in a defeat, the occupant elite respected the vested rights of the ousted elite in their private property.²⁸

²⁵ See, e.g., ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 9-10 (1978) [hereinafter GERSON] (stating "fundamental institutional reform [by the occupant] might be used to stir indigenous rebellion against the ousted sovereign.").

²⁶ See, e.g., Hague Regulations, *supra* note 16, at art. 55 (granting power to the occupant to possess, administer, and safeguard state property).

²⁷ See CHAMBERS, *supra* note 17, at 775 (mentioning the control of most of the wealthy aristocrats was closely allied to an established church and dominated the upper levels of administration and the military).

²⁸ See Feilchenfeld, *supra* note 20, at 12 (citing a legal dogma of the nineteenth century, the Doctrine of Vested Rights, private property of inhabitants is protected against confiscation; ancient forms of wartime impositions, such as contributions, requisitions, and collective fines, are subjected to detailed regulation).

The *debellatio*²⁹ situation, the one exception to the duty to establish an occupation regime, emphasizes the political concern of the elite.

If one belligerent conquers the whole territory of an enemy, the war is over, the enemy state ceases to exist, rules on state succession concerning complete annexation apply, and there is no longer any room for the rules governing mere occupation. .

. . [But] a phase of mere occupation persists as long as the allies of the conquered state continue to fight. . . .³⁰

By placing the elite's political interests above economic and social interests, occupation was essentially a pact between state elites providing reciprocal guarantees of political

²⁹ "The term *debellatio*, which is the same as 'subjugation', is not always used quite consistently." Roberts, *What Is Military Occupation?* 55 BRIT. Y.B. INT'L LAW 267-68 & n. 67 (1985) [hereinafter Roberts, *OCCUPATION*] (listing other scholars' definitions of *debellatio*); The *debellatio* is a situation in which one of the belligerents is utterly defeated, to the point of its total disintegration as a sovereign nation. Feilchenfeld, *supra* note 20, at 7.

³⁰ Feilchenfeld, *supra* note 20, at 7. See also JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICTS* 696 (2d ed. 1959) [hereinafter STONE], GEORG SCHWARZENBERGER & E. D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 165-66 (1976) [hereinafter SCHWARZENBERGER & BROWN]; NISUKE ANDO, *SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW* 76-80 (1991) [hereinafter ANDO].

continuity.³¹ Hence, the decision to resort to arms was less costly for the elite.³²

The nineteenth century imperative of the elites always retaining power, as well as the other imperatives, would not survive in the twentieth century.

B. The Cornerstone of Occupation Law -- Article 43 of the Hague Regulations

The principles underlying Article 43 of the Hague Regulations³³ reflect late nineteenth century customary occupation law³⁴ as enumerated in national court rulings,³⁵

³¹ EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION*, 29 (1993) [hereinafter BENVENISTI, *OCCUPATION*].

³² *Id.*

³³ "Nothing distinguishes the writing of the period following the 1899 Hague code from the writing prior to the code." GRABER, *supra* note 14, at 143. See, e.g., VON GLAHN, *OCCUPATION*, *supra* note 13, at 10-12 (providing specifically that until a more complete code of the laws of war has been issued, the inhabitants and belligerents remain under the protection and the rule of the principles of the laws of nations).

³⁴ Occupation was discussed at two Hague Conventions, Hague Convention No II Respecting the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, II Mallory 2042 including the regulations thereto and Hague Regulations, *supra* note 16.

³⁵ See, e.g., *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815) (holding resources derived from enemy occupied territory could be forfeited to the government as captured enemy property); *United States v. Rice*, 17 U.S. (4

military codes of the Laws of Armed Conflicts,³⁶ nonbinding international declarations,³⁷ and writings of noted legal scholars.³⁸ Article 43 of the 1907 Hague Regulations states:

Wheat.) 246 (1819) (upholding the British occupant's customs over the ousted American government's customs); Fleming & Marshall v. Page, 50 U.S. (9 How.) 603 (1850) (upholding customs duties on goods transported between occupied territory (Mexico) and the occupant's country (United States)).

³⁶ In 1863 Francis Lieber attempted to codify the Laws of Armed Conflict for use as a United States war manual during the civil war. The Lieber Code provided that an occupied area is put under martial law of the invading army, which "consists in the suspension . . . of the criminal and civil law, and of the domestic administration and government . . . and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation." Lieber Code, arts. 1, 3, & 6 (1863) *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, *THE LAW OF ARMED CONFLICTS* 3 (2d ed. 1981) [hereinafter SCHINDLER & TOMAN]. Other states including Germany, France, Great Britain, Italy, and Russia implemented military codes following the same basic principles. See GRABER, *supra* note 14, at 26-27, 114-15, 132-33.

³⁷ The occupation articles of the nonbinding Brussels Declaration of 1874 foreshadowed Article 43 of the Hague Regulations.

Article 2: The authority of the legitimate power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.

Article 3: "With this object he shall maintain the laws which were in force in the country in time of peace and shall not modify, suspend or replace them unless necessary.

Brussels Declaration of 1874 *reprinted in* SCHINDLER & TOMAN, *supra* note 36, at 26-28. See also GRABER, *supra* note 14, at

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The first English translation of Article 43 as "public order and safety" in place of "l'ordre et la vie publics" incorrectly narrows the scope of occupant responsibility. The broader term "public order and civil life" more correctly reflects the original French language.³⁹ The broader connotation of "civil life" over mere "safety" implies that the occupant must do more than merely keep civilians away from harm. Subject to the occupant's legitimate security concerns,

20-30 (discussing history of the Brussels Declaration of 1874). Article 6: "No invaded territory is regarded as conquered until the end of the war; until that time the occupant exercises, in such territory, only a *de facto* power, essentially provisional in character." The Oxford Manual on the Laws of War on Land of 1880 reprinted in SCHINDLER & TOMAN, *supra* note 36, at 35-40.

³⁸ See GRABER, *supra* note 14, at 13-48 (reviewing the Lieber code of 1863, the Brussels code of 1874, the Oxford code of 1880, and the Hague code of 1899 and 1907).

³⁹ Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 Yale L.J. 393 (1945).

the occupant must allow the territory's civilians to continue conducting their daily civil affairs.

1. *Occupant Is Not The Territory's Sovereign*

Framer's Intent

According to Gerhard von Glahn, "The Hague Regulations give no clear-cut answer to the problem of sovereignty in occupied territory, inasmuch as there is only reference to a passage of *de facto* authority into the hands of the occupant."⁴⁰ Eyal Benvenisti states "It is, however, quite clear that the framers of the Hague Regulations unanimously took the view that an occupant could not claim sovereign rights only because of its effective control over the occupied territory."⁴¹ Without referring to the framer's intent, Benvenisti's nontransfer of sovereignty interpretation is correct because von Glahn's analysis of the text stated that only *de facto* authority passed to the occupant. Hence, the *de jure* authority, or sovereignty, must remain with the ousted government.

⁴⁰ VON GLAHN, OCCUPATION, *supra* note 13, at 31.

⁴¹ BENVENISTI, OCCUPATION, *supra* note 31, at 8 n. 9.

Modern Practice -- Sometimes the Theory Works

Although the international community has discussed the principle of the framer's intent on several occasions,⁴² powerful states of the twentieth century have not always followed the principle. The United Nations standard response of condemning occupation and emphasizing the inadmissibility of the acquisition of territory by force has met with varied success through modern history.⁴³

⁴² See, e.g., "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." Article 1(11) of the Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (Oct. 24, 1970). During the same General Assembly session, the Declaration on the Strengthening of International Security, Resolution 2734 (Dec. 16, 1970) reiterated the same words at Article 5.

⁴³ See, e.g., Preamble of United Nations Security Council Resolution 242 (Nov. 22, 1967) (concerning the Israeli occupation the council "emphasize[d] the inadmissibility of the acquisition of territory by war"); General Assembly Resolution 2793 (Dec. 7, 1971) and Security Council Resolution 307 (Dec. 21, 1971) (reminding India of its duty to respect the territorial integrity of the East Pakistan (Bangladesh)); General Assembly Resolution 3212 (Nov. 1, 1974), General Assembly Resolution 3395 (Nov. 20, 1975), General Assembly Resolution 33/15 (Nov. 9, 1978), General Assembly Resolution 34/30 (Nov. 20, 1979), General Assembly Resolution 37/253 (May 13, 1983) (deploring the Turkish occupation of Northern Cyprus and demanding its immediate withdrawal); Security Council Resolution 541 (Nov. 18, 1983) and Security Council Resolution 550 (Nov. 15, 1984) (voiding the 1983 declaration of independence of the Turkish Republic of Northern Cyprus);

2. Occupant's Power

Article 43 is the miniconstitution for occupation administration.⁴⁴ Its concepts extend throughout the specific articles of the Hague Regulations and the acts taken by the occupant.⁴⁵ Occupants must "take all the measures in [their] power to restore and ensure, as far as possible, public order

General Assembly Resolution 384 (Dec. 22, 1975) (recommending the Security Council take "urgent action to protect the territorial integrity of Portuguese Timor and the inalienable right of its people to self-determination,"); General Assembly Resolution 34/22 (Nov. 14, 1979) (expressing that the General Assembly "regretted" the Vietnamese armed intervention in Kampuchea and called for the immediate withdrawal of the Vietnamese forces); General Assembly Resolution 34/37 (Nov. 21, 1979) (stating that the General Assembly "deeply deplore[d]" the situation resulting from the "continued Occupation of Western Sahara by Morocco"); General Assembly Resolution ES-6/2 (Jan. 14, 1980). (reaffirming with respect to the Soviet occupation of Afghanistan "that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which is contrary to its aims and purposes"); General Assembly Resolution 38/7 (Nov. 2, 1983) (rebuking the American military actions in Grenada and "deeply deplor[ing]" the military intervention"); General Assembly Resolution 44/240 (Dec. 29, 1989) (calling for the immediate withdrawal of American forces in Panama and "strongly deplor[ing]" the action); Security Council Resolution 662 (Aug. 9, 1990), paras. 1 & 2 (declaring that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void").

⁴⁴ BENVENISTI, OCCUPATION, *supra* note 31, at 9.

⁴⁵ See *infra* note 70-84 and accompanying text.

and [civil life]."⁴⁶ However, the "unless absolutely prevented" language gives the occupant the right not to respect some of the local laws.⁴⁷ Article 43 became a convenient legal mechanism for the occupant. The occupant could intervene in practically all areas of life under the "restore and ensure . . . public order and civil life" requirement⁴⁸ or refrain from action under the "as far as possible" limitation.⁴⁹

⁴⁶ Hague Regulations, *supra* note 16, at art. 43.

⁴⁷ *Id.*

⁴⁸ "Occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimate sovereigns themselves are generally wont to regulate." M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 747 (1961) [hereinafter McDUGAL & FELICIANO].

⁴⁹ Even though rationing of one loaf of bread per inhabitant per day was enforced in Tripoli city, the British occupation government in World War II Tripolitania denied desperate requests of the local inhabitants for spare parts, fuels, and lubricants for farm machinery needed to produce food under the rationale that its wartime administration was only concerned with care and maintenance of the territory in accordance with international law. LORD RENNELL OF RODD, BRITISH MILITARY ADMINISTRATION OF OCCUPIED TERRITORIES IN AFRICA DURING THE YEARS 1941-1947 266-93 (1948) [hereinafter RENNELL].

Legitimate Areas of Occupant's Concern: Public Order and Civil Life

During the debate over the Hague Regulation's nonbinding precursor, the Brussels Declaration of 1874, the weaker states insisted on inserting the public order and civil life requirements during an occupation. Due to the separation of military and civilian life, the weaker states wanted the stronger states, absent military necessity, to maintain the weaker state's public order and civil life until the weaker state's return to power.⁵⁰ As discussed below, the weaker states succeeded in requiring the occupant to take action in the public order and civil life arena.

Occupant's Actions Limited To "Restore and Ensure"

The Hague Regulations leave the occupant with little discretion relative to the restoration of daily life. The occupant must return the occupied society in the same state that existed before the occupation began.⁵¹ A strict reading of Article 43 would even suggest freezing the economic

⁵⁰ GRABER, *supra* note 14, at 123-25, 132-43, 143-45.

⁵¹ Hague Regulations, *supra* note 16, at art. 43.

infrastructure to a stagnate *status quo ante bellum* level or the preoccupation level.⁵²

The occupied territory's pre-occupation condition might continue for the unknown duration of the occupation. "The Hague Resolutions do not safeguard coherently the whole economic life of a region. In accordance with the trends of the last century, their emphasis is 'static' rather than 'dynamic' on 'having' rather than 'doing' or even 'obtaining' on vested rights rather than on economic function or opportunity."⁵³ However, during the twentieth century, "human existence requires organic growth, and it is impossible for a state to mark time indefinitely. Political decisions must be taken, policies must be carried out."⁵⁴ Subject to the occupant's legitimate security concerns, the occupant must allow the society to continue self-paced growth and change or risk possible extinction of the society through atrophy.

⁵² "The Hague Regulations . . . assume a laissez faire economy in both the Occupant and the Occupied States, giving little guidance for the positive economic action which is now routine in modern states." STONE, *supra* note 30 at 729.

⁵³ FEILCHENFELD, *supra* note 20 at 13.

⁵⁴ MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 225 (1959) [hereinafter GREENSPAN, *LAND WARFARE*].

Occupant versus occupied: "While Respecting Unless Absolutely Prevented, the Laws in Force in the Country"

The only Article 43 issue contested during the 1899 Peace Conference was the "unless necessary" exception.⁵⁵ By changing the nineteenth century norm and allowing an exception, the occupant may legitimately change the sovereign government's law.⁵⁶ The intended scope of the exception was small because military necessity was the only relevant consideration that could "absolutely prevent" an occupant from maintaining the

⁵⁵ "At the Hague Conference of 1899 an elaborate discussion developed over whether Article 3 of the Brussels's Declaration should be retained to protect occupied countries from far reaching legal changes or whether it should be eliminated because it concedes to any occupant the right to exercise legislative power even before occupation has taken place." Schwenk, *supra* note 39, at 396.

⁵⁶

Various drafts were submitted to reconcile these points of view, but none of them was approved by the Conference. Finally, Bihourd, the representative of France, suggested, as a matter of compromise, that while Article 3 should be canceled, its spirit should be incorporated into Article 2 . . . This suggestion was accepted by a vote of twenty-three against one (Japan).

Id. at 396-97. Both the weak and strong states rejected several suggestions as unsatisfactory, until a compromise was reached by replacing the Brussels Declaration wording of "maintaining" and "unless necessary" with the more restrictive Hague Convention wording of "respecting" and "unless absolutely prevented." GRABER, *supra* note 14, at 141-43.

old law.⁵⁷ Occupants had the opportunity to assist occupied societies' growth through proper application of the change provision.

The occupant's obligation to "respect" the existing laws "unless absolutely prevented" by itself has no meaning. Technically, the occupant is almost never absolutely prevented from respecting the local laws.⁵⁸ To apply this article, the occupant must delineate legitimate concerns and determine the proper balances, the general balance between stability and change and the specific balance between a particular situation's conflicting considerations.⁵⁹ Specifically, some changes to assist the occupant's military may be unlawful if the changes have a disproportionate effect on the welfare of

⁵⁷ "Literally taken, the clause 'sauf empech e ment absolu' has no meaning at all, because the occupant is never absolutely prevented from respecting the laws of the occupied country. It takes on meaning only if it is completed by a phrase such as 'by necessity.'" Schwenk, *supra* note 39, at 399-400.

⁵⁸ See, e.g., FEILCHENFELD, *supra* note 20 at 89 (1942) (interpreting "absolutely prevented" to mean at least that new laws can only be supplemented by old laws, that they must be sufficiently justified, and that the benefit of the doubt belongs to the old, not to the new, laws).

⁵⁹ BENVENISTI, OCCUPATION, *supra* note 31, at 13.

the population relative to the security advantage gained by the military.⁶⁰

Twentieth century scholars added legitimate concerns to the "unless absolutely prevented" exception. In addition to the drafter's military necessity rationale, scholars have suggested that an occupying state might disregard local law in the furtherance of: elimination of undemocratic and inhumane institutions;⁶¹ "safeguarding of the welfare of the native population;"⁶² "the maintenance of order, the safety of [the occupant's] force and the realization of the legitimate purpose of [the] occupation;"⁶³ and moral requirements to change existing laws that are oppressive.⁶⁴

⁶⁰ "[T]he restoration of public order and civil life aims primarily, if not exclusively, at the interest of the population . . . confin[ing] the term . . . 'empeachment absolu' to the military interest of the occupant seems too narrow if not actually incorrect." Schwenk, *supra* note 39, at 400.

⁶¹ GREENSPAN, *LAND WARFARE* *supra* note 54, at 224 (proposing that the exigencies of war may require the elimination of undemocratic and inhumane institutions).

⁶² VON GLAHN, *OCCUPATION*, *supra* note 13, at 97.

⁶³ LORD MCNAIR & A. D. WATTS, *THE LEGAL EFFECTS OF WAR* 369 (4th ed. 1966) [hereinafter MCNAIR & WATTS].

⁶⁴ For example, post World War II Allies occupying Germany were morally obligated to change the German racial laws and laws respecting Nazi organizations. "Since the Nazi system constitutes a threat to the security of the occupant's army, .

After World War II, Western scholars addressing the above concerns eased the changes in the law criteria by interpreting "absolutely prevented" to mean "absolute necessity,"⁶⁵ "necessity,"⁶⁶ or a test for "sufficient justification,"⁶⁷ or "reasonableness."⁶⁸ Although these interpretations allowed the occupant to invoke the needs of the civilian population as grounds to make changes in the territorial law under Article 43, "there [was] no objective criterion in practice for

. . it would seem that civil and criminal laws and provisions could be abolished which express racial, religious, or political discrimination." Schwenk, *supra* note 39, at 407. See also McDUGAL & FELICIANO, *supra* note 48, at 768 (stating the occupants' security interests absolutely preventing respect for the existing pro-Nazi laws); GREENSPAN, *LAND WARFARE*, *supra* note 54, at 225 (citing the unconditional German surrender as grounds for the occupants not to respect the Nazi institutions).

⁶⁵ "[The] occupant in restoring public order and civil life must respect the existing laws of the occupying country unless he is prevented from doing so by absolute necessity" Schwenk, *supra* note 39, at 401.

⁶⁶ Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 *ISR. Y.B. HUM. RTS.* 104, 112 (1978) [hereinafter Dinstein, *Occupation and Human Rights*].

⁶⁷ FEILCHENFELD, *supra* note 20, at 89.

⁶⁸ "A retinal theory of interpretation must recognize that treaty words acquire meaning in specific controversies only in context and in terms of the major purposes and demands of the parties to the treaty." McDUGAL & FELICIANO, *supra* note 48, at 89. "International law allows a reasonable latitude in such circumstances" GREENSPAN, *LAND WARFARE*, *supra* note 54, at 224.

drawing a distinction between sincere and insincere concern for the population."⁶⁹

3. *Specific Actions: Hague Regulations' Articles and Custom*

Other articles provide specific prohibitions, requirements, and authorizations concerning occupations. Occupant prohibitions include: using coercion to obtain enemy military information,⁷⁰ forcing inhabitants to swear an oath of allegiance to the occupants,⁷¹ pillaging,⁷² general punishment

⁶⁹ Dinstein, *Occupation and Human Rights*, *supra* note 66 at 113. For example, the World War II German occupation laws were insincere and could not be justified by military necessity absolutely preventing respect for the existing laws.

The introduction of German law and the changing of local law in the nonincorporated areas are dictated, as reflected in the character of the laws, by the occupant's plan to integrate these countries into the New European Order. Such introduction of German law cannot be justified by the occupant on the ground of military necessity (Article 43 of the Hague Regulations), because the integration of the occupied countries into the new order is obviously a political objective and has no realistic relation to the needs of the army or the successful conduct of the military operations.

RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* 30-31 (1944) [hereinafter LEMKIN].

⁷⁰ Hague Regulations, *supra* note 16 at art. 44.

⁷¹ *Id.* at art. 45. "Compelling inhabitants of an occupied territory to take an oath of allegiance is not only in

for the acts of an individual,⁷³ and the seizure, destruction, or willful damage of religious, charitable, education, arts, sciences, and historic property.⁷⁴

Occupant obligations include respecting family honor, individual lives, property rights and religious freedom,⁷⁵ and safeguarding the state property and administering the property in accordance with the rules of usufruct.⁷⁶

Allowed occupant actions include collecting "taxes, dues, and tolls imposed for the benefit of the state" according to existing rates and to defray occupant administration costs to the same extent as the ousted government;⁷⁷ collecting of

violation of the laws of war, but it is of doubtful utility." H. A. SMITH, *MILITARY GOVERNMENT* 17 (1920) [hereinafter SMITH].

⁷² Hague Regulations, *supra* note 16 at art. 47. "While it is true that in all wars there is a certain amount of pillaging, it is equally true that all officers condemn it, if not on moral grounds, at least because of its ill effects on discipline." SMITH, *supra* note 71, at 17.

⁷³ Hague Regulations, *supra* note 16 at art. 50.

⁷⁴ *Id.* at art. 56.

⁷⁵ *Id.* at art. 46.

⁷⁶ *Id.* at art. 55.

⁷⁷ *Id.* at art. 48. "The Hague Regulations are designed to prevent exorbitant demands on the inhabitants of the occupied area. Neither taxes nor contributions may be used to enrich the occupant, but must be applied solely to the costs of administering the territory and the maintenance of the occupying army." GREENSPAN, *LAND WARFARE* *supra* note 54, at 228.

contributions for the needs of the occupant's administration and army in the territory;⁷⁸ collecting requisitions of nonwarlike goods or services in proportion to the resources of the country for the needs of the army of occupation;⁷⁹ possession of all state assets;⁸⁰ and possession of all private communication, transportation, arms and ammunition assets

In regards to taxes *see, e.g.,* FEILCHENFELD, *supra* note 20 at 49 (reasoning for levying of taxes may include taxes to benefit the occupant and taxation may be increased due to general changes in economic conditions); STONE, *supra* note 30 at 712-13; MCNAIR & WATTS, *supra* note 63, at 386. As to customs, "Although the occupant may not increase taxes (and this includes customs dues in force when the occupation came into effect) nothing prevents him from reducing or waiving such levies." GREENSPAN, LAND WARFARE, *supra* note 54, at 229. See also FEILCHENFELD, *supra* note 20 at 83 (exercising law making power the occupant may collect customs in an occupied country or suspend the application of existing customs laws but it is less clear that an occupant is free to abolish all customs lines between his own country and the occupied region; for this almost invariably would be an intrinsic measure of complete annexation which a mere occupant has no right to effect); STONE, *supra* note 30 at 712; Schwenk, *supra* note 39, at 404 (stating international law seems to stipulate that the occupant could not suspend customs duties).

⁷⁸ Hague Regulations, *supra* note 16 at art. 49. art. 51.

⁷⁹ *Id.* at art. 52. "[C]ertain trained officers of judgment and discretion must be detailed to pass upon requisitions. . . . one very active and energetic young officer . . . wanted to requisition . . . one piano, three guitars, and five mandolins on the ground that they would add to the contentment of his organization." SMITH, *supra* note 71, at 23-24.

⁸⁰ Hague Regulations, *supra* note 16 at art. 53

during the occupation but these items must be restored to owner with compensation on the return of peace.⁸¹

Additionally, the military necessity exception to Article 43's respect for the law in force allows the occupant to suspend the operation of laws relating to military conscription, licenses to carry weapons, political activities such as elections, and some civil liberties such as free speech and free movement.⁸² However, the occupant should allow the operative indigenous court systems to continue operating.⁸³ There is no consensus as to rules regarding currency in occupied territories.⁸⁴

⁸¹ *Id.* at art. 53

⁸² "[I]n the field of constitutional law the occupant is totally independent of the constitution of the occupied country if the maintenance and safety of his military forces and the purpose of war so require." Schwenk, *supra* note 39, at 403-4. See also VON GLAHN, *OCCUPATION*, *supra* note 13, at 98-99 (suspending laws as a matter of course is in the interest of the safety and security of the occupant).

⁸³ See, e.g., STONE, *supra* note 30 at 701; VON GLAHN, *OCCUPATION*, *supra* note 13, at 106 (interfering in the legal structure of an occupied area by occupying forces is allowable due to military necessity and security demands).

⁸⁴ See, e.g., Stone, *supra* note 30, at 718 (emphasizing that no branch of occupation law is more important under modern conditions and none is freer of authorization guidance, than that concerning the control of money and currency); FEILCHENFELD, *supra* note 20 at 70-83 (regarding the use of existing currency or the occupant's currency both the German occupation governments and occupied populations of European territories

C. Adding to the Hague Regulation's Foundation: The Fourth Geneva Convention

The abuses suffered by civilians in World Wars I and II evidenced a need for more protections than provided by the Hague Regulations. In the process of providing more protection for civilians in time of war, the delegates to the 1949 Diplomatic Conference in Geneva would redefine the law of occupation in section three of their Convention.⁸⁵ The Convention does not indicate that attempts to change political institutions are illegal. The Convention does not mention sovereignty,⁸⁶ but prohibits harming "Protected Persons," the nationals of the enemy who remain in the territory.⁸⁷

saw it as essential that precious metals stand back of bank notes).

⁸⁵ Fourth 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].

⁸⁶ "[T]he text in question is of an essentially humanitarian character; its object is to safeguard human beings and not to protect the political institutions and government machinery of the state as such." JEAN S. PICTET, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 62 (1958) [hereinafter PICTET, COMMENTARY].

⁸⁷ Fourth Geneva Convention, *supra* note 85, at art. 4. PICTET, COMMENTARY, *supra* note 86, at 46 (explaining the two main classes of protected persons as enemy nationals within the national territory of each of the parties to the conflict and the whole population of occupied territories excluding nationals of the occupying power).

According to Jean S. Pictet of the International Committee of the Red Cross (ICRC), "The main point, according to the Convention, is that changes made in the internal organization of the State must not lead to protected persons being deprived of the rights and safeguards provided for them."⁸⁸ Article 47 and Article 64 are the two major law of occupation articles.

1. Article 47 -- Inviolability of Rights

Article 47 reaffirmed customary international law and the Hague Regulation's inalienability of sovereignty through force.⁸⁹ This legislation sought to put an end to occupants' attempts to exempt themselves from the law of occupation through annexations, puppet states, or puppet governments.⁹⁰

⁸⁸ PICTET, COMMENTARY, *supra* note 86, at 274.

⁸⁹

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Fourth Geneva Convention, *supra* note 85, at art. 47.

⁹⁰ See *infra*, notes 489-518 and accompanying text.

2. *Article 64 -- Expanded Occupant Law Making*

Article 64 states:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an Obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws.

The Occupying Power may, however, subject the population of the Occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of

the establishments and lines of communication used by them.⁹¹

The heading and the first paragraph's "remain in force" instruction refer to "penal laws." The second paragraph does not contain the "penal" adjective in enumerating areas the occupant may introduce changes in the local law. The drafters intentionally did not restrict the second paragraph to only "penal laws."⁹² The second paragraph's more expansive law making provisions enable the occupant to meet the obligations imposed by the other articles in the Convention.⁹³ Thus,

⁹¹ Fourth Geneva Convention, *supra* note 85 at art. 64. "Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lay down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented'." PICTET, COMMENTARY, *supra* note 86, at 335, 614, 617. Benvenisti counters that because Article 64 appears to introduce several innovations to the law of occupation, Article 64 is probably more of a departure from Article 43 of the Hague Regulations than a more precise and detailed expression of it. BENVENISTI, OCCUPATION, *supra* note 31, at 101. "Since the aims and provisions of this convention are humanitarian . . . it is obvious that Article 64 gives an occupant authority to do away with institutions, fundamental or not, in the occupied territory which conflict with the operation of such principles" GREENSPAN, LAND WARFARE, *supra* note 54, at 226. See also GERSON, *supra* note 25, at 7.

⁹² The drafting committee could not decide and submitted two versions of the second paragraph to a vote. The paragraph without the "penal" restriction was selected. See 3 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 139-40.

⁹³ See *infra* notes 98-116 and accompanying text.

Article 64 demands respect for the existing penal laws,⁹⁴ but permits certain modifications in all types of law.⁹⁵ Due to the Convention broadening the occupant's power to modify the law, Article 64 established the limits for occupant modification of law. Besides reducing the scope of respected laws from the Hague Regulation's "laws in force" to the Fourth Geneva Convention's "penal laws," the status quo biased "unless absolutely prevented" evolves into the more dynamic "may subject . . . to provisions which are essential to enable"

The innovative portion of Article 47 was the recognition of the power and the duty of the occupant to prescribe law "to fulfill its obligations under the present conventions." The two other allowances for prescriptive power, the maintenance

⁹⁴ Pictet explains that express reference was made only to penal laws simply because the penal laws "had not been sufficiently observed during past conflicts; [and] there is no reason to infer a *contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution." PICTET, COMMENTARY, *supra* note 86, at 335.

⁹⁵ The U.S. Army's reiteration of Article 64 is entitled "Local Law and New Legislation" and does not mention the penal laws restriction. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 369 (July 18, 1956) [hereinafter FM 27-10], *But cf.* GREENSPAN, LAND WARFARE, *supra* note 54, at 226 (limiting Article 64 to only penal legislation).

of orderly government and the security of the occupant's forces already were parts of established international law.⁹⁶ The following articles clarified these obligations.⁹⁷

3. *Section III -- The Occupied Populace's Bill of Rights*

Section III of the Fourth Geneva Convention grants rights to all protected people in occupied territories, special rights for special categories of protected people, and enumerates some of the occupant's powers and restrictions.

Protected people⁹⁸ have the following rights: evacuation from danger;⁹⁹ safe working conditions and wages;¹⁰⁰ food and

⁹⁶ Article 154 declared that the Fourth Geneva Convention supplemented the Hague Regulations. In the area of the occupant's prescriptive powers, despite the language of Article 154, the extensive enumeration of specifics in the Fourth Geneva Convention has in effect replaced the Hague Regulations. "[W]hen a State is party to the Fourth Geneva Convention of 1949, it is almost superfluous to inquire whether it is also bound by the Fourth Hague Convention of 1907 or the Second of 1899." PICTET, COMMENTARY, *supra* note 86, at 614.

⁹⁷ See *infra* notes 98-116 and accompanying text.

⁹⁸ For the definition of a protected person see *supra* note 89 and accompanying text.

⁹⁹ Fourth Geneva Convention, *supra* note 85, at art. 49. "Two considerations--the security of the population and 'imperative military reasons'--may, according to the circumstance justify either the evacuation of protected persons or their retention." PICTET, COMMENTARY, *supra* note 86, at 283.

medical supplies;¹⁰¹ medical services and public health and hygiene;¹⁰² ministers and books of their religion;¹⁰³ relief society supplies and services;¹⁰⁴ public notice of occupant penal provisions;¹⁰⁵ trial by the occupant's military courts

¹⁰⁰ Fourth Geneva Convention, *supra* note 85, at art. 51. "The right to requisition the services of protected persons may be regarded as a counterpart to the extensive obligations which the Occupying Power assumes . . . particularly in connection with the provision of food supplies, public health and sanitation" PICTET, COMMENTARY, *supra* note 86, at 296.

¹⁰¹ Fourth Geneva Convention, *supra* note 85, at arts. 55, 57. "Supplies for the population are not limited to food but include medical supplies and any article necessary to support life." PICTET, COMMENTARY, *supra* note 86, at 310.

¹⁰² Fourth Geneva Convention, *supra* note 85, at art. 56. "The occupying power must . . ., with the co-operation of the authorities and to the fullest extent of the means available to it ensure that hospital and medical services can work properly and continue to do so." PICTET, COMMENTARY, *supra* note 86, at 314.

¹⁰³ Fourth Geneva Convention, *supra* note 85, at art. 58. "Religious assistance may continue to be given and . . . books and other articles required for religious needs may be distributed. . . . [T]he spiritual needs of the population are taken into consideration in the same way as the material needs." PICTET, COMMENTARY, *supra* note 86, at 318.

¹⁰⁴ Fourth Geneva Convention, *supra* note 85, at arts. 59-63. "[P]ersons [have] the right to receive the individual or collective relief that may be sent to them[.] . . . [P]rotective powers . . . are to cooperate in the distribution of the relief consignments[.] . . . National Red Cross Societies . . . [and] the other relief societies . . . should be permitted to carry out their humanitarian work." PICTET, COMMENTARY, *supra* note 86, at 320-33.

¹⁰⁵ Fourth Geneva Convention, *supra* note 85, at art. 65. "[P]enal provisions . . . shall not come into force before

for alleged violations of the occupant's penal laws;¹⁰⁶ and reasonable restrictions on imprisonment.¹⁰⁷ Protected persons

they have been published and brought to the knowledge of the inhabitants in their own language . . . [and] shall not be retroactive." PICTET, COMMENTARY, *supra* note 86, at 338.

¹⁰⁶ Fourth Geneva Convention, *supra* note 85, at art. 66, 67, 70-74. The accused can be brought before military courts which must be "non-political," "regularly constituted" and "sitting in occupied territory. Penal laws cannot be retroactive and the penalty is to be proportional to the offense. PICTET, COMMENTARY, *supra* note 86, at 339-42 (discussing Articles 66 and 67). "The Occupying Power is . . . entitled to exercise penal jurisdiction in the occupied country in respect of acts which occur during occupation, and in respect of such acts only." *Id.* at 349 (discussing Article 70). "[N]o sentence may be pronounced by the competent courts of the Occupying Power except after 'a regular trial.'" *Id.* at 353 (discussing Article 71). "The calling and examination of witnesses . . . production of documents or other written evidence . . . being assisted by a 'qualified' advocate of his own choice [are rights of the accused]." *Id.* at 356 (discussing Article 72). "[A convicted person has] any recourse to law aimed at obtaining the quashing or alteration of the sentence . . . [and] must also be informed of the legal methods of appeal." *Id.* at 358-59 (discussing Article 73). "The representatives of the Protecting Power shall have the right to be present at the hearings of any court trying a person under their protection . . . [except] matters involving military secrets." *Id.* at 360 (discussing Article 74).

¹⁰⁷ Fourth Geneva Convention, *supra* note 85, at arts. 68, 76-77. "[T]he death penalty, . . . may only be imposed for . . . espionage, serious sabotage, and intentional homicide." PICTET, COMMENTARY, *supra* note 86, at 345 (discussing Article 68). "[G]ranting detained persons a number of rights and guarantees . . . medical attention, spiritual assistance . . . women separate quarters" *Id.* at 364-65 (discussing Article 76). "[P]ersons detained by the occupying power shall be handed over at the close of occupation to the 'authorities of the liberated territory.' This is an absolute obligation and no exception is permitted." *Id.* at 366 (discussing Article 77).

who are not nationals of the occupied territory have the right to leave the territory.¹⁰⁸ Protected children have a right to have their care and education provided by persons of their own nationality, language, and religion.¹⁰⁹

The occupant may compel adults to work¹¹⁰ and may assign residences to protected people.¹¹¹ However, the occupant may not take the following actions: forcibly transfer protected people out of their territory or expose them to danger;¹¹²

¹⁰⁸ Fourth Geneva Convention, *supra* note 85, at art. 48. "[The Occupying Power] is bound . . . to institute a new procedure . . . to deal exclusively with applications to leave made by protected persons in the occupied territory." PICTET, COMMENTARY, *supra* note 86, at 277.

¹⁰⁹ Fourth Geneva Convention, *supra* note 85, at art. 50. "The Occupying Powers must . . . facilitate the proper working of children's institutions[,] . . . facilitate the identification of children[,] . . . [and look] after children who are without their natural protectors." PICTET, COMMENTARY, *supra* note 86, at 286-87.

¹¹⁰ Fourth Geneva Convention, *supra* note 85, at art. 51. "The Occupying Power [may] work which is necessary for the needs of the army of occupation [and may] requisition labor for . . . maintaining order and the living conditions of the population." PICTET, COMMENTARY, *supra* note 86, at 295.

¹¹¹ Fourth Geneva Convention, *supra* note 85, at art. 78. "In the internment of protected persons . . . each case must be decided separately." PICTET, COMMENTARY, *supra* note 86, at 267.

¹¹² Fourth Geneva Convention, *supra* note 85, at art. 49. "Evacuation is only permitted . . . when overriding military considerations make it imperative." PICTET, COMMENTARY, *supra* note 86, at 280.

compel protected people to serve in the occupant's military;¹¹³ destroy property unless absolutely required by military necessity;¹¹⁴ interfere with the occupied territory's courts;¹¹⁵ or impose the death penalty absent a conviction for sabotage, espionage, or causing a death.¹¹⁶ On its face the Fourth Geneva Convention appeared to protect the populace. The powerful states' practice of finding exceptions to the application of Conventions lessened the Fourth Geneva Convention's impact. Therefore, the United Nations had to reemphasize certain principles of international law.

¹¹³ Fourth Geneva Convention, *supra* note 85, at art. 51. "The Occupying Power is forbidden to force protected persons to serve in its armed or auxiliary forces . . ." PICTET, COMMENTARY, *supra* note 86, at 295.

¹¹⁴ Fourth Geneva Convention, *supra* note 85 at art. 53. "[T]he prohibition covers the destruction of all property" PICTET, COMMENTARY, *supra* note 86, at 301.

¹¹⁵ Fourth Geneva Convention, *supra* note 85, at art. 54. "[T]he status of public officials and judges may not be altered . . . to enable them to continue carrying out the duties of their office as in the past." PICTET, COMMENTARY, *supra* note 86, at 304.

¹¹⁶ Fourth Geneva Convention, *supra* note 85, at art. 68, 75. "[P]rotected persons condemned to death [have] the right to appeal [and] the right to petition for pardon or reprieve." PICTET, COMMENTARY, *supra* note 86, at 361 (discussing Article 74).

D. United Nations Charter Outlaws Aggressive Use of Force

In addition to the inalienability of sovereignty by force principle articulated in the Hague and Geneva Conventions, the United Nations Charter has generally outlawed the aggressive use of force.¹¹⁷ There is a narrow exception for individual and collective self-defense.¹¹⁸ If a host state's government invites a guest state to assist the host government with its internal security, any conflict with internal factions does not amount to an international matter triggering the Hague and Geneva laws.¹¹⁹ States have both used¹²⁰ and abused¹²¹ the argument that a conflict is an internal matter not triggering the requirements of international law. In addition to the

¹¹⁷ U.N. CHARTER art. 2(4).

¹¹⁸ U.N. CHARTER art. 51.

¹¹⁹ "International law experts have long recognized that emergency protection actions where the lives of nationals are threatened are lawful under the Charter, although they differ as to whether such actions should be viewed as simply not violating Article 2(4) or as permitted under Article 51 of the Charter." JOHN N. MOORE, LAW AND THE GRENADA MISSION 23 (1984).

¹²⁰ See *infra* notes 532-80 and accompanying text (discussing the foreign possession operations in Kampuchea, Grenada, Panama, and Haiti).

¹²¹ See *infra* notes 486-545 and accompanying text (discussing the illegal occupations of East Timor, the Western Sahara, Kuwait, and Afghanistan).

above mentioned codified changes to international law, the customary law was also changing during the twentieth century.

E. Twentieth Century Changes to the Occupation Custom

Trends, beginning around the same time as the first Hague Conference and continuing to the present, modified the world's international systems and the application of occupation law to those systems.

1. Emergence of the Welfare State -- Societies Become Dependent On Their Governments

At the end of the nineteenth century, European national governments became more involved in their country's economic and social life.¹²² This was the beginning of the welfare state.¹²³ As governments regulated social and economic

¹²² "[T]he welfare state can be seen in terms of a successive broadening of state functions from the traditional core of security . . . to embrace responsibilities first in the economic sphere, and then gradually throughout the area of welfare to embrace the medical, the educational, and other sectors." NICHOLAS RESCHER, *WELFARE, THE SOCIAL ISSUES IN PHILOSOPHICAL PERSPECTIVE* 149 (1972).

¹²³ "The welfare state is generally defined as a state in which the government promotes social welfare through the collection of resources and the distribution of goods and services to its citizens." THOMAS JANOSKI & ALEXANDER M. HICKS, *THE COMPARATIVE POLITICAL ECONOMY OF THE WELFARE STATE* 272 n. 1 (1994) (citations omitted). "The modern welfare state emerged first in Germany when Bismarck introduced income security measures for industrialized workers in 1883." *Id.* at 254. "The first

activities, central institutions had to establish and control policies and goals.¹²⁴

As the temporary central authority to an occupied territory,¹²⁵ the occupant controls more of the individual's life and can impose its own self-serving requirements on the occupied territory.¹²⁶ In ensuring public order and civil

nationwide compulsory insurance scheme against income loss was established in Germany [by] Bismarck's all German government [which] has survived two World Wars, National Socialism and foreign occupation as the foundation of the West German welfare state." DE SWAAN, *supra* note 22, at 187.

¹²⁴ For example, in nineteenth century cities cholera epidemics were spread due to living conditions. This was remedied by a network of sanitation pipes for sewage removal and fresh water supplies throughout the cities funded by compulsory public contributions. DE SWAAN, *supra* note 22, at 4-5. For another example, around the end of the eighteenth century Europeans saw no need for education for children, especially girls and offspring of the poor, as education was privately funded for the elite. Due to the need for basic communication skills over the past century a compulsory national elementary school system has developed with basic skills in reading, writing, arithmetic and history and over one billion of the world's children go to school for most of the working day. *Id.* at 52-117. "Policing, water supply, sewage and garbage removal have become public services almost everywhere, whereas gas, electricity, telephone and antenna networks remain privately owned in some countries and subscriptions often remain voluntary." *Id.* at 139.

¹²⁵ See *supra* notes 100, 110 & 113 and accompanying text (discussing the Fourth Geneva Convention Article 51 welfare requirements placed on the occupant).

¹²⁶ McDUGAL & FELICIANO, *supra* note 48, at 746 (stating it was "difficult to point with much confidence to any of the usual subjects of governmental action as being *a priori* excluded

life, twentieth century occupants make policy changes that cause new events requiring further policy changes.

Eventually, the occupant's administration, in trying to ensure public order and civil life, assumes the almost full discretionary powers of a sovereign government.¹²⁷ Although the interests of the occupant, occupied population, and ousted government vary, the dynamic nature of the territory's economic and social life requires making policy decisions to avoid economic and social stagnation in the territory.¹²⁸

2. *Civilians Are Endangered*

Even though the welfare society territory had become dependent on its government, the historical occupation

from the sphere of administrative authority conferred upon the occupant").

¹²⁷ "Occupants did in fact intervene in and subject to regulation practically every aspect of life in a modern state which legitimate sovereigns themselves are generally wont to regulate." *Id.* at 747. "The longer the Occupation lasts, the more comprehensive will be the interference with the administration and legislation of the occupied country for its own sake." List, *Das Volkerrecht* 491 (12th ed. 1925) translated in Schwenk, *supra* note 39, at 399 n. 25.

¹²⁸ "The life of the occupied is not to cease or stand still but is to find continued fulfillment even under the changed conditions resulting from occupation." L. VON KOHLER, *THE ADMINISTRATION OF THE OCCUPIED TERRITORIES* 149-50 (W. Dittmar trans. 1942, 1927) [hereinafter VON KOHLER].

practice reduced government services. Additionally, the growth of the late nineteenth century armies demanded more human and material resources from the civilian population.¹²⁹ The civilian-military distinction between private activity and wartime evolved into the total war of World War I.¹³⁰ The governmental view of civilians changed from no involvement to being another state resource to be used to provide financing or labor to produce war materials.¹³¹ As a result, civilian resources, such as industrial centers, became targets for the opposing military.¹³² More importantly, the resources left

¹²⁹ See, e.g., CHAMBERS, *supra* note 17, at 915 (realizing their armies' requirements of ever more ammunition and supplies, governments quickly learned to use paper money, rationing, and central planning).

¹³⁰ See, e.g., FEILCHENFELD, *supra* note 20 at 19 (listing changing conditions affecting civilians as: percentage of soldiers to civilians, war work for civilians including women, increased number and percentage of military targets, and larger armies with more expensive equipment); STONE, *supra* note 30 at 728-29 (listing changes affecting civilians as: expansion of government functions and techniques, occupant's desire to shift the burden of war from occupant's national to the occupied populace, the increase of materials used for war, the shift of economic emphasis from available resource to production potential).

¹³¹ FEILCHENFELD, *supra* note 20 at 19.

¹³² For example, German bombers dropped 500 tons of high explosives and about 900 incendiary bombs on Coventry in a ten hour period. The main target was the facilities of the Standard Motor Company. With factories devoted to the manufacture of machine tools and parts for aircraft

over from the war effort to maintain the welfare of the civilians significantly decreased.¹³³ Worse yet, the growth of nationalism dehumanized civilians of other nationalities into substandard resources for use in any manner desired by the superior humans of the select nationality.

3. *Nationalism Politicizes International Law*

Competing national ideologies evolved concerning the proper internal and international functions of national governments.¹³⁴ As a result, nations would read their own self-serving conditions into the requirements of international law.¹³⁵ This politicization of international law allowed every state to act according to its own desires rather than conform

industries, Coventry was a legitimate military target. Other "arms towns" including Birmingham, Sheffield, Manchester, and Bristol were treated to the near-saturation bombing. EDWARD JABLONSKI, *AIRWAR* 141-43 (1979).

¹³³ Specific articles of the Fourth Geneva Convention were enacted to correct the problem of diminished resources available to civilians. See, e.g., *supra* notes 101-4 & 108-14 and accompanying text. For a historical example see, e.g. *infra* note 341-83 and accompanying text (discussing the oppressive civilian conditions in German occupied Belgium).

¹³⁴ JOSEPH R. STRAYER, *THE MAINSTREAM OF CIVILIZATION* 693 (2d ed. 1974) (contributing to the first world war was the powerful and divisive force of nationalism).

¹³⁵ See, e.g., *supra* note 398-437 and accompanying text (discussing the Axis and Soviet occupations of World War II).

its actions to earlier agreed on treaties and customs.¹³⁶ The injuries caused by nationalistic fervor would lead to the healing recognition of the individual's human rights.

4. *Emerging Respect for Human Rights*

Although the growth of total war had the ancillary effect of harming civilians, the nationalistic fervor of World War II targeted civilians based on ethnicity.¹³⁷ The world reaction to the atrocities of World War II reflected an emerging recognition of a core set of rights for the individual.

Human rights during occupations are a specific application of the growing international human rights movement. The international law of human rights deals with the protection of individuals and groups against violations by governments of their internationally guaranteed rights.¹³⁸ How

¹³⁶ BENVENISTI, *OCCUPATION*, *supra* note 31, at 47 (stating "Rather, the occupant is more likely to be an interested party, with short- and long-term objectives, with effective power to implement those objectives, and with the opportunity to couch them within the language of Article 43.").

¹³⁷ See *infra* note 330.

¹³⁸ The United Nations Charter states that one of the United Nation's purposes is to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." The United Nations Charter obligates member states to respect and observe these rights in Article 55 and cooperate with the United Nations in this matter in Article 56. The Universal

does the humanitarian law of the Hague and Geneva Conventions relate to human rights norms? Although the two are similar,¹³⁹ scholars' views differ. A few have advocated that the initiation of armed conflict introduces the humanitarian law of war, which displaces most law of peace human rights.¹⁴⁰ Another scholar has espoused the need to explicitly adapt international human rights into the occupation law.¹⁴¹ Others, to include the United Nations General Assembly¹⁴² have

Declaration of Human Rights, United Nations General Assembly Resolution 217A (Dec. 1948) mentions two broad categories of rights: civil and political rights include the right to life, liberty, and security of person; and economic, social and cultural rights.

¹³⁹ See, e.g., T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (1989).

¹⁴⁰ See, e.g., Yoram Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law in Human Rights in International Law* 345, 350-52 (Theodore Meron, ed., 1985) (most human rights exist in peacetime but may disappear completely in wartime); Jean S. Pictet, *Humanitarian Law and the Protection of War Victims* 15 (1975) (advocating humanitarian law can only be successful if its being carried on, as far as possible, outside the sphere of politics).

¹⁴¹ See, e.g., Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 *Stan. L. Rev.* 1539, 1600 (1985).

¹⁴² *Basic Principles for the Protection of Civilian Population in Armed Conflicts*, General Assembly Resolution 2675 (XXV) of Dec. 9, 1970 (approving by a vote of 109 to 0 with 8 abstentions that "Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.").

maintained that the international human rights apply to occupations.¹⁴³

The largest difference between human rights law and humanitarian law is in the area of civil and political rights. While human rights emphasis the people's political and civil rights, the law of occupation allows the occupant to halt the political process.¹⁴⁴ If the security interests of the occupant have halted the political process, it has also halted the exercise of the people's political rights. However, an occupant acting in good faith must help restore civil and political rights near the end of a long occupation under applicable human rights guidance.¹⁴⁵ At the same time the

¹⁴³ See, e.g., Roberts, *Occupation*, *supra* note 29, at 249, 250 (1985).

¹⁴⁴ See *supra* note 82 and accompanying text (discussing the customs surrounding the Hague Regulations allowing the occupant to halt the political process for the occupant's security). The Covenant on Civil and Political Rights, the European Convention of Human Rights and the American Convention on Human Rights all contain derogation clauses which permit states in times of serious national emergencies to suspend all but most fundamental rights such as the right to life, right not to be tortured, right not to be made a slave, and the right not to be subjected to ex post facto laws or punishment. They also stipulate that the derogating states may not adopt measures that are "inconsistent with other international law obligations."

¹⁴⁵ See, e.g., BENVENISTI, *OCCUPATION*, *supra* note 31, at 189.

international community began to recognize the individual's human rights, the right of peoples to self-determination began to evolve.

5. *Sovereignty Lies in the People*

In addition to the political conflict between the occupant and ousted government, conflicts grew between the ousted elite and the indigenous community.¹⁴⁶ The principles of self-determination and self-rule challenged Article 43's bias towards the ousted elite.¹⁴⁷ The growth of self-determination and self-rule has tended to shift the primary beneficiary from the ousted state government elite to the indigenous community.¹⁴⁸

During the twentieth century, the international community became aware that people were more than merely resources of states, but were worthy of being the subject of international norms. At the same time it reaffirmed the inalienability of

¹⁴⁶ See, e.g., Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 317-31 (discussing peoples' right of succession).

¹⁴⁷ *Id.* at 338-710 (analyzing self-determination versus sovereignty).

¹⁴⁸ *Id.*

territory, the Declaration of Principles of International Law concerning Friendly Relations recognized the peoples' right to self-determination:

Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.¹⁴⁹

¹⁴⁹ Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (Oct. 24, 1970). During the same session, the General Assembly also authorized the Declaration on the Strengthening of International Security, Resolution 2734 (Dec. 16, 1970). See also

1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neocolonialism and all forms of foreign aggression, Occupation and domination, and the economic and social consequences thereof, as a prerequisite for development, States which practice such coercive policies are economically responsible to the countries, territories and peoples affected, for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries,

In other words, occupants who deny peoples the self-determination rights of freedom and independence are illegal occupants. Hence, the peoples have a right to resist the rule of the illegal occupant.¹⁵⁰

territories and peoples. It is the duty of all States to extend assistance to them.

2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory Occupied by force.

The Charter of Economic Rights and Duties of States (Dec. 12, 1974). General Assembly Resolution 3171 (Dec. 17, 1973) (supporting "resolutely the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign Occupation in their struggle to regain effective control over their natural resources."). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 art. 1 para 4. (giving Geneva Conventions Common Article 2 protected status to "armed conflicts in which peoples are fighting against colonial domination and alien Occupation and against racist regimes in the exercise of their right of self-determination . . ."). The International Convention against the taking of Hostages, U.N. Doc. A/C.6/34/L.23 at art. 12 ¶ 12, reprinted in 18 I.L.M. 1456 (1979) (providing that hostage taking committed in the course of anti-colonialist struggles are not prohibited by the Convention).

¹⁵⁰ Local resistance is only authorized if the occupation is illegal. "Nothing . . . shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal age and self-determination of peoples . . ." Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the

Except for the United Nations Charter of Economic Rights and Duties of States' prohibition on the use of the occupied country's natural resources,¹⁵¹ no human rights document explains the illegal occupant's powers. The negative tone of the document towards illegal occupants would imply limited illegal occupant powers. The World War II Axis and Soviet occupations show the need for defining an illegal occupant's duties rather than allowing the illegal occupant to do as it pleases once it has crossed the legal line.¹⁵²

Benvenisti views the United Nations human rights document of the 1970s¹⁵³ as statements of 1970 international politics rather than international law. The basis of this view was Israeli occupations were the only post-World War II situations in which the controlling power invoked occupation law.¹⁵⁴ The literal interpretation of these documents allowing the use of force against foreign occupation conflicts with the entire law

United Nations, General Assembly Resolution 2625 (Oct. 24, 1970).

¹⁵¹ See The Charter of Economic Rights and Duties of States (Dec. 12, 1974).

¹⁵² See *supra* note 398-432 and accompanying text (discussing Axis and Soviet occupations of World War II).

¹⁵³ See *supra* note 150 and accompanying text.

¹⁵⁴ BENVENISTI, OCCUPATION, *supra* note 31, at 187.

of occupation. Both territorial integrity and self-determination are legitimate aims of the United Nations. The prevention of the use of force against territorial integrity or political independence of states of the United Nations Charter Article 4 Paragraph 2 is a primary United Nations aim. Respect for self-determination is a subordinate aim.¹⁵⁵ Perhaps, the local people's right to self-determination exists only to hold over occupants who refuse to negotiate in good faith for the occupant's withdrawal in return for peace.¹⁵⁶

The right to self-determination legitimizes the actions of an occupant that transfers authority to the government supported by a majority of the indigenous people, without the involvement of the ousted government.¹⁵⁷ The corollary to this principle invalidates agreements by the occupant with nonrepresentative ousted governments.¹⁵⁸

¹⁵⁵ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 122-23 (1979) [hereinafter CRAWFORD].

¹⁵⁶ BENVENISTI, *OCCUPATION*, *supra* note 31, at 187.

¹⁵⁷ See *infra* notes 532-93 and accompanying text (regarding self-determination validation of nontraditional foreign possession operations in Bangladesh, Kampuchea, Grenada, Panama, and Haiti).

¹⁵⁸ See *supra* note 398-437 & 502-10 and accompanying text (discussing illegal Axis puppet states and Spain's illegal Madrid agreement with Morocco over the possession of the Western Sahara).

*6.. States Exercise Foreign Possession Without
Resorting to Belligerency*

Due to the complexities added to armed conflicts by the above trends and Conventions most occupants are reluctant to admit that they have initiated an international armed conflict. The legal analysis of modern occupations has shifted focus from the belligerent requirement to the phenomenon of foreign possession. Modern states with their militaries possessing foreign territories claim exemptions from the subset of the law of armed conflict known as the law of occupation.

To avoid the illegal use of force, states claim to be aiding purported or real indigenous governments. To maintain a claim for permanent possession of a territory, either for themselves or a friendly nation, states avoid referring to the law of armed conflict. Additionally the word "occupation" has picked up a negative connotation of nineteenth century colonialism and occupants use euphemisms to rationalize their actions. "It is therefore my expectation that few future occupants will voluntarily recognize the application of the law of occupation. . . . [T]he tendency to ignore the basic commands of the law of occupation seems to pose the most

potentially destructive challenge to its survival."¹⁵⁹

Regardless of how the entity gained effective possession,¹⁶⁰ the international community takes notice of a possessing state that lacks the sovereign title.¹⁶¹

The possessing state can not have the privilege of possession over a territory, without the responsibility for the administration of the territory.¹⁶² The twentieth century practice did not provide the local population with the protections of the law of occupation. States avoided acknowledgment of the requirements of occupation law by exercising foreign possession through four different methods.

¹⁵⁹ BENVENISTI, *OCCUPATION*, *supra* note 31, at 212.

¹⁶⁰ Adam Roberts lists 17 types of occupations. Roberts, *OCCUPATION*, *supra* note 29, at 249.

¹⁶¹ See Hague Regulations, *supra* note 16, at art. 43. See also Fourth Geneva Convention, *supra* note 85, at art. 2 (providing that the Convention shall apply to occupations that meet "no armed resistance").

¹⁶² This responsibility was implicitly assumed by the "authority of the legitimate power has passed into the hands of the occupant" language of Hague Regulations, *supra* note 16, at art. 43, required by the necessity for military government paragraph of FM 27-10, *supra* note 95, at para. 362, and demanded by Roberts, *OCCUPATION*, *supra* note 29, at 252, and BENVENISTI, *OCCUPATION*, *supra* note 31, at 4.

States illegally annexed territories.¹⁶³ State illegally established puppet states or governments and denied international responsibility for the puppet's actions.¹⁶⁴ States legally used the existing government structure.¹⁶⁵ States merely refrained from establishing any administration.¹⁶⁶ These methods avoided, with varying degrees of success: occupation law restrictions on an occupant's future actions or obligations and claims regarding the ultimate status of the territory.

Although the Hague Regulations recognized the peace treaty as the only way to legally end the occupation, modern occupation practice has added two new principles. In addition

¹⁶³ See, e.g., *infra* notes 437-39, 486-518 and accompanying text (regarding illegal Axis, Indonesian, Moroccan, and Iraqi annexations).

¹⁶⁴ "The belligerent occupant should not be permitted to escape responsibility for an unlawful act, or indirectly to secure the advantages of conquest, by the bootstrapping procedure of establishing a 'puppet' government." MCDUGAL & FELICIANO, *supra* note 48, at 750. See *infra* notes 398-437, 486-501, 511-31 & 605-16 (discussing Axis puppet states and East Timor, Kuwait, Afghanistan, Northern Cyprus puppet governments).

¹⁶⁵ See *infra* notes 449-68, & 546-80 (regarding the genuine host invitations for foreign possession operations in Italy, Grenada, Panama, Haiti).

¹⁶⁶ See *infra* notes 618-20 (discussing the Coalition's operations in Northern and Southern Iraq).

to the self-determination principle discussed above, the second principle considers actions by a possessing country to stall efforts to peacefully terminate the foreign possession as bad faith aggression and delegitimizes the resultant continued possession. Due to possessing countries treating modern territories as bounties, possessing countries receive a benefit from stalemated termination efforts that turn the possession action into a *de facto* illegal annexation.¹⁶⁷ Perhaps states would not conduct illegal foreign possession operations if the general deterrence of an effective international law enforcement mechanism existed.

7. *The Need For Better Enforcement*

Although the concept of occupation assumes the occupant as a trustee will look out for the interests of the occupied territory, history has not followed the concept. Even when the occupant recognizes its *de facto* obligation to adhere to the Hague Regulations and Fourth Geneva Convention, the occupant interprets and implements the obligations and powers to its advantage. Just as a trustee is accountable to the courts, occupants should be accountable to external

¹⁶⁷ BENVENISTI, *OCCUPATION*, *supra* note 31, at 216.

institutions.¹⁶⁸ Without an effective enforcement mechanism the addition of more code only provides scholars more to write about and states more international law to ignore.¹⁶⁹ As discussed below, existing international law enforcement mechanisms are inadequate.

Protecting Powers: Good Briefing, Poor Execution

"A protecting power is a state that has agreed to look after the interest of another state (in our case, the occupied state), in a territory possessed by a third state (in our case, the occupant), after the latter has expressed its consent."¹⁷⁰ Article 9 of the Fourth Geneva Convention, provided for protecting powers.¹⁷¹ Even if an occupant

¹⁶⁸ See M. Cherif Bassiouni, *The Time has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991).

¹⁶⁹ "Codes and strict definitions would fail to accommodate the contingencies that occupants face during their rule, as much as they would fail to instruct any other government." BENVENISTI, *OCCUPATION*, *supra* note 31, at 216.

¹⁷⁰ "The belligerent Power which wishes its interests to be protected asks the neutral Power if it is willing to represent it. Should the neutral Power agree, it asks the enemy Power for authorization to carry out its duties." PICTET, *COMMENTARY*, *supra* note 86, at 87.

¹⁷¹ "[T]he present Convention shall be applied with the co-operation and under the scrutiny of the Protecting Powers

acknowledges an occupation, it can stall the selection of a protecting power due to required mutual recognition.¹⁷²

Article 11 of the Fourth Geneva Convention imposed a duty on the occupant as a "Detaining Power" to "request a neutral State, or such an organization, to undertake the functions performed . . . by a protecting power."¹⁷³ If the Detaining Power deems compliance as not possible, it "shall request, or shall accept the offer of services of a humanitarian organization, such as the ICRC, to assume the humanitarian functions performed by the protecting powers."¹⁷⁴

The Additional Protocol I of 1977 enumerated the procedures for appointing protecting powers, but did not establish any way to impose a protecting power on an unwilling occupant.¹⁷⁵ Due to neither the Fourth Geneva Convention nor

whose duty is to safeguard the interests of the Parties to the conflict." Fourth Geneva Convention, *supra* note 85, at art. 9.

¹⁷² "Although the enemy Power is not forced to accept any neutral Power proposed to it, it can not refuse all the neutral powers in turn; that would be entirely contrary to the spirit of the convention and its international usage." PICTET, COMMENTARY, *supra* note 86, at 87-88.

¹⁷³ Fourth Geneva Convention, *supra* note 85, at art. 11.

¹⁷⁴ *Id.*

¹⁷⁵ Protocol I, *supra* note 86, at art. 5.

Protocol I providing a way to impose protecting powers on nonconsenting occupants, this provision has seen little use.¹⁷⁶ This trend probably will not change.

Current Enforcement and Monitoring Systems: Acts Inviolable But Visible

In the absence of functioning protecting powers, the current international process is the reactions of: other governments; regional and international organizations; NGOs; and the international media. Although the collective power behind international and regional organizations is the most powerful tool in enforcing occupation law, political divisions within the organizations have kept these organizations from reaching their full potential.

From the end of World War II to the late 1980s, both the United Nations and regional organizations allowed political disputes among members to keep the organizations from fully enforcing occupation law.¹⁷⁷ The United Nation's actions

¹⁷⁶ "The system of protecting powers has been used only twice, in the Suez conflict in 1956 and in Goa in 1961." BENVENISTI, *OCCUPATION*, *supra* note 31, at 205.

¹⁷⁷ See, e.g., *infra* notes 486-510 & 546-70 (regarding the ineffectiveness of regional organizations during the foreign possession operations in East Timor, the Western Sahara, Grenada, and Panama).

ending the Iraqi illegal occupation of Kuwait,¹⁷⁸ and protecting the Kurds in Northern Iraq¹⁷⁹ exhibit the potential benefits of effective international organizations that avoid the mire of international politics.

NGOs assist occupied peoples by providing direct aid and monitoring the condition of the occupied people to enlighten the international community in hope of informally restraining illegal measures of occupants.¹⁸⁰ Media also assist in the second NGO function by monitoring and providing information to the international community.¹⁸¹ The international community should establish a duty for occupants to allow NGOs and media reasonable access to occupied areas to assist in the occupant's well-being. The reasonable access should not unduly infringe on the occupant's security needs. These current monitoring systems and their informal persuasion mechanisms seem to be more effective in deterring illegal state action than the available courts.

¹⁷⁸ See *infra* note 511-18 and accompanying text.

¹⁷⁹ See *infra* note 617-20 and accompanying text.

¹⁸⁰ See *infra*, note 283-98 and accompanying text.

¹⁸¹ *Id.*

The Choice of the Courts in the Occupied Territory:

Little Say or No Say

Courts in occupied territories face four conflicting bodies of law: the pre-occupation domestic law, law imposed by the new occupant, new laws of the ousted government, and international law. In theory, the courts could rule that occupant law violates pre-occupation law, new ousted government law, or international law. In practice, however, the courts have been extremely differential to the occupant.

Courts that are differential to the occupant are able to provide the populace with a minimal amount of recourse. If courts rule against the occupant, the occupant removes the courts and the populace has no recourse. Courts have ruled against the occupant only in extremely untenable situations. Once the occupant leaves, the courts retroactively apply the ousted sovereign's law. The courts' application of the ousted sovereign's law invalidates the occupant's laws. This practice started with the occupied Belgian courts of World War I,¹⁸² the first major occupation after the drafting of the Hague Regulations. Three trends have continued to the present. Local courts generally decline jurisdiction over

¹⁸² See *infra* note 341-83 and accompanying text.

occupant's law during occupations.¹⁸³ In the presence of compelling circumstances, local courts accept jurisdiction over occupant's law.¹⁸⁴ After the occupation ends, local courts retroactively invalidate the occupant's law.¹⁸⁵ If the courts in the occupied territory cease to function, the occupied population's only local recourse is the occupant's courts.

Occupant's Courts: Occupant's Justice

Even though the occupant may establish courts in the absence of a functioning local court, or to apply their law, occupant courts in the occupant's home state have either

¹⁸³ Occupation Courts declining jurisdiction to review occupation measures include: *In re Anthoine*, 11 Ann. Dig. 273 (Bel. Ct. Cass. 1940) (returning to its World War I occupant position by refusing to judge measures dictated by the occupant through the Belgian secretaries-general); *In re Lecoq*, 12 Ann. Dig. 452 (Fr. Conseil d'Etat 1944) (regarding itself as incompetent to make determinations involving "the interpretation of acts of an international nature" or that "touch upon the rights of the occupying power").

¹⁸⁴ After an unsuccessful attempt to strike down Nazification laws, the members of the Norwegian Supreme court resigned. The replacements were tried for treason after the occupation ended. See the Editor's Note to *Public Prosecutor v. X*, 11 Ann. Dig. 285 (Nor. 1940), and the Editor's Note to *Overland's Case*, 12 Ann. Dig. 446 (Nor. Dist. Ct. Aker, 1943).

¹⁸⁵ See, e.g., *In re G.*, 12 Ann. Dig. 437 (Greece Crim. Ct. Heraklion [Crete], 1945); *In re Contractors Knols*, 13 Ann. Dig. 351 (Neth. Ct. Cass. 1946).

declared the matters outside their jurisdiction or upheld an occupant's actions.¹⁸⁶ Occupied people and third parties who have brought suit in the occupant's home courts, have had similar results.¹⁸⁷ Just as the occupant can not unbiasedly weight security needs versus the populace's welfare in executing the law, the occupant's courts can not unbiasedly judge the complaints of the occupied population. However, despite the inherent bias, an occupant court's limited relief is preferable to no relief for the occupied population. If both the courts in the occupied territory and the occupant's courts are unavailable, parties will have to seek justice from third country courts.

¹⁸⁶ See, e.g., *Grahame v. Director of Prosecutions*, 14 Ann. Dig. 103 (Ger., Brit. Zone of Control, Control Commission Ct. Crim. App. 1947) (rejecting the applicability of the Hague Regulations because the Allies were exercising sovereign rights); *Dalldorf v. Director of Prosecutions*, 16 Ann. Dig. 435 (Ger., Brit. Zone of Control, Control Commission Ct. Crim. App., Dec. 31, 1949) (holding the Hague Regulations inapplicable to Allies exercise of sovereign rights).

¹⁸⁷ See, e.g., *Committee of U.S. Citizens Living in Nicaragua v. Ronald Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (denying claims for U.S. operations in Nicaragua); *Saltany v. Ronald Reagan*, 886 F.2d 438 (D.C. Cir. 1989) (denying claims for the air raid on Libya); *Industria Panificadora, SA. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991) (denying claims for the occupation of Panama).

Third Country Courts: Promising Potential

Theoretically, courts in third countries could have a substantial impact by such measures as invalidating property titles for immovable property, minerals, or commodities derived from illegal occupations.¹⁸⁸ In practice, third country courts have been hesitant to fully scrutinize and strike down illegal occupation measures.

Courts that fairly apply the international law of occupation might hurt their country economically. For example, a court might invalidate the possessor's title to a shipment of goods and restore the goods to the original owner. In response, the occupant and those deriving their powers from the occupant might limit their economic dealings with countries aligned with that court.¹⁸⁹ Courts avoid applying international law by deferring to their executives in matters

¹⁸⁸ "Many courts have assumed the right to examine whether the occupant's measures comply with Article 43 [of the Hague Regulations]. The wisdom of these decisions is doubtful. . . . [T]he Belgian and German Supreme Courts have denied the power of the courts to review measures of the occupant" Schwenk, *supra* note 39, at 411-13 (footnotes omitted).

¹⁸⁹ For example, the World War I Dutch courts held a German governor-general decree abrogating a Belgian moratorium passed Article 43, Hague Regulations scrutiny so as not to jeopardize the Netherlands status as Germany's best outlet for foreign trade due to a British blockade of Germany. VON KOHLER, *supra* note 128, at 149-50.

of foreign policy to avoid harming their country politically.¹⁹⁰ Just as third country courts' deference to their executives hampers their effectiveness, international courts' consent requirements hamper their effectiveness.

International Courts: Hampered by State Consent Requirement

Although international courts are free of the domestic constraints and national bias of third country courts, the results differ by tribunal. Permanent courts are aware of the limits of their consensual jurisdiction and might declare occupations illegal, but will not extend the illegality to private matters.¹⁹¹ However, the international ad hoc

¹⁹⁰ See, e.g., *Latvian State Cargo & Passenger S.S. Line v. McGrath*, 18 Ann. Dig. 61 (D.D.C. 1951) (following state department non-recognition of the Soviet occupation of the Baltic republic by invalidating Soviet measures); *Eck v. N.V. Nederlandsch Amerikaansche Stoomvaart Maatschappij*, 52 N.Y.S. 2d 367, 13 Ann. Dig. Pub. 32 (1944) (following state department recognition of German occupation of Austria by applying German law).

¹⁹¹ See Morgenstern, *Judicial Practice and the Supremacy of International Law*, 27 Brit. Y.B. Int'l Law 44 (1950) (explaining the tendency of international courts to refrain from declaring acts void was a result of "the imperfections of international organization."). Morgenstern, *Validity of Acts of the Belligerent Occupant*, 28 Brit. Y.B. Int'l Law 291, 301 (1951) (stating "[I]nternational courts are, as a rule, reluctant to regard as void municipal acts which are contrary to international law, even when international law appears to limit the competence of the municipal organ concerned).

Tribunals established after both World Wars, like national courts after liberation, did not hesitate to declare occupants' actions invalid.¹⁹² The state governments of illegal occupants avoid the international courts by either not consenting to jurisdiction or denying responsibility for the actions of the occupation government.¹⁹³ The international courts need the international community to provide for compulsory jurisdiction and an effective enforcement mechanism¹⁹⁴ for the courts to realize their full potential.¹⁹⁵

¹⁹² See, e.g., *Affaire relative a l'or de la banque nationale d'Albanie*, 12 R.I.A.A. 19 (1953) (authorizing restitution of gold taken by the German occupant in Rome); *Affaire des forêts du Rhodope central (fond)*, 3 R.I.A.A. 1405 (1933) (Greece v. Bulgaria) (invalidating Bulgarian measure transferring entitlements over Greek forces).

¹⁹³ But, c.f. Application 8007/77, *Cyprus v. Turkey*, 21 Y.B. EUR. CONV. ON H.R. 100, 230-34, 62 I.L.R. 5, 74-76, (1978) (disregarding Turkey's formal legalistic argument that it was not responsible for the actions of the Turkish Federated States of Cyprus and looking to the actual presence of Turkish soldiers in Cyprus).

¹⁹⁴ "In the abstract, international law is attractive as a conceptual matter, yet it remains largely incapable of resolving real-world crisis since it lacks an effective enforcement mechanism." Williamson, *supra* note 8, at 368.

¹⁹⁵ See Robert B. Rosenstock, 1994 McLean Lecture on World Law: *The Proposal for an International Criminal Court*, 56 U. PITT. L. REV. 271 (1994) (advocating for a standing international court system with jurisdiction over genocide, law of war violations and use of force violations).

IV. The Humanitarian Bailment

Given that the present international legal system is imperfect, analyzing foreign possessions through a bailment analogy will permit the judge advocate to have a clearer understanding of the issues and values involved. Scholars have viewed occupations as trusts in which a superior occupant cares for the territory of an incapable sovereign.¹⁹⁶ Modern foreign possession operations are more like a bailment, which resembles a trust in some respects, but is a separate type of legal relationship concerning the care of an equal's goods.¹⁹⁷ The Hague Regulations suggested such a relationship in its usufruct language concerning public property¹⁹⁸ and restoration and compensation provisions for certain types of private

¹⁹⁶ See Roberts, *Occupation*, *supra* note 29, at 295 ("the idea of trusteeship is implicit in all Occupation law"); GERHARD VON GLAHN, *LAW AMONG NATIONS* 686 (4th ed. 1981) (stating "The occupant . . . exercises a temporary right of administration on a sort of trusteeship basis. . .").

¹⁹⁷ Bailments were a development of the English courts of common law concerned with the legal interests in the subject matter, while the later courts of chancery developed trusts were concerned with the equitable interest in the subject matter. AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW OF TRUSTS* § 5a (1935).

¹⁹⁸ Fourth Geneva Convention, *supra* note 85, at art. 55.

property.¹⁹⁹ However, the Hague and Geneva Conventions failed in areas where legal fictions did not flow with the nature of occupation.²⁰⁰ Due to bailment being a natural, as opposed to an artificial legal concept, it can succeed where the legal fictions of the Conventions failed.²⁰¹ Bailment provides the advantages of property, contract, and tort law.²⁰²

Humanitarian bailment expands property law's concern with the title relationship between property and people to the sovereign title relationship between the property of the territory and states. Contract law permits sovereigns to modify liability and use standards. Tort law requires damages

¹⁹⁹ *Id.* at art. 53. See also *id.* at art. 54 (regarding restore and compensation provisions for submarine cables).

²⁰⁰ See, e.g., *supra* notes 170-76 and accompanying text (discussing the codified but seldom used protecting powers provisions of the Fourth Geneva Convention).

²⁰¹ "[B]ailment is a natural and not an artificial legal concept." RAY A. BROWN, *THE LAW OF PROPERTY* § 73 (1955) [hereinafter BROWN].

²⁰² "In many respects, bailment stands at the point at which contract, property and tort converge. In its standard form it represents a conveyance of personal property, created by contract and enforceable in tort. Bailment therefore partakes of all phenomena, and its remedies may correspond with remedies available under other forms of action. But it remains a separate legal personality with much to distinguish it from other concepts." N. E. PALMER, *BAILMENT* 1 (1979) (footnote omitted) [hereinafter PALMER].

before an action may sound. Therefore, if a foreign possessor state violates international law but does not harm the territory, the action does not merit international attention. Practically, the nonlawyers, who will be implementing the foreign possession actions in stressful situations can understand and implement this view. Also, the populace of the territory can understand the fundamental fairness of bailment law as opposed to the colonialist-like trustee law. To begin the humanitarian bailment analogy, I will define the terms.

A. Definitions

A bailment is the rightful possession of goods by one who is not the owner.²⁰³ For example, a person who borrows a

²⁰³ "A bailee of a chattel has possession of but does not have title to the chattel. A trustee of a chattel has title to the chattel." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TRUSTS § 5b (1935); 9 Williston on Contracts § 1030 (Jaeger 3d ed. 1967) (defining bailment as "the rightful possession of goods by one who is not the owner."); "The essence of bailment is possession. The word derives from the French verb *bailler* meaning to deliver. . . . Thus, the central theme of every standard bailment is the carving out, by the bailor, of a lesser interest than his own. That interest is possession . . . " PALMER, *supra* note 202, at 1-2 (footnotes omitted) "It is almost universally agreed that no-one can become a bailee without possession of tangible chattel" *Id.* at 78; "In the bailment the title to the good delivered remains in the bailor, the deliverer, or bailee, having possession only." BROWN, *supra* note 201, at §77; "A bailee, of course, does not own the bailed goods." JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 83 (2d ed. 1988) [hereinafter DUKEMINIER & KRIER].

neighbor's lawnmower has effected a bailment. A foreign possession operation is the rightful possession of territory by a state that is not the sovereign.²⁰⁴ The true owner is a bailor,²⁰⁵ which is the rightful sovereign.²⁰⁶ One of three

²⁰⁴ Examples of foreign militaries exercising rightful possession without claiming sovereignty, either under the law of occupation or when invited by the local sovereign, include the following. The post World War I occupations of the Rhineland under the authority of the armistice agreement and peace treaty. See *infra* notes 384-97 and accompanying text. The British assistance to Emperor Salaise in Ethiopia during World War II. See *infra* notes 438-43 and accompanying text. The three months of British assistance to the Vichy government in Madagascar prior to the Free French administration taking possession during World War II. See *infra* notes 444-48 and accompanying text. The Allied assistance to Italy during World War II. See *infra* notes 449-68 and accompanying text. The post World War II Allied occupation of Japan pursuant to the instrument of surrender and U.N. authority. See *infra* notes 469-85 and accompanying text. The Vietnamese occupation of Kampuchea. See *infra* notes 532-45 and accompanying text. The United States assistance to Grenada's governor-general. See *infra* notes 546-62 and accompanying text. The United States assistance to the Endara government in Panama. See *infra* notes 563-70 and accompanying text. The United States assistance to the Aristide government in Haiti. See *infra* notes 571-80 and accompanying text. India's assistance to the government of Bangladesh. See *infra* notes 587-93 and accompanying text. The Coalition operations in North and South Iraq under U.N. authority. See *infra* notes 607-10 and accompanying text.

²⁰⁵ "The interest of a bailor is a legal interest, whereas the interest of a beneficiary of a trust is an equitable interest." AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TRUSTS § 5c (1935).

²⁰⁶ The inalienability of sovereignty was implicit in the Hague Regulations. See *supra* notes 40 & 41 and accompanying text. Article 47 of the Fourth Geneva Convention does not allow

possible entities may hold sovereign title. The first possibility is the traditional ousted government elite.²⁰⁷ The second possibility is the peoples of the territory such as the peoples of Bangladesh.²⁰⁸ The third possibility is the peoples' chosen representative government in cases of conflicting claims to sovereignty such as the foreign possession operations in Kampuchea, Grenada, Panama, and Haiti.²⁰⁹ The entity in possession is the bailee.²¹⁰ The

alienation of sovereignty through the use of force. See *supra* notes 89-92 and accompanying text. See also FM 27-10, *supra* note 95, at ¶ 358 (stating "[Occupation] does not transfer sovereignty to the occupant").

²⁰⁷ Examples include: Belgium's government in World War I, *infra* notes 341-83 and accompanying text, and World War II, *infra* notes 414-25 and accompanying text; the governments of Korea, *infra* notes 398-403 and accompanying text; Ethiopia, *infra* notes 438-43 and accompanying text; and Kuwait's government during the Persian Gulf War, *infra* notes 341-83 and accompanying text; 511-18.

²⁰⁸ See *supra* notes 587-93 and accompanying text (concerning India's assistance to the sovereign of the peoples of Bangladesh).

²⁰⁹ Examples of peoples choosing their sovereign government by free elections following foreign assistance include: Kampuchea, see *supra* notes 532-45 and accompanying text; and Grenada, see *supra* notes 546-62 and accompanying text. Examples of foreign assistance to restore feloniously taken territory to sovereign governments chosen by their peoples through recent elections include: Panama, see *supra* notes 563-70 and accompanying text; and Haiti, see *supra* notes 571-80 and accompanying text.

country that possesses the territory is the bailee.²¹¹ The bailee has the duty to care for the goods²¹² and deliver them to the owner as agreed.²¹³ The possessing country as a bailee has possession of and a humanitarian duty to care for the territory until the territory's return to the sovereign government.

²¹⁰ "A person who finds lost or mislaid goods and takes them into possession (or a person who, though not a finder, has custody of the goods because of the circumstances under which they were found) is considered a bailee for the true owner, the bailor)." DUKEMINIER & KRIER, *supra* note 203, at 83; "Bailees . . . have limited property interests." JOHN E. CRIBBET, *CASES AND MATERIALS ON PROPERTY* 119 (6th ed. 1990) [hereinafter CRIBBET].

²¹¹ Although a foreign country may possess and control another sovereign's territory, the foreign country can not legally assume sovereignty over the territory due to the fundamental international law principle of the inalienability of sovereignty. See, e.g. Article 43 of the Hague Regulations, U.N. Charter, Article 47 of the Fourth Geneva Convention, and Declaration of Principles of International Law concerning Friendly Relations. "[A]n occupation government, whatever its precise composition in personnel, has neither authority nor effective power apart from the belligerent occupant." McDOUGAL & FELICIANO, *supra* note 48, at 750.

²¹² "The duties of a bailee to the bailor are legal duties . . ." AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW OF TRUSTS* § 5c (1935).

²¹³ "If there is a bailment, then it is said the bailee is under a duty to exercise a certain degree of care, and to return it to the bailor on demand." BROWN, *supra* note 201, at § 73; *id.* at § 86 (concerning the duty of the bailee to redeliver the bailed goods to the bailor); "[I]t is the duty of the bailee to deliver the bailed Article to the right person" CRIBBET, *supra* note 210, at 125.

I use the term humanitarian bailment to emphasize the concern for the welfare of the territory's populace. I do not intend for strict legalists to deny caring for the populace's welfare by finding a legal reason to deny Hague Regulations and Fourth Geneva Convention status.²¹⁴ The spirit of these documents should guide the humanitarian bailee even if the situation does not trigger the legal requirements of the documents.²¹⁵ I did not use the term human rights bailment due to human rights' emphasis on political rights.²¹⁶ During these times of crisis and limited resources for the territory, the populace requires the essentials of life more than the right to vote.²¹⁷ Once the bailee has provided for the populace's welfare, the bailee can not deny the populace more advanced human rights by relying on the minimal standard for human rights. Using the defined humanitarian bailment terms I will

²¹⁴ See Hague Regulations *supra* note 16, at § III, Fourth Geneva Convention, *supra* note 85, at *supra* note 85, at § III.

²¹⁵ "One might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable." Roberts, *Occupation*, *supra* note 29, at 249, 250 (1985).

²¹⁶ See *supra* notes 137-43 and accompanying text.

²¹⁷ See *supra* notes 144-45 and accompanying text.

examine the triggering requirement for a humanitarian bailment, possession.

B. Possession by a Foreign Country

To create a bailment, the alleged bailee must possess the goods through actual physical control with the intent to possess.²¹⁸ Possession is not custody where the owner has directly given up physical control of the goods to an employee, but does not intend to relinquish the right of

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In order for a valid bailment to arise, the bailee must obtain possession of the bailed property. If the bailee fails to take possession, no bailment exists, and none of the rights and obligations incident to a bailment are established. Possession in the bailment context consists of two elements: the bailee's exercise of physical control over the bailed property and the bailee's intent to exercise physical control.

A. Darby Dickerson, Note, *Bailor Beware: Limitations and Exclusions of Liability in Commercial Bailments*, 41 VAND. L. REV. 129 (Jan. 1988) (footnotes omitted) [hereinafter Dickerson]. "In order to have possession there must be the union of two elements, physical control over the thing possessed, and a manifested intent to exercise that control." BROWN, *supra* note 201, at § 74 (footnote omitted). "The judicial analysis of bailments seems therefore to have reached the stage at which any person who voluntarily assumes possession of goods belonging to another will be held to owe at least the principal duties of the bailee at Common Law." PALMER, *supra* note 202, at 30.

domination over them.²¹⁹ For example, an employer entrusts an employee with the employer's lawn mower to mow the employer's lawn.²²⁰ This is analogous to the permissive entry situation where a host government has allowed a foreign government to intrude on the host's territorial integrity but the host government still makes policy decisions for the area. The King of Italy's request for assistance from the World War II Allies for Southern Italy, which was still under the king's domination, is an example of a host government granting

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In the distinction between bailment, or possession, and mere custody, so called, the element of intent to control and possess plays the leading part. Where the owner of the goods places them in the actual physical control of another but does not intend to relinquish the right, as distinct from the power of dominion over them, there is no bailment or possession but only a mere custody. The handing over of goods to a customer in a store to examine in the presence of the clerk is a good example.

BROWN, *supra* note 201, at § 76.

²²⁰ "A servant to whom goods are delivered by the master to be used by the former in the latter's business is held not to be a bailee of the goods but only a custodian." BROWN, *supra* note 201, at § 76; "[A] servant who, as a concomitant of his employment, acquires custody of his master's goods does not in ordinary circumstances become a bailee. Possession is deemed to remain in the master . . . and the servant, having a mere custody . . ." PALMER, *supra* note 202, at 235.

foreign militaries custody of its territory.²²¹ Due to the employer directly giving control to the employee, the employee had only custody and not the possession required for bailment.²²² The employer could direct the employee's actions or take custody back at any time. By analogy, the nondisplaced sovereign directly gave control to the Allies. The Allies only had custody and not the possession required for bailment. The King could have directed the Allies' activities or ordered the Allies to leave Southern Italy.

However, if the employee receives the goods directly from a third party, the employee possesses the goods as a bailee.²²³ For example, an employee picks up an employer's mower from a

²²¹ See *infra* notes 449-68 and accompanying text.

²²² This situation occurs today with foreign internal defense missions where one state assists another state's defense of its sovereign government. See, e.g. *infra* notes 438-43, 449-68, 532-45, & 546-80 (concerning the foreign possession operations of Ethiopia, central and Northern Italy, Kampuchea, Grenada, Panama, and Haiti).

²²³ "[I]f a third person delivers the property in questions to the servant for the master, it is held that the servant is now a bailee for the master . . ." BROWN, *supra* note 201, at § 76. For the Roman law origins and Henry VIII's evolution of this distinction see *id*; "[T]he servant will possess his master's goods when they are delivered to him by a third party to hold or apply on behalf of his master; such possession, say Pollock and Wright, continues:'. . . until he has done some act by which the thing is appropriated to the master's use.'" PALMER, *supra* note 202, at 238.

repair shop. This international situation occurs when a country under the sovereign's or an international organization's authority²²⁴ ejects an illegal government, but has not yet returned the territory to the rightful sovereign. For example, the Allies took possession of Northern Italy from Germany and were bailees of Northern Italy for the King until the King resumed conducting sovereign functions in Northern Italy.²²⁵ Other examples of possessing states acting as a bailee of the legal sovereign's territory between the time it removed an illegal government and the return of the legal sovereign include: the British in Ethiopia;²²⁶ and the United States assistance to Grenada,²²⁷ Panama,²²⁸ and Haiti.²²⁹ After the return of the legal sovereigns, the United States and Great Britain only had custody and merely assisted in domestic matters with the permission of the sovereign.

²²⁴ See *infra* notes 335-36 and accompanying text (comparing international and regional organizations to legal authority relieving the bailee of the duty to return the bailed goods to the sovereign).

²²⁵ See *infra* notes 449-68 and accompanying text.

²²⁶ See *infra* notes 438-48 and accompanying text.

²²⁷ See *infra* notes 546-62 and accompanying text.

²²⁸ See *infra* notes 563-70 and accompanying text.

²²⁹ See *infra* notes 571-80 and accompanying text.

If an employee feloniously takes the lawn mower from the employer's place of business to the employee's house the servant has committed larceny because the employee never had possession of the mower, only custody.²³⁰ If the employee picked up the lawn mower from the repair shop and then took it to his house, the employee has embezzled the mower.²³¹ For example, depending on one's view of the sovereignty of the Turkish Cypriot government, Turkey has either embezzled or stolen the territory and populace of Northern Cyprus. If, in

²³⁰ "[If the bailee] appropriates goods to themselves, they can also be guilty of larceny." DUKEMINIER & KRIER, *supra* note 203, at 85.

²³¹

Most of the cases involving this distinction come from the criminal law, where unless changed by statute, it is extremely important to distinguish between larceny, the felonious taking of goods from the possession of the owner; and embezzlement, solely a statutory offense, which is ordinarily defined as the fraudulent conversion of the goods of another by one who is already in possession of the same. Where these distinctions are preserved conviction of an alleged felon for either larceny or embezzlement often depends on the question whether the accused did or did not have possession of the stolen Articles. Although serious objection has been made to the use of criminal law theories of possession in the civil law, it is believed that the distinction there drawn between possession and mere custody has a general application which should not be ignored.

BROWN, *supra* note 201, at § 76 (footnote omitted).

line with the overwhelming majority of world opinion, the Turkish Cypriot government is not a sovereign, Turkey took Northern Cyprus by larceny. Turkey and the puppet Turkish Cypriot government never had sovereignty. Even if one accepts Turkey's claim that the Turkish Cypriot government is a sovereign, Turkey empowered the Turkish Cypriot government to embezzle possession of Northern Cyprus.²³²

Robbery occurs when one takes property from its rightful owner by means of illegal force.²³³ Though the use of force to alienate territorial integrity violates twentieth century bailment and international law,²³⁴ several twentieth century governments have attempted such action. The most notable

²³² See *supra* notes 605-16 and accompanying text.

²³³ "The identification in many instances of the possessor with the owner was probably due to the insistence which primitive law has always had on the protection of possession as a means of preventing force and violence . . ." BROWN, *supra* note 201, at § 73.

²³⁴ See, e.g. Hague Regulations, *supra* note 16, at art. 43, U.N. Charter at art. 2(4), Fourth Geneva Convention, *supra* note 85, at art 47, and Declaration of Principles of International Law concerning Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (Oct. 24, 1970).

example was the Axis and Soviet occupations during World War II.²³⁵

Under bailment law, the intent to possess is as important as the actual physical control.²³⁶ Intent must be knowing and willful. This requires conscious and intentional action as opposed to an accidental action.²³⁷ Although the Hague and

²³⁵ See *infra* notes 398-437 and accompanying text. Other examples include German occupations of World War I, *infra* note 341-83 and accompanying text; the Indonesian annexation of East Timor, *infra* note 486-501 and accompanying text; the Moroccan occupation of the Western Sahara, *infra* note 502-10 and accompanying text; the Soviet occupation of Afghanistan, *infra* note 519-31 and accompanying text; and the Iraqi occupation of Kuwait, *infra* note 511-18 and accompanying text.

²³⁶

The intent to possess, to assume custody and control over an object, is as important an element of possession as is actual physical control. Given exactly the same physical relations to an object, a person may or may not be in possession thereof, according to whether or not he has the intent to exercise control over it. This principle has an important application in determining whether or not bailment exists.

BROWN, *supra* note 201, at § 75; "[A] bailment cannot rise without a certain mental element on the part of the putative bailee. . . . The view adopted by this book is that a bailment comes into being whenever one person is knowingly and willingly in possession of goods which belong to another." PALMER, *supra* note 202, at 2.

²³⁷ "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394-95 (1933).

Geneva Conventions do not mention occupant's intent as an occupation element, some states conducting foreign possession operations have recently emphasized their intent. For example, coalition forces emphasized their lack of intent in Southern and Northern Iraq.²³⁸ Unfortunately, their militaries did not end up in the territories by accident. The events occurred through the planning of their government and military leaders. Therefore, despite their claims to the contrary, they intended to possess the territories.

The state's executive leadership, after advice from its department of state's attorneys, determines which legal theory justifies the ends of the foreign possession operation.²³⁹ Even though commanders do not make this decision, the judge advocate uses this information to apply either the law of peace or the law of war to a foreign possession operation.²⁴⁰

²³⁸ See *infra* notes 607-10 and accompanying text.

²³⁹ The seriousness of this responsibility was demonstrated by the crimes against peace trials of the German national leader for "planning, preparation, initiation, or waging of a war of aggression." See II L. OPPENHEIM, INTERNATIONAL LAW § 257 (7th ed. 1952) [hereinafter, OPPENHEIM].

²⁴⁰ The judge advocate also should advise his commander on this determination, so the commander is better able to explain the reason that his commander-in-chief decided to conduct a foreign possession exercise when the commander is inevitably interviewed by the media.

The judge advocate's duty is to ensure that the means of the foreign possession operation such as his unit's plans and activities abide by international law as discussed in the next section.²⁴¹ The judge advocate needs to know the duty of care for the military unit.

C. Possessing Country's Duty of Care

Regardless of how a bailee obtained the bailed goods, the bailee is liable for the reasonable care of the bailed goods.²⁴² Thus, even though some states may be temporarily

²⁴¹ The judge advocate should be concerned that neither he nor his client, the unit, commit any war crimes (or crimes against humanity) which comprised the bulk of the guilty findings of the Nuremberg International Military Tribunal. See OPPENHEIM, *supra* note 239, at § 257. See also "[T]he law of war imposes on an army commander a duty to take . . . appropriate measure . . . to control the troops under his command for the prevention of . . . violations of the law of war . . ." *In re Yamashita*, 327 U.S. 1, 15 (1945).

²⁴²

All that the plaintiff is required to prove is title in himself, and a conversion by the defendant. . . . It is quite immaterial how the horse came to be in the defendant's possession. Whether lawful or unlawful is not of the slightest consequence. He may have found him in the highway; he may have hired him of a stranger; he may have taken him from the plaintiff's stable, with or without leave, upon a week day, or upon the Sabbath; it is all the same. The plaintiff is bound to offer no proof on the subject. If the defendant would derive any benefit from the illegal contract he is the one to prove it; and when he attempts to do so, he is met with the

successful in their use of illegal force against other sovereigns,²⁴³ they must still care for and not abuse the territory and its populace.²⁴⁴ Generally, all bailees are under a duty of care to exercise reasonable care over the bailed good, but the standard of care varies with the type of bailment.²⁴⁵ Traditionally, the degree of care has been commensurate with who gets the benefit of the bailment.²⁴⁶

objection that he cannot avail himself of an illegal transaction in which he participated as a defense to the action.

BROWN, *supra* note 201, at § 73 quoting *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18 (1873).

²⁴³ See *supra* notes 42 & 43 and accompanying text.

²⁴⁴ See *supra* notes 137-45 & *infra* notes 430-37 and accompanying text (discussing the need for illegal aggressor to follow human rights and humanitarian obligations).

²⁴⁵ But, *c.f.*, "[A] minority of the modern cases tend to impose liability for lack of ordinary care rather than distinguishing among simple, ordinary, and gross negligence." WILLISTON, *supra* note 203, at § 8.1 (footnote omitted); Kurt P. Autor, Note, *Bailment Liability: Toward a Standard of Reasonable Care*, 61 S. CAL. L. REV. 2117 (1988) [hereinafter Autor].

²⁴⁶ "According to orthodox theory, the measure of a bailee's responsibility for a chattel is governed (in the absence of a special contract) by the existence and location of any benefit received." PALMER, *supra* note 202, at 273; "Under these [traditional] rules, liability is a function of both the particular classification of the bailment transaction and the degree of care required in that particular form of relationship." Autor, *supra* note 245 at 2123.

1. *Possession Solely for the Possessor's Benefit*

If the bailment is for the sole benefit of the bailee, the bailee must use extraordinary care. For example, if a neighbor borrows a lawn mower to mow the borrower's yard, the bailee is liable for even the slight neglect that results in the good being lost, damaged, or destroyed.²⁴⁷ This is the standard courts should use in cases against aggressor occupants. The legal sovereign victim receives no benefit from losing possession of its territory. The illegal aggressor state receives illegal booty as the benefit.²⁴⁸

2. *Possession for the Benefit of the Possessing State and the Assisted Sovereign*

If the bailment benefits both the bailor and bailee, the bailee must exercise ordinary care²⁴⁹ and is liable for

²⁴⁷ "In the case of bailment for the benefit of the bailee, the bailee is held to the standard of great diligence and is liable for a slight neglect." BROWN, *supra* note 201, at § 81; "If [the bailment] is said to be for the sole benefit of the bailee (as when you borrow the lawnmower), the bailee is held to a standard of great care; he is liable for even slight neglect that results in the goods being lost, damaged, or destroyed." DUKEMINIER & KRIER, *supra* note 203, at 83-84.

²⁴⁸ See *infra* notes 42 & 43 and accompanying text (concerning illegal use of force).

²⁴⁹ "Ordinary diligence in this type of bailment has been defined as that care which men of ordinary prudence

ordinary negligence.²⁵⁰ For example, an owner leaving a lawn mower at a repair shop creates a mutual benefit bailment. If the assisting sovereign made economic and political gains while assisting the bailor government, the operation was for the mutual benefit of both. Examples include: World War II Allied help to Ethiopia,²⁵¹ and central and Northern Italy;²⁵² Vietnamese assistance to Kampuchea;²⁵³ and the United States assistance to Grenada,²⁵⁴ Panama,²⁵⁵ and Haiti.²⁵⁶

customarily take of their own goods of a similar kind and under similar circumstances." BROWN, *supra* note 201, at § 81.

²⁵⁰ "[I]f a bailment for mutual benefit is found, . . . the bailee is liable for ordinary negligence" WILLISTON, *supra* note 203, at § 8.1; "In the case of bailment for the benefit of both parties the bailee is held to the standard of ordinary care and is responsible for ordinary negligence." BROWN, *supra* note 201, at § 81; "If the bailment is regarded as one for the mutual benefit of the parties (for example, where you pay the electrician to take and repair the appliance), the bailee must exercise ordinary care and is liable for ordinary negligence." DUKEMINIER & KRIER, *supra* note 203, at 84.

²⁵¹ See *infra* notes 438-48 and accompanying text.

²⁵² See *infra* notes 449-68 and accompanying text.

²⁵³ See *infra* notes 532-45 and accompanying text.

²⁵⁴ See *infra* notes 546-62 and accompanying text.

²⁵⁵ See *infra* notes 563-70 and accompanying text.

²⁵⁶ See *infra* notes 571-80 and accompanying text.

3. Possession Solely for the Benefit of the Assisted Sovereign

Where the bailment is for the sole benefit of the bailor it is a "gratuitous" bailment. A gratuitous bailee must use only slight care and is liable only for gross negligence.²⁵⁷ For example, a friend that does not need any transportation assistance takes care of a neighbor's automobile while the neighbor is away on a trip. If, after considering the costs involved, the occupant gained nothing more than the regional stability enjoyed by every member of the international community, the occupation was for the sole benefit of the bailor sovereign. A subset of the bailment for the sole benefit of the bailor is the involuntary or constructive bailment where the bailee had the goods thrust on the

²⁵⁷ "In gratuitous bailment cases, the traditional rule has required of the gratuitous bailee only that he use slight care, or, stated differently, the gratuitous bailee is traditionally held liable for only gross negligence." WILLISTON, *supra* note 203 at § 8.1; "In the case of bailment for the benefit of the bailor, the bailee is bound to use only slight care and is held liable only when he is guilty of what is termed 'gross negligence.'" BROWN, *supra* note 201, at § 81; DUKEMINIER & KRIER, *supra* note 203, at 84; "Sir William Jones and Mr. Justice Story have defined gross negligence as the omission of 'that care which even the most inattentive and thoughtless of men never fail to take of their own concerns.'" BROWN, *supra* note 201, at § 83 (footnote omitted) (noting, however, that the bailee's loss of his own goods with the bailor's goods is no defense).

bailee.²⁵⁸ For example, one who cares for stray cattle, or finds an item lost by the rightful owner is a gratuitous bailee.²⁵⁹ The occupant closest to being considered an involuntary bailee was India when it assisted in the creation of Bangladesh. India's geographic position put it between two warring internal factions. After one faction started violating the other's human rights, India had to assist.²⁶⁰

²⁵⁸ "An involuntary bailee may be defined as a person whose possession of a chattel, although known to him and the result of circumstances of which [h]e is aware, occurs through events over which he has no proper control and to which he has given no effective prior consent." PALMER, *supra* note 202, at 379. The involuntary bailee had no duty towards the Article until he exercises dominion over the Article. "[T]here is no duty on a finder to protect Articles he comes across: a finder can simply ignore a find . . . Should a finder choose to take Articles into his custody, however, he assumes the obligations of a bailee and is liable accordingly." DUKEMINIER & KRIER, *supra* note 203, at 83. "[T]he involuntary bailee, as long as his lack of volition continues, is not under the slightest duty to care for or guard the subject of the bailment, and cannot be held, in respect of custody, for what would even be the grossest negligence in the case of a voluntary bailment . . . , but that, in case the involuntary bailee shall exercise any dominion over the thing so bailed, he becomes as responsible as if he were a voluntary bailee. . . ." CRIBBET, *supra* note 210, at 125.

²⁵⁹ BROWN, *supra* note 201, at § 91 (listing possibilities for creating involuntary bailments as: finders, bailed goods thrust upon the bailee by a force of nature; stray animals; third persons giving goods to the bailee through mistake or fraud; and goods left behind by tenants).

²⁶⁰ See *supra* notes 587-93 and accompanying text.

4. Subjective Standard of Care

Regardless of the level of accountability, the standard is subjective and takes into account the nature of the property,²⁶¹ the bailee's abilities,²⁶² and any special circumstances.²⁶³ Thus, a nation with civil administration capability, must use this capability.²⁶⁴ The assistance will

²⁶¹ "It is sufficiently obvious that the bailee would be expected to use a lesser degree of care of goods of slight value than those of great value." BROWN, *supra* note 201, at § 81. "A bailee is expected to exercise a higher degree of care if the bailed goods are of great value than if they are of slight value." Dickerson, *supra* note 218, at 137 (footnote omitted).

²⁶² "By the same token, the degree of care which one is bound to exercise depends upon the degree of skill he professes to possess; a gratuitous bailee who professes special skill will be liable for failure to use that skill." WILLISTON, *supra* note 203, at § 8.1.

²⁶³ "What constitutes ordinary care or diligence necessarily varies with the circumstances under which the bailment is made, the nature of the subject matter, the business in which the bailee is engaged, the usages of that particular industry, and is necessarily a question for the jury." BROWN, *supra* note 201, at § 81 (quoting *Moon v. First Nat. Bank*, 287 Pa. 398, 135 A. 114 (1926)). "[T]he determination of liability under the standard will take into account the nature of the property in question, the abilities of the bailee, and any special circumstances in the case." DUKEMINIER & KRIER, *supra* note 203, at 84. "Exactly what constitutes ordinary care is a question for the trier of fact that normally hinges on the nature of the bailed property, the business of the bailee, and the standards of the bailee's particular trade." Dickerson, *supra* note 218, at 137 (footnote omitted).

²⁶⁴ For example, the United States military has specially trained civil affairs units and its civilian populace has the

maintain or develop the local country's indigenous abilities according to the desires of the local sovereign, but does not have to establish systems comparable to those of the assisting state's systems.²⁶⁵

Bailees are responsible for all property they could reasonably expect to find within the bailed property and not just the property of which the bailee has actual knowledge.²⁶⁶

States that choose to assist other states, must assist the entire territory and populace and cannot "pick and choose" the beneficial areas and leave the costly areas on their own.

States abuse this principle when they divide a territory, such as the World War II Axis and Soviet occupations.²⁶⁷

capability to provide ad hoc assistance to other states such as Grenada, Panama, and Haiti with establishing or maintaining public services such as utilities, communications, commerce, police, fire fighting, and courts.

²⁶⁵ For example, just because the United States assists a nation repair its roads, the United States is not responsible for upgrading the system to one similar to the highway system in the United States.

²⁶⁶ BROWN, *supra* note 201, at § 75 (stating "[The bailee] will be held liable for such contents as he might reasonably expect to be present.").

²⁶⁷ See *infra* notes 398-437 and accompanying text. Other examples include: German occupations in World War I, *infra* note 341-83 and accompanying text; the Allied occupation of Libya during World War II, *infra* note 438-48 and accompanying text; and Turkey's intervention in Northern Cyprus, *infra* note 605-16 and accompanying text.

Possessing states also abuse the care for the entire territory principle when they favor one type of people in a country. Examples of this include the Germans favoring the Flemish race during the World War I occupation of Belgium,²⁶⁸ the French attempt to establish a Palatinate separatist movement during the post World War I Rhineland occupation,²⁶⁹ Indonesian attempts to dissolve the East Timorese people,²⁷⁰ and Turkey's favoring of Turkish Cypriots.²⁷¹

Possessing states may also abuse the duty to care for the entire territory by limiting the country's economic development. Examples include: German subjugation of the Belgium economy during both World Wars,²⁷² and French attempts to economically separate the Rhineland from Germany during the post World War I occupation.²⁷³

To meet the possessing state's standard of care, the spirit of the Geneva Conventions should guide even when the

²⁶⁸ See *infra* notes 341-83 and accompanying text.

²⁶⁹ See *infra* notes 384-97 and accompanying text.

²⁷⁰ See *infra* notes 486-501 and accompanying text.

²⁷¹ See *infra* notes 605-16 and accompanying text.

²⁷² See *infra* notes 341-83 and accompanying text.

²⁷³ See *infra* notes 384-97 and accompanying text.

technical triggering requirements do not apply or an inappropriate convention forms the basis for an analogy. For example, during the 1994 United States assistance to Haiti, the United States military decided, as a matter of policy, and not due to international legal obligation,²⁷⁴ to treat hostile persons detained during the operation as if they were prisoners of war.²⁷⁵ The soldiers and military police were familiar with and applied the "protect and respect" human dignity requirements of the Third Geneva Convention.²⁷⁶

²⁷⁴ See *supra* notes 118-19 and accompanying text.

²⁷⁵ CLAMO, HAITI, *supra* note 4 at 54. The United States forces detained individuals if:

1. the individual is a member of the Haitian military or police, or is armed, and threatens essential civic order;
2. the individual poses a threat to United States force, other protected persons, key facilities, or property designated mission-essential by the Combined Joint Task Force Commander;
3. the individual has committed a serious criminal act, meaning homicide, aggravated assault, rape, arson, robbery, burglary, or larceny;
4. the individual has valuable information pertaining to individuals not yet detained to whom one or more grounds 1 through 3 apply.

Id. at 69 (footnote omitted).

²⁷⁶ Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. Army documents

However, some of the articles of the Third Geneva Convention did not easily apply to the situation in Haiti.²⁷⁷ The Fourth Geneva Convention, even though it also did not apply, would have been the better Convention for the basis of the analogy.²⁷⁸

Even though the Geneva Conventions did not apply, the United States recognized its duty to Haiti's populace to establish an orderly society. This duty included protecting the populace from the serious criminal conduct of

inculcating the values of the Third Geneva Convention include: DEP'T OF ARMY, REG 190-8, ENEMY PRISONERS OF WAR ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (2 Dec. 1985); DEP'T OF ARMY, FIELD MANUAL 19-40, ENEMY PRISONER OF WAR, CIVILIAN INTERNEES AND DETAINED PERSONS (27 Feb. 1976); and DEP'T OF ARMY, TRAINING CIRCULAR 27-10-2, PRISONERS OF WAR (17 Sept. 1991).

²⁷⁷ See, e.g., Third Geneva Convention, *supra* note 276, at art. 60 (providing for prisoner pay), art. 79 (providing for prisoner of war representatives), and art. 84 (requiring prisoners accused of offenses to be tried by the detaining power's military courts).

²⁷⁸ See, e.g., Fourth Geneva Convention, *supra* note 85, at section IV, Regulations for the Treatment of Internees (regulating internment places; food and clothing; hygiene and medical attention; religious, intellectual and physical activities; personal property and financial resources; administration and discipline; relations with exterior; penal and disciplinary sanctions, transfers of internees, deaths; release, reparation, and accommodation in neutral countries; and information bureau and central agency) The United States Army's doctrine mirrors these principles in DEP'T OF ARMY, REG 190-57, CIVILIAN INTERNEE ADMINISTRATION, EMPLOYMENT, AND COMPENSATION (3 Apr. 1987).

individuals.²⁷⁹ The United States also recognized the detained individuals' right to humane treatment monitored by the ICRC, NGOs and the media, as well as their right to retention hearings.²⁸⁰ Theodore Meron commended the United States' conduct in this area.²⁸¹ Due to the discovery of the less than ideal Geneva Convention analogy occurring in the introspective after action phase of the Haiti operation, the United States could not undo its actions. If the United States still had

²⁷⁹ "[Protected persons] shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." Fourth Geneva Convention, *supra* note 85, at art. 27, para. 2. "It requires states to take all the precautions and measures in their power to prevent such acts and to assist the victim in case of need." PICTET, COMMENTARY, *supra* note 86, at 204. To determine which alleged serious criminals should be detained, conduct based distinctions should be made independent of the political orientation of the individual. "Without prejudice to the provisions relating to their state of health, age, and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion, or political opinion" Fourth Geneva Convention, *supra* note 85, at art. 27, para. 3. "In a word, any discriminatory measure whatsoever is banned, unless it results from the application of the convention." PICTET, COMMENTARY, *supra* note 86, at 206.

²⁸⁰ CLAMO, HAITI, *supra* note 4 at § III.D.

²⁸¹ "This attitude deserves to be commended because the Geneva Convention ensures humane treatment and judicial guarantees." Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995) [hereinafter Meron, *Extraterritoriality*].

possession of Haiti, it should have changed its policy to reflect the better analogy to the Fourth Geneva Convention.²⁸²

Beyond merely meeting the duty of care, the judge advocate should consider how to prove the unit met its duty of care.

D. Proving Due Care

Due to the bailee having control over the bailed goods and the only knowledge of the facts concerning the care of the goods, the bailee has the duty to prove due care.²⁸³ States

²⁸² The individual soldier whose military occupational specialty does not involve routinely handling detainees should continue to apply the general "respect and protect" the dignity of prisoners' principles taught in basic training because the detained person's humanitarian rights will be adequately protected during the short time the soldier has contact with a prisoner before speeding the prisoner to the detainee collection point and the individual soldier already has enough basic requirements to remember without turning him into a lawyer. All United States soldiers are required by Army doctrine to know how to perform 99 tasks in addition to the additional requirements placed upon them due to their military occupational specialty, rank, and duty position. Dep't of Army, Soldier Training Publication 21-2-SMCT, Soldier's Manual of Common Tasks, (1 Oct. 1990).

²⁸³

The principle reason for relieving the bailor of the duty of showing in the first instance specific acts of negligence on the part of the bailee and of allowing the bailor to recover by proof merely of the delivery and the nonreturn of the goods or of damage to them while in the custody of the bailee, is that the latter has in his possession the means of ascertaining the exact cause either of the failure to return, or of the damage to

assisting other states can prove due care by allowing NGOs and the international media to monitor the action subject to the possessing state's legitimate security and safety concerns.

The media presents news on a personal level so people throughout the world can understand events affecting other peoples of the world.²⁸⁴ Media and NGO reports of the atrocities in Kampuchea under the Khmer Rouge persuaded the international community to accept Vietnamese assistance in the establishment of Kampuchea as preferable to the return of the Khmer Rouge.²⁸⁵ The media reports on the situation in Bangladesh assisted the world community to accept Indian assistance to Bangladesh's self-determination despite the historical preference for territorial integrity.²⁸⁶ Similarly, the media and NGO have monitored and reported on the United States assistance to Grenada²⁸⁷ and Panama,²⁸⁸ and coalition

the goods. To require a bailor at the start of the trial to present such evidence would bar him from recovery altogether.

BROWN, *supra* note 201, at § 87 (footnote omitted).

²⁸⁴ See Amit Mukherjee, *The Internationalization of Journalists' "Rights": an Historical Analysis*, 4 D.C.L. INT'L L. & PRAC. 87 (1995).

²⁸⁵ See *infra* note 532-45 and accompanying text.

²⁸⁶ See *infra* note 587-93 and accompanying text.

²⁸⁷ See *infra* note 546-62 and accompanying text.

assistance to Southern and Northern Iraq²⁸⁹ and Haiti.²⁹⁰

States exercising foreign possession that do not cooperate with such institutions are highly suspect.²⁹¹

Bailees may limit their liability by contract except for gross or willful negligence.²⁹² The inability to limit gross or willful negligence is similar to protected persons being unable to consent to the abridgment of their rights or the occupant being unable to prohibit certain human rights even

²⁸⁸ See *infra* note 563-70 and accompanying text.

²⁸⁹ See *infra* note 617-20 and accompanying text.

²⁹⁰ See *infra* note 571-80 and accompanying text.

²⁹¹ "Acknowledgment of the status of occupant is the first and the most important initial indication that the occupant will respect the law of Occupation." BENVENISTI, *OCCUPATION*, *supra* note 31, at 5. The following lists examples where either intergovernmental organizations or the international media were excluded from monitoring. Examples include: the Indonesian annexation of East Timor, *infra* notes 486-501 and accompanying text; the Moroccan occupation of the Western Sahara, *infra* notes 502-10 and accompanying text; the Iraqi occupation of Kuwait, *infra* notes 511-18 and accompanying text; the Soviet occupation of Afghanistan, *infra* notes 519-31 and accompanying text; and Turkey's intervention in Northern Cyprus, *infra* notes 486-501 and accompanying text.

²⁹² "[I]t is well settled that the parties may agree among themselves, by any contract which is not contrary to public policy, as to the extent of the bailee's liability." BROWN, *supra* note 201, at § 84.

during a national emergency.²⁹³ The bailor must voluntarily consent for the contractual limit on liability to be valid.²⁹⁴ Such provisions could be made while the bailor sovereign is requesting the bailee's assistance.²⁹⁵

²⁹³ See supra note 87 & 144 and accompanying text (defining protected persons and explaining human rights that may not be subjected to derogation).

²⁹⁴ "When a company desires to impose special and most stringent terms upon its customer, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted" *The Majestic*, 166 U.S. 375, 386 (1897); *Willard Van Dyke Productions, Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 239 N.Y.S.2d 337, 189 N.E.2d 693 (1963) (ruling printed disclaimer on boxes of film to have no effect on the separate transaction of processing); *Conboy v. Studio 54, Inc.* 113 Misc. 2d 403, 449 N.Y.S.2d 391 (N.Y. Civ. Ct. 1982) (deciding sign posted by coat room ineffective in limiting liability to \$100 for a missing \$1350 leather jacket because bailee failed to show customer had notice of the sign).

²⁹⁵

Claims for damages almost always follow deployments of US forces. Absent agreement to the contrary, the US is normally obligated to pay for damages caused by its forces. As a general rule, the desirable arrangement is for the state parties to waive claims against each other. Since the receiving state benefits from . . . some . . . form of US presence, it is not uncommon for a receiving state to agree to pay third party claims caused by US forces in the performance of official duties. As a result, the US is liable only for third party claims caused other than in the performance of official duties. In such a case, the desirable language is that the United States may, at its discretion, handle and pay such claims in accordance

Bailees are not insurers of the bailed goods.²⁹⁶ If a territory experiences a naturally occurring disaster, the possessing state does not compensate the rightful sovereign for the damages as an insurer, but must assist the populace's recovery under the possessing state's international duty of care.²⁹⁷ For example, prior to the Indian assistance to Bangladesh, a major cyclone devastated the territory.²⁹⁸ If

with US laws and regulations, i.e., the Foreign Claims Act.

INT'L & OPERATIONAL L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK chap. 3 p. 8 (1995).

²⁹⁶ "[I]t is well established that the ordinary bailee is not an insurer of the goods entrusted to him, but is liable for their loss or damage only by showing of some lack of care by him in their keeping." BROWN, *supra* note 201, at § 80 (footnote omitted). "Despite a bailee's duty to exercise ordinary care absent a special contract to the contrary, a bailee is not an insurer of the bailed goods and is not liable for the preservation of the bailed property." Dickerson, *supra* note 218, at 137 (footnotes omitted).

²⁹⁷ See *supra* notes 70-84 & 98-116 and accompanying text (concerning duties required by the Hague Regulations and the Fourth Geneva Conventions).

²⁹⁸ "On November 12[, 1970] a massive cyclone and tidal wave struck East Pakistan with devastating force. In the catastrophe, the [Pakistani] government was widely charged with callous indifference to the fate of the villages and people affected, and this became the 'final proof' of the neglect the people of East Pakistan had suffered." WAYNE WILCOX, *THE EMERGENCE OF BANGLADESH*, 18 (1973) [hereinafter WILCOX]. "In November 1970, a dreadful cyclone and the resulting floods had killed a quarter of a million people" FATHER R. W. TIMM, *THE ADIVASIS OF BANGLADESH*, 7 (1991).

the cyclone had occurred during the assistance from India, India would have had a duty of care to assist the population of Bangladesh, but would not pay for cyclone damages as an insurer. In addition to meeting the due care requirements, the humanitarian bailee must meet reasonable use standards.

E. Use of the Territory

Bailees may use the bailed goods according to any express agreements between the parties.²⁹⁹ Both bailor and bailee, as members of the international community, are free to make agreements. The true sovereigns must be the parties to the agreements.³⁰⁰ Agreements with puppet governments and puppet

²⁹⁹ "The right of the bailee to use the subject matter of the bailment depends on either the express or the implied consent of the bailor. Where there is an express contract . . . the extent of his right to use depends, of course, upon the construction of the contract." BROWN, *supra* note 201, at § 88; "Whether or not [the bailor] can use [the bailed goods] while in his possession turns on an express agreement between the parties if there is one." DUKEMINIER & KRIER, *supra* note 203, at 85.

³⁰⁰ *De facto* authorities without sovereignty lack legal capacity to enter into international agreements with other sovereigns. "It would turn the Charter on its head to say that it protects an alien power bent on preventing an exercise of the right of self-determination through massive presence of troops and covert action to encourage a coup in the face of a request from legitimate authority for outside help." MOORE, *supra* note 119, at 35. The agreement negotiated between former President Carter and General Cedras and signed by President Carter and Emile Jonassaint, the military-appointed president of Haiti, might be enforceable as a matter of

states have no legal relevance. Examples of puppet states include: the Japanese created "free states" of World War II,³⁰¹ and the German created puppet states of Slovakia and Croatia.³⁰² Examples of puppet governments include German puppet governments in Norway and portions of France and Greece,³⁰³ Soviet-created governments voting for incorporation during World War II,³⁰⁴ the pro-Indonesian East Timorese government,³⁰⁵ the Nineteenth province government of Kuwait during the Iraqi occupation,³⁰⁶ the Karmal government in Afghanistan,³⁰⁷ and the Turkish Republic of Northern Cyprus.³⁰⁸

private domestic law, but it is not an international agreement between sovereigns until the sovereign governments of the United States and Haiti ratify it. See Agreement Signed by Jimmy Carter and Emile Jonassaint in Port-au-Prince on Sept. 18, 1994, ¶7 reprinted in CLAMO, HAITI, *supra* note 4, at app. C.

³⁰¹ See *infra* notes 398-410 and accompanying text.

³⁰² See *infra* note 416 and accompanying text.

³⁰³ *Id.*

³⁰⁴ See *infra* notes 426-29 and accompanying text.

³⁰⁵ See *infra* notes 486-501 and accompanying text.

³⁰⁶ See *infra* notes 511-18 and accompanying text.

³⁰⁷ See *infra* notes 519-31 and accompanying text.

³⁰⁸ See *infra* notes 605-16 and accompanying text.

As with any transaction, the bargaining positions have not been equal. During the United States actions in Grenada,³⁰⁹ Panama,³¹⁰ and Haiti,³¹¹ the sovereigns had the choice of accepting United States assistance under terms proposed by the United States, or allowing the illegal *de facto* governments to remain in possession of the country. This was the same bargaining position Emperor Haile Selassie I found himself in before the British liberation of Ethiopia,³¹² and the Badoglio bargaining position prior to the Allied liberation of Italy.³¹³ However, the possessing state may not put the rightful sovereign under illegal duress to reach the agreement. The German intimidation of the neutral Norwegian government exemplifies such duress.³¹⁴

³⁰⁹ See *infra* notes 546-62 and accompanying text.

³¹⁰ See *infra* notes 563-70 and accompanying text.

³¹¹ See *infra* notes 571-80 and accompanying text.

³¹² See *infra* notes 438-48 and accompanying text.

³¹³ See *infra* notes 449-68 and accompanying text.

³¹⁴

It was apparently Germany's intention to occupy Norway by using threats rather than actual fighting. . . . In order to create a menacing atmosphere, the German Minister to Norway, . . . invited [Norwegian officials] to see a German film . . . which showed the German conquest of Poland . . . accompanied by

If there are no agreements,³¹⁵ the bailee may use bailed goods if such use benefits the bailor,³¹⁶ where there is a reasonable method to determine bailor compensation for bailee

the caption: "For this they should thank their English and French friends."

The invasion began on the night of April 8[, 1940.] . . . The German Minister . . . presented . . . an ultimatum that . . . the German government had begun "certain military operations . . ." which will result in the occupation of . . . Norwegian territory . . . The German minister expressed the hope that Norway would not resist, using the words of the film showing the bombing of Warsaw; "For such horrors you would have to thank your English and French friends."

LEMKIN, *supra* note 69, at 208. See also *infra* note 419 and accompanying text (concerning German control of Belgium during World War II).

³¹⁵ "A bailment may now arise without delivery, without a contract, and apparently without consent on the part of the 'bailor'." PALMER, *supra* note 202, at 3.

³¹⁶

Under certain circumstances it may be of benefit to the bailor for the bailee to make some use of the bailed goods. It has been frequently stated in *dicta* that one who stables a horse for another would be authorized for the good of the bailed animal to exercise it; or, if the bailee is keeping a cow for the bailor, milking of the cow would be required in order to preserve the health of the animal. Such *dicta* seem eminently reasonable.

BROWN, *supra* note 201, at § 88.

services rendered,³¹⁷ or for other such reasonable use.³¹⁸

International law allows for reasonable use of territories.³¹⁹

If the use is inconsistent with any agreements or reasonable conduct, amounts to the bailee asserting ownership of the bailed goods,³²⁰ amounts to a sale³²¹ or willful destruction³²² of the goods, the bailee is liable for illegal conversion.³²³

³¹⁷ "The right of the bailee to use the bailed chattels has also been implied when such use constitutes a reasonable method for the bailee to compensate himself for the expenses incurred in caring for the same." BROWN, *supra* note 201, at § 88; "As to the compensation for any services rendered or expenses incurred by the bailee, this is usually explicitly agreed upon in an ordinary bailment for the mutual benefit of the parties. In other cases, the courts search for an implicit understanding in the circumstances surrounding the bailment." DUKEMINIER & KRIER, *supra* note 203, at 85.

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"[I]f there is no agreement, rules of reason govern. If, for example, use of the bailed goods is likely to be of benefit to the bailor (e.g., keeping a watch wound and operating, an animal fed), it will generally be permitted. Use will also be permitted where there is reasonable method by which the bailee (especially an involuntary bailee) can be compensated for services rendered."

DUKEMINIER & KRIER, *supra* note 203, at 85. "Where, however, there is no such agreement between the parties the bailee's right to use would seem to depend upon what would be the reasonable understanding of the parties had the matter been called to their attention." BROWN, *supra* note 201, at § 88.

³¹⁹ See *supra* notes 77-81, 110-111 and accompanying text concerning the privileges of an occupant.

³²⁰ "Any use by the bailee of the bailed goods for his own purpose in a manner inconsistent with and in defiance of the

The above illegal bailment actions are similar to a possessing country that illegally violates territorial integrity of another state. Possessing states have illegally abused the economic resources of the territory such as the

bailor's rights is a conversion." BROWN, *supra* note 201, at § 88 (footnote omitted).

³²¹ "A sale of the bailed goods or a pledge thereof by the bailee for his own debt undoubtedly constitutes a conversion" BROWN, *supra* note 201, at § 88 (footnote omitted).

³²² "It also seems clear that a willful destruction by the bailee of the bailed goods or an entire alteration and change of the subject matter is a conversion making the bailee liable to the bailor for their value." BROWN, *supra* note 201, at § 88 (footnote omitted).

³²³

A bailee, having merely possession of and not title to the chattel, normally has no power to transfer the chattel free of the bailor's interest. On the other hand, a trustee of a chattel has power to transfer the chattel free of the trust to a bona fide purchaser, since the trustee has title to the chattel, although holding it subject to the equity of the beneficiary, and can transfer it free of equities.

AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TRUSTS § 5d (1935). "Where such use by the bailee amounts to a practical assertion of dominion over the goods, inconsistent with the bailor's general right of ownership, such use is a conversion of the subject matter of the bailment, making the bailee liable for its value." BROWN, *supra* note 201, at § 88. "But if use is inconsistent with an express agreement or reasonable conduct, or if it amounts to an assertion of ownership by the bailee over the goods, the bailee may be held liable in damages for conversion. So too if the bailee sells the goods or willfully destroys them." DUKEMINIER & KRIER, *supra* note 203, at 85.

German diversion of the economic wealth of Belgium to support Germany's war efforts during World War I³²⁴ and World War II,³²⁵ French diversion of the Rhineland's resources after World War I,³²⁶ and Japan's use of occupied territory's resources to support its efforts in World War II.³²⁷

Possessing states also have illegally annexed territory. For example, the Axis and Soviet powers annexed territories during World War II.³²⁸ Possessing states have made illegal agreements over territories to which they did not have sovereignty. Examples include the above mentioned puppet states and puppet governments and Spain's Madrid agreement with Morocco over the possession of the Western Sahara.³²⁹ Possessing states have tried to illegally destroy the people of a territory such as Germany's treatment of the Jews during

³²⁴ See *infra* notes 350-62 and accompanying text.

³²⁵ See *infra* notes 414-25 and accompanying text.

³²⁶ See *infra* note 394 and accompanying text.

³²⁷ See *infra* notes 398-410 and accompanying text.

³²⁸ See *infra* notes 398-437 and accompanying text. Other examples include: Indonesia annexed East Timor, see *infra* notes 486-501 and accompanying text; Morocco annexed the Western Sahara, see *infra* notes 502-10 and accompanying text; and Iraq annexed Kuwait, see *infra* notes 511-18 and accompanying text.

³²⁹ See *infra* note 506 and accompanying text.

World War II.³³⁰ Possessing states have tried to illegally destroy the resources of a territory such as Iraq's needless burning of the Kuwaiti oil fields and dumping oil into the Gulf.³³¹ These actions violate another's sovereignty and also violate the bailee's privilege of reasonable use.

A bailor relies on the domestic courts to help protect the bailor's interests by determining criminal guilt and

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[T]he unbelievably ruthless extermination of millions of Jews, Poles, Russians, and gypsies and other inhabitants of occupied countries was blandly alleged to have been done out of necessity. The killing of the children of these unfortunate ethnic groups was rationalized upon the theory that at some time in the future, when the children had grown up, they would threaten the security of Germany.

MCDUGAL & FELICIANO, *supra* note 48, at 677.

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[Fires] are wreaking havoc in the environment and the Kuwaiti economy. By some estimates as much as 5 million barrels of crude--worth about \$87 million--is going up in thick black smoke daily. . . . A greasy, charcoal-gray rain is falling for hundreds of miles downwind, disrupting the delicate desert ecology and endangering the neighboring countries. . . . More than 460 million gallons of oil spilled by the Iraqis has been sloshing around for eight weeks, spreading into a slick that now covers one hundred miles.

Charles Leerhsen, et al., *Hellfighter to the Rescue*, NEWSWEEK 30 (Mar. 25, 1991).

adjudging punishment or finding civil liability and effecting remuneration as a general deterrent to others. States need a similar international system to help protect their inalienability of sovereignty and territorial integrity.³³² Although beginning and maintaining a legal humanitarian bailment is difficult, returning the territory to the proper sovereign is more difficult due to its strict liability requirement.

F. Duty to Restore Proper Sovereign

Regardless of the standard of care required of a bailee while the goods are in his custody, a bailee is strictly accountable when it comes to redelivery.³³³ If a bailee

³³² See *supra* note 169-95 and accompanying text.

³³³

If the bailee delivers the subject of the bailment to a third person who is not authorized by the bailor to receive it and is not the rightful claimant of the goods as against the bailor, the bailee is liable for a conversion of the goods or in damages for breach of contract, no matter how good his faith or how free he may be from negligence.

BROWN, *supra* note 201, at § 86 (footnote omitted). "[B]ailees are strictly liable for 'misdelivery.'" DUKEMINIER & KRIER, *supra* note 203, at 84; "[A]ny one of the usual types of bailees who delivers the bailed chattel to the wrong person has converted the chattel and is liable to the bailor Proof of negligence is not required, and proof of due care on the part of the bailee is no defense." A. JAMES CASNER & W. BARTON LEACH,

misdelivers the goods to the wrong person, he is liable even though he used reasonable care.³³⁴ If a legal authority takes the bailed goods from the bailee, the bailee is exonerated if the bailee notifies the bailor of the proceedings in time for the bailor to assert his claim and if the delivery was by a valid legal process.³³⁵ In situations where a foreign country possesses a territory and multiple entities are claiming to

CASES AND TEXT ON PROPERTY 39 (3d ed. 1984) (citation omitted); "[N]o rule is better settled than that . . . delivery to the wrong person is not capable of being excused by any possible showing of care or good faith or innocence . . . the duty . . . is absolute." CRIBBET, *supra* note 210, at 125.

³³⁴ The only exception is the involuntary bailee, who is liable only if he negligently delivers the goods to the wrong person because the bailee has no agreement with the bailor. "[A]n involuntary bailee who performs in good faith an act which, taken in the abstract, would amount to a conversion, is liable only if the performance of that act was accompanied by a lack of reasonable care." PALMER, *supra* note 202, at 387 (footnote omitted).

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Thus, it frequently happens that while the goods are in the possession of a bailee they are . . . taken from his possession by an officer of the law under the authority of a writ of execution or attachment. In the instances the bailor may or may not be a party to the proceedings. The bailee is nevertheless exonerated of his duty to deliver the bailed goods to the bailor in these circumstances if the delivery is by virtue of valid legal process and the bailee notifies the bailor of the proceedings in time to enable him to assert his claim to the goods in question.

represent the territory's legitimate sovereignty, the possessing nation or nations may follow the directions of the intergovernmental world and regional organizations. Another alternative would be to allow the inhabitants of the territory to choose their sovereign in internationally monitored elections. For example, national elections, monitored by international organizations and occurring within the year, verified the United States assistance to the sovereign of Grenada.³³⁶ In addition, the earlier national election of Guillermo Endara verified the United States assistance to the Endara government as Panama's sovereign.³³⁷ A United Nations declaration confirmed the United States assistance to Haiti's sovereign, the recently elected Aristide government.³³⁸

The *jus tertii* defense protects the bailee against third party claims of ownership during the bailment.³³⁹ However,

BROWN, *supra* note 201, at § 86 (footnote omitted).

³³⁶ See *infra* notes 546-62 and accompanying text.

³³⁷ See *infra* notes 563-70 and accompanying text.

³³⁸ See *infra* notes 571-80 and accompanying text.

³³⁹ "[B]ecause a possessor's title is good against all the world except those with a better title, one seeking to oust a possessor must do so on the strength of his own title, and may not rely on a *jus tertii*, or the better title held by a third party." Stephen H. Gifis, *Law Dictionary* 258 (2d ed. 1984). "As between bailee and stranger, possession gives title--that

after delivering goods to the entity that the bailee believed to be the owner, the bailee might face liability from others with claims of ownership. Countries installing their own puppet state in defiance of international law deserve such treatment. For example, Greek Cypriots could sue Turkey for delivering the territory of Northern Cyprus to the Turkish Cypriots.³⁴⁰

V. Analyzing Early Twentieth Century Occupations According to the Traditional and Bailment Views

The foregoing humanitarian bailment analysis could have been applied to a wide variety of past foreign possession operations and would have reached the same conclusions as then prevailing international law. Because the humanitarian bailment view would have worked for the major foreign possession operations of modern history, it should be able to

is, not a limited interest, but absolute and complete ownership" CRIBBET, *supra* note 210, at 142 quoting *In re Winkfield*, 1902 P. 42 (C.A.).

³⁴⁰ See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990) (ruling the confiscatory decrees of the "Turkish Republic of Northern Cyprus" did not divest the Church of Cyprus of its title to four priceless Byzantine mosaics removed from a Church in occupied Northern Cyprus and returning the mosaics from an Indiana art gallery to the church).

meet the challenges of future foreign possession operations. I will show how occupants misinterpreted or ignored the Hague Regulations during the first fifty years of the twentieth century. A humanitarian bailment analysis of these incidents would have reached the same conclusions regarding the action's illegality as reached by international scholars and jurists.

A. *The German Occupation of Belgium 1914-1918*

1. *Traditional Analysis: Following the Letter But Not the Spirit of the Hague Regulations*

Germany occupied most of Belgium and parts of France from August 1914 to November 1918.³⁴¹ The official German position recognized the duty to follow the law of occupation and many German officials believed their administration complied with the Hague Regulations.³⁴² Their practice gave the Germans

³⁴¹ Germany began hostilities against Belgium on August 4, 1914 before any other hostilities took place in the West, shortly after signing a pledge of neutrality with Belgium. CYRIL FALLS, *THE GREAT WAR* 41 (1959). Belgium was occupied by Germany until the Armistice on November 11, 1919. *Id.* at 419.

³⁴² An American Colonel's criticism of the German measure follows.

The German military Occupation of Belgium may have satisfied the psychology of its own people; apparently it did, but it failed miserably to win the respect of the Belgians or of the neutral world--it was not firm, just and dignified, but too often

effective control of every facet of the occupied populace's life for the benefit of the German war effort.

The German Government General claimed exclusive prescriptive powers within the occupied territory.³⁴³ In addition, the Germans executed the law and controlled the administration of Belgium by replacing Belgian provincial governors and other authorities with German military governors and officers.³⁴⁴

The Belgian courts continued to function during most of the occupation. The occupant and the courts for the most part did not encroach on the other's activities.³⁴⁵ For reasons

changeable, harsh, arrogant, insolent and contemptuous.

SMITH, *supra* note 71, at 8.

³⁴³ "The Governor General could delegate his right to issue executive ordinances having law-constituting force . . . not only administrative ordinances, . . . but also legal ordinances." VON KOHLER, *supra* note 128, at 152.

³⁴⁴ Germany imposed a dualism of tasks on the provincial and district administration in the Government General of Belgium, eliminating Belgian officials in higher ranks while personnel in the lower and middle grades continued in office. *Id.* at 39-41.

³⁴⁵ Operating under the ordinance of December 2, 1916, Belgian courts provided protection only to foreigners who were not citizens of states at war with the German Empire and were prohibited from trying or deciding against members of the German army or occupation administration. *Id.* at 146.

discussed below, near the end of the occupation, the Belgian Court of Cassation voluntarily suspended its session until further notice. The Germans then invoked the Hague Regulation's Article 43 duty to provide for public order to extend the military courts' jurisdiction to include the Belgian Criminal Code violations and set up German courts to handle German civil suits against Belgian citizens.³⁴⁶

Belgium was a highly industrialized country that relied on the importation of food and raw materials and the exportation of coal and manufactured goods.³⁴⁷ The British blockade created severe shortages in Germany and Belgium.³⁴⁸

³⁴⁶ *Id.* at 66-67 (citing interference by German occupiers, the Court of Cassation adopted "sans abdiquer ses fonctions de suspendre ses audiences" and all the courts in Brussels and the provinces followed).

³⁴⁷ CHAMBERS, *supra* note 17, at 766 (2d ed. 1979) (extracting twice as much coal as the rest of the continent and the first country to complete a railway network Belgium was the mainland's first industrialized state in the 1800s).

³⁴⁸

[B]read cereals were vital, but Belgium's production covered the needs of only a relative small part of the population . . . The country had to rely for the remainder on the importation of foreign foodstuffs which it tried . . . to exchange for its industrial products . . . This exchange of goods was threatened with extinction from the moment the occupied Belgium territory was included in the blockade which was declared against the central powers.

Belgian industry ceased production and hundreds of thousands of factory workers became unemployed. Germany then "compulsively" evacuated unemployed Belgians to work in Germany as a means to provide "for orderly government" that might have been hampered by serious unemployment.³⁴⁹

To continue the war, Germany needed to use occupied Belgium's resources. German justification for the use of Belgium's resources was either the need of the Belgian economy for assistance,³⁵⁰ military necessity,³⁵¹ or both.³⁵² The German

VON KOHLER, *supra* note 128, at 78-79.

³⁴⁹ "[T]he United States has learned . . . of the policy of the German Government to deport from Belgium a portion of the civilian population for the purpose of forcing them to labor in Germany . . . and is constrained to protest . . . against this action." Communication from United States Secretary of State Mr. Lansing to the American Charge d'Affaires at Berlin, Mr. Grew of Nov. 29, 1916 reprinted in HYDE, *INTERNATIONAL LAW* 383 n. 1 (1922). See also, STONE, *supra* note 30 at 712.

³⁵⁰ J. MASSART, *BELGIANS UNDER THE GERMAN EAGLE* 297-98 (1916) (reprinting a Governor General declaration dated Dec. 15, 1915, asserting the German duty to "assist the weak in Belgium, and to encourage them").

³⁵¹ VON KOHLER, *supra* note 128, at 74-75 (restricting free movement of goods as a consequence of ever increasing utilization of the country for the benefit of the occupant, which grew out of urgent necessity and the long duration of the war).

³⁵² The German policy for Belgian production was summarized by Governor General von Bissing on June 19, 1915:

I have . . . two tasks of equal importance. As administrator of this country, I am responsible for

economy would not, however, help the Belgian economy.³⁵³

German regulation of food prices,³⁵⁴ procurement,³⁵⁵

distribution,³⁵⁶ and consumption³⁵⁷ enabled Germany to redirect

its welfare and prosperity. I am of the opinion that a lemon squeezed dry has no value and that a dead cow no longer gives milk. Therefore it is so important and necessary that a country which is economically and in other respects of such importance to Germany, be kept alive. . . . But In relation thereto, I am simultaneously obligated to weigh the advantages and disadvantages for Germany. We want to avoid any harm to German industry through our restoration of the Belgian industry.

reprinted in Id. at 134.

³⁵³ *Id.* at 81-82 (citing both the Belgian economy and military necessity, the German administration provisioned the Belgian population to meet the demands of international law and to prevent hungry masses in the rear of the German fighting forces).

³⁵⁴ Foodstuffs were regulated according to uniform principles. For example, in the potato trade maximum prices were set, usurious trading was prohibited; contracts for futures required the exchange of confirmation notes for their validity and the number of potato traders was limited. *Id.* at 102.

³⁵⁵ "Under the ordinance of June 30, 1915 barley (fodder and brewing barley) were seized for the first time . . . The Central Barley Office . . . had a buying and distributing monopoly for the barley harvest." *Id.* at 99-100.

³⁵⁶ "Distribution [of the barley] took place in this manner: one part . . . for beer manufacturing; another part . . . to the Belgium yeast manufacturers and the rest was used for the manufacture of foodstuff." *Id.* at 100.

³⁵⁷ "Oats were rationed out by the factories on a contractual basis . . . In the main, these foodstuffs went, at fixed prices to those engaged in heavy labor." *Id.* at 101-2.

Belgian's food supply to the German homeland and military.³⁵⁸

Similar measures allowed Germany to control Belgian coal,³⁵⁹ oil,³⁶⁰ gas, water, electricity,³⁶¹ and financial institutions under the authority of Article 52 of the Hague Regulations.³⁶²

³⁵⁸ Due to Belgium's inability to provide enough of certain foodstuffs and because Germany was not willing to furnish any foodstuffs to Belgium, an international relief system was formed in 1915 to help meet Belgian needs. *Id.* at 96-97 (listing twelve rules for distribution of the relief organization's foodstuffs). Germany was under similar stringent food regulations. "Beginning early in 1915 Germany worked out and maintained an elaborate system of food control, rationing first bread, then meat and potatoes, and extending finally to nearly every essential food product." SMITH, *supra* note 71, at 39-40.

³⁵⁹ "The ordinance of the Governor General of April 26, 1915 deprived the owners of Belgium collieries of the free disposal of hard coal, coke, briquettes, and the by-product gained from cooking kilns, and passed the utilization of these product into the hands of the Central Coal Company. VON KOHLER, *supra* note 128, at 34.

³⁶⁰ "The Central Oil Office was . . . empowered to deal with the procurement, manufacture, or distribution of other articles, such as bones and carcasses, soap, edible fats and oils, glycerin, varnishes and paints, petroleum and calcium carbide, oil seeds, and oil fruits . . ." *Id.* at 37.

³⁶¹ "[The Gas, Water, and Electricity Office] was created with a view to safeguarding for military purposes the utilization of the large number of gas, water, and electricity works in the cities and communes and to circumventing any action injurious thereto." *Id.* at 38. A general criticism of the invasive German regulatory system was:

Whenever the German system touches human beings it consists of a multitude of regulations of verbotens [or forbiddens], instead of a few simple guide-posts to point the way through the wilderness.

The German administration applied Article 48 of the Hague Regulations to collect existing taxes and customs on German exports and used the revenue to defray administration expenses.³⁶³ When these measures failed to raise sufficient

The Germans would put up myriad sign-boards telling the traveler where not to go; instead of hacking a few trees to blaze the trail, they would hack all the trees in the forest except those along the way they wished to indicate.

SMITH, *supra* note 71, at 10.

³⁶² The Government General first tried to control the Belgian banks using two measures. First, a Government General order did not allow enemy controlled banks to enter into new transactions. Second, all other banks were instructed not to make payments to Germany's enemies and to coordinate their activities in the interests of Germany. When these arrangements proved insufficient, the German occupation authorities implemented a "compulsory administration" regime where specially trained German administrators took over the management of all Belgian banks, businesses suspected of being under the influence of nationals or residents of enemy states, and businesses whose operation could impinge upon German interests. VON KOHLER, *supra* note 128, at 173-76. See also, *Id.* at 139-41 (reflecting the official German position that "it goes without saying that German money had to be made legal tender everywhere in the occupied Belgian territory, alongside the local currency"). After discovering that the Belgian National Bank had shipped its cash, note plates, and stamps to London, the Government General conferred the national bank's authority on another Belgian bank and took measures to prevent London issued notes from circulating in occupied Belgium. FEILCHENFELD, *supra* note 20, at 72-76.

³⁶³ "[T]he Governor General announced that, in accordance with Article 48 of the Hague Convention respecting Warfare on Land, the Government-General would collect in the occupied territory the existing taxes, customs, and tolls imposed for the benefit of the Belgium state and that it would defray administration

revenue, the occupation administration raised existing tax rates and introduced new taxes, and placed surcharges on commodities.³⁶⁴ Additionally, under the authority of Article 49 of the Hague Regulations, the Government General levied contributions on the local Belgian population to pay for the administration of the territories.³⁶⁵

While on its face, the German welfare legislation for occupied Belgium apparently showed genuine concern for the Belgian population, most legislation served a more important ulterior German political motive. For example, an order requiring obligatory elementary school attendance³⁶⁶ assisted

expenses out of these revenues." VON KOHLER, *supra* note 128, at 71.

³⁶⁴ "The new taxes were: increased land taxes, surtaxes on net income from land above a certain yield, an occupational tax on those engaged in agriculture and forestry, a progressive tax on patents above certain income levels, and a supplementary personal tax on corporation executives." *Id.* at 73.

³⁶⁵ As the tax revenues were insufficient to cover needs and as no loans could be negotiated, the German administration had to seek new sources of revenue in accordance with Article 49 of the Hague Regulations. *Id.* at 72.

³⁶⁶ "The organic school law of May 19/June 15, 1914, introduced obligatory school attendance. The German administration enforced this regulation vigorously . . ." *Id.* at 231.

in determining the students' primary language for use in the German attempt to split Belgium unity.³⁶⁷

Due to Belgium's strategic geographical location, its neutrality was a crucial component of the nineteenth century European balance of power.³⁶⁸ The Flemings and the Walloons, peoples with distinct culture and language, occupied distinct geographic areas in Belgium.³⁶⁹ Before World War I, the major political parties drew support from both groups and helped channel tensions between these peoples.

The German occupants, desiring a long-term change in the European balance of power, wanted to obtain influence in the region by splitting Belgium into two distinct territorial

³⁶⁷ "Political development of the Flemish population, was brought to fruition, namely, that 'the young generation in the public schools should receive training and education on the basis and in the spirit of the Flemish vernacular, within the framework of the public school law of 1914'" *Id.* at 233. See also *infra*, notes 370-73 and accompanying text (concerning German attempts to split Belgian territory).

³⁶⁸ See DEP'T OF HISTORY, UNITED STATES MILITARY ACADEMY, *THE GREAT WAR 22-23* (1977) (discussing the pre-World War I planning of Count Alfred von Schieffen, Chief of the German General Staff, to ignore the neutrality of Belgium, Luxembourg, and the Netherlands due to military necessity).

³⁶⁹ "The ultimate goal of the administrative separation was the division of Belgium into two parts, marked off nationally and linguistically and each administered by officials of its respective nationality--Flanders and Wallonia." VON KOHLER, *supra* note 128, at 48.

units, Flanders and Wallonia. To further their purpose, the occupant discriminated in favor of Flanders due to the Flemish links to the "Lower German race."³⁷⁰ One notable incident involved the creation of separate administrations for Flanders and Wallonia,³⁷¹ and the encouragement of "Flemish Activists" to elect the Council of Flanders as the autonomous advisory representative of Flanders to the Government General.³⁷² At the initiative of Belgian senators, the Court of Appeals in Brussels directed the state's attorney general to institute treason proceedings against the members of the Council of Flanders. After the arrest of some "Flemish Activists," the Germans reacted by deporting some judges and relieving the rest. The Court of Cessation denounced the German interference with the court's independence, and indefinitely

³⁷⁰ German efforts in this area included: mandating Flemish instruction in elementary schools located in Flemish areas and German instruction in areas near the German border, *Id.* at 232-34; and transforming the University of Ghent into a Flemish speaking institution. *Id.* at 235-40.

³⁷¹ Brussels was the capital of Flanders that received the existing ministries. Namur was the capitol of Wallonia and had new ministries established. Belgian civil servants who refused the required move to Namur were replaced by imported Germans. *Id.* at 52.

³⁷² *Id.* at 48-53 (accepting the causes and goals of the Council of Flanders as the basis of policy in Belgium which directly affected the system of the occupation administration and the development of economic and social conditions).

suspended its sessions. The rest of the Belgian courts followed this lead causing the Germans to create their own courts to operate until the end of the war.³⁷³

During the war, the exiled King of Belgium issued decrees that had the status of law³⁷⁴ for the population in the occupied territory.³⁷⁵ The Belgian courts, unable to implement the decrees during the occupation,³⁷⁶ accepted the government's

³⁷³ *Id.* at 65-69.

³⁷⁴ For example one decree indefinitely extended the time limits for the statute of limitations and civil procedure for debts and claims. *Id.* at 143.

³⁷⁵

The Decree-Law of 8 April, 1917 [proscribing malicious denunciation to the enemy], applies to the person who gives the information whatever his nationality, even if he belongs to the army of Occupation.

Kauhelen Case, 1 Ann. Dig. 493 (Bel. Ct. Cass. 1920).

³⁷⁶

[T]he difficulties with regard to the alleged noncompliance [of the occupant] with [Article 43 of the Hague Regulations] merely concerns international relations, and their solution can only lead to the application of the sanction as set out by Article 3 of the [1907 Hague] Convention;] ... if they attempted to solve these difficulties, the judicial authorities of the occupied territory would encroach upon the prerogative of the competent national power, [and therefore] they must ... abstain from doing so under pain of acting *ultra vires*.

position without heavy scrutiny after liberation.³⁷⁷ The Belgian reaction of ignoring the Hague Regulations, during the first major occupation following their enactment, contributed to the Hague Regulation's instability.

Although the Western powers also adamantly opposed the German actions in occupied Belgium,³⁷⁸ the Western powers supported their views through a narrow reading of Article 43.³⁷⁹ These scholars treated the occupation as mere

By denying Belgian citizens the right to challenge occupation measures under Article 43 of the Hague regulations, occupant measure became unchallengable law. Judgment of May 18, 1916, 1 Int'l. Law Notes 136 (Ct. Cass. 1916).

³⁷⁷ See, e.g., *De Nimal v. De Nimal*, 1 Ann. Dig. Pub. 477 (Ct. App. Brussels Apr. 23, 1919).

³⁷⁸

The German Occupation of Belgium, with its cruelties and violations of international law, aroused the indignation of the civilized world, made a pariah among nations of Germany and proved conclusively that a good name is as valuable an asset to a nation as to an individual.

SMITH, *supra* note 71, at 6.

³⁷⁹ 2 J. GARNER, *INTERNATIONAL LAW AND THE WORLD ORDER* 88-89 (1920) (arguing that the mere fact that the occupant was involved in trade, education, and health was a blatant violation of international law); OPPENHEIM, *supra* note 239, at 437 (advocating that military necessity did not require such extensive German occupant involvement in Belgium).

aberration from established international law, instead of acknowledging the changing needs of modern occupation law.³⁸⁰

The occupation of Belgium exposed two shortcomings in Article 43 of the Hague Regulations. First, despite the Hague Regulation assumption that the modern occupant would impartially hold territory for the return of the sovereign, occupants continued their nineteenth century practice of manipulating occupation for the occupant's nationalistic interest.³⁸¹ Second, the minimal interference and stability guidance of Article 43 did not anticipate the problems of welfare state societies' dependence on change from their

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During and after the War of 1914-18, most authorities were in the habit of treating major deviations from established rules and practices merely as delinquencies and of ascribing their occurrence to a criminal spirit on the part of their national enemies. While there was undoubtedly a constant increase in international lawlessness, it was superficial to disregard the profound effect which fundamental changes in essential factors were bound to have.

FEILCHENFELD, *supra* note 20, at 22 n. 2.

³⁸¹ See *supra*, notes 134-36 and accompanying text.

central governments,³⁸² and civilians becoming entangled in the orchestration of state resources for total warfare.³⁸³

2. Bailment Analysis: Bailee Must Meet Duty of Care

The Belgian King's exiled government was the proper sovereign and bailor of Belgium. Germany had both possession and intent to possess the territory of Belgium and was the bailee. Further, Germany obtained its possession through the illegal use of aggressive force and was an illegal bailee. Regardless of how Germany obtained possession of the Belgian territory, as a bailee it had a duty to care for the territory. As with all aggressive use of force possessions, the bailment was for the sole benefit of the bailee. The Belgian government received no benefit from yielding possession of its territory and Germany used the Belgian territory for its own illegal ends. Hence, Germany was strictly accountable for the Belgian territory under a duty of extraordinary care. Unfortunately, Germany's actions did not satisfy even a duty of slight care.

³⁸² See *supra* notes 122-28 and accompanying text.

³⁸³ See *supra* notes 129-33 and accompanying text.

The legal duty applies subjectively. Belgium was a highly industrialized country and Germany should have maintained Belgium's industrial capability. Instead, Germany illegally converted the Belgian economy by diverting it to support Germany at the expense of the local populace's welfare. Germany further violated its bailment duties by dividing the territory into Walloon and Flanders and favoring the Flemish people instead of caring for the entire Belgian territory. Fortunately, the bailment ended with the lawful bailor, the rightful sovereign, regaining possession of the territory.

B. The Armistice Occupation of the Rhineland

1. Traditional Analysis: Following the Letter But Not the Spirit of the Hague Regulations

After the German World War I occupations, the Armistice Occupation of the Rhineland involved an occupant and occupied role reversal. Pursuant to the November 11, 1918, Armistice Agreement,³⁸⁴ the Allies occupied the German territory West of

³⁸⁴ For the treaty text see C. PARRY, ED., THE CONSOLIDATED TREATY SERIES 286 (1918-19).

the Rhine River on December 1, 1918.³⁸⁵ The Allied countries in control of each occupied zone from North to South were Belgium, Great Britain, the United States, and France.³⁸⁶ All zones had a weak economy, severe unemployment, health problems, and social unrest.³⁸⁷ In an effort to revive the

³⁸⁵ The Armistice Occupation was replaced by the Rhineland Agreement on January 10, 1920 when it was ratified along with the Versailles treaty by the European parties. It contained thirteen Articles in which the principles of the occupation were laid down. ERNST FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW* 77-78 (1944) [hereinafter FRAENKEL]. The text of the Rhineland Agreement is reprinted in *id.* at app. I.

³⁸⁶ "But from the very first day of the peacetime occupation there was a duel between the French political, military, and business forces working toward a penetration of the Rhineland, and the German anti-French state machine and no less anti-French business organizations." *Id.* at 97. In March 1921 the London Conference of Allied Governments sent Germany an ultimatum with a list of military and financial sanctions that might be imposed if she did not accept the Allies' requirements concerning reparations. *Id.* at 99 "The idea of interference originated with France and was opposed by England . . . The United States took no part in the sanctions policy of her former Allies." *Id.*

³⁸⁷ "The Armistice Agreement . . . did not touch upon the problems of mass unemployment, social unrest, and hunger, or upon the economic and financial collapse that threatened the population of that highly industrialized territory, especially after it had been administratively separated from the remainder of Germany." *Id.* at 13.

Living through conditions of war exercised a very definite effect on the vital statistics of the civil population in the occupied area; the birth rates were nearly cut in two while the death rates almost doubled; communicable diseases, especially typhoid fever, dysentery, and tuberculosis,

Rhineland's economic life, the Allies quickly restored the free flow of goods to and from Germany, France, and Belgium.³⁸⁸ The Allies left the local court system intact, to include appellate review by courts in unoccupied Germany.³⁸⁹

increased markedly; many of the school children were under weight and under height and were pale and poorly nourished.

SMITH, *supra* note 71, at 39.

³⁸⁸ All German trading with the enemy statutes for trade between the Rhineland and the Allies were annulled. The German cartels lost control of trade between local and Allied merchants. The Allies controlled the Germans custom officials, who conducted the daily bureaucratic functions. FRAENKEL, *supra* note 385, at 40-41. The Americans implemented their own economic measures in their zone which decreased unemployment and alleviated some of the economic strain.

Issuing more than 4,000 permits to export goods the American economic section reduced the number of unemployed from over 5,000 to 200 and this notwithstanding the fact that more than 16,000 demobilized German soldiers returned to their homes in the American district.

SMITH, *supra* note 71, at 36.

³⁸⁹ In the French zone, an occupant representative attended court sessions and had access to the court's nonpublic files, but there is no evidence these prerogatives were abused. FRAENKEL, *supra* note 385, at 45-46. The German system of courts was in no way interfered with and they exercised both civil and criminal jurisdiction, the same as before the occupation. Occupant tribunals handled occupation law and applied their national law for crimes against occupation personnel. "Appointing provost courts for trials of minor offenders against the laws of war or military government, up to and including May 15, 1919, 4,809 cases were tried by provost courts and more than a million francs were collected as fines." SMITH, *supra* note 71, at 36-38.

Although the Armistice Agreement was silent on the matter,³⁹⁰ the supreme occupation commander, France's Marshal Foch, acknowledged the applicability of the Hague Regulations.³⁹¹ As Belgium and France changed from occupied territory and exiled government to occupant, their reading of the Hague Regulations went from narrow to broad.³⁹² For

³⁹⁰ Scholars disagree about the general relationship between the Hague Regulations and armistice agreements. See Roberts, *Occupation*, *supra* note 29, at 265-67 (advocating that armistice occupation "is quite widely viewed as one form of belligerent Occupation.... It is widely accepted that the Hague Regulations apply to armistice Occupations.... The Hague Regulations remain important, at the very least, as a set of minimum standards."); FEILCHENFELD, *supra* note 20, at 110-11 (allowing parties to the treaty to agree to disregard the Hague Regulations); VON GLAHN, *OCCUPATION*, *supra* note 13, at 28 (applying the Hague Regulations to armistice occupations, "subject to such modifications as might have been included in the terms of the armistice agreement").

³⁹¹

In his basic order concerning the armistice period of occupation, Marshal Foch, Supreme Commander of the Allied and Associated Powers, referred to the Hague Convention as basis of the supervision to be exercised over the German administrative structure. And he asserted--also in confirmation with the Hague Convention--that the existing German laws and regulations would be respected unless they contravened the rights and security of the occupying armies.

FRAENKEL, *supra* note 385, at 8 (citation omitted).

³⁹² France used the high French official positions in the central occupation committees, in a manner similar to earlier German occupant practices, to strengthen French industry, to

example, in 1871, France had ceded Alsace-Lorraine to Germany pursuant to the terms of the peace treaty ending the Franco-Prussian War.³⁹³ French attempts to use Palatinate secessionists to "reunite" Alsace-Lorraine with the rest of France seem to mimic earlier German attempts to alienate Flanders from Belgium.³⁹⁴

Correspondingly, as Germany changed from occupant to occupied territory and exiled government, their officials' former broad reading of the Hague Regulations became narrower.³⁹⁵ Local German attempts to adjudicate German

strengthen economic ties between the occupied territory and France, and to economically separate occupied Germany from unoccupied Germany. The Germans protested that the French licensing officials gathering of detailed business information amounted to commercial espionage. French supervision of financial and commercial institutions imposed a *de facto* blockade of unoccupied Germany. *Id.* at 21.

³⁹³ "The same rules were observed by the Germans in Alsace and Lorraine in 1870-'71. The permanent annexation of these provinces had been determined upon." WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW*, 50 (1892).

³⁹⁴ In the region closest to France, Palatinate, the French attempted to start a secessionist movement by setting up a Council of Notables, a body representing the local population's economic and political issues before the administration and supporting a local separatist unsuccessful coup d'etat. The U.S. army commander's failure to comply with French requests for assistance to the coup played a large part in the coup's failure. FRAENKEL, *supra* note 385, at 36-37.

³⁹⁵ Due to occupants allowing appellant review of occupied German court decisions, the German Supreme Court or

nationals for aiding the Palatinate secessionist movement seemed like a repeat of the 1918 Flemish Activist arrests with an occupant and occupied role reversal.³⁹⁶

The Allied occupation of the Rhineland added another problem to the existing problems with Article 43 of the Hague Regulations. One recurring problem was the actions of France and Belgium showing that occupants with direct interests would continue to manipulate the law of occupation for those

Reichsgericht, located outside the occupied territories in Leipzig, could have theoretically reviewed the legality of occupation law and the applicability of new German legislation in the occupied territory. *Id.* at 212. The Reichsgericht's first decisions, which were not communicated to the general public, reiterated Germany's views during the occupation of Belgium that the occupant is the sole power entitled to legislate in the occupied territory and the occupant's laws may not be reviewed by the local courts for compliance with Article 43 of the Hague Regulations. The decision was not published in Germany until 1931. See *Id.* at 210. Later cases, which were released to the general public, held the opposite view that old and new German statutory legislation was immediately obligatory in the occupied Rhineland. The Reichsgericht entitled itself to indirect review of the international legality of the occupation criminal and civil laws. *Id.* at 187-88. These later holdings were based on the fact that "it was a contractual, not a war Occupation." This distinction allowed the court to maintain the double standard that French currency in Alsace was illegal, but German currency in occupied Belgium was legal. *Id.*

³⁹⁶ The French promulgated an order on January 29, 1919 removing local court jurisdiction concerning secessionist charges, and a German judge, who convicted a participant in the French backed coup was arrested. *Id.* at 45.

nationalistic interests. The second known problem was the static nature of Article 43's "restore and ensure public order and civil life" not anticipating the problems resulting from a defeated welfare state, whose impoverished civilians had supported a total war of resources, needing a life sustaining government. The new problem was the emerging trend of occupants finding self-serving exceptions to the law of occupation. The post-occupation analysis by the world community clung to the outdated nineteenth century view of limited occupant involvement with the occupied population and explained the Armistice occupation as a unique consensual arrangement.³⁹⁷

2. *Bailment Analysis: Bailees Must Meet Duty of Care*

Germany's government was the proper sovereign and bailor of the Rhineland. The Allies had both possession and intent to possess the Rhineland as the bailee. The Allies obtained their possession through the Armistice Agreement. Even though the bargaining positions were not equal, Germany was not under

³⁹⁷ "During the war of 1914-18, the Allies were on the whole in the position of occupied countries or friends of occupied countries, and throughout invoked every letter of the Hague Convention without making allowances for changed conditions." FEILCHENFELD, *supra* note 20, at 22.

illegal duress during the negotiations. Germany could either reach an agreement or choose to continue its illegal aggressive armed conflict until Germany suffered a total military defeat.

Regardless of how the Allies obtained possession of the Rhineland, as bailees they had a duty to care for the territory. Due to a mutual agreement creation of this bailment, it was for the benefit of both the bailor and the bailees. All parties to the agreement could end their state of armed conflict and begin rebuilding their nations. Hence, the Allies were under a duty of ordinary care.

As before, the legal duty applies subjectively. The Rhineland was an industrialized area with a war-ravaged and weakened economy. For the most part, the Allies met their duty of care by taking steps to allow the local populace to restore its economy. France's actions mirrored earlier German actions of diverting resources to the bailee's benefit and favoring one type of people in the territory. Their actions also were wrong in illegally converting the territory's goods and not properly caring for all the populace. At the end of the peacetime occupation following the Armistice occupation, Germany, the lawful bailor and rightful sovereign, regained lawful possession of the Rhineland.

C. World War II Axis and Soviet Occupations: Nationalistic Occupants Do Not Apply Hague Regulation's Standards

Despite scholars' explanations that the World War I law of occupation failures was a single aberration, the undesired trends continued during World War II.

1. Japanese Occupations

Economic, security, and ideological considerations motivated Japan's East Asia campaign.³⁹⁸ Japan tried annexation as a method of foreign rule with Korea in 1910.³⁹⁹

³⁹⁸ The Japanese viewed East Asia as critical to Japan's economy, as both producers of needed raw materials and energy resources and consumer of Japanese products. Japan felt threatened by the economic interference of Western influence over China and Western controlled colonies in Southeast Asia. Japan intended to replace the West as the dominant nation in the "Greater East Asia Co-Prosperity Sphere. The movement's slogan of "Asia for the Asiatics" undermined the moral and legal claims of Western colonial powers, and implied that Japanese could reject the application of the Western law of occupation to East Asia. JOYCE LEBRA, ED., JAPAN'S GREATER EAST ASIA CO-PROSPERITY SPHERE IN WORLD WAR II ix-xxi (1975) [hereinafter LEBRA].

³⁹⁹

The most significant contact between Japan and Korea was the Japanese Occupation of Korea beginning to 1905. While it hardly constituted a cultural exchange program, Japan certainly left its mark on Korea. Japan began its domination of the Korean peninsula in 1905 with the Treaty of Portsmouth, concluding the Russo-Japanese War, and the "Protectorate" Treaty, which launched a period of "governance by advisor." By the end of 1910, the

Due to problems such as restraining the flow of Korean workers into Japan with its homogenous society, controlling the Korean workers' activities in Japan, and attributing annexation as the reason for Korean animosity,⁴⁰⁰ Japan rejected annexation as a ruling method.⁴⁰¹

Prime Minister (a collaborator with the Japanese) had signed a treaty annexing Korea to the Japanese, and the Emperor had been forced to abdicate. Korea's thirty-five years as a Japanese colony saw widespread appropriation of Korean land and products, forcing farmers to move to industrial area where they were used as slave labor in Japanese owned and operated plants.

Kathleen B. O'Neill, Comment, *Industrial Relations in Korea: Will Korea Become Another Japan?*, 12 Comp. Lab. L. 360 (Spring 1991) (footnote omitted).

⁴⁰⁰ Japanese treatment of the Koreans was more likely the reason for Korean animosity towards the Japanese. "During the Japanese rule from 1905 to 1945, the Japanese suppressed political freedoms and deprived Koreans of all fundamental rights." Jennifer L. Porges, comment, *The Development of Korean Labor Law and the Impact of the American System*, 12 Comp. Lab. L. 335, 337 (Spring 1991) (Footnotes omitted).

⁴⁰¹ "Japan has had to take cognizance of the repeated attempts to assassinate her leaders, not excluding the Emperor himself . . . Korean laborers lured by high wages prevailing in the industrial regions of Japan [were] replac[ing] Japanese laborers [but] lived in squalid and unsanitary quarters and often become public charges" K. KAWAKAMI, *MANCHUKO--CHILD OF CONFLICT* 190-91 (1933) [hereinafter KAWAKAMI]. Wishing to avoid violent reactions of the Chinese to loss of independence and unrestricted Chinese immigration which would follow annexation, Japan decided not to annex "Manchuko." *Id.* at 190.

Japan saw the creation of new vassal states as the solution to foreign possession to exploit local nationalistic sentiments in western colonies, differentiate between native inhabitants and Japanese, and allow for international recognition of the actions.⁴⁰² The Japanese occupation of Manchuria in 1931-32 exhibited the two-part method for creating a Japanese puppet state.⁴⁰³ First, Japan helped constitute a fictitious indigenous government, the "State of Manchuko," under Japanese consultants' supervision.⁴⁰⁴ Second, Japan and the newly created local entity executed a "bilateral agreement," in which the local entity conceded practically everything Japan desired.⁴⁰⁵ Following the Manchuko method,

⁴⁰² See *Id.* at 187-91 (explaining the Japanese point of view of the Manchurian conflict).

⁴⁰³ BENVENISTI, *OCCUPATION*, *supra* note 31, at 60.

⁴⁰⁴ Japan contended that "the establishment of a strong central government in China is the prerequisite of a satisfactory solution of her international problems." KAWAKAMI, *supra* note 401 at 12.

⁴⁰⁵ The Japanese viewed the laws of Manchuko as being drafted by Manchurians "assisted by Japanese jurists." *Id.* at 144-45. For examples of how the Japanese administered and exploited Manchuko see,

Japan has recently acknowledged the rapes and associated deprivations of women's human rights permitted and facilitated by the Japanese military authorities in Manchuria and other occupied parts of China beginning in the late 1920s. Similar

Japan helped establish the "Reformed Government of Central China" in 1937.⁴⁰⁶ At the zenith of its power, Japan had created the "free states" of Thailand, Manchuko, Burma, Malaya (including Singapore), "Second Republic of the Philippines," and Indochina.⁴⁰⁷ During the periods of possession, Japan made extensive pro-Japanese changes to local laws.⁴⁰⁸

violations are documented in the Philippines and Korea. Local women were forced from their homes and detained in "Comfort Stations" for the sexual satisfaction of the Japanese militia. Following release, detainees were considered unfit for marriage within their communities, because of their lack of virginity and because of infertility caused by repeated rapes. The Japanese Federation of Bar Associations has concluded that the appropriate response to Japan's acknowledged wrongs is the payment of reparations to victims and their families.

Rebecca J. Cook, *State Responsibility for Violations of Woman's Human Rights*, 7 HARV. HUM. RTS. J. 125, 144-45 (1994) (footnotes omitted); See also Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 859-61 (giving first person accounts of the rapes and torture).

⁴⁰⁶ The new "state" was derived from Japanese occupied Inner Mongolia, North China, and portions of Central China QUINCY WRIGHT, *THE EXISTING LEGAL SITUATION AS IT RELATES TO THE CONFLICT IN THE FAR EAST* 38-40 (1939) [hereinafter WRIGHT, *CONFLICT IN THE FAR EAST*].

⁴⁰⁷ The Tojo's government's plan in the early months of 1942 called for encompassing all the conquered territory into the Greater Asia Co-Prosperity sphere, and "as speedily as possibly the conquered territories would be turned into allied nations with friendly governments that would contribute to Japan's defense and power rather than drain on it" EDWIN P.

The international community never took any of Japan's newly created states seriously.⁴⁰⁹ Japan did not invoke the Hague Regulations during the time between the Japanese invasion of the territory and the birth of the new republics.⁴¹⁰ This seriously impacted on the international

HOYT, JAPAN'S WAR THE GREAT PACIFIC CONFLICT 1853 TO 1952 243-63 (1989).

⁴⁰⁸ Changes included: introducing the Japanese civil code, changing the judicial system, regulating economic activities to Japan's advantage, introducing the Imperial Japanese Calendar, declaring Japanese as the official language, and imposing the Japanese state Shinto religion as the official religion. BENVENISTI, OCCUPATION, *supra* note 31, at 61, 63.

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The modern law of collective nonrecognition has its roots in the Stimson Doctrine enunciated in 1932 at the time of the Japanese invasion of Manchuria and in the action taken by the League of Nations in response to this act of aggression. Although nonrecognition in this case extended to the state of Manchuko, it also entailed the nonrecognition of territory acquired by force and of treaties entered under duress.

JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS (1987) [hereinafter DUGARD]. Manchuko was denounced as an independent state and referred to as a Japanese occupied territory by the Lytton Commission. This was endorsed by the League of Nations. Following the League of Nation's recommendation, most states did not recognize Manchuko as a state. Only the Axis powers, El Salvador, Finland, Hungary, Italy, Germany, Poland, Romania and Spain recognized Manchuko. ROBERT LANGER, SEIZURE OF TERRITORY, 69, 123-25 (1947) [hereinafter LANGER]. See also, WRIGHT, CONFLICT IN THE FAR EAST, *supra* note 406, at 58.

⁴¹⁰ Japan had signed and ratified both the 1899 and the 1907 Hague Conventions. See SCHINDLER & TOMAN, *supra* note 36, at 88,

community's perception of legitimacy, an important factor in these types of operations.

2. Italian Occupations

Italy invaded and subsequently annexed Ethiopia in the spring of 1936.⁴¹¹ In 1939, Italy annexed Albania.⁴¹² Italian scholars tried to justify these annexations under the

90. The Hague Regulations were not invoked in territories lacking a Japanese "grant of independence." The official policy for military administered territories such as the Netherlands East Indies (later Indonesia) and Hong Kong mentioned respect for existing government organizations and native practices. "[E]xisting governmental organizations [in occupied territories will] be utilized as much as possible, with due respect for past organizational structure and native practices." Principles for Administration of Southern Areas, adopted by the Liaison Conference, November 20, 1941, translated in H. BENDA ET AL., JAPANESE MILITARY ADMINISTRATION IN INDONESIA: SELECTED DOCUMENTS (1965), reproduced in LEBRA, *supra* note 398, at 111-16. However, later text emphasized "[t]he ultimate status of the occupied areas and their future dispositions shall be determined by the Central Authorities," and provided for the use of local economies for Japanese interests. *Id.* at 114.

⁴¹¹ STRAYER, *supra* note 134, at 762.

⁴¹² See Basic Statute of the Kingdom of Albania of June 3, 1939 reprinted in LEMKIN, *supra* note 69, at 267; Law no. 580 Regarding Acceptance of the Crown of Albania by the King of Italy, Emperor of Ethiopia, of April 16, 1939, reprinted in *id.* at 267; Albania had been a virtual Italian protectorate since 1927 STRAYER, *supra* note 134, at 769.

debellatio doctrine due to the total defeat of the forces of Ethiopia and Albania.⁴¹³

3. *German, Bulgarian, and Romanian Occupations During World War II*

During their attempts to establish a "New Order" in Europe, Germany, Bulgaria, and Romania did not invoke or follow the Hague Regulations concerning its foreign rule of other states. The situation-tailored political organization of the occupied states provided the Axis occupant with the most powerful form of control.⁴¹⁴ Axis powers annexed some areas into their states.⁴¹⁵ Germany annexed Alsace-Lorraine, Luxembourg, Eastern Belgium, the free city of Danzig, Western Poland, and the Sudeten. Bulgaria annexed portions of Greece. Romania annexed portions of the Western Ukraine. Germany created the puppet states of Slovakia and Croatia and set up puppet governments in Norway, and portions of France and

⁴¹³ See LANGER, *supra* note 409, at 132-54, 245-53.

⁴¹⁴ LEMKIN, *supra* note 69, at 267-635 (surveying Axis occupations in Europe); 9 J. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 194-289 (1978) (discussing Axis European occupations).

⁴¹⁵ LEMKIN, *supra* note 69, at 221-31.

Greece.⁴¹⁶ The Germans made only minor changes to the Danish government's administration of German occupied Denmark for most of the occupation period.⁴¹⁷

Although the Germans used different methods, extensive modifications to the laws of the annexed states suited the New Order in Europe.⁴¹⁸ Axis military occupation governments ruled Belgium,⁴¹⁹ the Netherlands,⁴²⁰ and portions of France,⁴²¹ the Soviet Union,⁴²² and Greece.⁴²³ Although the new Axis occupant would announce that the existing laws would remain in force

⁴¹⁶ *Id.* at 208-20.

⁴¹⁷ *Id.* at 157-68.

⁴¹⁸ The entire legal system was replaced with the German legal system in the areas ceded by Germany after World War I, Danzig, Memel, and Eastern Belgium. While the Germans had to individually introduce each law in Western Poland, Alsace-Lorraine, and Luxembourg, a great deal of German law was imported, to include: administrative laws, the duty to be conscripted into the German army, the German Commercial Code, German style court organization, the Lawyer's Code, and, in Poland, the German Criminal Code. LEMKIN, *supra* note 69, at 25-26. In order to fulfill the Bulgarian policy of the complete eradication of the Greek nationality, the entire legal system was changed in annexed Greece. *Id.* at 187-90.

⁴¹⁹ *Id.* at 125-29.

⁴²⁰ *Id.* at 200-7.

⁴²¹ *Id.* at 171-84.

⁴²² *Id.* at 232-40.

⁴²³ *Id.* at 185-92.

subject to compatibility with the goals and orders of the occupant,⁴²⁴ the "subject to compatibility" exception consumed the "existing law" rule.⁴²⁵

⁴²⁴ See, e.g.,

The general orders and regulations issued by the German Military Commanders take precedence over the law of the land. Local law not in conflict with these orders and regulations remained in force unless incompatible with the purposes of the Occupation.

Notice of the military governor of occupied France of May 10, 1940, reprinted in LEMKIN, *supra* note 69, at 389.

The law, heretofore in force, shall remain in effect in so far as compatible with the purposes of the Occupation. The Reich Commissioner [vested with "supreme civil authority"] may, by order, promulgate laws.

The German decree of May 18, 1940, regarding the establishment of an occupation regime in the Netherlands reprinted in *id.* at 446.

⁴²⁵ The goal of a New Order in Europe required the occupant to assume all sovereign powers, including legislative powers. See, e.g.,

(1) To the extent required for the fulfillment of his duties, the Reich Commissioner for the occupied Netherlands territories assumes all powers, privileges, and rights heretofore vested in the King and the government in accordance with the Constitution and the laws of the Netherlands. (2) Should the interests of the Greater German Reich or the safeguarding of public order or life in the Netherlands so require, the Reich Commissioner may take appropriate measures, including the issuance of general orders. These orders of the Reich Commissioner shall have the force of laws.

4. Soviet Axis Occupations 1939-1940

Like the nationalistic policies of the other Axis powers, the Leninist-Stalinist Communist expansion policies justified the use of force to obtain sovereignty over foreign states.

By injecting political criteria⁴²⁶ into the neutral law of

Section 1 of the order of the Reich commissioner for the occupied Netherlands, concerning the Exercise of Governmental Authority in the Netherlands, May 29, 1940 reprinted in *id.* at 448. Existing local law that interfered with the New Order in Europe was struck down. Due to the Hague Regulation's basic tenet of the inviolability of the sovereignty of the ousted government being incompatible with the New Order in Europe plan, the Hague Regulations were not invoked or followed. LEMKIN, *supra* note 69, at 25. Germany used both the local legislative mechanism and German decrees to transform the occupied territory's laws as suited the purposes of the New Order in Europe. During World War II, the Germans took advantage of a Belgium law issued by King Albert I shortly before the German World War I Occupation. The law delegated legislative power to the secretaries-general of the government ministries in time of national emergency. The Germans controlled the Belgian economy and implemented their policies through these ministries supplemented by occupation authority orders. For example, the Germans achieved the integration of the Belgian economy with that of Germany through a joint decree by the secretaries general, the "Order Concerning the Organization of the National Economy" of February 10, 1941 that established a pro-German regulatory regime. *Id.* at 323-25.

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[The task of Soviet lawyers consists in giving a learned justification of the legality of partisan wars on territories occupied by the imperialist aggressors, having in mind the Leninist-Stalinist teachings on just and unjust wars.

occupation principles, the Communists disregarded the Hague Regulations.

The Soviet occupations were similar to the puppet state two-step procedures used by Germany and Japan. Following the Soviet invasion of Poland, the Soviets organized the captured Polish territory into two areas, Western Ukraine and Western Byelorussia, and supervised the election of delegates to the constituent assemblies.⁴²⁷ These delegates requested admission into the Soviet Union.⁴²⁸ The Soviets repeated this pattern following the invasion of the Baltic republics of Estonia, Latvia, Lithuania, Moldavia (detached from Romania) and the Karelo-Finnish Republic (detached from Finland).⁴²⁹

Translated excerpt of the report of the discussion at the Theory of State and Law section of the (Soviet) Academy of Social Sciences, April 20, 1950 in Kulski, *Some Soviet Comments on International Law*, 45 AM. J. INT'L L. 347, 349 (1951).

⁴²⁷ LANGER, *supra* note 409, at 256-57.

⁴²⁸ *Id.* at 256-57.

⁴²⁹ *Id.* at 254-84..

5. *Traditional Analysis: Illegal Occupant Can Not
Escape the Duties of the Law of Occupation*

As a result of the Axis and Soviet occupations, the world community had to determine what international legal duties applied to occupants, ousted governments, and third party states during occupations resulting from illegal aggression. The minority of scholars argue that aggressors have no entitlement to any of the law of occupation powers for the occupant.⁴³⁰ The majority of the scholars view the law of occupation, like the law of war, as applying equally to legal and illegal militaries.⁴³¹ Pragmatically, if the occupant can expect other states to respect lawful Hague Regulations occupant actions, the occupant might administer the territory in conformity with the Hague Regulations occupant duties.⁴³²

⁴³⁰ See Harvard Research in International Law, *Draft Convention on the Rights and Duties of States in Case of Aggression*, 33 AM. J. INT'L L. (Supp.) 827, 844 (1939) (suggesting depriving aggressors of the rights, but not the duties of an occupant); Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365, 370-71 (1953).

⁴³¹ "[T]he better view supported by the bulk of judicial authority, is probably that the law of belligerent occupation applies notwithstanding that the occupant may be an unlawful aggressor." MCNAIR & WATTS, *supra* note 63, at 372. See also, STONE *supra* note 30 at 695 n. 10a.

⁴³² "[I]t is correct to say that courts have generally refused to uphold a distinction in managerial rights accorded

Although an occupant may not legally avoid the Hague Regulation duties by establishing an illegal occupation--such as an annexation, puppet state, or puppet government--must the ousted government and other states abide by the occupant's actions which pass law of occupation scrutiny or may they adopt their own policies because the established regime was illegal? The state that attempts to permanently alienate an occupied territory from its lawful sovereign receives no entitlement to international protection of its occupant interests. Such a state is indifferent to the reaction of the ousted sovereign because the state had no intention of relinquishing its possession. Due to the occupant state not sharing its power under international law, the ousted sovereign may take any and all possible countermeasures during and after the occupation. The ousted sovereign has no obligation to respect those measures that would have been lawful but for the failure of the occupant to recognize the basic sovereignty norm of international occupation law.⁴³³ For

occupants based on the lawfulness of their resort to war." GERSON, *supra* note 25, at 12.

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The modern law of nonrecognition may be formulated in the following terms. An act in violation of a norm having the character of *jus*

the law of occupation to be effective, third party states have a duty not to recognize such illegal occupant's actions.⁴³⁴

Only the ousted sovereign has the option of upholding lawful occupation measures.⁴³⁵ The actual practice reflected this

cogens is illegal and is therefore null and void. This applies to the creation of states, the acquisition of territory, and other situations such as the case of Namibia. States are under a duty not to recognize such acts.

DUGARD, *supra* note 409 at 135. The basic tenet of occupation law, the inalienability of territory through force, has been derived from the practice of not recognizing the conqueror's title over such areas. SCHWARZENBERGER & BROWN, *supra* note 30, at 165.

⁴³⁴ The Stimson doctrine of required nonrecognition of illegal sovereigns has been accepted by the world community as reflected in international instruments: I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 410-19 (1963). See also, CRAWFORD *supra* note 155 (arguing that the primary U.N. aim of territorial integrity superseded the secondary aim of self-determination).

⁴³⁵ Although the American Civil War was an internal rather than an international conflict, the Supreme Court sanctioned Confederate

acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance of property, real and personal, and providing remedies for injuries to persons and estates, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government.

Texas v. White, 74 U.S. (7 Wall.) 700, 733 (1868).

legal theory. During the occupation, and on their return to power, governments did not feel constrained by the Hague Regulations in rejecting the internationally lawful actions of the occupant.⁴³⁶ However, the majority of post-occupation national courts applied the sovereign's prerogative by pragmatically using the Hague Regulations to judge and validate some of the legal effects of occupant's measures.⁴³⁷

6. *Bailment Analysis: Illegal Bailees Must Meet Duty of Care*

The Axis and Soviet powers were bailees because they had both the possession and intent to possess the territories. The ousted governments were the lawful sovereigns and bailors. The Axis and Soviet powers obtained possession through the illegal use of aggressive force and were illegal bailees. Regardless of how they obtained possession of the territories, as bailees they had a duty to care for the territories. As with all aggressive use of force possessions, the bailments

⁴³⁶ The Polish Supreme Court declared the Hague Regulations inapplicable to the German annexation of Western Poland due to both the illegality of the war and the "criminal" incorporation of that territory. *In re Greiser*, 13 Ann. Dig. 387, 388 (July 7, 1946).

⁴³⁷ See *infra* note 479 and accompanying text.

were for the sole benefit of the bailees. The ousted governments received no benefit from yielding possession of their territories and the Axis and Soviet powers used the territories for their own illegal ends. Hence, the Axis and Soviet powers were strictly accountable for the territory under a duty of extraordinary care. The Axis and Soviet powers illegally converted the territories' economies by diverting the local economies to support the bailees. Most World War II Axis and Soviet bailments ended with the lawful bailors, the rightful sovereigns, regaining possession of their territories.

D. British Occupations in North Africa

1. Traditional Analysis: Avoiding the Hague

Regulation's Standards By Providing Internal Assistance

The North African occupations did not mirror the World War I occupations due to the territories' earlier status as European colonies. During 1941 and 1942 the British took Eritrea, Italian Somaliland, Ethiopia, Madagascar, and Libya from the axis powers and regained possession of portions of British Somaliland. The British occupations followed the Hague Regulations unless British interests necessitated an

exception. Existing laws were left intact in Eritrea,⁴³⁸ the Tripolitania region of Libya,⁴³⁹ and were theoretically in place in the Cyrenaica region of Libya.⁴⁴⁰ The British established new local governing systems in Somalia to replace the collapsed government.⁴⁴¹

To garner the assistance of the local population in the fight against the Italians, the British promised portions of a territory, over which Great Britain did not have sovereignty, to a particular group of people. For example, Britain gave

⁴³⁸ The military administration was instructed to retain Italian laws "in so far as military exigencies shall permit and in so far as they are not deemed contrary to natural justice or equality." RENNELL, *supra* note 49, at 116. Although the British replaced most senior Italian executive officials, the judges were not removed. *Id.* at 51-52. Fascist institutions were to be "progressively broken up or taken over" and the British progress was slow as exhibited by the December 1942 arrest of the Italian Fascist secretary general after rumors of a possible Japanese invasion rekindled local Fascist aspirations. *Id.* at 131.

⁴³⁹ Great Britain controlled Tripolitania in a minimalistic "follow[ing] the text-book" manner because Great Britain had no long-term interest in the territory. *Id.* at 270.

⁴⁴⁰ In theory Italian law was still in force. "It was too much to expect the Administration to administer Italian Law in full: hardly a legal book remained and the number of officers capable of interpreting was necessarily small." *Id.* at 252.

⁴⁴¹ *Id.* at 333 (replacing the Italian system of government that had broken down and establishing a full direct administration, including a judicial system).

the Eritrea province of Tigrai to Ethiopia.⁴⁴² Britain orally promised to give the Liberian Cyrenaica region to the Senussis.⁴⁴³ The British claimed an exception to the

⁴⁴² "Tigrai was detached from Eritrea and handed over to Ethiopia on the 1st August, 1941." *Id.* at 143-44.

⁴⁴³ To cull support for the British military from the followers of Senussi leader Sayed Mohammed Idris, the British made a written promise not to return Cyrenaica to Italian control.

The British Government has thanked Sayed Mohammed Idris el Senussi for the assistance he has given to the Allied cause and has promised that the Senussis will not again be subject to Italian rule

Message from General Montgomery to the People of Barqa of November 11, 1942 *reprinted in* RENNELL, *supra* note 49, at 250-51. This was accompanied by an oral promise of Cyrenaican independence. Statement of Secretary of State for Foreign Affairs A. Eden to the House of Commons of January 8, 1942, 377 *HOUSE OF COMMONS DEBATES* 77-78 (1942), *reprinted in* MAJIS KHADDURI, *MODERN LIBYA-A STUDY IN POLITICAL DEVELOPMENT* 35 (1963) [hereinafter KHADDURI, *MODERN LIBYA*]. Once in control and upon being presented with the local claim for governance as a prelude to independence, Great Britain decided it wanted to continue the occupation in order to establish its influence over the region after the end of World War II. In order to remain as the occupant, Great Britain explained to the Senussis that international law and the Hague Regulations prevented it from relinquishing control. After the British used international law as the rationale for retaining control beyond the signing of the peace treaty with Italy, the local population "came to treat 'International Law' as a poor joke which they could not understand." RENNELL, *supra* note 49, at 252-53. The British retained control over Cyrenaica until the United Nation's 1949 decision to grant independence to a unified Libya. See KHADDURI, *MODERN LIBYA*, *supra* note 443, at 74. The French had a similar arrangement controlling the Fazzan region of Libya, but continued their attempts to control the region even after the 1949 United Nations General Assembly

territorial integrity principle of the Hague Regulations because the sole motivation for such actions was concern for administrative expediency.⁴⁴⁴

In accordance with Britain's policy of appeasement, Britain had *de jure* recognized Italy's illegal annexation of Ethiopia in 1938.⁴⁴⁵ To support area covert operations after the outbreak of war, King George VI's government withdrew its recognition of the Italian title, and recognized the claim of ousted Emperor Haile Selassie I to the Ethiopian throne. By transferring recognition back to the emperor, the British could claim that they liberated the territory for the emperor and were merely providing "guidance and control" until formal transfer to the emperor. The Hague Regulations for enemy territory did not apply.⁴⁴⁶ This technique of avoiding the

decision granting independence to a unified Libya. KHADDURI, *supra* note 443, at 107.

⁴⁴⁴ KHADDURI, MODERN LIBYA, *supra* note 443.

⁴⁴⁵ "His Majesty's Government recognized the Italian conquest and the annexation of Ethiopia to the Italian crown on the 16th November 1938." RENNELL, *supra* note 49, at 61. See *supra* notes 411-13 and accompanying text (concerning Italy's annexations).

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As His Majesty's Government have withdrawn their recognition of the Italian conquest, it may be correct to say that *de jure* any part of Ethiopia

international law of occupation duties became a twentieth century trend instead of a single aberration.⁴⁴⁷

2. *Bailment Analysis: Bailees Must Meet Duty of Care*

If Great Britain had taken possession of the territories for itself, its possession would have been illegal. Due to *jus tertii*, the Axis's possession rights, even though illegal, were better than the claims to the territories by states other than the lawful sovereign.⁴⁴⁸ Due to Great Britain taking the territories for the rightful sovereigns, Great Britain was a bailee of the territories for the rightful sovereign bailors. Great Britain had both possession and intent to possess the territories as the bailee.

which is wholly cleared of the enemy comes *ipso facto* and at once under the rule of the Emperor, who will be present in person to claim it and to give it effective administration.

Major General P. E. Mitchell, Chief Political Officer, Notes on Policy and Practices *In respect of Occupation of Italian East Africa* of Aug. 2, 1941 reprinted in *id.* at 45. The Emperor and British officials reached an informal agreement concerning administration of Ethiopia prior to the British invasion, and the formal agreement was signed on January 31, 1942. Reprinted in *id.* at 539-58.

⁴⁴⁷ See, e.g., *infra* notes 449-68 & 546-80 and accompanying text (concerning the Allies in World War II Italy, and the United States in Grenada, Panama and Haiti).

⁴⁴⁸ See *supra* note 339 and accompanying text (explaining *jus tertii*).

Great Britain obtained its lawful possession through agreements with the rightful sovereigns, such as Emperor Haile Selassie I of Ethiopia or international (Allied) consensus concerning the sovereignty of former colonies, such as the Somaliland. Even though the Emperor's bargaining position was not equal to Great Britain's bargaining position, the Emperor was not under undue duress during the negotiations. The Emperor could either cooperate with the British or allow his territory to remain in Italian possession. Even if Great Britain had continued to recognize Italian title to Ethiopia and Italy had given its title to Great Britain when Italy joined the Allies, such title would be void as opposed to the Emperor's title to the territory. Further, the Emperor would have had a legal claim against Turkey for giving illegal possession to Great Britain instead of the rightful sovereign.

Regardless of how Great Britain obtained possession of the territories, as a bailee it had a duty to care for the territories. Due to mutual agreements creating these bailments, they were for the benefit of both the bailor and the bailees. Great Britain would make military gain for the Allies against the Axis powers and the sovereigns would regain possession of their territories. Hence, Great Britain was under a duty of ordinary care. Great Britain had a duty to

care for all of the territories. Therefore, giving Tigray to Ethiopia and planning to grant Cyrenacia to the Sennussis self-determination movement would have illegally converted the territories. The League of Nations had earlier determined the rightful sovereigns and these bailors regained possession of their territory.

E. The Allied Occupation of Italy

1. Traditional Analysis: Avoiding the Hague

Regulation's Standards By Providing Internal Assistance

Like the British North Africa occupations, the Allied occupation of Italy was also different from the World War I occupant and occupied role reversal in that Italy had not occupied the home territories of the Allies that were to become Italy's occupants. During earlier African occupations in Algeria, Morocco, and Tunisia, the Americans tried to minimize their involvement with occupation administration⁴⁴⁹ by

⁴⁴⁹ Allied Forces Headquarters General Order 5 of 12 October 1942, OPD Files 381, TORCH, sec. I reprinted in HARRY L. COLES & ALBERT K. WEINBERG, UNITED STATES ARMY IN WORLD WAR II SPECIAL STUDIES CIVIL AFFAIRS: SOLDIERS BECOME GOVERNORS 33 (1964) [hereinafter COLES & WEINBERG]. "The planners did not consider the declaration of military government desirable but were obliged to plan for it as a possibility." *Id.* at 33 n. 7.

The ideal type of military government is one which, coming into being amid the utter chaos of a

allowing the local Vichy French authorities to continue administering the territories.⁴⁵⁰ However, the Americans discovered that it was very difficult to occupy a territory without being dragged into civil affairs matters.⁴⁵¹

civilian population whose armed forces have just been subjected to military defeat, can restore order and stability with dispatch and at the same time integrate the local institutions and psychology of the occupied area and the superimposed military authority with a minimum of change in the former and a maximum of control by the latter.

Prospectus of the School of Military Government, March 1942, reprinted in *id.* at 145.

⁴⁵⁰ Hence, President Roosevelt directed the chief of civil administration to inform the local "reliable" French nationals that "[n]o change in the existing French Civil Administration is contemplated by the United States." Revised Directive from President Roosevelt to Robert D. Murphy, Chief Civil Administrator, Allied Forces Headquarters of Sept. 22, 1942 reprinted in COLES & WEINBERG, *supra* note 449, at 32. Further enticement for local cooperation came as remuneration and a promise to exclude the forces of General de Gaulle from the local occupation forces. "Money . . . will be made available for additional expenses incurred through co-operation with American Forces." *Id.* Pursuant to an agreement between American General Eisenhower and Vichy Marshall Petain, Admiral Darlan assumed authority over all the local French military and civilian institutions. "I hope it can be generally understood that the arrangement we have is one made for practical military purposes and should not be attacked as long as it works at its present efficiency and until the objects for which this army was directed to invade Africa have been attained." Message from General Eisenhower to the War Department of November 20, 1942, reprinted in *id.* at 36.

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Due to the lessons learned in Africa, the Allies planned for the occupation of Italy in a more realistic manner. The

[T]he sooner I can get rid of all these questions that are outside the military in scope, the happier I will be! Sometimes I think I live ten years each week, of which at least nine are absorbed in political and economic matters.

Message from General Eisenhower to General Marshall of Nov. 30, 1942, *reprinted in id.* at 45.

It is ... quite certain that any planning for military government, based on the assumption that the legal *status quo* in the territory occupied should be supported and the existing local personnel utilized, is on dangerously weak foundations. It will not always be easy to define the legal *status quo* and it may be highly undesirable to support it when it is defined. Shall we, for example, wish to give military sanction to the legal *status quo* in Nazi Germany ... ? Shall we want to endorse the Nazi educational system? Analogous questions will arise in other countries, some very difficult questions in confused areas like Alsace and Lorraine. They will have to be answered by the military governor with the uncomfortable feeling that the answer he gives will itself establish a *status quo* which will tend to perpetuate itself and profoundly influence the pattern of ultimate peace.... These are not the kinds of problems which can be solved out of military government books. The areas likely to be occupied must be studied intensively, the local personnel must be checked, the realities of the *status quo* as distinguished from the textbook version of it must be carefully appraised.

Memorandum from General W. Donovan, Director of the Office of Strategic Services to Deane the secretary of the Joint Chiefs of Staff of Apr. 12, 1943, *reprinted in id.* at 145-46.

Allies established the Allied Military Government of Occupied Territory (AMGOT) to administer Italy.⁴⁵² AMGOT planned to follow the principles of the Hague Regulations.⁴⁵³ To follow the Allied policy of dissolving Fascist organizations and abolishing discriminatory laws based on race, creed, or color,⁴⁵⁴ the Allies promulgated AMGOT Proclamation No. 7, "Dissolution of Fascist Organizations and Repeal of Laws."⁴⁵⁵

⁴⁵² Memorandum of Allied Forces Headquarters of May 1, 1943, reprinted in COLES & WEINBERG, *supra* note 449, at 181-83 (establishing an organization for AMGOT forming the basic legislative structure under which territory was to be governed).

⁴⁵³ Thirteen proclamations and two general orders were drafted during the planning for the occupation of mainland Italy dealing mostly with routine new occupation administrative matters such as enumerating crimes against the Allied military, Proclamation # 2; establishing currency, Proclamation # 3; establishing military courts, Proclamation # 4; temporarily closing financial institutions, Proclamation # 5; control of food distribution, Proclamation # 8; and establishing police and security regulations, Proclamation # 11. AMGOT Proclamations are reprinted in *id.* at 187.

⁴⁵⁴ "Distinction shall be drawn between (a) such organizations as do not exist for the benefit and security of the people . . . and those organizations which are of direct benefit to the people and whose removal would adversely affect the efficiency of the administration." Article 6 of Combined Chiefs of Staff Directive, Organization and Operation of Military Government for HUSKY of June 28, 1943 reprinted in *id.* at 177.

⁴⁵⁵ "The dissolution of the Fascist party and its subsidiary organizations and the establishment of provisions to deal with the properties of the Party and of such organizations." AMGOT Proclamation # 7 reprinted in *id.* at 187.

Proclamation No. 7's international legal basis was uncertain.⁴⁵⁶ This ambiguity led to civil affairs officers receiving no useful guidance prior to the Allied occupations.⁴⁵⁷

On July 26, 1943, during the final preparations for the Allied invasion, Mussolini fell from power and King Vittorio

⁴⁵⁶ The difficulty in departing from noninterference as the general rule was not merely one of administrative expediency because the international law of belligerent occupation, as stated in the Hague and Geneva Conventions still incorporated the doctrine of noninterference which was no longer adhered to in the express political aims of the United Nations. The proclamation was unclear on the basis of its international legal authority and did not invoke the claim of the Allies being "absolutely prevented" from maintaining the discriminatory laws and Fascist institutions under Article 43 of the Hague Regulations. COLES & WEINBERG, *supra* note 449, at 146 n. 4.

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Of the initial assumptions concerning civil affairs in World War II none was more fallacious than the idea that there is a distinct boundary line between the military and the political.... The only hope for civil affairs officers abroad lay in quickly realizing the falsity of all the indoctrination about their non-political role in Italy and in trying to lift themselves by their own bootstraps. Since they had not been taught the politics of civil affairs they would have to learn it themselves, the hard way.

Id. at 158 (lacking clear and comprehensive directives from the State Department, civil affairs officers had difficulty with political problems and judgments).

Emanuele III appointed Marshall Pietro Badoglio to fill Mussolini's place.⁴⁵⁸ Badoglio met with the Allies and made arrangements for the permissive Allied liberation of Italy.⁴⁵⁹ After fleeing Rome to the South,⁴⁶⁰ the Italian government consisted of the King and Badoglio. In an effort not to destroy the Italian government's prestige, the four Southern provinces were controlled by the King and Badoglio with the assistance of Allied officers and became known as the "King's

⁴⁵⁸ CHAMBERS, *supra* note 17, at 1035.

⁴⁵⁹ Badoglio signed a capitulation agreement and approximately one month later the King declared war on Germany. According to the "Short Term" Armistice Agreement, the commander in chief of the Allied forces had the power to "establish Allied Military Government over such parties of Italian Territory as he may deem necessary in the military interests of the Allied Nations." In areas not administered by the Allies, the Italian Government "[bound] itself to take such administrative or other action as the [Allied] Commander in Chief may require, . . ." "Short Term" Armistice Agreement of September 3, 1943, Article 10 reprinted in COLES & WEINBERG, *supra* note 449, at 227. The Badoglio government agreed to disband all Fascist institutions and rescind all laws discriminating on the basis of race, color, creed, or political opinion in the "Long Term" Armistice Agreement. Additional conditions of the Armistice of September 29, 1943, Articles 30 & 31, reprinted in *id.* at 235.

⁴⁶⁰ "[T]he King and Badoglio left Rome by automobile in great haste at 5 a.m. 9 September [1943]." Message from General Eisenhower to the Combined Chiefs of Staff of September 18, 1943 reprinted in *id.* at 231.

Italy."⁴⁶¹ The Badoglio government rubber stamped Allied measures as a method of installing Allied policies under internal domestic law, instead of resorting to international law.⁴⁶² Even though the Allied policy was to extend the nominal jurisdiction of the Badoglio government as much as possible, the weakness of the Badoglio government⁴⁶³ caused the Allied military administration to initially control Italian areas in central Italy recovered from the Germans.⁴⁶⁴

⁴⁶¹ "The importance of the Badoglio administration [was] its unchallenged claim to legality," Message from General Eisenhower to the Combined Chiefs of Staff of September 18, 1943 *reprinted in id.* at 231.

⁴⁶² The Italian government formed no policies of its own. "Badoglio has made repeated references to the spirit of the message from the President and the Prime Minister. He points out to us that his administration is conscientiously and loyally carrying out the terms of the armistice and has surrendered the Italian fleet." Message from General Eisenhower to the Combined Chiefs of Staff of Sept. 18, 1943 *reprinted in id.* at 231.

⁴⁶³ The government had no means to carry out any measures: ". . . when we arrived at Brindisi in September of last year there was virtually no Italian government and no administrative machine. There was the Italian Prime Minister, Marshal Badoglio, with two service ministers but without any other colleagues or any of the officials, archives, or even typewriters that are the apparatus by which administration can be carried on." Address of Captain Ellery W. Stone of August 22, 1944 *reprinted in id.* at 230.

⁴⁶⁴ Although the authority of the Italian government over areas under Allied military administration was formally restored on Feb. 9, 1944, Badoglio secretly agreed that the Allies would retain the powers they had been exercising in this area.

France,⁴⁶⁵ Yugoslavia,⁴⁶⁶ and one self-determination movement⁴⁶⁷ were contesting Italy's title to the Northern

"Shortly after the first handover of territory to the Italian Government which took place on 11 February 1944, there was an exchange of letters between the then Chief Commissioner, LT. GEN. Sir Noel Mason-MacFarlane and the then Prime Minister, Marshall Badoglio . . . In effect by these letters it was agreed that all senior government appointments would be subject to the prior approval of the commission." Letter from Colonel G. B. Upjohn of November 18, 1944 reprinted in COLES & WEINBERG, *supra* note 449, at 507.

⁴⁶⁵ Per the Allied plan, General DeGaulle's French Army invaded a Northwest frontier area considered undisputed Italian territory. In defiance of the Allied plan, France refused to hand the province over to the Allied Military Government. *Id.* at 587-89. Only after President Truman sent a letter to General de Gaulle threatening to cut off American supplies of military equipment and munitions, did the French acquiesce. Letter from President Truman to General de Gaulle of June 6, 1945 reprinted in *id.* at 570. Message from Field Marshall Alexander to the Combined Chiefs of Staff of June 10, 1945, reprinted in *Id.*

⁴⁶⁶ "Venezia Giulia, which included the port of Trieste and the Istrian Peninsula, had once been part of the Austro-Hungarian Empire but had been ceded to Italy [by Yugoslavia] at the end of World War I." COLES & WEINBERG, *supra* note 449, at 587. Operating in parts of Venezia Giulia and continuing their advance through the province, Yugoslav forces under Marshall Tito presented a serious difficulty, occupation designed to lead to annexation. To avoid the use of force against an ally, a division of the territory for purposes of military occupation along the "Morgan" line was established. Following the peace treaty with Italy, Venezia Giulia was divided between Yugoslavia and Italy with Trieste serving as a customs-free port for the ships of all nations. *Id.* at 587-89.

⁴⁶⁷ The South Tirolese population, claiming a right to self-determination, demanded the creation of a new independent republic. The Allied Military Government met this challenge

provinces. These countries believed that, as in nineteenth century occupations, the identity of the occupant would determine later sovereignty over the territory. The British and Americans occupants favored continued Italian sovereignty over the provinces, but could not quickly reintroduce an Italian administration due to local hostility toward the Italian government.⁴⁶⁸

2. *Bailment Analysis: Bailees Must Meet Duty of Care*

The Badoglio government, as the rightful sovereign, gave the Allies custody, but not possession of Southern Italy.⁴⁶⁹ The Allies' possession in Southern Italy was subject to the Badoglio government's domination. Although the Badoglio government chose to "rubber stamp" the desires of the Allies, it had the legal option of issuing the order the Allies desired or demanding the Allies leave Southern Italy.

If the Allies had taken possession of central and Northern Italy for themselves, their possession would have

by maintaining the territory within Italy's jurisdiction, while encouraging self-government. *Id.* at 571.

⁴⁶⁸ By January 1946, Italy had resumed administration of its territories. *Id.* at 636-39.

⁴⁶⁹ See *supra* note 219 and accompanying text (comparing possession to custody).

been illegal. Under *jus tertii*, the entity currently in possession, the Axis powers, had better claims to the territories than states such as the Allies. Only the Badoglio government, the lawful sovereign, had a better claim to the territory than the Axis powers.⁴⁷⁰ This was the status of the territory under Yugoslavian possession. The same status would have applied to the status of the territory the French reluctantly returned to Italy. Also, this would have been the status of the self-determination movement if it had succeeded. Due to the Allies taking the territories for the rightful sovereigns, the Allies were bailees of the territories for the rightful sovereign bailors.

The Allies had both possession and intent to possess the territories as the bailees. The Allies obtained their lawful possession through agreement with the Badoglio government, the rightful sovereign and bailor. Even though Badoglio's bargaining position was not equal to the Allies' bargaining position, Badoglio was not under undue duress during the negotiations. Badoglio could either cooperate with the Allies or allow his territory to remain in German possession.

⁴⁷⁰ See *supra* note 339 and accompanying text (explaining *jus tertii*).

Regardless of how the Allies obtained possession of the territories, as bailees they had a duty to care for the territories. Due to mutual agreements creating these bailments, the bailments were for the benefit of both the bailor and the bailees. The Allies would make military gain against the Axis powers and the Badoglio government would regain possession of Northern and central Italy. Hence, the Allies were under a duty of ordinary care. When the bailor, the Badoglio government, was capable of properly administering Northern and central Italy, it regained possession of its territories.

F. The Allied Occupations of Germany and Japan

1. Traditional Analysis: Victors Do Not Apply Hague Regulation's Standards

The Allied occupation of Germany was more than a mere repeat of the World War I occupant and occupied role reversal. The World War II occupation was pursuant to an unconditional surrender rather than World War I's Armistice Agreement. In addition to the eradication of existing national institutions and their replacement with democratic institutions,⁴⁷¹ the

⁴⁷¹ "Three elements . . . the apprehension and punishment of war criminals, the arrest and detention of Nazi leaders, and

Allies required the unconditional surrender of Germany and Japan as the requisite condition for the termination of hostilities.⁴⁷² Although the newly formed United Nations authorized such actions,⁴⁷³ the conservative legal scholars of the time did not view the changing of occupied political institutions as legal according to the Hague Regulations.⁴⁷⁴

the removal and exclusion from office and other positions of responsibility . . . came generally to be identified with the concept of denazification" ROBERT WOLFE, ED., AMERICANS AS PROCONSULS UNITED STATES MILITARY GOVERNMENT IN GERMANY AND JAPAN, 1944-1952 212-13 (1977).

⁴⁷² "The German armed forces on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her." DEP'T OF STATE, PUBLICATION 2783 EUROPEAN SERIES 23, OCCUPATION OF GERMANY POLICY AND PROGRESS 1945-46 79 (Aug. 1957) [hereinafter DEP'T OF STATE, PUBLICATION 2783]. "On August 14[, 1945] the Japanese made their second offer of surrender and President Truman issued a statement of acceptance. The second offer of surrender, said the President, was 'a full acceptance of the Potsdam Declaration which specifies the unconditional surrender of Japan.'" DEP'T OF STATE, PUBLICATION 2671 FAR EASTERN SERIES 17, OCCUPATION OF JAPAN POLICY AND PROGRESS 4 (1946) (reprinting President Truman's acceptance at appendix 6).

⁴⁷³ DEP'T OF STATE, PUBLICATION 2783, *supra* note 472, at 79.

⁴⁷⁴ See *supra* note 455-56 and accompanying text. Scholars considering how to justify replacing totalitarian regimes with democratic regimes under the Hague Regulations have explored the term "absolutely prevented" in Article 43 and moral arguments. "The Allied belligerent occupants may fairly be said to have been 'absolutely prevented' by their own security

By equating the unconditional surrender of Germany and Japan to the customary *debellatio* exception to the Hague Regulations law of occupation, the Allies claimed that international law did not apply.⁴⁷⁵

According to customary international law, the *debellatio* exception to the law of occupation occurs when a state has totally disintegrated and does not continue to challenge its foe.⁴⁷⁶ *Debellatio* conditions are determined on a purely

interests from respecting, for instance, the German laws with respect to the Nazi Party and other Nazi organizations and the 'Nuremberg' racial laws." MCDUGAL & FELICIANO, *supra* note 48, at 770. "If, in those circumstances [of unconditional surrender], the victors are not 'absolutely prevented' . . . from respecting those institutions, then those words ['absolutely prevented'] have no sensible meaning." GREENSPAN, *LAND WARFARE supra* note 54 at 225).

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[I]t may be observed that the constellation of events with which the Allied Powers were confronted in 1945 was quite different from that with respect to which the laws of belligerent occupation has traditionally been invoked and applied. . . . There appeared no possibility however remote that the Allied Powers might yet be expelled by a reversal of military fortunes; *ultima victoria* had been achieved and Allied control could in no sense be characterized as precarious.

MCDUGAL & FELICIANO, *supra* note 48, at 769-70 n. 95.

⁴⁷⁶ See *supra* notes 29-30 and accompanying text (explaining *debellatio*).

factual basis.⁴⁷⁷ The factual situation in Germany met the *debellatio* conditions and the four occupying powers acquired sovereignty over the territory.⁴⁷⁸ The transfer of sovereignty to the conquerors made the law of occupation inapplicable. The courts⁴⁷⁹ and scholars⁴⁸⁰ accepted the position that the

⁴⁷⁷ A written formal surrender instrument is not a requirement for *debellatio*. GERSON, *supra* note 25, at 5.

⁴⁷⁸ The Allied announcement of June 5, 1945 reflects this by declaring they had assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the high command, and States, municipal or local government or authority." Reprinted in ANDO, *supra* note 30, at 185. "The German forces in the field and the German Government had actually been destroyed . . . There was no exiled German government which could be regarded as the bearer of formal sovereignty." McDOUGAL & FELICIANO, *supra* note 48, at 769-70 n. 95.

⁴⁷⁹ See, e.g., "The Control Council and the Zone and Sector Commanders in their perspective spheres are . . . the supreme organs of government in Germany." *Grahame v. Director of Prosecutions*, 14 Ann. Dig. 103 (Ger., Brit. Zone of Control, Control Commission Ct. Crim. App. 1947); *Dalldorf v. Director of Prosecutions*, 16 Ann. Dig. 435 (Ger., Brit. Zone of Control, Control Commission Ct. Crim. App., Dec. 31, 1949).

⁴⁸⁰ See, e.g., "The [Berlin Declaration] means that the German territory, together with the population residing on it, has been placed under the sovereignty of the four powers. It means further that the legal status of Germany is not that of 'belligerent Occupation'." Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945). "Germany's military defeat . . . resulted in the transfer of sovereignty over Germany to the Allies. As a result of subjugation . . . [t]he [Allied] occupants do no longer act in lieu of the 'legitimate sovereign'. They themselves exercise sovereignty. . . . One of the prerogatives of the Allies resulting from the subjugation is the right to

Allies had sovereignty, and their actions were merely internal matters not governed by international law.

Considering the factual scenario, Japan, unlike Germany, still had a functioning sovereign government before and after the signing of the Instrument of Surrender. The Japanese probably retained their sovereignty.⁴⁸¹ Therefore, the legal source of Allied authority was the Instrument of Surrender based on the Potsdam Declaration and the Japanese responses.⁴⁸²

occupy German territory at their discretion." Fried, *Transfer of Civilian Manpower from Occupied Territories*, 40 AM. J. INT'L L. 303, 326-27 (1946). See also Jennings, *supra* note 22, at 135; Freeman, *War Crimes by Enemy Nationals Administering Justice in Occupied Territories*, 41 AM. J. INT'L L. 579, 605-6 (1947).

⁴⁸¹ ANDO, *supra* note 30, at 100 (noting that the American administration acted through the Japanese government instead of in place of the Japanese government) But cf. *Cobb v. United States*, 191 F.2d 604 (9th Cir. 1951), cert. denied, 342 U.S. 913 (1952) (holding that the United States acquired *de facto* sovereignty over the formerly Japanese island of Okinawa, but that *de jure* sovereignty had not passed to the United States, because a formal act of annexation, or at least an intention to annex, had not been communicated); Freeman, *supra* note 480, at 606 (maintaining that the situation in Japan was similar to the one in Germany, notwithstanding the continued functioning of the Japanese government).

⁴⁸² Reprinted in ANDO, *supra* note 30, at 127-30. The Basic Initial Post-Surrender Directive to the Supreme Commander for the Allied Powers (SCAP) for the Occupation and Control of Japan, of November 3, 1945, Section 2, *Reproduced in id.* at 137, states that those instruments are the basis for SCAP's authority over Japan as "Supreme Commander." and "In addition to the conventional powers of a military occupant of enemy territory, you have the power to take any steps deemed

The terms of the Instrument of Surrender were sufficiently broad to enable the Allies to use the Japanese government as an intermediary in implementing changes to Japan's laws and institutions similar to those in Germany.

German⁴⁸³ and Japanese⁴⁸⁴ scholars pointed out that even though the old domestic government institutions had disappeared, international law should not abandon the concerns of the indigenous population.⁴⁸⁵ The peoples did not lose their sovereignty when they lost their governing elite. The

advisable and proper by you to effectuate the surrender and the provisions of the Potsdam Declaration."

⁴⁸³ von Laun, *The Legal Status of Germany*, 45 AM. J. INT'L L. 267 (1951).

⁴⁸⁴ ANDO, *supra* note 30, at 76-77 (arguing for occupants to follow the spirit as well as the letter of the Hague Regulations).

⁴⁸⁵ Although he based his argument on the then prevailing sovereignty lies with the states' elite approach, Ax Hubbell, president of the ICRC, showed his concern for the conquered peoples in a letter to United States Secretary of State Byrnes:

Unconditional surrender of the German and Japanese forces which resulted in their laying down arms without the special reservations usually inserted in armistice conventions, does not *ipso facto* imply that the capitulating power abandons all claim to the benefits of the Hague and Geneva Conventions in favor of its nationals.

Reprinted in Freeman, *supra* note 480, at 605 n. 138 (excerpt).

local peoples were the basis for sovereignty. The elite only acted with sovereignty when they were acting in accordance with the peoples. The governing elite were losing their unconditional claim of representing their state's sovereignty.

2. Bailment Analysis: Bailees Must Meet Duty of Care

Japan's government was the proper sovereign and bailor of the island. During the occupation, the Allies had both possession and intent to possess Japan as bailees. The Allies obtained their possession through the agreement reached through the Japanese responses to the Potsdam Declaration. Even though the bargaining positions were not equal, Japan was not under undue duress during the negotiations. Japan could either reach an agreement or choose to continue its illegal aggressive armed conflict until Japan suffered a total military defeat. Regardless of how the Allies obtained possession of Japan, as bailees they had a duty to care for the territory. Due to mutual agreement creating the bailment, the bailment was for the benefit of both the bailor and the bailees. All parties to the agreement could end their state of armed conflict and begin rebuilding their nations. Hence, the Allies were under a duty of ordinary care. Following the

occupation, Japan, the lawful bailor and rightful sovereign, regained lawful possession of the island.

If, as the majority of scholars agree, the German government ceased to exist, the Allies assumed sovereignty of Germany under *debellatio* conditions and the later Allied transfer of sovereignty to a newly formed German government was merely a lawful transfer of legal title to the territory and not a bailment. If the German government continued to exist, the bailment analysis of the Allied occupation of Germany would mirror that of the Japanese occupation.

VI. Analyzing Annexations According to the Traditional and Bailment Views

In order to better understand the foreign possession operations of the last half of the twentieth century, I will review the operations in groups according to the traditional classification rather than operation chronological order. This first group of foreign possession operations, annexations, evinces some states have ignored the inalienability of sovereignty by force with varying degrees of success. I will start with the worst defeat for international law and progress to an international law success.

A. *Traditional Analysis of the Indonesian Occupation of East Timor: World Acquiescence*

The Island of Timor consisted of two European colonies.⁴⁸⁶ The Dutch controlled the Western part, which became a part of Indonesia at the same time as Indonesia's independence from colonial rule.⁴⁸⁷ The Portuguese had controlled the Eastern part of the Easternmost island of the Indonesian Archipelago since the 1500s.⁴⁸⁸ On August 11, 1975, during the decolonization process in which the popular East Timor Fretilin Movement (Frente Revoluionaria de Timor Leste Independente) was cooperating with Portuguese forces still

⁴⁸⁶ "The island of Timor lies some 300 miles off the northwest coast of Australia, at the tip of the main chain of Islands forming the Republic of Indonesia. Before World War II, the western half of the island was administered by the Netherlands, the eastern half by Portugal." CATHOLIC INSTITUTE FOR INTERNATIONAL RELATIONS & INTERNATIONAL PLATFORM OF JURISTS FOR EAST TIMOR, INTERNATIONAL LAW AND THE QUESTION OF EAST TIMOR 66 (1995) [hereinafter CIIR & IPJET].

⁴⁸⁷ "When Indonesia gained its independence from the Netherlands in 1949, the western half became Indonesian Timor, a part of Indonesia." *Id.* at 66. West Timor gained its independence on 2 Nov. 1949. B. NICOL, TIMOR: THE STILLBORN NATION, 13 (1978) [hereinafter NICOL].

⁴⁸⁸ NICOL, *supra* note 487, at 12 (suggesting the Portuguese landed in 1520 in search of sandalwood). CIIR & IPJET, *supra* note 486, at 13.

stationed in East Timor,⁴⁸⁹ Indonesia backed an armed attack against the Fretilin movement.⁴⁹⁰ By the end of August 1975, the Portuguese forces had left East Timor and Fretilin had established control over East Timor and forced the pro-Indonesian leaders out of the country.⁴⁹¹ On December 7, 1975, Indonesia successfully launched its major offensive that killed half of the East Timorese (300,000 people) in the process of bringing East Timor under Indonesian possession.⁴⁹²

⁴⁸⁹ "From the outset, the Fretilin administration seemed popular and reasonably efficient." CIIR & IPJET, *supra* note 486, at 43.

⁴⁹⁰ "East Timor was evacuated by the Portuguese authorities in August, 1975 during civil disorders condoned . . . if not fermented, by the Indonesians." *Id.* at 66.

⁴⁹¹ "By 27 August, Dili [, the capitol,] was completely under Fretilin's control, and on the first week of September, regional areas of UDT [, the Indonesian backed Timorese Democratic Union,] surrendered." *Id.* at 40. During its three months in control of East Timor, the Fretilin was widely popular with the local people. The quick resolution of the fighting stifled Indonesia's plan to intervene as peacemakers. On November 28, 1975 the Fretilin unilaterally declared the independence of East Timor, which was not recognized by Portugal or the United States. A BARBEDO DE MAGALHAES, *EAST TIMOR: LAND OF HOPE* 31-33 (1990) [hereinafter *DE MAGALHAES*] (reporting on the presentations during the second symposium on Timor at Oporto University).

⁴⁹² Jack Anderson, *Island Losing a Lonely Infamous War*, *WASH. POST*, Nov. 8, 1979, at 11, col. 4 (estimating about half of the 1975 population of 600,000 had been "wiped out by warfare, disease and starvation"). "There was no declaration of war and . . . the Indonesian Foreign Ministry issued a statement that the attackers were merely Timorese belonging to the

After the invasion, Indonesia installed puppets as the "Provisional Government of East Timor" and a "People's Assembly" unanimously approved a petition for integration with Indonesia on May 31, 1976.⁴⁹³ East Timor was under Indonesian military rule despite the facade of a pro-Indonesian puppet governor and "Regional People's Representative Council."⁴⁹⁴

[anti-communist movement] and Indonesian volunteers." DE MAGALHAES, *supra* note 491, at 36.

Indonesian forces have been landed in Dili by sea . . . They are flying over Dili dropping out paratroopers . . . A lot of people have been killed indiscriminately . . . Women and children are going to be killed by Indonesian forces. We are going to be killed . . . SOS . . . We call for your help. This is an urgent call.

Message received by a Darwin transmitter tuned to the Red Cross Radio in Dili hospital of 8 Dec. 1975 reprinted in CIIR & IPJET, *supra* note 486, at 48 n. 70.

⁴⁹³ "On May 31, 1976 a 28-member 'Peoples Consultative Committee' in Dili decided that East Timor would be immediately integrated into Indonesia without a referendum." CIIR & IPJET, *supra* note 486, at 52. NICOL, *supra* note 487, at 314 (reporting on attempts to establish legitimacy to Indonesian incorporation of East Timor, on 31 May 1976 a 28-member Popular Assembly of East Timor unanimously approved a petition calling for integration).

⁴⁹⁴ The members of the "Representative People's Assembly" were not elected but the Assembly was formed by individuals named on the basis of "consensus and consent." These Assembly members were designated by the occupying force. In its first meeting, members unanimously approved a petition to accept integration of the territory as a part of the Republic of Indonesia. On July 16, 1976 the Indonesian Parliament accepted the petition and the Republic of Indonesia

Indonesia's "integrasi" policy sought to control the Timorese by illegal means.⁴⁹⁵ Given the strategic position of Indonesia,⁴⁹⁶ the international community's transition from a

"promulgated the decree of incorporation of Portuguese Timor as the twenty-seventh Indonesian province." DE MAGALHAES, *supra* note 491, at 39. "[E]xcept in the towns of Dili and Baucau, the wishes of the people could better be expressed through their traditional leaders who would form a 'People's Consultative Committee' of 400 to 500 members." CIIR & IPJET, *supra* note 486, at 52. The first head of the Regional People's Representative Committee of East Timor asserted that the liurai (tribal kings) would reflect popular aspirations more accurately than political parties although all but seven of the 35 liurai of the pre-war era were replaced due to deaths, disappearances and imprisonments. CIIR & IPJET, *supra* note 486, at 32-33.

⁴⁹⁵ Incidents reported from various sources in DE MAGALHAES, *supra* note 491 included the following. Obtaining illegal title to Timorese land by requiring forfeiture for failure to provide excessive registration fees. *Id.* at 50. Forcing all Timorese aged 15-50 to enlist for use as human shields. *Id.* at 50. Killing nearly all political prisoners from 1975 to 1980. *Id.* at 49. Killing most living things in the territory to include 90% of the livestock, one quarter of the people, and scorched earth razing of the land to effectively end the sandalwood trade. *Id.* at 57. Implementing a program of forced sterilization. *Id.* at 58. Forbidding the use of the Timorese people's language of Tetum in the schools and churches. *Id.* at 59. Bringing 100,000 immigrants from Java and other islands. *Id.* at 58. Implementing a program of systematic rape of Timorese women by occupation soldiers. *Id.* at 59. Denying the ICRC access to East Timor from 1976 through 1982. *Id.* at 40.

⁴⁹⁶ "An important strategic factor--control of the Ombai Water Straits--has also guided Washington's support for Indonesia's seizure of East Timor. . . . [T]hese straits are crucial to the Pentagon for passage of its Poseidon and Polaris nuclear submarine fleets through a zone completely dominated by the Indonesian archipelago." CARMEL BUDIARDGO & LIEM SOEI LIONG, *THE WAR AGAINST EAST TIMOR* 10 (1984). "The offshore oil reserves in the

quickly announced strong denunciation of the Indonesian occupation⁴⁹⁷ to a *de facto* acquiescence⁴⁹⁸ over the course of years was not difficult to predict.

The remaining resistance to the Indonesian annexation of East Timor comes from the Non-Aligned Movement⁴⁹⁹ and the Roman Catholic Church. Ever since the invasion of East Timor,

sea of Timor and Australia, are considered to be among the twenty largest such deposits in the world." DE MAGALHAES, *supra* note 491, at 15.

⁴⁹⁷ On December 12, 1975 the General Assembly of the United Nations approved a resolution deploring the intervention of the Indonesian armed forces in Portuguese Timor and on December 22, 1975 the United Nations Security Council unanimously approved a resolution "calling upon the government of Indonesia to withdraw without delay all its forces from the territory". From 1976 to 1982 "the U.N. General Assembly approved resolutions on East Timor reaffirming its right to self determination and independence." DE MAGALHAES, *supra* note 491, at 37-40.

⁴⁹⁸ "Since 1983, the East Timor item had appeared annually on the agenda of the General Assembly. No general debate has, however taken place, but the mandate of the Secretary General to bring the parties together has continued." CIIR & IPJET, *supra* note 486, at 73 n. 49. On January 20, 1978, the Australian government formally recognized Indonesia's sovereignty over East Timor six weeks prior to the permanent sea-bed boundary negotiations that benefited Australia with a multi-million dollar off shore oil exploration program. NICOL, *supra* note 487, at 317.

⁴⁹⁹ The Non-Aligned Movement defended the rights of the people of the territory, in spite of the fact that Indonesia is one of the main founders of the Non-Aligned Movement. DE MAGALHAES, *supra* note 491, at 42.

Indonesia has never been able to chair the summit of Non-aligned Heads of State, even though the right of the people of East Timor to self-determination has been dropped from the Non-Aligned Movement's final declarations since 1983.⁵⁰⁰ The Vatican resistance to "intergrasi" and publicizing the monitoring of human rights abuses and the population's ill treatment are obstacles to Indonesia's full acceptance in the world community.⁵⁰¹

B. Traditional Analysis of the Moroccan Occupation of Western Sahara: International Community "Lip Service" to the Law of Occupation

The international community's reaction to the occupation of the Western Sahara was slightly better than its complete disregard for East Timor's plight. Pursuant to the United

⁵⁰⁰ "Sept 5 [,1988] Concluding its annual meeting, the Non-Aligned Movement calls in Nicosia for guarantees to respect the right to self-determination. Indonesia fails in its bid to be elected chair of the NAM for the coming year." JOHN G. TAYLOR, *THE INDONESIAN OCCUPATION OF EAST TIMOR 1974-1989 A CHRONOLOGY* 88 (1990).

⁵⁰¹ "Jan 1 [,1985] A statement written by the Council of Catholic Priests in East Timor refers to the military organizing regular 'clearing up' operations, using children 'fence of legs' operations, arresting people en masse, promoting resettlement, and demanding that the inhabitants of resettlement villages undertake 'nightwatch' duties." *Id.* at 51.

Nations General Assembly's decolonization declaration,⁵⁰² Spain was planning to allow the peoples of Western Sahara, an area rich in phosphate deposits, to exercise their right to self-determination.⁵⁰³ However, King Hassan of Morocco claimed his country had a legal right to the Western Sahara.

After the International Court of Justice rejected Morocco's claims to the Western Sahara,⁵⁰⁴ Morocco staged the "Green March," of 350,000 unarmed Moroccans into the Western Sahara from November 6 to 9, 1975.⁵⁰⁵ After the march, Spain, Morocco, and Mauritania signed the Madrid Agreement in which the Spanish government transferred authority over the Western Sahara to Morocco and Mauritania.⁵⁰⁶

⁵⁰² United Nations General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly Resolution 1514 (Dec. 14, 1960).

⁵⁰³ George A. Pickart, *The Western Sahara: The Referendum Process in Danger*, S. Prt. 102-75, 102d Cong., 2d Sess. 1 (1992) [hereinafter S. Prt. 102-75] (announcing its intention to hold a referendum on the future status of the territory, after nearly 100 years of colonial rule).

⁵⁰⁴ "[T]he court advocates the principle of 'self-determination and genuine expression of the will of the people' to decide the legal status of the territory." S. Prt. 102-75, *supra* note 503, at 1. *Western Sahara (Advisory Opinion)*, 1975 I.C.J. 12.

⁵⁰⁵ S. Prt. 102-75, *supra* note 503, at 1.

⁵⁰⁶ *Id.* (granting temporary authority over portions of the Western Sahara to Morocco and Mauritania upon the withdrawal of Spanish troops).

Morocco and Mauritania agreed on the partition of the Western Sahara and the joint use of the area's phosphate deposits, and each began occupying its portion. Morocco claimed it had annexed the areas under its possession. After signing a 1979 peace agreement with the Polisario (popular Front for the Liberation of Saguia el Hamra and Rio de Oro) as the exiled government of the self-proclaimed Saharan Arab Democratic Republic (SADR), Mauritania withdrew from the Western Sahara.⁵⁰⁷ Morocco immediately filled the occupant void. A 1992 estimate for the annual cost of the one hundred thousand Moroccan troops in the Western Sahara was at least one hundred million dollars.⁵⁰⁸

One week after the signing of the Madrid agreement, the United Nations General Assembly "deeply deplore[d the] continued occupation of Western Sahara by Morocco" and

⁵⁰⁷ "[F]ighting between Polisario [SADR] and Moroccan and Mauritanian forces . . . proved so costly to Mauritania that it contributed directly to a coup d'etat and the overthrow of the Mauritanian government. In August 1979 Mauritania signed a cease fire agreement with Polisario and renounced its claims on Saharan territory." *Id.* at 2.

⁵⁰⁸ "Morocco began construction of a fortified defense perimeter to protect the key Saharan towns of Laayoun, Bou Care and Smaara. Construction continued for several years and today the so called 'berm' extends approximately 2,000 kilometers and surrounds all Moroccan-controlled territory in the Western Sahara." *Id.*

reaffirmed the Western Saharan peoples' right to freely exercise its right to self-determination per the 1960 decolonization declaration.⁵⁰⁹ Five years later, in 1984, the Organization of African States admitted SADR to its membership list, but did little more. Twelve years of Polisario guerrilla warfare may have contributed to Moroccan acceptance of a 1991 United Nations-sponsored plan to hold a 1992 referendum on the future of the region. In April 1991, the United Nations Security Council established a Mission for the Referendum in Western Sahara.⁵¹⁰

⁵⁰⁹ See General Assembly Resolution 34/37 (Nov. 21, 1979). The colonial power has no power to transfer title with regard to a colony or to recognize the right of another state to claim the territory. See separate opinion of Judge De Castro in *Western Sahara (Advisory Opinion)*, 1975 I.C.J. 12, 145; Article 73 of the United Nations Charter (delimiting the powers of the colonial power with respect to the inhabitants of the "non-self-governing territories.").

⁵¹⁰ "On April 29, 1991, the Security Council adopted Resolution 690, which formally established the United Nations Mission for the Referendum in Western Sahara (MINURSO). The resolution also set in motion a series of steps that would lead to a cease fire and, in theory, the referendum itself." S. Prt. 102-75, *supra* note 503, at 3.

C. *Traditional Analysis of the Iraqi Annexation of Kuwait: A Law of Occupation Success*

Unlike the prior two annexations, the international community's response to the Iraqi annexation of Kuwait was one time that the international community's action upheld the requirements of codified international law. On August 2, 1990, Kuwait revolutionaries supposedly led a coup against the Kuwaiti emir and requested Iraqi assistance.⁵¹¹ Iraqi forces invaded Kuwait, and a Provisional Free Kuwait Government (PFKG) claimed to replace the al-Sabah regime.⁵¹² One flaw in the Iraqi plan was the failure to enlist Kuwaiti dissidents in the new government. The August 5, 1990 publicly released PFKG membership list contained only the names of Iraqis.⁵¹³ After a supposed Iraqi withdrawal and the establishment of the PFKG's

⁵¹¹ Russell Watson et al., *Baghdad's Bully*, NEWSWEEK, Aug. 13, 1990, at 16, 17.

⁵¹² "The only legal justification Iraq has suggested is that it intervened at the request of Kuwaitis opposed to the Emir, and that these people went on to form the (short-lived) provisional government of Kuwait." Christopher Greenwood, *How legitimate is force against Iraq?*, N.Y. TIMES, Aug. 10, 1990, at A3.

⁵¹³ "The pro-Iraqi regime installed in Kuwait consisted of unknowns with no evident support in Kuwait at any time. They were never more than a puppet government composed of Iraqi army officers." *Id.*

Republic of Kuwait, Iraq fulfilled a PFKG request by annexing Kuwait on August 8, 1990.⁵¹⁴

International reaction was speedy, succinct, and strong. The international community applied the law of occupation's basic tenet of the inalienability of sovereignty through the use of force. On the same day as the Iraqi invasion, the United Nations Security Council passed the first of several resolutions condemning the invasion and demanding Iraq's immediate and unconditional withdrawal.⁵¹⁵

⁵¹⁴ "It was the Iraqi claim that it was 'a bid for sovereignty on the ground that Kuwait was part of the province of Basra under Ottoman rule'" Majis Khadduri, *Iraq's Claim to the Sovereignty of Kuwait*, 23 N.Y.U. J. INT'L L. & POL. 5, 33 (1990). After renaming all the Kuwaiti towns, Iraq incorporated Kuwait as its nineteenth province on August 28, 1990. George K. Walker, *The Crisis Over Kuwait, August 1990-February 1991*, 1991 Duke J. Comp. & Int'l L. 25, 34 [hereinafter Walker].

⁵¹⁵ Security Council Resolution 660 (Aug. 2, 1990) at arts. 1 & 2. Four days later, the Arab League reached a twelve to nine similar decision. On August 6, 1990, a United Nations Security Council resolution called for a blockade of Iraq. Security Council Resolution 661 (Aug. 6, 1990). One day after the annexation of Kuwait, August 9, 1990, the Security Council declared the "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity and is considered null and void" and "call[ed] upon all state, international organizations and specialized agencies not to recognize the annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation." Security Council Resolution 662 (Aug. 9, 1990) ¶¶ 1 and 2. The Security Council later reaffirmed its demand that Iraq rescind its actions purporting to annex Kuwait, demanded Iraq rescind its orders for the closure of diplomatic

D. Bailment Analysis of Annexations: Illegal Bailees Must Meet Duty of Care

The annexing powers were bailees because they had both the possession and intent to possess the territories. The ousted governments were the lawful sovereigns and bailors. The annexing powers obtained possession through the illegal use of aggressive force and were illegal bailees. Regardless of how they obtained possession of the territories, as bailees they had a duty to care for the territories. As with all aggressive use of force possessions, the bailments were for the sole benefit of the bailees. The ousted governments received no benefit from yielding possession of their territories and the annexing powers used the territories for their own illegal ends. Hence, the annexing powers were strictly accountable for the territories under a duty of extraordinary care. The annexations illegally converted the territories' economies by diverting the local economies to support the bailees. Thus far, only the Iraqi bailment ended with the Kuwaiti government as the rightful sovereign and lawful bailee regaining possession of its territory.

VII. Assisting an Indigenous Government According to the
Traditional and Bailment Views

Although all annexing powers are illegal occupants, the determination as to the status of a state claiming to assist an indigenous government requires more careful scrutiny. As shown in the following examples, assisting states can fall anywhere on the illegal to legal continuum.

A. *Traditional Analysis of the Soviet Occupation of
Afghanistan: Inviting Oneself Into Internal Matters*

After the April 27, 1978 coup, a communist government ruled Afghanistan.⁵¹⁹ The new government signed a Treaty of Friendship, Good Neighborliness and Cooperation with the Soviet Union on December 5, 1978.⁵²⁰ During 1979, various

⁵¹⁹ "Communist power in Afghanistan in April 1978, . . . by force of arms through a bloody coup, assisted by the Soviet Union." SCOTT R. McMICHEAL, STUMBLING BEAR SOVIET MILITARY PERFORMANCE IN AFGHANISTAN 1 (1995) [hereinafter McMICHEAL]. "The reign of the Mohommedzai family, extending almost unbroken back to the early nineteenth century, had ended; the long term Soviet goal of establishing a pliable reign in Kabul had apparently been achieved." ANTHONY ARNOLD, AFGHANISTAN: THE SOVIET INVASION IN PERSPECTIVE 72 (1981) [hereinafter ARNOLD].

⁵²⁰ "[A] 'treaty of friendship, good neighborliness and cooperation' [was signed] with Soviet Russia on December 5, 1978 . . . it was this treaty which was cited by Moscow to justify the massive thrust of the Red Army and heavy armour into the heart of its 'good neighbor'" DR. A. M. MANZAR M.A., PH.D., RED CLOUDS OVER AFGHANISTAN 50 (1980).

rebel groups attacked Afghanistan army units and their Soviet advisors.⁵²¹ Late at night that Christmas Eve, Soviet aircraft began to land at Kabul and Begran airports and unload Soviet soldiers as the start of a "coup."⁵²² The basis for Moscow's claim to assist the "Afghan government" with its self-defense was the single request from Babrak Karmal, who held no position in the Afghan government and stayed in the Soviet Union during the fighting.⁵²³

On December 28, 1979, Karmal was unanimously elected leader of the puppet government.⁵²⁴ Later, Karmal's government

⁵²¹ "Soviet officers were involved in the Afghan army down to the company level." W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L. L. 459, 470 (1988) [hereinafter Reisman & Silk].

⁵²² MCMICHEAL, *supra* note 519, at 5.

⁵²³

At approximately 9:15 p.m., Afghan citizens who were tuned in to Radio Kabul heard the voice of Babrak Karmal, leader of the Parcham faction of the PDPA [People's Democratic Party of Afghanistan], in a pre-recorded statement being broadcast from a Soviet transmitter across the border but on Radio Kabul frequency. In the statement, Karmal announced that he had taken over control of the government and had appealed to the Soviet Union for military assistance.

Id. at 6.

⁵²⁴ On December 28, 1979 at 2:40 am Radio Kabul broadcast a message allegedly from the Revolutionary Council's Secretariat, naming Babrak Karmal the council president, and

ceded the strategically important Wakhan corridor to the Soviet Union.⁵²⁵ The Soviet Union claimed it did not interfere in Afghanistan's internal affairs.⁵²⁶ The facts show that the Soviet Union sent money and an army of advisors into Afghanistan to implement measures at all levels that were conducive to a socialist transformation that met with armed resistance.⁵²⁷ Using the puppet Afghan government's authority, the Soviets pursued long-term domination through financial

thus the President of Afghanistan. Reisman & Silk, *supra* note 521, at 473. The former Soviet backed leader of Afghanistan, Hafizullah Amin, was killed on the night of Dec. 27, 1979. *Id.* at 472-73.

⁵²⁵ "It was reported in March 1981 that he[, Pakistan's President Zai,] stated publicly that the corridor was 'now under the Soviet Union . . . The area was being administered directly by military authorities in the Soviet Union . . .'" *Id.* at 478.

⁵²⁶ See *infra* note 531 and accompanying text (explaining analysis of alleged invited assistance).

⁵²⁷ "When the Soviets intervened and installed Karmal as their hand-picked choice for ruler, popular outrage and resentment were such that the ranks of mujahedin swelled immensely as more and more Afghans entered into Jihad--holy war--against the Atheistic, foreign invaders, and its illegitimate puppet, the ruling PDPA." MCMICHEAL, *supra* note 519, at 25. See also Reisman & Silk, *supra* note 521, at 477 (reporting that more than 115,000 Soviet troops were in Afghanistan combating approximately 100,000 resistance fighters by early 1980).

investments which changed the country's infrastructure and acculturation programs.⁵²⁸

Despite the United Nations Security Council's inability to pass resolutions, due to the Soviet Union's veto power, the General Assembly met in an emergency session. The General Assembly voted to reaffirm respect for sovereignty, territorial integrity and political independence, deplored the armed intervention in Afghanistan, and called for an immediate withdrawal of foreign troops from Afghanistan.⁵²⁹

⁵²⁸ One acculturation project involved Soviet indoctrination in Afghanistan and the USSR. Another divide and rule strategy was implemented by abandoning the intertribal language and replacing it with Russian and the unique tribal languages in the public schools and media. See ARNOLD, *supra* note 519, at 109.

⁵²⁹

[reaffirmed] that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which is contrary to its aims and Purposes;

[s]trongly deplored] the recent armed intervention in Afghanistan which is inconsistent with that principle; [and]

[c]all[ed] for the immediate, unconditional and total withdrawal of foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political, and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever.

To determine if claims of local government assistance foreign possession is truly an internal conflict or an international armed conflict⁵³⁰ the international community evaluates the internal lawfulness of the inviting government and the genuineness of the invitation. The Soviet intervention relied on a retroactive affirmation of a supposed invitation from an obviously externally fabricated government. Looking behind the facade, the Soviet Union was nothing more than an illegal occupant.⁵³¹

General Assembly Resolution ES-6/2 (Jan. 14, 1980). This was "the worst defeat suffered by the USSR in that forum since the Korean War." ARNOLD, *supra* note 519, at 115.

⁵³⁰ See *supra* notes 117-19 and accompanying text.

⁵³¹

To suggest that this sort of stratagem can transform an invasion by one's military forces into the territory of another from an armed conflict into either an internal war or no war at all is to signal the end of a large part of the law of armed conflict. If concocted scenarios like this were to be taken at face value, any state could maintain a stable of political would-bes and has-beens of varying national pedigrees. At the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary "invitation."

Reisman & Silk, *supra* note 521, at 482.

*B. Traditional Analysis of the Vietnamese Occupation of
Kampuchea: Humanitarian Occupation*

Although the start of the Vietnamese assistance to Kampuchea appeared as illegal as the Soviet invasion of Afghanistan, the ending of the assistance revealed a quite different situation. The Khmer Rouge regime led by dictator Pol Pott had been the government of Democratic Kampuchea since 1975. During its reign, the Khmer Rouge committed genocide against its own Cambodian people.⁵³² On December 25, 1978, Vietnam invaded Kampuchea⁵³³ at the alleged request of the Cambodian people and claimed that the Vietnamese-backed Kampuchean United Front for National Salvation assisted in the invasion. The bulk of the force was Vietnamese.⁵³⁴ On January 9, 1979, the leader of the Kampuchean Front, Heng Samrin, declared himself the head of the People's Republic of

⁵³² "The revolution that spread through Cambodia between 1975 and 1979 left over a million Cambodians dead and half a million more exiled in Thailand and elsewhere." DAVID P. CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY*, 236 (1991) [hereinafter CHANDLER].

⁵³³ "The assault involved over 100,000 troops as well as naval and air elements." *Id.* at 310.

⁵³⁴ "[T]he Vietnamese denied they were fighting the war. They said the Cambodian front for salvation was doing the fighting." ELIZABETH BECKER, *WHEN THE WAR WAS OVER* 437 (1986).

Kampuchea.⁵³⁵ On February 18, 1979, Kampuchea and Vietnam signed a treaty of peace, friendship, and cooperation.⁵³⁶

During the eleven years of Vietnamese occupation, the indigenous government was highly dependent on the Vietnamese troops, the government indoctrinated people according to traditional Communist practices, and Vietnamese people settled on Kampuchean land. The Hun Sen government ended Pol Pott's reign of terror, implemented economic reforms,⁵³⁷ and received support from a majority of the Cambodians, who feared the return of the Khmer Rouge.⁵³⁸

Late in 1979, the United Nations General Assembly "regretted" the armed intervention and called for the

⁵³⁵ "A puppet government headed by Heng Samrin, the commander from the Eastern zone who had fled to Vietnam in September to avoid execution by Pol Pott" *Id.* at 438.

⁵³⁶ "With the signing of the twenty-five year peace and friendship treaty between Vietnam and the government it installed in Cambodia, the rulers in Hanoi were dominant over all of Indochina." *Id.* at 439.

⁵³⁷ "Over the next ten years conditions slowly stabilized, the economy stumbled to its knees and the Vietnamese loosened its control over many PRK ministries and the PRK's military forces." CHANDLER, *supra* note 532, at 313.

⁵³⁸ See, e.g., H.D.S. Greenway, *Cambodia's Last, Best Chance; Hun Sen's Regime is the Surest Way to Stop Khmer Rouge*, WASH. POST, Mar. 12, 1989, at 1.

immediate withdrawal of Vietnamese forces.⁵³⁹ A 1982 resolution referred to the situation as an occupation.⁵⁴⁰ The Soviet Union immediately recognized the People's Republic of Kampuchea and several third world nations later recognized the new Republic. The Hun Sen government did not represent Kampuchea in the United Nations and other international organizations.⁵⁴¹ After the September 1989 withdrawal of Vietnamese forces, Western governments began to acknowledge the popular internal support for the Hun Sen government.⁵⁴² After the Khmer Rouge began regaining Kampuchean territory, the international community exerted pressure for the warring parties to end their differences peacefully.⁵⁴³

⁵³⁹ General Assembly Resolution 34/22 of Nov. 14, 1979 (reflecting a majority of ninety-one to twenty-one, with twenty-nine abstentions).

⁵⁴⁰ General Assembly Resolution 37/6 of Oct. 28, 1982.

⁵⁴¹ Among the states that felt that the deplorable record of Democratic Kampuchea did not justify the acceptance of a regime installed through external intervention were Australia, France, Malaysia, New Zealand, Pakistan, Singapore, Somalia, and the United States: 33 U.N.Y.B. 1979, at 292 (1982).

⁵⁴² See, e.g., *Back to the Killing Fields*, NEWSWEEK, Sept. 11, 1989, at 40 (citing Hun Sen's argument that if the Khmer Rouge got even a share of power there would be "new massacres of millions of Cambodians.").

⁵⁴³ See, e.g., Jim Mann, *More 'Killing Fields'? U.S. May Have to Back Lesser of Evils in Cambodia*, L.A. TIMES, Oct. 23, 1989.

Looking at the actions taken by the occupants, both the Vietnamese occupation of Kampuchea and the Soviet occupation in Afghanistan violated the Hague Regulations and the Fourth Geneva Convention. Both occupations illegally used force to violate territorial integrity and implemented policies that altered the status quo ante bellum, but the impact on the populace's lives and the reaction of the populace to the occupants were significantly different. The eleven-year Vietnamese occupation improved the people's lives and received local popular support. The nine-year Soviet occupation made living conditions worse and met with armed resistance during the entire occupation.

The Soviet puppet government never received international recognition while the international community accepted the Hun Sen government because it maintained its popular support after the Vietnamese withdrew from Kampuchea. The international community's blind adherence to the premise that the presence of foreign troops equates to an unpopular government, only prolonged the Khmer Rouge's bloody civil war.

The Vietnamese occupation of Kampuchea raised the problem of external intervention for humanitarian reasons. Occupations follow fighting. Due to humanitarian intervention's emergence as a subject of international

debate,⁵⁴⁴ the case of long-term actions for humanitarian reasons or humanitarian occupations is the next step in the evolution of humanitarian law. The foreign possession in a humanitarian occupation protects the peoples from their own government. The occupant's duty for the well-being of the community outweighs the occupant's duty to preserve the status quo ante bellum as the replacement of the government and central institutions may become a lawful necessity. The major criticism of allowing humanitarian occupations is the ease with which it allows an occupant with selfish ulterior motives to cloak its true purpose in the guise of humanitarian assistance.⁵⁴⁵

⁵⁴⁴ Earlier humanitarian interventions that brought about an internationally accepted change of local leadership were the Tanzanian military intervention in Uganda, which ousted Idi Amin's regime (in 1979), and the French action against Emperor Bokassa of the Central African Republic (also in 1979). FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 159, 175 (1988) [hereinafter TESON].

⁵⁴⁵

Nothing in the [United Nations Charter] substantiates the right of one state to use force against another under the guise of insuring the implementation of human rights. If violations of human rights are committed by a state in a manner persistent and systematic enough to be considered a threat to the peace of the international community, measures of collective security may be taken by the United Nations Security Council.

C. *Traditional Analysis of the United States Assistance to Grenada: Infringements Cured By Democratic Approval*

While the Soviet illegal occupation of Afghanistan was still ongoing, the United States demonstrated a more genuine assistance to indigenous government foreign possession operation than the Soviet facade. In 1979, Maurice Bishop and his Marxist New Jewel Movement staged a successful coup and took control of Grenada's government.⁵⁴⁶ The new Communist government suspended the 1973 constitution that had provided for a democratic government.⁵⁴⁷ Cuban advisors trained the country's expanding army.⁵⁴⁸ In 1983, an internal power

YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 89 (1988).

⁵⁴⁶ Grenada became independent on Feb. 7, 1974 and adopted a constitution that provided for a governor-general with the power to exercise "the executive authority of Grenada." The first prime minister, Eric Gairy, was overthrown in a coup led by Maurice Bishop. MOORE, *supra* note 119, at 5-6. "On 13 Mar. 1979 a coup led by Maurice Bishop, overthrew the Gairy government." Romig, *The Legal Basis for United States Military Action in Grenada*, *ARMY LAW.*, Apr. 1985, at 1 [hereinafter Romig].

⁵⁴⁷ The constitution was suspended, elections were indefinitely suspended, freedom of the press and political freedoms were ended, and a military buildup was backed by Cuba and the Soviet Union. MOORE, *supra* note 119, at 6.

⁵⁴⁸ Riggs, *Grenada: Analysis*, 109 *MIL. L. REV.* 1, 6-7 (1985) [hereinafter Riggs] (referencing documents whereby the Soviet Union, Cuba, and North Korea would provide armament for a 10,000 soldier force from Grenada to be trained by Cubans).

struggle within the ruling class led to the execution of Bishop and other leaders by a dissident faction that established the Revolutionary Military Council.⁵⁴⁹

Eight thousand military troops from the United States and three hundred soldiers from the six neighboring Caribbean islands, landed in Grenada on October 25, 1983.⁵⁵⁰ By the end of the third day, the force led by the United States had possession over the island and its population of one hundred thousand people. An interim government replaced the government institutions that had broken down prior to the intervention.⁵⁵¹ By mid-December, only 240 American troops and forces from Jamaica and Barbados remained in Grenada as an interim police force.⁵⁵² An election, held on December 3,

⁵⁴⁹ Romig, *supra* note 546, at 6.

⁵⁵⁰ "On the evening of October 24, the United States responded affirmatively to the appeals from OECS and the Governor-General of Grenada for peacekeeping and humanitarian assistance. MOORE, *supra* note 119, at 12.

⁵⁵¹ "Governor-General Scoon established an interim nine member advisory council for the purpose of restoring order and stability in Grenada until free elections could be held consistent with restoring self-determination to the people of Grenada." *Id.* at 16-17.

⁵⁵² L. GARBER, ELECTIONS IN GRENADA: RETURN TO PARLIAMENTARY DEMOCRACY 27 (1985) [hereinafter GARBER].

1984, determined Grenada's new government.⁵⁵³ The new Grenadian government received international recognition.

The legal basis for the action was the invitation from the Grenadian governor-general. If the governor-general was Grenada's legal governing authority, the operation was a purely internal matter not subject to the international law of occupation. Unlike the occupations of Afghanistan and Kampuchea, which created a government after a successful military operation, the Grenadian government official authority actually existed before the action. However, scholars disagreed on whether the governor-general was the legitimate governing authority.⁵⁵⁴ Other arguments supporting

⁵⁵³ "Elections were held on 3 December 1984 and Herbert Blaize's moderate New National party won a landslide victory . . . The elections were monitored by observers from the Organization of American States and the British High Commission for the Eastern Caribbean." Romig, *supra* note 546, at 16. See Garber, *supra* note 552 at 63. (detailing the conduct of the elections through the eyes of an observer on behalf of the International Human Rights Law Group who generally found that this process "served to permit Grenadians to select the government of their choice.").

⁵⁵⁴ Article 57 of Grenada's 1973 constitution vested "the executive authority of Grenada" in Great Britain's Queen. The same Article granted the governor-general the power to exercise authority "on behalf of Her Majesty." The governor-general was mostly a figure-head position because the prime minister controlled the executive functions. However, if the prime minister was absent or ill during an emergency, Article 61 gave the Governor General the discretion to use some of the prime minister's powers. See MOORE, *supra* note 119, at 51-54.

the legality of the military action include collective self-defense by the Organization of East Caribbean States (OECS),⁵⁵⁵ humanitarian intervention,⁵⁵⁶ and preemptive self-defense.⁵⁵⁷

At the time, President Ronald Reagan gave three reasons for the action: to protect one thousand United States citizens on the Island, to "[f]orestall further chaos," and "to assist in the restoration of conditions of law and order and of government institutions to the island of Grenada."⁵⁵⁸ The United States met the OECS condition in the request for

Even though the 1979 coup suspended the 1973 constitution, the governor-general retained a titular "Head of State" position without any executive functions. Following Bishop's death in 1983 and the dissidents' inability to establish an effective government, "the constitutional Head of State would seem the principal constitution authority in Grenada." *Id.* at 53.

⁵⁵⁵ Romig, *supra* note 546, at 8. The United States was not a member of the Organization of Eastern Caribbean States, but members other than Grenada requested the assistance of the United States. *Id.*

⁵⁵⁶ See, e.g., Riggs, *supra* note 548, at 36-43 (comparing the Grenadian intervention to the Indian intervention in Bangladesh); Teson, *supra* note 544, at 188-200.

⁵⁵⁷ Yale Professor Eugene Rostow argued for a broad right of self-defense against the "impending deployment of a hostile force on a large scale on Grenada." *Law Is Not a Suicide Pact*, N.Y. TIMES, Nov. 15, 1983, at A35.

⁵⁵⁸ Romig, *supra* note 546, at 8.

American assistance⁵⁵⁹ that the restored government institutions would be democratic.⁵⁶⁰

On the day of his appointment, the newly elected prime minister sent a letter to heads of state involved asking them to keep their forces in Grenada until the next spring. Practically, the military action did not need its legitimacy boosted with letters of Grenadian support. Immediately after the action, the United Nations General Assembly sent a mixed message. The General Assembly "deeply deplored" the military intervention but requested that "free elections be organized as rapidly as possible to enable the people of Grenada to choose its government democratically."⁵⁶¹

Even if the Grenada action was not an internal matter and did not qualify as a humanitarian occupation, the explicit justification for intervention

⁵⁵⁹ The OECS request asked the United States "to invite the Governor-General of Grenada to assume executive authority of the country under provisions of the Grenada Constitution of 1973 and to appoint a broad-based interim government to administer the country pending the holding of general elections." *Reprinted in Romig, supra note 546, at 13.*

⁵⁶⁰ N.Y. TIMES, Oct. 26, 1983, at A16, A18 (reporting that President Reagan said the government in Grenada would be democratically elected).

⁵⁶¹ General Assembly Resolution 38/7 (Nov. 2, 1983).

becomes clearer when we examine the reaction of the people of Grenada. All sources agree that the Grenadian people welcomed the intervention . . . The value cherished by the Grenadians . . . was their individual autonomy and the rights derived therefrom, and not that of the inviability of the territory.⁵⁶²

D. Traditional Analysis of the United States Assistance to Panama: An Abridged Grenada?

Six years after providing assistance to Grenada, the United States provided similar military assistance to Panama. Panama conducted presidential elections in May 1989. Guillermo Endara was believed to have won the election but General Manuel Antonio Noriega, who appeared to be in control of Panama, annulled the vote.⁵⁶³ The United States support

⁵⁶² TESON, *supra* note 544, at 194-95.

⁵⁶³

First the military came [to the voting places] in uniform. Then they left and a few minutes later men came in with guns, out of uniform and just took by force the actual legitimate documents. What Noriega has done is stolen the accurate records and substituted totally false records without any attempt at subterfuge.

for Endara strained relations with General Noregia throughout the year.⁵⁶⁴ On December 16, 1989, forces loyal to Noriega shot an American officer to death at a roadside checkpoint.⁵⁶⁵ Early on December 20, 1989, at a United States military base in Panama, a Panamanian judge swore Endara in as President.⁵⁶⁶ The United States recognized Endara's government as the legal government responsible for maintaining public order in Panama, and vowed to assist it in gaining control over Panama's institutions. This recognition made the United States an invitee helping with Panamanian internal matters instead of an international law occupant.⁵⁶⁷ Later that morning United

THOMAS DONNELLY ET AL., OPERATION JUST CAUSE THE STORMING OF PANAMA 45-46 (1991).

⁵⁶⁴ "Recalling Ambassador Arthur Davis and ordering 1,881 soldiers and Marines to Panama, President Bush said, 'We will not be intimidated by bullying tactics . . . of the dictator Noriega.'" *Id.* at 47.

⁵⁶⁵ David Adams et al., *Invasion*, NEWSWEEK Jan. 1, 1990, at 12, 20 (Jan. 1, 1990).

⁵⁶⁶ "Informing Endara that an invasion was about to begin, he was brought to Fort Clayton, a United States military base in the Canal Zone, where he took an oath of office as President of Panama." Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L 293, 299 (1991).

⁵⁶⁷ In a suit brought in a U.S. district court, the plaintiffs argued that the Hague Regulations applied because Panama was an occupied territory. The U.S. government responded that "the increase in U.S. military forces in Panama did not

States troops invaded Panama, overcame the Panamanian Defence Forces resistance, took possession of the country, and ousted the government of Noriega.⁵⁶⁸

On December 27, 1989, the electoral tribunal revoked Noriega's annulment of the May 1989 vote. Sixty-four percent of the vote was recovered and Endara received 62.5 percent of the vote. Hence, the tribunal confirmed Endara's appointment as President along with the appointment of his two vice-presidents. The crowds that took to the streets appeared to support Endara and the downfall of Noriega. Panama's Legislative Assembly approved a Legal Assistance Treaty with the United States on July 15, 1991.⁵⁶⁹

displace the authority of the legitimate government in Panama." The court did not address the issue and rejected the claim on other grounds. *Industria Panificadora, SA v. United States*, 763 F. Supp. 1154 (D.D.C. 1991) (dismissing a claim of Panamanian companies to recover damages for property losses as a result of the invasion).

⁵⁶⁸ Noriega evaded the Americans until December 24 when he sought asylum in the Papal Nuncio. Ten days later Noriega surrendered to U.S. authorities and was arrested. Eloise Salholz et al., *Noriega's Surrender*, NEWSWEEK, Jan. 15, 1990, at 14.

⁵⁶⁹ Assistant Secretary for Inter-American Affairs Bernard W. Aronson's statement before the Subcommittee on Western Hemisphere Affairs of the House Foreign Affairs Committee of July 30, 1991 reprinted in DEP'T OF STATE, DISPATCH, PANAMA--ROAD TO RECOVERY 576, 578 (Aug. 5, 1991).

Despite criticism of the United States' actions, Endara's government faced very few international challenges. However, the United Nations General Assembly "strongly deplored" the invasion and called for the immediate withdrawal of American forces.⁵⁷⁰

The two legal concerns of the Grenada action were the same legal concerns during the Panamanian action. Was the Endara government a legitimate government requesting assistance? Naysayers pointed out that the Endara government lacked formal installation procedures at the time of the invasion. Others hold that the procedures substantially complied with Panamanian law. Did the Endara government receive the popular support necessary to justify an exception to the law of occupation? Scholars differed between asking for a new internationally monitored election to holding that the May 1989 elections and the public reaction were sufficient evidence of public acceptance.

⁵⁷⁰ General Assembly Resolution 44/240 (Dec. 29, 1989).

E. Traditional Analysis of the United States Assistance to Haiti: United Nations Supports Self-Determination

Unlike the earlier assistance to Grenada and Panama, the United Nations authorized the United States assistance to Haiti prior to the operation. Haiti, the poorest nation in the Western hemisphere, has a population of 6.5 million mostly rural people.⁵⁷¹ During most of the twentieth century, repressive dictators ruled Haiti.⁵⁷² On December 16, 1990, the Reverend Jean-Bertrand Aristide received an overwhelming majority of the votes in a presidential election which international observers had declared free and peaceful.⁵⁷³ After assuming office on February 7, 1991, Aristide announced a major reorganization of the army.⁵⁷⁴ The wealthy businessmen who had controlled Haitian politics supported a September 30, 1991 military coup led by Raoul Cedras that installed Joseph

⁵⁷¹ Annetta Miller & Peter Katel, *Rallying on the Brink*, NEWSWEEK, Dec. 17, 1990, at 38 (noting that "income levels, life expectancy, and infant mortality all hover close to the bottom of world rankings").

⁵⁷² *Id.* at 38 (reporting that Haiti has "a long history of military coups").

⁵⁷³ CLAMO, HAITI, *supra* note 4, at 9.

⁵⁷⁴ *Id.*

Nerette as provisional president and forced Aristide to flee the country.⁵⁷⁵

During 1993, the United Nations started a number of diplomatic initiatives to restore Aristide to power.⁵⁷⁶ On June 16, 1993, the United Nations Security Council declared an oil and arms embargo on Haiti.⁵⁷⁷ On July 3, 1993, General Cedras and President Aristide signed an agreement at Governor's Island, New York, stipulating that Cedras would resign and Aristide would return to Haiti by October 30, 1993.⁵⁷⁸ When the United States tried to implement the

⁵⁷⁵ "Aristide was nearly eight months into his five-year term when the generals threw him out in 1991." Russell Watson, et al., *Is This Invasion Necessary?*, NEWSWEEK, Sept. 19, 1994 at 36, 37.

⁵⁷⁶ Fourteen Security Council resolutions were issued between June 1993 and January 1995: Security Council Resolution 841 (June 16, 1993), Security Council Resolution 861 (Aug. 27, 1993), Security Council Resolution 862 (Aug. 31, 1993), Security Council Resolution 867 (Sept. 23, 1993), Security Council Resolution 873 (Oct. 13, 1993), Security Council Resolution 875 (Oct. 16, 1993), Security Council Resolution 905 (Mar. 23, 1994), Security Council Resolution 917 (May 6, 1994), Security Council Resolution 933 (June 30, 1994), Security Council Resolution 940 (July 31, 1994), Security Council Resolution 944 (Sept. 29, 1994), Security Council Resolution 948 (Oct. 15, 1994), Security Council Resolution 964 (Nov. 29, 1994), and Security Council Resolution 975 (Jan. 30, 1995).

⁵⁷⁷ Security Council Resolution 841, (June 16, 1993).

⁵⁷⁸ "[J]uanta leader Raoul Cedras agreed to step down, under terms of the accord, . . . Aristide would return by Oct. 30

Governor's Island plan by sending 200 lightly armed troops to Haiti, a demonstration by a group of gunmen rebuffed the troops at the harbor.⁵⁷⁹ Cedras's supporters resumed their campaign of violence, the United Nations renewed its sanctions against Haiti, and Aristide was not in power by the end of October.⁵⁸⁰ Due to the *de facto* Haitian leader's repression of Aristide supporters, Haitians started boarding boats and heading for the United States.⁵⁸¹ During 1994, the United

under the protection of the United Nations and the Organization of American States." Tom Masland, *How Did We Get Here?*, NEWSWEEK, Sept. 26, 1994 at 9-10 [hereinafter Masland].

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[T]he USS Harlan County steamed into Port-au-Prince carrying more than 200 lightly armed U.S. and Canadian military engineers. They were supposed to be the vanguard of a U.N. mission overseeing Aristide's return to power under an agreement brokered with the *juanta* As the Harlan County approached, its berth was blocked by a motley flotilla of small boats and a gang of about 100 pro-government thugs stood on the docks, shouting and waving machetes. The Harlan County was ordered to turn tail.

Id. at 9-10.

⁵⁸⁰ Security Council Resolution 873 (Oct. 13, 1993).

⁵⁸¹ "On May 8[, 1994] Clinton announced he would end the direct return of raft people . . . the Coast Guard by mid-June was rescuing 2,000 to 3,000 a day: hundreds drowned." Masland, *supra* note 578, at 27-30.

States opened "safe havens" at Guantanamo Bay, Cuba and in Panama to handle the flood of Haitian boat people.⁵⁸²

On July 31, 1994, the United Nations Security Council authorized a multinational force to use all necessary means to restore the legitimately elected authorities in Haiti.⁵⁸³ The United States led the multinational force. On September 15, 1994, President William Clinton stated during a televised address to the nation that the United States would use force to oust the Cedras regime.⁵⁸⁴ On September 17, 1994, President Clinton sent a diplomatic team consisting of former President Jimmy Carter, General Colin Powell, and Senator Sam Nunn to Haiti.⁵⁸⁵ On September 18, 1994, while American paratroopers were flying towards Haiti, the Haiti military leaders agreed to step down when Parliament passed an amnesty law or on October 15, whichever came first.⁵⁸⁶

⁵⁸² CLAMO, HAITI, *supra* note 4, at 11.

⁵⁸³ Security Council Resolution 940 (July 31, 1994).

⁵⁸⁴ CLAMO, HAITI, *supra* note 4, at 12.

⁵⁸⁵ "[A]n extraordinary delegation . . . sent by President Clinton to arrange what White House aides delicately referred to as "the modalities" of the strongman's departure." Evan Thomas, et al., *Here We Go Again*, NEWSWEEK, Sept. 26, 1994 at 22.

⁵⁸⁶ CLAMO, HAITI, *supra* note 4, at 13.

Due to the Cedras regime's reneging on the Governor's Island Accords, the United States military entered Haiti in large numbers on September 19, 1994.⁵⁸⁷ Cedras resigned on October 10, 1994 and Aristide returned on October 15, 1994.⁵⁸⁸ On March 31, 1995, a United Nations force of 6000 military personnel from thirty-three countries assumed responsibilities for assisting Haiti.⁵⁸⁹

The operation in Haiti was a United Nations authorized operation of collective self-defense,⁵⁹⁰ and a permissive deployment of troops onto foreign territory.⁵⁹¹ Although the protections of the Hague and Geneva Conventions were not required, the Haitian people were in need of assistance.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.* at 19 n. 45.

⁵⁸⁹ *Id.* at 22.

⁵⁹⁰ Security Council Resolution 940 (July 31, 1994).

⁵⁹¹

The agreement of September 18, 1994, negotiated in Port-au-Prince between President Jimmy Carter and General Raoul Cedras, and its acceptance by the Aristide government, led to the consent-based nonviolent, hostilities-free entry of U.S. forces and their peaceful deployment. In such circumstances, the Geneva Conventions on the Protection of Victims of War of August 12, 1949, are not, strictly speaking applicable.

Meron, *Extraterritoriality*, *supra* note 281, at 78-82.

*F. Bailment Analysis of Indigenous Government Assistance:
Bailees Must Meet Duty of Care*

The assisting powers were bailees because they had both the possession and intent to possess the territories. The bailor for each of the above events varied. The sovereign government for Afghanistan ceased to exist as an entity after the Soviet-backed 1978 coup that installed an illegal puppet government as their bailee agent. Even though the lawful government entity did not exist, sovereignty remained with the people of the Afghan territory as bailors. The Khmer Rouge was the bailor until its internal massacres of its own citizens proved its insanity and incompetence as a sovereign. Accordingly, the Khmer Rouge lost its claim to sovereignty and the people of Kampuchea retained their sovereignty as bailors. The rightful sovereigns of Grenada, Panama, and Haiti suffered illegal removal from power but still retained their bailor status.

In addition to varied bailors, the way that the bailee obtained possession also varied. The Soviet invasion of Afghanistan in 1979 obtained possession of the territory through robbery, the illegal use of aggressive force. Thus, the Soviet Union was an illegal bailee. If Vietnam and the

United States had taken possession of the territories for themselves, their possession would have been illegal. Under *jus tertii* the current possessors' rights, even though illegal, are better than the claims to the territories by states other than the lawful sovereign.⁵⁹² Accordingly, because Vietnam and the United States were taking the territories for the rightful sovereigns, they were lawful bailees.

Both Vietnam and the United States had possession and the intent to possess the territories as bailees. Vietnam obtained its questionable possession of Kampuchea without any agreement with the locals or the approval of any international or regional organizations. The United States obtained possession of Grenada, Panama, and Haiti through agreements with the local sovereigns, the bailors. Additionally the United Nations had preapproved the United States actions in Haiti through Security Council Resolution 940.

As to the United States bailments, even though the bailor's bargaining positions were not equal to the United States bargaining position, the bailors were not under undue

⁵⁹² See *supra* note 339 and accompanying text (explaining *jus tertii*).

duress during the negotiations. The bailors could either cooperate with the United States or allow their territory to remain in the possession of others.

Regardless of how the bailees obtained possession of the territories, they had a duty to care for the territories. The Soviet possession of Afghanistan, as with all aggressive use of force possessions, was solely for the benefit of the bailee. The destroyed government received no benefit from yielding possession of its territories and the Soviet Union used the territory for its own illegal ends. Hence, the Soviet Union was strictly accountable for the territories under a duty of extraordinary care.

Due to the uncertainty as to what entity represented the sovereignty of the Cambodian people as bailor of Kampuchea, Vietnam placed itself in the position of being a bailee for an unknown bailor. Both Vietnam and the to be determined bailor or sovereign of the Cambodian people received benefits from the bailment. Vietnam became the dominant power in Indochina and the people of Kampuchea and their to-be-determined-sovereign received an improved territory with better living conditions.

Due to the mutual agreement origins of the American bailments, the bailments were for the benefit of both the

bailors and the United States. The bailors regained possession of their territories. The United States protected its citizens' lives, interests, and property; and gained regional stability by its actions in Grenada, Panama, and Haiti. Thus, Vietnam and the United States were under a duty of ordinary care during their bailments.

Look to the inhabitant's quality of life to determine whether the bailee met its duty of care. The Soviet Union illegally converted the territory's economy by diverting it to support the bailee and violated the duty to care for the entire territory by trying to have the Wakhan corridor ceded to itself. Vietnam and the United States maintained or improved the quality of life in their territories during the periods of possession.

As with all bailments, the rightful bailor or sovereign should regain the territory. The sovereign government of the Afghan people as the bailor took possession of Afghanistan. Although no internationally monitored elections occurred in Kampuchea, the reports by international media and NGOs reflected substantial local support for the Vietnamese created Hun Sen government that had become the rightful sovereign and proper bailor of Kampuchea. Lastly, the bailors who received possession of the territories from the United States had their

sovereignty established by internationally monitored elections either shortly before or after the bailment. In the case of Haiti, the United Nations also authorized the support for the Aristide government.

VIII. Self-Determination of Territories According to the Traditional and Bailment Views

Just as assistance to an indigenous government can be either legal or illegal depending on the facts, foreign assistance to self-determination movements can be either legal, as in the case of India's assistance to Bangladesh, or illegal, as in the case of the Turkish establishment of the republic of Northern Cyprus.

A. Traditional Analysis of India and the Birth of Bangladesh: Legal Self-Determination Assistance

In 1970, East Pakistan was a distinct region geographically separated from West Pakistan by India.⁵⁹³ East Pakistan's Bangladeshi people differed linguistically,

⁵⁹³ "[S]eparated by 1,200 miles of Indian territory, each contained roughly half the nation's population of 110 million people." BEN WHITAKER, ET AL., *THE BIHARIS IN BANGLADESH*, 7 n. 1 (1977).

culturally, and ethnically from the people of West Pakistan.⁵⁹⁴ In December of that year the Awami League won the general elections for the Pakistani National Assembly.⁵⁹⁵ The Awami League supported an independent autonomous East Pakistan. West Pakistan initially reacted to the election by postponing the convening of the National Assembly, which also delayed progress on a new constitution for Pakistan.⁵⁹⁶ By March 25, 1971, West Pakistan's military attacked the civilian population of the East Pakistan city of Dacca. Millions of Bangladeshi refugees, including members of the Awami League, flooded into India.

On April 10, 1971, while located in India, the Awami League declared the independence of the Democratic Republic of Bangladesh.⁵⁹⁷ India maintained it was neutral. India

⁵⁹⁴ "'East Pakistan became a colony of West Pakistan; politically neglected, culturally subjugated and economically exploited.' The predominately Bengali population of East Pakistan strongly resented the attempt to foist a foreign language (Urdu) on them as the only national language." TIMM, *supra* note 298 at 7 (quoting R. ERHADT, CANADIAN DEVELOPMENT ASSISTANCE TO BANGLADESH, ix, 155 (1983)).

⁵⁹⁵ THOMAS W. OLIVER, THE UNITED NATIONS IN BANGLADESH, 3 (1978) [hereinafter OLIVER].

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* at 8.

permitted the Awami League and the Bangladesh Mukti Bahini guerrillas to recruit and train volunteers in India and supplied them with arms, ammunition and supplies.⁵⁹⁸ By November 1971, attacks by the guerrillas had escalated the military conflict into a full-scale war. After a series of Indian-Pakistan border clashes, India recognized the People's Republic of Bangladesh, asserted it was assisting the Bangladesh government with an internal matter, and invaded East Pakistan on December 6, 1971.⁵⁹⁹ Ten days later, the Pakistan army surrendered and the Indian forces occupied the entire East Pakistan region and assisted in the establishment of the state of Bangladesh.

The United Nations followed its usual practice of initial condemnation,⁶⁰⁰ while accepting the results, and recognizing

⁵⁹⁸ WILCOX, *supra* note 298, at 32-33.

⁵⁹⁹ "As far as the armed forces of India are concerned, there can be a cease-fire and withdrawal of India's forces to its own territory, if the rulers of West Pakistan withdraw their own forces from Bangladesh and reach a peaceful settlement with those who until recently were their fellow citizens, but now owe allegiance to the government of Banglo Desh" OLIVER, *supra* note 595, at 88 (quoting a cable from the government of India to the United Nations General Assembly of Dec. 7, 1971).

⁶⁰⁰ In December 1971, the United Nations General Assembly and Security Council Resolutions called for an immediate cease-fire and the withdrawal of force, efforts to bring about the return of refugees, assistance to the refugees, and efforts to

the state of Bangladesh.⁶⁰¹ Bangladesh became a member of the United Nations on September 17, 1974.⁶⁰²

The creation of Bangladesh pitted a people's right to self-determination against the law of occupation's inalienability of territorial integrity by force. Although India, like all occupants, would gain from a weakened Pakistan, the international community ignored the law of occupation due to the genuineness of the Bangladesh self-determination claim⁶⁰³ and the cruelty the people were suffering under their Pakistan government. Alternatively, humanitarian law could explain the action as a lawful

safeguard the civilian population. See General Assembly Resolution 2793 (Dec. 7, 1971); Security Council Resolution 307 (Dec. 21, 1971) called upon all concerned "to take all measures necessary for the preservation of human life and the observance of the Geneva Convention of 1949."

⁶⁰¹ By August 1972, eighty-six countries had recognized Bangladesh. U.N.Y.B. 1972, at 218 (1975). The General Assembly, without debate, adopted a resolution that the People's Republic of Bangladesh was eligible for United Nations membership and expressed a desire to admit Bangladesh "at an early date." General Assembly Resolution 2937 (XXVII) (Nov. 29, 1972) (adopting the resolution without debate or vote).

⁶⁰² See General Assembly Resolution 3203 (Sept. 17, 1974), Security Council Resolution 351 (June 10, 1974).

⁶⁰³ See *supra* note 593-96 and accompanying text (concerning the Bangladeshi people's claim for self-determination).

humanitarian occupation because the existing political system did not protect the population from human rights abuses. The international community allowed the occupant to modify existing laws and institutions for humanitarian goals.⁶⁰⁴

B. Traditional Analysis of the Turkish Establishment of the Republic of Northern Cyprus: Illegal Self-Determination Assistance

Cyprus gained its independence from colonial rule in 1960.⁶⁰⁵ Cyprus's population contained two groups; the majority Greek Cypriots and the Turkish Cypriots who comprised about twenty percent of the island's population. The two groups differed in religion, language, culture, and political goals. Cyprus's 1960 constitution provided for a common government over the entire island but separate local administrations, education systems, trade and labor unions,

⁶⁰⁴ See *infra* notes 617-20 and accompanying text (discussing the coalition humanitarian assistance in Northern and Southern Iraq).

⁶⁰⁵ "The Constitution having been signed, . . . and the Treaties of Establishment, of Guarantee and of Alliance, . . . Cyprus was declared to be an independent sovereign republic on 16 August 1960." Z. NECATIGIL, *THE CYPRUS QUESTION AND THE TURKISH POSITION IN INTERNATIONAL LAW* 11-12 (1989) [hereinafter NECATIGIL]; CHARLES FOLEY & W. I. SCOBIE, *THE STRUGGLE FOR CYPRUS*, 9 (1975) [hereinafter FOLEY & SCOBIE].

and presses.⁶⁰⁶ In 1963, the President, Archbishop Makarios, amended the constitution to put an end to the common government and shut the Turkish Cypriots out of the government of Cyprus.⁶⁰⁷ In December 1967, the Turkish Cypriots set up an autonomous administration with a legislature and executive council for Turkish Cypriot enclaves throughout the island.⁶⁰⁸

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An independent sovereign state of Cyprus, ruled by a Greek-Cypriot President with a Turkish Vice President who held the right of veto in foreign affairs . . . a house of representatives would be established in the proportion of seventy percent Greek to thirty percent Turkish members. The civil service and police would be shared in the same way, and the main towns would have separate Greek and Turkish municipalities. A treaty of alliance established the presence of 950 Greek and 650 Turkish troops on the island.

FOLEY & SCOBIE, *supra* note 605, at 157. See also ZAIM M. NEDJATI, ADMINISTRATIVE LAW 46-53 (1974); NECATIGIL, *supra* note 605, at 59-62.

⁶⁰⁷ FOLEY & SCOBIE, *supra* note 605, at 162 (informing the British, Greek, and Turkish Governments, Makarios unilaterally attempted to abolish the 70-30 ethnic ratio in the civil service and unify the town councils).

⁶⁰⁸ After a Greek assault on a Turkish suburb of the capital to rescue a pocket of surrounded Greeks, a shooting war began on Christmas Eve 1963. FOLEY & SCOBIE, *supra* note 605, at 162. By 1974, nineteen basic laws on executive, legislative, and judicial matters had been established.

In 1974, pro-Enosis (unification with Greece) supporters overthrew Makarios.⁶⁰⁹ Turkey responded by invading Cyprus on July 20, 1974.⁶¹⁰ After taking over the northern third of the island, the Turkish troops stopped at the "Atilla line." One-third of the island's population became refugees as over two hundred thousand people crossed the "Atilla line" in both directions to establish an almost complete separation of the Greek and Turkish Cypriots.⁶¹¹

Turkey initially advocated for a federated Cyprus,⁶¹² but after a year without any political resolution, Turkey switched to advocating a loose confederation for Cyprus. In November 1983, the legislative assembly cited the Turkish Cypriots'

⁶⁰⁹ "On July 15, 1974 . . . in a military coup engineered by the officers from Athens, parliamentary rule was overthrown and Makarios himself barely escaped with his life." *Id.* at 174.

⁶¹⁰ *Id.* at 175.

⁶¹¹ "Between 14 and 16 August, . . . Turkish forces moved to occupy 34 per cent of Cyprus. Over 180,000 Greek-Cypriots fled their homes. The advance halted on a line which was almost precisely the one proposed by Turkey as the demarcation of partition in 1965, and rejected by the United Nations moderator." CHRISTOPHER HITCHENS, *CYPRUS*, 104 (1984) [hereinafter HITCHENS].

⁶¹² On February 13, 1975 the Turkish Cypriot autonomous body reconstructed itself as the "Turkish Federated State of Cyprus." *Id.* at 107.

right to self-determination as the legal basis for the newly declared Turkish Republic of Northern Cyprus.⁶¹³

As of 1992, Turkish Cyprus is dependent on the Turkish economy and the support of twenty to thirty-six thousand Turkish troops. The Turkish lira is the local currency in Turkish Cyprus. Sixty thousand people, or half the current population of Turkish Cyprus, are Turks who migrated from Turkey to settle in Cyprus. The Turkish Cypriot government took possession of property that belonged to absent Greek Cypriots. The government issued certificates of ownership to the property to the Turkish immigrants, as well as Turkish Cypriots who migrated from the South after the invasion.

On five occasions the United Nations General Assembly has passed resolutions deploring the Turkish occupation and all unilateral actions to change the demographic structure of Cyprus. These resolutions also demanded an immediate withdrawal by Turkey.⁶¹⁴ Only Turkey has recognized the

⁶¹³ *Id.* at 135.

⁶¹⁴ See General Assembly Resolution 3212 (Nov. 1, 1974); General Assembly Resolution 3395 (Nov. 20, 1975); General Assembly Resolution 33/15 (Nov. 9, 1978); General Assembly Resolution 34/30 (Nov. 20, 1979); General Assembly Resolution 37/253 (May 13, 1983). In 1983, the U.N. Security Council invalidated the declared independence of the Turkish Republic of Northern Cyprus and called upon all states not to recognize any Cypriot state other than the Republic of Cyprus. Security

Turkish Republic of Northern Cyprus. The European Commission on Human Rights regarded Cyprus as under Turkish control and has alleged that Turkey has committed human rights violations.⁶¹⁵

Both the Turkish occupation of Northern Cyprus and the Indian creation of Bangladesh involved a political struggle between two distinct cultures, forced by the decolonization process into a single political body, in which one culture deprived the other of power. One of the major differences is that the Turkish Cypriots suffered only a deprivation of political rights as opposed to the deprivation of human rights suffered by the Bangladesh population. Internal political losses are common occurrences unworthy of international attention in this friction-filled world. Turkey instigated the illegal aggression instead of having the ill effects of a revolutionary war thrust on it as happened to India. A basic founding principle of the United Nations was the outlawing of

Council Resolution 541 (Nov. 18, 1983). This was reaffirmed in Security Council Resolution 550 (Nov. 15, 1984) and Security Council Resolution 649 (March 13, 1990).

⁶¹⁵ *Cyprus v. Turkey*, 21 Y.B. EUR. CONVENTION HUM. RTS. 100, 230-34, 62 INT'L LAW REP. 5, 74-76 (Eur. Comm'n Hum. Rts., July 10, 1978).

aggression.⁶¹⁶ The artificial "Atilla line" arbitrarily separates the two adjoining Cypriot communities instead of the entire country of India separating Bangladesh and Pakistan. Creation of the "Atilla line" forced a massive relocation of people as opposed to relatively minor relocation of the Pakistan administration and military caused by the creation of Bangladesh. The Turkish government continues to provide occupying troops and economic support to Northern Cyprus as opposed to the quick withdrawal of Indian troops in Bangladesh. Fear of the "slippery slope" is the reason for the international preference for territorial integrity over the principle of self-determination. The international community could slide down the "slippery slope" to the point of recognizing and encouraging every disgruntled minority to make a claim for self government.⁶¹⁷ There is no clear dividing line between permitted and illegal secessions under international law.

⁶¹⁶ The Turkish invasion violated Article 2(4) of the United Nations Charter and the 1960 Treaty of Guarantee among Cyprus, Greece, Turkey, and the United Kingdom. See DUGARD, *supra* note 409 at 110.

⁶¹⁷ BENVENISTI, OCCUPATION, *supra* note 31, at 180.

*C. Self-Determination Bailment Analysis: Bailees Must Meet
Duty of Care*

Both India and Turkey were bailees because they had both the possession and intent to possess the territories. The peoples' sovereigns were the bailors. Although Pakistan was the lawful sovereign, it lost this status through insanity and incompetence when its military attacked the civilians of Dacca. The sovereignty transferred to the people of Bangladesh. The common government of Cyprus was the rightful sovereign and bailor of Cyprus.

India had possession thrust on it as it became located in the geographic middle of an armed conflict in which one side violated the other's human rights. India was an involuntary bailee. Depending on one's view of the sovereignty of the Turkish Cypriot government, Turkey has taken the territory and populace of Northern Cyprus by either larceny or embezzlement. If, in line with the overwhelming majority of world opinion, the Turkish Cypriot government is not a sovereign, Turkey took Northern Cyprus by larceny because neither Turkey nor the puppet Turkish Cypriot government ever had sovereignty over the territory under Turkey's custody. Even if one accepts Turkey's claim that the Turkish Cypriot government is a

sovereign, Turkey empowered the Turkish Cypriot government to embezzle possession of Northern Cyprus.

Regardless of how they obtained possession of the territories, as bailees they had a duty to care for the territories. As with all aggressive use of force possessions, Turkey's bailment was for the sole benefit of the bailee. The ousted governments received no benefit from yielding possession of the Northern portion of the island and Turkey used the territories for its own illegal end. Hence, Turkey is strictly accountable for Northern Cyprus under a duty of extraordinary care. Although India benefited regionally by the weakening of Pakistan, this situation comes the closest to being a bailment for the benefit of the bailor. The chosen sovereign of the people of Bangladesh, the Awami League, gained possession of Pakistan, a disproportionately greater benefit than that received by India.

The bailee's duty of care is for the entire territory and populace. Turkey illegally converted Cyprus when it established an arbitrary "Atilla line," forced one third of the island to become refugees moving to different sides of this line, favored the Turkish Cypriots over the Greek Cypriots, and doubled the population of Northern Cyprus by introducing sixty thousand Turkish civilians into the

territory. Due to the Turkish Republic of Northern Cyprus not being a legitimate entity and not having true sovereignty over Northern Cyprus, any actions that rely on enactments of this entity are void.

Jus tertii protects a bailee against third party claims of ownership during the bailment. After delivering goods to the entity that the bailee believed to be the owner, the bailee might face liability from others with claims of ownership. The Turkish Republic of Northern Cyprus is not the true sovereign for Northern Cyprus. Turkey is liable for claims from the government of Cyprus, the true sovereign.

Even though Pakistan's loss of sovereignty over Bangladesh did not leave a clear sovereign over the territory, India allowed the media to report on the situation in Bangladesh and through the reports the world community accepted Indian assistance to Bangladesh's self-determination Awami government as the rightful sovereign and proper bailor.

IX. Limited Purpose Occupations According to the Traditional and Bailment Views: Northern and Southern Iraq "Safe Havens"

The previous foreign possession operations concerned the physical element of possession. During the aftermath of the

Gulf War, the coalition forces tried to emphasize the intent element of possession during limited purpose occupations.

A. Traditional Analysis: Actions, Not Words, Determines Intent

Following the Persian Gulf War and unsuccessful internal uprisings against the Iraqi leadership of Saddam Hussien, coalition forces set up "safe havens" for refugees in Northern and Southern Iraq. One hundred thousand coalition troops provided food, shelter, and medical care to tens of thousands of Iraqi refugees in Southern Iraq during March and April of 1991.⁶¹⁸ A similar operation occurred in Northern Iraq from April to July of 1991 to assist Kurdish refugees.⁶¹⁹ The status of these forces was never declared. The United States government coined the term "safe haven" to emphasis the

⁶¹⁸ "The . . . Third Armored Division set up a food-distribution center in the Iraqi town of Safwan, just over the border from Kuwait. The first day, it handed out more than 20,000 MREs [Meals Ready to Eat]" Melinda Liv, *A Desperate Flood of Refugees*, Newsweek, Apr. 8, 1991, at 20, 21.

⁶¹⁹ "On April 16, 1991, Navy and Marine Corps Resources were mobilized to complete a mission of mercy--Operation Provide Comfort in Turkey and Northern Iraq . . . The supply efforts ran daily for two months . . . delivering 12,092.6 tons of relief supplies." JOC Margie Shaw & JO1(AW) J.D. DiMattio, *Provide Comfort*, ALL HANDS, Sept. 1991. at 30.

humanitarian purpose and de-emphasize any doubts about any long-term possession or claim to the territories.⁶²⁰

Due to Article 42 of the Hague Regulations deeming an entity an occupant only if it succeeds in placing a foreign territory under its authority, may a government exempt itself from occupant status by merely declaring no intention to exercise authority despite the ability to control the territory? Even though the foreign government did not declare itself an occupant and emphasized the short-term nature of the military operations, its troops were capable of exercising authority over a foreign area and the indigenous government was unable to effectively oppose the foreign government.⁶²¹

⁶²⁰ "Bush's civilian advisors wanted to keep the boundaries of the haven as vague as possible, . . . [by] invoking the old international law doctrine of 'humanitarian intervention,' the United States had set up . . . an area that will remain outside Iraqi sovereignty for as long as the Kurdish crisis lasts" Russell Wallace, *Is It Too Late?*, NEWSWEEK, Feb. 11, 1991, at 20. "[I]nformal safe havens . . . [reflected] a compromise intended to sidestep problems of international law and regional sensitivities about the nature and future of the area." *Bush Sees Accord on "Safe Haven" for Kurds in Iraq*, N.Y. TIMES, April 12, 1991, at A1 (quoting U.S. officials).

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A military force may invade or enter an area in order to pass through it to its intended goal, while leaving the area behind it without effective control. But if the military force gained effective and practical control over a certain area, it is immaterial that its Presence in the territory is

B. Bailment Analysis: Actions, Not Words, Determine Intent

Iraq was the proper sovereign and bailor of the territories. The Coalition forces had possession, but denied intent to possess the territories. However, the military forces were not in the territories by accident but through the deliberate planning of their states' governments and military leaders. Therefore, even though they claimed otherwise, they intended to possess the territories.

X. Conclusion

Foreign possession of states by other states should be viewed as a bailment of territorial and populace integrity. If a judge advocate knows the correct bailment solution, the analogous international solution will withstand international scrutiny regardless of whether the action is later declared an occupation or an internal domestic matter.⁶²² Similarly, even

limited in time or that the intention is to maintain only temporary military control.

Tsemel v. Minister of Defence, 37 (3) Piskei Din 365, 373 (Isr. Sup. Ct. 1983) reprinted in *BENVENISTI, OCCUPATION*, *supra* note 31, at 109 (ruling the Israeli presence in Southern Lebanon was an occupation).

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Having said that, I would emphasize in closing that throughout the course of the Persian Gulf Crisis, the limitations of the law were never even

if the international community challenges the decision of the state's proper sovereign authority as to the ends, the means will always abide with international requirements. For example, if a state claims an action is a domestic matter and an international tribunal rules the action was an occupation, by following a bailment approach, the state has not violated the laws of how to conduct an occupation and will not have any further liability concerning its means despite wrongly classifying the action.⁶²³

As with bailment, a state exerting possession of another state's territory has an inescapable duty of care for the territory and its populace, regardless of whether the possession is an internal or international law matter, or whether the possession is legal or illegal. Aggressor state foreign possession operations are contrary to Article 2

approached by the decisions of U.S. policymakers, although some couched essentially political criticism of U.S. decisions in legal terms. As you prepare to embark on your respective legal careers, I would ask you all to consider these distinctions. I try to follow two very important rules: the penultimate in importance is: "Never say no when you could say yes." The most important is: "Never say yes when you should say no."

Williamson, *supra* note 8 at 371.

⁶²³ The state could still be liable for its aggressive ends.

Paragraph 4 of the United Nations Charter and are under a strict duty of care because the aggressor received all the benefits and the ousted sovereign received no benefit. A state exercising foreign possession pursuant to an invitation from an ousted sovereign is under a duty of ordinary care because both the ousted sovereign and the assisting state receive benefits. Even though it received some benefit, India's assistance to the people of Bangladesh is the closest historical example of a gratuitous bailment in which the bailee has the bailed goods thrust on it and was responsible for a slight duty of care.

The duty of care is subjective and takes into consideration the nature of the assisted state, the abilities of the assisting state and any special circumstances. The duty of care is for the entire territory and its populace and the possessing state can not favor one geographic area or section of the populace at the other's expense. Although the possessing state is under a duty of care, it is not an insurer for the assisted sovereign. Due to the possessing state having the ability to control the territory and populace, the possessing state has the duty of proving it met the standard of care. Until the arrival of an effective international law enforcement mechanism, the possessing state can prove it met

the duty of care by allowing media, ICRC, and NGOs to monitor its actions in the territory.

Illegal conversions of the possessed territory include attempting to annex the territory and abusing the territory's resources or populace. The possessing state as a bailee is strictly liable for failure to return the territory and its populace to its proper sovereign. When the identity of the proper sovereign is in doubt, the possessing state can seek the advice of international and regional organizations or conduct a national election monitored by NGOs and the media to determine the proper sovereign.

If the judge advocate of the unit conducting the foreign possession operation advises and the commander applies the above principles, that lone judge advocate's legal efforts equates to the heroic actions of Horatius⁶²⁴ holding off an army of after-the-fact lawyers at the bridge where international law meets the facts of a foreign possession operation.

⁶²⁴ Livy, *Horatius at the Bridge*, reprinted in ERNEST HEMINGWAY, ED., *MEN AT WAR*, 221-22 (1979).