

Why Did the U.N. Security Council Support the Anglo-American Project to Transform Postwar Iraq? The Evolution of International Law in the Shadow of the American Hegemon

CARLOS L. YORDÁN*

Introduction

Since the early 1990s, a great number of scholars have argued that the increasing pace of globalization is eroding state sovereignty, while empowering transnational networks and international institutions.¹ In essence, their studies have described the emergence of a system of cosmopolitan international law that can ‘impose legal constraints on government.’² Other scholars, while admitting that this may be the case in certain areas of international politics, such as global economic transactions and the formation of regional regimes, question this reality. This is especially the case in the aftermath of the American-led invasion of Iraq in March 2003. Jean L. Cohen, for instance, warns that ‘the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire.’³ This warning echoes Ugo Mattei’s views on the subject.⁴

It is difficult to say which side of this debate is right. Evidence shows that in some areas of international politics legal rules are constraining states’ ability to pursue their national interests. But not all states are equally constrained. Some powerful states have the ability to disregard international law, though in so doing sacrifice the legitimacy of their policies. The Bush administration’s reluctance to seek the approval of the United Nations (UN) for its policy of ousting Saddam Hussein’s regime from power is a good example. States will sometimes ignore international law if they feel that established rules are hurting innocent civilians in other states or if their actions are informed by ‘humanitarian’

* Assistant Professor in International Relations, Drew University. The author acknowledges the support of Cornell University’s Peace Studies Program, where the initial research for this article was conducted. Many thanks to Professor Matthew Evangelista for encouraging me to study the American-led post-war occupation of Iraq from a perspective that combined international relations research and contemporary debates in international law. The author also recognizes the helpful comments and suggestions of the two anonymous reviewers.

¹ For an oft-cited study, see: Gunther Teubner, ‘Global Bukowina: Legal Pluralism in World Society’ in Teubner, ed., *Global Law Without a State* (Brookfield, VT: Dartmouth Publishing Group, 1997).

² Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, ‘Introduction: Legalization and World Politics’ (2000) 54 *Int’l Org.* 385 at 386.

³ Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law’ (2004) 18:3 *Ethics & International Affairs* 1 at 2.

⁴ Ugo Mattei, ‘A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance’ (2003) 10 *Ind. J. of Global Legal Stud* 383.

interests. The North Atlantic Treaty Organization's (NATO) 1999 air campaign against Yugoslavia over Kosovo has been touted as a noteworthy example.⁵ Given that Russia and China were not willing to support NATO's request for a United Nations Security Council resolution sanctioning the military campaign, the allies were forced to take matters into their own hands.⁶ But, as Hilary Charlesworth notes, it is important not to overstate the humanitarian character of the campaign, as NATO planners were willing to intervene only as long as NATO fighter pilots were not in too much danger.⁷

While the Kosovo air war violated the UN Charter's provisions, the post-war reconstruction mission, organized by the UN with the co-operation of NATO, the European Union (EU), the Organisation of Security and Co-operation in Europe (OSCE), and the UN High Commission for Refugees, was supported by the international community. Thus, criticisms that NATO violated Yugoslavia's sovereignty dissipated as the UN-led post-war mission suspended Belgrade's rule over the province and started an ambitious project to transform Kosovo's political and economic system along neo-liberal lines. It is not surprising that many scholars argue that the Kosovo crisis was a catalyst for a new legal framework that upheld cosmopolitan principles at the expense of states' rights.⁸ Of course, some do not agree with this view. David Chandler, for example, maintains that the Kosovo crisis showed that the principle of sovereignty equality, which informs the UN Charter, has been abandoned, while a new international legal system is emerging that favours 'great power authority' and reasserts the importance of 'military and economic inequality.' He argues that cosmopolitanism is just a façade and any sense of 'progress' that may be earned by upholding humanitarian standards has actually been replaced by 'a less progressive era of "gun-boat diplomacy" and "might makes right",' as legal standards have no way of constraining the actions of powerful states.⁹

Interestingly, while scholars sharing Chandler's or Cohen's views were a minority before March 2003, many more scholars have questioned the legitimacy of the invasion and the subsequent occupation of Iraq on similar grounds. It is clear that the Bush administration's decision to go to war without the Security Council's authority supports

⁵ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 4 (New York, NY: Oxford University Press 2000).

⁶ Martti Koskenniemi, "The Lady Doth Protest Too Much" Kosovo, and the Turn in Ethics in International Law' (2002) 65 *Modern L.R.* 162 at 163.

⁷ Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Mod. Law Rev.* 377 at 383.

⁸ Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment' (2002) 43 *Harv. Int'l L. J.* 1 at 7-9; and Andrew Linklater, 'The Good International Citizen and the Crisis in Kosovo' in Schnabel and Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention*, 492-93 (Tokyo, Japan: United Nations University Press, 2000).

⁹ David Chandler, 'Kosovo and the Remaking of International Relations' (2002) 1 *Global Review of Ethnic Politics* 118.

Chandler's view. Cohen's warning that international law is becoming more imperial in character is not as clear cut, however. Her main contention is that some powerful states can use existing legal standards, precedents, and global norms to legitimize their actions and re-write established international rules to advance their interests, while seemingly advancing those of the international community.¹⁰ Does this reasoning apply to the Anglo-American occupation of Iraq?

Legal and international relations scholars have argued that the United States and the United Kingdom violated the international law of occupation, as the occupiers wanted to transform Iraq along neo-liberal lines. This criticism became more pronounced when the Coalitional Provisional Authority (CPA), which was established to administer post-war Iraq, set out an ambitious programme to privatize state-owned industries.¹¹ The United States and the United Kingdom have argued that their actions were within the bounds of United Nations Security Council Resolution 1483, which sanctioned the Anglo-American occupation.¹² Did this resolution sanction this project? If so, why did the Security Council support it, if it did not support the invasion? Given that this project helps the United States expand its influence in the Middle East and violates key aspects of the international law of occupation, which protects Iraqis' rights and interests, the UN should have constrained the occupiers' plans. But was this possible given the UN's role in post-war peacebuilding during the 1990s, especially its operations in Kosovo and East Timor?

Building on Detlev Vagts's work on the development of 'hegemonic international law',¹³ this article argues that the combination of American preponderance and the international community's growing support for democratic and capitalist ideals have fostered an environment that favours American understandings of intrastate order. That is to say, while the international community may not have supported the invasion of Iraq, it did not necessarily object to the Bush administration's post-war strategy. In addition, this article maintains that the Security Council was not in a position to counter the United States's project. Its primary purpose is to preserve and restore international peace and security. Since the end of the Cold War, the Security Council has accomplished its main objectives by sanctioning a number of controversial post-war peacebuilding missions. For the purpose of this article, the most noteworthy is the United Nations Mission in Kosovo (UNMIK), as many of its challenges were similar to the ones the Anglo-American occupation faced in Iraq. In the end, this article shows that the CPA's administration of

¹⁰ *Supra* note 3 at 10-11. For a similar argument, see Detlev F. Vagts, 'Hegemonic International Law' (2001) 95 Am. J. Int'l L. 847.

¹¹ Daphne Eviatar, 'Free-Market Iraq? Not So Fast' N. Y. Times (January 10, 2004).

¹² "Legal Perspectives from Iraq: Castle and McGurk Share Experiences on Post-Conflict Rebuilding," (Charlottesville, VA: University of Virginia School of Law, November 23, 2004), online: <http://www.law.virginia.edu/home2002/html/news/2004_fall/iraq.htm>.

¹³ *Supra* note 10 at 843, 848.

Iraq was within the legal parameters established by Resolution 1483, demonstrating the influence of American interests and values in the workings of the Security Council.

This article is divided into four sections. The first section presents Vagts's conceptualization of hegemonic international law and expands on it using research in the discipline of international relations. The next section demonstrates the impact that American hegemony has had on the evolution of international law in the post-Cold War. It not only argues that American values and the state's idealized vision of intrastate order has directly influenced the workings of international institutions but it also claims that the Security Council has become an agent of the United States. Section three maintains that NATO's war against Yugoslavia over Kosovo in 1999 and UNMIK's post-war strategies represent an important turning point in the evolution of a new set of standards that, while seemingly in line with cosmopolitan values, are of the United States's hegemonic power. The discussion of UNMIK's strategies illustrates the influence of neo-liberal values, while highlighting how the principle of sovereign equality waned after this war. New understandings of sovereignty stressed the need to transform state legal systems so these could secure their citizens' human rights and basic needs. Again, these developments deepen the United States's hegemony, as the transformation of state structures creates an environment favourable to American interests. The last section examines the Security Council's debates concerning the United Kingdom and the United States's request for a resolution that legitimized its occupation of Iraq and its project to transform the social order according to neo-liberal values. It demonstrates that Resolution 1483 met most of the occupying powers' demands, confirming that it was an outcome of American hegemonic international law.

I. Defining Hegemonic International Law

The concept of hegemonic international law sits between two opposing views of international law and international relations. As noted above, the first view argues that current international dynamics is giving way to a new system where state and non-state actors construct rules that erode state sovereignty and promote a new international order based on emerging cosmopolitan principles.¹⁴ More cynical views have recently emerged,

¹⁴ In the case of how the evolving human rights discourse is changing the domestic policies of nation-states' and international relations in general, see: Ruti G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' (2001-2002) 35 *Cornell Int'l L. J.* 355. On other areas, refer to: Martha Finnemore and Katherine Sicking, 'International Norm Dynamics and Political Change' (1998) 52 *Int'l Org.* 887; and Daniele Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace' (1995) 1 *European Journal of International Relations* 429. For views that tend to be critical of cosmopolitanism but reach similar conclusions due to an increasing need to promote global economic regulation, see: Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002-2003) 43 *Va. J. Int'l L.* 1; and Anne Marie Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.

arguing that international law and international politics are increasingly being dominated by American foreign policy interests, especially by its imperial ambitions.¹⁵ These two views are not without their shortcomings but scholarship in different areas of international relations and international law seem to sustain each view's claims.

Vagts describes hegemony as a relationship between a patron (a hegemonic power) and client states (secondary states). Using the Roman Empire's relations with client states as an example, he maintains that this relationship 'imposed obligations on each of them, although not reciprocal ones. In return for fidelity, the patron was supposed to provide protection and sustenance. Rome as a patron tended to define the rights and duties of the relationship in its own interests.'¹⁶ Building on these observations, José Alvarez adds: 'The hegemon promotes, by word and deed, new rules of law, both treaty based and customary. It is generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it has adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule.'¹⁷ Consequently, the hegemon uses its superior military and economic capabilities and its position of leadership in multilateral fora¹⁸ to create 'indeterminate rules – whose vagueness benefits primarily (if not solely) the hegemon.'¹⁹

While seemingly unfair, hegemony is welcomed by secondary states. A wide body of international relations research demonstrates that a hegemon is necessary to maintain international peace²⁰ and to promote economic interactions.²¹ Hegemony, however, is difficult to maintain over the long term if the hegemonic state cannot find ways to legitimate its rule. In other words, hegemony is a hierarchical condition that secondary states accept 'so long as the hegemon provides goods and services that are valued by the

¹⁵ Apart from Cohen, 'Whose Sovereignty?' *supra* note 3 or Mattei, 'A Theory of Imperial Law' *supra* note 4, see also: Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43 *Osgoode Hall L. J.* 45. For a competing understanding that does not necessarily see this outcome as an American project but a Western one, see: B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 *Eur. J. Int'l L.* 1.

¹⁶ *Supra* note 10 at 844.

¹⁷ José E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *Am. J. Int'l L.* 873.

¹⁸ *Supra* note 9 at 846.

¹⁹ *Supra* note 17 at 873.

²⁰ Niall Ferguson, 'A World without Power' (2004) 143 *Foreign Policy*. 32; and Robert Gilpin, *War and Change in World Politics* 33 (Princeton, NJ: Princeton University Press, 1981).

²¹ James Scott and David A. Lake, 'The Second Face of Hegemony: Britain's Repeal of the Corn Laws and the American Walker Tariff of 1846' (1989) 43 *Int'l Org.* 1; and Charles Kindleberger, *The World in Depression, 1929-1939* (Berkeley, CA: California University Press, 1973).

community at large and does not attempt to use its position to exploit the other powers.’²² The repeated use of a hegemon’s power to fulfill goals not in tune with secondary states’ interests provides incentives for the creation of counter-hegemonic alliances. Thus, G. John Ikenberry’s research on American hegemony explains why the United States supported the creation of the present multilateral system in the late 1940s.²³ Although the United States attempted to lock secondary states into these structures, while ‘simultaneously leaving itself as unencumbered as possible’,²⁴ the emerging international order placed clear limits on American power. However, these multilateral institutions served two clear purposes. First, they legitimated the United States’s hegemony, assuring secondary states that the hegemon would be bound by a set of rules. Second, these institutions helped the United States manage interstate relations.

Even though the hegemon may bemoan limits to its power, it understands the value of multilateral institutions. Similarly, secondary states may want to use international law to constrain the hegemon’s interests but are also aware that its superior economic and military capabilities give the hegemon the ability to execute policies without international consent or outside the boundaries of international law. For secondary states, the strategy is to preserve the functioning of multilateral institutions because these serve as fora where they can influence the hegemon’s preferences and even create rules that may socialize the hegemon into accepted patterns of international behaviour.²⁵ Thus, on certain issues, secondary states may have to look the other way because the hegemon’s withdrawal from these institutions could weaken them, compelling the hegemon to reconsider the value of the *status quo*. In order to preserve its supremacy, the hegemon feels the need to pursue strategies to transform the international order according to values and interests. This could potentially disrupt global economic interactions and undervalue the institutions that manage interstate relations and sustain the stability of the international system.²⁶

Hence one important goal for secondary states is to keep the hegemon involved in international institutions, hoping that diplomatic bargaining will soften its positions and preserve the legal and institutional foundations of the *status quo*.²⁷ This does not mean that this bargaining process will always constrain the hegemon or shape its preferences. At

²² Bruce Cronin, ‘The Paradox of Hegemony: America’s Ambiguous Relationship with the United Nations’ (2001) 7:1 *European Journal of International Relations* 108.

²³ See, G. John Ikenberry, *After Victory: Institutions, Strategic Restraints, and the Rebuilding of Order after Major Wars* (Princeton, NJ: Princeton University Press, 2001), especially at chap. 6.

²⁴ *Ibid.* at 9.

²⁵ Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16 *Eur. J. Int’l L.* 369 at 374.

²⁶ *Supra* note 17 at 888.

²⁷ The logic of this argument is based on the author’s reading of: Stephen G. Brooks and William C. Wohlforth, ‘Hard Times for Soft Balancing’ (2005) 30 *International Security* 72 at 99-104.

most, secondary states can refuse to recognize the legitimacy of the hegemon's actions or decline to support the execution of its strategies. If they cannot counter the hegemon's strategies, their best strategy is to work with the hegemon to preserve the *status quo* by allowing it to fulfill most of its interests. For its part, the hegemon will participate in this bargaining process, if it expects to get a measure of support for its project and access to other states' military and economic resources. Thus, the hegemon's willingness to negotiate with other states is seen as a measure of support for the *status quo*, increasing the chances that secondary states will acquiesce to the hegemon's demands, or at least take into consideration the hegemon's views. This process does not only secure the hegemon's primacy but it also assures secondary states the maintenance of the established international order.

At first glance, Vagts's and Alvarez's interpretation of hegemonic international law seems to suggest that the hegemon will be able to adapt existing laws according to its interests. However, as noted in the explanation above, the hegemonic state does not operate in a vacuum; if it wants to secure the legitimacy of its actions, it will need to take into account the views of secondary states. In essence, the laws may be rewritten but the bargaining process, while enacting new rules or rewriting existing laws that benefit the hegemon, can also give secondary states the mechanisms to strengthen international institutions' powers of oversight, in hope that they may construct norms that may limit hegemonic power in the future. This view of hegemony emphasizes the interactive nature of international affairs and also suggests that international law (even those rules that can potentially limit the hegemon's power) can emerge and evolve in the hegemon's shadow. Indeed, not all forms of hegemonic international law are negative. As Alvarez notes: '[D]efenders of the [Security] Council-generated ad hoc war crimes tribunals would be the first to argue, it may sometimes be necessary for Council members to use their exclusive legislative capacity to short-circuit arduous international treaty negotiations.'²⁸ Of course, Alvarez thinks that most examples of hegemonic international law are problematic but can this be rectified in a world dominated by American power and by weak international institutions that can be swayed by the United States or other powerful states?²⁹

II. The Evolution of American Hegemonic International Law in the Post-Cold War Era

Building on the historical analyses of Charles Beard and William Appleman Williams, Andrew Bacevich argues that American foreign policy since the end of the Cold War has been pursuing 'openness' or 'the removal of barriers to the movement of goods, capital, people, and ideas, thereby fostering an international order conducive to American

²⁸ *Supra* note 17 at 887.

²⁹ W. Michael Reisman raises a similar question but addressing the topic of the unilateral use of pre-emptive force. See, his: 'Assessing Claims to Revise the Laws of War' (2003) 97 Am. J. Int'l L. 82 at 90.

interests, governed by American norms, regulated by American power, and above all, satisfying the expectations of the American people for ever greater abundance.’³⁰ How did the United States achieve and maintain its position of hegemony? Using the terms ‘gunboats’, ‘gurkhas’ and ‘proconsuls’ as metaphors,³¹ Bacevich explains that American foreign policy has primarily relied on coercive mechanisms to sustain and expand its hegemony.

Even though Bacevich makes a strong case, he tends to overlook the importance of international institutions, as mechanisms, created by the United States, to manage the international system. Moreover, Bacevich does not explain how America’s hegemonic position also rests on the seductiveness of its values, which help the United States legitimate its project of transforming the world according to its image.³² As G. John Ikenberry and Charles A. Kupchan argue, hegemonic power must not only rely on the ‘manipulation of material incentives.’ It must also socialize leaders in ‘secondary nations’ so they pursue policies consistent with the hegemon’s notions of international order.³³ In line with Gramscian definitions of hegemony,³⁴ while the United States has the capabilities to enforce its preferences, it understands that coercion is an inefficient way of safeguarding the established international order. The United States has been able to sustain its hegemony by making sure that multilateral mechanisms support its values and interests. Consequently, because these *seem* to result from international bargaining processes, core

³⁰ Andrew J. Bacevich, *American Empire: The Realities and Consequences of US Diplomacy*, 88 (Cambridge, MA: Harvard University Press, 2003).

³¹ According to Bacevich, ‘[T]he Clinton administration found the modern equivalent of old-fashioned ‘gunboats’ in cruise missiles and aircraft armed with precision-guided munitions” (at 148). As for the ‘ghurkas’, he argues that the US relied on ‘third parties’ to carry out missions that could stabilize different regions of the world, allowing US troops to direct their attention to other more pressing matters. A good example is the Clinton administration’s funding of the Africa Crisis Response Initiative, which trained African militaries so they could undertake peacekeeping missions in their continent (at 158). The Clinton administration also relied on private military contractors to achieve key interests in different parts of the world (at 11-62). The new American ‘proconsuls’ are essentially the military commanders that are responsible for US interests in different regions of the world (at 173-180).

³² *Supra* note 22 at 110.

³³ G. John Ikenberry and Charles Kupchan, ‘Socialization and Hegemonic Power’ (1990) 44 Int’l Org. 283.

³⁴ See, Robert W. Cox, ‘Gramsci, Hegemony, and International Relations: An Essay in Method’ in Cox with Sinclair, eds., *Approaches to World Order* (Cambridge, England: Cambridge University Press, 1996).

American 'values and understandings' come 'to be seen as legitimate' by the rest of the international community.³⁵

Neo-Liberalism and American Hegemony

Since the end of the Cold War, these American 'values and understandings' have permeated international regimes and inter-governmental organizations and have influenced their decisions.³⁶ Roland Rich notes that in the early 1990s, the international community accepted that democracy was an important element of the human rights debate. For example, in 1993, the Vienna Declaration and Programme of Action established the link between human rights protection and the expansion of democracy. In 1999, the Commission of Human Rights adopted Resolution 1999/57, entitled 'Promotion of the Right of Democracy.' This resolution reaffirmed the 1993 Vienna Declaration and Programme. The Commission went even further in Resolution 2000/47 by declaring that single-party states' claims that 'they have in place the mechanisms for functioning democracy' were inconsistent with international human rights law.³⁷

Democratization, as an international goal, also became a key United Nations objective in 1996, with Secretary General Boutros Boutros-Ghali's release of *Agenda for Democratization*. As Rich maintains, this document, plus the UN's work in electoral monitoring and related democracy-building programmes throughout the early- and mid-1990s, established 'the concept of international democracy promotion and co-operation outside the domain of the world powers.'³⁸ Even though the United States and other major democratic states took the lead in this project, Boutros-Ghali's initiative re-oriented the work of the UN system's organs and specialized agencies to support the promotion of democracy.

On the economic side, international financial institutions (in particular the World Bank and the International Monetary Fund) and the World Trade Organization have dominated debates concerning international economics and development policy. Although the international community has recently become more critical of the so called 'Washington Consensus',³⁹ the prevailing opinion still is that neo-liberal mechanisms are

³⁵ Ian Johnstone, 'US-UN Relations After Iraq: The End of the World (Order) As We Know It?' (2004) 15 *Eur. J. Int'l L.* 813 at 818.

³⁶ *Supra* note 4 at 384-387; and *supra* note 15.

³⁷ Ronald Rich, 'Bringing Democracy into International Law' (2001) 12 *Journal of Democracy* 20 at 24.

³⁸ *Ibid* at 25.

³⁹ The phrase was coined by John Williamson in 'What Washington Means by Policy Reforms', in John Williamson, ed., *Latin American Adjustment: How Much Has Happened?* (Washington, DC: Institute for International Economics, 1990) 7. For a criticism of this approach, see Joseph E. Stiglitz, 'Whither Reform? Ten Years of the Transition', in Boris Plesovic and Joseph E. Stiglitz, ed., *Annual World Bank*

the best means to strengthen states' economic potentials and that these reforms will put poor countries on the path towards integration into the global marketplace. The neo-liberal policies of choice include the privatization of state-controlled industries, the contraction of the welfare state, de-regulation of financial markets and the banking industry, trade liberalization, tax reform, the end of subsidies for domestic industries and a competitive exchange rate, among many others.⁴⁰

The international community's willingness to promote neo-liberal economics and democratic procedures is informed by the belief that 'openness' is conducive to international co-operation, economic growth and global stability. The United States, since the end of the Cold War, has also supported these efforts but for more selfish reasons. The United States is one of the strongest proponents of globalization as it empowers forces that sustain and expand American hegemony.⁴¹ Strategists in the Pentagon have traditionally been a little hesitant to support this strategy.⁴² Although globalization has the potential to spread liberal values and to expand American hegemony, these same forces can have a destabilizing effect on societies with weak states or underdeveloped economies. Internal problems or external shocks could hamper these states' survivability, fostering civil wars, serious humanitarian crises and refugee flows that can destabilize neighbouring countries and promote further regional instability.⁴³ Weak states can also become havens for terrorist groups, drug cartels, or weapons proliferators. The United States has actively supported foreign interventions in intrastate wars, though it only participates in operations in regions where its interests are at stake; hence it played a leading role in the Balkans and a supportive role in East Timor and Sierra Leone.

To address the challenge posed by these intrastate conflicts and weak states, the UN has led or authorized a number of post-conflict peacebuilding missions, where the main goals are to stabilize these societies and to transform them according to democratic and neo-liberal principles.⁴⁴ While these missions have been controversial, there is growing

Conference on Development Economics 1999 (Washington, DC: World Bank, 2000); and Joseph E. Stiglitz, *Globalization and its Discontents* (New York, NY: W.W. Norton, 2002).

⁴⁰ John Williamson, 'What Should the World Bank Think of the Washington Consensus?' (2000) 15 *World Bank Research Observer* 251.

⁴¹ *Supra* note 30 at 88.

⁴² Thomas P. Barnett, *The Pentagon's New Map: War and Peace in the 21st Century*, 194 (New York, NY: Putnam, 2004).

⁴³ Joseph Grieco and G. John Ikenberry, *State Power and World Markets: The International Political Economy* 17 (New York, NY: W.W. Norton, 2003); and Robert K. Schaeffer, *Understanding Globalization: The Social Consequences of Political, Economic, and Environmental Change*, chapter 13 (Lanham, MD: Rowan and Littlefield, 1997).

⁴⁴ Alejandro Berdana, 'From Peacebuilding to State Building: One Step Forward, Two Steps Back?' (2005) 48 *Development* 5 at 9; and *supra* note 15 at 15-16.

international recognition that they are necessary to ensure regional stability and the protection of human rights standards.⁴⁵ The main criticism is that these missions are a new form of colonialism, in which the international community treats these operations as a 'modern rendering of the mission *civilisatrice*.'⁴⁶ For instance, Roland Paris explains these missions as a 'globalisation of the very idea of what a state should look like and how it should act.'⁴⁷ This re-conceptualization of peacebuilding practices is in line with Oliver Richmond's belief that post-Cold War peacebuilding missions are an 'attempt by hegemonic actors to preserve their own value systems, through international organizations via cosmopolitan structures that freeze the world's cartographies in their dominant members' favour.'⁴⁸ As a result, the UN, since the early 1990s, has promoted economic practices and political values that have strengthened and expanded America's hegemonic position, even though this was not the original intention.

Are these missions a result of American hegemony and do they serve as examples of hegemonic international law? If they are, then Paris's and Richmond's controversial views have some validity. The next section's review of UNMIK suggests that they can be seen as an outcome of American hegemony. One reason is that the international community's ability to enforce international legal standards regarding the resolution or prevention of armed conflict is ultimately dependent on the United States's willingness to work with the UN Security Council to support such enforcement actions.⁴⁹ By the same token, this article's hegemonic international law thesis suggests that if the UN or other international bodies are not willing to intervene in conflicts that threaten American interests, the United States will intervene and set up the necessary mechanisms to

⁴⁵ Recently, the UN General Assembly and Security Council concurrently approved the formation of the UN Peacebuilding Commission to rethink the practice of peacebuilding and to develop new mechanisms that can advance peace and stability. See, S.C. Res. 1645, UN SCOR, 5335th mtg. UNDOC S/RES/1645 (2005). Similarly, a recent study calls for the restoration of the UN Trusteeship Council so it can manage war-torn societies until these are ready to assume full sovereignty. See, James D. Fearon and David D. Laitin, 'Neotrusteeship and the Problem of Weak States' (2004) 8 International Security 5.

⁴⁶ Ronald Paris, 'International Peacebuilding and the Mission *Civilisatrice*' (2002) 28 Review of International Studies 637 at 638. A similar argument is presented by Kimberly Marten Zisk in *Enforcing the Peace: Learning from the Imperial Past* (New York, NY: Columbia University Press, 2004); and Marina Ottaway & Bethany Lacina, 'International Interventions and Imperialism: Lessons from the 1990s' (2003) 23 SAIS Review 71.

⁴⁷ *Ibid.* at 639.

⁴⁸ Oliver P. Richmond, *Maintaining Order, Making Peace* 186 (Basingstoke, England: Palgrave, 2002).

⁴⁹ Thomas Weiss, 'The Illusion of UN Security Council Reform' (2003) 26 Washington Quarterly 147 at 153.

transform these societies according to its values and interests.⁵⁰ Given these realities, what is the role of international institutions, such as the Security Council, in the present international order? Are they supposed to limit America's hegemonic power?

The UN Security Council: An Agent of American Hegemony?

Andreas Paulus argues that the founders of the post-1945 world did not create the UN for the purposes of 'the enforcement of international law as such. On the contrary, the goal was to maintain and, if necessary, to restore international peace and security.' In fact, he asserts that the UN Charter is 'not based on the primacy of law but on collective security provided by superpower involvement and broad Security Council discretion. The Council is not bound by international law itself but only by the "Purposes and Principles of the United Nations."' ⁵¹ Accordingly, the function of the UN is tied to the hegemon's will. If it wants to pursue its main goal of preserving and restoring international peace and security, the UN will bring together the United States and other states to re-interpret existing international laws and develop new laws that can empower the UN and its members to achieve a number of universal objectives, including peace, stability, democracy and market capitalism.⁵²

Paulus's views are controversial. But they are in line with the views of scholars analyzing the impact of American hegemony on international law.⁵³ Indeed, the Security Council's quasi-legislative power provides an incentive for the hegemon to actively participate in the body's proceedings and increases the likelihood that it will try to influence Security Council mechanisms to ensure that its resolutions advance hegemonic interests. This reality does not mean that the UN Secretary General, the General Assembly, or other organs do not have the moral authority to challenge American strategies but American preponderance and the United States's position in the Security Council forces the

⁵⁰ This observation is not only applicable to the Bush administration's decision to oust Saddam Hussein's regime from power in March 2003; it can also be applied to the United States's invasion of Panama in 1989 and its post-invasion efforts to secure the country's transition to democracy. The Organization of American States condemned the actions. The UN Security Council attempted to follow suit but the effort was vetoed by the United States, Britain, and France. However, the General Assembly passed a resolution condemning American actions. For more information, see Paul Lewis, 'Fighting in Panama: United Nations; Security Council Condemnation of Invasion Vetoed' N.Y. Times (24 December 1989) A8; and John Goshko and Michael Isikoff, 'OAS Votes to Censure U.S. for Intervention' Washington Post (23 December 1989) A7.

⁵¹ Andreas Paulus, 'The War Against Iraq and the Future of International Law: Hegemony or Pluralism?' (2004) 25 Mich. J. Int'l L. 691 at 715-716.

⁵² *Supra* note 49 at 153.

⁵³ For instance, see: Alvarez, *supra* note 17 at 873, 888; Thomas D. Grant, 'The Security Council and Iraq: An Incremental Practice' (2003) 97 Am. J. Int'l L. 823 at 829-830; Paul C. Szasz, 'The Security Council Starts Legislating' (2002) 96 Am. J. Int'l L. 901; Frederic L. Kirgis, 'The Security Council's First Fifty Years' (1995) 89 Am. J. Int'l L. 506 at 520-525.

UN to fall in line with American interests. But does this reality increase the legitimacy of the hegemonic order?

The United States may be able to force secondary powers to re-write established laws via the Security Council but doing so may undercut the legitimacy of the values it seeks to promote. In many ways, this would question America's benevolence and reveal the coercive tools it uses to establish and maintain its rule.⁵⁴ Hence, Joseph Nye's 'soft power'⁵⁵ gives way to Bacevich's 'gunboats', 'gurkhas' and 'proconsuls'. As noted above, in the long term, the United States's over-reliance on coercive mechanisms can force secondary states to form alliances against its hegemonic position.⁵⁶ However, the more likely scenario, at least in the short term, is that America's actions would reduce the incentive for international co-operation, forcing the hegemonic state to devote more of its resources to achieve its key interests.⁵⁷ In other words, the United States may convince other states to re-write existing laws but these laws' lack of legitimacy mean that secondary states will not be willing to expend its resources to help Washington keep its control over the international system. Of course, this is the dilemma that the Bush administration has faced in Iraq since March 2003. In line with this logic, the hegemon's inability to manage the international system over the long term weakens its power potential and invites other states to challenge its preponderance.⁵⁸

Ironically, many countries did not disagree with Bush's policy of regime change or Iraq's post-war transformation but did object to the president's unilateralist inclinations and his contempt for international law.⁵⁹ Therefore, the international community criticized

⁵⁴ *Supra* note 22 at 105.

⁵⁵ Joseph Nye, *Soft Power: The Means to Success in World Politics* 7 (New York, NY: Public Affairs, 2004). The concept was originally developed in Joseph Nye, *Bound to Lead: The Changing Nature of American Power* (New York, NY: Basic Books, 1990).

⁵⁶ For the logic of this argument, see Christopher Layne, 'The Unipolar Illusion: Why New Great Powers Will Rise' (1993) 17 *International Security* 5.

⁵⁷ G. John Ikenberry, 'State Power and the Institutional Bargain: America's Ambivalent Economic and Security Multilateralism' in Foot, MacFarlane, and Mastanduno, eds., *US Hegemony and International Organizations: The United States and Multilateral Institutions* 51-53 (Oxford, England: Oxford University Press, 2003).

⁵⁸ *Supra* note 20 at 33.

⁵⁹ While it is true that the members of the UN Security Council had expressed their outrage at Britain's and the United States's decision to invade without the body's approval, the Security Council, as noted below, endorsed the Anglo-American occupation of Iraq and supported its transformational agenda. It is important to keep in mind that this approval was awarded knowing that regime change and post-war transformation were two guiding principles of American and British policy towards Iraq. Also, while France had voiced its decision to veto the so-called 'second resolution', it had previously expressed its willingness to cooperate with Washington's plan if the UN Security Council approved the mission. Indeed, President Jacques Chirac started to mobilize its military for a possible engagement. Even though this may have been part of France's strategy to force the United States to take the Security

the American-led Coalition for going to war without the Security Council's authorization. Because America's post-war objectives were in line with the international community's neo-liberal agenda and its interest in restoring peace and stability, the UN endorsed the Coalition's transformative agenda. Most secondary powers have not been willing to use their resources in this project, even though a democratic and stable Iraq is also beneficial to the rest of the international community.

Keeping in mind that American hegemony affects the workings of intergovernmental organizations, leading to the evolution of hegemonic international law, it is important to consider whether the Coalition's actions in Iraq are in line with established international standards of post-war governance. The next section provides a review of UNMIK's post-war agenda. The purpose of this analysis is threefold. First, it presents a case in which American hegemonic international law had a significant influence over the UN's decisions. Second, the section shows the development of what Michael Ottolenghi calls the 'law of post-conflict governance',⁶⁰ which may provide an explanation as to why the Security Council endorsed the Coalition's plan to transform post-war Iraq. Finally, NATO's war over Kosovo and the UN's decision to administer the province after the war raised important questions regarding the principle of sovereign equality, leading to a re-conceptualization of sovereignty that reinforces the hierarchical character of the international order, while indirectly supporting America's hegemonic project.

III. The UN's Post-War Efforts in Kosovo, the Waning Principle of Sovereign Equality and American Hegemony

Council's concerns seriously, it is also important to remember that at the beginning of the invasion, the French ambassador to the United States promised his country's participation in Iraq's reconstruction. In the end, the possibility of participating in these post-war efforts were spoiled by the American Secretary of Defense Donald Rumsfeld, who had made it clear that reconstruction contracts were only to be awarded to members of the American-led coalition. For the possible French military contribution, see Phillip Gordon and Jeremy Shapiro, *Allies at War: America, Europe, and the Crisis Over Iraq* 142-43 (New York, NY: McGraw-Hill, 2004); on Rumsfeld's decision, *ibid.* at 202; and on the French ambassador's comments, see David Sanders, 'France to Help After War with Iraq' *Washington Times* (13 March 2003) A10.

⁶⁰ It has to be emphasized that this concept is used by Ottolenghi to describe a series of *ad hoc* mechanisms devised to address the challenge of war-torn societies. These by themselves do not constitute a body of law per se. However, it is important to stress the similarities between UN-mandated peacebuilding missions in Eastern Slavonia, Bosnia and Herzegovina, Kosovo and East Timor showing that each experience informs the UN Security Council's decisions in regards to this type of challenge. For more on the concept, see Michael Ottolenghi, 'The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation' (2004) 72 *Fordham L. Rev* 2177.

The UN Security Council did not sanction NATO's 1999 war against Yugoslavia over Kosovo. However, the UN, '*bearing in mind* the purpose and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,'⁶¹ agreed to assume responsibility over the civilian administration of post-war Kosovo. Although the UN had played different roles in various post-war peacebuilding missions during the 1990s, UNMIK was established according to a 'purposive interpretation' of Chapter VII of the UN Charter.⁶² Prior missions, though also authorized under these provisions, tended to uphold the spirit of Chapter VI.

Most of the pre-Kosovo missions were set up at the behest of the warring parties. Their goal was usually to monitor and support the implementation of a peace agreement negotiated by the parties.⁶³ Accordingly, the UN played an advisory role, though at times the Security Council authorized UN peacekeepers or military units of member-states operating under the UN-mandate to use force in order to secure the implementation of these peace agreements or to prevent a humanitarian crisis. These missions were in line with the provisions of Article 2 of the UN Charter, which states that 'The organization is based upon the principle of sovereign equality of all its Members'⁶⁴ and clearly claims that the UN shall not 'intervene in matters which are essentially within the domestic jurisdiction of any state.'⁶⁵ In other words, because these missions were established with the consent of the parties, the UN was not technically violating the sovereignty of these states.

UNMIK was not created with the consent of the warring parties and the establishment of the mission 'suspended' Yugoslavia's sovereignty over the province and established 'temporary' authority over the territory. The same rationale was used to establish the UN Transnational Administration in East Timor.⁶⁶ These missions clearly contradict the principle of sovereign equality, reinforcing the hierarchical nature of international politics and underscoring the fact that the Security Council can be turned into an instrument of American hegemony.

⁶¹ S.C. Res.1244, U.N. SCOR, 54th Sess., 4011 mtg., U.N. Doc. S/RES/1244 (1999).

⁶² Epaminontas E. Triantafylou, 'Matter of Law, Question of Policy: Kosovo's Current and Future States Under International Law' (2004) 5 Chi. J. Int'l L. 355 at 359.

⁶³ Ottaway & Lacina, *supra* note 46 at 76.

⁶⁴ United Nations Charter, art. 2, para. 1.

⁶⁵ United Nations Charter, art. 2, para. 7.

⁶⁶ Alexandros Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics' (2002) 13 Eur. J. Int'l L. 1037 at 1047-1048.

Having assumed the right to suspend the sovereignty of the states, as a means to secure the basis of international peace, the Security Council has subordinated Article 2 of the UN Charter to Article 1, which asserts that the organization's main responsibility is to:

maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Is this a reasonable interpretation? While this is debatable, it is important to recognize that the international community's understanding of sovereignty, as an organizing principle of international life, has evolved since the UN Charter's provisions were negotiated in the mid-1940s. What effect have these changes had on international law? Have these changes been informed by America's hegemonic position? Before answering these questions, it is important to provide a review of UNMIK's efforts, as the international debate on the legality and legitimacy of NATO's aerial bombing campaign against Yugoslavia and the UN's work in the province have had an important influence on international debates regarding the meaning of sovereignty and the UN's role in the current international order.

American Hegemonic International Law and UNMIK's Post-War Efforts

Under the authority provided by Chapter VII, specifically Article 39, the Security Council deemed the situation in Kosovo to be a breach of international peace. However, the members of the Security Council failed to find a common approach to address the situation. In accordance with Article 40, the Security Council instructed the parties to work together 'to prevent an aggravation of the situation.'⁶⁷ It supported the Contact Group's Rambouillet talks,⁶⁸ which were being sustained by the Clinton administration's threat to go to war if Yugoslav President Slobodan Milosevic failed to sign a peace agreement. Although not sanctioned by the Security Council, NATO, at Washington's behest, decided to launch attacks against Serb positions in Kosovo in hopes that it would lead Milosevic to capitulate to the Contact Group's demands.⁶⁹ After 72 days of aerial bombardment, Milosevic was forced to accept the provisions of the Rambouillet Accords.

⁶⁷ United Nations Charter, Art. 40.

⁶⁸ At the time, the Contact Group included representatives from the following states: the United States, the United Kingdom, Germany, France, Italy and Russia.

⁶⁹ Alex J. Bellamy, 'Lessons Unlearned: Why Coercive Diplomacy Failed at Rambouillet' (2000) 7 *International Peacekeeping* 95 at 110.

Led by the United States, the Contact Group asked the UN to organize and lead a post-war peacebuilding mission. According to its interpretation of Article 41,⁷⁰ the Security Council, through Resolution 1244, agreed to this request, setting-up a mission unprecedented in at least three respects. First, the UN established a mission with expansive civilian powers. Although recognizing Kosovo as part of Yugoslavia, it specified that UNMIK was to perform 'basic civilian administrative functions where and as long as required.'⁷¹ As Carsten Stahn observes, '[t]he UN assumed the role of "international governance" not by consent, but rather by way of unilateral decree.'⁷² Milosevic objected to UNMIK's broad powers, as it challenged Yugoslavia's sovereignty but the UN dismissed his views on the grounds that the presence of Serb authorities was not conducive to the restoration of peace and stability.⁷³ Similarly, the Kosovo Liberation Army did not welcome UNMIK's creation because it contradicted its efforts to secure the province's independence. The presence of NATO troops forced both sides to acquiesce to UNMIK's authority over the province.

Second, Resolution 1244 instructed the 'Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence.'⁷⁴ In regards to peacekeeping duties, the document authorized 'Member States and relevant international organizations to establish a security presence.'⁷⁵ Resolution 1244, making use of Article 48 of the UN Charter, organized the peacebuilding mission with the assistance of regional organizations.⁷⁶ The

⁷⁰ United Nations Charter, art. 41. It reads: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. This may include complete or partial interruption of economic relations and of rail, sea, air, postal telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' This list of measures is not comprehensive. As Ottolenghi notes, Article 41 has been used to establish international criminal tribunals. See Ottolenghi, *supra* note 60 at 2194.

⁷¹ Resolution 1244, *supra* note 61 at para. 11(b).

⁷² Carsten Stahn, 'Governance Beyond the State: Issues of Legitimacy in International Territorial Administration.' Paper presented at the SIGR Fifth Pan-European Conference (The Hague, The Netherlands: 9-11 September 2004): 6, online <<http://www.sgir.org/conference2004/papers/Stahn%20-%20Governance%20Beyond%20the%20state.pdf>>.

⁷³ *Ibid.* at 6-7.

⁷⁴ Resolution 1244, *supra* note 61 at para. 6.

⁷⁵ *Ibid.* at para. 7.

⁷⁶ Ottolenghi, *supra* note 60 at 2194. UN Charter, art. 48, para. 1 reads: "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." Para. 2 also asserts that: "such decisions shall be carried out by the Members of the United

peacekeeping force, known as KFOR, has been under NATO's authority. UNMIK, though under the UN's control, is divided into four functional pillars, two lead by the UN and the other two by the EU and the OSCE.⁷⁷

Finally, the UN clearly wanted to transform Kosovo according to democratic and capitalist values. Ottolenghi argues that Resolution 1244 granted the Special Representative 'broad powers compared to the restrictions imposed on an occupying power by the law of occupation.'⁷⁸ In fact, the Special Representative has the power to 'make new laws as needed.' UNMIK's first regulation affirmed its broad powers: 'all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative.'⁷⁹ The regulation also stated that Yugoslav law, promulgated prior to 24 March 1999, would remain applicable unless these contradicted UNMIK's mandate or its regulations.⁸⁰ Ottolenghi is right to point to UNMIK's transformative agenda but he fails to mention that U.N. lawyers initially recommended the Special Representative to observe the limitations set in the international law of occupation. According to Henry Perritt, the UN was unsure of whether it could execute the transformation of Kosovo's economy, even though the Resolution's language, as captured in operative paragraph 17, implicitly averred that the transformation was to be guided by the principles set out by the Stability Pact for South Eastern Europe.⁸¹ Kosovo's economic stagnation and increasing pressures from the international community, especially the United States, forced UNMIK to abandon these reservations and embrace

Nations directly and through their action in the appropriate international agencies of which they are members."

⁷⁷ Pillars I and II are under the UN's control. The first deals with police and justice issues. The second is responsible for civil administration. Pillar III is led by the OSCE. Its responsibility includes the promotion of democracy and human rights, the organization and supervision of elections, and the administration of capacity-building programs. Pillar IV is responsible for reconstruction efforts and the EU is responsible for this Pillar's programs. Originally, Pillars I and II were one and the UN High Commission for Refugees used to administer Pillar I which dealt with humanitarian issues and established programs to help internally displaced people and refugees. For more information, see UNMIK's website: <<http://www.unmikonline.org/intro.htm>>. For an excellent review of UNMIK's efforts, see: Michael J. Matheson, 'United Nations Governance of Post-Conflict Societies' (2001) 95 Am. J. of Int'l L. 76 at 80.

⁷⁸ Ottolenghi, *supra* note 60 at 2200.

⁷⁹ Cited in: Matheson, *supra* note 77 at 80.

⁸⁰ *Ibid.* at 80.

⁸¹ Antonio F. Perez, "Legal Frameworks for Economic Transition in Iraq – Occupation Under the Law of War vs. Global Governance Under the Law of Peace" (2004) 18 Transnat'l Lawyer 53 at 68-69.

this transformative agenda.⁸² As Matheson argues, UNMIK was charged with more than just reconstruction of Kosovo's infrastructure, it was also responsible for 'the development of a market-based economy, the coordination of international financial assistance, and the resolution of trade, currency, and banking matters.' Clearly, 'the reason for the UN administration was not to remedy a governmental breakdown, but to engineer a fundamental change in governmental policy.'⁸³

Accordingly, UNMIK's efforts are not only in line with American interests and understandings of intrastate order but they also capture the growing international consensus that democratic values and neo-liberal economic principles should guide the transformation of war-torn society. Post-war peacebuilding missions organized or authorized by the UN during the 1990s have led to the development of a set of ad hoc mechanisms Ottolenghi groups under what he calls the 'law of post-conflict governance.' Although these mechanisms are informed by cosmopolitan interests and the UN's duty to promote international peace and stability, it is also a consequence of American hegemony, which supports the transformation of these societies as a means to preserve and expand American influence. Hence, the United States's motivation for intervention may not be in line with the cosmopolitan values that inform the UN's decisions but support for such missions, as discussed in the next section, legitimates American understandings of intrastate order, while at the same time cementing and further expanding its hegemony.

As noted above, NATO's war against Yugoslavia and UNMIK's work also had a significant impact on international debates concerning the principle of sovereign equality as a roadblock to the UN's efforts to prevent serious humanitarian crises or the wanton violation of human rights. Although these discussions had taken place prior to this conflict, they influenced the analysis of several international commissions, shaping current attempts to reform the UN. If UNMIK's work is an example of American hegemonic international law, are these reform efforts going to deepen the United States's primacy over the international system?

Re-conceptualizing Sovereignty and its Impact on International Law

Commenting on the decision to intervene in Kosovo and East Timor on humanitarian grounds, then UN Secretary General Kofi Annan argued that the international community had to reconsider the longstanding definition of sovereignty. Even though he was critical of NATO's decision to bypass the Security Council, he also stressed that the memory of Rwanda perhaps justified this action. The clear message was not only that sovereignty

⁸² Henry H. Perritt, "Note on the 'Political Trustee' Concept," Symposium – Final Status for Kosovo (Chicago, IL: Chicago-Kent College of Law, April 16, 2004), online: <<http://operationkosovo.kentlaw.edu/symposium/note-on-political-trusteeship.htm>>.

⁸³ Ralph Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches' (2004) 15 Eur. J. Int'l L. 71 at 85.

could not serve as an excuse for inaction when serious human rights violations were taking place but that the Security Council had to find ways to act to rectify these wrongs.⁸⁴

Annan's views on sovereignty were in line with Stephen Krasner's research which expands the traditional definition of sovereignty by fusing it with the principle of self-determination.⁸⁵ As such, sovereignty cannot be solely seen as legal sovereignty – recognition of a nation-state as 'an independent political and legal entity';⁸⁶ it must also include two other elements: 'Westphalian sovereignty' and 'domestic sovereignty.' Taken together, sovereignty does not only mean international recognition of control over a specific territory but it also means that a government 'must not only be seen to be ruling but be felt to be ruling in the interests of the people.'⁸⁷ Hence, this characterization combines the principles of sovereignty and self-determination to demonstrate that political rule is based on legitimacy and citizens' participation in the political system. This reconceptualization informs the findings of the International Commission on Intervention and State Sovereignty's (ICISS) report, *The Responsibility to Protect*, and the report of the UN Secretary General's High-Level Panel on Threats, Challenges, and Change titled, *A More Secure World: Our Shared Responsibility*.

While many UN members have endorsed this expanded conception of sovereignty, many legal scholars are concerned that there are not enough parameters to specify under what conditions the Security Council can authorize a humanitarian intervention or similar peace operations.⁸⁸ Similarly, if the Security Council sets a precedent by recognizing that sovereignty is dependent on a state's protection of its people and other international standards (basic humanitarian standards, human rights, democracy, peace and so forth), could this logic be used to legitimize unilateral humanitarian interventions? The ICISS's document argues that such an intervention can take place, if the Security Council or the General Assembly fails to act, if a regional organization is unwilling to take up the matter and if the intervener's actions are guided by

⁸⁴ Kofi Annan, 'Two Concepts of Sovereignty', *The Economist* (18 September 1999), online <<http://www.un.org/News/ossg/sg/stories/kaecon.html>>.

⁸⁵ Stephen Krasner, *Sovereignty, Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999). For a similar interpretation but based on international law, see Kal Raustiala, 'Sovereignty and Multilateralism' (2000) 1 *Chi. J Int'l L* 401.

⁸⁶ Toby Dodge, 'A Sovereign Iraq?' (2004) 46:3 *Survival* 39 at 40. It is important to note that Dodge's interpretation builds on Stephen Krasner's work on this subject.

⁸⁷ *Ibid.* at 45.

⁸⁸ See, for example, I. Maxine Marcus, 'Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization' (2002) 25 *Hous. J. Int'l L* 99 at 108.

the interests of the affected population.⁸⁹ Although this is a very high threshold, the ICISS's consideration of a possible 'illegal' but legitimate intervention was shaped by the NATO's decision to attack Yugoslavia. Did this opinion influence the High-Level Panel's recommendations?

On its view of sovereignty, the High-Level Panel goes a step further. Released after the 2003 Iraq war, it argues that UN membership, which has been traditionally seen as an affirmation of a state's right to sovereignty, carries with it an obligation to honour international and domestic legal commitments, as defined by the provisions of international humanitarian law and human rights law.⁹⁰ Hence, states that do not meet these commitments are subject to international sanction in accordance with the UN Charter's provisions. More importantly, the report suggests that 'sovereignty misused' could become 'sovereignty denied'.⁹¹ Thus, the UN also reserves the right to intervene in order to establish new state structures that will be able to live up to this new definition of sovereignty.⁹² While this definition expands the 'circumstances in which the international community can decide to use force,'⁹³ the High-Level Panel's report establishes that all decisions regarding enforcement action lie with the Security Council.⁹⁴

In contrast to ICISS, the High-Level Panel's report fails to explain how it will prevent or resolve these conflicts if the Security Council is unable to act. This is an important problem because it suggests that the Security Council can only work if the permanent members can work together to advance the general interests of the international community. In many ways, it confirms Paulus' controversial views on the operation of the Security Council discussed in the previous section. The report recognizes this problem and calls on the Security Council to adopt 'a set of agreed guidelines', developed by the High-Level Panel, that will help the Security Council reach consensus regarding how to address the challenges posed by states that violate basic human rights standards.⁹⁵ This recommendation, on paper, sounds very good. But given this re-

⁸⁹ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, Ontario: International Commission on Intervention and State Sovereignty, 2001), available: < <http://www.iciss.ca/pdf/Commission-Report.pdf> >, at paras. 6.36-6.40.

⁹⁰ *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges, and Change*, UN Doc. A/59/565 (2004) at paras. 29-30.

⁹¹ Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99 Am. J. Int'l. L. at 628.

⁹² *Ibid.* at 629.

⁹³ *Ibid.* at 621.

⁹⁴ *Supra* note 90 at paras. 203-207.

⁹⁵ *Ibid.* at paras. 205-207. These guidelines include the following: 'seriousness of threat', 'proper purpose', 'last resort', 'proportional means' and 'balance of consequences'. These are similar to the

interpretation of sovereignty and the importance the report puts on the need to act, the Security Council should have taken the United States's case for ousting Saddam Hussein's regime more seriously. However, the debate in the Security Council was not centred on the plight of the Iraqi people or the threat Iraq posed to the region but on how the United States should use its power. This is similar to the debate concerning the Clinton administration's case for a Security Council resolution authorizing the use of force against Yugoslavia in 1999. The Kosovo war was criticized on legal grounds but praised for upholding humanitarian standards: does this mean that this war and the UN-mandated peacebuilding mission inform these two reports' recommendations, especially those offered by High-Level Panel as these are guiding current reform efforts at the UN?

NATO's war over Kosovo and the establishment of UNMIK are important precedents. Indeed, there are important parallels between this episode and the international community's reaction to the invasion of Iraq in March 2003 and to the Anglo-American request to establish a post-war mission. Moreover, even though the two reports discussed above did not discuss directly the benefits of neo-liberal values, the underlying logic, especially in the High-Level Panel's findings, is that the international community has a responsibility to force states to adapt their legal structures according to the precepts of international humanitarian law and human rights law. This report also called on the Secretary General to establish a Peacebuilding Commission to re-think the practice of peacebuilding and to develop new guidelines that will inform future operations.⁹⁶ Is this emphasis on transforming states a result of an emergent cosmopolitanism ethos? At first glance this may seem to be the case but it must also be considered a development influenced by American values and its idealized vision of intrastate order, generating condition that allows the United States to sustain its hegemony over the international system.

Taken together, UNMIK's efforts and this re-conceptualization of sovereignty not only highlight the influence of American values but also shed light on the issues considered by the Security Council when it addressed the United Kingdom's and United States's request for a resolution legitimizing their occupation of Iraq and the project to transform Iraqi social order along neo-liberal lines.

IV. American Hegemony, UN Security Council Resolution 1483 and the Legalization of Iraq's Post-War Transformation

The UN Security Council passed Resolution 1472 during the Iraq war on March 28, 2003. Its main purpose was to call on the international community to assist the American-led

ICISS's criteria, which include: 'right authority', 'just cause', 'right intention', 'last resort', 'proportional means', and 'reasonable prospects'. See, *The Responsibility to Protect*, *supra* note 89 at para. 4.16.

⁹⁶ *Supra* note 90 at paras. 82-85. This Commission was concurrently established by the UN Security Council and General Assembly on December 20, 2005. See, S.C. RES 1645, *supra* note 45.

coalition to prevent a humanitarian crisis in Iraq and to ensure the delivery of humanitarian supplies to the Iraqi people. While this was in line with the Coalition's interests, the document made it clear that the United States and the United Kingdom were occupying powers and requested them 'to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations.'⁹⁷ It also reaffirmed the right of Iraqis 'to determine their own political future and to control their own natural resources.'⁹⁸ Critics of the Coalition's policies may have included references to the international law of occupation in the resolution to contradict the United States's self-description as a 'liberator.'⁹⁹

Resolution 1472 is not mentioned in American or British government documents explaining the Coalition's reasons to create the CPA;¹⁰⁰ the United States and the United Kingdom resisted the idea of occupying and administering the country. The original post-war strategy for Iraq, designed by Jay Garner and the staff of the Office for Reconstruction and Humanitarian Affairs (ORHA), planned to transfer power to an interim Iraqi government three months after the end of military operations.¹⁰¹ In early May 2003, the Bush administration abandoned this strategy for two reasons. First, the liberation of Baghdad was followed by the massive looting of many state-owned enterprises, most governmental buildings and the country's electrical grid. Thus, Iraq needed a more robust strategy that could address the country's socio-economic challenges. Second, even though President George W. Bush and Prime Minister Tony Blair called on Iraqis to work with the ORHA to establish an 'Iraqi Interim Authority' to administer the country until the 'people of Iraq' could institute a permanent government,¹⁰² this was abandoned once the Pentagon noticed that Ahmad Chalabi and other like-minded exiled Iraqi leaders had little support

⁹⁷ S.C. Resolution 1472, U.N. SCOR, 58th Session, 4732 mtg., para. 1, U.N. Doc. S/RES/1472 (2003).

⁹⁸ *Ibid.* at preamble.

⁹⁹ Gregory H. Fox, 'The Occupation of Iraq' (2005) 36 Geo. J. Int'l L. 195 at 233-234.

¹⁰⁰ See, for instance L. Elaine Halchin, 'The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities' No. RL 32370 (Washington, DC: Congressional Research Service, April 29, 2004) and Paul Bowers, 'Iraq: Law of Occupation' Research Paper No. 03/51 (London, England: House of Commons Library, 2 June 2003).

¹⁰¹ On Garner's views on the duration of the post-war mission, see Adam Garfinkle, 'The Daunting Aftermath: L. Paul Bremer & Co. Have a Different of War on Their Hands' (28 July 2003) 55:14 The National Review 29. For a review of the 'original' post-war strategy, see Carlos L. Yordán, 'Failing to Meet Expectations in Iraq: A Review of the Original Post War Strategy' (2004) 8 Middle East Review of International Affairs 52; and David Rieff, 'Blue Print for a Mess: How the Bush Administration's War Planners Bungled Postwar Iraq' N.Y. Times Magazine (November 2, 2003).

¹⁰² Bowers, *supra* note 100 at 10.

among Iraqis and that Islamist political groups would play a dominant role in the new Iraq.¹⁰³

Learning from its experience in Afghanistan, the Bush administration knew that the premature transfer of power to an Iraqi interim administration would make it difficult for the United States and its coalition partners to influence the government's policies and to push for the necessary reforms to secure Washington's vision of post-Saddam Iraq as a secular, multiethnic democracy supportive of its global war on terror and a beacon of hope in the heart of the Middle East.¹⁰⁴ Facing this dilemma and building on post-war efforts in Kosovo and East Timor, some officials, especially in the United Kingdom, wanted the UN to set up a mission to administer post-war Iraq. The Bush administration opposed this proposal. The ORHA considered ways the UN could be used to pay for the occupation¹⁰⁵ and to increase the chances non-Coalition members would send troops to stabilize Iraq¹⁰⁶ but Bush made it clear that the UN could not run the show.¹⁰⁷ Knowing that the United States would be in post-war Iraq longer than three months, a new strategy was needed to secure America's interests but without angering the international community, as the Bush administration wanted UN support to legitimize its occupation and to increase the chances the international community would commit troops, financial resources and personnel to post-war efforts.

On 8 May 2003, the United States and the United Kingdom sent a letter to the President of the Security Council expressing their willingness to 'strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq' and to 'ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.' The occupying powers also informed the Council of their decision to replace the ORHA with the CPA to administer the country until Iraqis could establish their own representative government. Even though the letter satisfied the Security Council's demands as set out in Resolution 1472, it stopped short of agreeing to administer Iraq in accordance with the international law of occupation.¹⁰⁸ One reason they resisted this label was because this body of law, as captured in the Hague Regulations of

¹⁰³ Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* 33-34 (New York, NY: Times Books, 2005); and David Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* 136-139 (Boulder, CO: Westview Press, 2005).

¹⁰⁴ David B. Rivkin and Darin R. Bartram, 'Military Occupation: Legally Insuring a Lasting Peace' (2003) 26 *The Washington Quarterly* 87 at 92.

¹⁰⁵ Simon Chesterman, 'Bush, the United Nations and Nation-Building' (2004) 46 *Survival* 101 at 106.

¹⁰⁶ Michael R. Gordon, 'The Strategy to Secure Iraq Did Not Foresee a 2nd War,' *N.Y. Times*, 19 October 2004.

¹⁰⁷ Bob Woodward, *Plan of Attack* (New York, NY: Simon and Schuster, 2004) at 359.

¹⁰⁸ 'Letter from the Permanent Representatives of the UK and the US to the UN addressed to the President of the Security Council,' UN Doc. S/2003/538 (2003).

1907 (HR) and the Fourth Geneva Conventions of 1949 (GC), does not allow occupying powers to carry out the transformation of countries under military occupation.

A Brief Synopsis of the International Law of Occupation

The international law of occupation was established to limit the occupier's power. In the HR's case, diplomats participating in the document's negotiations wanted to protect the ousted sovereign's powers and to prohibit the annexation of occupied territory through war. At the time, occupations tended to be short affairs, mainly disputes between militaries and governments, rather than entire nations. Once the dispute was settled, the occupant would return the occupied territory to the defeated government.¹⁰⁹ Consequently, the occupying power, as stipulated in Article 43, would assume authority for the ousted sovereign, taking '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.'¹¹⁰ This is not to say that the occupier cannot make changes to the established legal order or suspend certain laws. These actions are possible in cases of 'military necessity', that is to say, when the occupant believes that these laws are 'injurious to the interests of the occupant or to his wartime aims.'¹¹¹ Although 'military necessity' warrants some changes, these apply to the penal code, and not to the civil code. The occupying power is required to rule the territory with existing governmental institutions.

The HR also limits the occupant's administration of state-owned property and its ability to requisition private property to support the occupant's military activities in the occupied territory.¹¹² The document recognizes two types of state-owned property: movable and immovable. Examples of movable property include: 'cash, funds, and realizable securities which are strictly property of the State, depots of arms, means of transport [and] stores and supplies....'¹¹³ All property must be returned to the ousted government once authority is transferred. In regards to immovable property, Article 55 determines that:

The occupying state shall be regarded as an administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to

¹⁰⁹ Grant T. Harris, 'The Era of Multilateral Occupation' (2006) 24 Berkeley J. Int'l L. 1 at 3; and Eyal Benvenisti, *The International Law of Occupation* 7 (Princeton, NJ: Princeton University Press, 1993).

¹¹⁰ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *Regulations Respecting the Laws and Customs of War on Land*, Annex, 36 Stat. 2277, 1 Bevans 631, art. 43 [hereinafter Hague Regulations].

¹¹¹ Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 6th edition, 787 (New York, NY: Macmillan, 1992).

¹¹² For the conditions occupying powers need to follow before destroying or expropriating private property, see, Hague Regulations, *supra* note 110 at Arts. 23, 46, 52 and 53.

¹¹³ *Ibid.* at art. 53.

the hostile State and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rule of usufruct.

This article has been used to limit the occupant's operation of state-owned enterprises and the administration of the territory's natural resources. According to the rule of usufruct, the occupant's authority is "measured not by his own needs but by the duty to maintain integrity in the corpus."¹¹⁴

Can the occupant privatize state-owned enterprises? Even though the HR did not address this issue, legal scholars argue privatization would conflict with 'the rule of usufruct.' Similarly, the occupant can administer these natural resources and related industry as long as the proceeds are employed to cover 'expenses of occupation' and to 'benefit the indigenous population.'¹¹⁵ In the case of Iraq's oil industry, there was a debate concerning the occupant's authority to drill new wells or develop new oil fields. One perspective argued that the occupant could tap unused oil resources but it had to do it responsibly. In other words, it needed to make sure that production did not deplete the country's resource base or damage the industry's infrastructure, which would threaten the sovereign's ability to use this industry once it assumed authority over the country.¹¹⁶

Because diplomats negotiating the HR's provisions considered occupations to be short affairs, they did not explain in detail whether an occupying power could manage an occupied country's financial, economic, or commercial systems.¹¹⁷ However, this is an area where international customary law suggests that the occupant can administer these systems if it does not 'serve to accomplish forbidden ends.'¹¹⁸ This is a controversial interpretation due to the HR's disapproval of long occupations. Another contentious issue is whether an occupying power can appoint a private firm to manage a state-owned industry. R. Dobie Langenkamp and Rex J. Zedalis note that Article 55 grants this authority as long as the selection of such firm 'was economically sound, made in good faith, and not somehow inuring to the occupant's "own enrichment."¹¹⁹ This interpretation of Article 55 is consistent with 'the realities of modern commerce.' The occupant, as a trustee

¹¹⁴ Cited in Ottolenghi, *supra* note 60 at 2186.

¹¹⁵ R. Dobie Langenkamp and Rex J. Zedalis, 'What Happens to the Iraqi Oil? Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields' (2003) 14 *Eur. J. Int'l L.* 417 at 432 and 433.

¹¹⁶ *Ibid.* at 428-429.

¹¹⁷ Laurence Boisson De Chazournes, 'Taking the International Rule Law of Seriously: Economic Instruments and Collective Security' 11-12 (New York, NY: International Peace Academy, October 2005).

¹¹⁸ von Glahn, *supra* note 111 at 802.

¹¹⁹ *Supra* note 115 at 434.

of this industry, should not ignore the local capacities of experts and firms. However, international law is silent on whether private local firms, state-owned companies, or foreign corporations can best administer these types of industries; thus, the occupant has the freedom to choose the best strategy as long as it does not conflict with the usufructuary principle.

In 1949, the International Committee of the Red Cross called a conference to revisit the international law of occupation, asking diplomats to focus on 'the indigenous community under occupation rather than the wishes of the ousted government.'¹²⁰ The GC did not supersede the HR; it strengthened the rights of civilians and required the occupying power to meet the humanitarian needs of individuals in the territory under occupation. Thus, like the HR, the GC limits the occupying power's ability to transform the legal order, although Article 64 allows for some modifications if the existing penal code is not in line with the GC's human rights standards. While the GC prohibits changes to the civil code, some research shows that a liberal interpretation of Articles 51 and 64 allows occupying powers to execute a transformation of the political and socio-economic systems.¹²¹ Nevertheless, most interpretations clearly show that an occupying power is 'not competent to enact reforms that fundamentally alter governing structures in the territory and create long term consequences for the local population' because it lacks local legitimacy.¹²² Thus, in the case of post-war Iraq, such reforms, even if executed with the best intentions, would violate Iraqis' collective sovereignty.

¹²⁰ Adam Roberts, 'What is a Military Occupation?' (1984) 55 *British Yearbook of International Law* 249 at 252; and Benvenisti, *supra* note 109 at 6.

¹²¹ Benvenisti argues that the Convention provides a tool to pursue a more maximalist strategy. Article 64 clearly enables the occupant to alter the penal code to make sure that citizens are protected under the law. However, Article 51 of the GC, which regulates labor related issues, provides for changes in the civil code, if the labor laws are not consistent with accepted standards: fair compensation, training, normal work hours, compensation for work-related accidents and so on. Benvenisti points that if the occupant can change an aspect of the civil code, then it should be able to adjust other areas as well. Of course, these revisions must comply with the GC's human rights principles. This is an interesting argument. However, the GC backed Article 64 with the provisions of Articles 65 to 78. Each of these Articles explains by what steps the occupant is authorized to change the law and what principles it needs to adhere to when changes are proposed. For instance, modifications to the penal law must be presented in writing and in the language of the local population before these changes take effect. Similarly, individuals charged for any type of crime must have access to a fair trial. Also, new laws cannot be applied retroactively and if an individual is found guilty by the courts, the sentence should be proportional to the crime. Thus, its conception of social change is very minimal and not as expansive as Benvenisti would argue. See, *supra* note 109 at 101-102.

¹²² *Supra* note 99 at 240.

Negotiating Resolution 1483: A Revision of the International Law of Occupation?

Given the limitations inherent in the international law of occupation, it is not surprising that the United States, and the United Kingdom to a lesser extent, were considering their options once 'major' military operations ceased in Iraq. Although this body of law goes into effect once an occupation takes place, not when occupying powers decide to abide by these rules, both governments considered ways to legitimate their plans to transform Iraq's political and socio-economic systems.¹²³ This was especially true for the Blair government following Claire Short's resignation as Secretary of State for International Development on 12 May 2003. Based on the British Attorney General's opinion that Iraq's transformation would be illegal without a mandate from the Security Council,¹²⁴ her resignation may have been part of an effort to call public attention to this fact and to force the United States to work with its Coalition partners to secure a new resolution.¹²⁵ In fact, at the time of her resignation, the United States, the United Kingdom, and Spain had tabled a draft resolution on Iraq and there were fears that the United States would bypass the Security Council if France, Germany and Russia opposed its interests. Although the Bush administration believed that it already had the legal authority, if not the moral responsibility, to carry out this project,¹²⁶ the White House may have decided to search for the Security Council's support to help Blair silence his critics.

The draft resolution was welcomed by the Security Council's members but it did not enjoy unanimous support.¹²⁷ Conceding to international pressure, and in accordance with Resolution 1472, the draft requested that 'all concerned' parties 'comply fully' with the GC and HR, suggesting that the United States and the United Kingdom would act in accordance with this body of law. But the Resolution also called on the Secretary General to support Iraq's transition to democracy and its economic transformation by appointing a Special Coordinator that would help the occupying powers achieve these goals, which clearly contradicted the standards set out in the GC and HR. In addition, it demanded the transfer of assets controlled by the UN Oil for Food Programme to an 'Iraqi Assistance

¹²³ *Supra* note 110 at Article 42. It reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army.'

¹²⁴ In a memo to Prime Minister Blair, Attorney General Lord Goldsmith explained that 'a further Security Council resolution is needed to authorize imposing reform and restructuring of Iraq and its Government', as this would violate the law of international occupation. Cited in John Kampfner, 'Blair Was Told that it would be Illegal to Occupy Iraq' *New Statesman* 17 (May 26, 2003).

¹²⁵ Bowers, *supra* note 100 at 12.

¹²⁶ Nile Gardiner and David B. Rivkin, 'Limiting the U.N. in Iraq', *United Press International* (April 28, 2003) [Lexis/Nexis].

¹²⁷ For a copy of the draft resolution, see: 'US-UK Draft Resolution on Postwar Iraq', *Global Policy Forum* (May 9, 2003) at s.12, on-line: <<http://www.globalpolicy.org/security/issues/iraq/document/2003/0509postwardraft.htm>>.

Account,' managed by the Coalition to pay for post-war efforts, including the provision of humanitarian goods, economic reconstruction, and civilian administration. This account would be monitored by an international advisory board, which members were to be chosen by the Secretary General. Although explaining that the occupation would last a year, the occupying powers wanted the Security Council to grant them the authority to extend the mandate if they could not meet their objectives in this time frame.

One member expressed deep reservations: 'What is asked of the Security Council is to provide the occupying powers with a kind of authority that goes far beyond international conventions.'¹²⁸ France, Germany and Russia were dissatisfied with the coalition's unwillingness to give executive power or a say on military matters to a Special Representative, appointed by the Secretary General. In fact, the draft document did not refer to the Secretary General's appointee in Iraq as a 'Special Representative' but as 'Special Coordinator', suggesting his efforts would be in line with the occupying power's interests. These three governments wanted the coalition to transfer post-war administration to a UN mission, similar to the one established for Kosovo. They also wanted the draft resolution to include a provision that gave UN weapons inspectors the authority to finish their investigation on Saddam Hussein's alleged weapons of mass destruction programmes. Moreover, they objected to the Coalition's desire to extend its mandate without the Security Council's approval, as this would have reduced the international community's influence on issues regarding Iraq's future.

After twelve days of intense negotiations, the Security Council passed Resolution 1483 by a vote of 14-0, with Syria abstaining, on 22 May 2003. In certain respects, the United States, United Kingdom and Spain bowed to international pressure. The document stated that the Security Council had the authority to extend the occupying powers' mandate in Iraq if they felt that more time was needed to accomplish the goals of the occupation.¹²⁹ The Coalition also agreed to allow UN weapons inspectors to finish their investigation concerning Iraq's alleged weapons of mass destruction programmes. Furthermore, the resolution called on the Secretary General to appoint a Special Representative. Although the appointee would help the occupying powers, he had independent responsibilities. Consequently, the Special Representative was also asked to report regularly to the Security Council, increasing the body's oversight over the Coalition's efforts.¹³⁰ Building on the proposed 'Iraqi Assistance Account', the Security Council established a 'Development Fund for Iraq' to pay for post-war efforts. It also ordered the creation of an 'International Advisory and Monitoring Board' to certify that the Coalition, and an anticipated interim

¹²⁸ Felicity Barringer, 'U.N. Reaction to Resolution Seems Positive But Reserved' *New York Times* A13 (May 10, 2003).

¹²⁹ S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at para. 25, U.N. Doc. S/RES/1483 (2003).

¹³⁰ *Ibid.* at para. 8 and para. 24.

Iraqi administration, used these funds to benefit the Iraqi people.¹³¹ Moreover, the resolution decided to phase out the UN Oil-For-Food-Programme and to transfer any accrued funds to the 'Development Fund for Iraq'.¹³²

The Security Council resolution established that the United Kingdom and the United States were occupying powers, recognizing the Coalition Provisional Authority as the civilian body responsible for post-war Iraq. However, the resolution made it clear that these powers' main responsibility was to re-establish security and stability in order to allow the Iraqi people to 'freely determine their own political future,' expressing its interest in a speedy end to the occupation.¹³³ While the resolution did indicate that the United Kingdom and the United States had to 'comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,'¹³⁴ a careful reading suggests otherwise. Resolution 1483's provisions are in line with the logic that informs Resolution 1244 and its wording, although no evidence exists that one directly informed the other.¹³⁵ The Security Council, employing its Chapter VII powers, watered down the limits found in the international law of occupation and authorized the Coalition's plan to transform Iraq's economy and political system.¹³⁶

Accordingly, Resolution 1483 invited international financial institutions to help the Coalition's civilian administrators in rebuilding the economy.¹³⁷ In addition, the Security Council called upon the Paris Club to consider what to do with Iraq's foreign debt.¹³⁸ Noting that the Paris Club works closely with the International Monetary Fund and the World Bank to put together structural adjustment programmes to transform the economies of debtor nations according to neo-liberal principles,¹³⁹ it is safe to say that the Security Council supported Iraq's economy transformation only as long as the CPA drew its plans with the advice of international economic institutions.¹⁴⁰ Similarly, the document called on the CPA to work with the Special Representative to 'restore and establish national

¹³¹ *Ibid.* at paras. 12-14.

¹³² *Ibid.* at paras. 16 and 17.

¹³³ *Ibid.* at para. 4.

¹³⁴ *Ibid.* at para. 5.

¹³⁵ *Supra* note 99 at 262.

¹³⁶ David J. Scheffer, 'Beyond Occupation Law' (2003) 97 *Am. J. Int'l. L.* at 844-846.

¹³⁷ *Supra* note 106 at para. 2 and para. 15.

¹³⁸ *Ibid.* at para. 15.

¹³⁹ For information on the Paris Club, see, Theodore Cohn, *Global Political Economy: Theory and Practice*, 2nd edition 200-201 (New York, NY: Longman, 2003).

¹⁴⁰ Brett McGurk, 'Revisiting the Law of Nation-Building: Iraq in Transition' (2005) 45 *Va. J. Int'l L.* 451 at 461.

and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq.¹⁴¹

For all their similarities, two main differences between Resolutions 1244 and 1483 are important to note because these show the Security Council's desire to limit the occupying powers' authority and preserve some of the guiding principles that inform the international law of occupation. First, Resolution 1483 'lacked the infinite character' found in Resolution 1244. The Security Council wanted the Iraqi occupation to be short, limiting the CPA's power to one year, consistent with Article 6 of the GC. This contradicted the CPA's original plan of occupying Iraq for 'several years'.¹⁴² In the case of Kosovo, and due to the Security Council's unwillingness to address the status of the province in 1999, it was understood that UNMIK's work was going to be expansive and would take a long time.¹⁴³ Second, Resolution 1483 wanted the CPA to administer Iraq with the assistance of an 'Iraqi interim administration'. This provision may have been added to reassure Iraqis that the CPA's decisions took into consideration Iraqi interests. However, it emphasized that the CPA did not enjoy complete sovereignty over the country and that the occupying powers could not use the occupation to advance their self-interests. In Kosovo, and due to the uncertainty of its status, UNMIK was not required to transfer its authority to local institutions until a political settlement was reached between Kosovar Albanians and the Serb government¹⁴⁴ and it has generally been reluctant to transfer power to local institutions.¹⁴⁵

The Security Council also tried to constrain the occupying power's authority by trying to empower Iraqis and by placing a Special Representative to monitor the CPA's work. The United States did create the Iraqi Governing Council but it was not the Iraqi interim government the international community expected the CPA to establish. While the UN played an important role in post-war Iraq, al Qaeda's bombing of the UN compound in Iraq, which claimed the life of the Special Representative Sergio Viera de Mello, forced the UN to reduce its presence in Iraq until the security situation improved. This gave the CPA the freedom to enact its ambitious post-war transformation programme. Its efforts, however, were spoiled by the insurgency, increasing Iraqi sectarian and ethnic divisions, and by Ayatollah Ali al Sistani's challenges to the Coalition's authority. Although the CPA passed over 100 regulations, a lot of these were not enforced because the Coalition was

¹⁴¹ *Supra* note 137 at para. 8(c).

¹⁴² *Supra* note 103 at 155.

¹⁴³ *Supra* note 140 at 460-461.

¹⁴⁴ *Supra* note 61 at para. 11(f).

¹⁴⁵ Carsten Stahn, 'Justice Under Transitional Administration: Contours and Critique of Paradigm' (2005) 27 *Hous. J. Int'l L.* 311 at 332-333.

understaffed,¹⁴⁶ failed to control Iraqi territory, or was unable to persuade local institutions to execute these reforms.¹⁴⁷

Consistent with this article of hegemonic international law, the Bush administration used its political and economic influence to force the Security Council to re-write the law of occupation, empowering the United States and the United Kingdom to carry out the transformation of post-Saddam Iraq along neo-liberal lines. While the Security Council did pass the resolution unanimously, it could not engineer the legitimacy the occupying powers needed to convince the international community to send peacekeepers and financial resources to stabilize and transform Iraq. Similarly, the CPA's responsibilities and regulations may have been in line with the requirements set out in Resolution 1483 but its lack of legitimacy undermined the CPA's ability to persuade Iraqis of its benign intentions. Thus, Iraqis and the international community understood that the CPA's work was not informed by cosmopolitan principles but by the Bush administration's desires to use the transformation of Iraq as a step to strengthen and expand America's hegemony in the heart of the Middle East.¹⁴⁸

Conclusion

Did the CPA violate the international law of occupation? While its actions seem to contravene the logic that informs this body of law, the CPA's strategies were within the bounds of Resolution 1483, which sanctioned the post-war occupation. Consequently, and similar to the Kosovo experience, the Security Council, using its Chapter VII powers, revised the international law of occupation, allowing the CPA to carry out its plan to transform Iraq according to neo-liberal values. Why did the Security Council rewrite the international law of occupation, especially if it was unwilling to support the American invasion of Iraq?

Building on Vagts's work on the evolution of 'hegemonic international law', this article argues that the combination of American hegemony and the international community's growing support for neo-liberal values and new definitions of sovereignty has fostered an international order that favours American conceptions of intrastate order and reinforces the hierarchical nature of the international system. Even though the international community may have been critical of the Bush administration's decision to oust Saddam Hussein's regime without a mandate of the Security Council, it did not necessarily object to its plan to transform Iraq along neo-liberal lines. In line with the UN's

¹⁴⁶ Supra note 103 at 289.

¹⁴⁷ Mark Etherington, *Revolt on the Tigris: The Al-Sadr Uprising and the Governing of Iraq* 236-241 (Ithaca, NY: Cornell University Press, 2005).

¹⁴⁸ Carlos L. Yordán, 'America's Quest for Global Hegemony: Offensive Realism, the Bush Doctrine and the 2003 Iraq War' (2006) 110 *Theoria: A Journal of Social and Political Theory* 125.

work in Kosovo and East Timor, the Security Council worked with the occupying powers to restore international peace and security in the Middle East.

Although legal scholars and international relations researchers have lamented the United States's ability to reshape international law according to its interests,¹⁴⁹ it is important to keep in mind that Washington had to work hard to get Resolution 1483 passed. Indeed, negotiations between the members of the Security Council on the draft document tabled by the Bush administration and its coalition partners demonstrate that the UN did not fully capitulate to American interests. For the Bush administration, a new resolution was necessary to legitimize its plans to transform Iraq and to call on other states to contribute peacekeepers and to help finance post-war efforts. Even though the Security Council unanimously passed the resolution, the CPA's programme did not receive widespread Iraqi support. Equally important, the international community did not send troops to Iraq or pay for its reconstruction, forcing the United States and its partners to assume complete responsibility over post-war Iraq.

Resolution 1483 may have called on the CPA to observe the international law of occupation, but its provisions clearly endorsed the CPA's plan to transform Iraq according to neo-liberal values. Although the Security Council seems to have succumbed to American pressure, its decision was in line with the international community's belief that long term peace and stability can be attained by transforming war-torn societies along neo-liberal lines. The UN's experience in Kosovo and East Timor illustrates this perspective's strength. These neo-liberal values may mirror American values but the growing influence of democratic states in the UN serves as a reminder that these are not solely American views. Similarly, Resolution 1483's revision of the international law of occupation did not give the CPA *carte blanche*; its activities were closely monitored by the Security Council via the reports submitted by the UN Secretary General's Special Representative in Iraq. More importantly, the Resolution made it clear that the CPA had to work alongside an Iraqi interim government and limit its activities to one year. These provisions were in line with the standards set out in the Fourth Geneva Conventions of 1949 and they were used to force the CPA to take into consideration Iraqi interests as they set out to transform their war-torn society.

Given that the Security Council did not fully succumb to American interests, is Resolution 1483 an example of American hegemonic international law? As noted in section I, the United States will be able to force the Security Council to rewrite established international rules but it will not always get all that it wants. Indeed, the hegemon, while a strong power, is not omnipotent.¹⁵⁰ It will have to take into consideration the views of

¹⁴⁹ See, Fox, *supra* note 99; and Marco Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 Eur. J. Int'l L 661.

¹⁵⁰ Michael Cox, 'September 11th and US Hegemony – or Will the 21st Century be American Too?' (2002) 3:1 International Studies Perspectives 53 at 64.

secondary states in hopes that it will gain a token of legitimacy for its policies. Similarly, secondary states will have to yield to American interests, as the United States has the capacity to work outside the international legal system, calling into question the *status quo* and forcing the hegemon to consider new ways of advancing its interests. By definition, hegemonic international law benefits the hegemon at the expense of the interests of secondary states. Thus, Resolution 1483 is an outcome of American hegemony as it legalized the Anglo-American occupation and its project to transform Iraq along neo-liberal lines.

The emergence of a system of cosmopolitan international law may still be a distant reality but it is not clear that the present condition is giving way to a system of imperial law either. The best description of the current status of international law is this article's understanding of hegemonic international law, where the United States enjoys a substantial amount of influence over international institutions and the ways these institutions define and deal with threats to peace and international stability. However, America cannot guarantee that these institutions will always yield to its needs or interests, forcing it to negotiate with other states to advance its interests. In this way, hegemonic international law sits uncomfortably between the promises of cosmopolitanism and fears of American imperialism.

