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# Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context

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## ARTICLES

### FOREIGN AND OTHER ECONOMIC RIGHTS UPON CONQUEST AND UNDER OCCUPATION: IRAQ IN COMPARATIVE AND HISTORICAL CONTEXT

JAMES THUO GATHII\*

Even in cases of conquest, it is very unusual for the conquerer [sic] to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world, would be outraged if private property should be generally confiscated, and private rights annulled . . . .<sup>1</sup>

[W]here the King of England conquers a country . . . by saving the lives of the people conquered . . . [he] gains a right and property in such people, in consequence of which he

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\* Associate Professor, Albany Law School. I would like to thank Desa Burton for encouraging me to write this article. All errors are mine. I appreciate the indulgence of my wife Carol and our sons Mikey and Ethan as I wrote this essay and for their unwavering and loving support. Thanks, too, to Stephen Gottlieb, Mary Wood, Traci Tosh, Robert Emery, Linda Murray, Abena Asante, Patrick Sorsby, Adam Herbst and Kohei Higo for their help in various ways.

<sup>1</sup> United States v. Percheman, 32 U.S. (7 Pet.) 51, 51 (1833).

may impose upon them what law he pleases.<sup>2</sup>

## 1. INTRODUCTION

Under customary international law, conquest does not vitiate pre-existing private property and contract rights.<sup>3</sup> However, the applicability of this classical rule has been restricted in scope, and at best it has been applied inconsistently over the last century. This article examines the rationales underlying the rule and the reasons accounting for the uneven and inconsistent application of its prohibition of extinction of private property and contract rights upon conquest. I argue that the primary reason accounting for its uneven and inconsistent application has been to facilitate the political expediencies and hegemony of conquering states over weaker and vulnerable states. Hence, courts have held treaties embodying this rule that private property rights shall be inextinguishable upon conquest are subject to the overriding constraint of their compatibility with national policy during times of war.<sup>4</sup> In the United States, such views have been fortified by judicial attitudes reluctant to use international law to restrain the Executive Branch,<sup>5</sup> espe-

<sup>2</sup> *W. Rand Cent. Gold Mining Co. v. The King*, [1905] 2 K.B. 391, 406 (K.B.).

<sup>3</sup> There is a varied range of private property and contract rights that may be protected from confiscation upon conquest. The range includes rights, interests or titles to bank accounts; all manner of securities (such as debentures, bonds, annuities, stock, shares, etc.), and beneficial interests therein; fixed and intellectual property rights; insurance on goods or other property; life insurance policies; shareholder rights and obligations; judicial awards, and so on.

<sup>4</sup> See *Clark v. Allen*, 331 U.S. 503, 513-14 (1947) ("Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine . . . [as *Techt v. Hughes* indicates] whether the provisions under which rights are asserted is [sic] incompatible with national policy in time of war."); *Techt v. Hughes*, 128 N.E. 185 (N.Y. 1920), *cert. denied*, 254 U.S. 643 (1920) (discussing the compatibility of a treaty granting rights to an alien of an enemy state to inherit land with national policy in times of war).

<sup>5</sup> See *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997) (holding that Executive decisions prevail over international law); *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993) (stating that immigration issues, legislative, executive, or judicial decisions may prevail even if contrary to international law); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-54 (11th Cir. 1986) (deciding that the Attorney General has the power to detain aliens indefinitely despite general principles of international law forbidding prolonged arbitrary detention). *But see Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 789 (D. Kan. 1980) (holding that although Rodriguez-Fernandez did not have rights to avoid detention under the Fifth or Eighth Amendments to the U.S. Constitution, the indefinite nature of his detention violated principles of customary international law, which create a right

cially with regard to wartime decisions.<sup>6</sup>

It follows that the prohibition against extinguishing private property and contract rights upon conquest is more likely honored by conquering states when it is most compatible with their interests.<sup>7</sup> For example, the prohibition is often enforced to secure the private property rights of nationals from a powerful belligerent state who are domiciled in a weaker state, vulnerable to conquest.<sup>8</sup> Yet, the private property rights of weaker enemy states are often

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to be free from such detention).

<sup>6</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450, 463–64 (4th Cir. 2003) (explaining that courts are bound to defer to Executive Branch decisions during wartime since the Executive Branch, rather than the courts, is best equipped to make such decisions); see also *Al Odah v. United States*, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring) (stating that “[military decisions] have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain.”).

<sup>7</sup> See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 308 (1829) (interpreting the Treaty of Amity, Settlement and Limits, between the United States and Spain, under which the United States was required to confirm land grants made by the Spanish sovereign before 1818 in territory that later became U.S. territory). Here the court construed the treaty as a contract between the United States and Spain upon which the United States was required to respect the Spanish title grants. However, in later cases, *Foster* was distinguished by the principle that a treaty might not create legal obligations except between state parties. See, e.g., *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (holding that the United States agreed to recognize titles derived from Spanish grants without further legislative acts). Notably, it was in the interest of the United States to have regard for its treaties with the Spanish crown, not only because the United States was not as powerful a country then as now but also because the treaties were crucial to the construction of the United States as a state. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 849 (1989) (discussing the shift in U.S. world power and its impact on U.S. responses to international law); see also *infra* Section 3.1 (discussing *Percheman*).

<sup>8</sup> For example, the United States argued that Iraq’s invasion of Kuwait in 1990 violated Article 23(g) of the Hague Regulations because Iraq had destroyed private property, including oil wells operated by multinational corporations, which they set on fire. See Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 23, 36 Stat. 2277, T.S. 539 [hereinafter *Hague Regulations*] (prohibiting the destruction of enemy property unless the destruction is demanded by the necessities of war). Note that the Hague Regulations are an annex to the 1907 Hague Convention With Respect to the Laws and Customs of War on Land, first adopted at the International Peace Conference of 1899 and revised at the Second International Peace Conference of 1907. Additionally, in the 1970s, the U.S. State Department took the position that Israel’s occupation of the Gulf of Suez did not authorize it to violate the concessionary rights granted by Egypt to an American corporation, as these rights were protected under the law of belligerent occupation. U.S. State Department Memorandum of Law on Israel’s Right to Develop New Oil Fields in Sinai and the Gulf of Suez, Oct. 1, 1976, 16 I.L.M. 733, 750-53 (1977) [hereinafter *Department of State Memorandum*].

subject to sequestration or confiscation especially where they are domiciled in the territory of a more powerful belligerent. It is therefore not surprising that following the U.S.-led conquest of Iraq in early 2003, most scholarly and press coverage has focused on the status of foreign corporations' property in Iraq before the war.<sup>9</sup> By contrast, there has been little attention given to the impact of the conquest on the private property and contracts that Iraqi citizens entered into before the war. In addition, the human rights of the Iraqi people took a backseat during the conquest and only emerged as significant during the planning to return sovereign control back to Iraqis.<sup>10</sup>

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<sup>9</sup> See, e.g., Chip Cummins, *U.S. Probes Its Iraq-Oil Rights: International Law Gives Occupying Power Freedom to Maneuver*, WALL ST. J., Jan. 29, 2003, at A16 (discussing ramifications of U.S. control over Iraqi oil policy); Stephen D. Davis & James L. Loftis, *Iraq's Opportunities for Energy Lawyers*, TEX. LAW., May 19, 2003 (noting that American and British government indications that active negotiations regarding twenty of the thirty to thirty-five known major oil fields prior to the war "would form the core of any plans to restore Iraqi oil production to levels in excess of 3 million bpd."); Robert S. Greenberger et al., *U.N. Lifts Iraq Trade Sanctions, Clearing Way for Oil Exports*, WALL ST. J., May 23, 2003, at A3 (discussing foreign companies from various countries involved with purchasing Iraqi oil); Neil King, Jr. & Jess Bravin, *U.S. May Spurn U.N. Iraq Sanctions: Sidestepping Rules Studied as a Way to Avoid Delay of Reconstruction Efforts*, WALL ST. J., May 5, 2003, at A3 (explaining how the United States found a loophole in sanctions by declaring contract work in Iraq as humanitarian); Anthony Lin, *Law Firms See Opportunities in the Reconstruction of Iraq*, N.Y.L.J., Apr. 16, 2003, at 1, 8 (focusing on companies participating in Iraqi reconstruction); Michael M. Phillips, *New Iraqi Laws Target Economy, Foreign Access*, WALL ST. J., Sept. 22, 2003, at A16; Jeanne Whalen, *Nations Begin Tussle Over Control of Post War Iraq: Russia's Lukoil to Protect Claims to Iraqi Oil Field*, WALL ST. J., Apr. 9, 2003, at A10 (noting that Lukoil, a Russian oil company, will oppose any steps to develop the West Qurna oil fields that the Saddam Hussein government awarded to it under a contract in late 2002); Pieter H.F. Bekker, *The Legal Status of Foreign Economic Interests in Occupied Iraq*, AM. SOC'Y INT'L L. NEWSLETTER (2003) (analyzing the property interests and contracts of foreign parties before, during, and after U.S. occupation), available at <http://www.asil.org/insights/insigh114.htm>.

<sup>10</sup> It is however noteworthy that Article 12 of the Law of Administration for the State of Iraq for the Transitional Period, adopted March 8, 2004 by the Iraqi Governing Council provides that:

All Iraqis are equal in their rights without regard to gender, sect, opinion, belief, nationality, religion, or origin, and they are equal before the law. Discrimination against an Iraqi citizen on the basis of his gender, nationality, religion, or origin is prohibited. Everyone has the right to life, liberty, and the security of his person. No one may be deprived of his life or liberty, except in accordance with legal procedures. All are equal before the courts.

Law of Administration for the State of Iraq for the Transitional Period, art. 12 (Mar. 8, 2004), available at <http://www.cpa-iraq.org/government/TAL.html>.

This difference in the application of the rule against extinction of private property rights and contracts upon conquest is not a post-World War II phenomenon but rather a reflection of a more systemic disregard of rights of non-European peoples going back decades in the history of international law.<sup>11</sup> Thus, as illustrated in Section 3 below, Native American ownership of land in early American history was held to have been extinguished upon conquest. The various peace treaties between the United States and Spain treated Native American ownership of land as mere possession. Similar possession of land by White colonial settlers was held to constitute unimpeachable private property interests upon conquest.

While under the classical international law rule conquest does not extinguish pre-existing private property and contract rights as a general matter, the municipal law of conquering states often requires the suspension of all contracts except those of necessity at the beginning of hostilities between states.<sup>12</sup> Thus, the national security interests and the political exigencies in preventing free commerce between belligerent states over time modified and relaxed the rule against extinction of private property and contract rights upon conquest.<sup>13</sup> For example, trading with enemy laws in the United States and the United Kingdom authorize confiscation and sequestration of the property and contracts of enemy nationals. The rationale for these actions has been to prevent enemy nationals from helping their home state in the war effort.<sup>14</sup>

In contrast to the rule prohibiting extinction of private property rights by conquest, the protection of private property and contract

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<sup>11</sup> A caveat must be added here. In the Civil War, the United States confiscated enemy-owned property. Two statutes authorizing the confiscations were upheld in a divided Supreme Court decision. For the majority, Justice Strong wrote: "Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and has always been an undoubted belligerent right." *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1871). Justice Field, dissenting, wrote: "There is a limit to the means of destruction which government, in the prosecution of war, may use, and there is a limit to the subjects of capture and confiscation, which government may authorize, imposed by the law of nations, and is no less binding upon Congress than if the limitation were written in the Constitution." *Id.* at 315-16.

<sup>12</sup> COLEMAN PHILLIPSON, *THE EFFECT OF WAR ON CONTRACTS* 48 (1909).

<sup>13</sup> *Id.* at 104-5.

<sup>14</sup> Otto C. Sommerich, *A Brief Against Confiscation*, 11 L. & CONTEMP. PROBS. 152 (1946).

rights under military occupation has a much lower threshold. Though the occupying power is required to respect pre-existing private property rights,<sup>15</sup> interferences are permissible where they accord with the requirements laid down under Articles 48, 49, 51, 52, 53, 54, and 56 of the Hague Regulations.<sup>16</sup> However, these provisions do not anticipate all possible scenarios where the private property of enemy state nationals may be interfered with by an occupying power.<sup>17</sup> This arguably gives occupying powers wiggle room to interfere with private property rights in occupied territory much more broadly than conquest does. In addition, expansive readings of the duties of an occupying power under Article 43 of the Hague Regulations have in practice justified broad authority.<sup>18</sup> It is also credible to claim that there are differences in some aspects of the treatment of the private property of the Fascists and Nazis, whom the Allied powers authorized to continue receiving certain payments such as pensions, as opposed to Japanese Ultranationalists or Iraqi Baathists. Thus, while the Fascists and Nazis were defeated by conquest and their territory occupied, their private property rights were relatively<sup>19</sup> better protected than those of the defeated Japanese after World War II and more recently those of the Baathists in Iraq after the U.S.-led conquest. I explore this difference in Section 4 of this article.

In Section 2 of this article, I examine the rule against extinction of private property and contract rights, its rationales, and why it has changed over time. In Section 3, I examine how the rule against extinction of private property rights and contracts upon conquest has been most attenuated in situations of non-Western states conquered by Western states, compared to the conquests among European states. This difference in the extinction of private

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<sup>15</sup> Article 46 of the Hague Regulations provides that military authorities occupying the territory of a hostile state are obliged to respect "family honour and rights, the lives of persons, and private property, as well as religious convictions, and practice . . . Private property cannot be confiscated." Hague Regulations, *supra* note 8, art. 46. Further, Article 47 prohibits pillage. *Id.* art. 47.

<sup>16</sup> *Id.* For further discussion of these Articles, see *infra* Section 3.

<sup>17</sup> See NISAKE ANDO, SURRENDER, OCCUPATION AND PRIVATE PROPERTY IN INTERNATIONAL LAW 103 (1991) (conceding that "these provisions do not cover every possible case of an occupant's dealings with private enemy property.").

<sup>18</sup> EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 11 (1993).

<sup>19</sup> However, both the Treaty of Versailles and the Treaty of Paris had provisions justifying the taking of private property rights of the defeated states' nationals that were domiciled within the territories of the successful allies after World War I and World War II respectively. See *infra* Section 2.2.1.

property rights and contracts upon conquest is, I argue, a systemic expression of the hegemonic power of conquering states that goes back decades in the history of international law. To show this hegemonic impulse to override private property rights of non-Europeans upon conquest in the history of international law, I discuss a 1905 House of Lords decision that explicitly found the rule against extinction was preempted by the overriding prerogatives of the Crown. I also discuss Native American ownership of territory in the early American Republic period which upon conquest was treated as constituting mere possession, while similar possession of land by White colonial settlers was held to constitute unimpeachable private property interests.

In Section 4, I explore whether the conquest of Iraq is exhibiting a parallel process of privileging and protecting foreign economic interests while under-protecting the property rights of Iraqis under the U.S.-led occupation as demonstrated in Section 3. To do so, first I outline the law governing treatment of private property under occupied territory before discussing the variety of claims that Iraqis in general, and Iraqi women in particular, may bring under the international legal regime to secure their private property rights adversely affected by conquest and occupation. In Section 5, I examine the legality of the process of transforming the Iraqi economy into an open market economy and illustrate how the doctrine of military necessity, and the political and hegemonic objectives of transforming Iraq, have justified expansive powers of the United States as an occupying power beyond those contemplated by Article 43 of the Hague Regulations. These powers include the authority to expropriate private property rights and the privatization of formerly publicly owned wealth in an unprecedented transformation of the Iraqi economy into a market economy. In Section 6, I compare how the "de-baathification" of Iraq compares and contrasts with similar occupation reconstruction programs in Nazi Germany, Fascist Italy and Japan with regard to the treatment of private property rights. This Section also examines whether a future Iraqi government would be bound by the decisions of the U.S.-led occupation. Finally, I end by exploring the alternative forums that Iraqis may turn to for remedies for the adverse consequences to their economic interests and the limitations that these alternatives pose.



## 2. THE EFFECT OF CONQUEST ON PRIVATE PROPERTY UNDER CLASSICAL CUSTOMARY INTERNATIONAL LAW

In this section, I focus on the effect of conquest on private property and contract rights. In Section 4.1 *infra*, I examine the status of private property rights under occupation following military conquest.

The prohibition against destruction of enemy property by belligerents is embodied in Article 23(g) of the 1907 Hague Convention respecting the Laws and Customs of War on Land, which *especially* forbids the destruction or seizure of an "enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."<sup>20</sup> Some have argued that such military necessity has to be determined given the prevailing circumstances during wartime rather than retrospectively.<sup>21</sup>

This rule against extinction of private property upon conquest and its underlying justifications is an ancient, indeed, classical rule of customary international law. It was recognized by Emer de Vattel, the eighteenth century Swiss international lawyer, who wrote:

In the conquests of ancient times, even individuals lost their lands. Nor is it a matter of surprise that in the first ages of Rome such a custom should have prevailed. The wars of that era were carried on between popular republics and communities. The state possessed very little, and the quarrel was in reality the common cause of all the citizens. But at present war is less dreadful in its consequences to the subject: [sic] matters are conducted with more humanity: one sovereign makes war against another sovereign, and not against the unarmed citizens. The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs.<sup>22</sup>

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<sup>20</sup> Hague Regulations, *supra* note 8, art. 23(g).

<sup>21</sup> MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 678-79 (1961) (noting such circumstances include factors such as the decision makers' position in the hierarchy of military command, the nature of the property, intelligence reports, every pressure, and even the ambiguity of the rule allegedly violated).

<sup>22</sup> EMER DE VATTEL, THE LAW OF NATIONS 388 (Joseph Chitty trans., T. & J.W. Johnson & Co. 1861) (1758). Vattel further opined, "[t]he whole right of the con-

This strict rule was adopted by the U.S. Supreme Court in *United States v. Percheman* where the Court observed that it is "very unusual, even in cases of conquest, for the conqueror to do more than displace the sovereign and assume dominion over the country."<sup>23</sup> Even though the case involved the interpretation of a treaty peaceably ceding Florida to the United States from Spain, the Court nevertheless went out of its way to observe:

The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled . . . . If this be the modern rule even in cases of conquest, who can discount its application to the case of an amicable cession of territory?<sup>24</sup>

Perhaps we should not be surprised by the apparent robustness of this rule since it has survived in many forms. For example, rules of state succession do not allow debts to disappear because they are carried forward and are binding on the new state.<sup>25</sup> But as we

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queror is derived from justifiable self-defence" and "doing of harm to an enemy is no further authorized by the law of nature, than in the precise degree which is necessary for justifiable self-defence, and reasonable security for the time to come." *Id.* at 388-89.

<sup>23</sup> See *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86 (1833). Indeed, in this case, the government rhetorically contended:

What, indeed can be more clearly entitled to rank among the things favorable than engagements between nations securing the private property of faithful subjects, honestly acquired under a government which is on the eve of relinquishing their allegiance, and confided to the pledged protection of that country which is about to receive them as citizens?

*Id.* at 67-68.

<sup>24</sup> *Id.* at 86-87. The Court further observed, "[t]he cession of a territory, by its name, from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property." *Id.* at 87.

<sup>25</sup> See Vienna Convention on Succession of States in Respect of States Property, Archives and Debt, Apr. 8, 1983, art. 32-36 (1983), reprinted in 31:1 SELECT DOCUMENTS ON INT'L AFF. 10 (1983) [hereinafter Vienna Convention on Succession] (establishing the survival of state debts), available at <http://www.austlii.edu.au/au/other/dfat/seldoc/1983/3112.html>.

Nearly all modern writers (*e.g.*, Calvo, Heffter, Funck-Brentano and Sorel, Martens, Twiss, Wheaton and others) declare debts due by the

shall see in Section 2.2 below, this rule has not been consistently or evenly applied, particularly in the context of colonial relations established through conquest.

Where private property belonging to a national of an enemy state is within the other belligerent state's territory, under international law such property is not extinguished by conquest. Rather it is regarded as being held in suspension, pending its return to its owner upon cessation of hostilities. Thus, in *Brown v. United States*, Chief Justice Marshall noted the "practice of forbearing to seize and confiscate debts and credits" is universally received and that if confiscated, such debts and credits revive to their owner "on the restoration of peace."<sup>26</sup> This principle is also affirmed in British courts. In one case, the Chancery Division held "it is a familiar principle of English law that the outbreak of war effects no confiscation or forfeiture of enemy property."<sup>27</sup> In this case though, the court held that an executory contract, which was not connected with a proprietary right to shares in a corporation, was not suspended as the parties had agreed but rather was dissolved by the declaration of a war.<sup>28</sup> In effect, the court held that confiscation is only prohibited in cases where an alien has property at the date of

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subjects of one belligerent State to the subjects of the other to be free from confiscation . . . . It has thus become a rule of international law that neither the principal nor the interest of a State debt can be sequestered or confiscated. Hall maintains that a State contracting a loan is understood to contract that it will hold itself indebted to the lender, and will pay interest on the sum borrowed under all circumstances.

PHILLIPSON, *supra* note 12, at 38-40.

<sup>26</sup> *Brown v. United States*, 12 U.S. (8 Cranch) 110, 112 (1814). In a more forthright statement of the principle, Marshall observed that the "proposition that a declaration of war does not in itself enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt." *Id.* at 127. However, Marshall conceded that war gives a sovereign the "full right to take the persons and confiscate the property of the enemy," but that this "rigid rule" had been moderated by "the humane and wise policy of modern times." *Id.* at 122-23. By contrast, Justice Story dissented arguing that while mere declaration of war did not *ipso facto* operate as a confiscation of the property of enemy aliens, such property is liable to confiscation "at the discretion of the sovereign power having the conduct and execution of the war" and that the law of nations "is merely resorted to as a limitation of this discretion not as conferring authority to exercise it." *Id.* at 154. Although Justice Marshall appeared to have affirmed the modern rule prohibiting confiscation under the law of nations, and the sovereign power to confiscate enemy property. *Id.*; *Percheman*, 32 U.S. at 51 (affirming the rule against confiscation under the law of nations unambiguously).

<sup>27</sup> *Fried Krupp Aktiengesellschaft v. Orconera Iron Ore Co.*, 88 L.J.R. 304, 309 (Ch. 1919).

<sup>28</sup> *Id.* at 308.

the declaration of war and not merely contracts to acquire concessions, which may ultimately be recognized as property rights. In this case, therefore, agreements to acquire concessions from the Spanish government to construct a railway and work an iron ore mine were held to be executory contracts and not private property rights.<sup>29</sup>

In *Ware v. Hylton*,<sup>30</sup> the Supreme Court upheld the Jay Treaty of 1793 under which the United States had agreed to compensate British creditors if losses arose as a result of "lawful impediments." This case was brought by British creditors whose debts and property had been sequestered by a Virginia law. The Court held that the law effected a confiscation of the property of British subjects.<sup>31</sup> In his concurring opinion, Justice Paterson noted:

Considering . . . the usages of civilized nations, and the opinion of modern writers, relative to confiscation, and also the circumstances under which these debts were contracted, we ought to admit of no comment that will narrow and restrict their operation and import. The construction of a treaty made in favor of such creditors, and for the restoration and enforcement of pre-existing contracts, ought to be liberal and benign.<sup>32</sup>

Justice Chase had been more emphatic about the importance of creditor rights observing that "Congress had the power to sacrifice the rights and interests of private citizens to secure the safety and prosperity of the public . . . [and as such] ample compensation ought to be made to all the debtors who [were] injured by the treaty, for the benefit of the public."<sup>33</sup>

Unsurprisingly, Alexander Hamilton supported the prohibition against confiscation contained in the Jay Treaty in the strongest terms, stating in part, "no powers at my command can express the abhorrence I feel at the idea of violating the property of individuals, which, in an authorized intercourse, in time of peace, has been

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<sup>29</sup> *Id.* at 309.

<sup>30</sup> *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

<sup>31</sup> *Id.* at 233 (Justice Chase opining, "the law of the 20th of October 1777, and the payment in virtue thereof, amounts either to a confiscation or extinguishment of so much of the debt as was paid into the loan-office of Virginia.").

<sup>32</sup> *Id.* at 255.

<sup>33</sup> *Id.* at 244.

confided of our Government and laws, on account of controversies between nation and nation."<sup>34</sup>

Finally, as recently as the World War II period, the norm against confiscation of private property that had been seized and sequestered was regarded by one commentator as an important precondition for the United Nations to build durable peace in the post-war period.<sup>35</sup>

## 2.1. *Rationales Underlying the Exemption of Property and Contract Rights From Extinction Upon Conquest*

### 2.1.1. *The Distinction Between Civil and Military Aspects of War*

The laws of war are predicated on a distinction between civilian and military aspects. This distinction arose in the practice of states that have professional militaries.<sup>36</sup> Pursuant to this distinction, the laws of war seek to reduce war's adverse consequences to non-combatants, particularly to civilians, the sick and the wounded of the belligerent and neutral states.

Thus, the laws of war apply considerations of equity and justice and are embodied in the obligation of belligerent states to treat civilians, neutrals and prisoners of war humanely. By contrast, under the doctrine of military necessity, the laws of war acquiesce to the application of forcible means as necessary and proportionate to defeat the enemy and to bring the war to an end.<sup>37</sup>

### 2.1.2. *War Is Between States Not Between Individuals: The Rousseau – Portales Doctrine*

Another justification for the rule that private property and contract rights are not affected by conquest is that the rules of international law governing the conduct of warfare are based on a presumed set of clear distinctions: between states and individuals; between a relatively stronger occupying state in relation to a weaker state; between the government and the people; between public and private property; and between civilians and combat-

<sup>34</sup> See Sommerich, *supra* note 14, at 156.

<sup>35</sup> John Dickinson, *Enemy Owned Property: Restitution or Confiscation*, 22 FOREIGN AFF. 126, 141 (1943).

<sup>36</sup> PHILLIPSON, *supra* note 12, at 29.

<sup>37</sup> See Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 213-15 (1998) (defining and giving examples of military necessity in the Civil War).

ants. Thus, under classical customary international law, war was conceived as something that occurs between states rather than between individuals.<sup>38</sup> Where an individual of enemy nationality and her property are domiciled abroad, her property is not regarded as having an enemy character and, if seized, cannot be confiscated.<sup>39</sup> Where citizens of an enemy state are domiciled within the territory of the opposing belligerent state, she and her property may assume an enemy character.<sup>40</sup> In particular, where the resources of such a citizen were applied towards aiding the enemy, she and her property automatically acquire an enemy character and become subject to confiscation.<sup>41</sup> Thus under customary international law, individuals were required to subordinate their property and contractual interests where they conflicted with the superior interest of the state.<sup>42</sup>

2.1.3. *It Is Unjust and Impolitic for War to Destroy or Impair Contracts Between Individuals for the Convenience and Continuity of Commerce*

Since at least the eighteenth century, it has been regarded as unjust and impolitic that debts and contracts between individuals, who had confidence in each other and as a result entered into obligations, should have that trust and confidence between them de-

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<sup>38</sup> According to Edmund H. Schwnek, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 YALE L.J. 393, 403 (1945), the Hague Convention was developed at a time when war was "waged against sovereign and armies and not against subjects and civilians." *Id.* But see *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 771 (2003) (observing in part that the "fact that Sudan, as a nation state, was not at war with the United States is not determinative . . . . Terrorism crosses national borders, even our own . . . . We do not regard a war against a non-state, non-insurgent group-stateless terrorists—to be any less a war.").

<sup>39</sup> See PHILLIPSON, *supra* note 12, at 35.

<sup>40</sup> *Id.* at 34.

<sup>41</sup> *Id.* at 35.

<sup>42</sup> For example, Justice Gray noted:

[T]he law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries . . . . At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

*Kershaw v. Kelsey*, 100 Mass. 561, 572-73 (1868).

stroyed as a result of national differences, or in the event of war.<sup>43</sup> Further, some authorities hold that it is prudent to suspend, rather than to abrogate, loan payments owed by subjects of an enemy to the subjects of the opposing belligerent until the conclusion of the war and the return to peacetime.<sup>44</sup>

Although as a general matter the doctrine of non-intercourse prohibits commerce between belligerent states, the strictness<sup>45</sup> of this doctrine was held by the end of the nineteenth century to have been attenuated by the "rapid advances in civilization," "progressive public opinion," and the "influence of Christianity" such that it was possible to differentiate between military as opposed to civil affairs, and between the conduct of war and of commerce.<sup>46</sup> Thus, in the United States, as well as in the United Kingdom, trading with the enemy requires special licenses.<sup>47</sup>

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<sup>43</sup> See Treaty of Amity, Commerce, and Navigation ("Jay Treaty"), Nov. 19, 1794, U.S.-Gr. Brit., art. 10, 8 Stat. 116, available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/jay.htm>, noting that:

Neither [d]ebts due from [i]ndividuals of the one [n]ation to individuals of the other, nor shares nor monies, which they may have in the public [f]unds or in the public or private [b]anks shall ever, in any [e]vent of war, or national differences, be sequestrated, or confiscated, it being unjust and impolitick that [d]ebts and [e]ngagements contracted and made by [i]ndividuals having confidence in each other, and in their respective Governments, should ever be destroyed or impaired by national authority, on account of national [d]ifferences and [d]iscontents.

<sup>44</sup> PHILLIPSON, *supra* note 12, at 45. Further, it appears that rules of state succession do not allow for debts to disappear upon succession of one state by another. Rather, debts are carried forward. See Vienna Convention on Succession, *supra* note 25, art. 32-36 (focusing on the passing of State debts).

<sup>45</sup> The strict application of this rule is demonstrated in a Supreme Court decision from 1814, where Judge Johnson noted in part:

The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy . . . .

The Rapid, 12 U.S. (8 Cranch) 155, 161 (1814).

<sup>46</sup> PHILLIPSON, *supra* note 12, at 49. Notably, Montesquieu, the French eighteenth century philosopher, argued that "[c]ommerce . . . softens and polishes [the manners of men]." ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS* 107 (1992).

<sup>47</sup> For the United Kingdom, see F.A. Mann, *Enemy Property and the Paris Peace Treaties*, 64 LAW Q. REV. 492, 499 (1948). For the United States, see Trading With the Enemy Act, Pub. L. No. 65-91, ch. 106, 40 Stat. 411 (1917), which forbids trade with enemies during times of war.

#### 2.1.4. *Considerations of Humanity*

Considerations of humanity are another justification given for the rule against extinction of property rights upon conquest. One of the most eloquent exponents of this view is John Bassett Moore who argued that:

The protection of property not militarily used or in immediate likelihood of being so used against destruction, not, as writers sometimes seem to fancy, because of humane regard for insensate things, but because of the belief that, in the interest of humanity, war-stricken peoples should not be reduced to a condition of barbarism or savagery, but should, on the contrary, be enabled to resume the normal processes of peaceful life as soon as possible.<sup>48</sup>

According to Moore, the basis of this rule lay in "a moral revolt, a new creed," a "loftier conception of the destiny of and rights of man and of a more humane spirit" according to which the confiscation of property was necessary to "assure the world's commerce a legitimate and definite freedom."<sup>49</sup> Moore's justification of the rule is a modernist emancipatory universalism, which is argued to have prevailed over the barbarity of war and similar dark forces in the interest of avoiding the adverse consequences of war.<sup>50</sup>

#### 2.2. *Unevenness and Inconsistency in the Application of the Traditional Canon Proscribing Extinction of Private Property Rights and Contracts*

The classical customary international rule forbidding the extinction of contracts and private property rights upon conquest has been undermined by uneven and inconsistent application. One of the reasons advanced for this inconsistency is that the rule is ancient and therefore does not reflect the practice of states.<sup>51</sup> In addi-

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<sup>48</sup> JOHN BASSETT MOORE, *INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS AND OTHER ESSAYS* 5 (1924).

<sup>49</sup> *Id.* at 13-14.

<sup>50</sup> For a similar exposition of the expunging of religion from international law, see David Kennedy, *Images of Religion in International Legal Theory*, in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 137, 142-3 (Mark Janis ed., 1991).

<sup>51</sup> There is a long list of commentators over time who have made these obser-



tion to the standard menu of justifications advanced for these departures from the traditional canon, I argue that the political and hegemonic objectives of conquering states have been an important factor in the unevenness and inconsistency in the application of the rule. Below, I address how each of the justifications has been eroded.

### 2.2.1. *The Emergence of the United States as a Hegemonic Power*

The Hague Regulations were negotiated at the end of the nineteenth century at a time when it was in the interest of the United States to comply with rules of international law.<sup>52</sup> The growth of the United States' political and economic power over the twentieth century has been argued by some as a justification for a less significant role for international law in governing the U.S. role in international affairs.<sup>53</sup> One commentator has concluded that international law serves as a tool for U.S. power as opposed to a restraint of U.S. power in the world today.<sup>54</sup> Thus today, almost a hundred years after the Hague Regulations came into force, the United States asserts and consolidates its global military and political dominance unilaterally<sup>55</sup> and in a manner unthinkable a century ago when the

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vations. See Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573 (1985) (arguing for a change in public international law regarding belligerent occupation); David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003) (arguing that occupation law is outdated).

<sup>52</sup> See Jay, *supra* note 7, at 845.

<sup>53</sup> See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1104 (1985) (suggesting that "[a]s international relations changed and American military and economic power grew, the status of international law [in this country] also changed.").

<sup>54</sup> See Nico Krisch, *Weak as Constraint, Strong as Tool: The Place of International Law in U.S. Foreign Policy*, in UNILATERALISM AND U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES 41 (David M. Malone & Yuen Foong Khong eds., 2003) (discussing the ambivalence of the United States to international law while retaining strong influence in the development of it); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998) (arguing that the United States presently uses international law as a tool to expand its power).

<sup>55</sup> The best statement of American hegemony begins with the proclamation that "[t]he United States possesses unprecedented- and unequalled-strength and influence in the world." National Security Strategy of the United States of America (Sept. 2002) at 1 [hereinafter National Security Strategy], available at <http://www.whitehouse.gov/nsc/nss.pdf>. The National Security Strategy makes it the responsibility of the United States to make the world safe and better. It declares the doctrine of pre-emption:

[D]efending the United States, the American people, and our interests at

United States was not a superpower. This global dominance, according to adherents of this view, has resulted in reducing the constraints of international law on the United States.<sup>56</sup>

In light of the foregoing, it is not surprising that upon conquest, belligerent states with large military capacities like the United States have often argued that dispositions of their municipal law override those of international law with regard to the extinction of private property rights and contracts upon conquest.<sup>57</sup> Thus, the view that it would be unjust and impolitic to adversely affect private property and contractual rights in contemporary times is often subject to the immediate political goals of conquering states. For example, Israel has argued that it is not legally bound by the Fourth Geneva Convention and thus, not by the Hague Regulations. Some commentators have suggested that in light of Israel's *sui generis* occupation over the West Bank and Gaza, the Fourth Geneva Convention can only be applied on a *de facto* basis with regard to Israeli occupation thereof.<sup>58</sup> In addition, the treaties en-

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home and abroad by identifying and destroying the threat before it reaches our borders . . . [and] if necessary, to exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country . . . .

*Id.* at 6; see also Henry J. Richardson III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Resolution 1441 on Iraq*, 17 *TEMPLE INT'L & COMP. L.J.* 27 (2003) (focusing on the gestation process of U.N. Security Council Resolution 1441); Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 *AM. J. INT'L L.* 873 (2003) (commenting further on the U.S. National Security Strategy).

<sup>56</sup> See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *GEO. L.J.* 478, 519 (1998) (suggesting that, from the U.S. perspective, the perceived risks associated with law-breaking have been reduced. Nor does the possible erosion of the connection between international law compliance and national security mean that it is morally right for the United States to ignore international law. Perhaps an argument can be made that the U.S. position regarding international law that developed in a time of relative weakness ought to be honored when the United States has reached its place in the sun).

<sup>57</sup> PHILLIPSON, *supra* note 12, at 52; see *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871) (noting that the power to wage war includes the right to seize and confiscate all property of an enemy and to dispose of it at will and that this "has always been an undoubted belligerent right.").

<sup>58</sup> Meir Shamba, *The Observance of International Law in the Administered Territories*, in *ISRAEL Y.B. ON HUM. RTS.* 262, 266 (1971) ("Accordingly, the Government of Israel distinguished between the legal problem of the applicability of the Fourth Convention to territories under consideration . . . and decided to act *de facto* in accordance with humanitarian provision of Convention."). Nathaniel Berman has criticized liberals who support the U.S. occupation as nothing other than a projection of raw power rather than that the U.S. is an enlightened occupier. See Nathaniel Berman, *Enlightened Occupiers?*, *N.Y. TIMES*, Nov. 9, 2003, at

tered into after World War I and World War II gave the victorious powers the right to seize, retain, liquidate or take such other action whose effect was to extinguish the private property rights of nationals of the defeated states.<sup>59</sup> The German property confiscation in the United Kingdom was justified as necessary to satisfy those British citizens indebted to German nationals. Thus, these confiscations, notwithstanding their clear departure from the traditional canon exempting private property rights and contracts from extinction or confiscation upon conquest,<sup>60</sup> were justified as "the only source of reparations open to" the United Kingdom.<sup>61</sup>

2.2.2. *The Distinction Between Military and Civilian Aspects of War Is Hard to Sustain as a Result of the Nature of Twenty-First Century Warfare*

Twenty-first century warfare, as meted out by powerful countries, such as the United States, is vastly different from nineteenth century warfare. While it has been argued that warfare has become high-tech and therefore more precise there has been a decrease in the death of civilians and destruction of their private property, this has not been the case. Rather, the trebled lethality of high-tech warfare has multiplied, rather than reduced, the impact of war on civilian populations and property.<sup>62</sup>

Several reasons account for the trebled lethality of presumably more precise weaponry. First, powerful states with such sophisti-

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<sup>59</sup> Both the Treaty of Versailles, entered into after World War I, and the Treaty of Paris, entered into after World War II, provided that it was the responsibility of the enemy states to compensate those whose property was confiscated. See Mann, *supra* note 47, at 498-99 (discussing interpretations of the Treaty of Paris and the Treaty of Versailles).

<sup>60</sup> Thus, some judges wrote opinions arguing that the confiscations authorized by the Treaty of Versailles were not consistent with the "common law." See generally *Daimler Co. v. Cont'l Tyre & Rubber Co.*, [1916] 2 A.C. 307, 347 (H.L.) (appeal taken from C.A.) (Lord Parker dissenting); *Hugh Stevenson & Sons, Ltd. v. Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A.C. 239, 244 (H.L.) (appeal taken from C.A.) (Lord Finlay's opinion); *Friedrich Krupp Aktiengesellschaft v. Orconera Iron Ore Co.*, 88 L.J.R. 304, 309 (Ch. 1919) (Lord Birkenhead's opinion).

<sup>61</sup> Mann, *supra* note 47, at 498-99.

<sup>62</sup> See generally Thomas W. Smith, *The New Law of War: Legitimizing Hi-Tech and Infrastructural Violence*, 46 INT'L STUD. Q. 355 (2002) (arguing that new legal interpretations of military necessity increase harm to long-term public health and human rights despite new technology's success in curbing immediate civilian casualties).

cated weaponry have made sophisticated legal arguments to justify narrowing distinctions between soldiers and civilians that legitimize civilian casualties and destruction to civilian property as collateral damage.<sup>63</sup> In addition, countries such as the United States have adopted doctrines justifying the use of overwhelming military force,<sup>64</sup> such as the use of unchallenged heavy precision-guided aerial bombs and missiles to support few, but well-equipped battalions in enemy territory.<sup>65</sup> Second, the traditional humanitarian constraints on the use of military force have been mobilized to lend credibility to new visions of military necessity and military action.<sup>66</sup> For example, Anne Orford has argued that the doctrine of militarized humanitarianism that began after the Cold War, which has accelerated with the War Against Terrorism, has had adverse human rights and economic consequences for non-dominant cultures and peoples.<sup>67</sup>

Thus, the premise that the classical rule prohibiting extinction of property rights and contracts upon conquest was justified by the distinction between military and civilian aspects of war is not any truer today than it was in the nineteenth century.<sup>68</sup> For example, in the *Bankovic* case before the European Court of Human Rights, six Yugoslavian nationals sought orders against the seventeen North Atlantic Treaty Organization ("NATO") member states concerning the bombing of the Serbian Radio and Television Headquarters in Belgrade during the course of the NATO air strike campaign in the Kosovo conflict.<sup>69</sup> In fact, aerial bombardment in the so-called

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<sup>63</sup> See Roger Normand & Chris af Jochnick, *The Legitimization of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387 (1994) (arguing that laws of war are drafted to subordinate humanitarian obligations to military necessities).

<sup>64</sup> For a description of the Powell doctrine, see *Doctrine of Digital War*, BUS. WEEK, Apr. 7, 2003, at 32.

<sup>65</sup> *Id.* at 30-32.

<sup>66</sup> See Smith, *supra* note 62, at 367-70 (discussing the erosion of fundamental rules and legal maneuvering to permit military necessity to supercede humanitarian law).

<sup>67</sup> ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003).

<sup>68</sup> For a similar point of view, see Michael W. Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT'L L. 481, 508 (2003) (quoting Clausewitz to the effect that war is the realm of uncertainty and as such notwithstanding the technological advances of modern warfare, the uncertainties of war will continue to produce "unintended consequences").

<sup>69</sup> *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (2001), reprinted in 123 I.L.R. 94, 98-99 (2001); see also Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned*

high-tech era of warfare has neither eliminated mistaken bombardment of non-military targets nor has it ended suspicion that consistent and repeated targeting of certain civilian targets,<sup>70</sup> as well as private property, was on purpose.<sup>71</sup>

2.2.3. *The War Against Terrorism: The Last Straw of the View that War Is Between States?*

In the nineteenth century, the classical rule restricting the vitiation of contracts and private property upon conquest was founded on the view that war occurred between states. While there are instances in the history of international relations, such as the threat of piracy where armed force was exercised against non-state actors,<sup>72</sup> the War Against Terrorism declared after September 11, 2001 by the United States, and later endorsed by the United Nations, has contributed to the continued erosion of the view that war occurs between states.<sup>73</sup>

The War Against Terrorism has come to be defined almost exclusively as against non-state actors. As the Bush Administration's National Security Strategy says of its global War Against Terror-

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*From It*, 25 FORDHAM INT'L L.J. 95 (2001) (discussing the failed attempt to commence an investigation of illegal aerial bombardments by U.S.-led NATO allies in the Kosovo intervention).

<sup>70</sup> Examples include the bombing of the Red Cross camp in Afghanistan, the bombing of the Chinese Embassy in Serbia, and others.

<sup>71</sup> For a discussion of a series of such incidents, see Lewis, *supra* note 68.

<sup>72</sup> See EDWARD CHANNING, *THE JEFFERSONIAN SYSTEM: 1801-1811*, at 36-46 (1968) (discussing the Tripolitan War between the United States and pirates); RAY W. IRWIN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS: 1776-1816*, at 109-148 (1970) (discussing diplomatic relations between the United States and piratical states); DUMAS MALONE, *JEFFERSON THE PRESIDENT FIRST TERM: 1801-1805*, at 97-99 (1970) (covering the history of U.S. efforts, including war, to deal with disruption of U.S.-flag ships by the "stateless" barbary (corsair) pirates stationed in a number of North Africa seaports. The pirates demanded ransom payments to allow ships to operate in the Mediterranean without capture. While President John Adams sought to strike a diplomatic solution by seeking Congressional appropriations to satisfy the Barbary pirates, President Jefferson ordered the U.S. Navy to patrol and cruise the Mediterranean and blockade Tripoli to ensure safe passage of American ships. Notwithstanding the concerted military efforts of the U.S. to ensure safe passage of U.S. ships, war was not officially declared against the pirates); DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 27-32 (1951) (discussing the difficulty Jefferson had in dealing with piratical states).

<sup>73</sup> See S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483, 42 I.L.M. 1016 (2003) [hereinafter S.C. Res. 1483] (by this resolution, the Security Council appears to have effectively legitimated the Iraq War that it had previously declined to authorize).

ism: "The enemy is not a single political regime or person or religion or ideology . . . . The struggle against global terrorism is [therefore] different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time."<sup>74</sup> In addition to preemptive strikes against terrorists or those suspected of it, the United States has adopted an aggressive effort to "disrupt and destroy" and disable terrorist organizations from planning and operating around the world through a variety of efforts, including disabling terrorist groups' material support and finances.<sup>75</sup> These efforts have been given imprimatur by the United Nations.<sup>76</sup> The Counter Terrorism Committee, established by the United Nations to monitor global anti-terrorism activities, has legitimated broad powers to block and confiscate private property belonging to groups (including religious organizations and charities that have been shown to have little or nothing in common with terrorists) and individuals suspected of terrorism without any due process and in clear violation of United Nations human rights mandates.<sup>77</sup> By refusing to act within the confines of international law or with due process in the blocking and confiscation of private property, both the United States and the Counter Terrorism Committee depart from prior practice under which peace treaties between belligerent states exempted property belonging to religious bodies and charitable organizations from confiscation and liquidation.<sup>78</sup>

#### 2.2.4. *Political Objectives of Hegemonic States Override the Survival of Property and Contract Rights Upon Conquest*

This point is best captured by arguments made in favor of changing the laws relating to belligerent occupation. Take the following proposition, for example:

Violations of the law of belligerent occupation are frequent

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<sup>74</sup> National Security Strategy, *supra* note 55, at 5.

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., S.C. Res. 373, U.N. SCOR, 57th Sess., 4385th mtg., U.N. Doc S/RES/1373 (2001) (establishing the United Nations ("U.N.") Counter Terrorism Committee).

<sup>77</sup> See generally Alvarez, *supra* note 55, at 878 (discussing the U.N. Council's efforts to combat terrorism as violating international human rights standards).

<sup>78</sup> Mann, *supra* note 47, at 503 (listing exemptions from liquidations and confiscations of property).

at least in part because the law is too restrictive today; this unrealistic restrictiveness tends to delegitimize international law, increasing the likelihood of continued and extensive violations. In order to bring this problem under control, a change in the purpose of the rules of belligerent occupation must be recognized along with a change in the rules themselves.<sup>79</sup>

These and similar justifications for changing the laws of belligerent occupation are written from the perspective of powerful belligerent powers with superior military capabilities. The foregoing perspective grounds the justification for a more permissive international legal regime governing belligerent occupation on the need to maintain legitimacy for international law. However, it says little about the potential for a more permissive regime of belligerent occupation to lend credibility to the political agenda of the powerful belligerent states extending their influence over weaker, less powerful states.<sup>80</sup>

For example, the Bush Administration's designs to introduce democracy,<sup>81</sup> the rule of law,<sup>82</sup> and free markets<sup>83</sup> in Iraq and Afghanistan seem to override any considerations about the legality of such actions under international law.<sup>84</sup> In seeking to remake Iraq

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<sup>79</sup> See Goodman, *supra* note 51, at 1582.

<sup>80</sup> For example, the National Security Strategy, *supra* note 55, at 30. President George W. Bush states:

The United States must and will maintain the capability to defeat any attempt by any enemy—whether a state or non-state actor—to impose its will on the United States, our allies, or our friends. . . . *Our forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States.* (emphasis added)

*Id.*

<sup>81</sup> *Id.* at 6. The document further states as an objective to win the war against international terrorism, "supporting moderate and modern government, especially in the Muslim world, to ensure that the conditions and ideologies that promote terrorism do not find fertile ground in any nation." *Id.*

<sup>82</sup> *Id.* at 17.

<sup>83</sup> *Id.* at 1, 17-20.

<sup>84</sup> See *id.* at 29, stating:

It is time to reaffirm the essential role of American military strength. We must build and maintain our defenses beyond challenge. Our military's highest priority is to defend the United States. To do so effectively, our military must: assure our allies and friends; dissuade future military

into the most idealistic type of free market economy, the United States has placed the interests of its leading multinational corporations at the forefront in transforming public and private wealth into engines of new profit for the United States. Thus, the apparently enlightened occupier mission of ending a dictatorial regime by replacing it with idealistic visions of free markets and liberal democracy may be nothing more than an excuse to legitimate new forms of oppression in Iraq. Indeed, the victory over the Taliban regime gave the United States another important military base<sup>85</sup> to protect the interests of well-heeled oil companies with oil interests and ambitions in Central Asia that predate the Bush Presidency.<sup>86</sup>

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competition; deter threats against U.S. interests, allies, and friends; and *decisively defeat any adversary if deterrence fails.* (emphasis added)

This seems to set the stage for declaring the need to adapt the international legal prohibition against use of force in self-defense unless attacked:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat – most often a visible mobilization of armies, navies, and air forces preparing to attack. We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. Instead, they rely on acts of terror and . . . weapons that can be easily concealed, delivered covertly, and used without warning . . . the United States cannot remain idle when dangers gather.

*Id.* at 15. This doctrine of preemptive war where there is no imminent threat is inconsistent with customary international law. See Oscar Schachter et al., *Recourse to Force: State Action Against Threats and Armed Attacks*, 97 AM. J. INT'L L. 721 (2003) (arguing that the privileging of the Security Council would make the law available to serve the interests of powerful at the expense of weak states). But see Lori Damrosch & Bernard H. Oxman, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003) (discussing the legality of the Iraqi conflict, especially contributions by William H. Taft and Todd F. Buchwald, with John Yoo and Ruth Wedgewood arriving at a different conclusion).

<sup>85</sup> For example, National Security Strategy, *supra* note 55, at 29 states:

The presence of American forces overseas is one of the most profound symbols of the U.S. commitments to allies and friends. Through our willingness to use force in our own defense and in defense of others, the United States demonstrates its resolve to maintain a balance of power that favors freedom. *To contend with uncertainty and to meet the many security challenges we face, the United States will require bases and stations within and beyond Western Europe and Northeast Asia, as well as temporary access arrangements for the long-distance deployment of U.S. forces* (emphasis added).

<sup>86</sup> See Marjorie Cohn, *Cheney's Black Gold: Oil Interests May Drive U.S. Foreign Policy*, CHI. TRIB., Aug. 10, 2000 (reporting that Cheney, then CEO of oil company Halliburton had referred to Caspian oil as black gold and that he favored the re-



### 3. HEGEMONIC EROSION OF A CUSTOMARY INTERNATIONAL LAW CANON OVER NON-EUROPEAN 'PROPERTY'

As demonstrated in Section 2, the necessities of national policy and political expediency as reflected in municipal law and the practices of belligerent states have modified and relaxed the classical international law rule that conquest does not extinguish pre-existing private property and contract rights. As a result, conquest is often accompanied by the taking and confiscation of the private property of the nationals of the defeated belligerent state(s).

In this Section, I show that this rule against extinction of private property rights and contracts upon conquest has been most attenuated with reference to the conquest of non-Western peoples and states by Western states as opposed to conquest among European states and peoples. This difference in the application of the rule against extinction of private property rights and contracts upon conquest is, I argue, a systemic expression of the hegemonic power of conquering states that goes back decades in the history of international law. To show this hegemonic impulse to override the private property rights of non-Europeans upon conquest in the history of international law, I discuss a 1905 House of Lords decision that explicitly found the rule against extinction was preempted by the prerogatives of the Crown. I also discuss how Native American ownership of land in early American history was treated as mere possession upon conquest and in the various peace treaties between the United States and Spain, while similar possession of land by White colonial settlers was held to constitute unimpeachable private property interests.

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peal of section 907 of the 1992 Freedom Support Act, which severely restricts U.S. aid to Azerbaijan because of its ethnic cleansing of the Armenians in Nagorno Karabakh, a mountainous enclave in Azerbaijan, to facilitate American oil corporations from getting access to Caspian oil), *available at* <http://www.cooperative-research.org/timeline/2000/chicagotribune081000.html>; *see also* Michael T. Klare, *Blood for Oil: The Bush Cheney Energy Strategy*, in *THE SOCIALIST REGISTER 2004: THE NEW IMPERIAL CHALLENGE* 166 (Colin Leys & Leo Panitch eds., 2003) (arguing that U.S. foreign policy is predicated on a two-pronged strategy, one energy-driven and the other security-driven, that have become forged into a militarist agenda in the Bush-Cheney energy plan). For a critique of the enlightened occupier view, *see* Berman, *supra* note 58.

3.1. *West Rand Central Gold Mining Company v. The King: Conquest Does Not Limit the Prerogative of the Crown to Extinguish Corporate Private Property*

In *West Rand Central Gold Mining Co. v. The King*,<sup>87</sup> the question before the House of Lords was whether, after annexation, a conquering state becomes liable to discharge the financial obligations of the conquered state due to individuals or corporations. The facts of the case were as follows.

In October 1899, the Republic of South Africa seized over 2,617 ounces of gold from the West Rand Central Gold Mining Company for "safe keeping." Following the Anglo-Boer War, Britain conquered the Republic of South Africa and by a proclamation dated September 1, 1900 all the territories of the Republic were annexed to and became part of the dominions of Queen Victoria. The Republic of South Africa thereby ceased to exist as it became part of the British Empire. West Rand Central Gold Mining Company brought suit seeking recovery of the gold seized by the Republic of South Africa that was now held by the British Crown. West Rand Central Gold Mining Company urged that conquest or change of sovereignty by cession ought not to affect pre-existing contractual rights. Further, it was argued that under international law, conquest does not destroy all private rights. According to West Rand Central Gold Mining Company, the seizure of the gold by the Republic of South Africa was a contractual obligation that the British government had assumed upon conquering the Republic.

Relying on *United States v. Percheman*,<sup>88</sup> West Rand Central Gold Mining Company argued that the whole of the civilized world would be outraged if private property should be generally confiscated and private rights annulled by the British conquest. In addition, it argued that while claims to enforce treaties or agreements between two sovereign powers were acts of state which courts had no power to inquire into, the repudiation of liability by the government for the seized gold belonging to an individual was not an act of state since the seizure had crystallized into a contractual obligation.

By contrast, the Crown refuted all arguments distinguishing private or contractual claims against the Crown, on the one hand, from public claims seeking to enforce obligations under treaties, on

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<sup>87</sup> *W. Rand Cent. Gold Mining Co. v. The King*, [1905] 2 K.B. 391, 391 (K.B.).

<sup>88</sup> *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86 (1833).

the other. The House of Lords, in agreeing with the Crown observed, "where the King of England conquers a country it is a different consideration, [from peaceable cession], for there the conqueror by saving the lives of the people conquered *gains a right and property in such people, in consequence of which he may impose upon them what law he pleases.*"<sup>89</sup> (emphasis added)

In essence, the House of Lords declined to extend protection to the private property rights of a South African corporation by drawing a distinction between the circumstances under which such protection applies and those in which it does not.<sup>90</sup> Following this distinction, territory seized by conquest does not save personal rights arising under a contract (as opposed to private property rights to land), from extinction upon conquest. By defining the interest in the confiscated gold as a personal right arising under a contract, the court declined to follow the classical rule under customary international law as adopted by American courts that private or contractual claims survive both conquest and cession of territory by peaceful means. The court reasoned that the American decisions were different because unlike the seizure of the gold, they involved landed property in territories which had been ceded or annexed to the United States.<sup>91</sup>

In light of the court's observation that the Crown was freed of any constraints in deciding what law to apply to a conquered people, it is plausible to argue that the decision was made to match the demands of colonial expediency rather than because the doctrine required such an outcome on any principled basis except those consistent with the designs of the expanding British Empire.

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<sup>89</sup> *W. Rand Cent. Gold Mining Co.*, [1905] 2 K.B. at 410-11.

<sup>90</sup> According to the court:

It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, particularly land as to which the title had already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals in that territory. If a particular piece of property has been conveyed to a private owner or has been pledged, or a lien has been created upon it, considerations arise which are different from those which have to be considered when the question is whether the contractual obligation of the conquered State towards individuals is to undertaken by the conquering State.

*Id.* at 411.

<sup>91</sup> *Id.* at 410.

This case is compelling because it did not involve non-European claims to safeguard their private property upon conquest. It reveals the malleable, flexible, and contradictory applications of this customary international law rule's saving benediction of private property and contracts upon conquest. Sometimes it was held to apply, but in cases like this, the King's prerogatives over a conquered state overrode the applicability of the rule.

### 3.2. Daniel F. Strother v. John B.C. Lucas: *Native American Land Claims Do Not Survive Conquest*

The rule against extinction of private property rights was successfully applied in *Strother v. Lucas*<sup>92</sup> to facilitate the survival of land grants made by the Spanish Crown to White settlers.<sup>93</sup> In addition, use and occupation of territory by Spanish and other White settlers that had not been recognized by the Spanish Crown or its administrators as constituting private property rights enjoyed the saving benediction of the rule against extinction of private property rights after Spain ceded her territories to the United States.<sup>94</sup> In this Sec-

<sup>92</sup> *Strother v. Lucas*, 37 U.S. (12 Pet.) 410 (1838).

<sup>93</sup> *Percheman*, 32 U.S. at 64, is another example. Similarly, in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 733-34, 753-54 (1835), the Supreme Court held:

[A] treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee . . . . [The U.S.] came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants . . . . They could assume no right of conquest which may at any time have been vested in Great Britain or Spain . . . new relations [had been] established between them by solemn treaties; nor did they take possession on any such assumption of right; . . . it was done under the guarantee of congress to the inhabitants . . . . They might, as the new sovereign, adopt any system of government or laws . . . consistent with the treaty and the constitution; but instead . . . all former laws and municipal regulations which were in existence at the cession, were continued in force.

<sup>94</sup> See *Strother*, 37 U.S. at 438, stating:

In following the course of the law of nations, this Court has declared, that even in cases of conquest, the conqueror does no more than displace the sovereign, and assume dominion over the country . . . . "A cession of territory" is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him; lands he had previously granted, were not his to cede. Neither party could so understand the treaty. Neither party could consider itself as attempting a wrong to individuals, condemned by the whole civilized world. "The cession of territory" would necessarily be understood to pass sovereignty only, and not to interfere with private property.' [sic] No con-

tion, my claim is that conquest transformed the use and occupation of land into private property rights upon Spanish cession of territory to the United States. However, this transformation did not work in favor of a Native American who occupied and used the land in the same way as by the Spanish and other White settlers.

In essence, Native American use and occupation of land was held not to enjoy the same status as similarly used and occupied land of Spanish and other White settlers. This attitude of early American courts towards Native American land as falling below private property rights is further evidenced by cases like *Johnson v. M'Intosh* where the Supreme Court held that conquest impaired Native American rights to land.<sup>95</sup> The rationale for non-recognition of Native American rights to land was espoused by Justice Marshall in *Johnson*:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness;

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struction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require.

This proposition is backed up by a series of treaties embodying the rule against extinction as the 1803 Treaty between Spain and France. *Id.* at 436 (referencing the Convention of Neutrality and Subsity, Oct. 19, 1803, Fr.-Spain, 57 Consol. T.S. 201).

<sup>95</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). According to Chief Justice Marshall, conquest "impaired" the rights of the indigenous people of North America because "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will . . . was denied by the original fundamental principle, that discovery gave exclusive title to those who made it." *Id.* at 574. The Court further held that conquest gives a title "which the [c]ourts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim." *Id.* at 588. Although *Johnson* was decided long after the doctrine of discovery was discredited among European nations, it may be said to represent a first generation case under which conquest and discovery were regarded as legitimate modes of acquiring sovereignty over territory. With the rise of the principle of self-determination after World War I, the doctrine of discovery as a legitimate mode of acquiring sovereignty over territory was eclipsed. For a discussion of this shift and its problems, see SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* (1996). For a critique holding that this shift towards self-determination was not immediately applied to non-Western peoples, such as Africans, see SIBA N'ZATIOULA GROVOGUI, *SOVEREIGNS, QUASI-SOVEREIGNS AND AFRICANS* (1996).

*to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.*<sup>96</sup> (emphasis added)

In other words, conquest and cession applied differently as between Native Americans, on the one hand, and Spanish and White settlers, on the other. While Spanish and White settlers had their use and occupation of land as rising to the equivalent of land grants or titles that survived conquest or cession of territory, similar use and occupation of land by Native Americans did not get recognition as private property rights capable of surviving conquest or cession.

What is even more striking here is that in *Strother*, the U.S. Supreme Court, in determining whether prescriptive title<sup>97</sup> existed in favour of the plaintiff, recognized "local laws," "usages," and "customs"<sup>98</sup> as evidenced by "informal writings," "parole agreements," and "possession alone, for long time,"<sup>99</sup> and even common/collective as well as private ownership of property land all on behalf of the Spanish and White settlers but not for the Native Americans.<sup>100</sup> Thus the Court declares:

[T]he law of this case is the law of all similar ones now existing, or which may arise, it is our plain duty to decide it on such principle. That while we do, as the law enjoins, respect ancient titles, possession and appropriation, give due effect to legal presumptions, lawful acts, and to the general

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<sup>96</sup> *Johnson*, 21 U.S. at 543, 590 (emphasis added). In *Mitchel*, 34 U.S. at 752, the property rights of Native Americans in Florida were held to be rights of mere "occupancy and perpetual possession, either by cultivation, or as hunting-grounds, which was held sacred by the crown, the colonies, the states, and the United States . . ." Indeed the right of occupancy was considered "as sacred as the fee simple of the whites." *Id.* at 746. However, Indians did not enjoy full ownership because the "ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians." *Id.* at 745.

<sup>97</sup> *Strother*, 37 U.S. at 300-01, 304-05, 306-14, 432 (referring to prescription as "uninterrupted cultivation" of the land).

<sup>98</sup> *Id.* at 435.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 458. The Court observes that in Missouri, "derivative titles" to land include the "several right or rights in common" and "according to their several rights." *Id.* at 459.

and local laws, usages and customs of Spain and her colonies.<sup>101</sup>

The Court then engages in a lengthy exposition of the "laws, usages and customs of Spain in relation to the grants[,] transfers and tenure of village property."<sup>102</sup> The description of how Spanish and other White settlers acquired property rights over territory informally through usages, customs and local laws parallels non-European settlement patterns, including those of the Native Americans.<sup>103</sup> For example, the informality of these processes insofar as they differed from formal grants conferred by written authority of the Crown or the Crown's representatives.<sup>104</sup> Thus, lack of formal Western education would not bar a settler from acquiring private property rights over land that had been settled and occupied in accordance with local laws, customs and usages.<sup>105</sup> Parol evidence to prove occupation and cultivation consistent with local laws, customs and usages was permissible<sup>106</sup> for the White settlers but not for the Native Americans who similarly occupied and cultivated their land

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<sup>101</sup> *Id.* at 435.

<sup>102</sup> *Id.* at 450. This exposition goes on in excruciating detail between pages 447-50. The Court justifies this exposition as follows:

Thus connecting the law of nations, the stipulations of the treaty, the laws, usages and customs of Spain, the acts of [C]ongress, with the decisions of this court; we are furnished with sure rules of law, to guide us through this and all kindred cases, in ascertaining what was property in the inhabitants of the territory when it was ceded. As all the supreme laws of the land, the constitution, laws and treaties, forbid the United States to violate rights of property thus acquired, so they have never attempted it; but the state of the province required that some appropriate laws should be passed, in order to ascertain what was private, and what public property, to give repose to the possession, security to titles depending on the evidence of facts remote in time, difficult of proof, and in the absence of records and other writings.

*Id.* at 446-47.

<sup>103</sup> See Carlos Scott Lopez, *Reformulating Native Title in Mabo's Wake: Aboriginal Sovereignty and Reconciliation in Post Centenary Australia*, 11 TULSA J. COMP & INT'L L. 21 (2003) (noting that the communal nature of title to territory in Australia was also considered as unproductive). But see JOHN W. BRUCE & SHEM E. MIGOT-ADHOLLA, *SEARCHING FOR LAND TENURE SECURITY IN AFRICA* (1994) (challenging the view that communal title is unproductive).

<sup>104</sup> See *Strother*, 37 U.S. at 439 (describing the arbitrariness of the process of granting land).

<sup>105</sup> See *id.* at 440 (stating that private property rights do not change, only sovereignty).

<sup>106</sup> *Id.*

in accordance with their customs, usages and practices.

Notwithstanding Native American occupation of land that was analogous to settler practice, the Court found that lands not so occupied or cultivated by the settlers in Louisiana were parts of the King's dominions.<sup>107</sup> This effectively meant that land occupied by Native Americans did not enjoy the same status as that occupied or cultivated by the White settlers. Hence, those White settlers in this case who had no formal grants were comparable to Native Americans in terms of the informality of occupation by dint of having no grants from the Crown, their lack of formal Western education, and the organization of their tenure system in accordance with their local laws, customs and usages, yet these Native Americans did not enjoy the saving benediction of the customary international law norm precluding their land rights from being extinguished by cession. The Court reinforced this difference by noting that local authorities should treat Native Americans with "mildness, gentleness and moderation, with verbal, and not judicial, proceeding."<sup>108</sup>

It is remarkable that while the Court defines property as broadly as incorporating "any right, legal, equitable, inceptive or inchoate or perfect,"<sup>109</sup> Native American and occupation of land is not regarded as adding up to legal title. As such, Native Americans were regarded as merely entitled to be treated with the patronizing kindness of a "civilized state." In this manner the Court gives imprimatur to the colonial and racist notion that non-European use and occupation of land did not rise to private property rights and that treaties between colonial powers in the nineteenth and twentieth centuries effectively extinguished pre-existing title to territory based on non-European use and occupation of land. In fact, as Justice Marshall held in *Johnson*, while conquest did not extinguish existing land rights, this rule did not operate in favor of "a people with whom it was impossible to mix, and who could not be governed as a distinct society."<sup>110</sup> For this reason, the same evidence of use, occupation and cultivation by Europeans that was presented in *Strother* was given the status of a private property right. Moreover, it was

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<sup>107</sup> See *id.* (stating that the royal ordinance of 1754 gave the king dominion).

<sup>108</sup> *Id.* By contrast, with regard to the White settlers, the Court finds after examining their customs, usages and local laws: "Such are the laws, usages and customs of Spain, by which to ascertain what was property in the ceded territory, when it came into the hands of the United States, charged with titles originating thereby; creating rights of property of all grades and description." *Id.* at 446.

<sup>109</sup> *Id.* at 406.

<sup>110</sup> *Johnson v. M'Intosh*, 21 U.S. 543, 590-91 (1823).



granted the saving benediction of the customary international law rule that preserves property rights upon conquest or cession that was not given to Native American property.<sup>111</sup>

There have been a few exceptional cases where courts of conquering powers have recognized the use and occupation of land by non-Europeans as a form of land tenure with a property rights system. In one such case, the House of Lords proceeded from the premise that among the indigenous Maori of New Zealand, there existed a system of land tenure which was known or was discoverable, and that this land tenure system was binding on the court with regard to the natives' rightful use and possession. The Crown could therefore not arbitrarily disregard this system of land tenure by appropriating land for sale inconsistent with the relevant statutory authority.<sup>112</sup> In effect, the House of Lords rejected the assertion by the Crown that no suit could be brought against it upon a native title.<sup>113</sup>

But, in the overwhelming number of cases where similar evidence of the existence of a land tenure system among non-Europeans was present, courts have found that there was no native title, and if any such title existed, it was extinguished by the conquering sovereign.<sup>114</sup> Hence, in *Ol le Njogo v. Attorney General*, the East African Court of Appeals held that an agreement entered into between the Crown and a native tribe was a treaty, and therefore any cession of land inconsistent with the treaty was not cognizable in the courts of the Crown since it was an act of state.<sup>115</sup> In this case, the court said of the argument made by the Maasai about their private property rights over their land, "[w]hether interference with the private rights of a subject by officers of the State to compel obedience to the terms of

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<sup>111</sup> I explore this theme at greater length in the article, James Thuo Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 LEIDEN J. INT'L L. 581 (2002).

<sup>112</sup> See *Nireaha Tamaki v. Baker*, 1901 A.C. 561, 577-580 (P.C.) (appeal taken from N.Z.) (stating that the Crown could not extinguish native title).

<sup>113</sup> *Id.* at 577 (allowing cases made by native titles).

<sup>114</sup> For example, in *Ol Le Njogo v. Att'y Gen.*, 1913 E. Afr. L. Rep. 70 (appeal taken from Eng.), the Court held, without recognizing that the Maasai had radical title to their territory, that they were nevertheless capable of entering into agreements with the Governor to cede their land, notwithstanding the fact that they were living in a protectorate.

<sup>115</sup> See *id.* at 78 (holding that the agreements in question are treaties). Similarly, in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), Justice Marshall held that the fact the Cherokee nation, a weaker state, had accepted the protection of the United States, a stronger state, did not mean that the Cherokee had surrendered their independence and right to self government or to terminate their right to exist as a state.

treaty could be authorised otherwise than by the Legislature is an open question."<sup>116</sup> More definitively, in *Sunmonu v. Disu Raphael*,<sup>117</sup> a case on appeal from the Supreme Court of Nigeria, the Privy Council held that there was a strong presumption that the title of a native to land was a usufructuary right which is subject to the radical title of the Crown and is held on behalf of the community or family.<sup>118</sup> Consequently, a native title was incapable of conferring exclusive possession of individual title against other members of the family. While the effect of this decision was to protect family members from being dispossessed by the holder of land under a grant, it is nevertheless indicative of the second-class status African ownership to land and territory enjoyed in colonial jurisprudence.<sup>119</sup> Indeed, as the Privy Council held in the *Sobhuza II* case:

The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign . . . . Such a usufructuary right . . . may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.<sup>120</sup>

In essence, the Privy Council held that since the Crown had radical title to territory, its acquisition of lands held under the rights, laws and customs of natives could not "legally interfere" or invalidate an exercise of the Crown's sovereign powers.<sup>121</sup> The upshot of these cases from Africa, unlike the *Nireaha Tamaki v. Baker* case from New Zealand, is that the Crown exercised unbridled and unaccountable power as the ultimate owner of the radical title to the territory

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<sup>116</sup> *Id.* at 113.

<sup>117</sup> See *Sunmonu v. Disu Raphael*, 1927 A.C. 881, 883 (P.C.) (appeal taken from Nig.) (holding that native titles cede to the crown).

<sup>118</sup> See *id.* (citing as authority the leading case of *Amodu Tijani v. Sec'y of S. Nig.*, [1921] 2 A.C. 399 (P.C.) (appeal taken from Nig.)).

<sup>119</sup> The treatment of Masubian occupation and use in the 1999 International Court of Justice case, *Namibia/Botswana*, is also analogous to the treatment of non-European claims to land and territory in these African cases. See Gathii, *supra* note 111.

<sup>120</sup> *Sobhuza II v. Miller*, [1926] A.C. 518, 525 (P.C.) (appeal taken from Swaz.) (citing as authority *Amodu Tijani*, [1921] 2 A.C. 399)).

<sup>121</sup> *Id.* at 528; see also *W. Rand Cent. Gold Mining Co. v. The King*, [1905] 2 K.B. 391, 394 (K.B.) ("Where the Sovereign annexes a foreign country the terms on which he does so are settled by him, and no Court of law has any power to interpret or enforce those terms.")

upon conquest or peaceable cession.

Native American land use and occupation, like African land use and occupation, did not rise to property rights under the Western system and its customs and usages. Thus, when the court referred to original title (property rights in land granted by the Crown) and derivative title (property rights in land arising from a transfer from original grantee or from such other mode as acquiescence, abandonment, adverse possession, prescription, or from local laws, usage, and custom) as the different modes of ownership of property in land, it did not contemplate that Native Americans had any such rights or even a land tenure system.<sup>122</sup>

In essence, American courts shared the view with British courts that international law and treaties between conquering colonial powers did not recognize non-European occupation and use of territory as establishing rights over territory, and if such rights existed, they were extinguished by the superior title of the conquering sovereign. In both *West Central Grand Mining Company* and *Strother*, it is clear that both with regard to the private property interests of a corporation or the occupation, use and property of a non-European community over land, the Crown's authority upon conquest or cession more often than not overrides the customary international law rule's saving benediction of these property interests from extinction.

Thus far, I have laid a basis to demonstrate that the customary international law rule prohibiting extinction of private property rights is unevenly and inconsistently applied by conquering states. Indeed, as the House of Lords held in *West Grand Mining Company*, upon conquest, the King is free to impose whatever rules he wants upon his subjects, including disregarding rules of customary international law that constrain his power.

Below I proceed to demonstrate that conquering states prioritize their hegemonic objectives over conquest states in the name of maintaining or restoring international peace and security, achieving a variety of humanitarian objectives and even preempting attacks against them where there is no imminent threat.<sup>123</sup> The widening agenda of militarized humanitarianism and preemptive and unilateral strikes to ostensibly maintain or restore international peace and security has at least two different private property con-

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<sup>122</sup> See *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 459 (differentiating between original and derivative titles).

<sup>123</sup> See *supra* Section 2.2.4.

sequences.

First, hegemonic powers are far more interested in protecting the private property rights of Western multinationals and privatizing public wealth in conquered states in favor of these hegemonic states and Western multinationals.

Second, upon conquest or surrender of non-Western or non-European states, it is more likely that the private property and contract rights of non-Westerners/non-European nationals do not enjoy the saving benediction of the customary international law canon against extinction, or at least to the same extent as western economic interests. Further, the hegemonic objectives of the conquering state to transform non-European states into liberal democratic political systems and market economies are used as a justification, pretext, or as military necessity to disregard, expropriate, or take without compensation the private property of defeated enemies. This trend is most earnest in European or Western conquest over non-Europeans or non-Westerners.

#### 4. PRIVATIZING IRAQ: ADVANCING THE INTERESTS OF THE PEOPLES OF CONQUERED LANDS AND TERRITORIES OR THE INTERESTS OF MULTINATIONAL CAPITAL?

"The right of conquest has no foundation other than the right of the strongest."<sup>124</sup>

In Section 3, I demonstrated that the classical international law rule that forbids the extinction of private property rights has been applied unevenly and inconsistently in the history of international law. In this section, I explore whether the conquest of Iraq is exhibiting a parallel process of privileging and protecting foreign economic interests while underprotecting the property rights of Iraqis under the U.S.-led occupation. To do so, I first outline the law governing treatment of private property under occupied territory before discussing the variety of claims that Iraqis in general and Iraqi women in particular may bring under the international legal regime to secure their private property rights affected by conquest.

In this section, I also discuss the international law governing treatment of Iraqi public assets under occupation and how the de-baathification of Iraq compares and contrasts with similar occupa-

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<sup>124</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 11 (G.D.H. Cole trans., E.P. Dutton & Co. 1950).

tion reconstruction programs in Nazi Germany, Fascist Italy and Japan. In so doing I show that there is a difference in treatment between Fascists and Nazis, whom the Allied powers authorized to continue receiving certain payments such as pensions after they lost their employment, on the one hand, as opposed to Japanese or Iraqi Baathists, on the other hand. Thus, while the Fascists and Nazis were defeated by conquest, their private property rights were relatively better protected than those of the defeated Japanese after World War II and more recently, those of the Baathists in Iraq after the U.S.-led conquest.

An additional issue addressed in this Section is the process of transforming the Iraqi economy into an open market economy and how the doctrine of military necessity and the political and hegemonic objectives of transforming Iraq, as espoused by the United States in particular, have justified expansive occupying powers beyond those contemplated by Article 43 of the Hague Regulations. These powers include the authority to expropriate private property rights and the privatization of formerly publicly owned wealth in what is an unprecedented transformation of the Iraqi economy into an almost utopian form of a market economy. This Section ends with an examination of whether a future Iraqi government would be bound by the decisions of the U.S.-led occupation and the alternative forums and their limitations that Iraqis may turn to for remedies as a result of adverse consequences to their private property rights.

#### *4.1. Private Property Under Occupation: The Applicable Law and Available Remedies*

While as a general matter conquest does not vitiate pre-existing private property and contract rights, under military occupation these rights enjoy a much lower threshold of protection under international law.<sup>125</sup> Though the occupying power is required to respect private property,<sup>126</sup> interferences with it are permissible where they accord with existing rules of "assessment and incidence" where the occupant collects taxes and tolls; in addition, the

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<sup>125</sup> See Hague Regulations, *supra* note 8, art. 42 (providing that "territory is considered occupied when it is actually placed under the authority of the hostile army").

<sup>126</sup> *Id.* art. 46 (requiring military authorities occupying the territory of a hostile state to respect "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions, and practice . . . [and] [p]rivate property cannot be confiscated.").

proceeds of such taxes and tolls must be used to defray the costs of administering the territory.<sup>127</sup> Further, no general punitive pecuniary penalties can be imposed on the population on account of acts involving specific individuals not imputing the general population jointly and severally.<sup>128</sup> All contributions must be made under a written order and can only be effective where it is "as far as possible in accordance with rules of assessment and incidence of the taxes in force."<sup>129</sup> Requisitions, where so demanded from individuals for the needs of the army of occupation, shall as far as is possible be paid in cash.<sup>130</sup> Only assets belonging to the state may be taken into possession, and where the assets and resources of individuals are seized, they must be returned and "compensation fixed when peace is made."<sup>131</sup> Where there are submarine cables between the occupied and neutral territory, seizure is prohibited and restoration and compensation must be fixed when "peace is made."<sup>132</sup> The property of municipalities, religious institutions, charities, educational institutions, and the arts and sciences are to be treated as private property whose seizure, destruction, or willful damage is forbidden.<sup>133</sup>

Some scholars have maintained that since World War II, the prohibition against interfering with private property rights by an occupying force is no longer governed by the foregoing framework of the Hague Regulations.<sup>134</sup> To support this position, reference is made to Article 46(2) of the second edition of the Fourth Geneva Convention,<sup>135</sup> which states: "restrictive measures affecting [pro-

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<sup>127</sup> See *id.* arts. 48, 49 (explaining that Article 49 further provides that where the occupant "levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question").

<sup>128</sup> See *id.* art. 50 (forbidding general penalties on individuals where they are not jointly and severally liable).

<sup>129</sup> See *id.* art. 51 (providing that a receipt shall be given to the contributors).

<sup>130</sup> See *id.* art. 52 (stating that, in proportion to the resources of the country, requisitions cannot involve inhabitants taking part in military operations against one's own country).

<sup>131</sup> *Id.* art. 53.

<sup>132</sup> *Id.* art. 54.

<sup>133</sup> See *id.* art. 56 (including damage to historic monuments and works of art and science).

<sup>134</sup> Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 303 (1995) (arguing, in part, that the original owners of private property destroyed, taken or damaged by an occupier "hold nothing more than the expectation of getting their property back . . .").

<sup>135</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time

ected persons] property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities."<sup>136</sup>

There are doubts whether Article 46(2) was intended to displace the Hague Regulations as the legal framework governing treatment of private property in occupied territory,<sup>137</sup> and therefore this position is not very tenable. An authoritative and comprehensive examination of U.S. requisitions in occupied Japan after its unconditional surrender has argued that the United States generally complied with the Hague Regulations.<sup>138</sup> Indeed, it seems plausible to argue that departures from the customary international law norms embodied in the Hague Regulations do not establish an alternative norm acquiesced to by Article 46 of the Fourth Geneva Convention but are, in fact, violations of the Hague Regulations.<sup>139</sup> Departures from the rule requiring occupying powers to respect the private property rights in occupied territory therefore confirm this customary international law rule rather than create an alternative rule.

Further, in light of state practice indicating that private property damaged, taken, or destroyed during war merely entitles its owners to an expectation of compensation following total defeat, belligerent such as Iraq was by the U.S. coalition,<sup>140</sup> it is unlikely

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of War, Aug. 12, 1949, art. 46, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www.unhchr.ch/html/menu3/b/92.htm>.

<sup>136</sup> *Id.*

<sup>137</sup> COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 271 (Oscar Uhler & Henri Coursier eds., 1958).

<sup>138</sup> See ANDO, *supra* note 17, at 104 (describing the history of U.S. requisition in Japan following World War II).

<sup>139</sup> In *Military and Paramilitary Activities (Nicar. v U.S.)* 1986 I.C.J. 14, para. 186 (June 27) (describing the International Court of Justice in expounding on the inconsistency between actual practice), *opinio juris* noted:

In order to deduce the existence of customary rules, the Court deems it is sufficient that the conduct of States should, in general, be consistent with such rules, and that *instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule*. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications within the rule itself, the significance of that attitude is to confirm rather than to weaken the rule.

*Id.* (emphasis added).

<sup>140</sup> See Benvenisti & Zamir, *supra* note 134, at 303 (arguing, in part, that the original owners of private property destroyed, taken or damaged by an occupier

that Iraqis will be able to get compensated by the U.S.-led occupying force when sovereignty is returned to the Iraqi people in a peace or other treaty entered into upon the formal end of the U.S.-led occupation. This might be further complicated because relief granted in an Iraqi judicial tribunal would have to be enforced against assets of the United States, either in the United States or elsewhere. That might be a daunting proposition for a country crushed by the remaining superpower, in a war not authorized by the United Nations Security Council in advance. Suits may be also filed in the United States, the United Kingdom, or in the countries involved in the coalition, to recover property confiscated by the occupying forces. Under the customary international law rules laid down in the 1907 Hague Regulations, where such claims are proved in principle, compensation would be available. However, in the United States where courts often treat issues relating to foreign affairs, especially in the context of war, as raising separation of powers issues, it is unlikely that relief would be available.<sup>141</sup> Yet, this does not change the international law rule that a violation of international law is not excused because it is permissible under domestic law.<sup>142</sup> As such, the United States or any of the occupying powers in Iraq cannot use their domestic law as a defense to a violation of norms of customary international law.<sup>143</sup> Any of the occupying powers in violation of the Hague Regulations would at minimum be liable to pay damages both under the Hague Regulations<sup>144</sup> as well as under general international law.<sup>145</sup>

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“hold nothing more than the expectation of getting their property back.”).

<sup>141</sup> See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (arguing that foreign affairs issues raise separation of powers constraints that prevent the judiciary from giving relief so as to maintain the integrity of the separate domains of governmental decision making); *Hamdi v. Rumsfeld*, 316 F.3d 450, 476-77 (4th Cir. 2003) (holding that “judicial review does not disappear during wartime, but the review of battlefield [decisions] is a highly deferential one”).

<sup>142</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 311(3). In addition, Article 46(1) of the Vienna Convention on the Law of Treaties provides that States cannot invoke domestic laws to invalidate its consent to be bound by a treaty unless such violation of the treaty “was manifest and concerned a rule of its internal law of fundamental importance.” Vienna Convention on the Law of Treaties, May 22, 1969, art. 46(1), 1155 U.N.T.S. 331, 8 I.L.M. 679. Article 46(2) of the Convention further obliges state parties to carry out their treaty obligations in good faith. *Id.* art. 46(2).

<sup>143</sup> *Id.*

<sup>144</sup> Hague Regulations, *supra* note 8, art. 3.

<sup>145</sup> *Factory at Chorzow (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (“It is a principle of international law that the breach of an agreement involves an obliga-



The occupying authorities in Iraq are also bound by the principle of humanity which supercedes the justifications founded on the military necessity of belligerent occupiers.<sup>146</sup> This principle, which goes to the heart of the laws of war,<sup>147</sup> was recognized even in the territorial cession conquests of the nineteenth century.<sup>148</sup>

#### 4.2. Private Property Claims of Iraqis

During the war, thousands of Iraqis had their private property, including agricultural land, destroyed.<sup>149</sup> In addition, several thousand Iraqis deserted their property in the wake of war.<sup>150</sup> Some of the buildings were occupied by the advancing forces to secure supply lines and to restore law and order. In addition, the looting of the period immediately following the fall of the Saddam regime in early 2003<sup>151</sup> resulted in loss of private and public prop-

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tion to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”).

<sup>146</sup> See ANDO, *supra* note 17, at 31, 76-78, 108 (stating that no ideological basis for war can prevent the principle of humanity from applying to a post-surrender occupation).

<sup>147</sup> *Id.*

<sup>148</sup> Thus, in the notorious *Johnson v. M'Intosh*, 21 U.S. 543, 589-590 (1823), the authority of the conquering power was regarded as being subject to “a general rule, [required by the constraints of humanity and public opinion], that the conquered shall not be wantonly oppressed . . . without injury to his [the conqueror] fame, and hazard to his power.”

<sup>149</sup> See, e.g., Brian MacQuarrie, *For Iraqis, A Struggle to Recoup Loss*, BOSTON GLOBE, Aug. 6, 2003, at A1 (reporting that U.S. military officials have received about 2,500 Iraqi claims of damage or loss of property related to the war); *U.S. Forces Demolish Iraq Homes*, AGENCE FRANCE-PRESSE, Mar. 3, 2004 (reporting that the U.S. military was destroying Iraqi homes as punishment for the insurgency during the occupation period), at [http://www.news.com.au/common/story\\_page/0,4057,7942137%5E1702,00.html](http://www.news.com.au/common/story_page/0,4057,7942137%5E1702,00.html); OCCUPATION WATCH CENTER IN BAGHDAD & NATIONAL ASSOCIATION FOR THE DEFENSE OF HUMAN RIGHTS IN IRAQ, JOINT REPORT ON CIVILIAN CASUALTY CASUALTIES AND CLAIMS RELATED TO U.S. MILITARY OCCUPATIONS (on file with author) [hereinafter JOINT REPORT] (noting how “the U.S. military and lawyers dealt with Iraqi victims of military operations who were requesting compensation.”), available at [http://www.unponteper.it/osservatorio/report\\_%20OW\\_engl.htm](http://www.unponteper.it/osservatorio/report_%20OW_engl.htm).

<sup>150</sup> UNITED NATIONS, HUMANITARIAN APPEAL FOR IRAQ: REVISED INTER-AGENCY APPEAL 1 APRIL - 31 DECEMBER, 2003, at 12-13, 15, 45, 49, 54 (2003) (detailing displacement and damage resulting from the war), available at <http://www.reliefweb.int/appeals/2003/files/irq03flash2.pdf>.

<sup>151</sup> See John Daniszewski & Geoffrey Mohan, *Looters Bring Baghdad New Havoc*, L.A. TIMES, Apr. 11, 2003, at A1 (commenting on the disarray of Iraq after being conquered).

erty and significant cultural artifacts.<sup>152</sup> The insecurity resulting from the looting, as well as from the insurgency against the occupation, has developed into a low intensity violence that continues to disproportionately affect Iraqis, both in terms of human loss and suffering as well as in further destruction of their private property. Add to these casualties those resulting from U.S. cluster munitions, “accidental” bombings, and other military related activities that evidence the “inescapable brutality of modern warfare.”<sup>153</sup>

However, there are many other claims relating to property damage arising from the movement of occupying power tanks and military vehicles, including injury or death to Iraqi livestock, bicycles, and so on.<sup>154</sup> The U.S. Air Force runs a program under the Foreign Claims Act to compensate such losses which are unrelated to combat. The Judge Advocate, who makes determinations for compensation in such cases, applies local law and custom. This exercise is made difficult by problems of language difference and determining compensation schemes for claims such as camels injured or killed by the occupying forces or their civilian employees.<sup>155</sup>

#### 4.3. *Private Property Claims of Iraqi Women*

Women are affected differently and arguably more adversely by conquest and war than men.<sup>156</sup> That is no different in Iraq. Al-

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<sup>152</sup> Article 56 of the Hague Regulations provides that the property of municipalities and institutions dedicated to education, the arts and sciences shall be treated as private property. In addition, the Article forbids the seizure, destruction and willful damage of the foregoing properties and historic monuments and works of art and science. Article 47 prohibits pillage. The pilfering by looters, including U.S. soldiers, of Iraq’s rich cultural artifacts in its Baghdad museums clearly violated the foregoing provisions of the Hague Regulations. Hague Regulations, *supra* note 8, arts. 56, 47. See S.C. Res. 1483, *supra* note 73, addressing this problem.

<sup>153</sup> Nehal Bhuta, *A Global State of Exception? The United States and World Order*, 10 CONSTELLATIONS 2003, at 3, available at <http://www.constellationsjournal.org/Bhuta.pdf> (last visited Mar. 28, 2004).

<sup>154</sup> See Vanessa Blum, *After the War, A Time to Pay: How JAG Lawyers Settle Foreign Claims Over Non-Combat Damage*, LEGAL TIMES, Apr. 21, 2003, at 1 (describing cooperation to Iraqis for property damage by the occupying troops).

<sup>155</sup> See *id.* (exploring the roles of Army lawyers in the compensation scheme).

<sup>156</sup> JUDITH G. GARDAM & MICHELE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 20 (2001) (noting in part that “one of the most significant factors leading to the disproportionate impact of armed conflict on women is the endemic discrimination that they experience in all societies.”); see also CYNTHIA ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN’S LIVES (2000) (showing how women’s lives and society in general has been militarized both deliberately and consciously in complex and ever-changing ways).

though, at a formal level in the 1970s, equal protection was extended to women and efforts were made to facilitate their access to the ballot box, the education system, the political system, and even to own private property, the 1991 Gulf War reversed these gains as the Saddam regime resorted to a conservative Islamic religious and traditional family law system as part of the nationalist response to Iraq's defeat in the 1991 Gulf War. The sanctions imposed by the United Nations ("U.N.") following this war further eroded the gains women had made in the formal economy.<sup>157</sup>

According to the United Nations Educational, Scientific and Cultural Organization, about seventy-five percent of Iraqi women were literate in 1987. By 2000, less than twenty-five percent were literate.<sup>158</sup> In addition, the government purged women from government jobs to make way for men, thereby restricting chances of formal employment for women. This in turn facilitated their staying at home consistently with the advent of the new conservative nationalism after the 1991 Gulf War.<sup>159</sup> With Iraq's economy getting even worse at the end of 2003, as indicated by falling household income to \$450-610 from \$3,600 per person in 1980, the position of women is all the more vulnerable.<sup>160</sup> The Interim Governing Council, appointed by the U.S.-led Occupation Iraqi Coalitional Provisional Authority ("CPA"), was initially unclear how to resolve the status of personal and religious laws in relation to guarantees of equality.<sup>161</sup> Eventually the CPA approved an Interim Administrative Law granting equality rights to women without arriving at a formula on how to balance equality rights for women, on the one hand, and the cultural, social, and religious practices of Iraqi society, including those of Islam, on the other.<sup>162</sup>

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<sup>157</sup> See HUMAN RIGHTS WATCH, BRIEFING PAPER: BACKGROUND ON WOMEN'S STATUS IN IRAQ PRIOR TO THE FALL OF THE SADDAM HUSSEIN GOVERNMENT (2003) (discussing the effects of U.N. sanctions on women in the Iraqi economy), available at <http://www.hrw.org/background/wrd/iraq-women.htm>.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Steve Schifferes, *Iraq's Economy Declines By Half*, BBC NEWS ONLINE, Oct. 10, 2003, at <http://news.bbc.co.uk/2/hi/business/3181248.stm>.

<sup>161</sup> See Jim Lobe, *Women's Rights in Iraq Under the IGC: A Crisis is Brewing*, ZNET, Feb. 5, 2004 (discussing Iraqi Governing Council Resolution 137, which would, if approved by the Coalition Provisional Authority ("CPA"), create religious laws to be administered by clerics from the countries' different faiths), at <http://www.zmag.org/content/showarticle.cfm?SectionID=43&ItemID=4936>.

<sup>162</sup> LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD, *supra* note 10, art. 12. However, Article 13(F) provides that "[e]ach Iraqi has the right to freedom of thought, conscience, and religious belief and practice.

The U.S.-led occupation has arguably been typical of belligerent treatment of issues relating to women as peripheral to the larger war effort, and to the extent that women's involvement is called into question, it is in the position of wives, mothers, widows or prostitutes who support the war effort on the home front and in the theatre of war who need the benevolent protection of the belligerents.<sup>163</sup> The United States has also invented a postwar role for women in reviving the Iraqi economy, all of course consistent with the free market vision of the U.S.-led coalition.<sup>164</sup>

The private property rights of Iraqi women are made even more precarious by the thousands of deaths of Iraqi men in and out of the military and the thousands being held in Iraq and outside the country. As women increasingly head families and become the breadwinners of their families, the liberalizing economic reforms further exacerbate their situation. The application of traditional and customary norms in the investigation of damage to property and human lives undertaken by the United States under the Foreign Claims Act in Somalia indicates the danger of the occupying authorities doing the same in Iraq: a Somali man's life was valued at 100 camels, while that of a woman at 50 camels.<sup>165</sup> The occupying authorities must avoid the danger of reinscribing the sexist differentiation between the lives, assets, and property of women, on the one hand, and the lives and assets of men, on the other. The vulnerability of women is further suggested by the fact that women would more likely than not claim title to movable assets, as opposed to more valuable immovable property that may be

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Coercion in such matters shall be prohibited." *Id.* For insightful essays on the relationship between women's rights, culture, the market and international institutions, see Symposium, *Globalization and Comparative Family Law*, 67 ALBANY L. REV. 54 (2004) (with a foreword by James Thuo Gathii and Patricia Youngblood Reyhan).

<sup>163</sup> GARDAM & JARVIS, *supra* note 156, at 35-37.

<sup>164</sup> Paula Dobriansky, Under-secretary of State for Global Affairs, ensured that the United States has engaged in the activities that advance the interests of Iraqi women in areas of human rights, politics, economics, and education. The first priority of the United States, according to Dobriansky, is the security of Iraqi women and their families. Ensuring their security will bring about a revival of economic freedom in Iraq, and will facilitate greater participation of Iraqi women in the reconstruction efforts. Paula Dobriansky, *Standing Up for Iraqi Women*, WASH. POST, July 2, 2003, at A23.

<sup>165</sup> Blum, *supra* note 154, at 17. By contrast, the report notes that the highest award granted under the Foreign Claims Act was a \$1 million settlement arising from a golf course accident involving a member of the U.S. Navy that struck an Australian woman with a golf ball and caused her serious injury. *Id.*

registered in their husbands' names in the current economy in Iraq. In light of these problems, the occupying authorities must develop a pragmatic methodology to compensate women for damage and confiscation of their property by adopting egalitarian estimates of the value of their assets from within their cultural, customary, and religious norms, instead of relying on dominant narratives that reinforce the patriarchal hierarchy and the patronizing mission of conquest.<sup>166</sup>

## 5. IRAQ'S PUBLIC ASSETS AND RESOURCES: THE LEGALITY OF PRIVATE PROPERTY INTERFERENCES RELATED TO PRIVATIZATION AND OTHER BROAD BASED MEASURES OF SOCIAL TRANSFORMATION

### 5.1. *The Applicable Rules*

Under the Hague Regulations, an occupying power is an administrator or usufructuary.<sup>167</sup> Article 55 reiterates the obligation of an occupying state to safeguard the capital of public properties and "to administer them in accordance with the rules of usufruct."<sup>168</sup> Pursuant to this rule, an occupant does not own public property in occupied territory and cannot, therefore, "sell or otherwise transfer ownership of the property to third parties."<sup>169</sup> Consequently, the occupier is only authorized to "take possession"<sup>170</sup> of movable assets including cash, funds, realizable securities, depots of arms and so on, but only where necessary for use in military operations.<sup>171</sup> Seizure of private property for use in military operations "must be restored and compensation fixed when peace is made."<sup>172</sup> It follows that Article 53 of the Hague Regulations

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<sup>166</sup> See Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L.J. 381 (2000) (offering description of the critical pragmatic approach). In Iraq, the process of filing claims under the Foreign Claims Act has been complicated by security, language and other barriers. JOINT REPORT, *supra* note 149.

<sup>167</sup> See Hague Regulations, *supra* note 8, art. 55 ("The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country."); see also JUSTINIAN'S INSTITUTES 61 (Peter Birks & Grant McLeod trans., 1987) (defining "usufruct" as the right to use the fruits of another person's property with the duty to preserve its substance).

<sup>168</sup> Hague Regulations, *supra* note 8, art. 55.

<sup>169</sup> Benvenisti & Zamir, *supra* note 134, at 313.

<sup>170</sup> Hague Regulations, *supra* note 8, art. 53.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

does not authorize taking possession of objects which cannot be used for military purposes.<sup>173</sup>

Article 43 of the Hague Regulations governs the scope of the authority of an occupying power. It provides:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>174</sup>

The right of an occupying power to administer occupied territory under Article 43 must be justified by its duty to restore and ensure public order and it must respect the laws of the occupied territory unless absolutely prevented. As such, large-scale social and economic transformations of a conquered territory, unless justified by considerations of public safety, are outside the purview of Article 43. In some contexts, such massive societal transformations by an occupant fall within the *debellatio* doctrine which presumes the complete dissolution of the occupied state.<sup>175</sup> Proceeding from analogous reasoning, the Allied Powers of the post-World War II period justified their occupation of the Axis states on the basis of "New Order in Europe."<sup>176</sup> Such expansive powers on the part of conquering and occupier states suggest an agenda of imposing their social, economic, and political systems and values on less powerful conquered and occupied states.

In fact, conquest invariably involves a "relationship of power, of domination [and] varying degrees of a complex hegemony"<sup>177</sup> between the conquering and the conquered state. Thus, conquering states unsurprisingly seek to remake conquered states to adopt their ostensibly superior norms of economy, society and politics. Conquering states justify the imposition of such hegemonic goals by linking them to humanitarianism and showing how conquest is really intended to serve noble objectives such as preserving international peace and security and enhancing the human

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<sup>173</sup> ERNEST H. FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION* 52 (1942).

<sup>174</sup> Hague Regulations, *supra* note 8, at art. 43.

<sup>175</sup> See BENVENISTI, *supra* note 18, at 57-58, 92-96.

<sup>176</sup> *Id.* at 64-65.

<sup>177</sup> EDWARD W. SAID, *ORIENTALISM* 5 (1979).

rights protections of the "oppressed" populations of the conquered country.<sup>178</sup>

### 5.2. *The Iraqi Conquest and Occupation Reforms*

The Anglo-American victory over Iraq was primarily premised on finding weapons of mass destruction to preempt their use in future terrorist attacks. Pre-war planning was especially poor<sup>179</sup> and ad hoc reasons for the decision to go to war with Iraq without Security Council authorization ranged from enforcement of Security Council Resolutions going back a decade to ending mass murder and torture.<sup>180</sup> Since the late 1990s it has been a policy of the United States to assist in regime change by replacing Saddam Hussein.<sup>181</sup> Lurking behind these justifications and the inability of the United States and the United Kingdom to build a coalition authorized by the Security Council was the question of Iraqi oil—could

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<sup>178</sup> *But see* Mustapha Kamal Pasha, *Predatory Globalization and Democracy in the Islamic World*, 581 ANNALS OF THE ACAD. OF POL. SCI. 121-32 (2002) (exploring how universal claims of economy and democracy fail to deal with the internal crisis of illegitimate Islamic States and their illiberal cultural politics).

<sup>179</sup> *See The War: What Washington Won't Tell Us*, BUS. WK., Mar. 3, 2003, at 140, stating that:

The United States risks being seen as an imperialist in the Middle East rather than a liberator if it doesn't allow the Iraqis to manage their own oil fields . . . . There is an ongoing debate . . . on whether a U.S. general should run a post-Saddam Iraq . . . or whether there should a quick transition to international agencies, then to Iraqis . . . . Even the kind of democracy to be introduced is unclear . . . . It's two minutes to midnight, and Americans are justifiably nervous. We appear to be unprepared for the cost of war, the price of occupation, and the demands of ensuring long-term peace.

<sup>180</sup> For a restatement of this view, see William H. Taft IV & Todd Buchwald, *Preemption, Iraq and International Law*, 97 AM. J. INT'L L. 557 (2003). For a discussion of whether the United States had the mandate to decide whether prior Security Council Resolutions authorized the use of force, see Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L., 607 (2003).

<sup>181</sup> *See* the Iraq Liberation Act of 1998, which provides that:

It is the sense of the Congress that once the Saddam Hussein regime is removed from power in Iraq, the United States should support Iraq's transition to democracy by providing immediate and substantial humanitarian assistance to the Iraqi people, by providing democracy transition assistance to Iraqi parties and movements with democratic goals, and by convening Iraq's foreign creditors to develop a multilateral response to Iraq's foreign debt incurred by Saddam Hussein's regime.

Pub. L. No. 105-338, 112 Stat. 3178, sec. 7 (codified as amended in sections of Title 22 of the U.S. Code), available at <http://news.findlaw.com/hdocs/docs/iraq/libact103198.pdf> (last visited Mar. 28, 2004).

all the other reasons have been a pretext for seeking control of one of the richest oil sources in the world today or was it to demonstrate the unparalleled military might of the United States to other *rogue* states?

Upon arrival in Baghdad following the ouster of the Saddam regime, the question arose whether the U.S.-led coalition would follow the laws governing occupants of a territory upon conquest or if they would turn over the country to the U.N. to transition it towards a new government. The coalition opted to be governed by the law of occupation. However, without a role for the U.N., the application of this law lacked an institutional context outside the coalition that would hold the coalition accountable under the law of occupation. In addition, the coalition needed the legitimacy it had failed to get by going to war without Security Council authorization. By the vaguely worded Resolution 1483 of May 2003,<sup>182</sup> the Security Council gave the CPA the imprimatur of legitimacy to administer Iraq.<sup>183</sup> Though the preamble to the resolution called upon the occupying powers to comply with the Fourth Geneva Convention and the Hague Regulations of 1907,<sup>184</sup> it did not expressly decide that the scope of the power of the occupying CPA would be determined by either of these sets of international obligations. In addition, the Security Council did not establish an accountability mechanism. Such vagueness and lack of an accountability mechanism, in turn, provides wiggle room for the occupying states to justify expansive powers under the ostensible cover of maintaining international peace and security.<sup>185</sup>

However, as I note below, the U.S.-led occupation of Iraq is bound not only by the Hague Regulations, but also by rules of international humanitarian law which form part of customary inter-

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<sup>182</sup> See S.C. Res. 1483, *supra* note 73 (calling on the “[CPA], consistent with the Charter of the United Nations and *other relevant international law*, to promote the welfare of the Iraqi people through the effective administration of the territory . . . .”) (emphasis added).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* For circumstances under which the Preamble (or object and purpose clauses) may be regarded as part of the substantive provisions of an international legal instrument, see James Gathii, *The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention of the Law of Treaties*, 15 HARV. J.L. & TECH. 291, 305 (2002).

<sup>185</sup> See Alvarez, *supra* note 55, at 882-883 (“[U.N.] Resolution 1483 leaves the U.N. role in postwar Iraq extremely vague and uncertain . . . .”); King & Bravin, *supra* note 9 (noting that as the United States tries to reconstruct Iraq, it will be hindered by U.N. rules).



national law. For now it will suffice to note that the U.S. State Department has referred to the Hague Regulations of 1907 regulating private property as codifying existing international law.<sup>186</sup> U.S. federal courts have also recognized the application of the Hague Regulations. For example, in 2002, the Ninth Circuit found that the seizure of property by the Austrian government during World War II was a violation of the Hague Regulations.<sup>187</sup>

In addition, the U.S. Uniform Code of Military Justice recognizes these rules, and there is persuasive authority that multilateral conventions apply to belligerent occupation as well.<sup>188</sup> Yet, there is still ambiguity, at least at a formal level, of the applicable law governing the U.S.-led occupation of Iraq. Hence, a commentator has argued that Iraq ought to have been administered by an U.N.-led transitional authority with a clearly planned mandate meeting the needs of Iraq and Iraqis.<sup>189</sup>

It would seem that the ambiguity of the limits of the U.S.-led coalition's authority provides wiggle room to transform Iraq as the U.S.-led occupation would like. This is apparently validated by the fact that the United States' experience of handling Kosovo's post-conflict transition, particularly in the privatization of state-owned property, was resisted for its inconsistency with a U.N. resolution.<sup>190</sup> In the absence of a U.N. Resolution, the Bush Administration and U.S.-appointed Civilian Governor Paul Bremmer have single-handedly, and without any apparent consultation with the U.S.-appointed Iraqi Governing Council, issued a series of wide-ranging orders authorizing, among other things: foreign investors to own up to one hundred percent interest in Iraqi companies (without profit repatriation conditions) in virtually all sectors of

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<sup>186</sup> Department of State Memorandum, *supra* note 8, at 734-35.

<sup>187</sup> *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

<sup>188</sup> See Theodor Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AM. J. INT'L. L., 542 (1978) (noting whether an occupying power as a belligerent occupation has to apply a new multilateral treaty); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L., 239, 243 (2000) (noting the tension between "military necessity and restraint on the conduct of belligerents"); Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L. L., 78, 79 (2000) (noting that until there is a more comprehensive code of laws of war, principles of international law apply to belligerents).

<sup>189</sup> Scheffer, *supra* note 51, at 859.

<sup>190</sup> See Daphne Eviatar, *Free-Market Iraq? Not So Fast*, N.Y. TIMES, Jan. 10, 2004, at B9 (noting the debate over reconstruction and privatization of Kosovo is due to the U.N. authority over Kosovo being set up by a peace treaty after a war sanctioned by the U.N.).

the economy<sup>191</sup> while leaving the oil industry in the hands of a professional management team who would be independent from political control;<sup>192</sup> the appointment of a former Shell Oil Company CEO to be Chair of an advisory committee to oversee the rehabilitation of Iraq's oil industry;<sup>193</sup> a flat tax;<sup>194</sup> a U.S.-Middle East free trade area;<sup>195</sup> the privatization of the police force;<sup>196</sup> formation of a stock market with electronic trading;<sup>197</sup> and the establishment of modern income tax, banking, and commercial law systems under the direction of U.S. contractors.<sup>198</sup>

A yet-to-be released plan dubbed "Moving the Iraqi Economy From Recovery to Sustainable Growth," drafted in part by U.S. Treasury Department officials, is widely regarded as a blueprint for reorganizing the Iraqi economy along a free market model.<sup>199</sup>

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<sup>191</sup> Coalitional Provisional Authority Order No. 39: Foreign Investment (CPA/ORD/19 September 2003/39), available at [http://www.cpa-iraq.org/regulations/20030921\\_CPAORD39.pdf](http://www.cpa-iraq.org/regulations/20030921_CPAORD39.pdf). Some commentators have suggested that this Order is 'highly troublesome' since it conflicts with the Iraqi Constitution. Thomas Catan, *Iraqi Business Deals May Be Invalid, Law Experts Warn*, FIN. TIMES, Oct. 29, 2003, at 14. The conservative Heritage Foundation has called for widespread privatization of publicly held Iraqi assets. Dr. Ariel Cohen & Gerald P. O'Driscoll, Jr., *The Road to Economic Prosperity for a Post-Saddam Iraq*, The Heritage Foundation, Mar. 5, 2003, at <http://www.heritage.org/research/middleeast/bg1633.cfm>.

<sup>192</sup> See Chip Cummins, *State-Run Oil Company is Being Weighted for Iraq: Officials in Baghdad Using Saudi Arabia and Kuwaiti Models; Little Role for Western Firms*, WALL ST. J., Jan. 7, 2004, at A1 (noting the opinion of occupation advisors that the oil industry should be kept in state hands).

<sup>193</sup> See Neela Banerjee, *A Retired Shell Executive Seen as Likely Head of Production*, N.Y. TIMES, Apr. 2, 2003, at B12 (noting that the former chief executive of Shell Oil is expected to be the leading contender to oversee Iraqi oil production).

<sup>194</sup> Coalitional Provisional Authority Order No. 37: Tax Strategy for 2003 (CPA/ORD/19 September 2003/37), available at [http://www.cpa-iraq.org/regulations/20030921\\_CPAORD37.pdf](http://www.cpa-iraq.org/regulations/20030921_CPAORD37.pdf). The flat rate tax is apparently down from forty-five percent under Saddam.

<sup>195</sup> Jess Bravin & Chip Cummins, *A Global Journal Report: U.S. Offers Concessions to U.N. in Bid to Lift Sanctions on Iraq*, WALL ST. J., May 9, 2003, at A1.

<sup>196</sup> See Andrew Higgins, *Contract Cops: As It Wields Power Abroad, U.S. Outsources Law and Order Work*, WALL ST. J., Feb. 2, 2004, at A1 (noting that with the addition of a police force in Iraq, the issue of reporting crimes is in a state of disarray).

<sup>197</sup> See Neil King, Jr., *Bush Officials Draft Broad Plan for Free-Market Economy in Iraq*, WALL ST. J., May 1, 2003, at A1 (noting that execution of the electronic stock market would fall to private American contractors).

<sup>198</sup> *Id.*; see also Bob Sherwood, *Legal Reconstruction: Investors Want Reassurance Over Iraq's Framework of Commercial Law*, FIN. TIMES, Nov. 3, 2003, at 14 (noting that international companies are calling for a recognizable legal framework).

<sup>199</sup> King, *supra* note 197.

Two primary premises of the privatization effort underpinning this effort are that Western-based firms are capable of making Iraq assets and resources more productive and that private ownership at a time when there is no stable government in the country is preferable to public ownership of assets.<sup>200</sup> In addition, these reforms are predicated on the view that a future Iraqi government organized around a model of free market democracy would be unlikely to become as dictatorial and inclined to developing weapons of mass destruction as the Saddam Hussein regime was. These reforms have been widely criticized for being thinly veiled plans to give multinational corporations access to Iraqi assets.<sup>201</sup>

The exercise of these expansive powers to transform Iraq into a free market economy incorporating controversial elements such as a flat tax have been justified as falling within the scope of the CPA's mandate of promoting "the welfare of the Iraqi people through the effective administration of the territory"<sup>202</sup> and assisting in the "economic reconstruction and the conditions for sustainable development . . ." <sup>203</sup> While this Security Council Resolution is at best a controversial source of such expansive authority,<sup>204</sup> it is scarcely arguable that the powers being exercised by the CPA in signing privatization contracts lack legitimacy among a broad range of Iraqis<sup>205</sup> and potentially may be subject to reversal by a

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<sup>200</sup> For similar views justifying a role for the private sector in post-war reconstruction, see Allan Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102 (2001).

<sup>201</sup> E.g., Sara Flounders, *The Corporate Looting of Iraq*, Workers World News Service (July 24, 2003) (describing how "[c]orporate America is determined to lay hold of the fabulous oil resources and the developed infrastructure."), at <http://www.globalresearch.ca/articles/FLO307B.html>; *The Rape of Iraq*, World Socialist Web Site (May 9, 2003) (noting that major U.S. corporations are "seeking to profit from the misery of the Iraqi people."), available at <http://www.wsws.org/articles/2003/may2003/iraq-m09.pdf>.

<sup>202</sup> S.C. Res. 1483, *supra* note 73, para. 4.

<sup>203</sup> *Id.* para. 8(e).

<sup>204</sup> For example, in March 2003, the top legal advisor to U.K. Prime Minister Tony Blair wrote a subsequently leaked memo warning that "the imposition of major structural economic reforms' might violate international law, unless the Security Council specifically authorized it." Eviatar, *supra* note 190, at B9.

<sup>205</sup> See Cummins, *supra* note 9 (noting in part that the "Bush administration . . . would have to consider how the Iraqi public and the international community would react to a postwar oil policy" in developing the oil industry); see also Andrew Newton & Dr. Malaika Culverwell, *Legitimacy Risks and Peace-Building Opportunities: Scoping the Issues for Businesses in Post-War Iraq* (published under the auspices of the Royal Institute of International Affairs in the United Kingdom) (examining the legitimacy challenges facing postwar Iraq), available at

post-occupation Iraqi regime exercising its internationally recognized sovereignty over its natural and other resources.<sup>206</sup> Further, justifying a broad mandate on the premise that it is consistent with the welfare of the Iraqi people is very reminiscent of the "sacred trust of civilization" under which European countries justified their mission of colonial rule and administration.<sup>207</sup>

These expansive powers of radically transforming the Iraqi economy and society are also questionable under Article 43 of the Hague Regulations. As Nisuke Ando has argued, such major transformations without the consent of the occupied people are inconsistent with the temporary nature of occupation governance and the principle of self-determination under international law.<sup>208</sup> Indeed, an occupier engaged in regulating and transforming social and economic values and institutions, beyond restoring and ensuring order as envisaged under Article 43, is invariably an interested party and cannot claim to be in the position of a neutral trustee.<sup>209</sup>

In the midst of the proposed and ongoing free market reforms, President Bush has issued Executive Order 13303, entitled "Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest."<sup>210</sup> This Order prohibits all judicial

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[http://www.cfr.org/pdf/highlight/Legitimacy\\_risks\\_Iraq.pdf](http://www.cfr.org/pdf/highlight/Legitimacy_risks_Iraq.pdf) (last visited Mar. 10, 2004).

<sup>206</sup> G.A. Res. 1803, U.N. GAOR, 17th Sess., 1194th plen. mtg. Supp. No. 17 at 15. U.N. Doc. A/5217 (1962). Article 1 provides that "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned." Article 7, thereof, provides that the "[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace." The Preamble of U.N. Security Council Resolution 1483, in addition, affirms "the right of the Iraqi people freely to determine their own political future and control their own natural resources . . ." S.C. Res. 1483 pmb., para. 4. Note that U.N. Security Council Resolution 1511 adopted on October 16th, 2003 underscored "that the sovereignty of Iraq resides in the State of Iraq," and reaffirmed "the right of the Iraqi people freely to determine their own political future and control their natural resources." S.C. Res. 1511, U.N. SCOR, 59th Sess., 4844th mtg. pmb., para. 2, U.N. Doc. S/RES/1511 (2003).

<sup>207</sup> See Gathii, *supra* note 111, at 614-15 (discussing the role of racism and arrogance played in the European colonization of African nations, and the contempt locals felt towards colonizers).

<sup>208</sup> ANDO, *supra* note 17, at 125.

<sup>209</sup> BENVENISTI, *supra* note 18, at 210.

<sup>210</sup> Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003). The Supreme Court has upheld this sort of Executive Order in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), suggesting a wide scope for executive power during war.

process, including, but not limited to, "attachment, judgment, decree, lien, execution, and garnishment" with respect to the Iraq Development Fund and all interests in Iraqi oil products. This broadly drafted order precludes suit to recover Iraqi assets with respect to which any country or individual of any country may have an interest. Simply put, it extinguishes rights of Americans and others from pursuing judicial redress for any injuries that they may suffer with respect to any interests touching on Iraqi oil or the Iraq Development Fund. That covers almost all aspects of the CPA mandate. In effect, the Executive Order immunizes the CPA and its contractors from all legal process.

In particular, the Executive Order preempts the use of the Alien Tort Act which confers federal district courts in the United States "original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."<sup>211</sup> It therefore seems that the intention of the President in enacting the Executive Order was to immunize the CPA, private contractors and other actors engaged in the occupation and reconstruction of Iraq from lawsuits for a broad range of torts including personal injury, death, damage to or loss of property committed in Iraq for which liability would be imposed by U.S. or international law.

## 6. THE EFFECT OF CONQUEST AND OCCUPATION ON IRAQI PRIVATE AND PUBLIC ECONOMIC RIGHTS IN A COMPARATIVE CONTEXT AND REMEDIAL OPTIONS

### 6.1. *Comparing and Contrasting De-Fascitization, De-Baathification, De-Nazification and the Liquidation of Japanese Zaibatsu*

The de-fascistization program of the Allied forces in Italy involved the impounding of the private property and assets of Fascist organizations and their affiliates that had been disbanded.<sup>212</sup> Individual members and sympathizers of these organizations had property that they had illicitly acquired and confiscated, and they were ejected from government jobs. However, "they were allowed to maintain their pension rights."<sup>213</sup> In addition, since a majority of government jobs were held by members of the Fascist Party, the

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<sup>211</sup> 28 U.S.C. § 1350 (1879).

<sup>212</sup> ANDO, *supra* note 17, at 53.

<sup>213</sup> *Id.*

Allied powers did not eject all of them to allow the continuity of Italian civil administration.<sup>214</sup> After the occupation, Italian courts invited to test the validity of occupation measures found them consistent with the Hague Regulations.<sup>215</sup>

In Germany, the Allied occupation was justified as necessary to ensure the elimination of Nazism and militarism, engage in disarmament, recover reparations, control industry and all aspects of the economy, reform education, and to ensure the democratic reconstruction of Germany through political decentralization.<sup>216</sup> The United States' occupation of Japan was motivated by similar objectives of demilitarization and democratization through measures aimed at purging militarists and Ultrationalists as well as liquidating of big business combines (Zaibatsu) and the private property of individuals involved in these businesses.<sup>217</sup>

The similarity of the foregoing occupation measures in Italy and Japan, on the one hand, and Iraq on the other is that they all sought to fundamentally change the very foundations and values of the political, economic and social institutions in these countries as they existed before occupation. However, in Japan, unlike in Italy and Germany,<sup>218</sup> the U.S. occupation measures, such as the transfer to the Japanese government of the private property of individual members of the liquidated Zaibatsu combines, the restriction of economic transactions on the part of some of these individuals, denials of pensions, and expropriation of their farmland

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 69-71.

<sup>216</sup> *Id.* at 59, 73.

<sup>217</sup> *Id.* at 105 (arguing that the German instrument of surrender, the complete collapse of the German government, as well as the period of occupation, conferred on the occupiers more authority than the Hague Regulations).

<sup>218</sup> Since in Japan many government officials depended almost entirely on pensions to sustain their own lives and those of their dependents after retirement, there can be no doubt that the flat prohibition of pension payment caused great difficulties to the lives of the persons involved . . . . It might be recalled that, in the implementation of defascistization measures in occupied Italy, many members and collaborators of the Fascist Party were removed from public service and part of their wealth illicitly acquired under the Fascist regime was confiscated. But they were allowed to maintain their pension rights. Even in the case of the denazification of Germany, members and collaborators of the Nazi Party were allowed to retain in their hands the minimum of livelihood.

*Id.* at 112-14.

were arguably inconsistent with the Hague Regulations.<sup>219</sup>

The de-baathification of Iraq is one of the most important occupation objectives of the U.S.-led occupation.<sup>220</sup> It has involved the dissolution of not just the Baath Party but a whole continuum of entities affiliated with Saddam Hussein, including defense, security, information, and intelligence organs of government and the entire structure of the Iraqi military including paramilitary units.<sup>221</sup> All the property and assets of the Baath Party are under order to be seized and transferred to the CPA "for the benefit of the people of Iraq."<sup>222</sup> Individuals in possession or control of Baath Party property are required to turn it in to the Coalition.<sup>223</sup> An Iraqi Property Claims Commission is authorized to return seized private property.<sup>224</sup> The Iraqi De-Baathification Council is charged with the location of Baathist officials and the assets of the Party and its offi-

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<sup>219</sup> *Id.* at 106 (arguing that since the Japanese occupation was followed by an unconditional surrender and the Japanese government was still in place during the occupation, there is room to argue that the Hague Regulations of 1907 did not apply to the occupation).

<sup>220</sup> The Preamble to the first order of the CPA on de-baathification notes in part:

that the Iraqi people have suffered large scale human rights abuses and deprivations over many years at the hands of the Baath Party [and] the grave concern of Iraqi society regarding the threat posed by the continuation of Baath Party networks and personnel in the administration of Iraq, and the intimidation of the people of Iraq by Baath Party officials

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Coalitional Provisional Authority Memorandum No. 1: Implementation of De-Baathification Order No. 1 (CPA/ORD/16 May 2003/01), available at <http://www.cpa-iraq.org/regulations/CPAORD1.pdf>.

<sup>221</sup> Coalitional Provisional Authority Order No. 2: Dissolution of Entities (CPA/ORD/23 May 2003/02), available at <http://www.cpa-iraq.org/regulations/CPAORD2.pdf>.

<sup>222</sup> Coalitional Provisional Authority Order No. 4: Management of Property and Assets of the Iraqi Baath Party § 3(1) (CPA/PRD/25 May 2003/04), available at <http://www.cpa-iraq.org/regulations/CPAORD4.pdf>.

<sup>223</sup> *Id.* § 3(3).

<sup>224</sup> Coalitional Provisional Authority Regulation No. 8: Delegation of Authority Regarding Establishment of a Property Claims Commission (CPA/REG/16 January 2004/08), available at [http://www.cpa-iraq.org/regulations/20040114\\_CPAREG\\_08\\_PCC.pdf](http://www.cpa-iraq.org/regulations/20040114_CPAREG_08_PCC.pdf). While the Property Rights Commission, a quasi-judicial agency, has its regulations designed by the Governing Council, there is a Property Reconciliation Facility, which is charged with administration of conflicting claims to real property and is more of an executive agency under the direction of the Administrator. Coalition Provisional Authority Regulation No. 4: Establishment of the Iraqi Property Reconciliation Facility (CPA/REG/25 June 2003/04), available at <http://www.cpa-iraq.org/regulations/REG4.pdf>.

cials with a view to eliminating the party and its potential to intimidate the population.<sup>225</sup>

The de-baathification of Iraqi institutions, like the judiciary, proceeds apace with its Americanization.<sup>226</sup> As Tony Blair stated in his address to Congress:

[O]urs are not Western values, they are the universal values of the human spirit . . . . Anywhere, anytime ordinary people are given the chance to choose, the choice is the same: freedom not tyranny; democracy, not dictatorship; the rule of law, not the rule of the secret police. The spread of freedom is the best security for the free. . . . And just as the terrorist seeks to divide humanity in hate, so we have to unify it around an idea. And that idea is liberty. We must find strength to fight for this idea and the compassion to make it universal.<sup>227</sup>

For Blair, American and British values are universal, and so it follows that the de-baathification and reconstruction of Iraq is no less neutral than those universal values. Yet, while repressive regimes that violate people's rights must be held accountable, military action that legitimizes wholesale reorganization of a militarily weaker society also necessarily involves the imposition of the will of the conquering state(s).<sup>228</sup> Hence, unsurprisingly, otherwise well-intended processes such as de-baathification have threatened or resulted in the loss of employment and income for thousands of

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<sup>225</sup> Coalition Provisional Authority Order No. 5: Establishment of the Iraqi De-Baathification Council (CPA/ORD/17 June 2003/05), available at <http://www.cpa-iraq.org/regulations/CPAORD5.pdf>.

<sup>226</sup> See Jim Edwards, *Re-Building Iraq's Judicial System From the Ground Up*, N.J.L.J., Oct. 27, 2003 (reporting that a Judicial Assessment Team sent to Iraq by the Justice Department recommended detailed judicial reforms in Iraq along the lines of the U.S. legal system including: extension of Miranda style rights, attorney compensation, case management, and so on), available at <http://www.law.com/jsp/article.jsp?id=1066605424932>. For an alternative model of legal reform in Iraq that would involve exiled Iraqi jurists, the U.S. State Department and a multinational group of experts, see Ori Nir, *Long Path Ahead For Establishing Rule of Law in Iraq*, FORWARD, Apr. 18, 2003, available at <http://www.forward.com/issues/2003/03.04.18/news8.html>.

<sup>227</sup> 149 CONG. REC. H7059 (2003) (address by Prime Minister Tony Blair to a Joint Meeting of Congress).

<sup>228</sup> Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization?*, 25 HOUS. J. INT'L. L. 102, 133-134 (2003).



Iraqi professionals in the health and education sectors for simply being ordinary members of the Baath Party.<sup>229</sup> The related dissolution of the Iraqi army has added to the unemployment and disillusionment of thousands of Iraqis. These and other outcomes of the de-baathification process which have had a negative and cascading effect on the families and dependents of those that have lost their incomes are a reflection of the unilateral and undemocratic nature of the unaccountable authority of the CPA, which has assumed all legislative, judicial, and executive powers combined.<sup>230</sup>

Hence, like in Japan, but unlike in Italy and Germany, the process of recreating the occupied country has resulted in adversely affecting the private property rights of these non-Western nationals to a far greater degree than similarly situated individuals in the Western states of Italy and Germany. This outcome could be coincidental or random, but in light of the unevenness and inconsistency of applying norms of international law as highlighted in Section 1 and demonstrated in Sections 3, 4 and 5 of this article, this difference suggests that there is more to it.

### 6.2. *Is a Sovereign Iraqi Government Bound by Measures Undertaken By the U.S.-Led Occupation CPA?*

The general rule is that a returning sovereign is obliged to recognize the validity of measures undertaken by an occupier if the measures were within the occupier's authority.<sup>231</sup> However, under the doctrine of postliminy, a returning sovereign may rescind those acts of the occupant that do not meet the test of legality under international law.<sup>232</sup> Such legality has been tested under the Hague

<sup>229</sup> Jonathan Steele, *US Decree Strips Thousands of Their Jobs*, GUARDIAN, Aug. 30, 2003, at 16.

<sup>230</sup> See Coalition Provisional Authority Regulation No. 1: The Coalition Provisional Authority § 1 (CPA/REG/16 May 2003/01) (outlining the scope of the CPA's authority), available at <http://www.cpa-iraq.org/regulations/REG1.pdf>; Brian Whitaker, *Iraq's Fresh Start May Be Another False Dawn*, GUARDIAN, Sept. 5, 2003; see also Amnesty International, *Iraq: Memorandum on Concerns Related to Legislation Introduced By the Coalition Provisional Authority*, MDE 14/176/2003 (Dec. 4, 2003) (expressing concerns about the nature of powers reserved to the Coalition Provisional Authority in light of international human rights concerns), available at <http://web.amnesty.org/library/Index/ENGMDE141762003>.

<sup>231</sup> See Felice Morgenstern, *Validity of the Acts of the Belligerent Occupant*, 28 BRIT. Y.B. INT'L L. 291, 293 (1951) (describing an Austrian court ruling upholding this principle).

<sup>232</sup> FEILCHENFELD, *supra* note 173, at 145-50. A reason precluding application of the doctrine of postliminy is where property is transferred with the permission of the owner. *Oakes v. United States*, 174 U.S. 778, 792-793 (1899).

Regulations in cases where the acts of an occupying power were questioned by a returning sovereign.<sup>233</sup> However, without a forum during the pendency of the occupation to inquire into and determine the validity of occupation measures, a future independent and sovereign Iraqi government would have to play that role. Unfortunately, although the Security Council has authorized the Secretary General to appoint a Special Representative to Iraq, the authorization did not include a role for the Special Representative to ensure that the occupying authorities complied with the Hague Regulations or any other international legal obligations.<sup>234</sup>

### 6.3. *What Other Forums for Remedying Occupation Violations Exist for Iraqis?*

Under Article 3 of the Hague Convention Respecting the Laws and Customs of War on Land, if a belligerent violates any of the provisions of the Regulations, it will be liable to pay compensation.<sup>235</sup> Thus where an occupying power has taken the oil wealth of the occupied country to expand the occupying power's war readiness, it has been held to be a violation of this prohibition and of customs of war, particularly Article 53 of the Hague Regulations of 1907.<sup>236</sup>

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<sup>233</sup> FEILCHENFELD, *supra* note 173, at 153.

<sup>234</sup> S.C. Res. 1483, *supra* note 73, para. 8; *see* BENVENISTI, *supra* note 18, at 207, which notes:

The decisive role played by the Security Council in ending the Iraqi occupation of Kuwait and subsequently establishing a peacekeeping force to protect the Kurds in Northern Iraq, are so far the strongest evidence of the profound change in this organization. It is to be hoped that the momentum gathered in the past will pave the way for a more responsible UN role with respect to other occupied territories.

<sup>235</sup> The provision further states that a belligerent party would also be liable for acts performed by its armed forces. In addition to Article 3 of the Hague Regulations, compensation would also be available under general principles of international law. *Cf.* *Factory at Chorzow (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (stating that "an obligation to make reparation in an adequate form" is a "principle of international law").

<sup>236</sup> *N.V. de Bataafsche Petroleum Maatschappij v. War Damage Comm'n*, 23 I.L.R. 810 (Singapore Ct. App. 1956). Similarly, the destruction of Kuwaiti oil fields by Iraq in the 1991 invasion has been argued to constitute a violation of Article 23(g) of the Hague Regulations and Article 53 of Hague Convention IV. Richard Carruthers, *International Controls on the Impact on the Environment of War-time Operations*, 10 ENVTL. & PLAN. L.J. 38, 48 (1993). *But see* Laura Edgerton, *Eco-Terrorist Acts During the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?*, 22 GA. J. INT'L & COMP. L. 151, 172 (1992) (arguing that the provisions of the Hague Convention failed to define what behavior is prohibited, thus leaving

However, as observed above, a variety of difficulties confront a future Iraqi government mediating claims of Iraqis whose property was confiscated by the occupying power. These difficulties are compounded by Executive Order 13303 of 2003 immunizing the U.S. government from any liability for the acts of the U.S. military, the reluctance of the federal judiciary in the United States to give relief to foreign litigants arising from a war executed by the U.S. government, and the sheer complexity and expense of filing claims for compensation.

On the basis of the reasoning in the European Court of Human Rights, December 2001 decision in the *Bankovic* case, the European Convention on Human Rights is applicable in occupied Iraq.<sup>237</sup> To establish the application of the European Convention on Human Rights in occupied Iraq and how it lays a basis for remedies for confiscation and damage to property, I will briefly examine the facts leading up to the *Bankovic* decision. In this case, six Yugoslavian nationals sought orders against the seventeen NATO member states concerning the bombing of the Serbian Radio and Television Headquarters in Belgrade during the NATO air strike campaign in the Kosovo conflict.<sup>238</sup> The applicants alleged that their rights to life and to freedom of expression, as well as their right to an effective remedy, guaranteed under the European Convention on Human Rights, were infringed.<sup>239</sup> The European Court of Human Rights dismissed the application, holding that it lacked jurisdiction because the European Convention was territorial in scope and does not apply to the territory of non-contracting states, such as Yugoslavia, unless it can be established that the affected individuals or territory were within the "effective control" of contracting states.<sup>240</sup>

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Iraq's actions outside its realm of control); Rex J. Zedalis, *Burning of Kuwaiti Oil-fields and the Laws of War*, 24 VAND. J. TRANSNAT'L L. 711, 729-733 (1991) (noting that Article 53 of Hague Convention IV is restricted to destruction of property where the occupation was uncontested, and since the U.S.-led coalition of the Gulf War struck at Iraq, the occupation was contested and therefore Article 53 was inapplicable).

<sup>237</sup> *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (2001), reprinted in 123 I.L.R. 94 (2001).

<sup>238</sup> *Id.* at 98-99; see also Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned From It*, 25 FORDHAM INT'L L.J. 95 (2001) (discussing the failed attempt to commence an investigation of illegal aerial bombardments by U.S.-led NATO allies in the Kosovo intervention).

<sup>239</sup> *Bankovic*, 123 I.L.R. at 102.

<sup>240</sup> *Id.* at 112.

Clearly, during the period of occupation, Iraq is under the effective control of the United States, the United Kingdom and other members of the coalition. The United Kingdom is a contracting state of the European Convention on Human Rights, and this together with the United Kingdom's occupation of Iraq would render its actions amenable to the jurisdiction of the European Convention on Human Rights. Iraqis would therefore be able to rely on the property protections of Article 1 of the First Protocol of the European Convention on Human Rights<sup>241</sup> for redress for confiscated and damaged property attributed to the United Kingdom and other members of the coalition that are parties to the Convention. Since Article 1 subjects deprivations of property to the general principles of international law, it follows that the Hague Regulations<sup>242</sup> fall within the scope of the norms applicable within jurisdiction of the European Court and Commission of Human Rights. There is already precedent for admissibility of petitions seeking relief for violation of international humanitarian law in the context of military occupation by non-state parties against state parties of the European Convention. In one such case, the European Court of Human Rights observed:

[T]he responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised

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<sup>241</sup> Article 1 of the Protocol to the European Convention on Human Rights provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, art. 1, 213 U.N.T.S. 224, available at <http://www.echr.coe.int/convention/webconvenENG.pdf>.

<sup>242</sup> As already alluded to before, the Hague Regulations are a statement of general principles of international law.

directly, through its armed forces, or through subordinate local administration.<sup>243</sup>

Similarly, analogous arguments could be made with reference to the United States within the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights. In fact, the Inter-American Commission on Human Rights has, in a case involving U.S. military action in Panama, rejected the U.S. government's contention that the Fourth Geneva Convention and the general international laws governing use of force and armed conflict, which include the Hague Regulations, do not fall within its jurisdiction.<sup>244</sup>

In the context of adjudication, another avenue to seek relief would be courts in occupied Iraq. But such courts are incapacitated by the possibility of retaliation for declaring occupation measures a nullity.<sup>245</sup> As was previously discussed, federal courts in the United States would most likely defer to the Executive Branch, especially with regard to the conduct of war overseas.<sup>246</sup> In addition, relief by a foreign claimant would have to overcome a maze of procedural barriers, including jurisdiction and standing, before it could be entertained on the merits. Judicial review in a third country not part of the U.S.-led occupation of Iraq is a possibility for Iraqis seeking to test the validity of occupation measures. However, the United States has expressed great exception not only to international tribunals, like the International Criminal Court, testing the legality of U.S. personnel involvement in military action around the world, but of third country courts such as with regard

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<sup>243</sup> *Loizidou v. Turkey (Preliminary Objections)*, 310 Eur. Ct. H.R. (ser. A) para. 62 (1995).

<sup>244</sup> Here, the Inter-American Commission argued that

Where it is asserted that a use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of noncombatants are implicated. In the context of the present case, the guarantees set forth in the American Declaration are implicated. This case sets forth allegations cognizable within the framework of the Declaration. Thus, the Commission is authorized to consider the subject matter of this case.

Case 10.573, Inter-Am. C.H.R. 312, OEA/ser. L./V.85, doc. 9 rev. (1993), *reprinted in* 123 I.L.R. 117, 134-35.

<sup>245</sup> *BENVENISTI*, *supra* note 18, at 197.

<sup>246</sup> *Id.* at 198.

to Belgium in the recent past.<sup>247</sup>

Where there has been deliberate or accidental destruction by military means of property conceded to be private, the U.S. Court of Federal Claims has jurisdiction to assess the claim of military necessity or whether the property was private if there is a claim of enemy property designation.<sup>248</sup> Jurisdiction is available in such cases because judicial deference to the Executive is not total. However, where the military engaged in deliberate damage to private property that the Executive Branch or the military had designated as enemy property, a federal court has no jurisdiction to examine the validity of the designation even if there is evidence suggesting that the designation was inaccurate as it seemed to be with the bombing of the pharmaceutical factory in Sudan in 1998.<sup>249</sup> In addition, the seizure, occupation or destruction of private property in furtherance of a military objective would predispose a federal court towards denial of a claim for compensation. Foreigners proceeding on the theory that just compensation under the Fifth Amendment would entitle them for takings relief in the United States, even in cases of destruction of private property for non-military purposes, face the almost insurmountable hurdle of the availability of the amendment's protection to foreigners and whether it applies to military operations.

As noted earlier in Section 4, another alternative open to Iraqis is the settlement of claims to private property by the U.S. Judge Advocate General ("JAG") Corps under the Foreign Claims Act, though this process does not require judicial adjudication.<sup>250</sup> Finally, with regard to judicial fora, it remains open for a future Iraqi government to approach the U.N. General Assembly to seek an

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<sup>247</sup> It has been noted:

[The Belgian] government, its consciousness raised by the increased global attention to individual responsibility for human rights atrocities, enacts a broad statute opening its courts to prosecutions of suspected murderers, torturers, and war criminals around the world. . . . The United States government eventually signals opposition to the statute, leading to its nearly instantaneous modification; when the United States says it is still too broad, the government gets the idea entirely.

Steven S. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 888-889.

<sup>248</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 772-773 (2003).

<sup>249</sup> *Id.* at 771.

<sup>250</sup> See Blum, *supra* note 154, at 1 ("Under the Foreign Claims Act, the U.S. military may compensate foreign nationals and businesses for losses unrelated to combat by applying local law and custom.").

advisory opinion regarding the legality of occupation measures under Article 96 of the U.N. Charter, as the Palestinians have successfully done with regard to the building of a wall by Israel to separate the occupied territories from Israel.

A nonjudicial, or quasi-judicial, claims settlement forum might be an alternative. However, in such a forum, those whose private property and contract rights were confiscated in the war would more likely than not receive only a small proportion, if anything, of what they lost. Such is the predicament of the people of a poor nation whose invasion, conquest and occupation adversely affected their property and contract rights. In the meantime, the rights of foreign investors in Iraq receive far more attention than the rights of the private property holders in Iraq affected by the conquest and occupation. In addition, the ongoing plans and process of massive transfers of publicly owned assets to foreign owned corporations raise additional questions of international legality and legitimacy among the Iraqis.

At the end of the occupation, an opportunity presents itself for a peace treaty between the U.S.-led allies and the new Iraqi government. Under such agreement, one of the elements could very well provide for a process of compensating for seized state assets and private property.<sup>251</sup> There may very well be a role for a U.N.-supervised process here in light of its experience in nation-building and reconstruction after war. In fact, there have been suggestions that the U.N. Compensation Commission, established by the Security Council in May 1991 which entertained claims from the 1991 Gulf War, could very well continue its mission with the latest war against Iraq.<sup>252</sup>

There is also the age-old tool of diplomatic pressure supported by active lobbying by interested groups, such as in the model used to recover confiscated property in Nazi Germany. There are also lessons to be taken from the variety of growing reparations move-

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<sup>251</sup> This proposition with reference to public assets like cash, funds and realizable securities is also suggested by Ernest H. Feilchenfeld. FEILCHENFELD, *supra* note 173, at 54; *see also* Sommerich, *supra* note 14, at 153 (noting that treaties of peace "commonly provide for the restoration of private property and debts.").

<sup>252</sup> *See* Brenda Sapino Jeffreys, *New War May Mean More Claims for UNCC: Texas Attorneys Helped Evaluate Payouts From First Gulf Conflict*, 19(3) TEX. LAW., Mar. 25, 2003 ("The new war in the Persian Gulf could mean more work for the United Nations Compensation Commission and more opportunity for Texas lawyers if the United Nations decides to entertain damage claims from new hostilities in Iraq.").

ments, which have had varying levels of appeal and success in the court of public opinion as well as in courtrooms.

7. CONCLUSIONS: BEYOND ORIENTALISM AND CONQUEST:  
PROPERTY, CONTRACTUAL RIGHTS AND HUMAN RIGHTS

Throughout this article, I have shown that rules of international law governing what happens upon conquest favor the interests of powerful Western states at the expense of conquered states, especially where the conquered states are non-Western. I have also shown that the rules of occupation with regard to private property rights protect peoples of non-Western states less than they protect the property of Western owners similarly situated and affected by conquest and occupation. This vulnerability is enhanced with regard to states like Iraq and Afghanistan, in part because the image of a terrorist as a sunglass-wearing bearded Muslim in a turban, which existed long before September 11, 2001,<sup>253</sup> has become enconced in occidental culture, particularly in the United States, and though based on a simplistic stereotype has been effectively mobilized to lend credence to loosening both the civil liberties protections and the private property rights for Arabs and Persians of the Muslim faith. Edward Said captured the difficulty of the dilemma in the following terms:

One aspect of the electronic post-modern world is that there has been a reinforcement of the stereotypes by which the Orient is viewed. Television, the films, and all the media's resources have forced information into more and more standardized molds [not to mention September 11, 2001] . . . . This is nowhere more true than in the ways by which the Near East is grasped. Three things have contributed to making even the simplest perception of the Arabs and Islam into highly politicized, almost raucous matter: one is the history of popular anti-Arab and anti-Islamic prejudice in the West, which is immediately reflected in the history of Orientalism; two, the struggle between the Arabs and Israeli Zionism, and its effects upon American Jews as well as

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<sup>253</sup> See Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 294, 306-307 (Dan Danielsen & Karen Engle eds., 1995) (discussing the view of terrorists as illegitimate combatants).



upon both the liberal culture and the population at large; three, the almost total absence of any cultural position making it possible either to identify with or dispassionately to discuss the Arabs or Islam. Furthermore, it hardly needs saying that because the Middle East is now so identified with Great Power politics, oil economics, and the simple-minded dichotomy of freedom-loving democratic Israel and evil, totalitarian, and terroristic Arabs, the chances of anything like a clear view of what one talks about in talking about the Near East are depressingly small.<sup>254</sup>

Indeed, as I have demonstrated in this paper, the peculiar nature of the international law applied towards non-European peoples is a reflection of a unique form of Western, American, or European power rather than a direct translation of these forms.<sup>255</sup> As Harold Hongju Koh<sup>256</sup>, Anne Marie Slaughter,<sup>257</sup> and Mariano-Florentino Cuellar,<sup>258</sup> among others, have demonstrated, the Iraqi invasion and the transgressions of international law that have occurred are the result of a small but growing group of "well-positioned individuals, who, by serving as key institutional choke-points, have successfully promoted particular well-publicized acts of American exceptionalism."<sup>259</sup>

Needless to say, the importance of the rule of law in international relations, especially with regard to relations between powerful hegemonic states on the one hand and weaker vulnerable states on the other, cannot be overstated. Indeed, the official discourse of American exceptionalism and unilateralism is not new in the context of relations between conquering and conquered states, as we have seen throughout this paper, and neither is the sanctification of

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<sup>254</sup> SAID, *supra* note 177, at 26-27.

<sup>255</sup> For more on this point, see Ann Laura Stoler, *Rethinking Colonial Categories: European Communities and the Boundaries of Rule*, 31 COMP. STUD. SOC'Y & HIST. 134, 136-37 (1989).

<sup>256</sup> Harold H. Koh, *American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

<sup>257</sup> Anne-Marie Slaughter, *A Rallying Cry*, AM. SOC'Y INT'L L. NEWSL., Nov./Dec. 2003, at 6 (regretting the growing convergence between the right and left in the U.S. in supporting the weakening, if not the disappearance, of the commitment to a rule-based international order and calling supporters of international law to fight back).

<sup>258</sup> Mariano-Florentino Cuellar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597 (2003).

<sup>259</sup> Koh, *supra* note 256, at 1496.

the economic interests of American and Western investors in the so-called developing countries.<sup>260</sup> These discourses must be exposed, as I hope I have done here, and resisted, challenged and protested.<sup>261</sup> Otherwise, there shall be successive waves of their evocation and re-enactment awaiting moments like the unfortunate terrorist attacks of September 11, 2001 in the United States for reinforcement and reiteration. By resisting, challenging and protesting hegemonic goals of powerful countries, institutions and corporations we also serve to delegitimize the American and European self-images of privilege and rule over non-European peoples.<sup>262</sup>

The findings of this article regarding the difference in the application of both the rule against extinction of private property and contract rights and the status of private property rights under occupation as between Europeans and non-Europeans may be mistakenly traced to a theory of cultural politics that suggests that non-Europeans do not recognize private property rights and that only Europeans or Westerners recognize them because they are an inherent feature of European and Western society. This view is mistaken to the extent to which it does not recognize that the disregard of non-Western private property rights is born out of the crucible of the encounter between a self-righteous Western cultural project and non-Western civilizations often designated as backward, barbaric, poor, smelly, and lazy but which nevertheless, have and continue to have their own political and ethical virtue.<sup>263</sup>

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<sup>260</sup> See, e.g., MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER*, (1979) (discussing the role of international law in shaping the international economic order); M. SONARAJAH, *INTERNATIONAL COMMERCIAL ARBITRATION: THE PROBLEM OF STATE CONTRACTS* (1990).

<sup>261</sup> Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397, 400 (2003) ("[I]nternational law requires a theory of resistance to remain relevant . . .").

<sup>262</sup> Gerry Simpson, *The Great Powers, Sovereign Equality and the Making of the United Nations Charter*, 21 AUSTL. Y.B. INT'L L. 133 (2002) (showing that international order is organized around two contrasting versions of liberalism, one based on the sovereign equality and another based on the view that it is the special responsibility of the great powers to "police" the world and maintain order, especially to ensure that "rogue" states "toe the line").

<sup>263</sup> For an excellent analysis, see Antony Anghie, *Francisco De Vitoria and The Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999); Antony Anghie, "The Heart of My Home": *Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993); Antony Anghie, *Creating the Nation State: Colonialism and Making of International Law* (1995) (unpublished S.J.D. thesis, Harvard University) (on file with the Harvard University Library); and Mahmood Mamdani, *Good Muslim, Bad Muslim: A Political*

Further, the massive privatization of publicly owned Iraqi assets by the U.S.-led occupation force raises questions about its legality under the Hague Regulations and the international norms recognizing the Iraqis' sovereignty over their resources. Placing the massive resources of the Iraqis in the hands of foreign firms without giving Iraqis an opportunity to participate in their ownership and management raises questions about the legitimacy of the process and the future sustainability of decisions taken by the occupying forces.

Part of the challenge confronting the Iraqi people at the moment is a larger question of seeking the best arrangements at the national level that would simultaneously recognize the human rights of all individuals, irrespective of their background, while at the same time respecting their diverse cultures and religions particularly those of minorities and women. At the international level, the challenge is not different. It requires an acknowledgment of the human rights of all non-Western people vulnerable to conquest, and further recognizing that projects of imperial conquest that are facilitated by orientalist images of Arabs and Persians as terrorists do not serve the goals of global security but actually work against global security. By upholding these rights, the peoples of the vulnerable states of the world would not have to live in the fear that powerful countries will run over them and appropriate or confiscate their private property while privatizing their public assets. In Iraq, this is happening at a time when Iraqis can least afford to lose their public and private assets to the powerful and organized business interests swarming over their country as if it were fallen prey.