VOLUME 47, NUMBER 2, SUMMER 2006

Who's Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq*

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The invasion of Iraq by the British and U.S.-led Coalition forces in March 2003 silently effected debellatio, the ancient doctrine by which a military victor takes title to territory in which the defeated government has ceased to function. The Coalition governments' failure to recognize it as such and to invoke the attendant legal consequences enabled destructive chaos on the ground and created a troubling precedent for the application of international law to any future exercise of one sovereign state's authority within the geographical boundaries of another sovereign state. The Coalition forces ostensibly acted pursuant to the international law of occupation, but the legal framework ultimately agreed upon and actually utilized in post-invasion Iraq more closely resembles debellatio. Though this doctrine traditionally is associated with conquest and annexation, it need not be; as updated by modern ideas of self-determination and what I call "sovereign identity," it is in fact the extant doctrine most consistent with the factual and legal situation caused by the invasion.[1]

In what was perhaps an understandable bid to constrain U.S. and British power, the United Nations labeled the Coalition "occupying powers,"[2] thereby invoking the body of international occupation law traditionally applicable only

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* This Note won the *Harvard International Law Journal*'s 2005 Student Note Competition.

** J.D., Harvard Law School, 2006. The author would like to thank Professor Noah Feldman for his comments on an earlier draft of this Note.

1. The Coalition's foray into nation-building highlights the need for the formulation of a new doctrine to fill the void left by the demise of the trustee and mandate systems, as do recent peace-building exercises. *See* Saira Mohamed, Note, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 COLUM. L. REV. 809 (2005). Prior to the Coalition's invasion of Iraq, the particular problem of occupation law's clumsy fit with nation-building had not come to the forefront because operations undertaken pursuant to Security Council authorization simply did not purport to be constrained by occupation law. *See* David J. Scheffer, *Future Implications of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 852–53 & n.48 (2003) ("None of the Security Council resolutions or international agreements governing these deployments [in Haiti, East Timor, Bosnia and Herzegovina, Kosovo, and Afghanistan] invokes occupation law. Rather, the mandates set forth specific tasks for the military deployments on and civilian administration of the relevant territories.").

2. S.C. Res. 1483, pmbl., U.N. Doc. S/RES/1483 (May 22, 2003).

to foreign authorities assuming "temporary managerial powers" over another sovereign's territory during which "limited period" the foreign force may not "bring about by itself a valid transfer of authority."[3] The application of this body of law to the Coalition presence in Iraq was a poor choice, however, given the Coalition's nation-building[4] aspirations[5] and may have stemmed in part from a perceived unavailability of any other plausible body of international law, given scholarly assertions that debellatio, the international legal doctrine that best fits the factual and legal situations existing after the Coalition's invasion, was defunct.[6] This Note argues that occupation law is fundamentally inconsistent with the Coalition's post-invasion exercise of power within Iraq and that, as contextualized within the modern regime of human rights law, a modern doctrine of debellatio much better comports with the Coalition's authority in post-invasion Iraq.

In Part I of this Note, I explain why occupation law is poorly tailored to nation-building and highlight some of the consequences of its application in Iraq for the occupiers, the occupied, and the evolution of occupation doctrine. In Part II, I make a case for the legal viability of a modern doctrine of debellatio consistent with both the right of a people to self-determination and the idea that sovereignty may not be taken by force. In Part III, I argue that the legal framework under which the Coalition Provisional Authority ("CPA") actually operated through the chaotic post-invasion phase that created further divisions among the Iraqi people[7] is something more than traditional occupation law but something much less than the ancient tradition of annexation via debellatio; it is a legal framework best supported by a modern doctrine of debellatio that allows the occupier to take contingent, temporary title to the territory in which the vanquished government formerly operated. Finally, in Part IV, I outline the advantages of acknowledging a modern doctrine of debellatio.

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3. Eyal Benvenisti, The International Law of Occupation 5–6 (1993).

4. "Nation-building" is "a phrase susceptible of many definitions." Stephen Townsley, *Foreword: Perspectives on Nation-Building*, 30 Yale J. Int'l L. 357, 357 (2005). Townsley notes that nation-building requires the creation of both a state, or the "territorial entity that provides certain services and public goods," and a nation, or the "legal and sociological idea to which those who live within the territory of a state may or may not subscribe." *Id.* at 358. Nation-building may be either "an institutionalist or nationalist endeavor." *Id.* at 360. This Note adopts a definition of nation-building as a concerted effort by an organized group to achieve either or both of Townsley's identified goals.

5. The nation-building goals of the Coalition were apparent pre-invasion. President Bush, for example, made explicit that the U.S. government would "defend the security of our country, but [that] our cause is broader. If war is forced upon us, we will liberate the people of Iraq from a cruel and violent dictator." Remarks at Carl Harrison High School in Kennesaw, Georgia, 39 Weekly Comp. Pres. Doc. 218, 225 (Feb. 20, 2003) [hereinafter Presidential Remarks].

6. Brett H. McGurk, *A Lawyer in Baghdad*, 8 Green Bag 2d 51, 52 n.1 (noting that the concept of debellatio "is discredited in the international legal community and would not easily transfer to Iraq" and that "[n]o Coalition member, in any event, argued that debellatio applied in Iraq").

7. Noah Feldman, What We Owe Iraq 77–80 (2004) (arguing that the sense of insecurity and uncertainty faced by Iraqis during the post-invasion phase led to the formation and entrenchment of political groups along ethnic and religious lines).

I. Occupation Law Is Unsuitable for Nation-Building

Not all occupations in the colloquial sense are occupations in the legal sense.[8] International occupation law, if invoked, confers on the occupier strict limitations on its power to implement permanent changes to the occupied state and affirmative obligations to protect the occupied population. International occupation law is codified principally in the Hague Regulations of 1907[9] and the Fourth Geneva Convention.[10] It functions on the basic premise that an occupying force temporarily assumes authority until hostilities cease.[11] Its application in the context of Iraq is fundamentally problematic, however, because it requires that power return to the former government and is incompatible with nation-building goals. Occupation law's well-defined limitations and long history of acceptance within the international community[12] may explain its attractiveness to both the Coalition governments and the United Nations despite these incompatibilities. The strength of this well-established pedigree, however, is susceptible to dilution since the Coalition's actions in Iraq have been inconsistent with occupation law's basic premises.[13]

The law of occupation was not designed with either disintegrated states or efforts to reintegrate them in mind. It is not by accident that occupation law limits the occupier's ability to effect long-term or fundamental changes to the occupied state since "at the turn of the twentieth century the law of occupation functioned as a pact between heads of state, providing that if one leader was temporarily ousted, a stand-in would operate as a trustee, handing the territory back to the rightful ruler once hostilities ended."[14] There is no ousted au-

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8. *See* Bryan Whitman, Briefing on Geneva Convention, EPW's and War Crimes (Apr. 7, 2003), http://www.defenselink.mil/news/Apr2003/t04072003_t407genv.html (questioning W. Hays Parks, Special Assistant to the Army Judge Advocate General, who distinguishes between the fact of physical military occupation and the legal obligation to govern a territory). Parks's remarks also reflect the early U.S. ambivalence toward becoming de jure as well as de facto occupiers. *See id*.

9. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

10. Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365 [hereinafter Fourth Geneva Convention].

11. *Occupatio bellica*, or belligerent occupation, is "quintessentially a temporary state of fact arising when an invader achieves military control of a territory and administers it on a provisional basis, but has no legal entitlement to exercise the rights of the absent sovereign." Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 Eur. J. Int'l L. 721, 725 (2005).

12. *See* Christopher Greenwood, *The International Law of Occupation*, 90 Am. J. Int'l L. 712, 712 (1996) (book review) ("The law of belligerent occupation developed in the late nineteenth century into one of the most sophisticated parts of the laws of war."); Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 Am. J. Int'l L. 44, 67 (1990) (stating it is a "cardinal principle that . . . the law of occupation . . . appl[ies] equally to all states, whether aggressors or victims of aggression"); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 Am. J. Int'l L. 53, 59 (2005) (noting the "long tradition of the law of occupation").

13. In Part III, I argue that the Coalition forces had garnered contingent title to Iraq, and therefore the ability to dictate many of the terms of their legal relationship to Iraq. It was not "illegal" to declare themselves bound by the law of occupation, but simply unwise and tantamount to an abdication of some of their powers and duties.

14. Suzanne Nossel, *Winning the Postwar*, Legal Aff., May/June 2003, at 18 (relying on Benvenisti,

thority returning to Iraq; the very purpose of the Coalition invasion was to raze Saddam Hussein's Ba'athist regime, which reputedly had been responsible for violations of disarmament duties and the human rights of Iraqi citizens.[15] The Coalition could not even rely on the dubious proposition of reinstalling an exiled authority, as the U.S. Central Intelligence Agency and the United Kingdom's MI6 did in returning Mohammed Reza Pahlavi to power as Shah of Iran in the 1953 coup d'état.[16] There was no exiled Iraqi government, legitimate or otherwise, to reinstall.

Moreover, in Iraq there were *no* authorities with whom the Coalition forces had any intention of cooperating. High-ranking members of Saddam Hussein's Ba'athist party were emblazoned on playing cards in order to facilitate their capture,[17] and Saddam Hussein himself was the subject of an eight-month manhunt that generated pictures trumpeting the Coalition forces' triumph and left the deposed dictator awaiting trial.[18] Civil society apart from the Ba'athist regime was virtually nonexistent.[19] Thus, occupation law's mandate to preserve existing government structures by cooperation with the previous government's authorities was an impossibility in post-invasion Iraq and could have been recognized as such even pre-invasion.

Both the Hague Regulations and the Fourth Geneva Convention emphasize that an occupier's power is temporary and limited. In the former, Article 55 specifies that the "occupying State shall be regarded *only* as administrator and usufructuary."[20] Articles 50 and 56 of the Geneva Convention direct a military occupant to cooperate with "national and local authorities."[21] These strictures ensure that an occupying force serves only as an administrative custodian of the occupied land until the requisite return of power.[22]

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supra note 3).

15. The intention to destroy Saddam Hussein's regime was implicit within the very name of the invasion: Operation Iraqi Freedom. *See, e.g.*, Presidential Remarks, *supra* note 5.

16. *See, e.g.*, Ervand Abrahamian, *The 1953 Coup in Iran*, 65 SCI. & SOC'Y 182 (Summer 2001).

17. Rajiv Chandrasekaran, *U.S. Captures Key Hussein Aide; No. 4 on List Found Near Tikrit*; *GI and Two Protesters Killed in Capital*, WASH. POST, June 19, 2003, at A1.

18. *See* Rajiv Chandrasekaran, *U.S. Forces Uncover Iraqi Ex-Leader Near Home Town; Detention Could Lead To Trial on Charges of War Crimes, Genocide*, WASH. POST, Dec. 15, 2003, at A1.

19. George E. Bisharat, *Sanctions as Genocide*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 379, 384 (2001). Feldman defines civil society as "nonstate organizations, not excluding political organizations or religious groups, who set out to achieve various goals through coordinated, nonviolent action and advocacy." FELDMAN, *supra* note 7, at 73. To support the "commonplace [assertion] that Saddam destroyed civil society," Feldman provides the example that the Iraqi Lawyers Association did not "trust[ ] the value of collective public discourse to get anything done," instead considering the only way to "get things done" was to "whisper in the ear of the right man." *Id.* at 75, 77.

20. Hague Regulations, *supra* note 9, art. 55 (emphasis added). A usufruct is one who has "a right to use and enjoy the fruits of another's property for a period without damaging or diminishing it." BLACK'S LAW DICTIONARY 1580 (8th ed. 2004).

21. Fourth Geneva Convention, *supra* note 10, arts. 50, 56.

22. Another significant limitation on an occupier's power is its inability to enter into binding international agreements on behalf of the occupied territory, an especially chafing limitation in the volatile Middle East. For example, occupation law expert Eyal Benvenisti has highlighted the problems such a restriction causes with regard to water rights. Eyal Benvenisti, *Future Implications of the Iraq Conflict: Water Conflicts During the Occupation of Iraq*, 97 AM. J. INT'L L. 860, 868 (2003).

While the CPA was headed by a figure deemed the "Administrator,"[23] the CPA's authority was hardly *only* that of an administrator, since it claimed—and the United Nations ceded to it—plenary powers well beyond the traditional boundaries of occupation law. From the beginning, the United Nations' goals for the CPA included restoring security and stability, creating conditions "in which the Iraqi people [could] freely determine their own political future,"[24] and facilitating recovery and reconstruction.[25] The CPA claimed to hold "all executive, legislative, and judicial authority necessary to achieve its objectives" in Iraq,[26] in clear contravention of the usual view that an occupier is "not entitled to enact comprehensive changes to the political, legislative, administrative, and social structures in the occupied territory."[27] The United Nations nonetheless acquiesced to this formulation of CPA power with Resolution 1483.[28] Far from advocating a return of any power to the former regime, Resolution 1483 referred to the "need for accountability for crimes and atrocities committed by the previous Iraqi regime"[29] and ordered Member States to freeze all assets belonging to Saddam Hussein or "other senior officials of the Iraqi regime and their immediate family members"[30] and to deny "safe haven to those members of the previous Iraqi regime who are alleged to be responsible for crimes and atrocities."[31] Though only temporarily and with the goal of enabling Iraqi self-governance,[32] the U.N. Security Council authorized the CPA "to promote the welfare of the Iraqi people through the effective administration of the territory"[33] and granted the CPA complete discretion over funds for rebuilding Iraq's infrastructure and "the costs of civilian administration."[34] In doing so, the Security Council granted the CPA the power of the purse in addition to its established military dominance. Despite its reference to the Fourth Geneva Convention and the Hague Regulations, Resolution 1483 seems to offer "sufficient proof that the Security Council also acknowledges the right of the occupying force to go beyond the traditional rules of occupation law."[35]

The Coalition exceeded other significant limitations on the occupier's powers as well. Article 43 of the Hague Regulations mandates occupiers to "respect[ ],

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23. Coalition Provisional Authority Regulation 1, pmbl. (2003), http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf [hereinafter CPA Regulation 1].

24. S.C. Res. 1483, *supra* note 2, ¶ 4.

25. *Id.*

26. CPA Regulation 1, *supra* note 23, § 1, ¶ 2.

27. Wolff Heintschel von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL'Y 843, 862 (2004).

28. *See generally* S.C. Res. 1483, *supra* note 2.

29. *Id.* pmbl.

30. *Id.* ¶ 23.

31. *Id.* ¶ 2.

32. *Id.* pmbl. (expressing "resolve that the day when Iraqis govern themselves must come quickly").

33. *Id.* ¶ 4.

34. *Id.* ¶¶ 12–14.

35. Von Heinegg, *supra* note 27, at 863.

unless absolutely prevented, the laws in force in the country" at the time of invasion.[36] In the Fourth Geneva Convention, Article 54 dictates that the occupier shall not alter the status of public officials or judges,[37] and Article 64 instructs that the occupied country's penal laws should remain in force and that the pre-existing tribunals "shall continue to function."[38] As the stated goal of the invasion—tellingly named "Operation Iraqi Freedom"—was not only disarmament, but also liberation,[39] one of its goals was clearly to transform the legal regime that had permitted abuses against the Iraqi citizenry. Not only was the United States not planning to respect the laws of the latest regime in Iraq, it was not planning to respect the laws of *any* regime that had ever existed in Iraq, itself the product of failed nation-building by the British after World War I. While the CPA has left some segments of Iraqi law in place, such as the penal code, it has replaced others wholesale: the traffic code, for example, was transplanted from Maryland.[40] Even the Iraqi laws that were left in place remained only at the CPA's sufferance; the CPA reserved the right to change any of them at any time.[41]

Occupiers historically have manipulated the Hague Regulations, using its phrase "unless absolutely prevented" and their affirmative duties to "ensure, as far as possible, public order and safety"[42] to justify circumvention of the obligation to leave the laws intact. The German occupation of Belgium during World War I was rife with such circumvention as the Germans exploited Belgian resources and introduced enduring changes in the country's linguistic and educational traditions.[43] These actions were widely viewed as illegitimate under occupation law.[44] Many German authorities, however, "did in fact believe that their administration followed the Hague Regulations,"[45] suggesting that even abusive occupying forces considered themselves somewhat constrained by occupation law and unable to "change the entire political, economic, social, or cultural system of the occupied territory"[46] without devising rather tortured justifications for such changes.[47]

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36. Hague Regulations, *supra* note 9, art. 43.

37. Fourth Geneva Convention, *supra* note 10, art. 54.

38. *Id.* art. 64.

39. *See* Presidential Remarks, *supra* note 5.

40. *Talk of the Nation: Interview with William Langewiesche* (National Public Radio broadcast Oct. 11, 2004).

41. CPA Regulation 1, *supra* note 23, § 2 ("[L]aws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.").

42. Hague Regulations, *supra* note 9, art. 43.

43. The German occupiers reorganized the Belgian economy, changed the legal tender to the reichsmark, introduced new taxes, diverted natural resources to the German army, established additional courts, and created lasting divisions in the Belgian culture, including the institution of the Flemish language in some areas. *See* BENVENISTI, *supra* note 3, at 32–44.

44. *See id.* at 44–46.

45. *Id.* at 33.

46. Von Heinegg, *supra* note 27, at 861.

47. *See* BENVENISTI, *supra* note 3, at 34–35 (identifying German justifications for changes to the Belgian economy).

The law of occupation prohibits sweeping changes to the occupied state's structure for good reason. The law is designed to at least partially preserve the occupied state's status quo and with it the population's way of life.[48] This goal, of course, does not account for the possibility that the population's way of life was characterized by repression and human rights violations before, rather than as a result of, the occupation. If occupation law is to "discipline aggressor armies and hold them accountable for their actions on foreign territory"[49] in future applications, it should not be made into a "license to transform" society, for then "the door would be wide open for abuse by aggressive and benevolent armies alike."[50] Furthermore, because international occupation law is so infrequently applied, each application greatly influences its development and future applications.[51] This fact makes the danger of inappropriately invoking occupation law all the greater.

The United Nations contributed to the enervation of this already elastic body of law when it used the label "occupying powers" in an attempt to rein in the Coalition's power in Iraq without acknowledging the legitimacy of the initial invasion.[52] Occupation law may have appealed to the United Nations in part because it can be applied whether or not the occupation is legal under *jus cogens*.[53] However, discomfort with the United States and the United Kingdom's bilateral enforcement of Security Council edicts[54]—and an unwillingness to clarify appropriate enforcement mechanisms for Security Council resolutions—does not justify the invocation of an inherently unsuitable body of international law that ostensibly places undue restrictions on the occupiers, leaves the occupied people with little predictability as to which of those re-

48. *Id.* at 11 (discussing "the extent to which the occupant must adhere to the *status quo ante bellum*").

49. Scheffer, *supra* note 1, at 851.

50. *Id.*

51. Benvenisti implies that a new chapter is needed in *The International Law of Occupation* in the wake of developments in humanitarian law and the Iraq conflict, which he calls "the most significant development in the law of occupation in recent years." BENVENISTI, *supra* note 3, at vii–ix.

52. S.C. Res. 1483, *supra* note 2, pmbl. In Security Council Resolution 1483, the United Nations did not retroactively endorse the legitimacy of the invasion, but only prescribed terms for the future occupation. *See id.*; *see also* Richard A. Falk, *Future Implication of the Iraq Conflict: What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 592 (2003) (arguing that President Bush's statement to the United Nations that military action was necessary due to the growing threat posed by Saddam Hussein was "essentially rejected by the UN Security Council's refusal to go along with U.S./UK demands for a direct endorsement of recourse to war."). The United Nations' reluctance to so endorse the invasion may have been because of the "unusual unanimity among academic international lawyers about the illegality of the invasion of Iraq even before the collapse of the Coalition of the Willing's claims about the existence of weapons of mass destruction." Hilary Charlesworth, *Saddam Hussein: My Part In His Downfall*, 23 WIS. INT'L L.J. 127, 137 (2005).

53. *See, e.g.*, Scheffer, *supra* note 1, at 843–47.

54. One argument invoked to legitimize the Coalition's actions is that they were acting pursuant to Security Council Resolution 678, which authorized the use of force in the Gulf War to "restore international peace and security in the area" and did not contain a sunset provision. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990). Coupling this with Resolution 1441 in 2002 (confirming that Iraq was in continuing breach of its disarmament obligations), commentators argue that the Coalition could agree to use force to remedy these breaches. *See, e.g.*, James C. Ho, *International Law and the Liberation of Iraq*, 8 TEX. REV. LAW & POL. 79, 80–82 (2003).

strictions the occupiers and the United Nations will honor, and erodes a valuable body of law that might be needed to check less democracy-oriented occupiers in the future. Since each application of occupation law helps shape its contours,[55] its ability to constrain future occupiers depends on its past applications. No matter what one thinks of the Coalition's current objectives in Iraq, it is quite possible to imagine future occupations in which occupation law, replete with its traditional strictures, would exert international pressure to prevent the dismemberment of a nation or the exploitation of an occupied people.[56] Furthermore, while Resolution 1483 pursues the laudable goal of changing the Coalition's claimed power to invade into a duty to reconstruct, there is inherent tension between this duty and the purported constraints on the Coalition's powers. If the Coalition faithfully followed and "fully compl[ied] with" occupation law, as Resolution 1483 demands,[57] it would be unable to fulfill its reconstruction duties, which exist by both U.N. edict and an inherent "if you break it, you buy it"[58] idea of fairness.[59] There is room within occupation law to "subject the population of the occupied territory to provisions which are essential"[60] to maintain order and security, but this room is simply not enough to accommodate the vast powers needed to successfully nation-build. Resolution 1483's seeming position that reconstructing a state's entire system of government is compatible with full compliance with occupation law fundamentally misunderstands—and provides precedent for future misunderstandings about—the limited powers afforded an occupier.

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55. *See* BENVENISTI, *supra* note 3.

56. *See* Scheffer, *supra* note 1, at 859 ("In a larger sense, occupation law should be returned to the box from which it came. It is an extremely important body of law to fully regulate belligerent occupation that occurs outside any UN-authorized action and in situations where wholesale transformation of the occupied territory is not a desirable international objective."). An example of a continuing occupation in which expanding an occupier's powers under international law could prove destabilizing is the Israeli occupation of the West Bank and Gaza Strip. *See* Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian*, 89 AM. J. INT'L L. 295, 306 (1995) (noting that, despite some confusion over the varying statuses of these territories, "the type of governance adopted in them was the same: military government subject to the international law of occupation") (footnote omitted).

57. S.C. Res. 1483, *supra* note 2, ¶ 5.

58. This phrase's applicability to the Iraqi invasion was popularized by reported references to variations on the so-called "Pottery Barn rule" of accountability by *New York Times* columnist Thomas L. Friedman, then-Secretary of State Colin Powell, and Senator John Kerry during the first 2003 presidential debate. *See* Thomas L. Friedman, *Present at . . . What?*, N.Y. TIMES, Feb. 12, 2003, at A37 ("We break Iraq, we own Iraq—and we own the primary responsibility for rebuilding a country of 23 million people . . . ."); William Safire, *If You Break It . . .* , N.Y. TIMES, Oct. 17, 2004, § 6, at 24 (examining the contested etymology of the phrase in the American public debate over the invasion).

59. *See* FELDMAN, *supra* note 7, at 81 ("[T]he Coalition was under a duty to guarantee that the country would not revert to anarchy . . . . The United States now has no ethical choice but to remain until an Iraqi security force, safely under the civilian control of the government of a legitimate, democratic state, can be brought into existence.").

60. Fourth Geneva Convention, *supra* note 10, art. 64.

II. The Legal Viability of Debellatio

The United Nations may have applied occupation law in post-invasion Iraq simply because of a perceived lack of other options. The legal doctrine of debellatio, for instance, is widely considered defunct, despite its largely successful application in post–World War II Germany by the Allied Forces;[61] scholars argue it has been precluded by modern ideas that peoples have a right to self-determination and that sovereign title may not be garnered by force.[62] Despite debellatio's current unpopularity, the spectrum of powers granted to military victors under debellatio has been truncated by, but is not in fact necessarily incongruent with, these modern ideas. Debellatio is "an ancient concept in international law" and is "one of the different ways of ending a war and acquiring territory."[63] While its exact meaning is much debated, the "minimum content of any definition of debellatio is that one of the belligerent States has been defeated so totally that its adversary or adversaries are able to decide alone what the fate of the territory of that State and of the State authorities will be."[64] Debellatio describes both factual and legal scenarios. Factually, it "refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf."[65] Legally, debellatio is a doctrine that "pass[es] sovereign title to the occupant in case of total defeat and

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61. The Allies' exercise of power in Germany after Germany's unconditional surrender is generally, though not universally, thought to be an instance of factual and legal debellatio. *See, e.g.*, Benvenisti, *supra* note 3, at 93 ("It was generally accepted that the conditions for debellatio had been met with respect to Germany and hence the four occupying powers had acquired sovereign territory over it."); Bhuta, *supra* note 11, at 734 ("Germany was reduced to a condition of debellatio, in which its state institutions and constitutive order were destroyed . . . ."). This condition enabled the Allies' "exercise of sovereign power (equivalent to conquest, but without annexation) . . . ." *Id.*; *cf.* Hans Kelsen, *The International Legal Status of Germany To Be Established Immediately Upon Termination of War*, 38 Am. J. Int'l L. 689 (1944) (arguing that occupation law was not an adequate basis for the fundamental changes that the Allies intended to introduce in Germany and that the exercise of Allied sovereignty in Germany would require debellatio). There is scholarly disagreement about the exact legal implications of Germany's unconditional surrender, and those subscribing to a more capacious definition of debellatio argue it did not occur in Germany. *See* Quincy Wright, Editorial Comment, *The Status of Germany and the Peace Proclamation*, 46 Am. J. Int'l L. 299 (1952).

62. *See, e.g.*, von Heinegg, *supra* note 27, at 862 ("No use of force, whether justified or not, may any longer be considered a legitimate means of acquiring foreign territory or of extinguishing another State."); Benvenisti, *supra* note 3, at 94–95 ("[D]ebellatio is a remnant of an archaic conception that assimilated state into government, a vestige that was revived by the Allies to explain their expanded powers, but whose demise should now be recognized.") (footnote omitted). "State" and "government," however, are not inextricably linked under debellatio. *See infra* text accompanying note 105. Even scholars arguing that "the doctrine [of debellatio] . . . has little if any place in contemporary practice, particularly following adoption of the 1949 Geneva Conventions," recognize that "the doctrine's demise foreshadowed the need for a new and far more widely accepted practice, guided by the United Nations, to emerge." Scheffer, *supra* note 1, at 848.

63. Karl-Ulrich Meyn, *Debellatio*, *in* The Encyclopedia of Public International Law 969 (1992).

64. *Id.*

65. Benvenisti, *supra* note 3, at 92; *see also* Yoram Dinstein, War, Aggression, and Self-Defence 48–49 (4th ed. Cambridge Univ. Press 2005) (1988) (offering similar circumstances as the "basic parameters of debellatio").

disintegration of the governing regime."[66] It is associated with other ancient international legal concepts such as subjugation, conquest, and annexation, but "there is no general consensus on its distinction from, and relationship to" those doctrines.[67]

Those proclaiming debellatio's death generally offer sweeping formulations of its doctrinal contours. Morris Greenspan equates "the rejected concept of debellatio" with a situation in which "the enemy was utterly defeated and accordingly the defeated state forfeited its legal personality and was absorbed into the sovereignty of the occupier."[68] Another proponent of the elimination of the legal doctrine of debellatio, Wolff Heintschel von Heinegg, asserts that it is

> correct to neglect debellatio if it is viewed as a legal title to territory. No use of force, whether justified or not, may any longer be considered a legitimate means of acquiring foreign territory or of extinguishing another State. Therefore, even in cases of a "total" victory, the presumption of the continuing existence of the vanquished State will prevail.[69]

What such commentators fail to recognize is the possibility of interpreting debellatio as having been modified, rather than destroyed, by post–World War II advances in international human rights law. Recognizing the fallacies in von Heinegg's statement helps illustrate the viability of debellatio as a means to acquire legal, if restricted, title to territory. First, it erroneously equates assuming title with "acquiring foreign territory." While the acquisition of title may lead to the acquisition of foreign territory, or annexation, it need not do so. Compare, for example, the Soviet Union's treatment of its debellatio-won portion of Germany with that of the other Allied Forces.[70] Moreover, if

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66. Benvenisti, *supra* note 22, at 862.

67. Von Heinegg, *supra* note 27, at 850.

68. Michael A. Newton, *The Iraqi Special Tribunal: A Human Rights Perspective*, 38 CORNELL INT'L L.J. 863, 873 n.47 (2005) (discussing Morris Greenspan, THE MODERN LAW OF LAND WARFARE 600–01 (1959)).

69. Von Heinegg, *supra* note 27, at 862.

70. Pursuant to the Potsdam Agreement, the United Kingdom, France, the U.S.S.R., and the United States each had "supreme authority" within "his own zone of occupation," and had joint authority over "matters affecting Germany as a whole." Protocol of Proceedings Approved at Berlin (Potsdam), § II(A)(1), Aug. 2, 1945, 3 Bevans 1207 (1945). Consensus among the Allied powers soon broke down, dividing Germany into two ostensibly sovereign nations:

> As the battle lines of the cold war began to solidify, the Soviet Union balked at efforts to create a fully sovereign German state, and instead created a military defense against the West in the eastern part of Germany. In response, France, Great Britain, and the United States unified the three Western occupation zones, and the Federal Republic [of Germany] was founded in 1949.

Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 85 AM. J. INT'L L. 155, 164 (1991). The Federal Republic of Germany and the Soviet-formed German Democratic Republic, colloquially known as West and East Germany, were granted formal sovereignty by their respective occupiers in the mid-1950s, *see id.*, but "whereas the integration of the western part of Germany into the Western community of nations was a fairly smooth process, helped by cultural affinities and generous American economic aid," East Germany remained controlled by an "alien" Communist party closely aligned with the U.S.S.R. through a process of "cooperation" and "acceptance of a separate national iden-

title to the territory were restricted in some way, as discussed in Part III, the title-holder would not have the option of annexation. Second, the statement mistakenly equates attaining title with the extinction of another state. Debellatio can only be invoked if crucial state institutions *already* have ceased to exist; debellatio is the result of their destruction, not the root of it. Moreover, as is further delineated in Part III, identifying the state as the mere sum of its governmental institutions—and thereby assuming that to acquire title to one aspect of "the state" is to acquire all aspects—underestimates the multiple facets of statehood. A victor may have title and power within a country without affecting the state's "sovereign identity," or the identity of the state as linked to the territory defined by its borders.[71] Thus, obtaining title via debellatio is not necessarily incompatible with the continued existence of the vanquished state.

One commentator seeking to prove the demise of debellatio also asserts that the Fourth Geneva Convention "provide[s] that residents of occupied territory . . . not be deprived of legal rights on the basis of debellatio."[72] In fact, however, the Convention simply reaffirms the intuition that modern notions of self-determination do not allow peoples to be subjugated via force; the factual prerequisites of debellatio do not justify annexation or other abrogation of human rights. If debellatio as a legal doctrine necessarily implies subjugation or annexation, then it would indeed be dead, as some commentators, such as Eyal Benvenisti, proclaim it to be.[73]

Yet debellatio does not necessarily imply subjugation or annexation, as Benvenisti's very formulation of the powers of a debellatio-inducing victor demonstrates; debellatio merely passes "sovereign title to the occupant in case of total defeat and disintegration of the governing regime."[74] Yet debellatio in no way mandates that the occupier permanently retain that title or subjugate the occupied people. At one time, the *acquisition* of title under debellatio implied the rightful *retention* of title, but developments in international law since World War II have foreclosed this possibility. International human rights treaties subsequent to the Fourth Geneva Convention articulate the rights of all peoples to express their political will and to exercise their rights to self-determination.[75] This body of international law necessarily imposes restrictions on how an occupier can hold title to a defeated territory. It need not, however, preclude the possibility of holding this title altogether, since to hold

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tity" that "was not voluntary" or "legitimate," but rather an unwilling "adaptation to the domestic and international realities of power." Hannes Adomeit, *The German Factor in Soviet Westpolitik*, 481 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 17–18 (1985).

71. *See infra* text accompanying note 105 for a fuller discussion of "sovereign identity."

72. Nossel, *supra* note 14, at 20.

73. *See* BENVENISTI, *supra* note 3, at 94–95; Benvenisti, *supra* note 22, at 862. Scholars discussing the Coalition's invasion of Iraq have made similar claims. *See, e.g.*, Newton, *supra* note 68, at 873 n.47 ("Geneva Conventions in the aftermath of World War II marked the definitive rejection of the concept of *debellatio* . . . .").

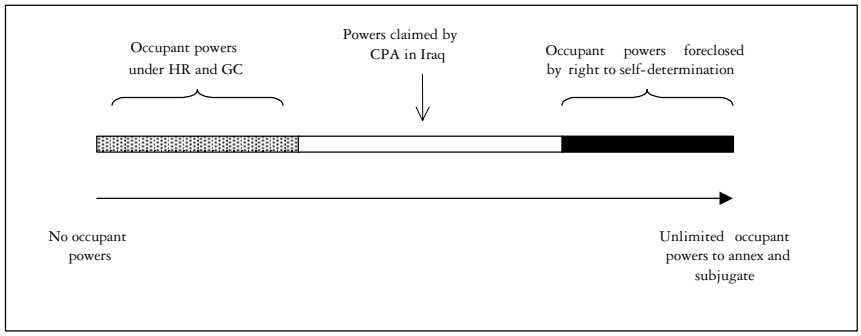
74. Benvenisti, *supra* note 22, at 862.

75. *See infra* notes 81–82 and accompanying text.

title is not inevitably to oppress political or personal rights.[76] Tellingly, the United Nations does not consider the temporary holding of sovereign title by a body not elected by the people living in the titular territory to be a presumptive violation of the right to self-determination, as evidenced by the Security Council's proclamation that the unelected Governing Council "embodie[d] the sovereignty of the State of Iraq."[77]

It is instructive to conceive of the possible powers granted to an occupier on a spectrum, as illustrated below in Figure 1. At the extreme right of the spectrum lie the powers granted under the traditional conception of debellatio, including annexation and subjugation, as well as all the lesser-included and more benevolent powers properly allowed a title-holder. The far left represents the denial of any occupant powers.

FIGURE 1



The body of occupation law codified in the Hague Regulations and the Fourth Geneva Convention confines the powers of a military occupant to administrative and usufructuary authority represented in the shaded area. Other modern international human rights laws[78] preclude a military victor from garnering the powers at the far right of the spectrum, represented in the blackened area, such as claiming non-temporary title (annexation), exploiting a territory's natural resources, or denying a people the right to self-determination. The area to the left of the blackened area represents the modern, truncated debellatio powers. The powers claimed by the CPA in post-invasion Iraq fall somewhere to the right of the area allowed by occupation law, but well left

76. If it were, the U.N. Trusteeship Council would have been a violation of the Fourth Geneva Convention. It also would have presumed that no non-self-governing territory potentially subject to the Trusteeship Council's authority could become a party to the Fourth Geneva Convention, a consequence with perverse results since non-self-governing territories are likely in great need of getting protection from—or providing a check against becoming—an abusive occupier.

77. S.C. Res. 1511, ¶ 4, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

78. *See generally* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, 993 U.N.T.S. 3 (Dec. 16, 1966).

of the area now foreclosed by modern human rights law; the CPA was then operating within the powers allowed an occupier under this modern debellatio doctrine.

The Fourth Geneva Convention does not outlaw debellatio; it does not address the subject directly at all, and it does not immutably fix full sovereign title in an occupied people. It merely regulates an *occupation* without compelling all military victors to be formal occupiers. However, one does not occupy a territory to which one holds title. While invoking a doctrine that lies outside of the Fourth Geneva Convention may set a dangerous precedent for future post-invasion periods, so does broadening the powers enjoyed by an occupier operating under occupation law.[79]

Refusing to deem the Coalition forces occupiers subject to the Fourth Geneva Convention in no way abrogates their responsibilities under other international agreements.[80] The United States and the United Kingdom are morally bound by the Universal Declaration of Human Rights[81] and legally bound by the International Covenant on Civil and Political Rights,[82] both of which articulate a people's right to self-determination. Moreover, invoking debellatio in order to engage in nation-building conforms with the spirit, if not the letter, of the law of the Fourth Geneva Convention: protection of citizens during war. Though the Convention's purpose is explicitly to protect "Civilian Persons in Time of War,"[83] it nowhere addresses a situation in which the civilian persons it seeks to protect may be more at risk from their former rulers than their current occupiers. Like the U.N. Charter, the Convention does not account for the possibility that a once self-governing nation-state is not infallibly so.[84] Leaving the Iraqi people, especially the long oppressed Kurds and Shi'a Muslims, to the remnants of the Ba'athist regime, or cooperating with the former regime to maintain oppressive government policies in Iraq, would be shoddy protection indeed,[85] and would undercut the disarmament

79. *See supra* note 56 and accompanying text.

80. Others have noted the truncation of a military victor's powers, whatever legal regime may govern those powers. *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 48–49 (1990) ("[T]he development of international human rights law since 1945 has greatly enlarged the scope of rules of international law that place limits on the right of any government to commit whatever actions it pleases against those under its control.").

81. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]. While largely aspirational, annexation of a sovereign state would blatantly violate moral obligations under Article 30's prohibition on "engag[ing] in any activity or . . . perform[ing] any act aimed at the destruction of any of the rights and freedoms set forth" in the UDHR. *Id.* art. 30.

82. ICCPR, *supra* note 78.

83. Fourth Geneva Convention, s*upra* note 10, pmbl.

84. When functional, the Trusteeship Council could take non-self-governing territories, but not Member States, in trust. This restriction precludes the possibility that a once self-governing Member State may become non-self-governing and populated by those most in need of international attention such as that of the Trusteeship Council. *See* U.N. Charter arts. 75–91.

85. Feldman argues that, having invaded, not only should the Coalition remain as an occupier in some form, it is in fact morally obligated to remain until a democratic state that can monopolize violence has arisen. *See* FELDMAN, *supra* note 7, at 126–29.

goals of the invasion.[86] Despite recent calls for a rebirth and revision of the trusteeship system,[87] no such revitalization has happened as yet. Until it does, debellatio, as modified by human rights advances in the last half century, is arguably the only viable international legal framework for nation-building activities.

III. The Applicability of Debellatio

Occupation law, as codified in the Hague Regulations and the Fourth Geneva Convention, does not provide for the possibility of factual debellatio[88] and therefore does "not reflect the reality of total defeat and the extinction of functioning governmental structures as in Iraq after Operation Iraqi Freedom."[89] Yet with Resolution 1483, the United Nations purported to hold the U.S. and British governments, as leaders of the Coalition, responsible as occupying powers.[90] The United States and the United Kingdom ostensibly acknowledged their obligations under international occupation law and agreed to its constraints.[91] The legal framework set out in Resolution 1483, however, resembles occupation law more in name than in practice.[92] Logically construing Resolution 1483, the U.N. appears in fact to grant the Coalition forces all the powers subsumed under a modern theory of debellatio as outlined above.

The conflict in Iraq fulfilled the factual requirements of debellatio. The Iraqi army had been "totally defeated,"[93] its national institutions had disintegrated, and "none of its allies continue[d] militarily to challenge" Coalition forces on its behalf.[94] In effect, the legal framework of debellatio was also utilized, even if not acknowledged. The three main stages of implementing the legal doctrine of debellatio are: (1) the invaded state ceases to exist by virtue

86. Steven R. Weisman, *Powell, in U.N. Speech, Presents Case to Show Iraq Has Not Disarmed*, N.Y. Times, Feb. 6, 2003, at A1 (summarizing then-Secretary of State Colin Powell's speech to the United Nations Security Council).

87. *See* Mohamed, *supra* note 1.

88. *See* von Heinegg, *supra* note 27, at 862 ("Neither the Hague Regulations nor Geneva Convention IV seem to have anticipated a situation of *debellatio*.").

89. David D. Jividen, *Rediscovering International Law Through Dialogue Rather Than Diatribe: Reflections on an International Legal Conference in the Aftermath of Operation Iraqi Freedom*, 27 Harv. J.L. & Pub. Pol'y 691, 717 (2004).

90. *See* S.C. Res. 1483, *supra* note 2.

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

92. Benvenisti has also argued that in the Iraqi context the United Nations "confirm[ed] the demise of *debellatio*" with Resolution 1483 because both the United Nations and the occupiers acknowledged "the downfall of the Iraqi regime did not affect the sovereignty and territorial integrity of Iraq." Benvenisti, *supra* note 22, at 862.

93. Benvenisti, *supra* note 3, at 92. The growth of the Iraqi insurgency might undermine claims that military operations had closed. To the extent that the insurgency had its roots in the uncertainty and chaos following the Coalition invasion, allowing such an insurgency to constitute ongoing military efforts—and thus prevent the application of a legal framework that allowed rebuilding of the conquered nation—would create perverse incentives for insurgents.

94. Noah Feldman, Remarks, Law of Nation Building Seminar at Harvard Law School (Feb. 14, 2005).

of the disintegration of its national institutions, (2) the occupying victor acquires title to the territory formerly controlled by the toppled state, and (3) the new title-holder has plenary powers over the territory where the state previously existed.[95] The post-invasion phase arguably corresponded to these three stages.

First, the Iraqi state—or at least the Ba'athist government that had so long controlled all Iraqi state functions—had effectively ceased to exist, symbolically as well as functionally. The statue of Saddam Hussein, the symbol of his dominance in Iraq, fell.[96] Post-invasion Baghdad was chaotic, with little functioning infrastructure and persistent looting problems.[97] Second, although the members of the "representative Governing Council" established by the CPA were ostensibly "the principal bodies of the Iraqi interim administration" that "embod[y] the sovereignty of the State of Iraq during the transitional period,"[98] the Governing Council's responsibilities were limited to consultation and coordination.[99] The CPA did not commit itself to following any of the Governing Council's suggestions, nor did it condition or qualify its previously asserted claim to "all executive, legislative and judicial authority."[100] Thus, the Coalition's purported investiture of sovereignty in the Governing Council did not in fact vest in it any of the traditional functions of a sovereign with respect to any internal functions of the territory.[101] Finally, in addition to retaining paper power over Iraqi territory, the CPA initially had the exclusive means of enforcement power. Thus the United Nations' attempt to reframe the Coalition as occupiers notwithstanding, the post-invasion phase satisfied the stages of legal, as well as factual, debellatio.

The United Nations' conflicting signals about power in Iraq is problematic not only because of the long-term effects on occupation law described above, but also because of the confusion it created in Iraq. While the United Nations may have been trying to reaffirm the Iraqi people's right to self-determination, its attempt to vest sovereign title in the Governing Council stands in direct opposition to its acquiescence to the CPA's total authority

95. *See* BENVENISTI, *supra* note 3, at 92. Note that the doctrine does not require the dissolution of a nation, or even of a state's identity, which may or may not be equivalent to each other. Rather, the doctrine equates the dissolution of the governing institutions with the dissolution of the state. This may represent a stingy concept of a state; see note 105, *infra*, and accompanying text for a discussion of the dual nature of state sovereignty.

96. *See* Richard W. Stevenson, *Baghdad Falls*, N.Y. TIMES, Apr. 13, 2003, § 4, at 2.

97. *See* Eric Schmitt & David E. Sanger, *Looting Disrupts Detailed U.S. Plan To Restore Iraq*, N.Y. TIMES, May 19, 2003, at A1; *see also* Edmund L. Andrews & Susan Sachs, *Iraq's Slide into Lawlessness Squanders Good Will for U.S.*, N.Y. TIMES, May 18, 2003, § 1, at 1.

98. S.C. Res. 1511, *supra* note 77, ¶ 2–4.

99. *See* Coalition Provisional Authority Regulation 6, ¶ 4 (2003), http://www.iraqcoalition.org/regulations/20030713_CPAREG_6_Governing_Council_of_Iraq_.pdf.

100. CPA Regulation 1, *supra* note 23, § 1, ¶ 2. Von Heinegg notes the Governing Council's lack of power, arguing its establishment "does not mean that the Security Council has curtailed the rights of the occupying forces ('the Authority') previously recognized." Von Heinegg, *supra* note 27, at 864.

101. *See* Stephen D. Krasner, *Sovereignty: An Institutional Perspective*, 21 COMP. POL. STUD. 66, 86 (1988) ("The assertion of final authority within a given territory is the core element in any definition of sovereignty.").

over Iraq. Legal confusion begat confusion on the ground: the uncertainty over who was in charge may have contributed to the deadly chaos and insurgency.[102] The CPA's uncertainty over its own powers may also have contributed to the chaos and looting that followed the invasion; how could it exercise authority it did not know it had?

Moreover, after the invasion and before the supposed vesting of sovereignty in the Governing Council, there was a formal as well as practical title vacuum. The Coalition's statements before, during, and after the invasion reflect the idea that Saddam Hussein was the exclusive, but illegitimate, sovereign of Iraq, a dictator who had stolen sovereign title from the Iraqi people.[103] The Coalition's rapid realization of its well-articulated goal of deposing Hussein left no one holding sovereign title if not the forces that had deposed him.[104] Immediately invoking—or, better yet, announcing in advance its intention of invoking—debellatio would have solved the troubling question of who had title and practical control on the ground. Granting such title via debellatio would not have undercut the Iraqi people's right to self-determination, so long as appropriate restrictions on that title were clearly delineated.

Those restrictions stem from the dual nature of sovereignty. Sovereignty can be thought of as Janus-faced, looking simultaneously outside and inside a state's borders. The first face is a form of external sovereignty, associated with the inviolability of the identity of the nation-state and the sanctity of the state's borders. I call this form the state's "sovereign identity." The second is what I call "internal sovereignty," the ability to control affairs within those borders. Counterintuitively, despite the Coalition's forced entry into Iraqi territory, it was Iraq's sovereign identity that remained intact post-invasion, and Iraq's internal sovereignty that had been seized via debellatio. Iraq's national identity and territorial claims were never in question. Annexation did not occur, as the United States, the United Kingdom, and Iraqis themselves acknowledge.[105] The CPA held no authority to take Iraq as its own or give

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102. *See* FELDMAN, *supra* note 7, at 72–75. Feldman argues that in the absence of a civil society, when authorities fail to monopolize violence, people seek to form mutual protection associations, giving rise to militias and the entrenchment of divisions within the population along local, familial, ethnic, or denominational lines.

103. *See* Remarks on the Iraqi Regime's Noncompliance with United Nations Resolutions, 39 WEEKLY COMP. PRES. DOC. 164, 165 (Feb. 6, 2003) (referring to Saddam Hussein as a "dictator" who "made Iraq into a prison, a poison factory, and a torture chamber for patriots and dissidents" and calling for the Security Council to help "give the Iraqi people their chance to live in freedom and choose their own government"); Remarks on the Anniversary of Operation Iraqi Freedom, 40 WEEKLY COMP. PRES. DOC. 430, 432 (Mar. 19, 2004) ("One year ago, military forces of a strong coalition entered Iraq . . . to liberate that country from the rule of a tyrant. For Iraq, it was a day of deliverance.").

104. This argument assumes that sovereign title must be held, either legitimately or illegitimately; any state in which title is not held is anarchic. This also assumes that the sovereign title could not reinvest in the Iraqi people given the absence of any civil society, exiled democratic government, or any other sort of placeholder. The lack of such a placeholder is evident from the fact that the CPA was compelled to invent one—with U.N. endorsement in S.C. Res. 1500—in the form of the Governing Council. *See* S.C. Res. 1500, ¶ 1, U.N. Doc. S/RES/1500 (Aug. 14, 2003).

105. Even the Kurds, a group with a credible claim to an alternate and mutually exclusive national identity, have not forsaken their Iraqi identity. The U.S. and British governments at no time contended

Iraq's territory away to other powers, as it would have under the strong form of debellatio. Iraq still occupies and will continue to occupy its former territory. Its people—however divided—remain Iraqis.[106]

Accordingly, the powers accompanying the title that passed to the Coalition victors, in practice if not in name, were restricted to matters of internal sovereignty. Acknowledging this seizure of internal sovereignty via debellatio would have addressed the abstract problem of the title vacuum and might have mitigated the very concrete problem of the destructive chaos of the period immediately post-invasion.

Besides formally granting internal sovereignty without the power to alter Iraq's sovereign identity, the United Nations could have imposed further restrictions on a Coalition title-holder in order to mitigate threats to the Iraqi people's right to self-determination.[107] The title could and should have been temporary, expiring upon the emergence of a functioning, representative Iraqi government. The United Nations obviously contemplated such a restriction since it repeatedly emphasized the temporary nature of the power that it acknowledged the Coalition possessed in Iraq,[108] an emphasis actually redundant under the occupation law it purported to apply. Such a restriction would have been in keeping with the right to self-determination and prevented possible abuses of a debellatio-procured title, such as indefinite extension of the title-holding period or the use of titular powers to build new state institutions that lacked adequate avenues to ensure self-determination.[109] The title could have been further restricted by a contingency: the power over internal sovereignty could have been valid only so long as the Coalition was fulfilling its obligations to provide for the human rights of the Iraqi people as articulated in the UDHR and the ICCPR.[110] This duty could have en-

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that Iraq's identity as Iraq, or the territory it held before the war, was subject to change.

106. It is not clear that even Iraqi insurgents dispute the idea of an Iraqi nationality, even if they do not agree with the way in which Iraqi identity is being formed under pressure from the Coalition forces. One recent Australian hostage was forced to plead with his home country to withdraw its troops because his captors were "fiercely patriotic" and "believe[d] in a strong united Iraq looking after its own destiny." *Hostage Douglas Wood's Statement*, May 2, 2005, http://www.abc.net.au/news/newsitems/200505/s1357422.htm.

107. The legitimacy of the Coalition invasion under international law is founded upon the argument that the use of force was authorized by either Security Council Resolution 687 or the self-defense provision in Article 51 of the U.N. Charter. *See* Ho, *supra* note 54. By claiming they are acting within the ambit of U.N. authorization, the United Kingdom and the United States are also implicitly acknowledging their obligation to comply with further action the United Nations might take; thus, had the United Nations sought to acknowledge the victors' title, it could have also restricted it as it saw fit. Such action, of course, would have required in return an implicit acknowledgement that the United States and the United Kingdom were indeed not violating the U.N. Charter. The United Nations did this anyway, however, by acknowledging the Coalition as subject to occupation law and not taking action against them. Since the Coalition was willing to accept the constraints of occupation law, it is highly likely that a Security Council Resolution offering it more legal leeway would have also been acceptable.

108. S.C. Res. 1483, *supra* note 2, pmbl. ("[T]he day when Iraqis govern themselves must come quickly . . . ."). The emphasis on speed was reiterated in S.C. Res. 1511, *supra* note 77, pmbl., ¶¶ 6, 10.

109. The Soviet reconstruction of East Germany arguably falls within this latter category, *see supra* note 70, and would now be foreclosed by the modern doctrine of debellatio herein proposed.

110. *See* UDHR, *supra* note 81; ICCPR, *supra* note 78.

tailed not only enabling the emergence of a democratically elected government, but also taking measures to supply the Iraqi people with food, shelter, medicine, and employment.[111] Should the Coalition have neglected these obligations, the title could have passed to the body under whose authority the Coalition claimed to be acting—the United Nations.

Though usually not used in discussions of sovereignty, the concept of a limited title is not foreign to Anglo-American property law.[112] Titles are routinely restricted. They can be temporally limited, as in a life estate, or encumbered with contingencies of many varieties. The United Nations' continuing interest in the Coalition's title could best be described as a contingent remainder. The most apt analogy in property law is, of course, a title held in trust, and indeed the demise of the Trusteeship Council and the U.N. Charter's failure to allow for the possibility that a once self-governing territory may disintegrate have sparked calls for a renewed form of trusteeship.[113]

There is a legal hurdle to invoking debellatio, but that hurdle is hardly insurmountable. While the Fourth Geneva Convention nowhere outlaws debellatio, Article 2 specifies that the Convention applies "to all cases of partial or total occupation of the territory of High Contracting Party."[114] In order for the Convention not to apply in post-invasion Iraq, then, Article 2 would have to be either modified[115]—unlikely, given widespread international antipathy toward the Coalition's actions—or, more likely, reinterpreted to apply only to cases in which a power occupies a territory to which an extant state holds valid title. In other words, the word "occupy" could be read to apply to formalized occupations only, not to the mere presence of foreign forces exerting

111. Extrapolation of this argument yields a conclusion that any time a government does not fulfill these obligations, its title may be revoked. Indeed, some form of this argument seems to have been at work in the removal of Saddam Hussein, who had certainly failed to perform these functions. Whether this is wise policy is beyond the scope of this Note; I only note the existence of these apparent contingencies in other contexts in order to argue for their possible application to the debellatio doctrine.

112. While the intricacies of Anglo-American property law may not provide an intuitive analogy for those readers from other legal traditions, the ubiquity of titles restricted temporally or otherwise in the Anglo-American tradition could have at least aided those best placed to make decisions about a legal framework post-invasion: the United Kingdom and the United States.

113. *See, e.g.*, Mohamed, *supra* note 1.

114. Fourth Geneva Convention, *supra* note 10, art. 2. Since Article 2 also provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them," *id.*, it is possible to interpret the Convention as applicable to the Coalition presence in Iraq regardless of formal occupation status. Indisputably, the Coalition was in armed conflict with Iraq. However, once the Iraqi state's armies had ceased fighting and disbanded, the Coalition was no longer in an armed conflict with the High Contracting Party of Iraq, emergent insurgency notwithstanding.

115. As the U.S. judiciary has sanctioned the unilateral withdrawal from a treaty by past presidents, it is possible that the President could also effectively opt out of individual provisions of the Convention. *See* Goldwater v. Carter, 444 U.S. 996 (1979). Given the U.S. Senate's practice of making reservations, understandings, and declarations, however, combined with the apparent view in *Clinton v. City of New York*, 524 U.S. 417 (1998), that approved legislation comes as a package and not as discrete items, presidential opt-out of individual treaty provisions may be a justiciable encroachment on the Senate's "advice and consent" powers.

authority within the borders of another state.[116] The Allied Forces used similar logic to bypass the Hague Regulations when they invoked debellatio in post–World War II Germany.[117]

The extensive preparation done in advance of Victory in Europe ("VE") Day and the official assumption of Allied sovereignty in Germany highlight the duties that accompany debellatio.[118] Over a year before assuming sovereignty, the Supreme Headquarters for the Allied Expeditionary Force ("SHAEF") authored numerous "papers on such questions as armistice terms, displaced persons, prisoners of war, disarmament, martial law, control of German courts, and co-ordination of movement and transport facilities" and prepared a handbook vetted extensively by senior officials, including President Roosevelt himself.[119] When U.S. troops first began assuming power in parts of Germany, even before VE Day, they came armed with a "handbook [that] included the plan for occupation, initial proclamations, laws and ordinances and numerous functional chapters, including: civil administration, eradication of Nazism, finance and property control, legal, public health, labor, education and religious affairs, food distribution, industry, communications, and transportation."[120] Recognizing that debellatio effectively wipes the legal slate clean, the Allied Forces came with a new, interim legal regime ready to supplant the German law they were displacing. Such action is not only desirable for its obvious stabilizing effects, but may even be an affirmative duty of a victor who has effected factual debellatio in order to prevent anarchy and insurgency from scuttling the timely vindication of the right to self-determination.[121]

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116. To claim that the word "occupation" implicates this international law only in an instance when occupation law is going to apply may sound like a truism, but it is nonetheless a frequently used tactic. *See* Benvenisti, *supra* note 22, at 860 n.2 ("Using sophisticated claims, all occupants in the past three decades avoided acknowledging that their presence on foreign soil was in fact an occupation subject to the Hague Regulations or Fourth Geneva Convention (except for Israel, on a de facto basis, in parts of the areas occupied in June 1967)."). To follow the precedent set by Geneva Convention dodgers may lend further support to a dangerous precedent and decrease the global legitimacy of the Coalition and its invasion of Iraq. Such consequences may be the price of legal leeway to preserve occupation law and yet engage in a desired nation-building exercise until a more suitable legal framework is established.

117. *See* Michael Ottolenghi, Note, *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177, 2191 (2004). In a striking parallel to the Allied efforts at "Denazification" in Germany, the first order of the CPA was entitled "De-Ba'athificaiton of Iraqi Society." Coalition Provisional Authority Order 1 (2003), http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf.

118. *See* FORREST C. POGUE, DEPARTMENT OF THE ARMY, UNITED STATES ARMY IN WORLD WAR II: THE SUPREME COMMAND (EUROPEAN THEATER OF OPERATIONS) 346–47 (1954) (detailing the extensive planning done before Allied forces assumed sovereignty over Germany).

119. *Id.* at 347.

120. Wally Z. Walters, The Doctrinal Challenges of Winning the Peace Against Rogue States: How Lessons from Post–World War II Germany May Inform Operations Against Saddam Hussein's Iraq 20 (Apr. 9, 2002) (strategy research project, U.S. Army War College), http://www.au.af.mil/au/awc/awcgate/army-usawc/walters.pdf.

121. *See id.* at 15–18. Providing a sufficient number of troops in order to enforce the newly announced laws may also be part of the victors' duties; an estimated 1.6 million American troops were in Germany on VE day as part of a systematic, and in some regions simultaneously, effected takeover of civilian functions. *Id.*

The CPA appears to have recognized and attempted to fulfill this duty with its first regulation, which provided that

> [u]nless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.[122]

While the provision that Iraqi law would by default remain in force seems reminiscent of the Hague Regulation mandate to respect the existing law of the occupied territory, the reserved power to change that law if it conflicts with any further order of the CPA makes it clear that previous Iraqi law is but an extraordinarily malleable default. This open conflict with the Hague Regulations illustrates that the CPA was not truly operating within the confines of occupation law, but rather under a modified form of debellatio that carried with it the duty to fill the legal vacuum caused by debellatio's abolition of preexisting law. That the CPA—unlike SHAEF in occupied Germany—chose to fill that void with the default of Iraqi law instead of a body of law carefully tailored to the territory and conflict at hand indicates not dedication to occupation law so much as a regrettable lack of planning.

A title acquired pursuant to the goal of establishing a democratic system that enables self-determination of a people also carries with it the duty to pay attention to the opinions and grievances of those people.[123] The Coalition's acknowledgement of the Governing Council and attention to the influential Grand Ayatollah Ali al-Sistani imply that this duty was better discharged than that of preventing chaos via a clear implementation of a new legal regime with sufficient enforcement power.

IV. The Advantages of Acknowledging Modern Debellatio

There are several distinct advantages to reviving the legal doctrine of debellatio and applying it to nation-building exercises not governed by the United Nations.[124] First, as discussed above,[125] it is valuable to acknowledge the importance of maintaining a robust regime of occupation law in order to constrain future occupiers in situations in which a fundamental transformation of the occupied territory would constitute a violation of the occupied peo-

122. CPA Regulation 1, *supra* note 23, § 2.

123. *See* Feldman, *supra* note 7, at 66–67 ("[S]peech and assembly [rights] are the most effective means for drawing the occupier's attention (and the world's for that matter) to what the occupier is doing wrong.").

124. Nation-building exercises performed under the auspices of a clear Security Council resolution with "specific tasks" delineated for military forces and civilian administration do not implicate occupation law. Scheffer, *supra* note 1.

125. *See supra* note 56 and accompanying text.

ple's right to self-determination, or in which an occupying government sought to exploit the occupied people in order to improve its own position during hostilities.[126] It is not, however, important to maintain a robust doctrine of debellatio, which, in its traditional form, has been widely reviled as repugnant to all advances in human rights law[127] and would create incentives at odds with the goal of preventing aggressive wars. Critics of debellatio are quite right to assert that, when associated with the annexation of occupied territory and subjugation of a sovereign people, debellatio can have no place in a body of international law that recognizes the right to self-determination as *jus cogens*. Thus, there should be no objections to the enervation of debellatio as proposed herein.

Second, applying a modernized doctrine of debellatio to a nation-building endeavor would alleviate the disingenuousness, conflicting mandates, and political uncertainty that accompany the application of occupation law to unabashedly transformative interventions. In Iraq, the factual situation created by the Coalition and the U.N. resolutions simply did not match the legal situation created by the invocation of occupation law. Matching facts to labels not only has the laudable goal of veracity, it more importantly provides the occupied people with real guidance as to what powers their occupiers may legitimately exercise, as well as internationally sound grounds for grievance should the occupiers exceed those powers.

Third, debellatio has the simple advantage of already existing in international law, in contrast to other ad hoc theories proposed to govern nation-building exercises.[128] In the aftermath of the Coalition's invasion of Iraq, the United Nations and the Coalition itself may have asked, if not occupation law, then *what?* Invoking an updated version of debellatio, especially with reference to its successful utilization in post–World War II Germany by the Coalition's members, could provide a theoretical band-aid to the current lack of doctrine to describe nation-building exercises undertaken outside the auspices of U.N. action.[129]

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126. *See* BENVENISTI, *supra* note 3, at 35–40 (describing the German exploitation of the "economy of the occupied territory [of Belgium] to meet the demands of the German war machine" during World War I by regulating Belgian resource consumption, making changes to the Belgian financial structures, and imposing steep taxes). "Anglo-American scholars of the period . . . flatly rejected" German claims of power under the Hague Regulations, and Benvenisti describes the changes introduced by the Fourth Geneva Convention that countered the German interpretation of what sort of goals occupiers could legitimately pursue under occupation law. *See id.* at 42–45.

127. *See supra* note 62.

128. One scholar trying to sort out the Allies' legal status in Germany after World War II dismisses such ad hoc theories: "Germany's unique situation, thefore [sic], explains why the literature has produced many ad hoc solutions, such as an 'occupation of intervention' or a 'fiduciary occupation.' But these ad hoc solutions are legally untenable, because they have no basis in general international law." Josef L. Kunz, *The Status of Occupied Germany Under International Law: A Legal Dilemma*, 3 WESTERN POL. Q. 539–40 (1950).

129. "[T]here is a critical need in world affairs and international law to develop a more effective and legally acceptable means to respond to civilian populations that are at risk or desire participation in their country's political transformation into a more democratic form of government." Scheffer, *supra* note 1, at 859. Scheffer uses the term "transformational occupation" to differentiate such a response from tradi-

Debellatio as such a band-aid would, of course, address only the symptom of the unsettled legal status of would-be nation-builders and not the underlying problems that attend nation-building, especially when resulting from preemptive war. If nothing else, however, applying the much-maligned term "debellatio" might spark further conversations about what circumstances, if any, legitimate nation-building, and what legal regime should regulate such endeavors should they occur legitimately or otherwise.

V. Conclusion

Debellatio has a bad reputation, and it requires significant updating to make it coexist with contemporary ideas of self-determination. Rather than amputating this ancient doctrine in order to conform to latter-day political philosophies, it is tempting to leave it in the grave that its critics have dug for it, especially in light of troublesome questions of who is entitled to invoke it and the circumstances under which it is legitimate.[130]

This temptation, however, is dangerous, when it involves the enervation of occupation law, the body of law necessary to constrain those occupiers who do not pursue democratic goals. The lack of applicable international nation-building frameworks for the United Nations to apply in the wake of Operation Iraqi Freedom has highlighted the larger problem of nation-building after the ratification of the United Nations Charter. While the extensive powers required for effective peacekeeping missions in formerly sovereign but disintegrating states in the 1990s sparked calls for a renewed form of trusteeship, no such system has yet been established. In its absence, the best answer to this problem is not modification of the already elastic occupation law. The actual legal framework applied does not resemble traditional occupation law, and calling it such sets a dangerous precedent for future occupations and has created deadly confusion. The framework under which the Coalition Provisional Authority operated in Iraq is better described as a modern form of debellatio that gave the Coalition contingent, temporary title to Iraq.

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tional belligerent occupations, acknowledging that a gridlocked Security Council may result in such action without Security Council approval. *See id.*

130. This Note has not sought to answer this particular question. For conflicting discussions of the legitimacy and wisdom of the invasion of Iraq, compare W. Michael Reisman, *The Manley O. Hudson Lecture: Why Regime Change Is (Almost Always) a Bad Idea*, 98 Am. J. Int'l L. 516 (2004) with William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 Am. J. Int'l L. 557 (2003).