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In Pursuit of Reconstructing Iraq: Does Self-Determination Matter

Keywords

Self-Determination, International Law: History, Military Law, Military Occupation, Obligations, Rule of Law

IN PURSUIT OF RECONSTRUCTING IRAQ: DOES SELF-DETERMINATION MATTER?

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I. INTRODUCTION

Since the U.S.-led “coalition of willing”¹ invaded Iraq and toppled the Saddam Hussein regime, Iraq has effectively been under the control of the Coalition forces.² One can argue that the Iraqi territory is under belligerent occupation pursuant to international law.³ As an occupying power, the United States and its allies are vigorously attempting to reconstruct Iraq and eradicate the sources of threat to international peace and security.⁴ Among politicians and academics around the world, the legality of the war in Iraq was perhaps the single most controversial issue in the year 2003.⁵ States opposing the attack on Iraq invoked the principles of the U.N. Charter,⁶ while those supporting the cause of the war based their arguments on numerous U.N. Security Council⁷ resolutions and the

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1. See Steve Schifferes, *US Names ‘Coalition of the Willing,’* BBC NEWS, available at <http://news.bbc.co.uk/2/hi/americas/2862343.stm> (last visited Jan. 7, 2003) The United States’ government lists forty eight countries in their “Coalition of the Willing. *Coalition Members*, at <http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html>. (last visited Feb. 23, 2005).

2. See Jordan J. Paust, *ASIL Insights: The U.S. as Occupying Power over Portion of Iraq and Relevant Responsibilities Under the Laws of War*, at <http://www.asil.org/insights/insigh102.htm> (last visited Jan. 7, 2004).

3. See *Id.* (explaining the primacy of fact as the test of whether or not occupation exists). The regulations concerning the laws and customs of war on land annexed to the Hague Convention of 1899 stipulate that territory is considered occupied when it is actually placed under the authority of the hostile army.

4. Dana Milbank & Robin Wright, *Off the Mark on Cost of War, Reception by Iraqis*, WASH. POST, March 19, 2004, at A1.

5. The debates mainly concern the interpretation of relevant U.N. resolutions and the legality of pre-emptive self-defense. See generally Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607 (2003); Michael Kelly, *Time Warp to 1945 - Resurrection of Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT’L L. & POL’Y 1 (2003); Ronald C. Santopadre, Note, *Deterioration Of Limits On The Use of Force and Its Perils: A Rejection Of The Kosovo Precedent*, 18 ST. JOHN’S J. LEGAL COMMENT. 369 (2003); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT’L L. 599 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT’L L. 576 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT’L L. 563 (2003).

6. See, e.g. Franck, *supra* note 5, at 611-12 (rejecting the U.S. arguments that the invasion of Iraq was authorized by Security Council resolutions).

7. See *id.* at 608.

allegedly imminent threat of the Hussein government that justified the use of force in self-defense.⁸ It is even suggested that international law should accept a new paradigm of "collective duty" to prevent unruly regimes from threatening global security with weapons of mass destruction (WMD).⁹

However, there is another important question that one needs to address: how to end the war. There seems to be a long way to go before peace and stability replace the current turmoil in Iraq, and the intermittent violence directed against the occupying powers ceases.¹⁰ Nevertheless, the challenge of restoring public order and safety has come to the forefront, which appropriately leads to question, "How does the Coalition end the war?"

The main motivation for the United States and its allies was to remove the "alleged threat" to international peace and security posed by the former Iraqi leader, Saddam Hussein, in the form of his ostensible WMD programs.¹¹ No one would deny that the future reconstruction of Iraq should be aimed at enabling the Iraqi people to freely pursue freedom and economic recovery. Moreover, the new Iraq needs to address the issue of the long-standing divisions among diverse internal sectarian groups, the Shi'ites, the Sunnis, and the Kurds, in order to build a stable social and political structure serving the peoples' needs.¹² Therefore, the dual tasks of (1) completely eliminating all sources of threat and (2) reconstructing Iraq to serve the interest of its people are fundamental issues to address. The answer to the question "how to end the war?" may be found by undertaking a thorough analysis of the legal implications of belligerent occupation. This is appropriate since the current occupation is at a critical phase during which a new foundation for the political and social systems will soon be established in the devastated country.

The law of belligerent occupation provides a basic framework to determine how, and to what extent, the rights of the Iraqi people should be protected as the war nears its end. As the occupying power builds a new political and social structure for Iraq, close attention must be directed to the Iraqi people's choices and preferences. This U.N. Security Council adopted Resolution 1511 on October 16,

8. See Wedgwood, *supra* note 5, at 578-82 (supporting the exercise of the right of preemptive self-defense against Iraq); Yoo, *supra* note 5, at 567-74.

9. See Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan./Feb. 2004, at 136 (proposing a collective "duty to prevent nations run by rulers without internal checks on their power from acquiring or using WMD").

10. See *The Tyrant in Chains*, THE ECONOMIST, Dec. 16, 2003, at http://www.economist.com/opinion/PrinterFriendly.cfm?Story_ID=2295809 (explaining that, although Saddam Hussein was captured by the United States, the violence shows no sign of abating).

11. See BOB WOODWARD, BUSH AT WAR 349-52 (2002).

12. See Yitzhak Nakash, *The Shi'ites and the Future of Iraq*, FOREIGN AFF., July/Aug. 2003, at 17 (explaining the history of Iraq, with a focus on the political division between the Shi'ites and the Sunnis); *Middle East: Iraqi Sunnis Feel Marginalized Under New U.S. Order*, IPS-INTER PRESS SERVICE, Dec 23, 2003, available at LEXIS, News Library, IPS-Inter Press Service file (explaining the composition of the 25-member interim Iraqi Governing Council (IGC) is already raising a representation issue within Iraq, leaving many members of the Sunni community nervous about their status).

2003.¹³ The Resolution reaffirms the “right of the Iraqi people freely to determine their own political future and control their own natural resources.”¹⁴ Although the Resolution does not explicitly mention the term ‘self-determination,’ it strongly implies that self-determination is at issue.¹⁵ In other words, one is faced with the question of how to accommodate the right to self-determination within the context of belligerent occupation.

The concept of self-determination was not salient at the time of conclusion of the Hague¹⁶ and the Geneva Conventions¹⁷ concerning the laws and customs of war, which sought to regulate the status of the occupying powers.¹⁸ In fact, the self-determination theory was once denounced as political rhetoric.¹⁹ Throughout the twentieth century, however, the international community has gradually accepted this theory as one of the most robust principles of international law.²⁰ It is even believed to constitute a part of *jus cogens*.²¹ Therefore, one needs to raise and answer the question of self-determination in every belligerent occupation context.

This article examines the rules of belligerent occupation and the status of the right to self-determination in the contemporary era, focuses on their mutual relationship at a normative level, and proposes that the right to self-determination should be regarded as an important factor when applying the laws of belligerent occupation. The article also argues that the right of the people to self-determination will limit the options of the occupying powers in managing the political process in the occupied territory.

13. S.C. Res. 1511, U.N. SCOR, 4844th mtg. at 1, U.N. Doc. S/Res/1511 (2003).

14. *Id.*

15. See Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823, 841-42 (2003).

16. See generally Hague Convention Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277 [hereinafter “Hague Convention of 1907”].

17. See generally, Geneva Convention, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter the “Geneva Convention of 1949”].

18. Halim Moris, *Self-Determination: An Affirmative Right Or Mere Rhetoric?* 4 ILSA J. INT'L & COMP. L. 201, 202-03 (1997) (describing the major emergence of self-determination theory in 1916, after the conventions of 1899 and 1907).

19. *Id.* at 202; Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 26 (1992).

20. Mitchell A. Hill, *What The Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120-23 (1995).

21. *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, at 207-08, U.N. Doc. A/56/10 (2001).

II. STATUS OF BELLIGERENT OCCUPATION IN INTERNATIONAL LAW

1. *Modern rules relevant for belligerent occupation*

The earliest government codification of the laws of the war was the famous Lieber Code, which was issued by the U.S. government in 1863.²² Modern international law on belligerent occupation can be found in the 1907 Hague Convention IV,²³ “[r]especting the Laws and Customs of War on Land” together with its Regulations, and the 1949 Geneva Convention (IV),²⁴ along with the 1977 Geneva Protocol I.²⁵ The Hague Peace Conferences in 1899 and 1907 resulted in the conclusion of the Hague Conventions, which serve as “a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.”²⁶ The Hague Regulations annexed to the Convention also contain provisions regulating belligerent occupation.²⁷

World Wars I and II made it clear that a more comprehensive set of international laws was necessary in order to prevent atrocities aimed at civilians from occurring during hostilities.²⁸ The Fourth Geneva Convention reflected such an awareness of the international community.²⁹ Today, the Convention is said to apply universally as part of general international law.³⁰ Although human rights law was not a main theme of international law at the time the Fourth Geneva Convention was concluded, the Convention is generally known as a “bill of rights” for the people in occupied territories because it focuses on the protection of civilians, rather than on the rights of the states engaged in war.³¹

Article 3 provides for the minimum guarantee for fundamental human rights,³² and Articles 27 through 34 specifically provide for the rights of individuals.³³ The rules in the Convention that relate to occupied territories also reflect the need to protect civilians in such territories.³⁴

22. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origin and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L. L. 213, 213 (1998); PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 344 (1997); Ardi Imseis, *On the Fourth Geneva Convention and The Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 87 (2003).

23. Hague Convention of 1907, *supra* note 16, § 1, Ch. 1, art. 1-3, 36 Stat. 2277, at 1907 U.S.T. LEXIS 29, at 17-18.

24. Geneva Convention of 1949, *supra* note 17, part 1, art. 2, 6 U.S.T. 3516, at 1949 U.S.T. LEXIS 484, at 2.

25. Imseis, *supra* note 22, at 89-92; Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1577 (1985).

26. Hague Convention of 1907, *supra* note 16, pmbl., 36 Stat. 2277, at 1907 U.S.T. LEXIS 29, at 4.

27. *Id.* § III, arts. 42-56.

28. Imseis, *supra* note 22, at 89.

29. MALANCZUK, *supra* note 22, at 113.

30. *Id.*

31. Suzanne Nossel, *Winning the Postwar*, LEGAL AFF., May/June 2003, at 18, 20. (explaining that the Geneva Conventions of 1949 were intended to empower the local population under occupation).

32. Paust, *supra* note 2.

33. *Id.*

34. Geneva Convention of 1949, *supra* note 17, §111, art. 27-34, 6 U.S.T. 3516, 1949 U.S.T.

What underlies the law of belligerent occupation is the idea that belligerent occupation is a temporary condition, during which the belligerent occupant acts only as the de facto administrative authority.³⁵ This thought is in line with the Rousseau-Portales doctrine, which asserts that war is about sovereigns and armies, not about subjects and civilians.³⁶ Article 43 of the Hague Convention reiterates the provisional nature of belligerent occupation because it obligates the occupant to respect the laws that are in force in the occupied country.³⁷

Belligerent occupation does not bring about any changes in sovereignty. The ousted sovereign still retains de jure sovereignty.³⁸ The occupant assumes only de facto control over the occupied territory without acquiring any sovereign rights or entitlement.³⁹ The Hague Convention envisaged short-term occupations before the conclusion of a peace treaty.⁴⁰ The occupying power should respect and maintain the existing laws in force in the occupied territory.⁴¹ According to Article 55, the occupying state is to be "regarded only as administrator and usufructuary of public buildings, real estates, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country."⁴²

Since the Fourth Geneva Convention was not intended to replace the Hague Conventions, the Hague rules continue to apply to belligerent occupation.⁴³ Article 4 of Protocol I to the Geneva Convention reaffirms that the occupation of a territory does not affect the legal status of the territory in question.⁴⁴ Modern international law has established rules on the comprehensive prohibition of the use of force, but the law of belligerent occupation is still valid. Furthermore, it is suggested that Hague and Geneva Conventions declare and constitute customary international law.⁴⁵ Irrespective of the legality a particular instance of the use of force, the laws of war and belligerent occupation reflected in such Conventions are binding on all parties to armed conflicts.⁴⁶

2. *Belligerent Occupation: An analogy with overthrowing a legitimate government*

In considering the rights of the people under belligerent occupation, two possibilities for comparison come forward. One is the accession of power by a de

LEXIS 484, at 21-24.

35. Goodman, *supra* note 25, at 1581; Imseis, *supra* note 22, at 91.

36. Goodman, *supra* note 25, at 1579.

37. Hague Convention of 1907, *supra* note 16, art. 43, 36 Stat. 2277, T.S. No. 539.

38. Goodman, *supra* note 25, at 1580.

39. *Id.*

40. Nossel, *supra* note 31, at 18 (explaining the temporary nature of the belligerent occupation).

41. Hague Convention of 1907, *supra* note 16, art. 43., 36 Stat. 2277, at 1907 U.S.T. LEXIS 29, at 37.

42. *Id.*, art. 45, 36 Stat. 2277, at 1907 U.S.T. LEXIS 29, at 37.

43. Imseis, *supra* note 22, at 89-90.

44. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, June 8, 1977, art. 4, 1151 U.N.T.S. 423.

45. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12-13 (4th ed. 1990).

46. See MALANCZUK, *supra* note 22, at 342-46.

facto government after dismantling the previous regime.⁴⁷ The other is belligerent occupation and accession of power by a de facto government involving the subversion of the existing regime.⁴⁸ Another useful comparison treats belligerent occupation similar to colonial rule. This comparison works because colonial rule entails foreign domination, as it was practiced in Asia and Africa during the early twentieth century, in a manner akin to a belligerent occupying force.

These comparisons lead us to focus on the issue of self-determination as such. A de facto government implies the notion of "internal" self-determination,⁴⁹ since the government in question often assumes that there has been a change of political power, although on an unconstitutional basis. Constitutionality is not an absolute or a dominant standard by which the will of people is to be measured, but such a change of political power begs the question: what do the people desire? Colonial rule is related to "external" self-determination, a principle by which a people's status in, and relations with, the international society should be determined on its own. The modern principle of self-determination was formulated as a result of the global process of decolonization after World War I.⁵⁰ Thus, political conditions similar to those of people under colonial rule should be examined in the context of self-determination.

When the law of belligerent occupation was codified in the international forum during the early twentieth century,⁵¹ the principle of self-determination had yet to be recognized as a legal right. It was only after numerous resolutions by the U.N. General Assembly that the self-determination principle seemed to have gained the minimum level of *opinio juris*.⁵² The laws of belligerent occupation and the right of self-determination developed independently of each other in different historical and legal contexts. No matter how temporary belligerent occupation is in nature, it denies the people the right to their own government. Those occupied people have not given their prior consent and, therefore, the consideration of the principle of self-determination in this context is relevant. Before looking into the possible nexus between belligerent occupation and self-determination, it is necessary to examine the modern position of law on the latter.

47. A de facto government here, as opposed to de jure government, refers to a situation where state power goes through abrupt changes by unconstitutional process such as military coup d'etat or revolutions.

48. Belligerent occupation is regulated by the rules in The Hague Conventions and Regulations and the Geneva Conventions, while de facto government is related to the law of recognition of government and the principle of non-intervention into domestic affairs. BROWNLIE, *supra* note 45, at 90-92.

49. Internal self-determination is about people's choice of their own political system within national boundaries. See ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 117 (1994).

50. Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1288 (1991).

51. See Goodman, *supra* note 25, at 1577-79 (describing how the modern rules of belligerent occupation have evolved in international law).

52. MALANCZUK, *supra* note 22, at 326-27.

3. *Self determination*

The principle of self-determination, with its historical origin in the making of nation-states,⁵³ is a relatively new concept in international law.⁵⁴ Only after the nineteenth century was the principle of self determination recognized as a substantial political right on the global stage.⁵⁵ At the end of the World War I, Woodrow Wilson emphasized the importance of self-determination as a fundamental principle for establishing long-lasting peace.⁵⁶ The principle of self-determination, however, did not receive widespread recognition at that time.⁵⁷ The League of Nations did not mention the principle of self-determination and refused to apply this principle to the territories which were under Allied occupation after World War I.⁵⁸ Furthermore, in the *Aaland* controversy, the International Commission of Jurists issued an advisory opinion contending that “the right of national groups... to separate themselves from the state” did not form part of positive international law.⁵⁹

After World War II, the U.N. Charter explicitly referred to the “principle of equal rights and self-determination of peoples.”⁶⁰ Through Articles 1 and 55 of the Charter, self-determination together with the equal rights of peoples, constitute a common principle but, as Rosalyn Higgins contends, the U.N. Charter does not confer self-determination with an absolute status.⁶¹ The Charter is concerned about the “rights of the peoples of one state to be protected from interference by other states....”⁶² However, the articles on non-self-governing territories and international trusteeship do not contain the phrase “self-determination.”⁶³ Self-

53. Chen, *supra* note 50, at 1288 (explaining that the concept of self-determination was born in the 16th century with the emergence of the nation states).

54. In the nineteenth century, John Stuart Mill, in his essay “A Few Words on Non-Intervention,” defended the self-determination of a community, probably on the same premises concerning personal autonomy and freedom. See Michael J. Glennon, *Self-Determination and Cultural Diversity*, 27 FLETCHER F. WORLD AFF. 75, 75-76 (2003) (stating that the defense of community autonomy may actually undermine the personal autonomy when an oppressive community is protected against outside intervention).

55. Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT’L L. 153, 154-55 (1994) (explaining that, as the principles of the new international order became more developed after the formation of the United Nations, self-determination attained the status of an international legal right).

56. Hill, *supra* note 20, at 121-22.

57. *Id.* Wilson’s effort resulted only in “allowing for the adoption of special treaties for the protection of minorities.” J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT’L L. REV. 151, 159-60 (1999).

58. Hill, *supra* note 20, at 122.

59. Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT’L & COMP. L. 443, 447 (1997) (quoting LEAGUE OF NATIONS O.J., Spec. Supp. 1, at 5 (1920)).

60. U.N. CHARTER art.1, para. 2 and art 55.

61. Higgins explains that the concept of self-determination in the U.N. Charter did not include a right of dependent peoples to independence. HIGGINS, *supra* note 49, at 112.

62. *Id.*

63. There is only a reference to ‘self government;’ it is sometimes said that the U.N. Charter ‘implicitly’ recognized the right to self-determination of peoples under colonial rules but such an

determination was neither about a legal right nor about dependent peoples. Many jurists and governments seem to view self-determination, though enshrined in the Charter, as a political façade.⁶⁴

The practice of the U.N. bodies made self-determination a part of the law of the United Nations.⁶⁵ In the 1950s, the U.N. General Assembly began to accept self-determination as a right of the people.⁶⁶ The rise of self-determination to a status of an enforceable legal right of "peoples" materialized as a result of the decolonization process.⁶⁷ The "Declaration on Granting Independence to Colonial Countries and Peoples" was adopted by the U.N. General Assembly as a non-binding resolution in 1961.⁶⁸ That Declaration provided that all people under colonial rule have the right to "freely determine their political status," which is essentially the right to self-determination.⁶⁹ The 1960 Declaration, while acknowledging the right to self-determination, emphasizes the territorial integrity of states.⁷⁰ Although the colonial powers resisted the idea of self-determination as a legal right, the right of people to decolonization became widely pervasive.⁷¹ Resolutions adopted by the U.N. General Assembly are not legally binding on member states but can be accepted as constituting or evidencing *opinio juris*. Moreover, in one academic opinion, the Declaration of 1960 serves as "an authoritative interpretation of the Charter."⁷²

It should be noted that self-determination became a right of the people and not of a state. This distinction is clearer in the development of human rights law. The two human rights covenants of 1966—the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights—include the right to self-determination in their respective first articles.⁷³ This inclusion implies that self-determination is a human right existing outside of the specific historical context of decolonization.⁷⁴

interpretation seems to be based on what Higgins refers to as an incorrect 'popular assumption'. See *id.*

64. BROWNIE, *supra* note 45, at 554. Brownlie says self-determination referred to in the U.N. Charter was regarded as merely of hortatory effect, while Higgins goes a little further by stating that it was not even about dependent peoples. HIGGINS, *supra* note 49, at 112-14.

65. BROWNIE, *supra* note 45, at 554.

66. HIGGINS, *supra* note 49, at 113; Cass, *supra* note 19, at 24-26 (stating that the acceptance of self-determination was reflected in the U.N. Charter and a series of resolutions adopted by the General Assembly).

67. Chen, *supra* note 50, at 1289.

68. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

69. *Id.*

70. This emphasis on territorial integrity is relied on by many who object to a right to secession of a minority group within a state. See HIGGINS *supra* note 49, at 124; Derege Demissie, *Self-Determination Including Secession vs. The Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 169 (1996).

71. HIGGINS, *supra* note 49, at 113.

72. See Taryn Ranae Tomasa, Comment, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247, 263 (1998).

73. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

74. HIGGINS, *supra* note 49, at 114-15.

General Assembly Resolution 2625, the "Declaration of Principles on Friendly Relations," which was adopted in 1970,⁷⁵ is another important document emphasizing the right to self-determination. Self-determination was pronounced to take various forms: it may be "independence," "free association," "integration with an independent state," or "emergence into any other political status."⁷⁶ The essential idea to note is that people are given a choice.⁷⁷ The Declaration of 1970 states that self-determination is not only a right to decolonization, but also a right to be free from foreign domination.⁷⁸

Nothing in the Friendly Relations Declaration is to be construed to undermine "the territorial integrity or political unity of sovereign or independent states [that are] conducting themselves in compliance with the principle of... self-determination and thus possessed of a government representing the whole people belonging to the territory."⁷⁹ This language in the Declaration seems to result in a couple of different interpretations. In one view, the wording seems to suggest the principle of democracy, or 'internal' self-determination.⁸⁰ A more extreme way of interpreting the Declaration can be drawn from the proposition that supports the supremacy of the right to secession over territorial integrity in instances of government oppression and harassment of minorities within its national boundaries.

Self-determination beyond the context of decolonization has been a source of trouble for some countries and has been a subject of heated debates.⁸¹ The issue has been presented in the form of opposition between respect for territorial integrity of states and the right of self-determination, including the right to secede.⁸² States challenged with issues of minority factions within their territorial

75. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 17, at U.N. Doc. A/5217 (1970).

76. *Id.*

77. Hill, *supra* note 20, at 128; Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination And the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 193 (2001).

78. See HIGGINS, *supra* note 49, at 116 (referring to foreign domination reflected the situations in Palestine and Afghanistan).

79. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 17, at U.N. Doc. A/5217 (1970).

80. Nanda, *supra* note 59, at 445-46 (noting that internal self-determination refers to a democratic form of government with wider participation).

81. Steve R. Ratner, *Drawing a Better Line: Uti Possidetis And the Borders of New States*, 90 AM. J. INT'L L. 590 (1996).

82. Self-determination and secession are intertwined with the concept of *uti possidetis*. *Uti possidetis*, which provides that "states emerging from decolonization shall inherit the colonial administrative borders that they held at the time of independence," served as a useful guideline for those seeking liberation from colonial rule, but may at the same time endanger global order by leaving certain minority groups unstable and stimulating secessionist movements. See *id.*

borders fear that the principle of self-determination might motivate minority groups to pursue secession.⁸³ The United Nations, however, has been resolute and consistent in excluding secession from the right to self-determination.⁸⁴

The jurisprudence of the International Court of Justice (ICJ) is another authoritative source in favor of the right to self-determination. In an advisory opinion on Namibia, the ICJ stated that self-determination was made applicable to all people as a result of "the subsequent development of international law" on non-self-governing territories.⁸⁵ In the *Western Sahara* case, the ICJ also endorsed the right of the people to determine their political status by their "freely expressed will."⁸⁶

More recent pronouncements are present in the *East Timor* case.⁸⁷ In 1991, Portugal, as the administering power of East Timor, instituted proceedings against Australia concerning the latter's activities with respect to East Timor.⁸⁸ Portugal asked the ICJ to declare that Australia had failed to respect the duties of Portugal as the administering power and the right of the people of East Timor to self-determination.⁸⁹

The ICJ dismissed Portugal's claims on the ground that in the absence of the consent of Indonesia, a third state, accepting the application would violate the rights and obligations of Indonesia.⁹⁰ In its judgment, however, the ICJ declared that self-determination is "one of the essential principles of contemporary

83. Self-determination has inspired bitter debates on secession of minorities. For example, secession of Bangladesh is an exceptional case to some. Nanda, *supra* note 59, at 450. Some others, however, regard it as an example of secession by the operation of a right to self-determination. Chen, *supra* note 50, at 1292-93. The dissolution of the former Soviet Union and experiences in Eastern Europe has added to the controversy. The view supporting right to secession based on the interpretation of the Declaration of 1970 seems a little flawed. Apart from the Declaration of 1970, which is legally non-binding in itself, there is not enough state practice supporting a right to secession, and the principle of territorial integrity seems to prevail over such a putative right. A more appropriate approach may be that secession is regarded as one political option to protect certain minority group in extreme circumstances. It is one thing to suggest secession as a legal right, and another to suggest it as a political alternative.

84. This determination probably reflects the weight carried by the principle of territorial integrity in the U.N. Charter. Also, it may be that the threat of rampant secession endangers international peace and security; the very values the United Nations was created to protect. See Kolodner, *supra* note 55, at 159-60 (stating that granting the right to secede would produce a highly fragmented and politically unstable international system).

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

86. *Western Sahara*, 1971 I.C.J. Reports 12 (Oct. 16).

87. *Concerning East Timor* (Port. v. Austl.), 1995 I.C.J. 90 (June 30).

88. Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305, 305-11 (1996) (explaining that the core of the dispute was Indonesia's military invasion of the former Portuguese colony of Timor in 1975).

89. *Concerning East Timor*, 1995 I.C.J. at 92.

90. This was the result of application of the so-called Monetary Gold principle. Under the principle, the ICJ cannot adjudicate a dispute where the interests of a state not consenting to the court's jurisdiction constitute the very subject matter of the dispute. Klein, *supra* note 88, at 313.

international law.”⁹¹ Portugal asserted that the rights of people to self-determination had an *erga omnes* character, meaning that the rights involve the obligations to the international community as a whole.⁹² The ICJ was of the opinion that Portugal’s argument was “irreproachable.”⁹³

The ICJ did not give its opinions on the implications of the *erga omnes* character of self-determination. However, many academics regard the principle of self-determination as a *jus cogens* norm in modern international law.⁹⁴ The tendency to label self-determination as *jus cogens* reflects the position of modern law on the comprehensive prohibition of colonization by the use or the threat of force. However, labeling is not the end of the problem. As the exact boundaries of self-determination are controversial,⁹⁵ so too is the result of giving the principle of self-determination a special status in international law.⁹⁶ Another important aspect of self-determination is that it forms one factor that constitutes the theory of democratic governance in international law.⁹⁷ According to Thomas Franck, self-determination “has evolved into a more general notion of internationally validated political consultation.”⁹⁸ This line of argument places more emphasis on internal self-determination than on its external aspect relating to decolonization and

91. *Concerning East Timor*, 1995 I.C.J. at 102. In his separate opinion, Judge Vereshchetin stressed the importance of the views of the people of East Timor with regard to the whole case. According to his analysis, after the adoption of the Declaration of 1960 on the Granting of Independence, the Administering Power has a duty to consult the people of a non-self-governing territory when “the matter at issue directly concerned that people.” Separate Opinion of Judge Vereshchetin, *id.* at 138.

92. Portugal aimed to show that the ‘Monetary Gold’ principle was not applicable in a case where rights *erga omnes* were at issue, but the Court did not accept the argument, stating the *erga omnes* character of a norm and the rule of consent to jurisdiction were “two different things”. *Id.* at 102.

93. *Id.*

94. *Jus cogens*, a peremptory norm, has a firm place in modern international law. According to Article 53 of the Vienna Convention on the Law of Treaties (1969), “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, Nov. 8, 1972, art. 53, 23 U.S.T. 3227, 3237, 8 I.L.M. 679, 698, The International Law Commission (ILC) states that a right to self-determination is one of few accepted peremptory norms of international law. *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, *supra* note 21, at 208, at U.N. Doc. A/56/10 (2001). According to the ILC, *jus cogens* and *erga omnes* rules are almost identical, only with different focuses. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance being entitled to invoke the responsibility of any State in breach. *Id.* at 277-78.

95. Many questions remain unanswered: Is self-determination only about independence, or is it a principle of a continuing application? Do minorities have the right to secession under circumstances?

96. For example, are the rights of minorities to secession also a *jus cogens* norm? If so, what is the status of the principle of territorial integrity of states? It is also related to other fundamental principles such as human rights and international peace. Is the exercise of self-determination that violates human rights acceptable? Or, is the use of force in pursuit of self-determination justifiable?

97. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992) (explaining that the entitlement to democracy in international law has its root in the normative entitlement to self-determination).

98. *Id.* at 55.

nationalism. In other words, self-determination is associated with the victory of liberal democracy all over the world. Self-determination, however, is also said to have contributed to the "undemocratic climate in which ethnic-nationalism... has blossomed into a new, totally credible force" in international politics.⁹⁹

III. SELF-DETERMINATION AND BELLIGERENT OCCUPATION

Applicability of self-determination in the context of belligerent occupation

As demonstrated above self-determination is not an idealistic, rhetorical slogan but a legal right stemming from specific historical experience. The principle, as it stands now, is a legal invention produced to deal with the decolonization process after the establishment of the United Nations.¹⁰⁰ It is not a sacred, God-given right of natural law but a legal conception that resulted from historical struggles and compromises. It is noteworthy that even the U.N. Charter, one of the most important instruments for the protection of human rights, failed to directly associate self-determination with decolonization and national liberation.¹⁰¹ Therefore, it may be rather demanding to state that everyone is entitled to the right to self-determination under all circumstances. Nevertheless, contemporary belligerent occupation may serve as an appropriate setting for the application of the established doctrine of self-determination.

The right of people to self-determination may be realized in many forms, including independence and association with other groups in a federal or non-federal state.¹⁰² In this regard, a theoretical question arises: "Is self-determination to be regarded as 'consumed' once a choice is made?" In case of association, this turns into a controversy on whether the right to self-determination includes a right to secession.¹⁰³ A more general aspect of the question surfaces when people choose to establish an independent state, a decision that most peoples have actually made.¹⁰⁴ Then, is self-determination exhausted once independence is achieved? It may be said that from the moment when independence is achieved, sovereignty and equal rights of a state start to take effect.¹⁰⁵ A state is given sovereign rights and legal guarantees under international law. In the normal conduct of state affairs, then, does self-determination disappear? The answer is no.

99. Russell A. Miller, *Self-determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 608 (2003).

100. Kolodner, *supra* note 55, at 155 (explaining the development of the concept of self-determination after the World War II).

101. HIGGINS, *supra* note 49, at 111-12 (stating that the U.N. Charter focused on the right of the sovereign member states).

102. BROWNIE, *supra* note 45, at 553.

103. Where a people chose to associate with other groups in an existing state, the right of that people to self-determination should probably be regarded as assimilated to the right of the whole people of that state. The right to secession is not about continuous applicability of self-determination, but about who is entitled to self-determination.

104. HIGGINS, *supra* note 49, at 113-14.

105. See U.N. CHARTER, arts.1(2), 55.

International law confers equal sovereignty upon a state—a state is a ‘subject,’ or a distinct actor of international law.¹⁰⁶ Sovereign rights are given to a state, which is different from ‘people’ in the eyes of international law.¹⁰⁷ On the contrary, self-determination is a right of the people, not of a state, and the right continues to exist as long as that group of people exists, whether they constitute a state governing entity or whether that group remains under colonial rule.¹⁰⁸ It may be said that the sovereignty of a state and the right of people to self-determination exist in parallel with each other. When the sovereignty of a state is invoked against colonialism, the right of people to self-determination is to be invoked as well. In this type of scenario, the right to self-determination would come to the forefront, although such a situation cannot legally destroy sovereignty of an occupied state. In short, the right to self-determination—a right for people “to choose for themselves a form of political organization and their relation to other groups”¹⁰⁹—always lies with the people, not with the state.

The U.N. Charter stipulates that friendly relations between states should be based on self-determination, and that states must respect the principle of self-determination in continuing mutual relations.¹¹⁰ The 1966 Covenants also provide for a right to self-determination as a human right,¹¹¹ which is attached to individuals and not consumed as a result of political changes. Therefore, it is only logical to state that people have the ongoing right to self-determination under all circumstances, even in instances of foreign domination.¹¹² Accordingly, there is no reason to exclude self-determination from consideration of the rights of civilians in a territory under belligerent occupation. In Security Council Resolution 1511,¹¹³ however, there is no direct reference to self-determination, which reflects the fact that self-determination as a legal right beyond the historical process of decolonization has yet to be fully acknowledged.¹¹⁴

The nature of belligerent occupation is similar to conditions of colonial rule and has the potential of developing into a new form of colonialism. Belligerent occupation imposes a kind of de facto government in the occupied territory. This de facto component, as opposed to a de jure component relied upon by a sitting authority, indicates that people under belligerent occupation are entitled to the right

106. A state is identifiable as a unit upon which international law confers various rights and duties. See BROWNIE, *supra* note 45, at 58-59.

107. *Id.*

108. As Higgins pointed out, the U.N. Charter provided for self-determination as a right of states, not of peoples, but the subsequent practice of the UN changed the situations. See HIGGINS, *supra* note 49, at 111-21.

109. BROWNIE, *supra* note 46, at 595.

110. See U.N. CHARTER art. 1, para. 2 and art. 55.

111. HIGGINS, *supra* note 49, at 114-15.

112. Foreign domination is still a source of disputes. For example, the occupation of Jerusalem by Israel has caused serious controversies about Israeli sovereignty and the self-determination of the community of citizens of Palestine. See John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 774-80 (1996).

113. See S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/PV.4844 (2003).

114. In some cases of alien occupation, as with Afghanistan in 1987, the United Nations did refer to the right to self-determination. See HIGGINS, *supra* note 49, at 116.

to self-determination. This assertion does not mean that belligerent occupation has created a *de novo* right to self-determination for people to be protected under the laws of war. The right of people to choose their political future continues to exist whether or not there is a normal, non-wartime, government in place.

When The Hague Regulations and the Geneva Conventions were concluded in 1907 and 1949 respectively, the international community was not in the position to foresee that the principle of self-determination could have evolved to its current form. It was only after the practice of the United Nations in 1950s and 1960s that the principle of self-determination was accepted as a part of international law.¹¹⁵ The U.N. Charter was in force at the time of the conclusion of the Geneva Conventions but the Charter was ambiguous about the concept of self-determination.¹¹⁶ Consequently, there was no place for self-determination in the making of the law of belligerent occupation.

Given the status and the meaning of self-determination that is firmly established in modern international law, re-evaluating the duties of the occupying powers, and the rights of the people in occupied territories, becomes important. There is a *prima facie* contradiction between a people's right to self-determination and the existence of belligerent occupation. Belligerent occupation, although temporary in nature, has obtained ruling power not based on the people's will. Thus, the law of belligerent occupation needs to be revised or, at least re-interpreted in a way that incorporates the concept of self-determination which developed independently of international wartime law.

2. Occupation At War in Light of Self-Determination

The first issue needing clarification is the basic relationship between belligerent occupation and self-determination. Belligerent occupation is not a result of the exercise of a people's right to choose their own political destiny, thus, it follows that belligerent occupations contravene the principle of self-determination. Does it follow, then, that belligerent occupation should be legally prohibited? This is the same question facing the rules of war.¹¹⁷ Today, war, as a means of state policy, is illegal, and the prohibition of the use of force lies at the core of modern international law.¹¹⁸ The use of force is only lawful when it is used for the

115. BROWNIE, *supra* note 45, at 595 (explaining that self-determination had not been a positive principle of law before the United Nations tackled the issue of decolonization).

116. HIGGINS, *supra* note 49, at 111-12.

117. See MALANCZUK, *supra* note 22, at 306 (explaining the principle that the rules governing the actual conduct of armed conflict are applicable in cases of armed conflict, whether the conflict is lawful or unlawful under the rules governing the resort to armed conflict).

118. See IAN BROWNIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112-122 (1963) [hereinafter "The Use of Force"]; MALANCZUK, *supra* note 22, at 309-11.

purposes of legitimate self-defense or when the U.N. Security Council authorizes such a use, in accordance with Chapter 7 of the U.N. Charter.¹¹⁹ Once an armed conflict occurs, however, the laws of war begin to impose themselves on every party to the conflict.¹²⁰ An aggressor is to be judged in the light of international humanitarian law *and* the laws of war, which present issues separate from responsibility for the breach of peace.

In theory, the principle of self-determination immediately makes any belligerent occupation illegal, because occupation is inevitably against the will of the people in the occupied territory. Considering that the right to self-determination is a peremptory norm of international law, the illegality of the very existence of belligerent occupation seems more plausible. The *jus cogens* character of the principle of self-determination would disallow every situation that is in violation of the principle. It may be said that belligerent occupation, which violates the core value of people's right to self-determination is simply not permitted.¹²¹ This theoretical prohibition, however, does not deprive the Hague and Geneva Conventions of their *raison d'être*.

When actual belligerent occupation occurs in the course of an armed conflict, certain rules of protection and preservation are to be applied. These rules are found in the Hague¹²² and Geneva laws.¹²³ Those who violate the rules of belligerent occupation are responsible for their breaches without regard to the lawfulness of their acts at the initial phase of armed conflicts.¹²⁴ Therefore, the question comes down to how to incorporate the principle of self-determination into the context of armed conflicts and the subsequent belligerent occupation. In other

119. There are some other forms of use of force, such as humanitarian intervention, which some suggest international law accepts as legitimate. The debates surrounding the legality of humanitarian intervention are mainly about the interpretation of Article 2(4) of the U.N. Charter, and the formation of customary international law. See BROWNLIE, *supra* note 45, at 564-71; Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonialism?*, 25 HOUS. J. INT'L L. 99, 103 (2002).

120. BROWNLIE, *supra* note 45, at 564-71; Marcus, *supra* note 119, at 103.

121. This proposed prohibition of belligerent occupation has yet to be accepted by the actual state practice. The legality of belligerent occupation seems to remain integrated with the legality of the initial use of force that resulted in that occupation. It is also to be reminded that, where states representing the international community impose measures of security on a country for its certain internationally wrongful acts such as aggression, the principle of self-determination, in the form of due consultation of the people, may be precluded. See BROWNLIE, *supra* note 45, at 169-71. Movement of populations and frontier changes, which are definitely against the will of the people concerned, may be pursued in the wake of a war of sanction to prevent future threats to the peace. See *The Use of Force*, *supra* note 118, at 409. Similarly, if the U.S.-led multinational forces are regarded in their exercise of occupation and reconstruction of Iraq as enforcing the decisions of the international community or of the United Nations, their acts concerning the belligerent occupation can be more easily justified.

122. See generally Hague Convention of 1907, *supra* note 16, 36 Stat. 2277, at 1907 U.S.T. LEXIS 29.

123. See generally Geneva Convention of 1949, 75 U.N.T.S. 287, at 1949 U.S.T. Lexis 484.

124. "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation it shall be responsible for all acts committed by persons forming part of its armed forces." Hague Convention of 1907, *supra* note 16, art. 3, 36 Stat. 2277, at 1907 U.S.T. LEXIS 29, at 17-18.

words, how is self-determination balanced with belligerent occupation? The purpose of the laws of belligerent occupation is to protect civilians and to restore order and security in the occupied territory.¹²⁵ Minimizing or preventing miserable conditions inflicted upon civilians is the underlying rationale behind the modern laws of war, and the relevant rules are based on humanitarian needs and causes.¹²⁶

One practical approach to reflect self-determination in this area of wartime law is to restrict the temporal span of belligerent occupation.¹²⁷ It should be understood that belligerent occupation should not exceed a certain minimum period of time. The longer the occupation continues, the more the principle of self-determination is undercut. Fixing a time limit in an inflexible form is probably unrealistic and ineffective because so much depends on the actual conditions of each armed conflict and on specific military needs. As a general principle though, it should be expressly acknowledged that belligerent occupation should continue for the shortest period of time necessary so that the preservation and the exercise of self-determination by the people under occupation is not undermined. Once this general principle is established, more concrete factors that take into consideration individual cases can be considered.¹²⁸

Limiting the duration of belligerent occupation, however, is not a sufficient application of the principle of self-determination to fundamentally illegal situations of foreign domination. Another general principle that needs to be adopted is that belligerent occupation, as long as it exists, should be a temporary process so that self-determination is truly realized. Given that self-determination is a principal factor undermining the legitimacy of belligerent occupation, the final result of occupation should be to lay down the necessary conditions under which the people in the occupied territory can build their own government—one based on a freely expressed will. Helping a country to rebuild itself on its own is not an easy task; it is a much more daunting challenge when the country in question is a hostile enemy under the belligerent occupation, because the occupant has its own needs, such as ensuring security.

The recent experience in the reconstruction of several African nations and the Balkan areas after civil conflicts shows the practically insurmountable obstacles facing a belligerent occupier, even in the absence of widespread armed conflict.¹²⁹

125. Nossel, *supra* note 31, at 20; Imseis, *supra* note 22, at 91.

126. See MALANCZUK, *supra* note 22, at 342-46.

127. Some people believe that rules on belligerent occupation are too idealistic to expect states to observe, and that they need to be revised to accommodate reality of wars. See Goodman, *supra* note 25, at 1581. However, what is more important and urgent is to reflect human rights including self-determination in the existing laws of belligerent occupation.

128. *E.g.*, S.C. Res.1511, U.N. SCOR, 4844th mtg., at U.N. Doc. S/PV.4844 (2003) (urging the Coalition Provisional Authority to return governing authorities to the Iraqi people "as soon as practicable").

129. See Ruth Wedgwood & Harold K. Jacobson, *State Reconstruction After Civil Conflict: Foreword*, 95 AM. J. INT'L L. 1, 1-2 (2001).

The precise methodology of reconstruction and self-determination cannot be dealt with here, but worthy of note are the two correlated aspects of the proposed general principle that belligerent occupation should be about securing self-determination of the people under occupation.

First, in enabling people to exercise self-determination, the occupying powers may have to be allowed to introduce changes to the existing structures of the occupied society. The law of belligerent occupation is based on the temporary nature of occupation and provides that the occupant should respect the laws in force.¹³⁰ Sometimes, however, the existing elements of socio-political organization of the occupied territory may fundamentally preclude any notion of self-determination.¹³¹ In this case, it may not be appropriate to allow the existing conditions to continue. The belligerent occupier may also have to establish proper legal and political systems in order to enable people to represent themselves.¹³² This general statement on the necessary changes that need to be introduced leads us to the second aspect of the principle of self-determination that has to be applied to belligerent occupation.

Belligerent occupants should resist the temptation to excessively “nation build.” The term nation building usually refers to a reconstruction strategy with the goal of bringing about durable peace in a state that has suffered from internal ethnic or religious conflicts.¹³³ It is often said that the reconstruction of failed societies requires more than foreign economic aid, and the notion of nation building refers to helping dysfunctional states, devastated by civil strife or wars, to build the political institutions that make future development possible.¹³⁴

Recognition that financial aid is fruitless where decent governance is not present, inspired the West to focus on nation-building in the reconstruction of chaotic states.¹³⁵ Nation-building implies a deeper involvement in the domestic conduct of political affairs.¹³⁶ Planting specific democratic institutions in a certain country, for example, is a more realistic way to help that country to get out of poverty and political chaos, instead of simply distributing donated funds.¹³⁷ The use of nation-building is also perceived as an effective means to fight against the

130. Hague Convention of 1907, *supra* note 16, art. 43, 36 Stat. 2277, at 1907 U.S.T. LEXIS 29, at 37.

131. *Id.*

132. In Iraq, the Governing Council was composed to represent the Iraqi people. See CNN, *Iraqi Official: Saddam No Longer a Threat* (July 30, 2003), at <http://www.cnn.com/2003/WORLD/meast/07/30/sprj.iq.main/index.html> (last visited Jan. 7, 2004).

133. Quynh-Nhu Vuong, *U.S. Peacekeeping and Nation-Building: The Evolution of Self-Interested Multilateralism*, 21 BERKELEY J. INT'L L. 804, 804-06 (2003) (explaining that peacekeeping operations are increasingly intertwined with nation building designed to lay the foundations for a durable peace in regions devastated by civil conflicts).

134. See Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, FOREIGN AFF., Mar./Apr. 2002, at 4.

135. *Id.*

136. *Id.*

137. *Id.*

threats of terrorism.¹³⁸ But when applying nation-building to a state under belligerent occupation, the fundamental question to ask is: how compatible is the principle of nation building with the principle of self-determination? The answer to this question cannot rule out the notion of nation building but should consider the inherent risks of such a concept.

Nation building efforts are likely to undermine the right to self-determination in a country under belligerent occupation. Political institutions may be chosen and implemented by the occupying powers with the intention of destroying any elements that look intrinsically hazardous to the belligerent occupants.¹³⁹ The building of national institutions has to stop short of the total implementation of specific extraneous political systems, and should focus on the establishment of basic conditions for the exercise of self-determination.¹⁴⁰ Therefore, occupying powers need to strike a reasonable balance between no involvement and too much involvement, when attempting nation-building.

IV. CONCLUSION

Today, the principle of self-determination has the potential to outlaw belligerent occupation altogether. Belligerent occupation, once it occurs, should be subject to limitations imposed by the operation of the principle of self-determination. Since belligerent occupation violates the principle of self-determination, the end of the occupation should foster the right to self-determination. Self-determination may call for an early end to the occupation and may obligate the occupants to secure the necessary conditions to implement the political choice of the occupied peoples. These implications must be legally recognized so that belligerent occupation will not turn into neocolonialism. In terms of the laws of belligerent occupation, occupying powers should be allowed to make minimal changes to the existing political conditions of the occupied society. At the same time, however, too much involvement in the name of nation building may hurt the core elements of self-determination.

The question of how to end the war in Iraq is to be answered by bearing in mind such normative relations between self-determination and belligerent occupation. The United States and its allies established the interim Iraqi Governing Council (IGC), wherein various internal sectors of the Iraqi society were supposedly represented.¹⁴¹ On January 30, 2005, the historic Iraqi election took place, leading to formation of the new government effectively replacing the IGC. Since most Sunnis did not participate in the January election,¹⁴² it remains to be

138. Vuong, *supra* note 133, at 821-22.

139. *Id.*

140. Post-Cold War experiences led foreign aid donors to seek to build in aided countries political parties, law courts, police forces, central banks and newspapers, etc. See Mallaby, *supra* note 134, at 4. It is practically impossible to define a category of institutions that are compatible with self-determination of the population involved, but it may be said that consultation with the people and appropriate international bodies would be useful in finding solutions to these sensitive matters.

141. See Patrick E. Tyler & Richard A. O'Connell Jr., *After the War: Occupation*, N.Y. TIMES, July 15, 2003, at A11.

142. *The Conflict in Iraq: Election; Shiite Coalition Takes A Big Lead in the Iraq Vote*, N.Y.

seen whether the new government can enjoy political legitimacy, which is essential to political and social integration of a majority Shia, Kurds, and Sunnis. The government has a responsibility to write a permanent Constitution of Iraq hopefully by mid-August of 2005, pursuant to which a new general election is to take place soon.¹⁴³

Considering the proposed principle that belligerent occupation should endow people with the right to self-determination, the formation of the new government could possibly serve as a stimulus for a complicated process for rebuilding Iraq by Iraqi's own will. The occupying powers, especially the United States, may be tempted to accomplish a short-term political goal of establishing a pro-U.S. government with which they can easily deal; this is of concern to many.¹⁴⁴ It seems rather dangerous to try to impose certain political systems of U.S. choosing and supporting specific sects more responsive to such systems, because this practice would probably aggravate the existing political division among the religious and ethnic groups within Iraq.¹⁴⁵ The final destiny of the Iraqi people should be left in their own hands. The principle of self-determination must be the primary factor in making every decision concerning Iraq's status. A feasible development strategy may be possible only after the Iraqi people are satisfied with the exercise of their right to self-determination. It should be noted, however, that self-determination is required, not because it warrants success of democracy for the Iraqi people, but because it is to be applied as a legal rule. It is true that self-determination is a theoretical starting point for democratic governance,¹⁴⁶ but the principle of self-determination could arouse ethnic or nationalist awareness, which could end up rejecting the idea of democracy.¹⁴⁷ The distinction between external and internal self-determination shows these opposing perspectives. Given the current situation, it is likely that claims for self-determination lean toward an external aspect of the principle that emphasizes an absence of outside interferences.

The principle of self-determination may hamstring or halt the necessary economic reconstruction and political development toward democracy. Nevertheless, the United States and its allies must accept the reality that the rights of the people under occupation impose fundamental restrictions on the management of that occupation.

TIMES, Feb. 4, 2005, at A1.

143. *Iraq Legislators Set Up Panel to Draft a Constitution*, N.Y. TIMES, May 11, 2005, at A9; *U.S. Presses Iraqi Government To Broaden the Role of Sunnis*, N.Y. TIMES, May 13, 2005, at A11.

144. Tyler & Oppel, *supra* note 141.

145. *Id.*

146. See Franck, *supra* note 97, at 52-54.

147. See Miller, *supra* note 99, at 608.

