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# CAN MIGHT MAKE RIGHT? THE USE OF FORCE TO IMPOSE DEMOCRACY AND THE ARTHURIAN DILEMMA IN THE MODERN ERA

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*Every impulse to protect the weak and help the infirm is noble. The impulse to use the means at our disposal to liberate a people from a government that poses no imminent or prospective threat to us, but is so despotic, violent, and vicious that those suffering under it cannot shake it off, is also noble. The action that gives effect to that impulse may sometimes be internationally lawful. It may sometimes be feasible. It is often—but not always—misconceived.<sup>1</sup>*

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## I

### INTRODUCTION

Anyone familiar with the ancient lore surrounding King Arthur, Merlyn, and the Knights of the Round Table is probably also familiar with the nascent king's struggle with whether "might makes right."<sup>2</sup> After a Socratic discussion with his teacher Merlyn, Arthur, the idealistic student, rejects the famous aphorism and determines that the converse is true—right makes might. Or at least that it should be true. But the strength of Arthur's conviction is put to the test when his beloved wife Guenever is wooed away to France by Sir Lancelot. Once something he desires is at stake, Arthur reneges on his previous conviction and uses force to exact vengeance on Lancelot and the French.

Arthur's struggle is one that continues today on a much larger stage and with much larger stakes. In contemporary parlance, the question of whether might makes right translates into the geopolitical question of whether it is acceptable and desirable to impose democracy by force. Does the ability to nation-build give one the right to do so? Does the end justify the means?

The saliency and complexity of the contemporary debate over whether nations should use force, an often-condemned means, to establish democracy, a

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1. 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).

2. See generally T.H. WHITE, *THE SWORD IN THE STONE* (Philomel Books 1993) (1938); T.H. WHITE, *THE ONCE AND FUTURE KING* (Ace Books 1996) (1939); *CAMELOT* (Warner Bros. 1967).

generally lauded end, can be evinced by the self-conflicting statements of the most prominent U.S. leaders. Before being elected President, George W. Bush vocally denounced the practice of nation-building.<sup>3</sup> In one stump speech after another during the 2000 presidential campaign, Bush declared, “I don’t think our troops ought to be used for what’s called nation-building.”<sup>4</sup> He criticized Al Gore, stating, “I’m worried about an opponent who uses nation-building and the military in the same sentence.”<sup>5</sup> But in one of the more famous “flip-flops” in recent political history, once in office and confronted with an array of daunting foreign-policy challenges, President Bush became an active nation-builder.<sup>6</sup> The President used force to bring the Taliban to its knees and create a fledgling democracy in Afghanistan. He then invaded Iraq with the end goal of establishing a democracy there, as well.<sup>7</sup> Similarly contradictory sentiments have been expressed by presidential hopeful Senator Barack Obama, who declared that “we should be more modest in our belief that we can impose democracy on a country through military force. . . . [W]e should be clear that the institutions of democracy—free markets, a free press, a strong civil society—cannot be built overnight, and they cannot be built at the end of a barrel of a gun.”<sup>8</sup> In the very same speech, though, Obama praised those who “built democracy’s arsenal to vanquish fascism, and who then built a series of alliances and a world order that would ultimately defeat communism,”<sup>9</sup> seeming to extol and vindicate the previous U.S. efforts to impose democracy by force. Indeed, at least part of the Cold War involved “hot” wars that were, in some instances, efforts to combat communist satellite states and install “democratic” bulwarks. These two leaders’ struggles to nail down a definitive answer on whether force should ever be used to impose democracy exemplify some of the challenges in evaluating the practice. The goal of this note is to further unpack these legal, moral, and political complexities and to provide the start of an answer.

Part II will address whether the use of force to impose democracy passes international legal muster. Part III will address the practicalities and policy

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3. Nation-building, here, describes using military forces to help recraft a foreign country’s government.

4. Governor George W. Bush, The Second Gore–Bush Presidential Debate (Oct. 11, 2000), [http://www.debates.org/pages/trans2000b\\_p.html](http://www.debates.org/pages/trans2000b_p.html) (last visited Feb. 18, 2008).

5. Joe Klein, *It’s Time for Extreme Peacekeeping*, TIME, Nov. 24, 2003, at 25 (quoting George W. Bush), available at <http://www.time.com/time/magazine/article/0,9171,1006280,00.html>.

6. See Terry M. Neal, *Bush Backs into Nation Building*, WASH. POST, Feb. 26, 2003, available at <http://www.informationclearinghouse.info/article1710.htm> (last visited Feb. 18, 2008).

7. This is not to say that the Bush Administration did not have other goals and reasons for invading Afghanistan and Iraq. Certainly, in the wake of 9/11, a military response in Afghanistan seemed, by most accounts, a necessary, measured retaliation. Even in Iraq there were other goals attached, namely the destruction of Weapons of Mass Destruction. However, these additional objectives do not alter the fact that force was used for the purpose of establishing working democracies in these nations. See Francis Fukuyama, *Nation-Building 101*, ATLANTIC MONTHLY, Jan.–Feb. 2004, available at <http://www.theatlantic.com/doc/print/200401/fukuyama> (last visited Feb. 18, 2008).

8. Sen. Barack Obama, A Way Forward in Iraq, Remarks Before the Chicago Council on Global Affairs (Nov. 20, 2006), available at [http://obama.senate.gov/speech/061120-a\\_way\\_forward\\_in\\_iraq/index.html](http://obama.senate.gov/speech/061120-a_way_forward_in_iraq/index.html) (last visited Feb. 18, 2008).

9. See *id.*

questions to be considered when deciding whether to impose democracy through force. The conclusion to each of these sections will be the same: that democracy through force is not only illegal, but also impracticable and undesirable from a policy perspective. But the similarity between the conclusions of Parts II and III should not lead one to believe that the debate about imposing democracy through force is a clear-cut one. Far from it.

## II

### INTERNATIONAL LEGAL PERSPECTIVE

Of the two perspectives on imposing democracy through force, the law probably provides the more definitive answer. The United Nations Charter, a binding, multilateral treaty, serves as the bedrock foundation governing the use of international military force.<sup>10</sup> In no uncertain terms, Chapter I, Article 2(4) prohibits the use of force by states against other states. It declares that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>11</sup> Moreover, the Preamble of the Charter affirms that its goals are to “save succeeding generations from the scourge of war,” to “maintain international peace and security,” and to “live together in peace.”<sup>12</sup>

The Charter identifies two exceptions to this general prohibition on the use of force. First, Chapter VII, Article 39, states that the UN Security Council shall determine whether a threat to the peace, breach of the peace, or act of aggression exists.<sup>13</sup> If the Security Council so determines, Article 42 gives it the power to authorize the use of force to maintain or restore international peace and security in the event that other actions not involving armed force prove ineffective.<sup>14</sup> Hence, for democracy through force to be legal under this provision of the Charter, it must be sanctioned by the Security Council.

The second exception comes in Chapter VII, Article 51, which preserves a nation’s “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>15</sup> By its terms, Article 51 seems to indicate that there must be an actual, armed attack before a nation could respond in self-defense. Thus, presumptively, for the imposition of democracy through force to be legal under this section, it would have to be in response to an actual armed attack.<sup>16</sup> Even

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10. MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 210 (2005).

11. UN Charter art. 2, para. 4, *available at* <http://www.un.org/aboutun/charter>.

12. UN Charter pmbi.

13. UN Charter art. 39.

14. UN Charter art. 42.

15. UN Charter art. 51.

16. There is some reason to believe that self-defense under Article 51 can be anticipatory in nature and in response to imminent threats as opposed to actual attacks. *See* discussion *infra* Part II.

then, however, the use of force would be constrained by the conditions of necessity and proportionality,<sup>17</sup> which are rules of customary international law.<sup>18</sup> Necessity and proportionality would require the initial armed attack to be so extensive as to require a regime change to extinguish the threat.<sup>19</sup> Presumably, examples of armed attacks that would legally justify such an extensive use of force were those during World War II in response to expansionism by Japan and Germany. Ostensibly, nothing short of all-out control and reforming the Japanese and German governments would have sufficed to eliminate the threat those nations posed. As a consequence, the Allied response arguably met the requirements of necessity and proportionality.

In addition, there is a generally recognized right to anticipatory self-defense.<sup>20</sup> Prior to adoption of the UN Charter, which established the right to self-defense outlined in Article 51, customary international law permitted a nation to pursue a would-be aggressor before it actually attacked, and to exercise defensive force when a threat was imminent. Following the Suez Canal Crisis in 1956, debate emerged about whether Article 51 had extinguished previously established customary law, including this right to anticipatory self-defense, and about whether Article 51 includes the customary interpretation that a nation need not wait for the would-be aggressor to actually attack, but could instead engage when the threat was imminent.<sup>21</sup> The debate became largely immaterial, however, because the right to anticipatory self-defense survives, one way or another, and was later recognized as extant during the Six Day War. When debating whether the Israeli attack on Egypt during the Six Day War of 1967 was justified under Article 51, the UN General Assembly seemed to recognize the right to anticipatory self-defense.<sup>22</sup> This debate surrounding the Six Day War convinced many to interpret Article 51 as sanctioning the use of force in “anticipatory self-defense, whe[n] an attack was

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17. The requirement for such restraint was a part of the original formulation surrounding anticipatory self-defense as formulated by Daniel Webster after the *Caroline* affair. See *infra* notes 25–26 and accompanying text.

18. Customary international law exists or is created when two criteria are met. The first is an objective criterion that focuses on whether there is general and consistent state practice. The second, more subjective criterion, known as *opinio juris*, requires that the state action in question be taken out of a sense of legal obligation. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute]; Mary Ellen O’Connell, *Taking Opinio Juris Seriously: A Classical Approach to International Law on the Use of Force*, in *CUSTOMARY INTERNATIONAL LAW ON THE USE OF FORCE: A METHODOLOGICAL APPROACH* 9, 13 (Enzo Cannizzaro & Paolo Palchetti eds., 2005).

19. See O’CONNELL, *supra* note 10, at 278–79 (referring to an ICJ advisory opinion discussing the “well established” rules of necessity and proportionality).

20. Stephen J. Cox, *Comment: Confronting Threats Through Unconventional Means: Offensive Information Warfare as a Covert Alternative to Preemptive War*, 42 HOUS. L. REV. 881, 903 (“That customary international law recognized this right [of anticipatory self-defense] well before Article 51 existed is not debated.”).

21. Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 45 (Council on Foreign Relations, Inc. ed., 2d ed. 1991); see also O’CONNELL, *supra* note 10, at 246 (examining the concept of imminence after Israel’s Six Day War).

22. O’CONNELL, *supra* note 10, at 246; Cox, *supra* note 20, at n.141.

imminent or occurring, even if it had not yet occurred.”<sup>23</sup> Hence, either as a matter of surviving custom or under Article 51, anticipatory self-defense is still a legitimate use of force under international law. Whether the right of anticipatory self-defense exists as a result of custom or by adoption of Article 51 is significant only to the extent that custom would limit it to individual self-defense, whereas the Charter would establish a right of collective self-defense.

The key inquiry regarding anticipatory self-defense, whether it be under the Charter itself or under customary international law, is whether the attack is imminent. A hard-and-fast rule is hard to craft, but some examples help illustrate the outer edges of what is “imminent.” The principle of anticipatory self-defense was born out of a dispute between the United States and Britain in 1837, when the British attacked a private U.S. vessel, the *Caroline*.<sup>24</sup> At the time, the British were at war with Canada and suspected the *Caroline* of bringing munitions to Canadian insurgents. U.S. Secretary of State Daniel Webster claimed that the only way to justify an anticipatory attack of this kind was if the “necessity of self-defence [was] instant, overwhelming, leaving no choice of means and no moment for deliberation”<sup>25</sup> Webster further contended that the response must entail “nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”<sup>26</sup> British Minister of Defense Lord Ashburton seemed to agree on the standard of imminence, but disagreed as to exactly what events or behavior constituted “imminence”—he claimed the situation of the *Caroline* fit Webster’s description of what justified anticipatory self-defense “in as high a degree as [did] any case of a similar description in the history of nations.”<sup>27</sup> Nevertheless, Webster’s formulation of imminence became woven into the fabric of customary international law.

The debate about the standard’s scope reemerged a century later in 1967 with Israel’s military response to Egypt’s military build-up along its border just prior to the Six Day War. The military build-up and posturing by Egypt was seen by most of the international community as justifying Israel’s attack: the threat to Israel was imminent enough.<sup>28</sup> But the Security Council condemned

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23. O’CONNELL, *supra* note 10, at 246.

24. See Wolf Schäfer, Learning from Recent History, Provost’s Lecture on Global Issues at Stony Brook University n.2 (Oct. 15, 2003), <http://www.sunysb.edu/globalhistory/PreventiveWar.shtml>; Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in the Age of Disequilibrium*, 100 A.J.I.L. 88, 101 (2006).

25. Anthony Dworkin, *Iraq and the “Bush Doctrine” of Pre-Emptive Self-Defence*, CRIMES OF WAR PROJECT, Aug. 20, 2002, <http://www.crimesofwar.org/expert/bush-intro.html> (last visited Feb. 18, 2008) (quoting Daniel Webster); see also STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 355–56 (3d ed. 2002) (discussing Webster’s now “classic statement”).

26. Schäfer, *supra* note 24, at n.2 (quoting Daniel Webster).

27. Letter from Lord Ashburton, British Minister of Defense, to Daniel Webster, U.S. Secretary of State (July 28, 1842), available at <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm#intro>.

28. See O’CONNELL, *supra* note 10, at 246.

Israel's subsequent attack and the destruction of a nearly completed Iraqi nuclear reactor as unjustified—no imminent threat had existed.<sup>29</sup>

Though no bright line exists between what is and is not imminent, these and other examples<sup>30</sup> demonstrate a general consensus that a visible mobilization of military forces constitutes an imminent threat, but simply building nuclear reactors or less-threatening weapons arguably does not. For the imposition of democracy through force to be justified as anticipatory self-defense, then, a nation would have to demonstrate that the absence of democracy, or the state's failed or rogue status, posed an imminent threat to its security, one so massive as to justify total regime change. Given how "imminent threat" has so far been interpreted, it would be extremely difficult, even under the most liberal interpretation, to justify such an attack as anticipatory self-defense.

Since the attacks of September 11, 2001, the United States has offered a more expansive view of imminent threat and armed attack as a basis for invoking the right to anticipatory self-defense. The National Security Council (NSC) argues in its 2002 report, *The National Security Strategy of the United States of America*, that the concept of imminent threat must be adapted to deal with rogue states and terrorists who do not employ conventional means.<sup>31</sup> The NSC further contends that as the size of the threat or the magnitude of the harm expands, the need for certainty that the attack will occur correspondingly decreases. Moreover, given that a missile could be fired from the Middle East and reach the United States in a matter of minutes, the threshold or imminence of the threat is heightened. Witness the birth of the "Bush Doctrine" and its focus on merging anticipatory self-defense with the principle of preemption. Indeed, as early as the Afghanistan conflict, "[U.S.] officials and decision-makers who sought to solve the Afghanistan problem inflated the principle of self-defense so that international law would not be constrained by matters of temporal limitation, such as the imminence of future attacks or the need for immediacy required to repel an actual attack."<sup>32</sup> In justifying the 2003 invasion of Iraq, the Bush Administration relied in part on Iraq's alleged build-up of weapons of mass destruction, its support of terrorists, and the rogue nature of Saddam Hussein's leadership as posing a sufficiently imminent threat.<sup>33</sup> The Administration used this alleged threat of Iraq to justify not only initial U.S. attacks, but also the regime change that ensued and U.S. efforts to install

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29. See S.C. Res. 487 ¶ 1, U.N. Doc. S/RES/487 (June 19, 1981), as reprinted in O'CONNELL, *supra* note 10, at 252–53.

30. See, e.g., Michael J. Kelly, *Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSN'T'L L. & POL. 1, 29 (discussing how the U.S. blockade was a use of force, but was generally accepted by the Security Council as justified in response to the imminent threat posed by nuclear warheads in Cuba).

31. NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

32. Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375, 380 (2004).

33. President George W. Bush, Remarks at the United Nations General Assembly (Sept. 12, 2002), <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html> (last visited Feb. 18, 2008).

democracy. According to the contemporary U.S. government interpretation, therefore, democracy through force is legally justified whenever a state postured similarly to Iraq or Afghanistan exists.

The extent to which the Bush interpretation of preemption is international law, however, is questionable. The U.S. action in Iraq, though supported by the Coalition of the Willing, was not endorsed by the Security Council and was condemned by much of the international community.<sup>34</sup> This lack of consensus, and the dearth of other uses of force justified rhetorically on similar grounds, indicate that the Bush Doctrine, as embodied in the 2002 National Security Strategy, has not reached the level of widespread practice or *opinio juris* necessary to be considered customary international law. As a result, democracy through force, without more, is probably still illegal under international law.

Another potential avenue for legally justifying the imposition of democracy through force is as a response to humanitarian crises. Although the Charter does not explicitly authorize interventions to alleviate humanitarian crises, there is some debate as to whether either pre-Charter- or newly developed international custom permits it. Pre-Charter humanitarian interventions are numerous, including interventions by France, Britain, and Russia against Turkish massacres of Greeks in 1830; the intervention in 1860 by Austria, France, Britain, and others in Syria; and the 1877 Russian intervention in Turkey in response to Turkey's persecution of Christians in Eastern Europe.<sup>35</sup> Whether these and other instances of humanitarian interventions constitute customary international law is far from clear. Many scholars think they do;<sup>36</sup> other scholars do not.<sup>37</sup> What matters more than the intellectual community's acceptance of the practice of humanitarian intervention is government practice and acceptance. Such international acceptance is hard to gauge, and that ambiguity makes the argument that humanitarian intervention is established law difficult to maintain.<sup>38</sup> Indeed, it is doubtful that the pre-Charter interventions were taken out of a sense of legal obligation.<sup>39</sup> Further, in many cases, humanitarian interventions—such as those in Greece, Syria, and

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34. Richard Stevenson & Warren Hoge, *Bush, and Allies Will Meet to Seek Ways to Sway U.N.*, N.Y. TIMES, Mar. 14, 2003, at A1; *Chirac Says France Will Veto U.N. Resolution on Iraq*, ONLINE NEWS HOUR, Mar. 10, 2003, [http://www.pbs.org/newshour/updates/iraq\\_03-10-03.html](http://www.pbs.org/newshour/updates/iraq_03-10-03.html) (last visited Feb. 18, 2008).

35. Richard Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (John Norton Moore ed., 1974), as reprinted in O'CONNELL, *supra* note 10, at 306–15.

36. O'CONNELL, *supra* note 10, at 307–08 (listing scholars such as “Grotius, Vattel, Wheaton, Heiberg, Woolsey, Bluntschli, Westlake” (quoting Manouchehr Ganji)).

37. *Id.* (listing scholars Ganji and Brownlie); see also Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD*, *supra* note 35, at 217, as reprinted in O'CONNELL, *supra* note 10, at 299–306.

38. PETER MALANCZUK, *HUMANITARIAN INTERVENTION AND THE LEGITIMACY OF THE USE OF FORCE* 11 (1993).

39. See Brownlie, *supra* note 37, as reprinted in O'CONNELL, *supra* note 10, at 300–01.

Turkey—were accompanied by ulterior motives as the balance of power in Europe was shifting.<sup>40</sup>

Assuming *arguendo* that pre-Charter custom did authorize humanitarian intervention, the question remains whether that custom survived the Charter. Some argue that given the Charter's main purposes—to maintain peace and protect human rights—humanitarian interventions are still legal, even though the Charter does not specifically authorize them. Others contend that the Charter bans the use of force only to the extent that it affects the “territorial integrity” or “political independence” of the state against which force is directed.<sup>41</sup> Further, especially since the end of the Cold War, humanitarian interventions have become increasingly frequent—notable examples being Kosovo and, albeit belatedly, Rwanda. Nevertheless, the international community seems to lack a strong degree of consensus on the issue. It would be hard to say that the practice has become so ubiquitous as to entrench it in the law or that when nations did intervene, they did so out of a sense of legal (as opposed to moral) obligation. The questions and scrutiny surrounding NATO's activities in the Balkans during the 1990s exemplify the lack of crystallization required for a custom to take shape.<sup>42</sup> Moreover, the world community's reluctance to intervene militarily in the Sudan indicates that, despite an ostensible genocide, much of the world views unilateral humanitarian intervention as lacking the force of law. The world community is reticent to act in the absence of Security Council approval.<sup>43</sup>

Thus, it is doubtful that humanitarian interventions represent valid expressions of the use of force under international law. But even if they did, they would still be limited by the just-war requirements of proportionality and necessity, which apply equally to measures of humanitarian intervention and self-defense.<sup>44</sup> This is to say, even if intervening were legal, imposing a new regime would be acceptable only when the local government was incapable of changing its behavior. In many circumstances—such as Rwanda—total regime

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40. *Id.*; MALANCZUK, *supra* note 38, at 7.

41. UN Charter art. 2, para. 4; *See also* Lillich, *supra* note 35, as reprinted in O'CONNELL, *supra* note 10, at 308; AHMED M. RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT: ITS DEVELOPMENT AND DEFINITION IN INTERNATIONAL LAW 120–21 (1979).

42. *See* DANA H. ALLIN, INT'L INSTITUTE FOR STRATEGIC STUDIES, NATO'S BALKAN INTERVENTIONS, 347 ADELPHI PAPERS 57–59 (2002); Anup Shah, *The Kosovo Crisis*, GLOBAL ISSUES, Jan. 21, 2001, <http://www.globalissues.org/Geopolitics/Kosovo.asp> (last visited Feb. 18, 2008) (demonstrating the widespread and divergent debate surrounding the legality of force in the face of humanitarian crises and how crystallization of custom has occurred as a result).

43. TED DAGNE, CONGRESSIONAL RESEARCH SERVICE, SUDAN: HUMANITARIAN CRISIS, PEACE TALKS, TERRORISM, AND U.S. POLICY 7 (2006), available at <http://www.usembassy.it/pdf/other/RL33574.pdf>. There may be other geopolitical reasons why countries such as the United States have been unwilling to act in Sudan. Such reasons include hope for a peaceful settlement, involvement by the African Union, and fears of American military overstretch.

44. Eric A. Heinze, *Waging War for Human Rights: Toward a Moral Legal Theory of Humanitarian Intervention*, 3 HUM. RTS. & HUM. WELFARE 83, 85 (2003), available at <http://www.du.edu/gsis/hrhw/volumes/2003/heinze-2003.pdf>.

change will be the only plausible option. In others, perhaps a more limited intervention is possible.

That said, there seems to be an emerging body of practice and belief that in some situations—when the atrocities are so egregious—nations should not sit around idly waiting for Security Council authorization before acting. And in some instances, working to reinstall a more benevolent government, presumably a democratic one, will be the only tenable path forward. Indeed, in the wake of NATO's unauthorized aerial attacks on Serbia, then-Secretary-General of the UN, Kofi Annan, said,

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?<sup>45</sup>

This rhetorical question no doubt provides its own answer. Unilateral or multilateral action in these circumstances, though perhaps not authorized by the letter or by customary law, would have nevertheless been acceptable. The difficulty is determining when such an atrocity is occurring, and, of course, who is to make that determination. Certainly not the UN—that is the very body that Annan recognizes was too slow to act. Allowing nations to decide unilaterally when the situation necessitates, first, intervention and, second, the completion of the job by installing a new government, opens up a fairly large loophole in international law for the use of force with no potential check except the opprobrium of the international community. In many cases such opprobrium may be sufficient; in others, perhaps not. Certainly, world opinion had staying power—even for the United States in the context of Iraq. Although ultimately the Bush Administration flouted the Security Council, it mounted an intense campaign and delayed action to try and appease the international community and gain as much rhetorical, if not military, support as possible.<sup>46</sup>

Nevertheless, under current international law, except perhaps in the most extreme “dark days and hours,” might does not make right. The UN Charter's prohibition on the use of force applies equally to force used to impose democracy, however noble the purpose. If the Security Council authorizes the action, it is, of course, legal. If the use of force is in response to a massive invasion or attack by a hostile state, such as those witnessed during the Second World War, it would arguably be legal to retaliate and impose a new rule of law. If the Bush Doctrine gains wider acceptance in the international community, then perhaps the doctrine of preemption will authorize democracy through

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45. Press Release, Secretary-General Presents His Annual Report to General Assembly, U.N. Doc. SG/SM/7136, GA/9596 (Sept. 20, 1999), *quoted in* Reisman, *supra* note 1, at 521.

46. See, e.g., *How Powell's Evidence Compares to Findings from Prior Intelligence*, N.Y. TIMES, Feb. 7, 2003, at A11; *Powell: Iraq Hiding Weapons, Aiding Terrorists*, CNN ONLINE, Feb. 6, 2003, <http://www.cnn.com/2003/US/02/05/sprj.irq.powell.un> (last visited Feb. 18, 2008) (illustrating efforts the United States undertook to persuade the international community).

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force, though it would still be limited by the principle of proportionality. But until then, absent Security Council authorization or an armed attack, imposing democracy through force is illegal under international law.

### III

#### POLICY PERSPECTIVE

The question whether might makes right has been answered in the negative from a legal perspective. Although strong arguments support it, imposing democracy through force is similarly undesirable from a policy perspective. The main arguments in its support are aligned along two different themes—one liberal, one conservative. The liberal theme focuses on the humanitarian aims of imposing democracy—giving people political and economic freedom. The more conservative theme revolves around security—reducing, in the short-term, any direct threat posed by dictators hostile to democratic interests and, in the long term, leading to a more interdependent, democratic world that is less likely to engage in warfare. The policy arguments opposed to imposing democracy through force focus on the principles of sovereignty and pluralism, as well as on the obstacles to actually being successful at bringing about democracy. Finally, the risks of violence and immediate loss of lives are obvious and compelling reasons why the policy is undesirable.

#### A. Why Might Should Make Right

The conservative argument for supporting a policy of permitting the imposition of democracy through force is that it enhances security for the already democratic world. As Francis Fukuyama has described it, “[t]he fact is that the chief threats to us and to world order come today from weak, collapsed, or failed states. Weak or absent government institutions in developing countries form the thread linking terrorism, refugees, AIDS, and global poverty.”<sup>47</sup> According to Fukuyama and other pro-interventionists, the only way to turn these “weak” states into stable ones that no longer pose military threats, terrorism threats, or AIDS threats is to intervene and establish cure-all democratic institutions. To Fukuyama, democracy, once in place, will lead to a more peaceful, stable country: “A lot now rides on our ability not just to win wars but to help create self-sustaining democratic political institutions and robust market-oriented economies, and not only in these two countries [Afghanistan and Iraq] but throughout the Middle East.”<sup>48</sup>

There are a few problems with Fukuyama’s view that the existence of failed states justifies intervention to impose democracy. For starters, it is difficult to ascertain both when a state is truly failed or weak enough to pose a significant threat to the international community and who is responsible for making that

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47. Fukuyama, *supra* note 7.

48. *Id.*

determination.<sup>49</sup> If individual states are able to act unilaterally to impose democracy, then without question the door is opened for opportunism as nations that seek to gain from the invasion are confronted with few obstacles. Moreover, whereas intervention in unstable and potentially dangerous states may reduce some security risks, invasion also creates new, often more-dangerous risks. The war in Iraq demonstrates that although one threat (Saddam Hussein) was removed, the war sparked sectarian violence and, by destabilizing a country, created a terrorist training and recruiting ground.<sup>50</sup> As recognized by the National Intelligence Estimate, the war in Iraq has served as a rallying cry for radical Muslims and as a powerful recruiting tool, increasing the threat of attack against the United States.<sup>51</sup> Violence and war often create opportunities for other security and humanitarian threats such as the spread of disease<sup>52</sup> and refugee camps.<sup>53</sup> Moreover, conflict often inevitably leads to food shortages as economies slow or stop in order to cope with the violence.

Nevertheless, those advocating the imposition of democracy through force point to the internationally recognized effects of democracy in promoting individual liberty and economic development. In 1998, then-Secretary-General Kofi Annan issued a report entitled “The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa,”<sup>54</sup> which focused on and emphasized the crucial role democracy can play in cultivating “an environment where peace and development can flourish.”<sup>55</sup> No doubt establishing democratic governance is a laudable goal, and the economic interdependence often associated with it can lead to a more peaceful world.<sup>56</sup>

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49. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L. L. & POL'Y 903, 906 (1997).

50. See generally DIRECTOR OF NAT'L INTELLIGENCE, DECLASSIFIED KEY JUDGMENTS OF THE NATIONAL INTELLIGENCE ESTIMATE “TRENDS IN GLOBAL TERRORISM: IMPLICATIONS FOR THE UNITED STATES” DATED APRIL 2006 2, [http://hosted.ap.org/specials/interactives/wdc/documents/terrorism/keyjudgments\\_092606.pdf](http://hosted.ap.org/specials/interactives/wdc/documents/terrorism/keyjudgments_092606.pdf) (last visited Aug. 31, 2007).

51. *Id.*

52. See, e.g., ANTHONY ZWI & PILAR RAMOS-JIMENEZ, WORLD HEALTH ORGANIZATION [WHO], CONFLICT, CRISIS AND INFECTIOUS DISEASE (2004), <http://www.who.int/tdr/publications/tdrnews/news68/conflict.htm> (last visited Feb. 18, 2008).

53. See, e.g., KURT MILLS, THE FIVE COLLEGE PROGRAM IN PEACE AND WORLD SECURITY STUDIES, REFUGEES, FORCIBLE DISPLACEMENT, AND INTERNATIONAL SECURITY, <http://pawss.hampshire.edu/topics/refugees/index.html#refugees> (last visited Sept. 1, 2007).

54. UN Secretary-General, The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa, delivered to the Security Council and the General Assembly, UN Doc. S/1998/318, A/52/871 (Apr. 13, 1998), construed in Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 322 (1998).

55. *Id.* ¶ 77; see also Nowrot & Schabacker, *supra* note 54, at 322.

56. See Norman Angell, *The Great Illusion*, in CONFLICT AFTER THE COLD WAR: ARGUMENTS ON CAUSES OF WAR AND PEACE 232, 232–33 (Richard K. Betts ed., 2d ed. 2002). See Thomas L. Friedman, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 248–75 (1st Anchor Books ed. 2000), for a discussion of the “Golden Arches theory” of conflict prevention and how free markets, which are often but not always associated with democracies, increase the cost of going to war. Friedman also discusses how the NATO bombing of Yugoslavia was the only modern example of economically integrated nations attacking each other, much less a democracy attacking another democracy. Of course, Yugoslavia’s democratic credentials under Milosevic are highly suspect.

Indeed, U.S. Presidents as different as Ronald Reagan<sup>57</sup> and Bill Clinton<sup>58</sup> have emphasized that democracies tend not to wage war against each other; both Presidents considered democracy-promotion an important “pillar” of their foreign policies. That the spread of mature democracies helps reduce conflict, promote economic development, and increase individual liberty, however, does not necessarily mean that the best means by which to bring about democracy is through force. It is inherently contradictory and oxymoronic to say that the best way to create a peaceful, secure world is through conflict. Moreover, an empirical study conducted by Mansfield and Snyder reveals that nations which take quick leaps from autocracy, or even a mixed democratic–autocratic regime, to democracy are more likely to engage in international conflict than are autocracies.<sup>59</sup> As Mansfield and Snyder’s evidence indicates, though a world of mature democracies “would be safer and preferable,” promoting democracy too rashly—much less imposing it—may create more danger, at least in the short term, than it alleviates.<sup>60</sup>

A conservative argument for *opposing* U.S. intervention abroad—one that heralds back as far as the Monroe Doctrine—is that the United States will be more secure at home if it focuses on securing its own borders and region rather than meddling in the affairs of other governments and attempting to eradicate threats abroad. Henry Kissinger has noted, “No other nation has ever advanced such goals [as humanitarian intervention or forcibly imposed democracy], which risk maneuvering the United States and its allies into the role of world policeman.”<sup>61</sup> Moving the United States into the position of a world police force not only runs the risk of overstretching the military, but also imposes direct security threats by putting U.S. troops in harm’s way for causes that are, potentially, of little strategic interest. This is an unacceptable position from the perspective of a conservative realist such as Kissinger.<sup>62</sup>

The liberal argument for supporting forcibly imposed democracy is that government oppression results in horrible human suffering. To sit back and watch that suffering would be inhumane. Following horrors such as the Holocaust and the Rwandan genocide, the world always says “never again”—but atrocities such as these continue to happen. No doubt the humanitarian argument is a powerful one in favor of using force to compel a regime change and to install democracy. But given the legal implications of forcibly imposing democracy,<sup>63</sup> military action should only be used in the most egregious

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57. Michael Doyle, *Liberalism and World Politics*, in CONFLICT AFTER THE COLD WAR, *supra* note 56, at 308 (Richard K. Betts ed., 2d ed. 2002).

58. Edward D. Mansfield & Jack Snyder, *Democratization and War*, in CONFLICT AFTER THE COLD WAR, *supra* note 56, at 335.

59. *Id.* at 336–37.

60. *Id.*

61. HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? 253 (2001).

62. *See id.* at 253, 271 (discussing how a “global mission for the United States and on behalf of humanitarian and moral values . . . risks an even more sweeping overextension” of U.S. military forces).

63. *See supra* Part I.

situations. And even then, force should be used only to the extent necessary to avert disaster. If that means overturning the government and setting up a new one, so be it. But if not, then a nation's sovereignty should be respected to whatever extent possible. Obviously there will be differences of opinion as to whether action should be taken and how far such action should go. Unilateral action raises a dangerous specter of lawlessness and a lack of respect for sovereignty, which is the cornerstone of international peace. Yet, as then-Secretary-General Annan pointed out, the UN is often too slow. Regardless of who ultimately makes the decision to authorize attack, though, it should only be made in the rarest and most horrible circumstances.

These arguments in favor of imposing democracy through force are not without significant merit. Certainly a world full of democracies would likely be a much more stable, peaceful one. It would likely also be one in which there is less oppression and more protection for individual freedom. The benefits are vitiated, however, by the enormous costs and the fact that, as a means of change, force is unlikely to be successful in reaching its objective.

#### B. Why Right Should Make Might

John F. Kennedy once said,

[W]e must face the fact that the United States is neither omnipotent nor omniscient—that we are only six percent of the world's population—that we cannot impose our will upon the other [ninety-four] percent of [human]kind—that we cannot right every wrong or reverse each adversity—and that therefore there cannot be an American solution to every world problem.<sup>64</sup>

These words embody two of the main arguments for opposing the forcible imposition of democracy. The first is that the United States, or the West in general, does not have a monopoly on good ideas or effective ways to govern and solve problems. The second is that even if the West were so enlightened, it does not have the resources to enforce democracy in the rest of the world.

Kennedy's first point emphasizes that the notion of forcibly imposing democracy brings with it more than just a hint of western arrogance. Democracy no doubt holds a promise of political enfranchisement and equality, and for many nations it has been the primary tool for ensuring such inalienable rights as those recognized in the Universal Declaration on Human Rights.<sup>65</sup> Further, when western-style democracy and the freedoms associated with it are juxtaposed to "wicked and violent" regimes, democracy might understandably be seen as the obvious and only replacement.<sup>66</sup> But as easy as it is to recognize the shortfalls of an existing regime, "[i]t is difficult and indeed culturally arrogant to determine what sort of contextually workable regime should replace

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64. Address in Seattle at the University of Washington's 100th Anniversary Program, 1961 PUB. PAPERS 724, 726 (Nov. 16, 1961), *quoted in* Nagan & Hammer, *supra* note 32, at 375.

65. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 8 1948), *available at* <http://www.un.org/Overview/rights.html> (last visited Feb. 18, 2008).

66. Reisman, *supra* note 1, at 522.

it.”<sup>67</sup> Those who would impose democracy must recognize that “their own model may not fit the local political culture or cultures.”<sup>68</sup> After all, Leon Trotsky believed that once people around the globe saw the sublimity of Bolshevism, they would overthrow their current governments and transform them into communist ones.<sup>69</sup> This same “democratic Trotskyism” exists today.<sup>70</sup> But by assuming that democracy is a panacea—the “be all and end all”—pro-interventionists ignore a host of countervailing factors that may make democracy unworkable. Such factors include religion, language, culture, nationalism, and other types of identity.<sup>71</sup> Democratic Trotskyism ignores that the people of a given country may have different traditions or ideas that may be more suitable to their culture, religion, or other attributes than western-style representative democracy.

This sort of cultural-pluralism argument against universally imposing democracy runs the risk of turning into an Orientalist argument—one that sees Islam and democracy as incompatible, or that perceives people inexperienced with democracy as incapable of fully navigating its privileges.<sup>72</sup> But certainly Islam, as a religion and a larger cultural influence, can co-exist with representative democracy. Turkey, secular as it has become, demonstrates the compatibility between democracy and Islam. Indeed, when it comes to suffrage and women’s rights, Turkey has been ahead of the western curve. Women in Turkey were granted the right to vote and to be elected to municipal offices in 1930, and in 1934 they gained the right to run and vote in all elections.<sup>73</sup> In France, women were not given the right to vote until 1944, and in Switzerland, not until 1971.<sup>74</sup> That Islam and democracy *can* be compatible, however, does not mean that they are the *most* compatible or that where additional ethnic and cultural differences may be at play, democracy is workable—at least when imposed by an outsider.

Those advocating the forcible imposition of democracy respond by arguing that democracy is culturally neutral:

Critics of nation-building point out that outsiders can never build nations, if that means creating or repairing all the cultural, social, and historical ties that bind people together as a nation. What we are really talking about is state-building—that is, creating or strengthening such government institutions as armies, police forces,

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67. *Id.*

68. *Id.* at 522–23.

69. *Id.* at 523.

70. *Id.*

71. Reisman, *supra* note 1, at 523.

72. For more on “Orientalism” and how the West views the Middle- and Far East, see generally EDWARD W. SAID, *ORIENTALISM* (Vintage Books ed., 1979).

73. *Turkey Marks 72nd Anniversary of Women’s Suffrage*, *TURKISH DAILY NEWS*, Dec. 6, 2006, <http://www.turkishdailynews.com.tr/article.php?enewsid=61002> (last visited Feb. 18, 2008); Inter-Parliamentary Union [IPU], *Women’s Suffrage: A World Chronology of the Recognition of Women’s Rights to Vote and to Stand for Election*, <http://www.ipu.org/wmn-e/suffrage.htm> (last visited Sept. 1, 2007) [hereinafter IPU, *Women’s Suffrage*].

74. IPU, *Women’s Suffrage*, *supra* note 73.

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judiciaries, central banks, tax-collection agencies, health and education systems, and the like.<sup>75</sup>

But state institutions do not exist in a vacuum separate from the cultural norms that surround them. The U.S. experiment with democracy is a testament to the fact that democratic institutions and ideals are slowly woven into the fabric of society and culture—they are not wholly separate. Indeed, elementary history and civics lessons taught in the United States ingrain in children the stories—the shared culture—of Martin Luther King, the Boston Tea Party, the Civil Rights Movement, and so forth. These lessons together teach U.S. citizens how democracy arose from and out of our cultural history; they are a part of what Benedict Anderson has dubbed our “imagined community.”<sup>76</sup>

To be sure, the whole of western progress from the Renaissance and Enlightenment forward is envisioned now, in retrospect, as part of an almost inevitable movement toward freedom that resulted in the democratic institutions the United States cherishes today. To say that democracy is somehow distinct from the most basic aspects of U.S. culture would fly in the face not only of our education, but also of the community beliefs that go into making the United States a nation. Again, this is not to say that countries without histories of democracies cannot create them, but those democratic movements stand a much better chance of success if they are indigenous and have some relationship to the nation’s identity and history. This idea that democracy works best when it comes from the ground up coincides well with Mansfield and Snyder’s argument that the focus, at least for the United States, should not be on imposing democracy, but rather on helping democratic movements manage the instability and potential for conflict that comes with change in political systems. For example, the United States could help by providing “golden parachutes” for former elites threatened by democracy,<sup>77</sup> or employment for “communist nomenklatura, military officer corps, nuclear scientists, and smokestack industrialists.”<sup>78</sup> This is to say, it could help by providing incentives for those with a strong stake in the old regimes (and hence a strong stake in making a transition to democracy difficult) to embrace democracy.

Certainly there are examples of the forcible imposition of democracy that have been relatively successful—even in countries that were relatively unaffiliated with the democratic experience. Post-World War II Japan is a notable example. However, the Japanese transformation to democracy was successful in part because significant Japanese cultural institutions were left

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75. Fukuyama, *supra* note 7.

76. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 1991). Anderson describes the process by which “nations” are conceived in the minds of their nationals by relying on history, tales, written text, and other traditions that serve to bond people who have never met into a greater community of common, or at least imagined, interests.

77. Mansfield & Snyder, *supra* note 58, at 346 (“Democratization was least likely to lead to war when the old elites saw a reasonably bright future for themselves in the new social order.”).

78. *Id.* at 347.

intact.<sup>79</sup> It is doubtful, given the Japanese people's loyalty to Emperor Hirohito, that the transition would have been so smooth without his consent to the surrender.<sup>80</sup> Moreover, the Emperor's royal position, one of the key cultural institutions, was allowed to live on—albeit in a neutered form.<sup>81</sup> It was this neutering of the revered Emperor's place in Shintoism that prevented the previously engendered kamikaze fanaticism from turning into the sort of insurgency and religious fanaticism that is now wreaking havoc in Iraq. Many in the West called for the Emperor to be tried for war crimes, but MacArthur refused because he knew that Japan would be easier to rule with the Emperor left in power, at least nominally.<sup>82</sup>

It is also questionable whether the Japanese democratic experience would have been successful had it not been for the quick rise of China after the war, which forced Japan to rely on its western allies to counterbalance the emerging Maoist juggernaut.<sup>83</sup> Further, Japan remains to this day a marginally “occupied” nation.<sup>84</sup> United States military forces are stationed throughout the Japanese islands, and the Japanese constitution, for all intents and purposes written by MacArthur and the Allied Powers,<sup>85</sup> continues to forbid Japanese offensive forces.<sup>86</sup> Finally, democracy was not a completely foreign system in Japan prior to the end of the war. Indeed, in the 1920s, before the militarist takeover, Japan had a parliamentary system.<sup>87</sup> Without question this exposure, short-lived as it was, aided the transition.

In postwar Germany, the transition to democracy was also greatly aided by a democratic tradition preexisting the war. Germans were familiar and well acquainted with the democratic experiment. Indeed, Hitler himself ran for office on several occasions and as a result of the Nazi's parliamentary strength

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79. ROBERT HARVEY, *AMERICAN SHOGUN: MACARTHUR, HIROHITO AND THE AMERICAN DUEL WITH JAPAN* 314–20 (2006); Chalmers Johnson, *Iraq Is Not Japan*, HISTORY NEWS NETWORK, Jan. 27, 2003, <http://hnn.us/articles/1225.html> (last visited Feb. 18, 2008).

80. HARVEY, *supra* note 79, at 314–20; Frank Gibney Sr., *Emperor Hirohito: Japan's Wartime Monarch Outlived His Role as God-King, But He Oversaw the Nation's Modern Transformation*, TIME ASIA, Aug. 23, 1999, at 60.

81. See NIHON-KOKU KENP [Constitution] ch. I (Japan), *translation available at* [http://www.solon.org/Constitutions/Japan/English/english-Constitution.html#CHAPTER\\_I](http://www.solon.org/Constitutions/Japan/English/english-Constitution.html#CHAPTER_I); see also J.A.A. STOCKWIN, *DICTIONARY OF THE MODERN POLITICS OF JAPAN* 33 (2003).

82. Gibney, *supra* note 80.

83. Johnson, *Iraq Is Not Japan*, *supra* note 79.

84. Sheila A. Smith, *A Place Apart: Okinawa and Japan's Postwar Peace*, in *PARTNERSHIP: THE UNITED STATES AND JAPAN 1951–2001*, at 179, 180–81 (Akira Iriye & Robert A. Wampler eds., 2001); CHALMERS JOHNSON, *JAPAN POL'Y RES. INST., MILITARY COLONIALISM IN OKINAWA*, *available at* <http://web.archive.org/web/20061208002516/http://www.aasianst.org/Viewpoints/johnson.htm> (last visited Sept. 2, 2007).

85. 2 DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* 518–49 (2002); see also PBS, *Creation of the Japanese Constitution (1945–1946)*, <http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX102.html> (last visited Dec. 15, 2006) (demonstrating MacArthur's and the United States' considerable involvement in writing the Japanese Constitution, albeit with Japanese input).

86. NIHON-KOKU KENP ch. II, art. 9 (Japan).

87. STOCKWIN, *supra* note 81, at XV–XVI; Mansfield & Snyder, *supra* note 58, at 347; Johnson, *Iraq Is Not Japan*, *supra* note 79.

was eventually appointed as Chancellor, paving the way for his eventual consolidation of power.<sup>88</sup> Unfortunately, the Germans had also seen how quickly democracy could be turned on its head and its freedoms usurped. Like Japan, Germany remained democratic, in part, because Allied forces continued to occupy it through the end of the Cold War and still maintain a military presence there today. That sort of long-lasting occupation is untenable now, and, indeed, it is undesirable—untenable because it saps the interventionists of military and economic resources and undesirable because it continues, at least to a degree, to limit a nation’s control of not only its own territory, but also its own destiny.

Although democracy imposed through force has been successful in the past, that success depended on several factors: the particular, democratic histories of the nations being transformed, the extensiveness of the military occupations, competing geopolitical forces such as the Cold War, the lack or at least the curtailment of religious-type fervor, more widespread international commitment to the particular military occupations, and more widespread commitment from the home populations of the “occupiers.”<sup>89</sup> But on an even more fundamental and abstract level, the idea of “imposing” anything on a group of people is antithetical to the cornerstone of democracy—that the people should choose their government. Not only do these competing ideas not mesh well in theory; it is often even worse in practice. Iraq is a telling example. At times, the U.S.-led Coalition Provisional Authority (CPA) paternally held the Iraqis’ hands as they tried to determine what Iraqi democracy would look like; at other times, the CPA dictated what the new government would be.<sup>90</sup> For instance, the CPA selected the twenty-five members of the Iraqi Governing Council,<sup>91</sup> and it selected the members of its replacement, the Iraqi Interim Government.<sup>92</sup> Indeed, some have questioned whether the U.S. occupation abided by the 1907 Hague Regulations and the Fourth Geneva Convention by not leaving the legal, political, and economic structures of the occupied territory intact.<sup>93</sup>

It could be said that the West’s drafting of the Japanese constitution has worked fairly well. But was it a product of democracy? No. It was a product of outside intervention. How can a democracy retain its legitimacy if its foundation was not formed from a democratic process? Truth be told, democracy elsewhere will have an uphill battle. Japan was able to win that battle, in part, because of

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88. WILFRIED FEST, *DICTIONARY OF GERMANY HISTORY: 1806–1945* 69 (1978).

89. These last two distinguishing characteristics, and how they contribute to imposing democracy through force unlikely to be successful today, are discussed in further detail below. *See* discussion *infra* Part III.

90. *See* Gregory Fox, *The Occupation of Iraq*, 36 *GEO. J. INT’L L.* 195, 202–04 (2005).

91. *Id.* at 204.

92. *Id.* at 226.

93. *Id.* at 234–37.

its previous democratic governance—democracy was indigenous rather than foisted upon it.<sup>94</sup>

The imposition of a new form of government, aside from being in tension with the very idea of democracy, also creates practical obstacles because it soon engenders resentment among the local populations. Even in situations where the invasion and toppling of a brutal dictator are welcomed by the people of a country, “[a]n army of liberation becomes an army of occupation the moment it wins. As an army of occupation, it encounters more and more resistance the longer it stays.”<sup>95</sup> As time passes, populations become less tolerant of outside armed forces and view them as hostile to their interests. Especially in countries with histories of subjugation and colonialism, such as those in the Middle East and Africa, the return of western troops is likely to be viewed with skepticism. The recent Iraq conflict bears this out. As the army of liberation rode into Baghdad, the people were jubilant and welcomed the Coalition.<sup>96</sup> But as time has dragged on and the economic and security situations have not improved, more and more animus has been directed, often violently, toward Coalition forces.

The protracted stay, not to mention the invasion itself, irritates and angers the local population because it is an affront to their nation’s sovereignty. But aside from creating local opposition to the occupying force—a practical problem—the usurpation of sovereignty is also a philosophical problem for pro-interventionists. Sovereignty is one of the guiding principles of the international system, and respect for it has helped foster a peaceful world since the Peace of Westphalia in 1648.<sup>97</sup> On a macro level, sovereignty recognizes a nation’s ability to direct its own course and to protect the sanctity of its territory. On a micro level, by allowing the nation this freedom, the principle of sovereignty also recognizes the right of individuals within that nation to choose their own government. If a nation has an oppressive regime, then sovereignty may still protect the nation’s ability to be independent, but it risks neglecting the individual’s freedom. But imposing democracy also imposes a certain system of governance on individuals. Moreover, given the major obstacles to success for interventionists and the unlikelihood that individuals will be fully enfranchised

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94. Johnson, *Iraq Is Not Japan*, *supra* note 79.

95. Reisman, *supra* note 1, at 523.

96. Susan Chira, *Invasion Is Easy. Occupation Is Hard*, N.Y. TIMES, Apr. 13, 2003, § 4, at 6.

97. This is not to say that the particular regime of sovereignty established by Westphalia was desirable. Without question it created its own set of problems, the most significant of which was an array of rivalries. Rather, the discussion of sovereignty is meant to highlight that such respect for the territorial integrity of another nation has, for the most part, engendered stability in international relations. The importance of sovereignty is further evidenced by its recognition in Article 2 of the UN Charter. See Gene M. Lyons & Michael Mastanduno, *Introduction: International Intervention, State Sovereignty, and the Future of International Society*, in BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 1, 5–10 (Gene M. Lyons & Michael Mastanduno eds., 1995) (discussing the origins and importance of sovereignty in international law); STANFORD ENCYCLOPEDIA OF PHILOSOPHY, SOVEREIGNTY (2003), <http://plato.stanford.edu/entries/sovereignty> (last visited Feb. 18, 2008) (outlining the basic concept and importance of sovereignty).

in the new regime, the affront to a nation's sovereignty is not worth the risk. With each incursion on sovereignty, the international balance of power and rule of law are chipped away, removing one of the main obstacles to war.

The difficulties associated with forcefully imposing democracy dovetail into the second of John F. Kennedy's points: that even if the United States has all the right ideas, it does not have the resources to do the job.<sup>98</sup> The ease with which the United States and the "Coalition of the Willing" were able to overthrow the Ba'athist regime and penetrate Baghdad speaks volumes about U.S. global military supremacy. But toppling the previous regime is only the start of the battle. As of mid-December 2006, Congress had appropriated \$379 billion for the conflict in Iraq.<sup>99</sup> And in the final weeks of 2006, President Bush requested an additional \$100 billion for Iraq and Afghanistan.<sup>100</sup> These numbers have and will continue to climb. This of course does not include the additional contributions from the Coalition. Moreover, it does not count the human costs. More than 3,000 U.S. troops have died in the Iraqi conflict. Both the economic strain and western constituencies' impatience with seeing their soldiers die in battle—especially a battle that may not be of any strategic interest to the intervener—mean that an intervening government has a very short leash and a limited ability to engage in protracted regime changes designed to result in democracy. As Alexis de Tocqueville put it, "[I]t is an arduous undertaking to excite the enthusiasm of a democratic nation for any theory which does not have a visible, direct, and immediate bearing on the occupations of their daily lives."<sup>101</sup> Professor Reisman puts de Tocqueville's argument within the context of regime change, stating, "The process of regime change may put great strain on the economic resources of the changer and its national economy. And the longer and more widespread the economic strain, the more tenuous the domestic support for regime change becomes."<sup>102</sup>

No doubt the 2006 congressional elections and public-opinion polls are powerful evidence for the growing domestic discontent with the prolonged war in Iraq. A national poll conducted in August 2007 indicates that sixty-nine percent of Americans disapproved of how the war in Iraq was being handled.<sup>103</sup> The great irony here is that convincing the domestic populace that they have an interest in the conflict runs in opposition to the task of convincing the international community that the purpose of the intervention is a benevolent, selfless one. And convincing the international community of the intervener's selflessness is necessary to avoid international opprobrium, which is one of the key checks on unilateral action, especially by a superpower.

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98. See *supra* text accompanying note 64.

99. *Bush Wants \$100 Billion More for Wars, Report Says*, REUTERS, Dec. 14, 2006, available at [http://www.infowars.com/articles/iraq/cost\\_bush\\_wants\\_100b\\_more\\_for\\_wars.htm](http://www.infowars.com/articles/iraq/cost_bush_wants_100b_more_for_wars.htm).

100. *Id.*

101. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 642 (J.P. Mayer ed., George Lawrence trans., Harper Perennial 1988) (1969), quoted in Reisman, *supra* note 1, at 523.

102. Reisman, *supra* note 1, at 523.

103. PollingReport.com, Iraq, <http://www.pollingreport.com/iraq.htm> (last visited Sept. 2, 2007).

The economic and military costs associated with forcibly imposing democracy are even more untenable today given the passionate ideological interests of many potential adversaries and given recent developments in military technology and tactics. The preeminent military power of the United States enables it to obliterate a country in the blink of an eye—maybe a couple of blinks if it is relying on conventional forces.<sup>104</sup> It could thus control any nation's and virtually any individual's fate.<sup>105</sup> But military power does not translate into "behavior control"; the United States has been unable to prevent the proliferation of even the crudest of weapons, and an armed counterinsurgency, equipped with discipline, self-sacrifice, ruthlessness, and an intense emotional ideology, can be an insurmountable obstacle to nations wanting to impose democracy by force.<sup>106</sup> Nor is Iraq the only example. Both the Shining Path in Peru<sup>107</sup> and the Tamil Eelam in Sri Lanka<sup>108</sup> demonstrate the potency with which a small insurrection can debilitate entire countries.<sup>109</sup> Though guerrilla-style counterinsurgencies have gained new potency, *some* of the tactics being used and the challenges insurgencies can pose are reminiscent of the American Revolution.<sup>110</sup> Though the colonists relied in part on conventional warfare, they also relied on insurgent, guerilla warfare to stymie British plans for continued occupation.<sup>111</sup> The technological advent of car bombs, suicide bombers, and other ingenious but heinous tactics has only amplified the effectiveness of counterinsurgencies.

The economic and military costs associated with forcibly imposing democracy lead to additional problems that continue to compound. As the costs mount and more resources, including troops, are needed to win the battle, the prospect of winning with a sufficiently large and adequately trained volunteer force becomes less and less likely. Potential volunteers begin to believe, wrongly or rightly, that the mission serves no domestic interest yet involves great personal and national risks, and so they decide against enlisting. Again, the situation in Iraq is instructive. United States generals recently called for more troops to be sent to Iraq, arguing that without more people-power the

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104. Reisman, *supra* note 1, at 522 (providing a critique of using force to impose democracy and discussing the limits of U.S. military power to control individuals' behavior, as opposed to individuals' resources and territory).

105. *Id.*

106. *Id.* at 523.

107. LEWIS TAYLOR, SHINING PATH: GUERRILLA WAR IN PERU'S NORTHERN HIGHLANDS, 1980–1997 102–03 (2006); COUNCIL ON FOREIGN RELATIONS, SHINING PATH, TUPAC AMARU (PERU, LEFTISTS) (2005), <http://www.cfr.org/publication/9276> (last visited Feb. 18, 2008).

108. ANTON BALASINGHAM, WAR AND PEACE: ARMED STRUGGLE AND PEACE EFFORTS OF LIBERATION TIGERS 30–42 (2004); GlobalSecurity.org, Liberation Tigers of Tamil Eelam (LTTE), <http://www.globalsecurity.org/military/world/para/ltte.htm> (last visited Sept. 2, 2007).

109. Reisman, *supra* note 1, at 521.

110. William Marina, *The American Revolution as a People's War*, INDEPENDENT INSTITUTE, July 1, 1976, <http://www.independent.org/newsroom/article.asp?id=1485> (last visited Feb. 18, 2007).

111. *Id.*

U.S. armed forces are on the brink of collapse.<sup>112</sup> Unfortunately, there are not many more to give, as the reservists have already been sent on extended tours and the U.S. military is on the verge of being overstretched.<sup>113</sup> This shortage of human resources not only decreases the chances of successfully imposing democracy, but it also leads to a corresponding erosion of democratic freedom at home. One form of this erosion is the threat of conscription. But democratic freedoms are also eroded because as the conflict intensifies, so does the risk of attack at home.<sup>114</sup> Even if that risk does not increase once war has begun, wartime almost inevitably leads to shrinking domestic liberties as freedom of speech and travel are curtailed and lawmakers prioritize security over liberty. This is not to say that during times of war it is inappropriate to alter the balance between security and liberty, but that in the absence of prolonged conflict, the balance permits greater liberty.<sup>115</sup>

Finally and most fundamentally, forcibly imposed democracy is going to cost lives. Any time force is used, people will die. In some instances the cost of action—the lives lost as a result of intervention—will be worth the lives saved. Rwanda and World War II are clear examples. Nevertheless, the cost of intervention should always be weighed carefully when deciding whether going to war is the right decision. The human death toll mounts not just as a result of bullets and bombs, but also because the conflict runs the high risk of creating internally displaced populations and refugees, disrupting food supplies, and spreading disease. In Iraq it is estimated that somewhere between 50,000 and 655,000 Iraqis have died, as of the beginning of 2007, as a result of the invasion and its downstream consequences.<sup>116</sup> Certainly there are ways to mitigate these harms and reduce the damage done by a forceful intervention. However, given the hurdles facing a policy of forcibly imposed democracy, the more practical and wise solution—except perhaps in the most grave situations—is to work to cultivate and support indigenous movements for democracy from within the state. This not only avoids such costs as human life, loss of sovereignty, and potential cultural imperialism, but it also helps to avoid many of the problems associated with intervention such as resistance to outsiders, costs to the intervener, and conflict fatigue among the intervener's populace.

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112. *Top General: Army Near Breaking Point*, CBS NEWS, Dec. 14, 2006, <http://www.cbsnews.com/stories/2006/12/14/national/main2266367.shtml> (last visited Feb. 18, 2008).

113. *Id.*

114. Reisman, *supra* note 1, at 523 (“In liberal societies, all mobilizations for coercive action result ineluctably in a constriction of civil liberties at home. The constriction increases . . . the extent to which the adversary is able, credibly, to bring the threat of violence home.”).

115. *Civil Liberties: Expendable or Not During War?*, CNN ONLINE, Oct. 2, 2001, <http://cnnstudentnews.cnn.com/2001/fyi/news/10/02/civil.liberties/index.html> (last visited Feb. 18, 2008).

116. David Brown, *Study Claims Iraq's 'Excess' Death Toll Has Reached 655,000*, WASH. POST, Oct. 11, 2006, at A12.

## IV

## CONCLUSION

The Arthurian dilemma looms large today. The United States and other western democracies value their freedom and their method of governance. The desire to share democracy with those who are oppressed on a daily basis is without question laudable. But as Henry Kissinger put it, “When moral principles are applied without regard to historical conditions, the result is usually an increase in suffering rather than its amelioration.”<sup>117</sup> In other words, good intentions should not blind us to very real and very likely obstacles. And in the case of forcibly imposed democracy, the obstacles to trying to spread its associated freedoms around the world loom large. In essence, the United States or others who may want to impose democracy by force are not mighty enough to do the job and do it well. By trying and failing, those who use force to impose democracy may create new problems and exacerbate the conditions they were trying to ameliorate. But even if the litany of practical problems did not exist, the use of might to make right should be avoided because it compromises and contradicts the very foundations, the very “rights,” that democracy values and that the international system was built on, including pluralism, difference of opinion, and sovereignty. This is not to say that people around the globe should stop their efforts to expand freedom and increase the quality of global life. But the use of force—of might—is neither an effective nor a philosophically consistent method of doing so.

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117. KISSINGER, *supra* note 61, at 258.