Book Review/Review Essay

THE LIMITS OF INTERNATIONAL LAW[1]

REVIEW-ESSAY BY LIEUTENANT COLONEL WALTER M. HUDSON[2]

The Limits of International Law by Jack Goldsmith, a law professor at Harvard, and Eric Posner, a law professor at the University of Chicago, is an interesting and stimulating book that has aroused a great deal of controversy and criticism in international law circles.[3] While *The Limits of International Law* (*Limits*) may appear to be most relevant only to legal scholars, the book is also relevant to judge advocates, especially in these turbulent times. This review provides a basic overview of the book and addresses several scholars' criticisms of it, including one particular criticism that is noteworthy for judge advocates. In addition, this article addresses the applicability of *Limits* to one field of international law, the law of military occupation, especially focusing on Eyal Benvenisti's comprehensive survey of that field of law, *The International Law of Occupation*.[4]

The authors of *Limits* rely on economic-based rational choice theory, using some modeling techniques derived from game theory, to advance their basic thesis.[5] Using this theory, Posner and Goldsmith argue that states act rationally to maximize their interests and that international law is little more than an expression of various state interests. "[International law] is not a check on state self-interest; it is a product of state self-interest."[6] As the authors assert, what practitioners perceive as international law is really "behaviorial regularit[y] that emerge[s] when states pursue their interests on the international stage."[7] There are four basic models that describe these regular international interactions: (1) coincidence of interest (a pattern of behavior that occurs when two states ignore the behavior of the other and pursue private interests);[8] (2) coercion (when one state forces another to serve its interests),[9] (3) cooperation (when states improve their relative positions by exchanging information);[10] and (4) coordination (when states' interests converge, but "each state's best move depends on the move of the other state").[11]

Limits applies these models to both customary international law and treaty-making. The authors contend the notion of a customary international law as a normative system that compels state behavior is false. Rather, state behaviors that appear to be customary international law are simply coincidences of interests between states or some form of bilateral transaction—of cooperation, coordination, or coercion—between states.[12] *Limits* also analyzes international treaties and agreements. Given

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[1] JACK L. GOLDSMITH & RICHARD A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[2] Judge Advocate, U.S. Army. Presently assigned as Staff Judge Advocate, 2d Infantry Division, Camp Red Cloud, Republic of Korea.

[3] *See, e.g.,* Robert Cryer, *The Limits of Objective Interests*, 82 INT'L AFFAIRS 183-88 (2006); Peter Berkowitz, *Laws of Nations*, POL'Y REV., Apr. 2005; Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. (forthcoming 2006). For a positive review, see Sanford R. Silverburg, Review, *The Limits of International Law*, 15 L. & POLS. BOOK REV. 336 (2005). A series of articles published in a 2006 volume of the *Georgia Journal of International and Comparative Law* provide the most comprehensive treatment of the book. *See* Kenneth Anderson, *Remarks by an Idealist of the Realism of The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2006); Daniel Bondansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285 (2006); Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305 (2006); Daniel M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333 (2006); Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006); Margaret E. McGuinness, Exploring *the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393 (2006); Kal Raustiala, *Refining the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423 (2006); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445 (2006). I am indebted to Ms. Rachel Saloom, the editor-in-chief of that journal, for providing me advanced copies of these articles.

[4] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2d ed. 2004). *The International Law of Occupation* was first published in 1993 and republished (including a new introduction) in 2004, following the invasion and occupation of Iraq.

[5] Game theory was principally developed in the early twentieth century by a mathematician, John von Neumann, and an economist, Oskar Morgenstern, when they noted that certain economic problems were highly similar to mathematical notions of game playing. Rational choice theory derives in part from game theory, in that it posits economic choices as "games" in which the actors are economic players who use certain strategies to obtain payoffs. The players always seek to obtain their payoffs; hence their play is always in their "interest" and always "rational." *See* MORTON O. DAVIS, GAME THEORY: A NONTECHNICAL INTRODUCTION (1970); JONATHAN CAVE, INTRODUCTION TO GAME THEORY (1986) (providing simple introductions to game theory).

[6] GOLDSMITH & POSNER, *supra* note 1, at 13.

[7] *Id*. at 26

[8] *Id*. at 27.

[9] *Id*. at 28-29.

[10] *Id*. at 29-22.

[11] *Id*. at 32-35.

[12] *Id*. at 12-13.

that rational choice theory seems most suited to contract law problems, in which two parties with presumably equal information exchange something of value, it is not surprising that the authors determine that treaties are the only truly effective form of international law, since in written form such treaties reduce ambiguities between the parties and specify the parameters of the coordination or cooperation "games" the states are "playing" (obviously, treaties are not necessary when states have coincident interests, and treaties are of less significance when one state is coercing another).[13] According to the rational choice theory propounded in *Limits*, multilateral agreements cannot work effectively using international law for a variety of reasons, to include monitoring and enforcement problems.[14] A far more effective tool (and perhaps the only effective tool) in international law is the bilateral treaty since it simplifies a problem of international relations to a contractual arrangement.[15]

The authors further contend that the reality of state power and state interests has been historically demonstrated. For example, they point out that most nations, to include the United States, held the principle of neutral rights at sea as customary international law. The Civil War, however, caused the United States quickly to abandon the principle outright and to violate it with impunity in order to defeat the Confederacy.[16] The United States reversion to neutrality during the much less consequential Spanish-American War was simply due to the shortness of the war and the decrepitude and incompetence of the Spanish Navy.[17] Customary international law in no way impeded the national interests of the United States. If non-compliance is so demonstrated, compliance is shown as a matter of behaviorial regularity that has little to do with international law's normative power. For instance, historical evidence indicates that diplomatic immunity is nearly always granted but that such grantings take place in the context of bilateral (and not multilateral) relationships between states. As the authors put it, as "broad behavioral regularit[ies] [that develop as] an amalgam of independent, bilateral repeated prisoner's dilemmas".[18]

In the concluding chapters of *Limits*, the authors also provide interesting arguments against so-called liberal "cosmopolitanism"—the view that the interests of the United States (or any state) are subordinate to the larger interests of world society. The authors contend that states have no moral obligation to follow international law.[19] They do *not* say that states should not follow international law. Rather, if such law interferes with an articulable state interest, then international law "imposes no moral obligation that requires contrary action."[20] The authors assert that the state does not organize itself for the purpose of engaging in acts of cosmopolitan charity but instead is organized for the well-being of its own citizens and the execution of their political intentions.[21] International law does not rest on such internal political consent, nor does it necessarily consider the well-being of members of national communities. It thus conflicts with the higher principle of democratic sovereignty. Therefore, as a normative principle, when such law interferes with a state's (especially a liberal democratic state's) own interests, that law does not need to be followed. [22]

In contrasting the goals of such internationalist imperatives with domestic (and more democratic) goals, the arguments the authors make against such forms of liberal cosmopolitanism are telling and effective. Simply put, what if the majority of the domestic population does not want the state to enforce a set of international standards? What, in a world conceived in a philosophically liberal way, gives the international standard any normative viability (beyond appeals to the academic authority of philosophers, such as John Rawls or Jürgen Habermas) if the majority of the people within the borders of a nation do not accept it?

Limits has provoked controversy and criticism, though it would be incorrect to say that the book is little more than controversialist rhetoric. In fact, there has been some detailed empirical evidence published in the past ten years that, at the

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[13] *Id*. at 13-14

[14] *Id.* at 87.

[15] *Id*. at 91-100.

[16] *See* Golove, *supra* note 3, at 347-77 (providing a different view of the exercise of neutrality rights by the United States during the Civil War, and a pointed criticism of Posner and Goldsmith's historical scholarship).

[17] GOLDSMITH & POSNER, *supra* note 1, at 48-49.

[18] *Id*. at 56.

[19] *Id.* at 185.

[20] *Id*.

[21] *Id*. at 189-97, 211.

[22] *Id.*

very least, casts doubt on the ability of international law to affect, absent other compulsions, state behavior.[23] Nevertheless, the foundational premises of the book are open to debate. At the beginning of *Limits*, the authors attempt to preempt some foundational criticisms by making the following statement: "Our theory should be judged not on the ontological accuracy of its methodological assumptions, but on the extent to which it sheds light on problems of international law."[24] This attempt at drawing critical sting is not particularly persuasive, for if a theory's assumptions are not accurate ontologically, then the theory itself must be inaccurate. If the book's assumptions about state behavior are wrong, then its conclusions about international law are almost surely wrong.[25] And unfortunately, the boldness of the book's assertions does not always seem adequately supported by the evidence presented. *Limits* is a relatively short book of 223 pages of text. Partly as a result of its brevity, it does not contain a wealth of statistical data, provide detailed mathematical formulae to explain the game theories that are the theoretical heart of the book, or provide lengthy historical surveys of some of its supporting evidence.

Because of its controversial thesis, critics have launched attacks on the book. For example, by making the state the only actor in international law (as opposed to individuals, non-governmental organizations, or inter-state agencies) at the center of their analysis, the authors open themselves up to possible criticisms that they have too narrowly defined the scope of international law. Political science theorists have taken them to task for not dealing with "constructivist" approaches to world political systems.[26] Others have pointed out that the "realism" the authors claim they are providing to international law is in fact highly "idealist" because it posits a "norm" of democratic sovereignty that they contend must trump the competing "norm" of liberal internationalism.[27] Other scholars assert that the authors' rational choice theory is too reductive and simplistic and does not take into account external societal factors that may shape that theory.[28] In the era of multinational corporations, non-governmental organizations, and terroristic "non-state actors," is a theory of international law that only considers states unduly narrowing?[29] These critics have made their points pointedly and sometimes persuasively. This review highlights and elaborates upon one such critique that is relevant to military legal practice.

The Limits of *Limits*: Norm Internalization and the "Disaggregation" of State Interest

For judge advocates, one of the most relevant critiques of *Limits* focuses on how Posner and Goldsmith conceive of the state. According to the authors' rational choice theory, the state presumably acts in a unified way according to a particular state interest. The state's interest emerges cleanly in this theoretical construction, and little within the state exists to impede it. Yet the proposition that a state is a unified and single-minded agent that acts upon its intentions has been subject to scholarly criticism. Such scholarship points to another possibility—the state, especially an advanced "democratic" one with multiple branches of government and multiple bureaucratic agencies, is composed of many "interests" that are

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[23] Eric Neumayer surveys much of this evidence in a recent article. Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights*?, 49 J. CONFLICT RESOLUTION 922 (2005). Neumayer points out that, in comparison to the regimes of international finance or trade, human rights regimes are comparatively weak. "No competitive market forces drive countries toward compliance, nor are there strong monitoring and enforcement mechanisms." Neumayer, *supra*, at 926. Oftentimes, monitor and enforcement mechanisms are "nonexistent, voluntary, or weak or deficient." *Id*. One study on whether ratification of the International Covenant on Civil and Political Rights has had an effect on political or civil rights finds no difference before and after ratification. Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RESEARCH 95 (1999). Indeed, there is one study that indicates that human rights treaty ratification actually can be harmful because it may falsely indicate that a country is committed to human rights, thus deflecting outside pressure for actual change. That study, however, also indicates that in "fully democratic" countries, treaty ratification can be associated with better human rights records. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). Neumayer's own study yielded mixed results. It indicated that in pure autocracies with no civil societies to speak of, ratification actually was associated with worse violations, but that ratification had stronger and possibly beneficial effects on democratic societies with strong civil societies. Neumayer, *supra*, at 941.

[24] GOLDSMITH & POSNER, *supra* note 1, at 8.

[25] As Robert Cryer, Senior Lecturer in Law at the University of Nottingham, noted author, and book review editor of the *Journal of Conflict and Security Law*, points out, "This is quite extraordinary in that the light that is shed on a subject is necessarily affected by methodology-if that is flawed, the vision it provides will be problematic." Cryer, *supra* note 3, at 185.

[26] "Constructivism" refers to a school of political theory that focuses less on material forces and more on shared ideas and human communities, and that the identities of political actors are formed by those shared ideas. *See* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999) (providing the most comprehensive study of constructivism in international politics).

[27] Anderson, *supra* note 3, at 258.

[28] *See* MARY DOUGLAS, HOW INSTITUTIONS THINK 45-67 (1986) (providing an implicit critique of the presumed rationality in rational choice thinking).

[29] Spiro, *supra* note 3, at 455-6; Raustiala, *supra* note 3, at 429.

"disaggregated."[30] These scholars further assert that these intergovernmental interests sometimes compete and conflict with one another and that the notion of a constant and single state "will" is a chimera.[31]

According to these scholars' line of thought, then, Posner and Goldsmith are pursuing an illusion, though they believe they are pulling back the curtain of international law to reveal the reality of a singular state interest.[32] While certain states (e.g., highly totalitarian ones) may suggest they are monolithic and reflect a single, unified will, not all states do. Instead, the authors of *Limits* have simply elevated the historical conception of a state (the kind conceived during the heyday of European power-politics) to a level of absolute principle.

Furthermore, as scholars have also pointed out, some international norms appear to take hold within certain bureaucratic structures, and these norms are internalized—absorbed and made a part of its cultural identity—by large components of a governmental bureaucracy.[33] These norms, over time, "thicken" and thus are potential stumbling blocks if another section of government wishes to articulate a state interest that might run contrary to those norms.[34] Within a "disaggregated" government, there are likely impediments to the actualization of a perceived state interest by agencies within that state that have internalized norms that may conflict with that interest.

These impediments are emphasized by one of the critics of *Limits*, Kenneth Anderson. Mr. Anderson states that his own personal observations of the commitment of soldiers in many militaries to the laws of war, both morally and legally, clearly indicate an internalization of international law norms.[35] Norm internalization within the military has been carefully studied by legal scholars in recent years. Marc Osiel, in his excellent book, *Obeying Orders*, details how extensive—and necessary—norm-based training is to the American military, and how vague "reasonableness" standards exist in the military to a greater extent than in civilian society because norms and ethical standards are so internalized.[36] Indeed it may be that the shared norms regarding international law in western militaries indicate the emergence of a "transnational class"—a class that has more in common with those of a similar class outside its borders than fellow nationals of a different class.[37]

In similar fashion, Paul Berman provides another example of the "internalization of international norms" when he points out the role of U.S. military attorneys and their role in opposing the non-application of the Geneva Conventions in detaining and interrogating terrorism suspects.[38] That internal governmental struggle during the opening months of the current struggle against forms of global terrorism reveals quite a lot about how international law norms not only have been internalized but also how those norms themselves have profoundly shaped what emerged as the perceived state "interest." The various apparent disagreements and reversals between and within executive branch departments may indeed show one bureaucratic level or agency being "frustrated" by another element that has "internalized" particular norms of international law.

The twisted trail of the standards of conduct for interrogation from 2002 to the present day highlight this internal struggle.[39] In August 2002, a Department of Justice (DOJ) memorandum on standards of conduct for interrogation stated that in regards to interrogations, the federal torture statute might be an unconstitutional infringement of the powers of the

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[30] *See* ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2005); Anderson, *supra* note 3, at 273-76; Paul Berman, *Seeing Beyond the Limits of International Law: Jack L. Goldsmith and Eric A. Posner, The Limits of International Law*4-5, 7-12 (U. Conn. Sch. L., Working Paper, 2005) (providing discussions of the concept of "disaggregation").

[31] *Id.*

[32] In *Limits*, the authors discuss this "bureaucratic internalization" but largely dismiss it. Instead, they simply claim that there is little evidence to support the assertion that government officials internalize and get into the habit of complying with international law even when doing so would not serve their government's interests. *See* GOLDSMITH & POSNER, *supra* note 1, at 104-6.

[33] Berman, *supra* note 30, at 34.

[34] *Id*.

[35] Anderson, *supra* note 3, at 271.

[36] MARK OSIEL, OBEYING ORDERS: MILITARY ATROCITY AND THE LAW OF WAR (1999).

[37] Anderson, *supra* note 3, at 271-72.

[38] As Berman points out,

> These acts are not explainable simply by suggesting that this is a "cooperation game" where these military officers obey international law solely to ensure that US targets or captured soldiers in the future are treated similarly. Instead, it seems clear that these officials have internalized the values of international law and see them as part of what is required, both morally and strategically.

Berman, *supra* note 30, at 34.

[39] Colonel Dick Pregent, Briefing, Interrogation Today (Nov. 2, 2005) (on file with author). In that briefing, Colonel Pregent reconstructs the path of the various memoranda and exchanges within the DOD and between the DOD and DOJ during 2001 to 2003.

President and that defenses of necessity and self-defense would potentially be available to those who violated the statute.[40] A subsequent 2 December 2002 Department of Defense (DOD) memorandum allowed, among other things, for persons being interrogated, twenty-hour-interrogations, use of phobias on interrogees, and the use of stress positions (e.g., standing for up to four hours).[41]

These appear to be expressions of an apparent state interest to expand the methods of interrogation used on suspected terrorists. Despite the Secretary of Defense's approval of the December memorandum, just over a month later, on 15 January 2003, the Secretary of Defense *rescinded* the same memorandum.[42] When the approved counter-resistance techniques for Operation Iraqi Freedom (OIF) came out in 16 April 2003,[43] they included the standard pre-2002 *Field Manual 34-52* interrogation "approaches" (techniques), along with dietary manipulation, but they did *not* include stress positions, deprivation of light, twenty-hour-interrogations, use of phobias, or use of mild-non-injurious physical contact.[44] The applicable DOD standards in force were therefore significantly different than the ones granted by the original 2002 DOJ memorandum.[45]

Whatever interests may have been at stake, during this period there was considerable inter-and intra-departmental disagreement and dispute. There was, in other words, furious dispute as to whether these expressions of apparent state interest violated standards of international law. For example, in a series of six memoranda from early 2003 on Interrogation Techniques written by Army, Navy, Air Force, and Marine Offices of the Judge Advocate Generals for a DOD Working Group, there were sharp dissents against "extreme" interrogation, concerns that proposed methods might damage American credibility and that certain proposed interrogation practices might create damaging precedents.[46]

The particulars of the above example show how different bureaucratic agencies can sharply disagree as to what constitutes a state "interest," and perhaps even cause an interest to be reconceptualized because certain norms of international law have been internalized within those bureaucracies. Granted in certain governmental bureaucracies, and assuredly in many militaries, the above norm internalization and intergovernmental struggle to determine a state "interest" likely does not occur. In a totalitarian order, the will of the despot will very possibly override such bureaucratic infighting. The differences between governmental bureaucracies simply reveal that the rational choice model of an unwavering state interest is contingent upon political structures, and that the model cannot be reified into absolute permanence.

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[40] Memorandum, Mr. Jay S. Bybee, Assistant Attorney General, to Mr. Alberto R. Gonzalez, Counsel to the President, subject: Standards of Conduct for Interrogation Under 18 §§ U.S.C. 2340-2340A (Aug. 1, 2002), *available at* news.findlaw.com/hdocs/docs/dod/62204index.html. This memorandum was later superseded in its entirety by a subsequent DOJ memorandum. Memorandum, Mr. Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, subject: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (on file with author). This latter memorandum disagrees with certain statements regarding interrogation standards made in the earlier Bybee memorandum. *Id*.

[41] Memorandum, Mr. William J. Haynes, II, General Counsel, to Mr. Donald H. Rumsfeld, Secretary of Defense, subject: Counter-Resistance Techniques (Nov. 27, 2002) (approved Dec. 2, 2002), *available at* news.findlaw.com/hdocs/docs/dod/62204index.html.

[42] Memorandum, Mr. Donald H. Rumsfeld, Secretary of Defense, to Commander, United States Southern Command, subject: Counter-Resistance Techniques (Jan. 15, 2003), *available at* news.findlaw.com/hdocs/docs/dod/62204index.html.

[43] Memorandum, Mr. Donald H. Rumsfeld, Secretary of Defense, to Commander, United States Southern Command, subject: Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), *available at* www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16pdf).

[44] *Id*.

[45] Indeed, the legislative branch ultimately entered into this area and created definitive guidance for interrogation by Department of Defense personnel when the U.S. Congress passed a law that *only* permitted the use of interrogation methods contained in *Army Field Manual 34-52*. This law was subsequently implemented by the Department of Defense. Memorandum, Mr. Gordon England, Acting Deputy Secretary of Defense, for Secretaries of the Military Departments, et al., subject: Interrogation and Treatment of Detainees by the Department of Defense (Dec. 30, 2005) (on file with author).

[46] *See* Memorandum, Major General Thomas J. Romig, The Judge Advocate General of the Army, to General Counsel, Secretary of the Air Force, subject: Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Mar. 3, 2003); Memorandum, Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the Marine Corps, to General Counsel, Secretary of the Air Force, subject: Working Group Recommendations on Detainee Interrogations (Feb. 27, 2003); Memorandum, Rear Admiral Michael F. Dohr, The Judge Advocate General of the Navy, to General Counsel, Secretary of the Air Force, subject: Working Group Recommendations Relating to Interrogation of Detainees (Feb. 6, 2003); Memorandum, Major General Jack L. Rives, The Deputy Judge Advocate General of the Air Force, to General Counsel, Secretary of the Air Force, subject: Final Report and Recommendation of the Working Group to Assess the Legal Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. 5, 2003), *available at* balkin.blogspot.com/jagmemos.pdf).

The Usefulness of *Limits*: the Law of Military Occupation

The above discussion highlights an objection to the notion of a state interest in *Limits* that is of particular relevance to military lawyers. Despite criticism of the theory, the rational choice model of *Limits*, however, has some value. Indeed, in certain areas of international law, areas where the question of international law does not necessarily involve deeply internalized norms of behavior, an analysis of international law as an expression of state interest becomes more persuasive.

As an example of this persuasiveness, one should look to the international law of military occupation. As Eyal Benvenisti points out in his book, *The International Law of Occupation*, the twentieth century saw, at least on paper, a great expansion of the scope and extent of this law.[47] And yet as Benvenisti demonstrates, this expansion is highly deceiving because the last century demonstrated an overwhelming reluctance by occupying powers to apply the same expanded set of rules.[48] Benvenisti's analysis of modern occupations led him to the following conclusion that seems lifted out of *Limits*: "My analysis of occupations shows—and this should not be surprising—that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants."[49]

Benvenisti illustrates that courts in occupied territories nearly always have ruled in favor of the occupying power.[50] In only three instances have courts in third countries offered "credible applications" of occupation law, and in all three of these countries the rulings occurred "long after the occupant had been defeated and the territory liberated."[51] Supranational tribunals have likewise proven hesitant to enforce occupation law, one primary reason being the "lack of consent of states [those occupying the nations] to have these issues adjudicated."[52]

In the case of the international law of military occupation, therefore, it appears as if the state's interest holds near-absolute sway, and that the normative power of international law has little compulsory power. It seems to fit the model that the authors of *Limits* employ quite well. Why is this so?

The most significant reason is because the law of occupation provides ample opportunity for an occupying power to execute only what it perceives to be in its interests. Indeed, the law as codified in the late nineteenth century by European diplomats and politicians sought not only to protect the people of an occupied territory but to ensure that the interests of the occupying power, which one scholar has described as ensuring "a docile, accepting population, behaving as if conquest and transfer to the victor's sovereignty had already happened."[53] The starting point of modern occupation law, Article 43 of the 1907 Hague Regulations, states that the occupying power "shall take all the measures in his power to restore and ensure, as far as possible, public order, and [civil life], while respecting, *unless absolutely prevented*, the laws in force in the country."[54] There is thus significant justification in the law itself for an occupier to disregard an occupied territory's domestic structure. If one is engaged, for instance, in more than physical occupation of the territory (such as a regime change) than an occupying power can use Article 43 to make the case that it is in fact "absolutely prevented" from abiding by the laws of the former sovereign.[55] In fact, as history shows, occupying powers frequently invoked Article 43's expansive language about the duty to restore civil order and public life to justify their extensive interference in an occupied territory's governmental system.[56]

International law has had virtually no normative pull in military occupations. The law was created in such a way to maximize the stronger state's interests. Within the rational choice schema of *Limits*, there has been virtually no need to cooperate or coordinate with another state. Instead, it simply has been a matter of a state coercing another state. Dispensing with occupation law requirements under the Hague Regulations completely, states have developed "nonoccupation" methods to govern conquered territories. These methods include annexation, establishment of puppet regimes, *debellatio* (the

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[47] BENVENISTI, *supra* note 4, at 3-4, 209-12.

[48] *Id.* at 5.

[49] *Id*. at 12.

[50] *Id.* at 201.

[51] *Id*.

[52] *Id*. at 202-03.

[53] GEOFFREY BEST, HUMANITY IN WARFARE 190 (1980). Best examines the historical underpinnings of the law of occupation in that book as well. *Id.* at 179-200.

[54] Hague Convention No. IV, Respecting the Laws and Customs of War on Land art. 43, October 18, 1907, 36 Stat. 2277 (emphasis added).

[55] BENVENISTI, *supra* note 4, at 7.

[56] *Id*. at 10-11.

principle that the conquered state no longer exists), or invocation of invitation rights by the occupied territory's government.[57] The scheme of occupation law is thus largely unused. One critic has gone so far as to question whether a genuine law of occupation has ever existed.[58]

Scholars have paid close attention to the application of occupation law in Iraq, following the U.S.-led invasion and occupation in 2003. Benvenisti calls it "the most significant development in the law of occupation in recent years."[59] He points out that, despite the reluctance of the United States and United Kingdom to call themselves occupiers, United Nations Security Council Resolution (UNSCR) 1483 states that the powers were obliged to conduct themselves in accordance with the international law as occupying powers.[60] Benvenisti asserts that UNSCR 1483 has revived occupation law, and that it lays out the following fundamental principles of that law: its nature is temporary, it is supposed to serve primarily the civilian population; annexation cannot occur, and "sovereignty" is not extinguished.[61] "[T]he law of occupation, according to Resolution 1483, connotes respect to popular sovereignty, not to the deposed regime."[62]

All this is undoubtedly true. However a few points need to be considered. United Nations Security Council Resolution 1438 has to be understood in the political context. The resolution *followed* the occupation of Iraq by the United States and the United Kingdom. It did *not* set the conditions for the occupation before it occurred. The UNSCR is a product of a political body that quite explicitly represents the interests of the states within that body. And thus, in significant ways, UNSCR 1483 very much expresses the interests of the United States, the most powerful member of the Security Council—it grants the right to "transform the previous legal system" in significant ways to conform with the principles of western-style democracies.[63] The resolution also "envisions the role of the modern occupant as the heavily involved regulator," as when it calls upon the occupants to pursue the civil administration of Iraq.[64]

The Security Council's involvement suggests an occupation paradigm for future operations by powerful democratic nations. External international control over the occupation may come in the form of UNSCRs. But if UNSCR 1483 is any indication, this guidance will be rather vague, and at least somewhat coincident with the occupying power's interests, especially if the occupying nation is a superpower such as the United States. Indeed, because such resolutions are the result of state interests—the results of compromises, deals, and interests of states themselves—the use of a UNSCR may be the most effective method of internationally controlling occupations, rather than relying on supranational courts or other tribunals.

In the case of the international law of occupation, the book's economic-based rational choice theory appears empirically persuasive for a number of reasons. First, occupation law was conceived not just to protect those in the occupied territory but also to enforce the conquering state's interest. The calculus was heavily favored toward state interest from the outset since the conquering state could invoke the applicable law to pursue its interests. Second, in contrast to international law standards on torture and interrogation of prisoners, there has been little "norm internalization" of what constitutes an "occupation"—the very nature of the law is ambiguous, and some scholars doubt whether a genuine law of occupation even exists. Third, the apparent revitalization of occupation law has come about through a mechanism—UNSCRs—in which state interests of members of that Council are explicit. Therefore, in areas of international law that more clearly allow the articulation of a pure state "interest," the book's economic-based rational choice theory has some applicability. It should also be noted, however, that the modern law of occupation is a historical construction, initially developed in the late nineteenth and early twentieth centuries during the heyday of the nation-state. Because occupation law currently favors state interest does not mean that it *always* will. At least for the time being, occupation law still seems very much suited to the needs and interests of the occupying power.

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[57] *Id*. at 5.

[58] "Indeed it is tempting to question seriously whether any genuine 'law' of occupation ever existed, at least if one understands 'law' as 'authoritative and controlling state practice.'" Robert C. Beck, Review, *The International Law of Occupation*, 4 L. & POLS. BOOK REV. 89 (1994).

[59] BENVENISTI, *supra* note 4, at viii-ix.

[60] *Id.* at ix; S.C. Res. 1483, UN Doc. S/RES/1483 (May 22, 2003).

[61] BENVENISTI, *supra* note 4, at xi.

[62] *Id*.

[63] *Id.*

[64] *Id*. at xii.

Conclusion

Posner and Goldsmith have written a provocative and controversial book that is also accessible and intriguing, and they deserve a great deal of credit for this. The book is relevant for military attorneys, as it contains both strengths and weaknesses relevant to the practice of military law. Unlike other critics, who find the rational choice model without value, I think in certain areas of international law, the model appears to work very well. But I also contend that the economics-based rational choice theory suits these certain areas of international law because history has made it so. To paraphrase the historian John Lukacs, rather than understanding historical developments in terms of economic models, we instead must attempt to understand economic models in terms of historical developments.[65] As history as shown, we are—or at least can be—more than the sum of our desires or our interests, and therein lay the true limits of *The Limits of International Law*.

[65] John Lukacs, *About Historical Factors, or the Hierarchy of Powers*, *in* REMEMBERED PAST 28 (2005).