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# The Morality of Military Occupation

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## I. A NEGLECTED ISSUE

The U.S. military has now occupied Iraq for more than five years. This is a long time for one state to impose a military occupation on another. But of course the American occupation of Iraq seems almost momentary by comparison with Israel's forty-one-year occupation of Palestinian territories in the West Bank and Gaza. Considering how controversial both these occupations have been, one would expect them to have elicited a substantial body of thought about the moral dimensions of the practice of occupation. But such an expectation would be disappointed. There is, of course, a body of *law* governing the practice of occupation, but the moral foundations of that law have suffered the same neglect by moral and political theorists that the practice of occupation itself has. As I prepared my remarks for the conference from which this symposium issue is derived, I was surprised to be unable to recall having read or even seen any philosophical discussions of occupation. I own most of the books that have been written on the theory of the just war over the past half century or so, but a search through their indexes turned up only a few entries on occupation, none of which proved, on investigation, to offer significant illumination.

I have not, however, had to conjure up a theory *de novo*. Occupation involves both the threat of military force and, usually, the use of military force; hence it is akin to, and indeed often overlaps with, war (as the alternating references to the occupation of Iraq and the war in Iraq attest). There should therefore be continuities between the morality of war and the morality of

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occupation, which will enable us to begin to think about the morality of occupation by reference to the morality of war.

The morality of war has traditionally been divided between the principles that justify war itself—that is, that govern the resort to and continuation of war (*jus ad bellum*)—and those that govern the conduct of war (*jus in bello*). The morality of occupation naturally contains a parallel division. There are principles that determine in which conditions occupation is justified, and further principles that govern the conduct of an occupation.<sup>1</sup> And there is a parallel distinction in the law. According to the law, the rules governing the conduct of an occupation are the same for legal and illegal occupations alike, and it is equally possible for forces conducting an illegal occupation to obey these rules without detriment to their prospects of success as it is for those conducting a legal occupation. I will argue, however, that there is a substantial divergence between the law of occupation and the morality of occupation, just as I have argued elsewhere that there is a substantial divergence between the law of war and the morality of war.<sup>2</sup> I will argue that an occupation that is both unjust and unjustified cannot be conducted in a just or permissible manner. The morality of the conduct of an occupation cannot be independent of the morality of the occupation itself.

In this short essay, I will distinguish three morally different types of occupation. I will then discuss what it is permissible and impermissible for both occupiers and occupied people to do during occupations of these three types. Finally, I will conclude with a few observations about the relation between the morality of occupation and the law of occupation.

## II. JUST OCCUPATION

The occupation of a territory by a foreign power is imposed and maintained by military force. It requires the use of military force against those who resist or oppose it, and almost inevitably

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1. There are no corresponding Latin terms to refer to the principles governing the imposition of an occupation and those governing the conduct of an occupation. This is because neither the Romans nor the classical just war theorists, who wrote in Latin, had a concept of occupation. The practice of occupation is of recent origin and arose as an alternative to the traditional practice of conquering and annexing the territory of defeated enemies.

2. Jeff McMahan, *The Morality of War and the Law of War*, in *JUST AND UNJUST WARRIORS: THE LEGAL AND MORAL STATUS OF SOLDIERS* 19-43 (David Rodin & Henry Shue eds., 2008).

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results in instances of brutality toward innocent people when, as is usually the case, the territory occupied is that of a defeated but still hated adversary. Even when the occupied people are treated well, an occupation is usually highly burdensome to them nonetheless, as it greatly diminishes their capacity for self-determination, both individual and collective. Occupation therefore always requires moral justification. It is, as I indicated, reasonable to assume that the conditions of a just occupation parallel those of a just war.

As in the case of a just war, the most important condition of a just occupation is that there should be a just cause—not, of course, a just cause for war, but a just cause for occupation. As I understand it, this is not merely a requirement that there be some significant good to be achieved by the occupation. It is, rather, the requirement that there be a *wrong*, or set of wrongs, that the occupation would prevent or correct, and for which the occupied people are sufficiently responsible to make them morally liable to suffer the effects of occupation. To say that the people occupied are liable to occupation is to say that because of their responsibility for the problem that the occupation addresses, they are not wronged by being subject to occupation, or have no valid complaint about being occupied.

Occupation is largely indiscriminate in its effects, since it is imposed equally on virtually all of those within the territory under occupation, most of whom are civilians. But if it is right that a just occupation must have a just cause, if the existence of a just cause entails that those who are its intended subjects are liable to it, and if most of those deliberately subjected to occupation are civilians, then the possibility of a just occupation presupposes the possibility of civilian liability. This may seem surprising and implausible to many proponents of just war theory. According to the reigning theory of the just war, civilians are *innocent*, in the technical sense of *not* being liable. But when just war theory claims that civilians are not liable, that is shorthand for the claim that they are not liable to *intentional attack*, and it is compatible with their not being liable to intentional attack that they can be liable to certain lesser harms. For proportionality in defensive action is sensitive to the degree to which an individual is morally responsible for an unjust threat, which depends in part on the degree to which that individual has causally contributed to the existence of that threat. Civilians seldom make significant individual causal contributions to an unjust war; hence while they may bear sufficient causal and

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moral responsibility to be liable to suffer the effects of economic sanctions, or perhaps even to suffer certain side effects of military action, they are rarely sufficiently responsible to be liable to intentional military attack. They may, nevertheless, be sufficiently responsible for harms caused during an unjust war to be liable to pay reparations in its aftermath. Or they may be sufficiently responsible for the war and thus for unstable conditions resulting from it to be liable to occupation until those *post bellum* conditions can be remedied.

Yet when I claimed that occupation is indiscriminate in its effects, I was implicitly conceding that it is never the case that all those who are burdened by a just occupation are liable to suffer its effects. In every just occupation, there are inevitably some who are unjustly harmed. If, therefore, one were to justify a just occupation to all of those affected by it, one would have to invoke different forms of justification in addressing different people. The three basic forms of justification are, first, that some people are liable to it, second, that some people benefit from it and can be presumed to consent to it, and, third, that some people's suffering from it is the lesser evil.

Consider, for example, the occupation of a country whose unjust war of aggression has just been defeated. If the unjust war was a natural and predictable consequence of the culture that the citizens themselves had contributed to creating and sustaining, and if the war enjoyed significant popular support, as was true of the unjust wars fought by Germany and Japan in the middle of the twentieth century, then the principal justification for a *post bellum* occupation is that most of the people occupied have made themselves liable to occupation until the relevant features of their culture and political institutions can be sufficiently altered to ensure that their society will not again erupt into aggressive war.

Even in such a case, however, there are inevitably many people who are burdened by the occupation but are not individually liable to bear those burdens. If the harms inflicted on these people are justifiable, the justification must take the same form as the traditional justification for the killing and injuring of innocent people as a side effect of military action in war. In contemporary war, it is virtually impossible to conduct large-scale military action without foreseeably, though unintentionally, killing or injuring innocent people. The traditional view in just war theory is that these effects can be justified if they are both unintended and

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proportionate in relation to the importance of the military action. Similarly, when innocent people are harmed, or wronged, by an occupation, the occupation may still be just if most of those under occupation are liable to suffer its effects and the harm to those who are not is unintended and proportionate.

It may seem, however, that burdens imposed universally, or on everyone, during an occupation must be intentionally imposed even on those who are innocent. But this is debatable; indeed, I think it is false. Return to the analogy with killing in war. Suppose a pilot can bomb a concentration of approximately one hundred people, virtually all of whom he knows are enemy combatants. But suppose he can identify one or two innocent civilians among them. According to the traditional view, he can drop his bomb intending to kill only the combatants yet foreseeing that he will also kill the civilians. Although he drops his bomb on the civilians, he does not intend to kill them. Killing them is neither his end nor his means; it does not serve any purpose for him and is no part of his plan.

This example is, however, not quite analogous to an occupation to which most of the people occupied are liable. For in such an occupation, those who are not liable to be burdened in general cannot be identified. A closer analogy is therefore a case in which the pilot can bomb a concentration of approximately one hundred people, all of whom appear to be enemy combatants though the pilot knows that one or two are innocent civilians who have been forced to wear the uniform of enemy combatants. Again according to the traditional view, the pilot can bomb the entire concentration intending only to kill combatants though foreseeing that his act will kill one or two innocent civilians, whom he would spare if he could identify them and avoid harming them. In one sense, of course, he intends to kill everyone, one or two of whom are innocent civilians; but that is compatible with his intending to kill combatants only.

To see this, compare a sequence of individual executions. A judge may sequentially order the execution of one hundred people, believing that each is guilty and thus intending to execute only guilty people, even if he knows that it is statistically certain that one of the people he executes is innocent. He never intends to kill an innocent person though he knows that one of the people he intentionally kills is innocent, though of course he does not know which. The same description applies to the pilot. And, more importantly for our purposes, a parallel description might apply to

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those who organize and direct an occupation. In part because they cannot determine who among the occupied people are innocent, they impose the occupation on the entire population. But that is compatible with their intending to restrict the action only of those who have made themselves liable to occupation, while merely foreseeing that the occupation will burden many innocent people as well. There is, after all, no point in their restricting the action of those who pose no threat and would cooperate with them voluntarily. Restricting these people's freedom is neither an end nor a means but a mere side effect. Because these people cannot be reliably identified, they must share the burden with those who are liable.

For the occupation to be just despite the unjust harm it causes to these innocent people, the harm they suffer must be unintended and proportionate in relation to the just goal the occupation is intended to achieve. The harm they suffer is justified by virtue of being the unintended lesser evil.

Suppose the innocent people could be identified, but that exempting them from the burdens of occupation (for example, from curfews) would require excessive administrative costs and would involve a significant risk that the exemptions would be exploited by those engaged in violent resistance against the occupation. If the innocent people could be spared the burdens but are not, it seems that exposing them to those burdens must count as intended—or, to be more precise, *not exempting* them from the burdens of the occupation is intended as a means of avoiding risks and costs. If intention is relevant to justification, an occupation in which the innocent could be spared but are not will be harder to justify morally than one in which the innocent cannot be identified and spared, even if in the former case the costs of identification would be prohibitive.

Thus far I have been discussing a just occupation following the defeat of a popularly supported war of aggression. There are, however, unjust wars of aggression that are not the product of a society and its culture, but are initiated within an undemocratic country by a dictatorial elite whose commands it would be virtually suicidal to defy or oppose. The war fought by Iraq against Iran in the 1980s was such a war. The civilian citizens would bear little or no responsibility for a war of this sort and thus would not be liable to occupation following its defeat. In the absence of significant civilian responsibility for the war, of course, there

would be less reason for an occupation, and even if one were necessary it would be less likely to be resisted if it were clearly intended to facilitate the transition to a different and more benign form of governance. Yet if for some reason there was a compelling case for a *post bellum* occupation to which the people were not liable and to which they were in general opposed, the justification would have to be that the consequences of not occupying the country would be so much worse, impartially considered, than those of an occupation, that the rights of the occupied people are overridden. Lesser-evil justifications of this sort are rarely valid in practice.

Another circumstance in which an occupation might be just is the immediate aftermath of a justified humanitarian intervention, when it may be necessary to offer continued protection to a persecuted group by forcibly restraining the government and those among its supporters who have been guilty of the violent persecution of the members of that group. The justification for an occupation in these conditions would include elements of all three forms of justification noted earlier. The government and its supporters would be liable to the burdens of occupation, the beneficiaries of the intervention would continue to benefit from the occupation and so could be presumed to consent to it, and the burdens imposed on the remaining people who are neither the intended targets nor the intended beneficiaries of the occupation would have to be justified as unintended, but proportionate evils.

### III. UNJUST OCCUPATION

The various reasons why an occupation may be wrong parallel the reasons why a war may be wrong. For example, even if there is a just cause for war, war may be wrong because the just cause can be achieved by less destructive means, or because the pursuit of the just cause by means of war would cause disproportionate harm. Similarly, there might be a just cause for occupation when occupation would nevertheless be unnecessary or disproportionate. In such a case, occupation would be wrong but perhaps not *unjust*, since the people on whom it would be imposed would be liable. They would have a valid complaint but it would not be that they were being unjustly harmed but that they were being unnecessarily harmed, or harmed to a degree disproportionate to their liability.

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But perhaps the most common reason why a war is wrong is that it lacks a just cause—which is to say, on the understanding of the notion of just cause I have suggested, that the people warred against have done nothing to make themselves liable to military attack. The parallel category of occupation consists of those occupations that are unjust because the people occupied have not made themselves liable to suffer the burdens of occupation. No doubt in the aftermath of every war there are some people on the side that fought without just cause who are liable to be forcibly restrained in certain ways for a certain period. But there is a just cause for *occupation* only if these people are sufficiently numerous, or constitute a sufficient proportion of the civilian population, to make an occupation necessary rather than a set of more finely targeted restrictions that could be imposed only on those who are liable to suffer restraint.

Most occupations that are unjust in this sense—that is, that wrong the majority of people burdened by them because those people are not liable to suffer those burdens—are also morally unjustified. But just as there can be an occupation for which there is a just cause but that is unjustified because it is unnecessary or disproportionate, so there can be an occupation that is unjust because it lacks a just cause but that is nonetheless overall morally justified. Such an occupation might be justified, even though it wrongs those subject to it, if the consequences of *not* conducting it would be much worse, impartially considered. This is a familiar, if perhaps uncommon, form of justification. Most of us concede that it can be permissible to infringe a person's rights, even intentionally, if that is necessary to avert a significantly greater harm. The person's rights are, we say, "overridden," though the infringement leaves a residual obligation to compensate the person later, if possible. In most cases of this sort, a person's rights are infringed in the course of averting a much greater harm *to others*. But it seems that there can also be cases in which one is justified in infringing a person's rights *for his own sake*.

Suppose, for example, that a surgeon culpably injures a man in a way that is potentially lethal. The man is unconscious and will soon die unless his leg is amputated. Given the conditions he has wrongfully created, the surgeon is now morally justified in amputating the man's leg, thereby infringing his right, though for his own sake. (If the man were conscious, he would no doubt waive his right by consenting to the amputation. That might

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remove one objection to the amputation, preventing it from being an infringement of a right and thereby shifting the moral focus more to the initial act of injuring. But the surgeon would remain responsible, and culpable, for the man's loss of his leg, even though the amputation was, in the circumstances, the lesser evil.)

Occupations that are unjust because they lack a just cause but are nevertheless morally justified as the lesser evil may also be divided into those that are justified because they avert greater harms to others and those that are justified because they are, in the circumstances, the lesser evil for those subject to them. Those of the first sort are arguably less common than those of the second. It is hard to think of realistic circumstances in which the rights of innocent people against occupation could be overridden by the necessity of occupying them in order to avert a much greater harm to others. It is, however, easy to imagine circumstances in which an occupation is unjust, in that the people generally have done nothing to make themselves liable to it, but is nevertheless morally justified as the lesser evil for those same people. The occupation of Iraq is arguably an example of an occupation of this sort. This is not the place to argue in detail that the war in Iraq was an unjust war, but a brief indication of how the argument would go may be relevant.

Those who sought to justify the war in moral terms made two claims: that it was justified as an instance of preventive defense and that it was justified as an instance of humanitarian intervention. The case for preventive defense hinged crucially on the claim that Iraq possessed certain types of weapons of mass destruction and was poised to acquire other types as well. But in fact Iraq neither had such weapons nor was on the verge of acquiring them, and key figures in the Bush administration knew at the time that the evidence for a threat from Iraq was negligible. They made no effort to verify what little supposed evidence they had and their precipitate invasion preempted the thorough investigation and accounting of Iraq's arsenal that had finally become possible and would have refuted the claims about the necessity of preventive defense.

The claim that the war was justified because it liberated the Iraqi people from an oppressive dictatorship is stronger but fails on two counts. First, the war has violated any reasonable proportionality constraint. Estimates vary considerably, but it is uncontroversial that over one hundred thousand Iraqi civilians

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have been killed since the initial invasion in 2003.<sup>3</sup> More than two million others have fled the country and are living as refugees in neighboring countries, mainly Jordan and Syria, and nearly three million have been displaced internally by violence and persecution. Given that there were fewer than thirty million people in Iraq prior to the war, this means that at least one person in every three hundred has been killed while another seventeen percent of the population have fled their homes to avoid inclusion in the mortality figures. It was entirely foreseeable that there would be resistance to an American invasion and that the sudden dissolution of structures of political authority would release the smoldering animosities among different ethnic and religious groups that had hitherto been forcibly contained by the Baathist dictatorship. Thus far, therefore, the war has indisputably been far worse for most Iraqis than if they had just been left alone. Defenders of the war may argue that the overthrow of the dictatorship will nevertheless work to the benefit of the Iraqi people in the long term. But in a case such as this, short-term failure is failure. For no dictatorship can endure indefinitely and this one would eventually, perhaps even by now, have been brought down by other and, probably, less destructive means.

Defenders might also argue that the Iraqi people are in fact liable to occupation because it is precisely their own ethnic and religious divisions that make the occupation necessary. Yet while this objection is correct in principle, it is mistaken about the facts. It is false that the majority of Iraqis would immediately be at each other's throats in the absence of coercive authority. What seems to be true is that small minorities in the different groups would begin to attack members of other groups, leading to an escalating cycle of violence, much of which would involve justified defense. Thus, prior to the initiation of such a cycle of violence, only those minorities are liable to preventive restrictions of their liberty.

The second reason the war cannot be justified as an instance of humanitarian intervention is that it is a condition of justification for that kind of war that the alleged beneficiaries should welcome it; yet despite the desire of most Iraqis not to be ruled by Saddam Hussein, there was no evidence—nor was any sought—that a

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3. For the various estimates, see National Public Radio, *The Toll of War in Iraq: U.S. Casualties and Civilian Deaths*, <http://www.npr.org/news/specials/tollofwar/tollofwarmain.html> (last visited March 8, 2009).

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majority wanted to get rid of him by means of a U.S. invasion and occupation. Because humanitarian intervention imposes on its intended beneficiaries all the risks involved in having a war fought where they live, as well as the risks of subsequent domination and exploitation by the intervening power, they must have the right to determine whether they wish to accept those risks in exchange for the potential benefits.

Sometimes, of course, it is abundantly clear that the victims of domestic persecution desperately want external protection, as in Rwanda in 1994, when an entire population was being slaughtered. In these cases there is little need to look for signs of consent. But in Iraq, though there was no political freedom and the state used terrorist means to suppress domestic dissent, the vast majority of people were able to live their lives in relative security. So it is no surprise that many of them preferred to continue to live under domestic despotism than to risk dying in a war fought by an untrusted and, as it turns out, untrustworthy foreign power—one that had helped to maintain Saddam Hussein in power as long as it was in its interest to do so, that had bombed their capital just over a decade earlier, and that had a manifest interest in ensuring the availability of their oil reserves.

The requirement that a war of humanitarian intervention be welcomed by the great majority of its ostensible beneficiaries, which we may loosely refer to as the “consent condition,” does not, in my view, derive from a principle of respect for collective autonomy. If it is certain that many more of a country’s innocent citizens would be killed in the absence of intervention, but a majority of them refuse to believe it, intervention may be justified despite their misguided opposition. One must not allow the human rights of the minority to be sacrificed because of the mistaken beliefs of the majority. The basis of the consent condition is instead largely pragmatic. Because the risks imposed by war are uncertain, and because an oppressed people know better than others what they can endure, decision-making authority with respect to humanitarian intervention should be allocated in such a way as to give them a moral veto. They may not be entitled to demand an intervention, but the presumption must be that an intervention may not be undertaken unless there is compelling reason to think that the majority of its intended beneficiaries would welcome it.

When an instance of humanitarian intervention fails to satisfy the consent condition, does it follow that the war lacks a just cause? There are two ways of answering this question and I am uncertain which is better. I have claimed that there is a just cause for war when those warred against have made themselves liable to military attack as a means of preventing or correcting a wrong for which they are responsible. I agree with supporters of the war that Saddam Hussein and those complicit in maintaining his rule were guilty of egregious and continuing wrongs against the vast majority of people in Iraq. He and those who shielded him were therefore morally liable to forcible removal from power to prevent the continued infliction of those wrongs. One could claim, then, that there was a just cause for war but that the war was nevertheless unjustified because it violated an entirely distinct and independent requirement: the consent condition.

Alternatively, one could incorporate the consent condition in the requirement of just cause, claiming that if the intended beneficiaries of an act of defense themselves object to being defended, that makes the act of defense unjust. Suppose that a third party proposes to defend an innocent victim from a culpable attacker but that the potential victim wants *not* to be defended and forbids the intervention. It seems that although third party defense would not wrong the attacker, it *would* wrong the victim. One could argue that the opposition of the beneficiary, especially if it is well-grounded (for example, the culpable attacker is her own child), effectively nullifies the reason for the intervention (that is, the apparent just cause for third party defense). If that can be true in the individual case, it may be true as well in cases in which the numbers of attackers, innocent victims, and potential third party interveners are all vastly greater, as in humanitarian intervention. This answer requires a revision of the rather simple account I have given of the requirement of just cause in ways that would make it more complex, but this would be an easy revision to make.<sup>4</sup>

Returning from this short theoretical digression to the evaluation of the war in Iraq, I suggest that because both of the moral justifications that were offered fail, and because there are no other candidate justifications with even minimal plausibility, it is

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4. For further discussion of these issues, see Jeff McMahan, *Humanitarian Intervention, Consent, and Proportionality*, in *ETHICS AND HUMANITY: THEMES FROM THE PHILOSOPHY OF JONATHAN GLOVER* (forthcoming 2009).

reasonable to proceed on the assumption that the war was unjust, in that there was no positive reason to initiate it that justified the predictable wronging of those whom it was allegedly intended to benefit. Yet the war itself dismantled the structures of political authority in Iraq, leaving a vacuum that had to be filled if the country were not to descend into anarchy, chaos, and, potentially, civil war. In these conditions, wrongfully created by the unjust invasion, a brief occupation was justified as necessary for the security of those made vulnerable by the dissolution of the government. At that point, it was unavoidable that the United States' prior action would inflict great evil on the people of Iraq. Of the possible evils, occupation was arguably the least bad for the potential victims. Although unjust, an occupation (though not the actual occupation, which was conducted for years with appalling cynicism and incompetence) was morally justified.

#### IV. PERMISSIBLE ACTION DURING A JUST OCCUPATION

I have claimed that there are two sorts of unjust occupation, or occupation that wrongs the occupied people. There are occupations that are both unjust and unjustified, and occupations that are unjust but nevertheless morally justified, all things considered. I will sometimes refer to occupiers of both sorts as "unjust occupiers," though I will also use the term "unjustified occupiers" to refer specifically to those whose occupation is both unjust and unjustified, and "justified occupiers" to refer to those whose occupation, though unjust, is nevertheless justified all things considered. I will reserve the term "just occupiers" for those who conduct an occupation that is both just and justified. (One might distinguish a fourth category of occupations that are just because they have a just cause but unjustified because they are either unnecessary or disproportionate. I will not discuss occupations of this sort.)

Thus far I have been discussing the conditions in which an occupation might be justified. This is the part of the ethics of occupation that corresponds to the principles of *jus ad bellum*. I will now turn to question of what it is permissible for people to do during the course of an occupation—that is, the part of the ethics of occupation that corresponds to the principles of *jus in bello*. I will begin by discussing permissible conduct during a just occupation.

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In a just occupation following a just war, what the occupiers owe to the occupied people may be different depending on what the just cause for the war was. For example, what the occupiers owe may be different in the aftermath of a war fought to defeat unjust aggression from what they owe after a war of humanitarian intervention.

Consider the Allied occupation of Germany after WWII. As I noted earlier, the various unjust Nazi invasions were natural outgrowths of the culture and ideology of Nazism, which the mass of Germans had embraced with enthusiasm. Hitler had been democratically elected and the Nazis' numerous campaigns of aggression enjoyed widespread popular support. The great majority of adult German civilians were therefore complicit to a greater or lesser degree in Germany's unjust war (or wars), which had made an occupation necessary. The necessity of occupation derived at least in part from the just aim of ensuring that Germany would not again erupt into aggressive war. This required a process of disarmament, the removal of key Nazi figures from positions of power, and the gradual restructuring or replacement of Nazi political, legal, and other institutions. Many of the required acts were illegal under the law of occupation, but were nevertheless morally justified.<sup>5</sup> The moral justification for imposing an occupation as a means of achieving those just aims was that the great majority of adult Germans had, by being active or passive accessories to Nazi aggression, made themselves morally liable to suffer the burdens of occupation, given that occupation was necessary to prevent their society from committing further wrongs of the sort it had already committed on a massive scale.

In such conditions, in which the great majority of those burdened by an occupation have made themselves liable to suffer those burdens, the duties of the occupiers to the people occupied are mainly negative rather than positive in character. The occupied people are, in other words, primarily owed duties of forbearance and restraint: duties that they not be made the objects of vengeance, cruelty, or any other forms of gratuitously inflicted or tolerated suffering (duties that the Allies did not consistently fulfill during the occupation of Germany).<sup>6</sup> It is not that there are no

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5. See, e.g., EVAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 91-106 (1993).

6. See GILES MACDONOGH, *AFTER THE REICH: THE BRUTAL HISTORY OF THE ALLIED OCCUPATION* 237-242 (Basic Books 2007).

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positive duties to protect and promote the well-being of the people under occupation, but only that such duties are fewer and weaker the more responsible the people are for the conditions that necessitate the occupation. The occupation of postwar Germany, which dovetailed with the Marshall Plan to facilitate West Germany's spectacular political and economic recovery, shows in any case that magnanimity and generosity are often also a matter of enlightened self-interest.

Even after the defeat of a war of aggression, the liability to occupation of the citizens of the aggressor state may be weak if they had little or no power to restrain the action of their government. In this case the positive duties of the occupying power are stronger than they would be if the liability of the people were greater.

If an occupation is required in the aftermath of a just instance of humanitarian intervention, some of the occupied people—those complicit in the wrongs the intervention brought to an end—may be liable to be occupied, while others—the victims of those wrongs—are not. The justification for the occupation must thus appeal to the claim that the former are liable to suffer it while the latter are either benefited by it or are unintentionally burdened by it as the lesser evil. The difference between the justifications for what is done to the members of the different groups then corresponds to a difference in the duties that are owed by the occupiers to the different groups. As was true of most adult Germans after WWII, those who are liable to be occupied are owed mainly negative duties, while those who are not liable may be owed extensive positive duties of aid, protection, and so on. They are victims and their benefactors may owe them more than just stopping their persecution—though once the occupation has ended, these beneficiaries may owe their benefactors not only gratitude, but even compensation, if that is possible; however, their duty to compensate the interveners will be slight in comparison to that of the people whose wrongful persecution of them necessitated the intervention.

The morality of conduct during an occupation is, of course, not just a matter of what occupiers owe to the occupied; there is also the question of what the occupied people owe to the occupiers. The most important question here is whether there is a right of violent resistance. When an occupation is both just, in that most of those subject to it are liable to suffer it, and also justified,

it seems obvious that resistance is in general impermissible. I say "in general" because I can think of at least two possible exceptions. The most obvious exception is when a just occupation is being conducted in an unjust or impermissible manner. If just occupiers are in breach of their negative duties to the occupied people, resistance may be justified, though only to stop the abuse, not to defeat the just aims of the occupation.

The other possible exception is more doubtful but is worth mentioning. This is that those who are not liable to occupation, do not benefit from it, and indeed are unjustly and severely burdened by it may be justified in engaging in certain forms of resistance as a matter of self-defense. The reason this is doubtfully an exception is that the burdens of occupation are generally temporary and endurable, so that when an occupation is just and can reasonably be expected to work to the long-term benefit of the occupied society as a whole, it may be incumbent on those who are unjustly burdened to suffer those burdens both for the good of their own society and, perhaps more importantly, to avoid harming members of the occupying forces, who are acting with moral justification and thus are not liable to defensive action.

#### V. PERMISSIBLE ACTION DURING AN UNJUST, UNJUSTIFIED OCCUPATION

In an occupation that is both unjust and unjustified, what the occupiers owe the occupied people is to leave, immediately. After they have done that, they will owe compensation. It is as simple as that. But of course they will do neither voluntarily. So it is important to consider what it may be permissible for the unjustly occupied civilian population to do in such a situation.

The occupying forces are governing the lives of innocent people at gunpoint, thereby violating not only these people's rights to individual liberty and collective self-determination but also their right not to be threatened with death for acting in ways that are morally permissible. Even if these forces are acting under duress, and even if they believe that the occupation is justified, they are nevertheless responsible for wronging innocent people in ways that are sufficiently serious to make them liable to violent resistance if that is necessary for the people to recover their political freedom. They can have no justified complaint if they are attacked by those whose rights they are violating. Nazi soldiers in

occupied France were not wronged when they were attacked by members of the French Resistance.

Yet the example of the Resistance shows that there is often an important moral reason for people under unjust and unjustified occupation not to attack the occupying forces. This is that attacking the occupying forces is very likely to provoke reprisals against the civilian population, for it gives these forces a reason to attack civilians—namely, to deter further attacks against themselves. Thus, when the Nazis occupied France, they operated a savage system of reprisals to deter action by the Resistance. The walls of the Metro carried notices threatening dire harms against the relatives of anyone found to be a member of the Resistance. And whenever a member of the Wehrmacht was killed, a number of hostages—usually Jews or communists—were executed in reprisal. When occupying forces are this barbaric, members of the occupied population may owe it to their innocent fellow citizens not to expose them to vicious reprisals by attacking the occupying forces. Yet if violent resistance could reasonably be expected to be *better* for the occupied people as a whole than either acquiescence or nonviolent resistance, it may be morally justified, even when conducted by civilians against members of the military, and thus in violation of the laws governing the practice of occupation.

#### VI. PERMISSIBLE ACTION DURING AN UNJUST BUT JUSTIFIED OCCUPATION

While the United States has sought to portray the occupation of Iraq as a just occupation following a just war of humanitarian intervention, these claims are belied by the fact that it has met with widespread and determined resistance by diverse uncoordinated and even rival groups within the civilian population and has been unable to recruit significant assistance from the Iraqi people in combating the various insurgencies. This is evident in the absence of any real distinction between the occupation of Iraq and the war in Iraq. Rather than being a short-term transitional state between war and the restoration of full Iraqi sovereignty, the occupation instead devolved into a protracted war of counterinsurgency. Still, I have argued that some kind of occupation became morally justified once the United States had overthrown the government of Iraq and dismantled a range of political institutions necessary for governance and the maintenance of domestic security. Yet because the majority of Iraqis neither welcomed the U.S. invasion nor had

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made themselves liable to occupation, any occupation of Iraq would have been unjust, in that it would have unjustly burdened the majority of those subject to it, however justified it may have been on the ground that it was, in the circumstances, the lesser evil for those burdened by it.

It is in this kind of occupation that the obligations of the occupier to the occupied people are greatest. When the occupier has, through its own wrongful action, made it the case that a highly burdensome occupation is the lesser evil for the occupied people, it has an obligation as a matter of justice to pay every cost, and make every sacrifice, necessary to ensure that the victims of its action are at least as well off as they would have been in the absence of the action that made the occupation necessary.

The obvious problem, of course, is that those who have wrongfully created conditions in which a military occupation of an entire country has become the lesser evil are evidently unfit for the task of conducting that occupation. Unless there is a radical change of regime in the responsible country (an event that will occur six years too late for the people of Iraq), the government of that country will continue to be guided by the interests and concerns that motivated the action that created the need for occupation. That government will not fulfill its obligations to the victims of its action but will exploit the occupation as a further means of achieving its own aims. Even if this were not the case and the government was actually willing to do all it could to rectify its earlier wrongdoing, it would be in no position to expect the trust or cooperation of the people it had wronged and would thus be gravely handicapped in its ability to fulfill its obligations. Perhaps the ideal solution in these conditions would be for the country that is responsible for the need for an occupation to pay all of the costs of an occupation that would be conducted by the forces of a neutral, impartial power, such as the UN—assuming that such a power could be found that would be willing to repair the damage. But that this could actually happen is no more likely than that the country would fulfill its obligations on its own.

When an occupation is unjust but nevertheless justified as the lesser evil, are the occupied people justified in engaging in violent resistance? If an occupation is really objectively justified on the ground that it is better for the occupied people than any other feasible alternative, armed resistance must be contrary to the legitimate interests of the occupied people and thus cannot be

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justified. The occupied people ought instead to cooperate with the occupiers in order to bring the occupation to as early an end as possible. One cannot, however, expect all those subject to an unjust but justified occupation to recognize that it is justified. Many patriotic members of the occupied population may be unable to see beyond the simple fact that their country is under military occupation by a foreign power. Some of these people will seek to expel the occupiers by force. Their action may be misguided, but it is understandable in the circumstances. Those who wrongfully created the need for an occupation would seem to have greater moral responsibility for the misguided action of these patriots than the patriots themselves do. It was, after all, the wrongful action of the occupiers that put these people in a situation in which it may be reasonable for them to believe that the occupation is not only unjust but also unjustified. In these circumstances, the insurgents may have a strong excuse (or even a subjective justification) for their objectively wrongful resistance, and this in turn may mean that the justified occupiers ought to exercise various forms of restraint in fighting against them.<sup>7</sup>

Many questions remain. Suppose that an occupation is being badly conducted and thus is worse for the occupied people than it need be but is still objectively better for them than no occupation at all. In these conditions, violent resistance might be justified if it would prompt the occupiers to alter their strategy in ways that would improve the character of the occupation and bring it to a speedier conclusion. But of course it could also provoke harsh reprisals and in general make the situation worse. Neither ordinary citizens nor insurgents are likely to be able to determine with any confidence whether a badly managed occupation is better than no occupation or whether armed resistance would have a beneficial effect or simply exacerbate the problems. Although in these conditions, with so much inevitable uncertainty, it may be true to say that occupying forces could be liable to attack if the net effect would be good but not if the effect would be bad, such a claim is virtually devoid of practical significance.

Just as a war may be just at the outset but cease to be just as it continues (because, for example, the just cause has been achieved,

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7. On the idea that there may be a requirement of restraint in fighting against those who, though in the wrong, are nevertheless fully excused, see JEFF MCMAHAN, *KILLING IN WAR* § 4.5 (2009).

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abandoned, or supplemented by unjust aims), so an occupation that is initially just, or unjust but justified, may become wholly unjust and unjustified as it progresses. When this happens, it may become permissible for those who are its victims to begin to use violence to expel the unjust occupiers, and for third parties to use violence to assist them.

Furthermore, just as those who fight in a just war may make themselves morally liable to defensive attack when they pursue their just cause by impermissible means or commit other wrongs or abuses in the course of the war, so both just occupiers and justified occupiers, including nonmilitary occupation personnel, can make themselves liable to defensive attack when they wrongfully harm members of the occupied population or otherwise abuse their authority in harmful ways, for example, by committing or sanctioning torture, rape, collective punishment, theft of land, and so on. As I suggested earlier, however, if the occupiers are sufficiently brutal, it may, in some instances, be wrong for the victims of abuse to exercise their rights of self- and other-defense in certain ways—not because to engage in defensive action would wrong the occupiers but because a credible threat of reprisal would make defensive action counterproductive, or worse for the occupied people as a whole.

In the case of a just or justified occupation, defensive action should be limited to stopping or deterring particular abuses and should not be aimed at undermining or defeating the occupation itself. This assumes that abuses are isolated deviations from occupation policy. If abuses become systematic, or a matter of policy, they may render the occupation itself unjustified, in which case defensive action may permissibly aim at the expulsion of the occupiers. To say that an occupation that is sufficiently badly conducted may thereby become unjustified is not to say that *any* occupation would be unjustified, but only that the particular occupiers have disqualified themselves for the task and may not permissibly remain as occupiers.

When I say that nonmilitary occupation personnel may be liable to defensive action, I include not only administrators but civilian collaborators in abuses as well. In the Israeli-occupied West Bank, for example, civilian settlers have for decades been engaged in a deliberate, officially-sanctioned effort by means of transgenerational residence to establish moral claims to land that by right must be considered Palestinian territory, the homeland of

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the Palestinian nation. The adult settlers are the culpable perpetrators of a grave violation of the rights of an occupied people and as such are liable to necessary and proportionate defensive action. It may be, however, that such action can be proportionate only if it can be effective, which at present it probably cannot be.<sup>8</sup> I also think that at present violent defensive action is not necessary because active forms of nonviolent resistance would be more effective. But if violent means were the only feasible means and offered some promise of success, the settlers could not claim to be morally immune from defensive action simply by virtue of having civilian status.

#### VII. THE MORALITY OF OCCUPATION AND THE LAW OF OCCUPATION

My aim in this short essay has been to open an overdue discussion in analytic moral philosophy of the morality of military occupation. Nothing I have said is intended to have any direct bearing on the law of occupation. The relation between the morality of occupation and the law of occupation is much like that between the morality of war and the law of war. While neither the morality of war nor the morality of occupation is neutral between the just and the unjust, the law of occupation, like the law of war, is and must remain neutral, at least until institutional changes make it feasible to reform the law in ways that would bring it into closer congruence with morality.

The principal reason why the law of occupation must at present be neutral between just and unjust occupiers is that all occupiers believe, or claim to believe, that their occupation is just. Those engaged in unjustified occupations, or unjust but justified occupations, will therefore regard themselves as permitted to do whatever is legally permitted to just occupiers. The law governing the conduct of occupation therefore cannot have different sets of rules for just, justified, and unjustified occupiers; for occupiers would not sort themselves into the correct categories and obey the rules that would actually apply to them. Nor is there any legal body with sufficient authority to compel occupiers to recognize their actual legal status. For the government of a powerful country, such as the Bush administration in the United States, can simply

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8. On the issue of hopeless resistance, see Daniel Statman, *On The Success Condition for Legitimate Self-Defense*, 118 *ETHICS* 659, 659-86 (2008).

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get its corps of legal hacks to devise some meretricious reasoning that will keep the legal controversy going long enough to allow it to accomplish its aims.

The law of occupation must at present be designed to encourage even unjust occupiers to accept certain constraints on their conduct during an unjust occupation. It must, therefore, apply neutrally to all occupiers. It must be sufficiently permissive to enable just occupiers to achieve their legitimate aims, yet sufficiently restrictive to impose necessary constraints on unjust occupiers. It will therefore inevitably make various morally permissible acts by just occupiers illegal and legally permit a variety of morally impermissible acts by unjust occupiers, and particularly by unjustified occupiers.

The law of occupation is, however, like the law of war in being an area in which law ought, ideally, to coincide with morality. This ideal of convergence has been achieved to a considerable degree in domestic criminal law, at least in many jurisdictions. The law of homicide, for example, is not designed, as the law of war is, to minimize harm overall, giving equal weight to the interests of killers and their potential victims. It is instead designed to minimize the violation of rights and is thus radically asymmetrical in its treatment of murderers and their potential victims. The law of war and the law of occupation ought ideally to be the same. It ought to be illegal to engage in acts of war that violate people's moral rights because the war is unjust, and illegal to violate the rights of innocent people by imposing on them the burdens of an unjust occupation. Eventually it may indeed become possible to create international institutions that will enable us to overcome some of the practical obstacles—particularly those arising from the absence of any epistemically reliable and authoritative means of distinguishing among just, justified, and unjustified occupations—to reforming the law in such a way that it would impose different constraints on just and unjustified occupiers. It is therefore important for legal purposes to think carefully about the morality of occupation quite independently of what the law of occupation is at present and even independently of what it ought to be in current conditions. We should aim to understand the morality of occupation in terms of the individual rights and liabilities both of the occupiers and of the people occupied. A clear understanding of this basic morality of occupation can then provide guidance in the creation of

institutions that will facilitate the ultimate translation of morality into law. It can provide a template for the eventual redesign of the law so that the permissions and prohibitions of the law coincide more closely with those of morality.