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JEAN L. COHEN

The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for "Interim Occupations"

ABOUT THE AUTHOR: Jean L. Cohen is Professor of Political Theory in the Political Science Department of Columbia University.

Is there and should there be international law relevant to "post-conflict" constitution-making? Should we attempt to revive or develop a "*jus post bellum*"? In an epoch of "humanitarian" and "democratic" interventions, the "war against terror," U.N. sponsored "regime change" and "nation-building" for "failed" or "outlaw" states, and the prolonged and highly transformative foreign occupations that all of these tend to entail, this question inevitably arises.[1] It is indeed analytically distinct from the issues of the justice of the war itself (*jus ad bellum*) and the justice of how the war has been conducted (*jus in bellum*). At issue are the principles and rules regulating "interim administrations" erected by occupying forces in the aftermath of foreign military intervention in the context of a belligerent occupation or a U.N. "peace building" mission.[2] At stake are not only the human rights, but also the sovereignty and self-determination of the occupied. To put it succinctly, if "post-conflict" constitution-making is to be an exercise in self-determination instead of foreign imposition, then occupying forces must not engage in expansive legislative and institutional changes that preempt autonomous political decision-making regarding the nature of the political, social, and economic regime.

The relevant international law of *jus post bellum* is the law of belligerent occupation codified in two key treaties: the 1907 Hague Regulations Respecting the Laws and Customs of War on Land and the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and in the Additional Protocols I and II of 1977.[3] These treaties enshrine what is known as the Conservation Principle by prohibiting major changes in the legal, political, economic, or social institutions of the occupied territory. The concepts of belligerent occupation and the conservation principle delimit the authority of the occupier

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1. *Jus ad bellum* deals with the justice of the decision to go to war, *jus in bello* deals with the justice of conduct of the battles. *Jus post bellum* should deal with justice after the war. *See* MICHAEL WALZER, ARGUING ABOUT WAR xiii (2004). I am concerned not only with the justice, but also with the law of post war occupation.

2. I am restricting my analysis to non-consensual occupations and transformations. National sovereignty is not placed into question if intervention and occupation are consensual; for example, when foreign lawyers, politicians, etc. are invited to help draft constitutions, as in Eastern European transitions and in South Africa, or following U.N. Chapter VI action as in Cambodia and El Salvador, at the invitation of those states. In such cases, success is due in part to legitimacy, generated by real participation and a real process of self-determination. Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 288 (2005). I make use of Benvenisti's definition of occupation, a term which he prefers to "belligerent occupation" so that the emphasis is not placed on how a territory came under a foreign state's control, but on the fact of its being occupied. He defines occupation as ". . . the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory." EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4 (1993).

3. Technically, Hague and Geneva rules regarding belligerent occupation are deemed part of *jus in bellum*, but I will refer to them as part of *jus post bellum* also in order to cover cases of occupation even if no full-scale war occurred and even if a war ends without a peace treaty. Hauge Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

administering a territory he controls by virtue of the purely factual nature of his power — which was assumed to be temporary and provisional. Indeed, "the foundation" of the "entire law of occupation . . . is the principle of inalienability of sovereignty through the actual or threatened use of force."[4] This is what the conservationist principle "conserves," as it were, and what differentiates de facto occupation from actual annexation and/or complete and permanent control by outside powers (subjection).

This all sounds rather quaint today. It's unsurprising that the concept of belligerent occupation seemed to fall into desuetude during World War II and in the epoch of the cold war, with its numerous undeclared and rather transformative occupations.[5] The development of U.N.-administered occupations in "failed" or deeply divided states in the 1990s, in the aftermath of the cold war, was hardly the context in which to revive it.[6] Nevertheless, it was resuscitated, albeit reluctantly, by the U.S. and Britain's declaration that they were occupying powers in Iraq. Additionally, the Security Council Resolution 1483 expressly recognized the U.S. and Britain as occupying powers and required them to comply with their obligations under the international law of belligerent occupation, specifically mentioning the Hague Regulations and the Fourth Geneva Convention.[7] This is quixotic given that the occupation of Iraq, like the only other self-declared occupation since World War II, the Israeli occupation of the West Bank and Gaza since 1967, clearly promised to be a highly "transformative occupation," with no intention to respect the rules or laws of the ousted sovereign.[8] Moreover, Resolution 1483 itself appears contradictory and ambivalent, insofar as it also called for the occupying authority to "assist the people of Iraq in their efforts to reform their institutions," to "[create the] conditions in which the Iraqi

4. BENVENISTI, *supra* note 2, at 5.

5. *See id.* at 59–184.

6. U.N. Security Council sponsored interim administrations are not to be subject to the law of belligerent occupation.

7. S.C. Res. 1483, ¶ 5, U.N. Doc. S/RES/1483 (May 22, 2003), *available at* http://www.un.org/documents/scres.htm ("Calls upon all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907."). Resolutions 1483 and 1511 did not authorize this occupation by the "coalitional provisional authority" ("CPA"), but they acknowledged it and insisted that the authority remain bound by the Geneva Conventions. In addition, these Resolutions charged the CPA with duties that go beyond the Geneva Conventions, such as establishing and administering a development fund for Iraq. *See* David J. Scheffer, *Agora (Continued): Future Implications of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 845–46 (2003).

8. Indeed, one of the stated war aims was regime change. *See* Gregory Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 196 (2005). Israel is the other contemporary power that acknowledges it is engaged in an occupation, but it grants only the de jure relevance of the Hague Regulations. It claims that the Fourth Geneva Convention's humanitarian provisions will be applied de facto, but that otherwise they do not apply to its occupation of Palestinian territory of the West Bank and Gaza. *See* BENVENISTI, *supra* note 2, at 104–08; *see also* Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory,* 44 HARV. INT'L L.J. 65, 136–37 (2003).

people can freely determine their own political future," "[to promote] economic reconstruction and the conditions for sustainable development," and "[to promote] the protection of human rights."[9] Such "requests" hardly involve respect for the prior laws and institutions of the Iraqi state and certainly were not geared toward the restoration of the status quo ante.

Thus, we face a paradox that others have noted: If the conservation principle intrinsic to the law of belligerent occupation rules out fundamental change in political, economic, legal, and social structure by occupying powers, don't the imperatives of contemporary occupations, be they unilateral and belligerent or U.N.-sponsored, render it an anachronism today? If what is at stake in an occupation is the protection of human rights, regime change, and ultimately "post-conflict constitution-making," if the quality of governance is now generally a matter of international concern, shouldn't the conservationist principle be deemed moot and the law of belligerent occupation be abandoned or radically reinterpreted/reformed so as to enable the occupier to institute normatively desirable political change?[10] Wouldn't it be absurd for an occupier to maintain the laws of a tyrannical or a racist regime out of respect for the "ousted sovereign"? Shouldn't concerns for human rights trump outdated conceptions of sovereignty? Moreover, since the world in which the concept of belligerent occupation was devised and made sense no longer exists, isn't it anachronistic to attempt to revive or even reform it?[11]

On the other hand, how can they avoid the charge of liberal imperialism if occupiers have a free hand to impose their preferred form of "liberal democratic" institutions on a subject population? Aren't "transformative occupations" more akin to a modern form of indirect colonialism than the selfless liberation they often pose as? Shouldn't we be suspicious of the revival in contemporary discourse of concepts like "shared" or "disaggregated" sovereignty and "neo-trusteeship," whether these refer to belligerent occupation or U.N.-sponsored, yet non-consensual, administrations, given the inordinate influence of the sole superpower within the Security Council since the 1990s and its rather transparent efforts to create what has been called Hegemonic International Law?[12] Without

9. S.C. Res. 1483, *supra* note 7, at ¶ 5.

10. *Iraqi Reconstruction and the Law of Occupation: Hearing on Constitutionalism, Human Rights and the Rule of Law in Iraq Before the Subcomm. on the Constitution, S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of John Yoo, Visiting Fellow, American Enterprise Institute Professor of Law, University of California at Berkeley). Yoo reinterprets the Hague Regulations as enabling of transformative occupations. Others argue for going beyond the law of belligerent occupation, and that it is an anachronism today and should not be reformed. *See* Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT'L L. 721 (2005); Scheffer, *supra* note 7.

11. Bhuta, *supra* note 10, at 734–37.

12. On shared sovereignty, see Robert O. Keohane, *Political Authority After Intervention: Gradations in Sovereignty*, *in* J.L. HOLZGREFE & ROBERT O. KEOHANE, HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 275 (2003); Stephen D. Krasner, *Rebuilding Democracy After Conflict: The Case for Shared Sovereignty*, 16 J. DEMOCRACY 69, 60–83 (2005); Stephen D. Krasner,

a *jus post bellum* that asserts the relevance of this principle to *all* occupations, what would prevent the resuscitation of a new type of mandate or trustee system that once again condones prolonged occupation administrations and foreign control, and which will once again, in the name of the "civilized values" of the international community, treat the occupied as wards, incapable or unwilling to responsibly govern themselves?[13] Shouldn't we resist giving a legal imprimatur to any (non-consensual) foreign project of transformative occupation and leave the burden of proof on the occupier?[14]

I take these dilemmas seriously. Nevertheless, I will argue first that the spirit of the conservation principle, if not the letter of the law of belligerent occupation, remains relevant today and that it is well worth the effort to articulate its normative thrust in light of contemporary conditions. In particular, I will maintain that the principle of the "inalienability of sovereignty by force" remains valid and crucial today, although the understanding of who the ultimate bearer of national sovereignty is, and of what prerogatives sovereignty entails, have undergone important shifts. Second, I will claim that it is advisable to acknowledge the need for legal reform of occupation law and to articulate clear principles (purposes) and determinate rules that should guide such reform. The Hague Regulations and Geneva Conventions remain relevant customary international law, but it is important to update these conventions so as to develop rules adequate to address contemporary conditions and expectations. We must, in short, navigate between the Scylla of rigid legalism regarding Hague and Geneva IV, which invites the wholesale disregard of occupation law as anachronistic or a willful misreading of it as simply enabling, and the Charbydis of overly-enabling reforms in the name of human rights or "democratic regime change," which undermine the very principle that occupation law should be protecting.[15]

Sharing Sovereignty: New Institutions for Collapsed and Failing States, 29 INT'L SECURITY 85 (2004). On neo-trusteeship, see James D. Fearon & David D. Laitin, *Neotrusteeship and the Problem of Weak States*, 28 INT'L SECURITY 5 (2004). On the concept of Hegemonic International Law, see Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001) and Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003) (stating that hegemonic international law jettisons the formal equality of states, replacing pacts between equals grounded in reciprocity with patron-client relationships in which clients pledge loyalty to the hegemon in exchange for security or economic sustenance). Hegemonic international law is characterized by indeterminate rules whose vagueness benefits primarily the hegemon, recurrent projections of military force, and interventions in the internal affairs of other nations. Elsewhere I have referred to this phenomenon as "imperial law." Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L AFF. 1 (2004).

13. Since decolonization, the U.N. trusteeship system established in 1945 is basically defunct, so it is unsurprising that the Secretary-General has recommended deletion of the Trusteeship Council from the Charter. *See* The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 218, *delivered to the General Assembly*, U.N. Doc. A/59/2005 (Mar. 21, 2005).

14. *See* Bhuta, *supra* note 10, at 740.

15. For an example of such a willful misreading, see Yoo, *supra* note 10.

I will thus argue in favor of the development of a *jus post bellum* to forestall the usurpation of constituent power that is all too likely in the case of prolonged occupations, belligerent or otherwise. I will begin by addressing the two major approaches to the law of occupation that my own interpretation is at odds with: the moral humanitarian and the realist/Schmittian, both of which suggest that the conservation principle is irrelevant today. Part I will discuss the former approach, which interprets the development of occupation law as a process of humanization guided by the increasing and salutary influence of human rights on humanitarian law. The logical implication of this approach is the expansion of the scope of the legislative and institutional change on the part of occupying powers in order to protect the welfare and rights of the occupied population. Part II will discuss the latter approach, which insists that the concept of belligerent occupation along with the conservation principle belong in the dustbin of history because the international order and social structural conditions to which they were functional no longer exists. It sees the revival of the discourse of belligerent occupation in the aftermath of the Second World War as at best naive, or at worst suspect and self-serving on the part of the Great Powers. At the same time, it rejects legalization of transformative occupations as playing into imperialist hands. In Part III, I will suggest a third alternative, which grants that we are in an epoch of transformative occupation and claims that this is precisely why clear principles and updated legal rules that remain true to the spirit of the conservation principle are so necessary. It is possible to square the circle if we look more closely at what is at stake in the law of occupation today in light of other relevant principles of international law. Our epoch is regulated not only by human rights norms, but also by the normative legal principles of sovereign equality, self determination, non-intervention, and the strictures against aggression and annexation — these principles provide the basis on which to reconstruct the conservation principle in a non-anachronistic way. In Part IV, I conclude by arguing that unilateral as well as multilateral occupations should be regulated by international law, based on the principles these norms embody.

I. THE DEVELOPMENT OF OCCUPATION LAW AS A STORY OF HUMANIZATION

The standard humanitarian interpretation of the development of occupation law (and the law of war generally) is that its main purpose is to moderate the excesses of modern warfare and military rule, the focus being the welfare of the helpless civilian population at the mercy of a foreign army.[16] Legal rules were deemed necessary because the ousted sovereign no longer has the ability to protect the local population; and the occupier, precisely because his occupation is seen as temporary, has no interest in doing so. Indeed, the international law of belliger-

16. For the classic statement, see Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

ent occupation is understood today as that branch of humanitarian law that regulates the occupation and administration of foreign territory by an entity that is not its sovereign government, either during a war or after a cease-fire.[17] The nineteenth century trend toward the humanization of the laws of war on this reading thus spilled over into a *jus post bellum*.

A. The Beginnings of the Humanitarian Approach

The humanitarian story begins with the first codification of the law of belligerent occupation prepared by Dr. Francis Lieber during the American Civil War in an 1863 text called "Instructions for the Government of the Armies of the United States in the Field," and issued as General Order No. 100 to Union Forces on April 24, 1863 at President Lincoln's request.[18] The Lieber Code is of course famous as an early attempt to humanize the conduct of modern war and it covers many topics — including treatment of prisoners, enemy property, prohibition of rape and enslavement — but a large part of the code is also devoted to belligerent occupation.[19] The original articulation of the idea behind the modern concept of "belligerent occupation" is attributed to Emmerich de Vattel, although the first usage of the concept was by a German publicist in 1844.[20] Belligerent occupation refers to the possession or control of territory acquired under an occupation that is deemed provisional and pending a treaty of peace, and thus involves temporary and limited prerogatives of administration rather than outright sovereignty and, by implication, a special legal status. Accordingly, the concept of belligerent occupation was distinguished from the older "right of conquest" which *ipso facto* ascribed full sovereignty over conquered territory and the total subjugation of its inhabitants — absolute dominion to the victor in a war. The latter could do as he pleased with the conquered territory and subjugated population as a corollary of his absolute sovereignty over everything that came under his control — the ruler's forces could lay waste, annex, set up a client state, cede the territory to a third state, etc. The merely temporary and limited rights of administration accorded to a military under the concept of belligerent occupation thus appear as an important step in the humanization of war and its aftermath because de facto power did not immediately translate into de jure sovereignty, conquest, and subjugation. This is all the more impressive since the norms delimiting what could be done under a belligerent occupation developed in a context in

17. *See id.* at 239 (where Meron makes much of the fact that the law of war today is now called "humanitarian law," stressing the impact of human rights principles).

18. Known as the Lieber Code, it is cited in DORIS GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY 14 (1949).

19. *See* Meron, *supra* note 16, at 245 n.22.

20. *See* GRABER, *supra* note 18, at 14. Vattel asserted that "possession acquired under occupation was not definite until the treaty of peace." *Id.*; *see also* Bhuta, *supra* note 10, at 725.

which war was still deemed a legitimate tool of state-craft and in which annexation (pending a peace treaty) was normal practice.[21]

Although the Lieber Code referred to an "internal conflict," it was influential as a model for the national manuals of European militaries and paved the way for international codification.[22] There were attempts throughout the nineteenth century to codify an international law of belligerent occupation, starting with the 1874 Intergovernmental Conference at Brussels and culminating in the 1907 Hague Convention Respecting the Laws and Customs of War on Land, which included fifteen articles addressing belligerent occupation under the rubric "Military Authority over the Territory of the Hostile State."[23]

B. The Occupier as "Trustee" of the Ousted Sovereign

On the humanitarian reading, the distinction between belligerent occupation and conquest/subjugation, along with limits on the prerogatives of the victor during occupation (especially those articulated in Article 43) developed in reaction to the brutality and punitive practices that accompanied the dominion following from past conquests. "With the rise of standing armies and more standardized codes of conduct in the nineteenth century, efforts were made to restrain these excesses of conquest."[24] However, given assumptions about the absoluteness of a sovereign's prerogatives and his right to war, and given the fact that only states had international legal personality, it was inconceivable to attempt to limit the brutality of occupations by invoking human rights or forbidding aggressive war at this period.[25] The only way to do this was to deny full sovereignty to the occupier and to speak instead of the "authority of the legitimate power having in fact passed into the hands of the occupant," and of preserving the laws and institutions of the "ousted sovereign."[26] As already indicated, belligerent occupation involved the establishment of military administrative authority over the territory and subject population that was deemed temporary, provisional, and "interim" between the cessation of hostilities and the final disposition of the territory in question (via a peace treaty, it was assumed).[27] In other words, occupation law according to the Hague regulations governs the period of interregnum be-

21. BENVENISTI, *supra* note 2, at 27.

22. *See* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 12 (3d. ed. 2002); *see also* Imseis, *supra* note 8, at 87–88. The national military manuals of the Netherlands in 1871, France in 1877, Serbia in 1882, Spain in 1882, Portugal in 1890, and Italy in 1896 all drew on the Lieber Code.

23. 1907 Hague Convention, *supra* note 3. For this history see GRABER, *supra* note 18, at 1–34.

24. Fox, *supra* note 8, at 229. Meron, Benvenisti and Imseis all can be characterized as partisans of the humanitarian reading. Fox actually differs from these thinkers by wishing to limit the application of human rights law to humanitarian law. *Id.* at 270–78.

25. *Id.* at 229–30.

26. *Id.* at 235.

27. *See supra* text accompanying note 4.

tween the end of a war and the conclusion of a peace treaty between the contending parties. Accordingly, the occupying military authority and the administration it set up was placed in the position of trustee of the interests and rules of the ousted sovereign.[28] Included among those interests were the preservation of property, basic order, and basic welfare of the civilian population.[29]

Occupation law thus protects the indigenous population, as well as interests of the "ousted sovereign," while providing legal cover for exigencies and needs of the occupying power (security, duty to ensure the peace, and certain basic rights). This triple imperative requires a balancing of the right of the occupier to protect its forces and preserve peace, the interests of the ousted sovereign, and the humanitarian needs of the population. Accordingly, the occupier may not alter the existing form of government, upset the constitution and domestic laws of the occupied territory, or set aside the rights of the inhabitants unless absolutely required by military necessity.[30] On the other hand, it can and must set up a military administration that provides public order and security for its own forces. Such an "interim administration" is, in some respect, similar to a domestic emergency regime under military authority, but it is meant to be restrained and to maintain the status quo ante regarding the laws and institutions under which the civilian population functions.[31]

The humanization of the law of occupation was predicated on the development of the all important distinction between citizen (civilian) and soldier that emerged in the context of the development of the modern state and the international state system. The latter institutionalized the general differentiation between public and private power (and offices), public and private property, public fiscal and monetary policies and private economic activity, and the differentiation between standing armies and private civilians. By the mid-1870s, this development reached the point where King William of Prussia could state on August 11, 1870, "I conduct war with the French soldiers, not with the French citizens."[32] As Eyal Benvenisti convincingly argues, war was seen as a match between governments and their armies, and thus civilians were left out of war and to be kept physically and economically unharmed as much as possible.[33] Given the general laissez-faire economic orientation of most states, the policy of minimal governmental intervention in the economy, and the great respect for

28. BENVENISTI, *supra* note 2, at 6.

29. *See id.*

30. Fox, *supra* note 8, at 236–37.

31. *See* Bhuta, *supra* note 10, at 727–29 (analogizing a belligerent occupation to that of a "commissarial dictatorship," where a "dictator" is granted emergency powers in order to preserve the existing constitutional system).

32. Eyal Benvenisti, *The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 ISR. DEF. FORCE L. REV. 19 (2003).

33. *See* BENVENISTI, *supra* note 2, at 27.

private economic rights, the theory was advanced that just as states have little interest in regulating the economic activity of their own citizens, so occupying powers should have little interest in regulating or interfering with economic activity and property of the occupied.[34] That is why it was possible to conceive of the occupier as an impartial trustee of the ousted sovereign and the local population: It was assumed that there was no conflict in principle between the temporarily subject population and the occupying power, once all resistance died down. Military administration of occupied territory was thus to be tamed and humanized by law: The preservation of order and security was not to involve interference with the daily lives of the civilian population. The numerous rules protecting the latter's property in the 1907 Hague Convention thus gave rise to the civil liability, in the form of compensation, of belligerents who violated them.[35] The complementary duty of the occupied population was to abide by the occupant's exercise of authority. In addition, the occupier was accorded the power to administer state property while being placed under the duty to safeguard it and refrain from destroying or depleting national resources.[36]

However, the idea of rights of conquest did not vanish entirely — it survived in the concept of "debellatio," the counter concept to belligerent occupation.[37] War was, as already indicated, still deemed a legitimate way to pursue national policy and full sovereignty over territory could be obtained either through a peace treaty or through the "total defeat" of an adversary — a concept entailing the complete destruction of the political and juridical institutions of the sovereign and the total disintegration of the enemy state.[38] So long as no other power continued the struggle on behalf of the defeated sovereign, occupation in such a case transfers sovereignty.[39]

This exception to the law of belligerent occupation reveals the limits of the Hague principles from the humanitarian point of view. As Benvenisti aptly points out, it reveals that "[t]he only relevant political interests in the Article 43 regime were those of state elites, not its citizens."[40] Territory and sovereignty could be transferred to a victor in a war culminating in debellatio irrespective of the wishes of the local population — who, of course, were not consulted. Even in the case of belligerent occupation, the occupant was expected to privilege the interests of the "ousted sovereign" over those of the indigenous population if these

34. *Id.* at 27–28.

35. Imseis, *supra* note 8, at 89.

36. 1907 Hague Convention, *supra* note 3, at art. 55.

37. BENVENISTI, *supra* note 2, at 28–29; SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 221–22 (1996).

38. *See supra* text accompanying note 21.

39. BENVENISTI, *supra* note 2, at 29.

40. *Id.*

diverged.[41] Moreover, of the fifteen articles on belligerent occupation, only three were related to the physical integrity of civilian persons, the rest dealt essentially with the protection of property.[42] There was no discourse of human rights informing the Hague Regulations, but only a limited and vague humanitarianism at best. Indeed, the interstate character of the Hague convention, and the principles of inter-elite reciprocity it enshrined, explains its deficiencies from the humanitarian point of view.

C. The Resurgence of Humanitarianism Through Geneva IV

The humanitarian spirit resurfaced with the effort to define anew the international law of occupation in reaction to atrocities committed in occupied territories during World War II. Coming in the aftermath of the Nuremberg Charter and the 1948 Genocide Conventions, the Fourth Geneva Convention sought to create a new balance between the rights of the occupant and the need to protect civilian populations in occupied territory.[43] Given the massive internments, deportations, reprisals, hostage-taking, enslavement, and murder of civilians in occupied Europe by both the Soviets and the Nazis, the need to remedy the deficiencies of the 1907 Hague Regulations appeared self-evident. The International Committee of the Red Cross ("ICRC") was accordingly charged with drawing up a revised codification of the law of belligerent occupation. The Fourth Geneva Convention, devised to supplement the Hague Regulations, thus went much further in protecting the humanitarian needs of civilians against violence.[44] Benvenisti argues that it "delineates a bill of rights for the occupied population" by giving them the legal status of "protected persons" and enumerating a specific set of rights which occupants must protect. For example, Article 27 asserts the duty of the occupier to ensure the humane treatment of "protected persons," and to respect the persons' honor, family rights, religious convictions and practices, manners, and customs, while forbidding discrimination on the basis of race, sex, political opinion, or religion.[45] The Convention protects civilians against torture or inhuman treatment, willful killing, collective punishment, reprisals, deportation, settlement of the occupier's own nationals in the occupied territory, and the subjection of that territory to the occupier's own national laws.[46] It also spells out, in detail, rules requiring the occupant to facilitate the proper working of institutions devoted to the care and education of children; it addresses labor conditions prohibiting the deliberate restriction of job opportuni-

41. *Id.* at 30–31.

42. Meron, *supra* note 16, at 246.

43. Imseis, *supra* note 8, at 89; Meron, *supra* note 16, at 246.

44. Fourth Geneva Convention, *supra* note 3.

45. *Id.*

46. *Id.*

ties in occupied territory or efforts to create unemployment or to induce locals to work for the occupier; and several articles address medical and hospital services and the maintenance of health and hygiene.[47] The fact that there is a list of human rights articulated in the Convention as well as in its title reveals that the focus was now on the protection of civilian *persons* and their humanitarian treatment.[48] The Convention thus amounted to a

> new constitution for occupation administrations: . . . the very decision to dedicate the Fourth Geneva Convention to persons and not to governments signified a growing awareness in international law of the idea that peoples are not merely the resources of states, but rather that they are worthy of being the subjects of international norms.[49]

Moreover, violation of these norms is considered a grave breach that is subject to criminal prosecution.

Indeed, Theodor Meron insists that by creating a set of affirmative duties for the occupier, who must assume active responsibility for the welfare of the population under its control, Geneva IV created a "new balance between the rights of the occupant and the rights of the population in the occupied country."[50] He agrees with Benvenisti that the Convention initiated an important shift from an emphasis on the interests of states or governments to the rights of individuals and civilian populations.[51] He emphasizes that, together with the Nuremberg Charter and the Genocide Convention, the 1949 Geneva Conventions helped shift some state-to-state aspects of international humanitarian law to individual criminal responsibility, thereby opening up the path to individual standing in international law.[52] Even though the concept of a "protected person" was initially defined within the traditional state-centric reciprocity-based approach of classic international law, and thus restricted to nationals of the occupied state, Geneva IV laid the groundwork for future developments of humanitarian law under the influence of human rights principles. This allowed humanitarian law to "go beyond the interstate level and to reach for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals."[53]

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47. *Id.* at art. 50–59.

48. *Id.*; BENVENISTI, *supra* note 2, at 104.

49. BENVENISTI, *supra* note 2, at 106.

50. Meron, *supra* note 16, at 246.

51. *Id.* at 240 and *passim*.

52. *Id.* at 243, 257 (where Meron admits that the Fourth Geneva Convention remained faithful to the traditional state-centric reciprocity based approach, but subsequent developments, via the impact of human rights norms, shifted to a focus on all individuals).

53. *Id.* at 246.

D. The Modern Expansion of Humanitarian Principals

Accordingly, the subsequent development of the law of occupation, starting with the Additional Geneva Protocol I adopted in 1977, which extended protection against reprisals to the entire civilian population, individual civilians, and civilian objects and cultural objects, is seen as a step-by-step movement beyond the interstate paradigm to an individualized rights-based approach. On this view, the gradual expansion of the category of "protected persons" beyond nationals of the occupied state, to include *all* persons on the adverse side who fall into the hands of a party to an armed conflict, is a prime example of the salutary assimilation of occupation law to human rights. Already under Common Article 6/6/6/7, rights were granted to "protected persons" themselves.[54] But under Article 4 of Geneva IV, the concept of "protected persons" referred only to "those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[55] This not only excluded nationals of a neutral state and nationals of non-signatories, it also excluded civilians under military occupations resulting from internal armed conflicts such as civil wars.

The decision in the 1999 appeal of the *Tadic* case altered this restrictive approach by ruling that the war in the former Yugoslavia amounted to an international conflict,[56] and by embracing a flexible, substantive approach to the application of the category of protected person.[57] In short, it rejected the literal legalistic approach, which required different nationalities in order to meet the definition of protected persons, characterizing its own approach as follows:

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts . . . in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance . . . [A]llegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[58]

Moreover, the Appeals Court cited ICRC commentary to the effect that the purpose of Geneva IV is first and foremost to protect individuals, not to serve

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54. *Id.* at 252.

55. International Committee of the Red Cross [ICRC], *Commentary On The Geneva Convention (IV) Relative to the Protection of Civilian Persons In Time of War* at 46 (1958), *cited in* Meron, *supra* note 16, at 258.

56. Prosecutor v. Tadic, Case No. IT-94-1-I, Judgment, ¶ 87 (Jul. 15, 1999).

57. *Id.* at ¶¶ 164–65, *cited in* Meron, *supra* note 16, at 259.

58. *Tadic*, Case No. IT-94-1-I, Judgment, ¶ 166, *cited in* Meron, *supra* note 16, at 260.

State interests, and thus is directed to the protection of civilians to the maximum extent possible. Indeed, regarding Article 4 it stated:

> . . . Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves.[59]

This individualized human rights-based approach to humanitarian law in general, and the law of occupation in particular, is evident in Additional Geneva Protocol II that extended protections to civilian populations in non-international "internal" armed conflicts.[60] Accordingly, the general principle articulated in the ICRC commentary to the Fourth Geneva Convention seems to be a generally accepted legal norm: Every person in enemy hands must have some status under international law either as a prisoner of war, and thus covered by the Third Geneva Convention, or as a civilian, covered by the Fourth Convention. Nobody in enemy hands can be considered outside the law.

It is thus unsurprising that the story of normative progress and progressive individualization of the subject of occupation law puts the emphasis on the affirmative duties of occupiers to actively protect human rights. Advocates are undisturbed that this seems to require expanding the legislative powers of administrations in occupied territories for the benefit of the civilians in their care, especially in protracted occupations.[61] Indeed, Benvenisti criticizes the minimalism of Geneva IV, complaining that the commands of the Convention neither direct the occupant to treat the occupied people with standards similar to the ones employed for its own nationals, nor require the occupant to develop (not just maintain) the economic, social, and educational infrastructure.[62]

Accordingly, human rights enthusiasts who invoke the humanitarian impulses of occupation law as a story of moral progress seek to ascribe the posture of benevolent custodian and trustee to occupying powers. To accomplish this goal, they seek to dramatically expand the scope of legal and legitimate action of occupying powers to ensure that post conflict regimes are rights-respecting.[63] The affirmative obligations imposed by Geneva IV, in conjunction with other sources of international law, require respect for human rights and are invoked to justify the abrogation of laws and institutions that presumably violate the Convention,

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59. *Tadic*, Case No. IT-94-1-I, Judgment, ¶ 168.

60. Additional Geneva Protocol II, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Nonetheless, Human Rights Law and Humanitarian Law are not identical; although it is Meron's thesis that these concepts are merging.

61. *But see* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT'L L. 44, 44–103 (discussing counterarguments).

62. BENVENISTI, *supra* note 2, at 105. The danger is that this could lead to stagnation which would be unfair and unjust in a prolonged occupation.

63. DAVID KRETZMER, THE OCCUPATION OF JUSTICE 69 (2002), *cited in* Fox, *supra* note 8, at 238–39.

even if they pose no obstacle to maintaining order or pursuing military objections (the Hague criteria).[64] In the context of an occupation that results in "regime change," this orientation suggests that the identity of the trustee has shifted from the ousted sovereign to the civilian population. This implies a new focus on the welfare and basic rights of the civilian population, guided by the principle of "humanity."[65] Accordingly, the occupant is no longer cast as a disinterested watch-guard, but rather as an involved regulator and provider.[66] Indeed, the rise of the interventionist "welfare" state in the twentieth century allegedly generates the expectation that an occupying power, like a domestic state, should provide for basic social services and thus fulfill the requirements of good governance.[67] While Article 64 of Geneva IV and the additional protocols already reflected the need to relax Hague Article 43's strong bias against modifying local law, they apparently did not go far enough. Instead, they left occupiers engaged in fostering human rights and thus vulnerable to being charged with violating existing international law.

Security Council Resolution 1483, passed on May 22, 2003, recognized the United States and British forces in Iraq as occupying powers, and is seen as the solution to this dilemma and as the latest and most authoritative restatement of several basic principles of contemporary occupation law.[68] On the one hand, the Resolution rescued the law of belligerent occupation from oblivion by requiring the Coalition Provisional Authority, established by the aforementioned powers, to comply fully with their obligations under international law including, in particular, the Geneva Conventions of 1949 and the Hague Regulations of 1907.[69] On the other hand, it granted a mandate allowing the occupants to promote the welfare of the Iraqi people, human rights, legal and judicial reform, and to transform the previous legal and political system so as to facilitate the establishment of institutions of representative governance.[70] The tension between the two imperatives and the ambiguity of the Resolution has led some commentators to reject any interpretation that would permit or encourage the United States and Britain to engage in a "transformative occupation."[71] But on the humanitarian reading, although the Resolution resurrected the law of belligerent occupation from its slumber, it did so clearly under the influence of U.N.-supported humanitarian interventions or peace-enforcement operations in the 1990s which involved

64. For a counterargument see Fox, *supra* note 8, at 228–42.

65. *See id.* at 270–71.

66. Benvenisti, *supra* note 32, at 29.

67. *Id.* at 23.

68. BENVENISTI, *supra* note 2, at x–xi.

69. S.C. Res. 1483, *supra* note 7, at ¶ 5.

70. *Id.* at ¶ 8.

71. *See generally* Fox, *supra* note 8.

highly transformative "state building" processes. Indeed, U.N. interim occupation administrations were ascribed plenary powers with no limits placed on their legislative or executive roles apart from being subject to internationally recognized human rights standards. In Kosovo and East Timor, U.N. Interim/Transitional Administrations were ascribed all legislative and executive authority, including the administration of justice.[72] To be sure, the latter were not unilateral belligerent occupations; they were international administrations established under the U.N. Security Council Chapter VII prerogatives, and thus did not come under Hague or Geneva rules. They nevertheless provided the background and context for understanding Resolution 1483 as a revision of the law of belligerent occupation in general, and the particular claim that the occupation administration in Iraq must take on a transformative hue for the sake of human rights and democratic state building.

According to Benvenisti, the U.N.'s reference (for the first time) to the concept of occupation in Resolution 1483 served four purposes. First, it refuted the claim that occupation as such is illegal, by reviving the applicability of the law and the neutral connotation of the doctrine.[73] Second, it reaffirmed the sovereignty and territorial integrity of Iraq, thereby indicating that the total demise of the Iraqi regime notwithstanding, total victory did not result in debellatio, and hence did not pass sovereignty over to the occupant.[74] This outcome was conceivable thanks to a shift in the understanding that the (Iraqi) people, not the "ousted government," were the ultimate holders of sovereignty, and were ascribed the right of national self-determination. Third, the Resolution "recognizes in principle the continued applicability of international human rights law in occupied territories in tandem with the law of occupation."[75] Human rights law may thus complement the law of occupation on specific matters.[76] Fourth, the Resolution "envisions the role of the modern occupant" as a "heavily involved regulator."[77] Indeed, the Resolution empowers the occupant to promote economic reconstruction

72. BENVENISTI, *supra* note 2, at xv. Thus the "Special Representative" of the U.N. Interim Administration Mission in Kosovo ("UNMIK") could declare that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General." The Special Representative of the Secretary-General, *On the Authority of the Interim Administration in Kosovo,* ¶ 1.1, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999). Similar language is used for the United Nations Transitional Administration in East Timor. *See* The Special Representative of the Secretary-General, *On the Authority of the Transitional Administration in East Timor*, ¶ 1.1, U.N. Doc. UNTAET/REG/1999/1 (Nov. 27, 1999). On this topic, Benvenisti says that had the law of occupation applied here, these occupations would have made fewer mistakes. *See* BENVENISTI, *supra* note 2, at xvii.

73. BENVENISTI, *supra* note 2, at xi.

74. Benvenisti, *supra* note 32, at 36.

75. BENVENISTI, *supra* note 2, at xi.

76. *Id.*

77. *Id.*

and to provide the conditions of sustainable development. On this reading, humanization of occupation law is driven by increasing respect for every individual's human rights and welfare, and the law of belligerent occupation turns into the law of transformative occupation.

The ultimate logic of this trajectory is to apply the fullest possible range of human rights obligations to occupied territories. However, this reading of the development of occupation law, and of Resolution 1483 as its most current restatement, would render the conservation principle at the heart of that law moot.[78]

II. THE REALIST/SCHMITTIAN READING OF THE LAW OF BELLIGERENT OCCUPATION

The realist/Schmittian reading of occupation law points in the same direction, but for radically different reasons. Formulated explicitly as an alternative to the humanitarian account, which is seen as abstract, a-historical, and either naively or cynically moralistic, the Schmittian approach insists on a structural-functional and contextualized analysis of the law of belligerent occupation.[79] Accordingly, the real function of the law of belligerent occupation, as it developed in the aftermath of the 1815 Congress of Vienna and throughout the nineteenth century (culminating in the 1907 Hague Regulations), was to help re-found the concrete European order of sovereign states and reconstitute a *jus publicum Europeaum*.[80] The "determinate content" of the concept of belligerent occupation was tied to geopolitical and ideological interests, rather than some sort of moral humanitarianism.[81] Accordingly, the rules of belligerent occupation made possible the creation of a system of sovereign states, a European "international society," in which conflicting principles of political legitimacy (the dynastic vs. the democratic) and a plurality of constitutional regimes (absolutist, liberal parliamentarian, and enlightened despotism) could coexist.[82] They served to block the

78. Fox, *supra* note 8, at 246–47. Indeed, from the perspective of substantive contemporary human rights standards, one could justify the imposition of a new constitution on a defeated polity, wholly rewriting its civil and criminal laws, restructuring the judicial system, and imposing a new political structure. This, of course, would leave human rights fundamentalists at a loss when it comes to their own embrace of the principle of self-determination, and at a loss over how to distinguish imperial from autonomous democratization.

79. CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPEAUM* 207–09 (G.L. Ulmen trans., Telos Press Ltd. 2003) (1974); Bhuta, *supra* note 10, at 723–26.

80. Bhuta, *supra* note 10, at 723. For Schmitt's discussion of *jus publicum Europeaum* on which Bhuta clearly relies, see SCHMITT, *supra* note 79, at 140–213.

81. Bhuta, *supra* note 10, at 723. Of course, the law of belligerent occupation did not apply beyond Europe. It did not apply to colonies, rather only to European states and their land wars with one another. See SCHMITT, *supra* note 79, at 42–49 for the concept of "concrete order" on which Bhuta draws. For the concept of "Nomos," see *id.* at 336–50.

82. Bhuta, *supra* note 10, at 730–31.

revolutionary transformation of a domestic order through intervention by another state (revolutionary wars "exporting republican liberty") or insurrection from below.[83] While the administration of the occupant ended up serving two interests—the preservation of the rights of the ousted sovereign and the humanitarian interests of the indigenous population—the occupant, as we have already noted, was always to prefer the former over the latter. Thus the very concept of belligerent occupation — the provisional, temporary, and purely de facto exercise of power by the occupant until a peace treaty legitimately and legally resolved the outcome of the dispute — was constituted in the context of and served to preserve the sovereignty of rulers and the concrete spatial order of the European sovereign state system. Neither the concept nor the law of belligerent occupation applied to colonial possessions of European Powers which, by definition, were not considered sovereign states.[84]

A. The Historical Development According to the Schmittian Approach

The socio-political context (conditions of possibility) of the concept and law of belligerent occupation were thus historically specific and unique. The concept takes on a functional intelligibility only in the context of late eighteenth and nineteenth century European politics.[85] In particular, it was developed in the aftermath of the French Revolution and Napoleonic wars which challenged the old intra–European political order by introducing transnational revolutionary movements — occupations which claimed to be liberations initiating constitutional change instead of conquest and annexation — a new form of political identity: national citizenship, movement, and nationalism, all of which were, to say the least, destabilizing in the context of the restoration of Europe.[86] Thus,

> [b]y enjoining the occupant from changing the political order of the occupied territory, and by interdicting the legal transfer of sovereignty until the state of war was formally concluded, the legal category of belligerent occupation effectively facilitated the mediation of territorial and constitutional change . . . the negotiated concurrence . . . of the Great Powers was a practical precondition for the appropriation of territory . . . . The revolutionary transformation of the domestic order of a state through the intervention of another state was effectively bracketed.[87]

83. *Id.* at 723.

84. *Id.* at 729–30.

85. *Id.* at 732.

86. *Id.* at 730–32.

87. *Id.* at 732.

So too was the legitimacy of local civilian resistance to an occupant's rules or to the preservation of the laws and institutions of the ousted sovereign. Indeed, on this reading, the conservation principle, along with the distinctions between combatant and non-combatant, and soldier and civilian,[88] served to de-legitimatize civilian struggles for regime change or resistance to occupying forces. This resulted in the enabling of harsh measures against partisans and "irregular combatants."[89] Far from being an impartial trustee, the occupant under the law of belligerent occupation was clearly biased against the political interests of the subject population. It cannot be stressed too strongly that even though it was not supposed to institute a new political or legal order, the temporary administration established during a belligerent occupation was a military one, which could, in order to maintain order, not only suspend civil and political liberties, but also engage in harsh disciplinary techniques. It is right to invoke the analogy between a belligerent occupation in which the military temporarily exercises discretionary powers to maintain order, and what Schmitt called a domestic "commissarial dictatorship" — referring to the discretionary powers exercised in emergencies by the executive via the military (such as martial law), to provide security and protect the constitutional order when appears to be under threat.[90]

B. The Schmittian Reading of Belligerent Occupation as "Outdated"

Accordingly, the concept of belligerent occupation today belongs in the dustbin of history because the international order and social structural conditions to which it was functional no longer exist. If the codification of the conservation principle in the Hague Regulations was already like the owl of Minerva in 1907, the 1949 revival of conservationist language, from this perspective, looks like a moralistic farce.[91] In the aftermath of total war plus highly transformative occupations, and in the absence of a new Nomos to which it could be functional — the two blocs and the stand-off of the Cold War did not constitute an order in the Schmittian sense — resurrecting the law of belligerent occupation appears ab-

88. These distinctions were both predicated on the historically specific differentiation between public and private power, property and armed conflicts described above. *See supra* discussion p. 505.

89. Bhuta, *supra* note 10, at 733.

90. According to Schmitt, a commissarial dictator exercises discretionary power to preserve a constitutional order against internal or external threats, while a sovereign dictator exercises unlimited constituent power for an indeterminate period to create a new constitutional order. This is analogized by Bhuta to the distinction between belligerent and transformative occupation. Bhuta, *supra* note 10, at 724, 728 (citing CARL SCHMITT, DIE DIKTATUR (1994)).

91. GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT (T.M. Knox trans., 1967). The phrase implies that the legal articulation of the rules of belligerent occupation occurred only after the reality that subtends it has fully come into existence. In this case, its moment was already almost past as the emergence of total war only seven years later indicated.

surd.[92] The Fourth Geneva Convention was written at a time when the prescriptions of the Hague Regulations had lost their authority as the embodiment of customary international law.[93] Indeed, the long-term post-war occupations, whose very purpose was the imposition of the occupier's socio-economic and political system, plus the resurgence of partisan and guerilla struggle, made "the preservationist principle at the heart of occupation law seem particularly anachronistic."[94] The same is true, on this analysis, of the citizen/soldier distinction and the expectation that occupations or wars end officially with the conclusion of a peace treaty between the belligerents.

To be sure, it was the weaker states at the Fourth Geneva Convention that pushed for retention of the Hague Regulations, prevailing against the wishes of the great powers, especially the U.S., which sought a very permissive occupation law that would legally enable transformative occupation. The former position stood for those countries at risk of being occupied; the latter position expressed the perceived lack of such a risk on the part of powerful victors.[95] However, it is also true that the 1949 resurrection of the "conservation" principle of "inalienability of sovereignty" through force served the Allies' geopolitical interests.[96] Indeed, it provided the "perfect legal justification" for the return of Southeast Asian colonies "liberated" by the Japanese during the war to the "ousted sovereign," despite violent opposition of large segments of the local populations.[97] This, rather than any humanitarian purpose, could help explain, from the "realist perspective," why the victors accepted the revival of the discourse of belligerent occupation. With regard to occupied Germany and Japan, it appears that the principle of "inalienability of sovereignty through the use of force" was respected insofar as there was no attempt to annex or subjugate these territories, despite the invocation of the concept of debellatio (given their unconditional surrender) to justify liberal democratic imposition.[98] As for the victorious invading Allied forces in Southeast Asia, the principle of inalienability of sovereignty permitted the Allies to return those colonies to the "ousted" imperial sovereign once the Japanese were defeated,

92. The first total war of the twentieth century was of course World War I. The transformative occupations I am referring to after the Second World War are of course those in Germany and Japan by the allies, and in occupied Eastern Europe and East Germany by the Soviets. Benvenisti argues that the law of belligerent occupation was basically disregarded in the epoch of two blocs. Bhuta, following Schmitt, argues that there was no Nomos at that time since there was no single spatial order within which competing principles of legitimacy could be, or had to be, mediated. Bhuta, *supra* note 10, at 734; SCHMITT, *supra* note 79, at 351–55.

93. BENVENISTI, *supra* note 2, at 98.

94. Bhuta, *supra* note 10, at 734 ("Whoever occupies a territory also imposes on it his own social system . . . as far as his army can reach." (quoting Stalin)).

95. BENVENISTI, *supra* note 2, at 103.

96. *Id.* at 97.

97. *Id.*

98. *Id.*

under the cover of full legality. As Benvenisti tellingly notes, "invocation of the law of occupation proved useful to reoccupants who invoked it to allow military administrations" to use "wide discretionary powers against resistance, unencumbered by constitutional restraints."[99]

This rather cynical interpretation of why the powerful acquiesced to the Fourth Geneva Convention's resurrection of the conservation principle notwithstanding, on the realist/Schmittian reading, it is redundant today. But this is not because the development of human rights norms, including the "human right" to popular sovereignty and national self-determination, have problematized the notion that the occupier is the trustee for the ousted sovereign government, duty bound to preserve its laws and institutions. Rather, it is because the social structural and political presuppositions for the concept of belligerent occupation to make sense have vanished. Today, we are irrevocably in the world of the regulatory state, global capital, unilateral and multilateral military interventions allegedly for "humanitarian" purposes or for the sake of "democratic regime change," and the inevitable transformative occupations that will accompany them.[100]

C. The Schmittian Approach as it Applies Today

Nevertheless, unlike the "reformist" approaches to occupation law,[101] the Schmittian approach rejects any attempt to give a legal/conceptual imprimatur to the project of transformative occupation. The law of belligerent occupation, on this view, is inappropriate to situations in which the occupant exercises the de facto power of a sovereign dictator, by transforming the state, law, and socio-economic institutions, and in effect appropriating the constituent power even if it does so "temporarily" in the name of instituting democracy. Nevertheless, to legalize transformative occupation would be a dangerous mistake. Whether this involves vesting supreme authority in the hands of a single state and its coalition partners (unilateral occupation) or in a U.N.-sponsored transitional administrative authority, legalization would de-legitimize resistance *avant la lettre*, thereby preempting the meaning of local political struggle and its outcome.[102] It would, in other words, give a green light to self-interested transformations on the part of occupiers before one had a chance to assess the legitimacy of the occupation from the point of view of the occupied. Transformative occupation would, under

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99. *Id.* at 97 n.152.

100. Bhuta, *supra* note 10, at 733 (citing JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 727 (1954)). Insurgencies, total war, guerilla war, "terrorist" actions, et al. also undermine the civilian/soldier distinction crucial to the concept of belligerent occupation.

101. These "reformist" approaches attempt to construe occupation law as enabling from the beginning, or interpret Resolution 1483 as updating it in order to legitimatize/legalize post-Cold War transformative occupations in the name of human rights principles (including the "right to popular sovereignty").

102. BENVENISTI, *supra* note 2, at xi, 187 (discussing the illegitimacy of resistance to a legal belligerent occupation).

such circumstances, block local self-determination and preempt autonomous processes of post-conflict constitution-making.

A transformative occupation involves an inevitable paradox: Before it can succeed in attaining local legitimacy for its actions, it has to subordinate (quell resistance); but the more an occupier tries to subordinate through the use of force and sheer imposition of rules and institutions, the less it appears as legitimate.[103] I would also add that even if resistance is fully quashed and finally dies down, this could be a sign of a successful imperial imposition ("democratization") rather than the acceptance of the changes made by the occupier as legitimate. This is especially true if the occupied have a minimal or subordinate role in the state building process.[104] This dilemma was clearly operative in the two prominent cases of unilateral occupation — that by Israel in Gaza and the West Bank, and by the U.S. and Britain in Iraq.[105] But it is also operative in the U.N.-sponsored occupations. Although they established genuinely international governance structures, they nevertheless are not exempt from serious questions about their political selectivity, dictatorial methods, and in some cases paternalistic orientation to the subject population.[106] Thus, it is not a good idea to claim legitimacy or legality for transformative occupations, especially given the rather ambivalent record of such occupations. Moreover, the Security Council, which decides on such occupations through its resolutions, is a political, not a legal, body and the degree to which it makes its decisions as a result of genuine collective deliberation about the merits of the case — as opposed to itself being instrumentalized by powerful member-states pursuing their own interests — is an open and serious question.[107] Indeed, there are many who view Resolution 1483 as an example of the latter.[108] The Resolution brought the U.N. back after its initial refusal to acquiesce in the U.S. invasion of Iraq, but it did so in an indeterminate and irresponsible way. Far from providing effective control or real accountability mechanisms, per Benvenisti, Resolution 1483 failed to establish an effective independent mechanism for ensuring that the occupation Authority, to which it ascribed wide powers, could meet its obligations.[109]

> While it has been hailed for bringing the United Nations back into Iraq, Resolution 1483 leaves the U.N. role in post war Iraq extremely

103. Bhuta, *supra* note 10, at 739.

104. This is certainly the case for the governing council in Iraq. *See* Fox, *supra* note 8, at *passim*.

105. *Id.* (discussing the ways in which the CPA in Iraq violated occupation law with its excessively transformative occupation).

106. *See* BENVENISTI, *supra* note 2, at xv–xvii; *see also* Fearon & Laitin, *supra* note 12, at 14–24.

107. Fox does not question the impartiality of the U.N. occupations. *But see* Alvarez, *supra* note 12, at 874–82; John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage?*, 35 TEX. INT'L L.J. 129, 129–72 (2000) (criticizing Fox's position).

108. *See* Alvarez, *supra* note 12, at 883–86; Bhuta, *supra* note 10, at 735; Fox, *supra* note 8, at 202–05.

109. *See* Alvarez, *supra* note 12, at 882–83.

> vague and uncertain, refusing even to concede to the United Nations those tasks within its established expertise, such as verifying and supervising a free and fair election.[110]

This mode of legalizing what remains a unilateral transformative occupation is thus highly suspect. But even multilateral U.N. occupations initiated by the Security Council and administered under U.N. auspices can be instances of what is called "global hegemonic international law."[111]

Thus, far from taking U.N. transformative occupations as a sign of an emerging legal norm relevant to unilateral occupations, the realist/Schmittian questions the bona fide nature of these recent developments, reminding us of the context in which they occur: the neo-imperial efforts of the sole existing superpower and its penchant for designating some polities "rogue states," deemed undeserving of full sovereign equality and open to international tutelage.[112] The current popularity of the discourse of "neo-trusteeship" and "shared-sovereignty" to describe the transformational occupation regimes in those subdued rogue states is disingenuous in such a context.[113] So is the attempt to distinguish such administrations from "classical imperialism" on the grounds that they are multilateral and temporary.[114] As Hans Kelsen argued long ago with respect to the transformative occupation of Germany, just because a sovereign power refrains from annexation, or includes other co-administrators, or decides that his presence will be temporary, does not mean that he lacks full sovereignty or that it is somehow shared with someone else.[115] The decision to co-administer, and to leave, is the sovereign's decision; certainly the occupied had no role in making this choice or in enforcing it.

Moreover, the attempt to avoid the charge of imperial imposition by stressing the differences between classical imperialism and "neo-trusteeship" fails to parry the charge of neo-imperialism. James Fearon and David Laitin, for example, grant that there appears to be an analogy between classical nineteenth and twentieth century imperialism and the transformational occupation adminis-

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110. *Id.* at 883 n.50 (arguing that the provision for a U.N. special representative, with "independent responsibilities," to work with the Authority is a studied effort to avoid any of the usual trigger words for U.N. involvement in election supervision, thereby according the authority very wide latitude in administrating in Iraq and deciding its future).

111. *See id.* at 888 ("Global HIL is more insidious, as it provides legal cover and shared blame.").

112. *See* Jean L. Cohen, *Sovereign Equality vs. Imperial Right: The Battle over the New World Order," in* 13 CONSTELLATIONS 485 (2006); *see also* Bhuta, *supra* note 10, at 736; Cohen, *supra* note 12, at 24.

113. *See, e.g.,* Fearon & Laitin, *supra* note 12, at 7; Keohane, *supra* note 12; Stephen D. Krasner, *Rebuilding Democracy After Conflict: The Case for Shared Sovereignty*, 16 J. DEMOCRACY 60 (2005); Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85, 89 (2004).

114. Fearon & Laitin, *supra* note 12, at 7.

115. Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945).

trations they call neo-trusteeship: Both involve strong states "taking over . . . the governance of territories where Western-style politics, economics, and administration were underdeveloped," and both invoke international legal authority (with the exception of Iraq) and in the former case, League of Nation mandates.[116] Still, both authors insist there are two "striking differences" between the models: The classical imperial model involved unilateral administrations imposed by great powers jealously monopolizing control of their imperial domains, conceived of as indefinite in duration, while the "neo-trusteeship" model involves multilateral administrations aimed at rebuilding self-supporting, but politically and economically acceptable state structures, with the intention to leave as quickly as possible.[117] This implies either that such transformative occupations are already legal and legitimate, although some tinkering may be necessary to create mechanisms to ensure efficiency and accountability, or that legal recognition of transformative occupation is desirable to accomplish those goals.

Of course, this analysis is unconvincing to those who see the imposition of state structures by outsiders as imperial and in conflict with the self determination which is characteristic of a pluralist international system based on sovereign equality. Such imposition usurps constituent power, with bases left behind and the threat of re-intervention for good measure. Given the absence of a Nomos, that is, given the undecidability at the present time of the direction of the international system, it is imperative to keep transformative occupation outside legality and within the realm of sheer facticity and power politics, where it belongs. This, at least, would place the burden of proof on the occupier to demonstrate local legitimacy and impartiality in the transformations put in place by the occupant's administration. Legalizing transformative occupation would, in short, inevitably play into the hands of imperialists. Thus, on the realist/Schmittian approach, the law of belligerent occupation is an anachronism unsusceptible to updating or reform. Because we are in an epoch without a Nomos, only the exercise of power and the projection of force by a militarily unchallenged superpower, intent, to be sure, on creating global hegemonic law to give it legitimacy, transformative occupations may be unavoidable, but still, we should not give them legal cover.

III. TOWARD A *JUS POST BELLUM* THAT RESPECTS SOVERIEGN EQUALITY, SELF-DETERMINATION AND HUMAN RIGHTS: RETHINKING THE CONSERVATION PRINCIPLE

I take the arguments of the humanitarians and the realists seriously, but maintain that they are symmetrically one-sided. We are indeed in a new epoch. The changes described by both approaches, however, make it urgent, in my view,

116. Fearon & Laitin, *supra* note 12, at 12.

117. *Id.* at 13. Although they use the term "post modern imperialism," the thrust of their argument is that these occupations are not imperial at all.

to develop legal principles and rules to regulate *all* types of occupations, in order to block the legitimization of creeping annexation or of indirect imperial control through the emergence of global hegemonic law. While the human rights approach to occupation law rightly seeks to update it in light of contemporary norms, it fails to take the conservation principle or the principle of sovereign equality seriously as articulating a normative idea: the political autonomy and equal standing of all political communities — rather than as an expression of the "non-ideal" fact that we are still in a "statist" international system.[118]

The historicist and functionalist approach of the realist/Schmittian school, on the other hand, throws out the baby with the bathwater by rejecting the relevance of the law of belligerent occupation today, however interpreted, along with any attempt at legal reform. Its contemporary advocates are nonetheless parasitic on the continued force of the conservation principle at the heart of that law; as evidenced in their critique of imperial usurpation of local sovereignty, their support of the pluralist conception of the international order, and their support of nation-state self-determination.[119] That is, they implicitly rely on the principle of the inalienability of sovereignty by force, the heart of the concept of belligerent occupation (and of the U.N. Charter). Moreover, the discourse of sovereign equality and self-determination indicates that there is indeed a Nomos at stake: the one established by the U.N. Charter and then reaffirmed in the Geneva Conventions, the U.N. Declaration on Friendly Relations, and in the recent U.N. reform proposal of 2005![120] To be sure, the sovereignty regime established in 1945 is in transition. The dualist nature of the international system involving international *and* cosmopolitan principles, sovereign equality *and* human rights, has undergone important shifts.[121] The law of occupation is indeed hinged between imperial imposition and the pluralistic notion of nation-state self-determination.[122] But this is precisely why it is imperative to come up with international law principles adequate to the normative and structural conditions of the current epoch, that provide an alternative to hegemonic international law. Otherwise, when the existing international law of occupation is dismissed as anachronistic, the imperialists will reap the benefits. They will do so either by claiming moral and legal legitimacy for their use and/or bypassing of international institutions, or they will destroy the credibility of international law and

118. They thus have much in common with contemporary cosmopolitan liberals. For a critique of the cosmopolitan neo-Kantian theory behind this position and of cosmopolitan liberalism, see Cohen, *supra* note 112, and Alvarez, *supra* note 12, at 884. *See generally* GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER (2004).

119. Bhuta, *supra* note 10, at 740.

120. *See* The Secretary General's High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), *available at* http://www.un.org/secureworld [hereinafter *A More Secure World*]; Cohen, *supra* note 112.

121. On the conception of the current order as dualist, see Cohen, *supra* note 12.

122. Bhuta, *supra* note 10, at 740.

institutions altogether.[123] It is possible that international legal reform may not be able to bind the superpower, but it is the only way to deprive it of the claim to legal legitimacy when it imposes its institutions on occupied populations without their genuine participation or consent.

Thus, the issue before us is the following: How can the "transformative aspects of occupation" required by human rights principles, in the current context, be reconciled with the spirit of the conservation principle and its core premise of the inalienability of sovereignty by force? How can one insist on the continued applicability of the law of occupation, yet acknowledge the changes in role ascribed to the occupant, shifts in the definition of who is the ousted sovereign, and shifts in the nature of the trustee relationship established between the two?

The circle can be squared if one takes account of two crucial changes in international law that neither the humanitarian nor the Schmittian approaches acknowledge in the right way. The first involves a shift from governmental to popular sovereignty, accomplished in part through the self-determination principle; the second refers to a change in the nature of the sovereignty ascribed by international law to states by the legal principle of sovereign equality enunciated in the U.N. charter in 1945, and generalized as a global principle in the aftermath of decolonization.[124] Let me address each in turn.

A. Self-Determination and Occupation Law

To put the first point succinctly: If it is no longer assumed that the ousted government is necessarily the holder of sovereignty, and if the occupying power does not claim permanent sovereignty (annexation), then it is up to the citizenry of an intact territorial state to authorize the new representative of popular sovereignty. The conservation principle can still mean that the occupier may not usurp the rights of the sovereign in occupied territory, but the sovereignty in question pertains to the citizenry and the territorial state in which they live, not to the ousted ruler.

The Fourth Geneva Convention foreshadowed this move with its shift of attention from the rights of "the ousted sovereign," i.e. the governing elite, to the rights of the population. According to Benvenisti, the growing awareness in international law of the idea that peoples are not merely the resources of rulers, but rather are worthy of being subjects of international norms, created a foothold for diminishing the "claim of ousted elites to return to areas" they once controlled if they do not "enjoy the support of the indigenous population."[125] Indeed, he argues that already in 1945, the attempt on the part of the Allies to resurrect the doctrine of debellatio in order to justify their transformative occupation was an

123. This oscillation has been most evident in the international behavior of the current Bush administration and its chosen U.N. representative, John Bolton.

124. U.N. Charter art. 2, para. 1.

125. BENVENISTI, *supra* note 2, at 106.

archaism that misleadingly assimilated state and government.[126] He is right to insist that "this doctrine has no place in contemporary international law which has come to recognize the principle that sovereignty lies in a people, not in a political elite."[127] The very idea that sovereignty inheres in the people indicates the demise of the concept of debellatio: Accordingly, "regime collapse does not extinguish the sovereignty" of the defeated state, nor does "total defeat and disintegration of the governing regime" transfer it to the occupant.[128] Thus the fall of a government has no effect, whatsoever, on the sovereign title over the occupied territory, which remains vested in the local population.[129] The most current restatement of the law of occupation in Resolution 1483 confirms this view by reaffirming that the sovereignty and territorial integrity of the Iraqi state remains intact despite total subjugation. This indicates that sovereignty lies with the Iraqi people and not with the demised regime, stressing the right of the former to freely determine their own political future and control their own natural resources, and finally encouraging efforts by the people of Iraq to form a representative government that respects the rule of law.[130]

The germ for this position can be found in the U.N. Charter, which mentions respect for the principle of self-determination of peoples as one of its purposes, but acquired practical relevance via the reassertion of that principle in the 1970 Declaration of Friendly Relations, and in the context and aftermath of decolonization.[131] It is true that in the period between the two World Wars, the concept of territorially located "peoples" that qualify for self-determination had an ethno-national meaning which gave it resonance against alien and imperial domination. This revival of the ethnic/substantive signification of "peoples" made little sense in the context of decolonization in Africa and elsewhere, for it was well known that the borders of ex-European colonies, retained in the process of "nation-state" making, included a hodgepodge of cultures, languages, ethnic groups and the like. For example, it would have been impossible to come up with any reasonable interpretation of a substantive concept of "the people," in either cultural or ethno-national terms, to describe those who were bundled together

126. *Id.* at 94–95.

127. *Id.* at 95.

128. *Id.* at xi.

129. *Id.*

130. *See* S.C. Res. 1483, *supra* note 7, ¶¶ 4, 9; *see also* BENVENISTI, *supra* note 2, at xi–xii.

131. *See* U.N. Charter art. 2, para. 1; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A Res. 2625 (XXV), at 123–24, U.N. GAOR, 24th Sess., Supp. No. 28, U.N. Doc. A/5217 (Oct. 24, 1970) [hereinafter *Declaration on Friendly Relations*] (stating that "subjection of peoples to alien subjugation, domination and exploitation constitutes a . . . denial of fundamental human rights," and that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have a right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development").

into a single state across most of Africa.[132] But the term provided a useful fiction and valuable rhetoric against foreign colonial/imperial control, and its meanings were multiple and shifting. Subsequently, the concept of self-determination was insisted upon by the new states to protect their political autonomy in creating domestic political institutions, in controlling their economic resources, and in choosing political, economic, social and cultural systems without interference by other states. Gradually, it has come to be bound up with the concept of popular sovereignty, acquiring a procedural rather than a substantive connotation.[133] Today, that concept is associated with the ideas of self rule, political autonomy, and popular sovereignty. Its relevance for occupation law is complex but compelling. Indeed, "self-determination appears firmly entrenched in the corpus of international general rules in only three areas: as an anti-colonialist standard, as a ban on foreign military occupation and as a standard requiring that racial groups be given full access to government."[134]

In what follows, I shall avoid addressing the highly fraught issue of which populations merit designation as "a people" to whom the right of self-determination can or ought to be ascribed; it is sufficient for my purposes that the international community acknowledges a population under occupation by a foreign power in this way.[135] Once this is done, then the principle of self-determination implies that under an occupation it is the people rather than the ousted government that is the holder of sovereignty. This facilitates acceptance of a key feature of the concept of "transformative occupations," namely that the ousted sovereign is "the people," not the former "tyrannical" or "rogue" government. Clearly if the latter was tyrannical, in the true sense, if there is no "fit" between the ousted sovereign and the citizenry, then it should not be incumbent upon the occupier either to enforce tyrannical or discriminatory laws (thereby violating other international laws) or to return the ousted government to power.

However, this should not be taken as a green light for an occupation administration either to impose new laws and a new political/economic system, or as an invitation to outsiders to intervene militarily to depose a tyrannical regime and "give" the locals rights and democracy, or, for that matter, to dismember a territorial state.[136] Instead, the proper way to read the shift from the sovereignty of

132. David Makinson, *A Logician's Point of View*, *in* THE RIGHTS OF PEOPLES 74 (James Crawford ed., 1988).

133. The substantive connotation of "people" cannot be dispensed with, but its source can shift, thus permitting multicultural and multi-national sovereign federal "nation-states" to exist without contradiction or even conflict.

134. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 319 (1995).

135. This is the case with Iraq and the Palestinians under occupation. The first time the U.N. recognized a population as a people deserving self-determination and used this to trump the sovereignty claim by the state in which it was located was in the case of Bangladesh. *See* BENVENISTI, *supra* note 2, at 173–77.

136. The 1970 *Declaration on Friendly Relations* anticipated this gambit and thus reaffirmed the non-intervention principle strictly forbidding the organization, formation, assistance, or incitement of subver-

elite rulers to the sovereignty of the people is to do so in terms of the spirit of the conservation principle. Accordingly, one must update the conservation principle in light of the principle of self-determination, and insist that the inalienability of sovereignty refers to popular and state sovereignty. Regarding the latter, it means that the external sovereignty of the state cannot be alienated by force, as we have already seen. But the former means that the internal sovereignty of the people, which involves a special political and legal relationship between a population and its government, cannot be confiscated or regulated by outsiders.[137] Accordingly, the conservation principle requires that major transformations occurring in the context of an occupation must be accomplished by the people themselves — through their representatives, not the occupying authority. It is thus incumbent upon the latter to facilitate this process as quickly as possible, by securing order and stability and stepping back and permitting the coming together of representatives of all the segments of the population to rebuild their own legal and political institutions. To be sure, one hopes that such processes will result in representative governments that are rights respecting, but the occupant may not seek to ensure this by usurping the constituent power of the occupied population through imposing major or irreversible reforms. Deferring sweeping reforms until the return of an indigenous government and setting up the process for negotiations involving all popular forces before this comes to pass, while repealing offensive laws that are seriously rights violating, would allow a "transformative occupation" to avoid violating the principle of the inalienability of sovereignty and of self-determination.[138] I argue that in this form, the conservation principle applies to multilateral as well as unilateral occupations.

We should be careful here, however. The shift of the concept of ousted sovereign to "the people" does imply that the latter's sovereignty is "suspended" during an occupation, until their representatives become active and form a government.[139] But this should not be taken to entail an "anti-statist" interpretation of the concept of self-determination of peoples: The legal personality of the state and its "international legal sovereignty" remains intact.[140] At issue is rather the rep-

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sive activity towards the violent overthrow of the regime of another state for any reason. *Declaration on Friendly Relations*, *supra* note 131, at 124.

137. On sovereignty as involving a political relationship see Martin Loughlin, *Ten Tenets of Sovereignty*, *in* SOVEREIGNTY IN TRANSITION 55 (Neil Walker ed., 2003).

138. *See generally* Fox, *supra* note 8, at 250 n.59.

139. On the concept of suspended sovereignty, which I prefer to the oxymoron "shared sovereignty," see generally Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and its Implications in International Politics*, 13 EUR. J. INT'L L. 1037 (2002). However, I disagree that this term means that the concept of sovereignty is no longer relevant. I prefer to insist on a reinterpreted conservation principle involving popular sovereignty, self-determination, and the international legal sovereignty of the occupied state as remaining intact.

140. *But see* Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, *in* THE RIGHTS OF PEOPLES 17, 17–39 (James Crawford ed., 1992). Here I differ with Falk, not on the substance of the issue of what sorts of autonomy rights indigenous peoples should have, or what kinds of international

resentative of popular sovereignty. Unless the relation between a government and the people is autonomous and intact, popular sovereignty is in abeyance. This raises innumerable issues regarding the obligations of the state during an occupation, which become pressing if that occupation is prolonged, which I cannot enter into here except to urge that the longer an occupation, the less legitimacy and legality it should enjoy under updated occupation law.[141] What is important to stress from the normative perspective is that the shift in the referent "ousted sovereign" to the people does not give foreigners a license to intervene militarily in order to depose a ruler and impose a "democratic" regime, nor does it permit occupiers to redesign the political or economic institutions of the occupied territory on their own, absent the consent and primary participation of representatives of the citizenry.[142] Suspended sovereignty is not "shared" sovereignty in that sense.[143] The discourse of "rogue" or "failed" states and the new vogue of talk about disaggregated or shared sovereignty and neo-trusteeship under the international community or the major "democratic" powers must not be used to justify the imposition of a political, economic or social regime that deprives occupied peoples of their political autonomy in the name of their so-called basic rights.

As reaffirmed in the 1970 Declaration on Friendly Relations, "[e]very State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."[144] Already the Geneva Conventions recognized the problem of quisling governments and outlawed sanitizing agreements with pliant local bodies put in power by occupants to further their own self interest.[145] Nor should the shift in the referent of "the ousted sovereign" enable an occupant to question the sovereignty of the ousted power in

representation, but on abandoning the discourse of state sovereignty. I believe that the concept of state sovereignty is indispensable for the concept of popular sovereignty — it provides the space within which the latter can be exercised.

141. *See generally* Roberts, *supra* note 61. Even Benvenisti grants that if an occupant is recalcitrant and holds out in bad faith against or during negotiations, "using its control of occupied territory as leverage," his occupation should be regarded as illegal, and measures aimed at "the occupant's own interests," should be void; "such a position is no different from outright annexation." BENVENISTI, *supra* note 2, at 215–16.

142. Ian Brownlie, *The Rights of Peoples in Modern International Law*, *in* THE RIGHTS OF PEOPLES 5, 11–12 (James Crawford ed., 1988) (denying that the principle of self-determination trumps the principle of non-intervention).

143. If the concept of "shared sovereignty" makes any sense, it does so in the context of participation by equals within a broader institutional and legal framework like the E.U. It becomes pure ideology when applied to an occupation regime. I thus reject the use of this concept made by Keohane and Krasner. Keohane, *supra* note 12, at 275–98; Stephen D. Krasner, *Rebuilding Democracy After Conflict: The Case for Shared Sovereignty*, 16 J. DEMOCRACY 60 (2005); Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85 (2004).

144. *Declaration on Friendly Relations*, *supra* note 131, at 123.

145. *See* Fox, *supra* note 8, at 295 (arguing that the Iraqi Governing Council set up by the CPA in Iraq was just such a body whose "consent" to radical institutional reform was not autonomous. Neither the CPA nor Resolution 1483 provided any mechanisms by which the Security Council could disapprove CPA actions). This sets a bad, dangerous, and clearly failing precedent.

order to reject the applicability of the Fourth Geneva Convention protections to the occupied population.[146] Rather, it means the occupier is trustee for the sovereignty of the indigenous population, and as such it must ensure that the latter has the opportunity, at the earliest possible moment and with the greatest possible scope and autonomy, to determine its own political institutions. Self-determination interpreted along these lines is thus not an invitation to disrupt the territorial integrity or national unity of a country.[147]

B. Sovereign Equality

This reinterpretation of the conservation principle in light of a proceduralized concept of self-determination conforms to the other key prong of contemporary international law; namely, the principle of sovereign equality. First enunciated in the U.N. Charter as a legal principle, the fundamental importance of the principle of sovereign equality was reaffirmed in the 1970 Declaration on Friendly Relations, as well as in the 2005 U.N. Reform Proposal, all of which insist that only if states comply fully with the requirements of this principle can the purposes of the United Nations be implemented.[148]

As is well known, the principle of sovereign equality constitutes a plural international society in which every state has an equal standing in international law. Accordingly, all states have an equal entitlement to participate in the formation of international law (consent) and to take on international legal personal-

146. As in the case of Israel vis a vis the occupied Palestinian territories. *See* Imseis, *supra* note 8, at 92–96. (stating that Israel was a high contracting party, signed the Fourth Geneva Convention, and originally intended to apply it to the occupied Palestinian territories after the June 1967 war. It subsequently altered its position in October 1967 stating that it would apply the "humanitarian" provisions de facto, but that it was not de jure bound by Geneva IV because of the "missing revisioner" theory — the absence of a legitimate ousted sovereign. According to this argument, Jordan and Egypt were the ousted rulers of the territories, but they were not lawful sovereigns as a result of their unlawful aggression against Israel in 1948. Accordingly, that territory was not a territory of a high contracting party under Common Article 2, and Israel's control over it was the result of a defensive conquest. Imseis argues that this is unconvincing). Quoting W. THOMAS MALLISON & SALLY V. MALLISON, THE PALESTINE PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER 257 (1986), Imseis points out that "if humanitarian law were to be interpreted so that its application were made contingent upon acceptance by the belligerent occupant of the justness and non-aggressive character of the war aims of its opponent, it is clear this law would never be applied." Imseis, *supra* note 8, at 96. For a detailed presentation and rebuttal of this argument, see SALLY V. MALLISON & W. THOMAS MALLISON, SETTLEMENTS AND THE LAW: A JURIDICAL ANALYSIS OF THE ISRAELI SETTLEMENTS IN THE OCCUPIED TERRITORIES 16 (1982). *See also* Richard Falk, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991).

147. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), at 66, 947th plen. mtg., U.N. Doc. A/59/565 (Dec. 14, 1960) ("The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights . . . [a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.").

148. *Declaration on Friendly Relations*, *supra* note 131, at 123–24; *A More Secure World*, *supra* note 120.

ity. A principle of reciprocity with legal effect follows from this: All states are formally entitled to the same general rights and subject to the same general obligations. Any state claiming a right under international law has to accord all other states the same right. Sovereign equality is thus a relational concept. The legal principle of sovereign equality also entails jurisdiction: the authority to make and enforce rules within a certain geographic area, limiting the application of external power. From the juridical perspective, domestic jurisdiction and immunity from foreign laws (autonomy) is the *sine qua non* for international law as it delimits legal systems from one another and thus articulates plurality. It means that states are not subject to other states' jurisdiction. Still, it should be noted that the scope of acts for which state officials have immunity can be restricted by international law (today, restrictions concern acts of aggression, forced annexation, genocide, and other international crimes). In other words, a state is sovereign because it is normatively and legally deemed independent from any other state: It is bound only by international law.[149]

Thus the principle of sovereign equality, which ascribes political autonomy to all states equally, has the following corollaries: the principle of non-aggression, the concept of domestic jurisdiction, and the stricture against annexation or the acquisition by another state resulting from the threat or use of force. The Declaration on Friendly Relations puts all this very succinctly:

> All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: a) States are judicially equal; b) Each State enjoys the rights inherent in full sovereignty; c) Each State has the duty to respect the personality of other States; d) The territorial integrity and political independence of the State are inviolable; e) Each State has the right freely to choose and develop its political, social, economic and cultural systems; f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.[150]

In a separate paragraph, the Declaration asserts that "[t]he territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter."[151] The many references to self-determination in the Declaration discussed above militate against the cosmopolitan-liberal anti-pluralist defense of military intervention for the purpose of regime change, for it forbids going over the heads of states to their populations for purposes of "liberation." It is as crucial to reassert and reinforce the principle of

149. For a full discussion, see MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 53–125 (1999); *see also* Cohen, *supra* note 112.

150. *Declaration on Friendly Relations*, *supra* note 131, at 124.

151. *Id.* at 123.

sovereign equality in the battle against the imperial transformation of international law as it is to retain the reinterpreted conservation principle. Indeed, as already indicated, these normative ideas complement each other.

However, it is also important to note the effect of human rights law on the conception of the prerogatives of sovereignty ascribed to states by the legal principle of the sovereign equality enunciated in the U.N. Charter.[152] In short, state sovereignty is no longer deemed to be absolute — the prerogatives of sovereignty are determined by the international legal system. Sovereign states no longer have the right to go to war or to annex other states. Nor are grave rights violations like genocide, ethnic cleansing, torture, other crimes against humanity, or the more drastic forms of discrimination like apartheid deemed to be within their domestic jurisdiction. It is, moreover, the duty of sovereign states to comply with their international obligations, even if these were voluntarily assumed, and of course, with customary international law, *jus cogens* norms, and Security Council rulings. Human rights law is part of contemporary international law. However, acknowledging that certain human rights norms are relevant to the law of occupation need not lead to an overly expansive interpretation of the occupant's prerogatives, thereby facilitating a neo-imperial form of "liberal-democratic" imposition through the back door that undermines the egalitarian nature of the international system. Instead, occupants must follow the spirit of the Fourth Geneva Convention in light of the international law principles just mentioned, and interpret human rights obligations in a narrow way, as circumscribing specific acts or modes of governance, not as an invitation to legislation by an occupier, and certainly not as a right to impose a liberal or democratic constitution. The duty to protect human rights should not become a vehicle for transforming the occupier into a sovereign dictator or discounting the value of national political processes.[153] Indeed, notwithstanding the human rights fundamentalists, an occupant cannot be expected to institute all the human rights protections that exist in international covenants or which oblige a state acting domestically. The question of which rights an occupant must provide has yet to be seriously discussed. But in light of the principle of the inalienability of sovereignty and the general presumption against institutional change *imposed* by outsiders, it would be a good idea to proceed cautiously, especially in the case of a unilateral occupation. One could start with the repeal of offensive laws that require the occupant to violate well-established human rights principles, move on to the enactment of new laws tailored to particular violations in the absence of legal protection, and

152. *See* Cohen, *supra* note 12.

153. Fox, *supra* note 8, at 276 (rightly insisting on the "affirmative value in some domestic norms and institutions emerging from the politics of a post-occupation society," especially regarding "political architecture, legal policy" and socio-economic structure).

help facilitate the erection of supervisory institutions or review mechanisms to help prevent and sanction human rights violations.[154]

But I want to argue for a more systematic legal reform that applies to U.N.-sponsored interim administrations as well as unilateral occupants. The relatively new tendency of the Security Council to indulge in legislation, and to ascribe unlimited legislative and executive powers to its "peace-enforcing" transitional administrations in the absence of effective mechanisms of accountability, should give us pause.[155] The issue here is not the enforcement of the Geneva Conventions because the Security Council is not bound by humanitarian law, but only by the U.N. Charter. As already indicated, Chapters VI and VII of the Charter have been interpreted very permissively to allow the vesting of ultimate legislative authority in an agent of the Secretary General, leading to near dictatorial powers in refashioning the legal, political, economic, and social structure of the occupied territory. Granting such powers to the Security Council, a body meant to be political and not legislative and without any independent mechanisms to ensure it is acting responsibly, is an alarming prospect given the nature of its membership and their veto rights. The fact that, thus far, the Security Council resolutions establishing highly transformative interim administrations have failed to establish meaningful accountability mechanisms is not reassuring. Nor is the fact that U.N.-authorized enforcement operations, including occupations, are not subject to the 1999 Bulletin of the Secretary General that announced the application of international humanitarian law to U.N. forces involved in peacekeeping and peace enforcement operations.[156] Though both the missions erected in Kosovo and East Timor were required to report regularly to the Security Council, they were not subject to judicial review. Rather, the only check was the Ombudsperson, established to look into human right abuses and other abuses of authority, not, however, by the administrative forces themselves.[157]

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154. *Id.* at 277.

155. *See* Paul C. Szsaz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901 (2002). "Under Charter Articles 25 and 48(1), the Security Council can adopt decisions binding on U.N. members" but the assumption was that these would refer to particular conflicts or situations, imposed for a limited purpose. *Id.* While decisions of the Council generally cannot be considered as establishing new laws, several portions of Resolution 1373 (2001) are closer to laws than decrees. *Id.* at 902 (noting provisions of Resolution 1373, such as designed actions against financing or supporting terrorist activities); *see also* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). This is a qualitatively different activity and enterprise for the U.N. The same is true of its relatively new (since the 1990s) and unprecedented "peace-enforcement" activities, especially in Kosovo with the creation of UNMIK and East Timor with the creation of UNTAET. *See supra* note 72; *see also* Boon, *supra* note 2, at 311–18, for a discussion of the extent of the executive and legislative mandate of these interim administrations.

156. *See* The Secretary-General, *Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law*, ¶ 1.2, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999); *see also* ROBERTS & GUELFF, *supra* note 22, at 721–30.

157. *See* Boon, *supra* note 2, at 320.

In my view, the lack of real accountability mechanisms in the case of UNSC interim administrations and the lack of enforcement mechanisms for existing occupation law in belligerent occupations are very serious indeed.[158] But in order for this to be rectified, it is crucial to articulate a coherent normative and legal framework (a *jus post bellum*) for all occupations which can orient reform and provide clear limits to the legislative powers of occupiers. As already indicated, this reform should be guided by strong insistence on the "conservationist" principle of the inalienability of sovereignty by force, the principles of self determination, popular sovereignty, and sovereignty equality. Otherwise, expanding the Security Council's powers regarding occupations in the name of human rights or democratic regime change, in the context of U.S. predominance, is a dangerous game, opening the latter to the charge of neo-imperialism, especially given the selectivity of U.N.-sponsored interventions. It is not enough to reinvent the discourse of trusteeship, proportionality, and accountability, for this is too laden with bad connotations from the old epoch of civilizing missions, mandates, and all the rest. What is at stake is the sovereign equality and self-determination (popular sovereignty) of the occupied polity. Any talk about limits on the powers of occupants or "consultation" between the occupied and the occupant interim administration will ring hollow without such a reform. Moreover, unless "prolonged occupations" involve the quick turnover of legislative power to the genuine representatives of the indigenous population, any post-conflict constitution that emerges out of the process will appear to be imposed.

Self-determination (popular sovereignty), human rights and the principle of sovereign equality are all at risk in prolonged and transformative occupations and none should be reduced to or sacrificed in the name of the other. Only if the conservation principle, suitably interpreted, is respected, can these principles be reconciled under an occupation regime, and sovereign equality remain the organizing principle of international relations.

IV. CONCLUSION

It was not my task in this paper to outline the elements of the reform of occupation law but rather to articulate its normative and theoretical premises. I have argued that the spirit, if not the letter, of the two prongs of the conservation principle remains valid today: the humanitarian concern for the welfare and rights of the occupied and the inalienability of sovereignty. I also want to maintain that there is a Nomos at stake here: The principles of the U.N. Charter associated with sovereign equality, the prohibition on annexation, the negative connotation associated with empires, and the subsequent elaboration of the concept of self-determination as well as human rights norms, are part of the plural-

158. *See generally id.* at 322–26; *see also* Fearon & Laitin, *supra* note 12, at 14–43 (discussing the Brahimi report and the need for reform).

istic world order well worth preserving. In the domain of occupation law, as in the domain of "humanitarian intervention," we face the choice between a dualistic egalitarian international society with cosmopolitan elements regulated by international law and a neo-imperial hierarchical conception of international order replete with "hegemonic international law or even worse, the loss of legitimacy of international institutions and law, and their replacement by 'grossraum' ordering."[159] Only the development of a *jus post bellum* guided by the above mentioned principles, backed up by accountability mechanisms with teeth, and regulating all occupations, will ensure that the latter has a chance against the former.

159. *See* Cohen, *supra* note 12, at 22–23.