

Transformative occupation and the unilateralist impulse

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Abstract

The 2003 occupation of Iraq ignited an important debate among scholars over the merits of transformative occupation. An occupier has traditionally been precluded from making substantial changes in the legal or political infrastructure of the state it controls. But the Iraq experience led some to claim that this ‘conservationist principle’ had been largely ignored in practice. Moreover, transformation was said to accord with a variety of important trends in contemporary international law, including the rebuilding of post-conflict states along liberal democratic lines, the extra-territorial application of human rights treaty obligations, and the decline of abstract conceptions of territorial sovereignty. This article argues that these claims are substantially overstated. The practice of Occupying Powers does not support the view that liberal democratic transformations are widespread. Human rights treaties have never been held to require states parties to legislate in the territories of other states. More importantly, the conservationist principle serves the critical function of limiting occupiers’ unilateral appropriation of the subordinate state’s legislative powers. Post-conflict transformation has indeed been a common feature of post-Cold War legal order, but it has been accomplished collectively, most often via Chapter VII of the UN Charter. To grant occupiers authority to reverse this trend by disclaiming any need for collective approval of ‘reforms’ in occupied states would be to validate an anachronistic unilateralism. It would run contrary to the multilateralization of all aspects of armed conflict, evident in areas well beyond post-conflict reconstruction.

Keywords: transformative occupation, conservationist principle, legislative authority, Article 43 of the Hague Regulations, extra-territorial application of human rights.



Shortly after the United States and United Kingdom began their occupation of Iraq in April 2003, the two governments announced an ambitious program of reform. The occupiers' governing authority, the Coalition Provisional Authority (CPA), declared that it would exercise 'all executive, legislative and judicial authority' in Iraq to advance 'efforts to restore and establish national and local institutions for representative governance and facilitat[e] economic recovery and sustainable reconstruction and development'.¹ In the fourteen months that followed, the CPA pursued these goals with abandon, issuing decrees that fundamentally remade Iraq's legal, political, military, and economic institutions.² If one looked only at Iraq's written law, one might conclude that in just over a year the country had been transformed from an authoritarian one-party state with a centrally planned economy to a liberal democracy with one of the most permissive free-market systems in the world.

The Iraqi reforms posed a dilemma for international lawyers. On the one hand they presented a direct challenge to the traditional law of belligerent occupation. As codified in the 1907 Hague Regulations and the Fourth Geneva Convention of 1949, occupation law casts occupying powers as mere trustees who do not assume the legislative competence of ousted *de jure* sovereigns.³ Article 43 of the Hague Regulations famously requires occupiers to respect the laws in force in the country 'unless absolutely prevented'.⁴ This 'conservationist principle', which limits the occupier's legislative authority, demarcates a critical boundary between occupation and annexation.⁵ Occupiers enjoy limited legislative authority because they lack full sovereign rights over the territory, something annexation would presumably supply. But annexation is profoundly antithetical to contemporary international law.⁶ In the traditional view, therefore, a 'reformist occupation' is a virtual oxymoron. As the UK Attorney General concluded on the eve of the Iraqi

1 The Coalition Provisional Authority, 'Coalition Provisional Authority Regulation Number 1', 16 May 2003, CPA/REG/16 May 2003/01, sec. 1(2), available at: <http://www.iraqcoalition.org/regulations/> (last visited 15 March 2012).

2 Special Inspector-General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience*, U.S. Government Printing Office, Washington, DC 2009, p. 326: '[t]he CPA adopted a maximalist approach to reconstruction, developing plans to transform every aspect of Iraqi society, from the banking system to traffic laws'; E. Anthony Wayne, Assistant Secretary for Economic and Business Affairs, Testimony Before the Senate Banking Subcommittee on International Trade and Finance, 11 February 2004, available at: <http://2001-2009.state.gov/e/eeb/rls/rm/29288.htm> (last visited 15 March 2012): 'U.S. assistance is predicated on and directed toward reforming Iraq's society and economy. A new, prosperous, peaceful Iraq must be a democratic, free enterprise Iraq, fully integrated into the community of nations.' For a detailed description of the CPA reforms, see Gregory H. Fox, 'The occupation of Iraq', in *Georgetown Journal of International Law*, Vol. 36, No. 2, 2005, p. 197.

3 Regulations Respecting the Laws and Customs of War on Land, annex to Convention [IV] Respecting the Laws and Customs of War on Land, 18 October 1907 (hereafter Hague Regulations), Art. 43; Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereafter GV IV), Art. 64.

4 Article 43 provides in full, 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety [civil life], while respecting, *unless absolutely prevented*, the laws in force in the country' (emphasis added).

5 Gregory H. Fox, *Humanitarian Occupation*, Cambridge University Press, Cambridge, 2008, pp. 233–237.

6 See generally, Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Clarendon Press, Oxford, 1996.

invasion, 'wide-ranging reforms of governmental and administrative structures would not be lawful'.⁷

This is not to say that an occupier is without legislative authority. That authority may be quite broad and permit a wide range of changes to local law, but the capacity to legislate must be commensurate with the temporary nature of occupation. Reforms deemed necessary to the tasks of occupation administration or to avoid the occupier enforcing local laws that infringe fundamental human rights are, in this view, necessary consequences of an occupier assuming temporary political authority. That is, they are essential to occupation being both effective and humane. There is even a plausible argument that an occupation lasting for many years (read Israel's) may require more extensive reforms since, as Adam Roberts observes, '[d]uring a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the status quo ante'.⁸ But reforms explicitly designed to outlast the occupation and address problems unrelated to the occupier's immediate security or governance concerns are not justifiable on ground that they are necessary for efficient administration during the occupation. Instead, as Nehal Bhuta puts it, transformative occupation derives its legitimacy 'from the promise of the order to come'.⁹ Such an occupation – again in the traditional view – appropriates legislative authority properly reserved for a locally chosen government that will follow the occupier's departure.¹⁰

But the transformation of Iraq was not without normative roots.¹¹ The Iraq reforms seemed to resonate with many important trends in contemporary international law. They explicitly promoted human rights and democratic governance. They sought to bring political stability to a state emerging from armed conflict and years of authoritarian rule, a set of tasks now regularly undertaken by the United Nations and various regional organizations. They sought to open the Iraqi economy to foreign investment and greater integration within the global economy. They seemed consistent with the trajectory of occupation law more generally, which began as a means of securing the military objectives of European powers (though not when they operated outside Christian Europe) but moved in the

7 John Kampfner, 'Blair was told it would be illegal to occupy Iraq', in *New Statesman*, 26 May 2003, pp. 16–17 (reprinting Memorandum from The Rt. Hon. Lord Goldsmith, QC to the Prime Minister, dated 26 March 2003).

8 Adam Roberts, 'Prolonged military occupation: the Israeli-occupied territories since 1967', in *American Journal of International Law*, Vol. 84, No. 1, 1990, p. 52.

9 Nehal Bhuta, 'The antinomies of transformative occupation', in *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 737 (italics omitted).

10 Even the Israeli Supreme Court, which has regularly upheld changes to laws in the Palestinian territories, recognized the illegitimacy of future-oriented reforms. In the *Elon Moreh* case the Court concluded that 'no military government may create in its area facts for its military purposes that are intended from the very start to exist even after the termination of military rule in that area, when the fate of the territory after the termination of the military rule is unknown'. High Court of Justice (HCJ) 390/79, *Dweikat et al. v. Government of Israel et al.*, 1979, 34(1) PD 1, 22.

11 For a creative effort to characterize the Iraq transformation not as regime change but as a by-product of legitimate security-related reforms, see Michael N. Schmitt and Charles H. B. Garraway, 'Occupation policy in Iraq and international law', in Harvey Langholtz, Boris Kondoch, and Alan Wells (eds), *International Peacekeeping: The Yearbook of International Peace Operations*, Vol. 9, 2004, pp. 27, 36, n. 54 ('democratization may certainly be a fortuitous by product of valid security actions, as it is in this case').

post-World War II era to provide a ‘bill of rights’ to inhabitants of all occupied territories.¹² And the Iraqi reforms seemed to confirm the common observation that for most of its history the conservationist principle has been observed only in the breach, flouted and ignored so frequently that its prescriptions bear little relation to state practice of the past few decades.¹³ According to this view, the CPA’s blatant disregard for the conservationist principle simply affirmed its anachronism in an age when external reform of national institutions – particularly of the liberal democratic variety – is a common and widely accepted practice.¹⁴

Each of these arguments figured prominently in the outpouring of scholarly commentary on occupation law in the years following the invasion of Iraq.¹⁵ Professor Adam Roberts introduced the term ‘transformative occupation’ to describe Iraq and other occupations ‘whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule’.¹⁶ Much of the commentary recognized the novelty of transformative occupation: unlike earlier innovations such as the Fourth Geneva Convention that sought to protect the population of occupied states from depredations by occupiers,

- 12 Eyal Benvenisti, *The International Law of Occupation*, Princeton University Press, Princeton, 1993, p. 105; Grant T. Harris, ‘The era of multilateral occupation’, in *Berkeley Journal of International Law*, Vol. 24, No. 1, 2006, pp. 15–19; N. Bhuta, above note 9, pp. 728–729.
- 13 N. Bhuta, above note 9, p. 734; Major Breven C. Parsons, ‘Moving the law of occupation into the twenty-first century’, in *Naval Law Review*, Vol. 57, 2009, No. 1, pp. 14–15.
- 14 As one CPA legal advisor put it, ‘[a]t the very least . . . whatever customary law Article 43 purported to declare in 1907, that law appears to have been overtaken by history and the new norms of state-building in failed and post-conflict states’. Brett H. McGurk, ‘Revisiting the law of nation-building: Iraq in transition’, in *Virginia Journal of International Law*, 2004–2005, Vol. 45, pp. 451, 459.
- 15 In addition to the works already cited, the literature includes Ralph Wilde, ‘Complementing occupation law? Selective judicial treatment of the suitability of human rights norms’, in *Israel Law Review*, Vol. 42, No. 1, 2009, pp. 80–100; Eyal Benvenisti, ‘The origins of the concept of belligerent occupation’, in *Law and History Review*, Vol. 26, No. 3, 2008, pp. 621–648; Noemi Gal-Or, ‘Suspending sovereignty: reassessing the interlocking of occupation, failed and fragile state, responsibility to protect, and international trusteeship (lessons from Lebanon)’, in *Israel Law Review*, Vol. 41, 2008, pp. 302–330; Kenneth Watkin, ‘Maintaining law and order during occupation: breaking the normative chains’, in *Israel Law Review*, Vol. 41, 2008, p. 175–200; Aeyal M. Gross, ‘Human proportions: are human rights the emperor’s new clothes of the international law of occupation?’, in *European Journal of International Law*, Vol. 18, No. 1, 2007, pp. 1–35; Hamada Zahawi, ‘Redefining the laws of occupation in the wake of Operation Iraqi “Freedom”’, in *California Law Review*, Vol. 95, No. 6, 2007, pp. 2295–2352; Ebrahim Afsah, ‘Limits and limitations of power: the continued relevance of occupation law’, in *German Law Journal*, Vol. 7, No. 6, 2006, pp. 563–590; John Cerone, ‘Human dignity in the line of fire: the application of international human rights law during armed conflict, occupation, and peace operations’, in *Vanderbilt Journal of Transnational Law*, Vol. 39, 2006, pp. 1447–1510; Steven R. Ratner, ‘Foreign occupation and international territorial administration’, in *European Journal of International Law*, Vol. 16, No. 4, 2005, pp. 695–719; Marco Sassòli, ‘Legislation and maintenance of public order and civil life by occupying powers’, in *European Journal of International Law*, No. 16, No. 4, 2005, pp. 661–694; David W. Glazier, ‘Ignorance is not bliss: the law of belligerent occupation and the U.S. invasion of Iraq’, in *Rutgers Law Review*, Vol. 58, No. 1, 2005, pp. 121–194; Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’, in *International Review of the Red Cross*, Vol. 86, No. 856, 2004, pp. 745–769; Bartram S. Brown, ‘Intervention, self-determination, democracy and the residual responsibilities of the occupying power in Iraq’, in *UC Davis Journal of International Law & Policy*, Vol. 11, No. 1, 2004, pp. 23–73; Mahmoud Hmoud, ‘The use of force against Iraq: occupation and Security Council Resolution 1483’, in *Cornell International Law Journal*, Vol. 36, No. 3, 2004, pp. 435–454.
- 16 Adam Roberts, ‘Transformative military occupation: applying the laws of war and human rights’, in *American Journal of International Law*, Vol. 100, No. 3, 2006, p. 580.

transformative occupation sought to legitimize *rights-enhancing* acts of legislative and constitutional change. Transformative occupation has thus been viewed as involving transformation *away* from repressive closed political systems and *towards* democratic systems that more closely adhere to international standards of governance and individual rights. From this perspective, the countervailing policies represented by the conservationist principle seemed weak indeed. Conserving existing law makes sense when the alternative is repression or even plunder by an occupier. But when the alternative is greater protection of human rights and the introduction of democratic politics, the principle appears regressive and even anachronistic.

These are compelling arguments. In this article I will suggest that they are almost all overstated, in some cases substantially so. The exaggerated nature of the conservationist principle's reported demise is critical in assessing the shifting normative expectations described by the principle's critics. Viewed in isolation, these claims might suggest that the conservationist principle survives with only a tenuous link to the policy assumptions, surrounding doctrines, and factual underpinnings of current international law. But I would like to argue that the conservationist principle retains a critical utility in contemporary law, indeed so critical that, I will argue, a presumption should exist against its demise or replacement by a doctrine of transformative occupation. The exaggerated nature of the criticism suggests that this presumption has not been rebutted in any convincing manner.

One certainly cannot deny that expectations for occupations have radically changed. Despite being outsiders to the territories, occupiers cannot be indifferent to the plight of citizens and so cannot treat their control as no more than an opportunity to bargain with the ousted regime over the terms of its return. The days of occupation as a means to secure the prerogatives of political elites are over, as they are for almost all aspects of armed conflict. But it is one thing to say that occupiers should refrain from neglecting or mistreating inhabitants. It is another to grant them licence to become agents of constitutional revolutions, which was effectively what occurred in Iraq. That task cannot be left to the unilateral discretion of a single state.

In summary, I argue the following. One of the singular achievements of the post-Cold War era has been a move toward realizing the UN Charter's goal of multilateralizing armed conflict. In particular, reconstruction of post-conflict states is now a regular feature of Security Council resolutions, under Chapter VII of the Charter. In assuming the role of an agent for change in post-conflict societies, the Council has performed a critical sorting function: it has *legitimized collective* involvement in matters of governance and social relations that sit at the heart of states' domestic prerogatives, and it has *delegitimized unilateral* efforts to the same ends. Enshrining transformative occupation into doctrine threatens to reverse that hard-won legitimacy, for its only consequence would be to empower *unilateral* state occupiers.

Such a costly step, whatever its purported benefits, should come only after clear and convincing evidence that the conservationist principle has been

thoroughly eroded. That appears lacking. While occupation law more generally has often been honoured in the breach, Iraq literally stands alone as the only example in the post-Cold War era of a liberal and democratic transformative occupation. While some commentators seek to include multilateral post-conflict missions on the list of transformative occupations – a move that would make the practice appear quite common and widely accepted – conflation of multilateral and unilateral transformative projects is highly problematic. The former arose in large part in order to delegitimize the latter. Finally, while the extra-territorial application of human rights obligations is now increasingly accepted, those instruments provide a mandate for legislative change only in a narrow set of circumstances. Those circumstances have yet to find their way before an international court or treaty body, none of which has found human rights instruments to provide a mandate for extra-territorial legislative action.

How transformation challenges occupation law: refining the problem

The challenge that transformative occupation presents to the conservationist principle is quite unlike the problems previously faced by occupation law. Much of the commentary on transformative occupation misses this disjunction, describing a steady erosion of occupation norms through the second half of the twentieth century, culminating in the wholesale transformation of Iraqi in 2003. Iraq plays such a prominent role in these analyses precisely because it is linked to this prior history.

The Fourth Geneva Convention (and its elaboration in Additional Protocol I) was the last major innovation in occupation law. Geneva law has famously been described as providing a ‘bill of rights’ for the occupied population.¹⁷ After two world wars in which occupiers committed widespread brutalities and sought to bend local law to their own interests, the obvious priority for the treaty’s drafters was to strengthen individual rights protections in the territories.¹⁸ That it did. Seeking to remedy the inadequacies of Hague law, its numerous restraints assumed an occupier unconcerned, to say the least, with the welfare of individuals.¹⁹

17 E. Benvenisti, above note 12, p. 105.

18 Theodor Meron, ‘The humanization of humanitarian law’, in *American Journal of International Law*, Vol. 94, No. 2, 2000, p. 245 : ‘[t]he Fourth Geneva Convention reflects the felt need to enhance the protection of individuals and populations, especially in occupied territories’. Introducing commentary on the new occupation norms, Pictet summarized the recent history that the Convention was designed to address: ‘[d]uring the Second World War whole populations were excluded from the application of the laws governing occupation and were thus denied the safeguards provided by those laws and left at the mercy of the Occupying Power’. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, (IV) Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross (ICRC), Geneva, 1958, Art. 47, p. 273.

19 Rights protections are dispersed throughout the Fourth Geneva Convention and include protections from discrimination (Art. 27), impositions on honour and dignity (Art. 27), physical or moral coercion (Art. 31), physical suffering (Art. 32), collective punishments (Art. 33), intimidation, retribution, the taking of hostages or pillage (Arts. 33 and 34), mass or individual forced transfers (Art. 49), compulsion to

But transformative occupation does not involve an occupier who seeks to subordinate local institutions, citizens, and resources to its own self-interested goals. It rather assumes an occupier attempting to *enhance* individual rights, build and strengthen local institutions, and increase the occupied state's capacity to use and capitalize on its natural resources (or at least attempt to do these things). This is because reform of the territory is central to both the occupier's initial decision to use force (regulated by the *jus ad bellum*) and its conduct once it gains control over the territory (regulated by *jus in bello*). In other words, a transformative occupier does not seek a purely geostrategic objective in its use of force, one in which occupation appears as merely a phase of the armed conflict. Instead, transformation *accomplishes* the occupier's *jus ad bellum* objective. The traditional concern that an occupier may subordinate rights in the territory to broader military objectives is thus largely absent. Professor Roberts notes this changed rationale in his seminal article,

Put crudely, the traditional assumption of the laws of war is that bad (or potentially bad) occupants are occupying a good country (or at least one with a reasonable legal system that operates for the benefit of the inhabitants). In recent years, especially in some Western democratic states, various schools of thought have been based on the opposite idea, crudely summarized as good occupants occupying a bad country (or at least one with a bad system of government and laws).²⁰

Roberts is entirely correct that distinguishing 'good' from 'bad' occupiers is a crude and imprecise distinction, but one that is necessary nonetheless. A rapacious ('bad') occupation is inconsistent with much of existing Geneva law. A transformative ('good') occupation can easily be seen as almost entirely consistent with rights-based Geneva norms. First, a transformative occupier commits no violation of the rights-enhancing provisions that are the distinctive feature of the legal era ushered in by the Fourth Geneva Convention. Its objectives are instead rights-enhancing. Second, a thorough transformation of law and political institutions is future-oriented, seeking as its primary goal not the restraint of an occupier's own propensity to violate rights but the creation of new institutions that will permanently enhance local political culture after the occupation ends. If Geneva law is indeed focused on individuals rather than the state as such,²¹ it should present no obstacle to consolidating institutionalization of human rights protections for the time after the occupation ends.

Third, transformation takes as its model not the self-interested acts of predatory occupiers but the multilateral post-conflict reconstruction missions that

serve in the occupier's armed forces (Art. 51), destruction of personal property (Art. 53), altering the status of judges or other public officials (Art. 54), infringements on the free exercise of religion (Art. 58), executing those under 18 (Art. 68), *ex post facto* prosecutions (Art. 70), infringements on due process protections in criminal proceedings (Art. 71), and inhumane conditions for detainees (Art. 76).

20 A. Roberts, above note 16, p. 601.

21 J. S. Pictet, above note 18, Art. 47, p. 274 (the Fourth Geneva Convention's 'object is to safeguard human beings and not to protect the political institutions and government machinery of the State as such').

have proliferated in the last two decades.²² These missions seek to avoid renewed conflict by creating an inclusive and pluralistic politics in the post-conflict state. Former antagonists can only co-exist peacefully if they can reasonably expect to find their views expressed in national policy. The only system capable of making such an assurance is pluralist democracy. The missions have thus advanced a broad range of majoritarian and counter-majoritarian initiatives designed to convert former military foes into political rivals. This view of ‘statebuilding as a foundation for peace-building’ is also broadly consistent with Geneva law.²³

Viewed in this light, the case for transformative occupation seems compelling. It implicates none of the prohibitions in Geneva law, instead seeking to further the values embodied in that law. One might conclude that, at worst, apart from the conservationist principle, contemporary occupation law simply does not address transformation. No other provision of the Fourth Geneva Convention prevents an occupier from *enhancing* human rights protections over their prior state. As for the conservationist principle, it appears out of touch with important trends in cognate areas of international law – in particular the proliferation of post-conflict reconstruction missions and the universalization of human rights protections. What’s not to like about transformative occupation?

Challenging the argument for transformative occupation

Thus conceived, transformative occupation is seen as promoting many widely accepted goals of contemporary international law: the protection of human rights, democratic transitions, post-conflict reconstruction, and the use of force for humanitarian ends. But does state practice actually support such a complete (or almost complete) retreat from the conservationist principle? A closer examination suggests that it does not. The following sections examine three areas of practice often invoked to support a nascent acceptance of transformative occupation: the practice of state occupiers, multilateral post-conflict missions, and the extra-territorial application of human rights treaties.

State practice of occupiers

The flood of literature that followed the occupation of Iraq leaves the distinct impression that transformative occupations became common in the post-World War II era.²⁴ This is a highly misleading view. Few occupations in the post-World

22 See, e.g., B. C. Parsons, above note 13, pp. 15 and 16 (describing UN nation-building operations as ‘transformative occupations’ that have ‘impacted the modern law of occupation significantly’).

23 Roland Paris and Timothy D. Sisk, ‘Introduction: understanding the contradictions of postwar statebuilding’, in Roland Paris and Timothy D. Sisk (eds), *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations*, Routledge, London and New York, 2009, p. 3.

24 Peter M. R. Stirk, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh, 2009, p. 203 (summarizing recent scholarship claiming that ‘the indifference of the Hague Regulations to the quality of local governance has given way to an age in which regime change is a primary intention of occupiers’); Nicholas F. Lancaster, ‘Occupation law, sovereignty, and political transformation: should the Hague

War II era have even attempted to bring about liberal democratic transformations. While the Iraq occupation certainly did so and produced a rich legal discourse in its wake, Iraq stands as an exceptional case in the universe of post-World War II occupations. The vast majority have been non-transformative and, when transformative, largely illiberal.

There have been nineteen unilateral occupations since 1945, including the immediate post-World War II cases of Germany, Japan, and Austria.²⁵ This number does not include UN-sponsored nation-building missions, which are addressed separately below.²⁶ Only four of these nineteen cases involved comprehensive liberal democratic transformations and three of those four cases (Germany, Japan, and Austria) occurred over sixty years ago in the aftermath of World War II. There is only one case of comprehensive liberal reform in the post-Cold War era in which humanitarian concerns were a significant motive for warfare: that of the United States in Iraq. Six cases involved non-liberal transformations: Turkey in Cyprus, Indonesia in East Timor, Vietnam in Cambodia, the Soviet Union in Afghanistan, Iraq in Kuwait, and Israel in the Palestinian territories.²⁷ In the remaining nine cases, no meaningful transformation occurred.²⁸ One study of new constitutional orders promulgated under occupation – a related but not entirely identical phenomenon to transformative occupation – found that constitutional change is overwhelmingly the work of a few leading military powers, some democratic and some not.²⁹ The authors conclude that ‘occupation constitutions should be seen as a

Regulations and the Fourth Geneva Convention still be considered customary international law’, in *Military Law Review*, Vol. 189, 2006, p. 90, (‘Current occupation practice . . . allows for much wider scope of legislation than permitted by the language of the Hague Regulations and Fourth Geneva Convention’); A. Roberts, above note 16, p. 588 (‘In many cases . . . occupants, for a wide variety of reasons, have changed laws in the occupied territory without incurring international criticism’). In Grant Harris’s summary view: ‘Changes in warfare have dramatically altered the nature of modern occupation. Occupations no longer consist of the victor simply leaving local law and institutions intact while temporarily holding the territory hostage for political or territorial concessions. Instead, humanitarian and regime change interventions flip the law of occupation on its head by: (1) making the occupation the end goal rather than a byproduct of the war; (2) undercutting the prime rationale for the creation of the traditional law of occupation; (3) embracing nation-building over the law of occupation; and (4) sometimes reversing the calculus of which power is considered to be “legitimate”’. G. T. Harris, above note 12, p. 33.

25 The cases of occupation discussed in this section are compiled and analysed in greater detail in Gregory H. Fox, ‘Exit and military occupations’, in Richard Caplan (ed.), *Exit Strategies and State Building*, Oxford University Press, Oxford, 2012, pp. 197–223.

26 See below, in the section ‘Inspiration from multilateral missions’.

27 See the discussion of Israel’s occupation below.

28 Soviet Union in Northern Iran (1941–1946), Soviet Union in Czechoslovakia (1968), Libya in Chad (1973), Syria in Lebanon (1976), Tanzania in Uganda (1979), United States in Grenada (1983), United States in Panama (1989), Uganda in the Democratic Republic of the Congo (1998), Ethiopia in Somalia (2006). See G. H. Fox, above note 25, pp. 201–203.

29 Zachary Elkins, Tom Ginsburg, and James Melton, ‘Baghdad, Tokyo, Kabul . . . : constitution making in occupied states’, in *William & Mary Law Review*, Vol. 49, No. 4, 2008, pp. 1139–1178. The authors define occupation constitutions as those ‘drafted or adopted in the extreme condition of one state having explicit sovereign power over another’ (*ibid.*, p. 1140). They have occurred in the majority of occupations: *ibid.*, p. 1152 (new constitutions in 42 of the 107 occupations are examined). The nature of these new constitutions varies widely: some are liberal and some not; some establish entirely new political institutions and some create variations on existing institutions; and some replicate the occupier’s political structures and some do not. Occupation constitutions are typically short-lived, with many barely outlasting the end of the occupation. *Ibid.*, pp. 1157 and 1158.

particular strategy of particular states, rather than a global phenomenon'.³⁰ In short, transformative occupation is very much the exception in a set of cases dominated by occupations that fit the traditional model comprehensively regulated by Hague and Geneva law.

Instead of examining the entire class of recent occupations, many authors focus only on the immediate post-World War II cases and two more recent high-profile cases: Israel in the Palestinian territories and the United States in Iraq.³¹ Such a limited sample obviously cannot support the proposition that parties to the Hague and Geneva instruments have rejected the conservationist principle.³² Even so, does this small subset of cases represent a unified legal phenomenon?

Germany, Austria, and Japan

Though following very different paths, the occupations of Germany, Japan, and Austria obviously involved liberal democratic transformations. But three factors counsel hesitation in marshalling these cases to argue for the conservationist principle's demise. First, whereas the three western allies used their post-World War II occupations to bring democratic change, the Soviet Union did not. Indeed, if one looks beyond Soviet actions in its East German zone of occupation to its actions elsewhere in eastern Europe, post-World War II practice appears anything but uniformly liberal and democratic.³³ In this sense, the status of occupiers' legislative powers seems to share the stagnant quality that marked so much of international practice in peace and security law during the Cold War.

Second, even assuming the Western occupations launched a challenge to the conservationist principle, that challenge was not taken up when the international community codified occupation law in the light of post-World War II practice. This occurred twice. First, during drafting of the Fourth Geneva Convention of 1949, the United States proposed language that would have effectively validated its actions in Germany and Japan and given occupiers virtually unlimited legislative

30 *Ibid.*, p. 1153.

31 See, e.g., A. Roberts, above note 16, pp. 601–603 (discussion of 'Post-1945 occupations with a transformative purpose' skips from discussion of post-World War II occupations to 'International military actions since the end of the Cold War'); N. F. Lancaster, above note 24, p. 70 (in section on 'Occupations since 1949', discussing Israeli occupation as the only non-UN sanctioned case).

32 Subsequent practice of treaty parties is an accepted source of treaty interpretation. See Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties. But that practice must be 'consistent rather than haphazard and it should have occurred with a certain frequency'. Further, as Article 31(3)(b) itself provides, the practice must 'establish the agreement of the parties regarding its interpretation'. Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, Leiden and Boston, 2009, p. 431. Given the reception of the Iraqi and Palestinian occupations by the rest of the international community, such agreement seems absent.

33 While the only other immediate post-World War II Soviet action meeting the definition of occupation occurred in northern Iran, Soviet influence in what became the Warsaw Pact countries soon brought about the demise of liberal democratic institutions. See generally, Tony Judt, *Postwar: A History of Europe since 1945*, Penguin Books, Hammersmith, 2006, pp. 165–196. Later Soviet occupations of Hungary (1956) and Czechoslovakia (1968) graphically illustrate the type of reforms that its occupations occasioned.

discretion.³⁴ The proposal was opposed by the Soviets, as well as several Western states, and was not adopted.³⁵ Instead, Article 64 of the Convention reiterated the conservationist principle, though the rights-enhancing provisions elsewhere in the Convention effectively abrogated it for their specific purposes. The second codification was Additional Protocol I of 1977, which addressed a series of occupation law issues. None of its provisions purported to modify the conservationist principle.

Third, the arguments used in the late 1940s to justify the post-World War II occupations have not aged well. Post-World War II Allied lawyers faced a daunting task in justifying de-Nazification in Germany and Austria and the new constitution for Japan drafted by General MacArthur. All appeared blatantly inconsistent with Hague law, a conclusion they strove mightily to avoid. The justifications that these lawyers devised, while clever and even plausible at the time, are hardly replicable today.³⁶ Most relied on *debellatio* and related principles appurtenant to the right of conquest.³⁷ In a widely cited article, for example, Robert Jennings argued that, because the victorious allies could have annexed Germany, they were also 'entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in annexation'.³⁸ These doctrines find scant support in contemporary international law, as they are wholly incompatible with the UN Charter's limitation on the aggressive use of force and affirmation of the sovereign equality of states. As a result, the post-World War II claims have dropped out of scholarly discussion and official justifications of state policy, which focus instead on the human rights-centred justifications examined here.³⁹ None of the post-World War II justifications are repeated in any of the now voluminous writings on transformative occupation. In short, the post-World War II

34 The US proposal would have replaced the then draft Article 55 with the following language: 'Until changed by the Occupying Power the penal laws of the occupied territory shall remain in force and the tribunals thereof shall continue to function in respect of all offenses covered by the said laws'. See Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff Publishers, Leiden and Boston, 2009, p. 118. The Soviet delegate objected that the US approach would grant occupying powers 'an absolute right to modify the penal legislation of the occupied territory' and would 'greatly exceed the limited right laid down in the Hague Regulations' (quoted in *ibid.*).

35 *Ibid.* (noting opposition of the Soviet Union, Norway, Romania, and Mexico).

36 G. H. Fox, above note 2, pp. 289–294.

37 Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 32.

38 The passage reads in full: 'If, after the German surrender, the Allies had indeed annexed the German state there could have been no doubt about the nature of their right in law to do so; the circumstances would have fitted neatly and unquestionably into the familiar category of subjugation. But if as a result of the Allied victory and the German unconditional surrender Germany was so completely at the disposal of the Allies as to justify them in law in annexing the German state, it would seem to follow that they are by the same token entitled to assume the rights of supreme authority unaccompanied by annexation; for the rights assumed by the Allies are coextensive with the rights comprised in annexation, the difference being only in the mode, purpose, and duration of their exercise, the declared purpose of the occupying Powers being to govern the territory not as an integral part of their own territories but in the name of a continuing German state'. Robert Y. Jennings, 'Government in commission', in *British Year Book of International Law*, Vol. 23, 1946, p. 137.

39 Jennings's article, for example, was cited in in the 1958 edition of the *British Military Manual* but was dropped from the 2004 revised edition. See British Command of the Army Council, *Manual of Military*

occupations are separated by much doctrine and history from contemporary views of liberal democratic transformation. Claims that they support a legally unified conception of transformative occupation are unsustainable.

Israel in Palestine

The problem of legal anachronism is not present in the case of Israeli occupation of the Palestinian territories. Israel's direct administration lasted from its military victory in 1967 to its transfer of civilian authority to the Palestinians in the 1993 Oslo Accords.⁴⁰ It is certainly the most-discussed occupation of the modern era and is cited by virtually all commentaries on transformative occupation as supporting the erosion of the conservationist principle.⁴¹ But it is also the most widely condemned: individual states and international organizations have loudly and consistently denounced the occupation itself, the extension of Israeli law to the territories, the proliferation of settlements, and a wide variety of practices that violate the human rights of individual Palestinians.⁴² One puzzles over the attempt to claim Israeli actions as precedent for a liberal democratic model of transformation when Israel has been criticized for pursuing precisely the opposite path: *violating* Palestinians human rights and *denying* them the opportunity for democratic self-government that would come with full self-determination.⁴³ Such condemnations, like those of abuses in other illiberal occupations, find deep resonance in the negative prohibitions of existing occupation law and present no basis for discarding the conservationist principle in search of a new justificatory theory.

Even putting aside these condemnations, Israeli changes to law in the territories have not amounted to comprehensive transformation, let alone a liberal democratic one.⁴⁴ Most of the legislative changes (and they were

Law, Part III, The Law of War on Land, 1958, p. 230; UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004.

40 See Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories*, Kluwer Law International, Cambridge, MA, 1997.

41 See, e.g., A. Roberts, above note 16; S. R. Ratner, above note 15; M. Sassòli, above note 15; A. M. Gross, above note 15.

42 See A. Roberts, above note 8, p. 67, n. 79 (Security Council and General Assembly resolutions have 'deplored Israel's conduct of the occupation, have condemned as illegal the purported annexation of parts of the occupied territories (including Jerusalem), and have called upon Israel to put an end to its occupation of Arab territories'); G.H. Fox, above note 2, p. 239, n. 264 (collecting Security Council resolutions condemning Israeli occupation practices). Many of these criticisms are addressed and validated in International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, p. 136 (hereafter ICJ, *Wall* decision).

43 See, e.g., ICJ, *Wall* decision, above note 42, para. 122 (the construction of the security wall 'severely impedes the exercise by the Palestinian people of its right to self-determination').

44 Indeed, the *lack* of coherence in law applicable in the territories was itself a significant problem during the period of Israeli administration. See George E. Basharat, 'Peace and the political imperative of legal reform in Palestine', in *Case Western Reserve Journal of International Law*. Vol. 31, 1999, p. 265 ('a means for assessing the Palestinian community's need for new legislation was never institutionalized and local Palestinian leaders remained perennially reluctant to seek legislative innovations from an occupying power whose legitimacy they refused to acknowledge. Thus, the law remained stagnant in many areas of importance to the Palestinians').

substantial⁴⁵) can be understood as furthering the security and political interests of Israel rather than enhancing the quality of life in the territories.⁴⁶ The initial terms of each of the occupations – in the West Bank, Gaza, East Jerusalem, and the Golan Heights – were established in proclamations constituting military administrations for the territories. Each declared that the law in force would continue as long as it did not conflict with the order or subsequent proclamations.⁴⁷ The later changes can be grouped into four main areas. The first was the enactment of a substantial body of security-related decrees and the establishment of military courts to hear cases of their alleged violation.⁴⁸ Second was extending the jurisdiction of Israeli civilian courts to people, property, and events in the territories in which at least one party was an Israeli citizen.⁴⁹ Local courts continued to operate as before, except when claims were brought against the occupying authorities.⁵⁰ The extension of jurisdiction followed the growing interaction between Israelis and residents of the territories as the occupation lingered on and provided a means of resolving disputes in an Israeli forum under Israeli law.⁵¹ Third was extending Israeli law and making Israeli courts available to the growing settler population in the territories.⁵² The fourth set of changes involved a comprehensive effort to integrate the territories' economies with Israel's, described in the early days of the occupation as a 'common market'.⁵³ These reforms were extensive and included the abolition of internal customs barriers and creation of a single external barrier for international trade; unification of indirect taxation; facilitation of free passage between the territories and Israel; introduction of Israeli currency into Gaza and the West Bank;⁵⁴ amendment of local banking laws to reflect Israeli practices;⁵⁵ and even replacement of the local traffic code.⁵⁶

While these measures were expansive and highly intrusive into life in the territories, it would be a category mistake to group them with reforms intended to enhance individual rights and autonomous political decision-making. With some notable exceptions, they were designed primarily to ease the task of administering the territories, promote the security interests of the Israeli Defense Forces, and ensure that Israelis living in or having contact with the territories continued to have recourse to Israeli laws and courts. They neither sought to facilitate a democratic

45 See Neve Gordon, *Israel's Occupation*, University of California Press, Berkeley and Los Angeles, 2008.

46 See David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, Albany, NY, 2002, p. 64.

47 The 7 June 1967 Proclamation Concerning Law and Administration (No. 2) for the West Bank, for example, stated: 'The law in existence in the Region on June 7, 1967, shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamation or any other proclamation or Order which may be issued by me, and subject to modifications resulting from the establishment of government by the Israeli Defense Forces [IDF] in the Region'. Quoted in E. Benvenisti, above note 12, p. 114.

48 *Ibid.*, pp. 115–116.

49 *Ibid.*, p. 129.

50 *Ibid.*, p. 118.

51 *Ibid.*, pp. 129–134.

52 *Ibid.*, pp. 129–139.

53 *Ibid.*, p. 123.

54 *Ibid.*, p. 126.

55 *Ibid.*

56 *Ibid.*, p. 128.

transition nor to protect Palestinians from human rights violations perpetrated by the most powerful political actor in the territories, Israel itself. As a result, most of Israel's actions fit easily within the existing negative protections of the Fourth Geneva Convention.

Iraq 2003

The Iraq occupation was transformative beyond any case since 1945. Its explicit promotion of liberal democratic institutions and massive disregard for existing Iraqi law, as well as the US and UK's direct acknowledgment of their status as Occupying Powers, makes it the paradigmatic case in the current debate. One might argue that, for these reasons alone, it has advanced the legitimacy of transformative occupation.⁵⁷ But the legal import of the occupation of Iraq has become something of a Rorschach test. Those who saw a trend toward increasing acceptance of transformation view Iraq as confirming that trend; others who see it as violating existing law do not.⁵⁸ More fundamentally, some view occupation law as the critical normative framework for Iraq, while others believe that the Security Council authorized the reforms in Resolution 1483.⁵⁹ And some view that resolution as situated within the evolving nature of occupation law, while others view it as an act of legislative fiat that overrode but did not engage with occupation law as such.⁶⁰

Iraq, then, is at this point in history not so much a data point in the evolution of the conservationist principle as a blank canvas on which broader arguments about the legislative power of occupiers are applied. But even those who view Iraq as presaging a crisis for the conservationist principle acknowledge two limitations on its use as precedent for future transformations. The first is that the occupation was extraordinarily mismanaged.⁶¹ The United States' unwillingness or inability to govern the country effectively will probably play an important role in assessing claims that unilateral transformations are essential to moving post-conflict states toward liberal democracy. The second is that to describe Iraq as having been fully transformed by its occupier is inaccurate. Critical aspects of the Iraq transformation took place after the occupation ended on 30 June 2004

57 Even those who view the occupation of Iraq as having significantly eroded the conservationist principle generally limit themselves to the CPA's political reforms. The economic reforms are generally seen as well beyond the scope of an occupier's authority, even as liberally construed.

58 Contrast John Yoo, 'Iraqi reconstruction and the law of occupation', in *UC Davis Journal of International Law & Policy*, Vol. 11, 2004, pp. 7–22, with Rüdiger Wolfrum, 'Iraq: from belligerent occupation to Iraqi exercise of sovereignty: foreign power versus international community interference', in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, Vol. 9, 2005, pp. 1–45.

59 See Kaiyan Homi Kaikobad, 'II. Problems of belligerent occupation: the scope of powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004', in *International and Comparative Law Quarterly*, Vol. 54, No. 1, 2005, pp. 253–264; G. H. Fox, above note 2, pp. 254–262.

60 See M. Zwanenburg, above note 15, pp. 763–767; Eyal Benvenisti, 'The Security Council and the law on occupation: Resolution 1483 on Iraq in historical perspective', in *Israel Defense Forces Law Review*, Vol. 1, 2003, pp. 19–38.

61 See James Fallows, *Blind into Baghdad: America's War in Iraq*, Vintage Books, New York, 2006; Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq*, Owl Books, New York, 2005.

and in response to Security Council demands for an early restoration of local sovereignty.⁶² The first legislative elections, the drafting of a new constitution, the election of a new government pursuant to that constitution, and the Status of Forces Agreement providing for the withdrawal of all US combat troops by the end of 2011 all came after the CPA ceased to exist.⁶³ Of equal importance was that, as the occupation progressed, the United States increasingly sought assistance from the United Nations both to legitimize its actions in Iraq and to perform critical tasks it proved unable to carry out. Grant Harris has described an ‘invisible hand’ exerting pressure on occupiers to multilateralize their operations, and Iraq is his prime example.⁶⁴ The fourteen-month US occupation may present less a legacy of unilateral transformation than is often assumed.

Inspiration from multilateral missions

The second area of practice is multilateral, the mostly UN-authorized missions to post-conflict states that have proliferated since the early 1990s.⁶⁵ Much recent literature questioning the conservationist principle cites the UN missions in identifying a trend toward viewing the post-conflict period as a vital opportunity for reform.⁶⁶ And, indeed, reconstructing societies emerging from civil war has become a central task of international organizations. Many such missions have an explicitly transformative mandate. The clearest examples are the territorial administrations approved by the Security Council for Bosnia, Kosovo, East Timor, and Eastern Slavonia.⁶⁷ In many other cases the UN (with Security Council approval) has been integral in making transformation a part of winding down armed

62 In Resolution 1483, passed on 22 May 2003, the Security Council expressed ‘resolve that the day when Iraqis govern themselves must come quickly’ (UNSC Resolution 1483, 22 May 2003, preambular para. 4). On 16 October 2003 the Council requested the Governing Council and the Occupying Powers to provide a timetable for drafting a new constitution and holding democratic elections no later than 15 December 2003: see UNSC Resolution 1511, 16 October 2003, para. 7. And in Resolution 1546 the Council dictated the occupation’s end: ‘by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty’ (UNSC Resolution 1546, 8 June 2004, para. 2).

63 See James Dobbins, ‘Who lost Iraq: lessons from the debacle’, in *Foreign Affairs*, Vol. 86, No. 5, September–October 2007, pp. 61–74; Trevor A. Rush, ‘Don’t call it a SOFA! An overview of the U.S.–Iraq Security Agreement’, in *Army Lawyer*, No. 432, 2009, pp. 34–60.

64 G. T. Harris, above note 12, pp. 37–38 and 56–68. ‘Despite a primarily unilateral intervention, the U.S. was forced to attempt to multilateralize the occupation. The Bush Administration, even despite strong unilateral impulses and the “bad blood” that lingered from the rancorous international debate that preceded the invasion, realized that international support and resources were prerequisites to a successful occupation of Iraq’ (*ibid.*, p. 57).

65 See generally, Ray Murphy (ed.), *Post-conflict Rebuilding and International Law*, Ashgate, Farnham, 2012.

66 N. Bhuta, above note 9, p. 736 (‘The claimed legitimacy of imposing a new institutional and constitutional structure [in Iraq] was also strengthened by emergent practice of the international administration of territories that has emerged since the end of the Cold War’); B. C. Parsons, above note 13, p. 16; B. S. Brown, above note 15, p. 42; G. T. Harris, above note 12, pp. 25–32.

67 See Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge University Press, Cambridge, 2008; Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, Oxford, 2008; G. H. Fox, above note 5; Richard Caplan, *International Governance of War-torn Territories: Rule and Reconstruction*, Oxford University Press, Oxford, 2005.

conflict: negotiating peace agreements that commit the parties to legal and political reform, crafting a role for the UN as monitor and facilitator of the reforms, providing expertise to implement the reforms, and pronouncing on their consistency with international standards. Examples include UNAMSIL in Sierra Leone,⁶⁸ UNOCI in Côte d'Ivoire,⁶⁹ ONUB in Burundi,⁷⁰ and MINUSTAH in Haiti.⁷¹ In their most robust form, these changes seek to remake the political structures and cultures of states in which warring groups have been unable to co-exist in peaceful political competition. The model favours norms of tolerance, inclusion, and participation. The new institutions are familiar from Western democratic states, pairing majoritarian elections with robust protections of individual and minority group rights.⁷²

The parallels to transformative occupation are obvious. Both typically follow the end of major hostilities in armed conflicts. Both favour liberal democratic institutions implanted through wide-ranging legal reforms. Both pay little regard to the formalities of traditional sovereign exclusivity over national governance. Invoking a Chapter VII mandate (for the multilateral missions) or the prerogatives of *de facto* authority (for transformative occupiers), both focus on popular sovereignty rather than effective control as the critical fount of legitimate governmental authority.⁷³ Finally, both embody the hope – though it is often a hope tinged with scepticism and a sense that the initiatives are the best of a series of bad options – that these new structures will eventually socialize formerly warring factions into peaceful co-existence. The newly implanted democratic institutions are thus valued not only for their own sake but as means of avoiding renewed conflict.⁷⁴

Much thoughtful scholarship has explored a potential convergence between these two forms of post-conflict political transformation.⁷⁵ But to conflate multilateral missions with occupation by states acting without a Security Council mandate or authorization would ignore significant differences between the two. These differences flow from one critical fact: multilateral transformation is

68 UNSC Resolution 1270, 22 October 1999.

69 UNSC Resolution 1528, 27 February 2004.

70 UNSC Resolution 1545, 21 May 2004.

71 UNSC Resolution 1542, 30 April 2004.

72 See generally, R. Murphy, above note 65. In its most recent review of peace operations, the United Nations described its tasks as working, *inter alia*, to 'facilitate political processes, protect civilians, help refugees return, support elections, demobilize and reintegrate former combatants, and promote human rights and the rule of law'. See United Nations, *2011 UN Peace Operations Year in Review*, United Nations, New York, 2012, available at: <http://www.un.org/en/peacekeeping/publications/yir/yir2011.pdf> (last visited 15 March 2012).

73 See A. Roberts, above note 16, p. 621: 'Of all the elements of a transformative project, the ones likely to have the strongest appeal include the introduction of an honest electoral system as part of a multiparty democracy'; W. Michael Reisman, 'Sovereignty and human rights in contemporary international law', in *American Journal of International Law*, Vol. 84, 1990, p. 866 (popular sovereignty justification for pro-democratic intervention and regime change); G. H. Fox, above note 5, pp. 52–55 (democracy promotion as central goal of post-conflict reconstruction missions).

74 Gregory H. Fox, 'Democratization', in David M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century*, Lynne Rienner Publishers, Boulder, CO, 2004, p. 69.

75 Steven Ratner has provided the most comprehensive explication of their similarities. S. R. Ratner, above note 15.

authorized by the UN Security Council under Chapter VII of the UN Charter and transformative occupation is not.

First, approval by the Security Council allows for debate over the wisdom and objectives of the transformation. This prior vetting provides a critical legitimacy for the resulting missions. If Thomas Franck is correct that normative legitimacy emerges from an inclusive and transparent process of law-making, then consideration in the Security Council is critical.⁷⁶ An inclusive legislative process is more likely to produce inclusive implementation of transformative measures.⁷⁷ Here the international reaction to Iraq provides an object lesson. Facing an occupation that had become a *fait accompli*, following a war they had almost all opposed, members of the Security Council in 2003 provided only tepid support for the US-led reforms.⁷⁸ Equally, multilateral planning for an occupation arguably produces better outcomes. Again Iraq is illustrative: US planning for the post-war period was notoriously inept and insensitive to local concerns.⁷⁹ It is inconceivable, for example, that a UN-led mission would have disbanded the entire Iraqi army as one of its first actions. Equally, it seems unlikely that the free-market fundamentalism driving so many of the CPA's economic reforms would have survived Security Council consideration. While the UN has made its share of errors in post-conflict states, it has amassed a large repertoire of practice and at least makes a conscious effort to learn from its mistakes.⁸⁰

Second, unilateral intrusions into states' domestic orders are severely limited by contemporary international law. Eliding the distinction between unilateral and multilateral transformation acts requires overlooking these limitations, or at least minimizing their significance. Transformation is often described as seeking goals that are widely shared in the international community, and in a limited sense this is correct. Multilateral instruments have removed human rights and electoral matters from the realm of exclusive domestic jurisdiction. And, as previously noted, reforms in both areas are increasingly seen in particular as critical means of pacifying post-conflict states. But the scope of these normative goals cannot be divorced from the circumstances of their creation. Human rights treaties are carefully negotiated to accommodate states' divergent interests and to provide for limited enforcement mechanisms through national legal institutions and international bodies.⁸¹ UN Security Council involvement in post-conflict

76 Thomas M. Franck, *The Power of Legitimacy Among Nations*, Oxford University Press, Oxford, 1990.

77 *Ibid.*

78 M. Hmoud, above note 15, pp. 446–447.

79 See sources cited in above note 61.

80 This repertoire of practice has been compiled and assessed by the Peacebuilding Commission, established in 2005. The Commission has established a Working Group on Lessons Learned, which has issued reports on a wide variety of issues in post-conflict reconstruction. See http://www.un.org/en/peacebuilding/doc_lessonslearned.shtml (last visited 15 March 2012).

81 In the Nicaragua case, the ICJ suggested that human rights treaties operate as self-contained regimes and preclude other means of enforcement, even those not inconsistent with general international law. ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports* 1986, p. 14, para. 267 (hereafter ICJ, *Nicaragua* case): 'where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions

reconstruction is subject to critical procedural limitations, principally the veto. More generally, all forms of state responsibility are specifically denoted as not licensing responses that violate the UN Charter or other serious international legal obligations of the injured state.⁸² Normative objectives, in other words, are inseparable from the limited and collective means of their implementation. Human rights and democracy norms have never been understood (at least outside certain powerful states) as a licence for unilateral action.

The reason is clear: states do not trust each other's judgement, in the absence of collective oversight, to determine when and how these norms should be implemented. They fear pretexts. The temptations for political meddling are simply too great. That a prohibition on unilateral intervention is the necessary flip side of robust collective articulation of norms is made clear by the myriad non-intervention norms specifically addressed to unilateral action. The Friendly Relations Declaration, the *Nicaragua* case, the severe limitations on counter-measures, and robust principles of sovereign immunity are but the highlights of a post-World War II legal order that strongly favours the collective over the unilateral.⁸³

Are there reasons to exclude transformative occupation from these limiting principles? Not based on the desirability of the goals it seeks, for their collective authors thought them no less desirable but refused to license their unilateral implementation. Not based on the absence of other means of achieving reform, since the Security Council has been authorizing missions to post-conflict states for more than two decades. Not based on the claim that humanitarian law – the primary regime governing occupation – displays a greater tolerance of unilateral acts than human rights law. The usurpation of legislative authority contemplated by transformative occupation is specifically excluded by the law of occupation in its critical distinction between a *de facto* occupier and a *de jure* sovereign.⁸⁴ To elide this distinction and allow the former to effectively become the latter would grant occupiers the sole prerogative they lack by virtue of their temporary,

themselves'. While this conclusion is not uncontested, the Court's important distinction between human rights obligations and limited means for their enforcement – particularly in a case in which the US cited Nicaragua's violation of human rights as a justification for the use of force – is indicative of a view pervasive in international law.

- 82 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 50(1), in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Session, Supp. 10, November 2001, UN Doc. A/56/10 (2001) (counter-measures contravening UN Charter or *jus cogens* norms not permitted).
- 83 Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Resolution 2625, 24 October 1970, UN GAOR, 25th Session, Supp. No. 28, at 121, UN Doc. A/8082 (1970); ICJ, *Nicaragua* case, above note 81; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Merits, 3 February 2012, (state immunity in national court is not affected by allegation of *jus cogens* violations). See generally, Pierre-Marie Dupuy, 'The place and role of unilateralism in contemporary international law', in *European Journal of International Law*, Vol. 11, No. 1, 2000, pp. 19–29.
- 84 This is hardly a formalistic distinction. If an occupier makes far-reaching changes in the structure of government, the indigenous regime taking power after the occupation ends may be effectively precluded from reversing the effects of those changes. See Y. Dinstein, above note 37, p. 124: changes to political institutions raise 'the disquieting possibility that profound structural innovations – once the population gets used to them (especially in the course of a prolonged occupation) – may prove hard to eradicate when the occupation is terminated'.

de facto assertion of authority.⁸⁵ Transformative occupation is unique only in that it presents a propitious opportunity to alter domestic institutions. The defender of those institutions – the ousted regime – has ceased to exist. But to claim that improper unilateral acts can be easily accomplished is not much of an argument either.

Third, assimilating collective and unilateral transformations threatens to permeate the *jus ad bellum/jus in bello* divide. A critical function of a Chapter VII mandate for reform during occupation is to override or displace the conservationist principle. The Security Council exercises legislative authority to render lawful a practice that was (in my view) unlawful under the normally applicable *jus in bello*.⁸⁶ But, in so doing, the Security Council does not also legitimize the intervention that enabled foreign forces to occupy the territory. That would have required a separate authorization, one the Security Council (as in the case of Iraq) may have been unwilling to give,⁸⁷ and one that would implicate an entirely different body of law: the *jus ad bellum* regulating the initial use of force.

The question is whether the barrier between these two regimes can be maintained when a unilateral occupier, invoking multilateral missions as precedent, transforms the law of the territory it occupies. Answering this question requires understanding the incentives created by the possibility of transformative occupation. Imagine an intervention to halt rampant human rights abuses. To ensure that they do not reoccur once foreign troops leave, the interveners create liberal democratic institutions during the subsequent occupation. What kind of occupier is likely to engage in such actions? Non-democratic occupiers are highly unlikely either to intervene on humanitarian grounds or to engage in democratic reforms. Democratic occupiers may intervene for reasons unrelated to human rights and democracy, but in those cases their likelihood of undertaking a transformative occupation is uncertain. Panama and Grenada are cases of intervention for non-humanitarian reasons that were not followed by transformative occupations, while Iraq and the US/Allied wars against Germany and Japan in World War II are cases where non-humanitarian entry into conflict was followed by transformative occupation. The only scenario in which transformative occupation is almost certain to be attempted – to a greater or lesser degree in each case – is when a liberal democratic state intervenes for humanitarian reasons. For such a power to intervene because human rights abuses have become intolerable but then to leave the abusing government in place and depart would be self-defeating. And, indeed, one common argument made by supporters of transformative occupation is that contemporary warfare has come to be dominated by a transformative objective.⁸⁸ As Grant Harris

85 In Julius Stone's words, the difference in legislative authority granted to occupiers and indigenous regimes rests on 'the contrast between the fullness and permanence of sovereign power and the temporary and precarious position of the Occupant'. Julius Stone, *Legal Controls of International Conflict*, Rinehart, New York, 1954, p. 694.

86 See the discussion in below note 113.

87 Some writers argue that the Security Council in fact granted the United States broad latitude to engage in reform in Iraq. See, e.g., E. Benvenisti, above note 60. I have disagreed with that view: G. H. Fox, above note 5, pp. 263–269.

88 See, e.g., P. M. R. Stirk, above note 24, p. 203.

writes, ‘the motivation for much of modern warfare is precisely to reshape occupied territory and intervene in the lives of its inhabitants’.⁸⁹ The most likely scenario for transformative occupation becoming a *jus in bello* question, therefore, is one in which it is also an asserted justification under the *jus ad bellum*.

Herein lies the danger. Though unilateral humanitarian intervention is the subject of intense and ongoing debate, international lawyers are virtually unanimous that it contravenes the *jus ad bellum*.⁹⁰ If this is correct, how can that prohibition on initiating armed conflict to secure human rights be maintained if an intervener knows that, when it succeeds in occupying a territory, the *jus in bello* will allow it to enact the very reforms that prompted the intervention? Where transformation is the reason for intervention, in other words, the consequences of legitimizing transformation cannot realistically be confined to the *jus in bello*. Justification and purpose cannot be disentangled. As Adam Roberts acknowledges, ‘an element of artificiality marks the proposition that transformative goals may be acceptable, but only as a by-product of military action, not as its real justification’.⁹¹ The danger is avoided when the Security Council must vote separately to legitimize intervention and then reform. But if the latter cases are taken as precedent for acts by unilateral occupiers, then Security Council authorization will have ceased to matter for *jus in bello* purposes. The incentives suggest that it will soon cease to matter for *jus ad bellum* purposes as well.

In sum, conflating unilateral and multilateral transformations creates a dangerously potent incentive for the *jus in bello* to legitimize violations of the *jus ad bellum*. Such a breach of the barrier between these two bodies of law admittedly occurs in the opposite direction from that usually warned against: the division is usually described as preventing claims of *jus ad bellum* legality from justifying violations of the *jus in bello*, such as claims of a just cause legitimizing abuse of detainees. But the problem here is arguably more insidious, for using *jus in bello* legality to justify initiation of an entire armed conflict may well have much farther-reaching consequences than legitimizing specific illegal acts in the course of armed conflict.

Extra-territorial application of human rights treaty obligations

The third part of the claim for emergence of transformative occupation is the extra-territorial application of an occupier’s human rights treaty obligations. If an

89 Grant T. Harris, ‘Human rights, Israel and the political realities of occupation’, in *Israel Law Review*, Vol. 41, 2008, p. 102.

90 Yoram Dinstein, *War, Aggression and Self-Defense*, 4th edition, Cambridge University Press, Cambridge, 2005, pp. 70–73; Christine Gray, *International Law and the Use of Force*, Oxford University Press, Oxford, 2000, pp. 24–42.

91 A. Roberts, above note 16, p. 581. See also, Robert D. Sloane, ‘The cost of conflation: preserving the dualism of *jus ad bellum* and *jus in bello* in the contemporary law of war’, in *Yale Journal of International Law*, Vol. 34, 2009, p. 108 ([t]he emerging idea of transformative occupation, whatever its other merits, may well be in tension with’ the *jus ad bellum/jus in bello* dichotomy); Rotem Giladi, ‘The *jus ad bellum/jus in bello* distinction and the law of occupation’, in *Israel Law Review*, Vol. 41, Nos. 1–2, 2008, p. 277 (‘Rather than a coincidental by-product of war, occupation is very often the intended result of the war. Often it is a *sine qua non* for meeting the strategic goals for which a state uses force in the first place’).

occupying power displaces the *de jure* government of a state that is bound by human rights treaties, it is argued, the occupier's authority within that state's territory should be subject to the same treaty norms. Otherwise, the population would be divested of the treaty's protection through no actions (or fault) of its own. Further, because human rights treaties require state parties to enact rights-protective legislation at home, the same obligations would apply when they assert governing authority through occupation.⁹² The full panoply of treaty obligations effectively functions as a political blueprint for a human-rights-compliant society. Occupiers of illiberal states may thus be compelled to act as social engineers, creating the norms, procedures, and institutions of a treaty-compliant, liberal society. As Grant Harris notes, 'there is no natural ending point for an occupant's obligations to protect human rights short of the creation of a functioning state with permanent institutions capable of doing so'.⁹³

The general proposition that states remain subject to at least some of their human rights treaty obligations during an occupation is now well established in international law.⁹⁴ But to move from this general principle to legitimizing transformative occupation requires a complex journey. In part this is because much of the jurisprudence on extra-territoriality – apart from that of the European Court of Human Rights – is quite superficial and provides little explanation of how a conflict between human rights (legislative obligations) and humanitarian law (prohibition on legislative changes) is to be resolved. Occupation sits uneasily on the border between armed conflict and peacetime governance. On the one hand, it presents an excellent opportunity to open closed societies to the robust debate and political competition provided by democratic institutions. On the other, the security environment in many occupations is so fragile that the military requires powers unthinkable during peacetime.⁹⁵ This duality creates a problem of legal categories. If occupation is viewed primarily as a stage of armed conflict, governance can become a vehicle for human rights protection only when doing so is compatible with the occupier's ability to maintain security. Occupation law tempers its protection of human rights with significant deference to considerations of military

92 Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR) typifies such legislative obligations: 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.

93 G. T. Harris, above note 89, p. 121.

94 See ICJ, *Wall* decision, above note 42; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, p. 168; European Court of Human Rights (ECtHR), *Al-Skeini et al. v. The United Kingdom*, Judgment, 7 July 2011, App. No. 55721/07; Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

95 A well-planned operation will pair traditional security operations with efforts to build the rule of law and strong state institutions, which in the long run are the only effective guardians against civil unrest. See the thorough discussion in Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Cambridge University Press, Cambridge, 2006, pp. 134–177.

necessity.⁹⁶ But the opposite view – regarding occupation as equivalent to peacetime governance – would subject occupiers to human rights treaties that make no concessions to military necessity.

The options for reconciling these two regimes are unsatisfying. Deference to military necessity can obviously be retained by viewing occupation solely as a matter of humanitarian law – perhaps as the *lex specialis* – but this would negate the now-established application of human rights treaties to occupied territories. Alternatively, those treaties could serve as the sole relevant legal framework, but human rights treaties make no accommodation for military necessity since they were designed for peacetime governance.⁹⁷ Making no allowance for the military exigencies of occupation would be unworkable and probably unacceptable to most states. While derogation clauses obviously exist in human rights treaties, to invoke them in order to permit necessary security operations would effectively neuter the greater protections offered by human rights treaties and render the protections offered by the two regimes substantially similar.⁹⁸ The same would be true of a ‘flexible’ interpretation of the treaties to limit the scope of rights when they affect security concerns. The more nuanced approach of the International Court of Justice (ICJ)’s *Nuclear Weapons* opinion, which views humanitarian law as the *lex specialis* to be applied in the event of conflict with particular human rights norms,⁹⁹ promises a more fact-specific analysis but would similarly privilege military necessity over rights protection.

Even if one could overcome this doctrinal incoherence and occupiers were deemed fully bound by their human rights treaty obligations, legislative change in the occupied territory would only be required in a narrow set of circumstances. And those are circumstances in which the occupier’s justification for acting without a Security Council mandate – that is, acting pursuant to occupation law as opposed to Chapter VII authorization – is at its weakest. A conflict between human rights treaty obligations and the conservationist principle would only arise if an occupier could not comply with the treaty without undertaking legislative action.¹⁰⁰ Human rights treaties contain three distinct forms of obligation: states parties must themselves refrain from violating protected rights; they must ensure that others within their jurisdiction refrain from such violations; and they must act affirmatively to ensure that right-protective procedures exist, remedies are provided, and victims are

96 Y. Dinstein, above note 37, p. 115: ‘[t]he tension between military necessity and humanitarian considerations permeates ... the law of belligerent occupation’.

97 See Michael J. Dennis, ‘Application of human rights treaties extraterritorially in times of armed conflict and military occupation’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 119–141.

98 It is arguable that the ICCPR’s derogation was designed only ‘to permit the suspension of *domestic laws* of states parties during periods of public emergency, including periods of armed conflict’ (*ibid.*, pp. 136–137). This view is supported by the fact that, as of 2005, no state party to the Covenant had submitted a notice of derogation in relation to actions outside its national territory (*ibid.*, pp. 125–126).

99 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, p. 226, para. 25. See also ICJ, *Wall* decision, above note 42, para. 106.

100 As Dinstein observes, ‘[a]s long as there is no head-on collision between the exigencies of the occupation and the political institutions existing in the occupied territory, there is no real necessity for the Occupying Power to tinker with the latter’. Y. Dinstein, above note 37, p. 124.

compensated.¹⁰¹ I argue that only the third form presents an obvious conflict with the conservationist principle.

First and foremost, states parties must themselves refrain from violating protected rights. This is a purely negative obligation. Occupiers may comply by issuing orders to their military forces and civilian administrators that rights not be violated. Such inaction is hardly inconsistent with the conservationist principle. No new legislation is needed in order for occupiers themselves to act with restraint.

One might respond that an occupier will frequently govern through existing laws and institutions. If those violate human rights treaties in and of themselves (as opposed to the way in which they were applied by the ousted regime), then legislative change would become essential to compliance with the treaties. But this argument will apply only to a rather small category of laws that *require* government officials to violate human rights. If the law simply *allows* such violations – for example, by permitting discrimination against classes of citizens, permitting police to use abusive practices, permitting courts to truncate due process, or permitting governmental censorship, and so forth – the source of any violation would be an official's choice to violate rights, not a legal compulsion to do so. Ensuring that local administrators do not continue to exploit the law's permissiveness to violate rights would be a matter of the occupier's issuing clear instructions for the laws' implementation.

Second, states parties must ensure that others in territory they control do not violate rights. In the *Congo/Uganda* case the ICJ described this as an obligation 'to protect the inhabitants of the occupied territory against acts of violence, and *not to tolerate such violence by any third party*'.¹⁰² In an occupied territory, such third parties can usefully be grouped into two categories. The first are those in a subordinate relationship to the occupier, such as a compliant local administration or an allied armed group. While restraining such third parties will certainly require more affirmative acts than when an occupier simply restrains itself, in essence the obligation is still to abstention from human rights violations: the third parties must not torture, rape, murder, or discriminate, for example. They might be restrained by direct orders, or more active follow-up by the occupier might be needed, such as ensuring that orders filter down through a chain of command and that obstinate officials are relieved of their duties. All such acts would meet the ICJ's requirement that third-party acts not be tolerated. If the relationship is truly one of superior-subordinate, there seems no reason why a change to existing law should be expected to bring third-party violators to heel, when directly ordering – and perhaps even compelling – their compliance has not.

The second category of third parties are those not in a subordinate relationship to the occupier. Indeed, they may be insurgents who directly target the occupier. Not to 'tolerate' violations by such independent or hostile groups would involve maintaining security in the territory, a basic obligation of

101 These categories obviously do not neatly capture all cases, and the acts of some occupiers will almost certainly defy this typology.

102 ICJ, *Armed Activities on the Territory of the Congo*, above note 94, para. 178 (emphasis added).

occupation law.¹⁰³ Because non-subordinate third parties do not act through the apparatus of state power, their human rights violations would not involve the sort of official misconduct that might require new legislation. As in the *Congo* case itself, violations by these groups are likely to involve independent acts of violence that can only be deterred or ended through enhanced security measures.¹⁰⁴ New legislation would do little to address these groups' violations.

Only a third form of treaty obligation might require legislative action. In addition to the negative obligation to refrain from abuse, human rights treaties also require states to act affirmatively in order to prevent violations, investigate abuses, punish violators, and ensure justice to victims.¹⁰⁵ If existing law does not create these institutionalized monitoring and enforcement mechanisms, states parties can only comply by creating them through legislation. Some rights by their nature require institutional mechanisms, such as democratic elections and fairness in prosecuting criminal defendants. Such rights involve entitlements to a particular institution or procedure. Other rights may require expanding institutions to meet previously unaddressed challenges, such as violence against women in the private sphere. The degree of institutional change needed to protect rights with important procedural components can be quite far-reaching.¹⁰⁶

This third category presents a clear conflict with the conservationist principle. The first thing to be said is that there is literally no support in existing jurisprudence on extra-territoriality for the proposition that occupiers must build institutions and reform laws. All of the extra-territoriality cases against occupying powers before the ICJ and the European Court of Human Rights have involved human rights abuses by the occupiers themselves.¹⁰⁷ Each involved acts that could have been halted or prevented without changing the laws in force. One can also

103 The obligation derives from the injunction in Article 43 of the Hague Regulations that an occupier 'take all the measures in his power to restore and ensure, as far as possible, public order and safety'.

104 This certainly seemed to be the ICJ's view of Uganda's obligations as an occupier, finding it responsible for 'any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account'. ICJ, *Armed Activities on the Territory of the Congo*, above note 94, para. 179.

105 As the Human Rights Committee notes in regard to the ICCPR, 'Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'. General Comment 31, above note 94, para. 7.

106 Anja Seibert-Fohr summarizes the affirmative implementation measures required by the Human Rights Committee of parties to the ICCPR: 'the Committee has elaborated a whole series of obligations of conduct concerning the status of the Covenant in domestic law, i.e. the obligation to codify the Covenant rights, to accord to it a status superior to domestic legislation, to ensure the conformity of domestic law including the Constitution with it and to incorporate it into the Constitution. Specific measures to prevent and punish violations of the Covenant as elaborated by the Committee in the reporting system (i.e. law enforcement, institutional and procedural safeguards, monitoring and control mechanisms, contextual measures, information and education) are additional examples of obligations of conduct'. Anja Seibert-Fohr, 'Domestic implementation of the International Covenant on Civil and Political Rights pursuant to its article 2 para. 2', in *Max Planck Year Book of United Nations Law*, Vol. 5, 2001, pp. 467–468.

107 ICJ, *Wall* decision, above note 42 (construction of a wall by Israel in occupied Palestine); ICJ, *Armed Activities on the Territory of the Congo*, above note 94 (conduct of Ugandan armed forces in the occupied portion of the DRC); ECtHR, *Al-Skeini*, above note 94 (acts of British occupying forces in Iraq); ECtHR, *Al-Jedda v. The United Kingdom*, Judgment, 7 July 2011, App. No. 27021/08 (acts of British occupying forces in Iraq); ECtHR, *Loizidou v. Turkey*, Judgment, 18 December 1996, App. No. 15318/89 (acts of Turkish occupying forces in Cyprus); ECtHR, *Andreou v. Turkey*, Decision on Admissibility, 3 June 2008,

observe that this category does not involve the worst human rights abuses in occupied territories. Few truly egregious acts – massacres, rapes, torture, plunder, mass expulsion, persecution of disfavoured groups – require legislative solutions. If history is any guide, these are almost always the acts of occupying forces themselves or their close allies. They fall into the first or second categories described above and the parties can stop these actions by restraining themselves. The Iraqi plunder of occupied Kuwait in 1990–1991, for example, could have been halted by orders given down the chain of command.

But even if the cases are few, the question remains whether this third category of affirmative obligations should be applied extra-territorially. Here the discussion must inevitably turn to the type of occupation that the international community chooses to validate. For, as the prior discussion suggests, only a limited class of reform-minded occupiers is likely to pursue broad legislative change. From recent occupation experience, two specific scenarios seem to implicate this category. The first is a prolonged occupation in which no plans are made for an immediate return to local control and the occupier assumes responsibility for the territory over the long term. The second is where an occupation is commenced for the specific purpose of legal and political reform, namely a transformative occupation. In both situations the occupier makes governance decisions based not only on the pragmatic necessities of the moment (including compliance with the individual rights provisions of Geneva law) but also to address perceived long-term problems in the territory. In the case of prolonged occupation, the problem is legal stasis over time. As the Israeli Supreme Court has observed, '[a] prolonged military occupation brings in its wake social, economic and commercial changes which oblige him [the occupier] to adapt the law to the changing needs of the population'.¹⁰⁸ In the case of transformative occupation the problem is the many maladies of a closed authoritarian society.

Should human rights treaties enable such occupations, whose long-term strategic objectives and reform agendas are inexorably intertwined? If one answers yes, one must be prepared to defend the proposition that human rights treaties can permit (or even compel) the *de facto* annexation of occupied territory.¹⁰⁹ Legislating reforms intended to be permanent is fundamentally incompatible with the temporary nature of occupation.¹¹⁰ Such fundamental policy decisions are the prerogative of the indigenous sovereign, and to appropriate them is to assume the mantle of that sovereign. As Pictet observes, the 'temporary, *de facto*' nature of

App. No. 45653/99 (acts of Turkish occupying forces in Cyprus); ECtHR, *Al-Saadoon and Mufdhi v. The United Kingdom*, Judgment, 2 March 2010, App. No. 61498/08 (acts of British occupying forces in Iraq).

108 HCJ 337/71, *Christian Society for the Holy Places v. Minister of Defense*, 26(1) Piskei Din 574 (1972).

109 As Professor Roberts states forthrightly, 'transformative occupation may be considered to have emerged as a more honorable, but still deeply controversial, successor to the discredited notion of annexation'. A. Roberts, above note 16, p. 585.

110 Christopher Greenwood, 'The administration of occupied territory in international law', in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories: Two Decades of Israeli Occupation in the West Bank and Gaza Strip*, Clarendon Press, Oxford, 1992, p. 247: '[a]n occupant may, therefore, suspend or bypass the existing administrative structure where there is a legitimate necessity of the kind discussed... but any attempt at effective permanent reform or change in that structure will be unlawful'.

the foreign presence is ‘what distinguishes occupation from annexation’.¹¹¹ The ICJ’s holding that the Israeli security wall could become ‘tantamount to *de facto* annexation’ because it would ‘create a *fait accompli* on the ground that could well become permanent’¹¹² invokes a similar idea: when an occupier assumes powers reserved to the *de jure* sovereign – in the *Wall* case the demarcation of boundaries – it effectively treats the territory as its own, even without its formal incorporation.

The multilateral option

The attraction of transformative occupation is twofold. First, it promises to move illiberal state institutions toward compliance with international standards of human rights and democratic governance. Second, it takes advantage of a unique moment in which transformation appears possible. No forces stand between a reform-minded occupier and necessary political change. The conservationist principle can well appear unnecessarily obstructionist and even anachronistic in rejecting both of these justifications as unconvincing. The criticisms above, focusing on the agent of change – a state acting unilaterally – do not address these points.

But this Manichean view of transformation – as either a *de facto* annexation or a critical opportunity to advance human rights – is itself an anachronism. It assumes that the agent of transformation will be a state, since only states are limited by the conservationist principle and would be the only agents of change liberated by its obsolescence.¹¹³ But a third option exists: authorization by the Security Council under Chapter VII.¹¹⁴ Few doubt that if the Security Council were to authorize an occupier to reform local laws and institutions its legislative authority would override the conservationist principle.¹¹⁵ As a result, its actions would cease to be governed by occupation law, at least in regard to limits on the occupier’s legislative authority. Instead, such occupation would be akin to the many missions that the Security

111 J. S. Pictet, above note 18, Art. 47, p. 275, available at: <http://www.icrc.org/ihl.nsf/COM/380-600054?OpenDocument> (last visited 16 March 2012).

112 ICJ, *Wall* decision, above note 42, para. 121.

113 While some suggest that international organizations may be bound in some respects by the law of occupation, that possibility remains hypothetical, since neither the United Nations nor any other international organization has ever acknowledged itself to be an occupier for humanitarian law purposes. See G. H. Fox, above note 5, pp. 222–225. Further, as explained below, even if the United Nations were so bound, the Security Council could exempt the organization from the conservationist principle via Chapter VII.

114 For a discussion of various forms of potential Security Council involvement in setting mandates for occupiers, see G. T. Harris, above note 89, pp. 168–171.

115 See A. Roberts, above note 16, p. 622; S. R. Ratner, above note 15, p. 710; B. S. Brown, above note 15, p. 60; David J. Scheffer, ‘Beyond occupation law’, in *American Journal of International Law*, Vol. 97, No. 4, 2003, p. 851. The Security Council’s authority to supersede existing treaty norms is grounded in Article 103 of the UN Charter, whose pre-emptive authority was affirmed by the ICJ in its provisional measures opinion in the Lockerbie case. ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, 14 April 1992, *ICJ Reports* 1992, p. 3, para. 39; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, 14 April 1992, *ICJ Reports* 1992, p. 114, para. 42. See generally, Stefan Talmon, ‘The Security Council as world legislature’, in *American Journal of International Law*, Vol. 99, No. 1, 2005, pp. 175–193.

Council has created over the past two decades with detailed mandates to advance human rights and political democracy in post-conflict states.

That so much energy would be expended in arguing to expand the unilateral authority of Occupying Powers is itself surprising. The goal of the UN peace and security regime has been to multilateralize all aspects of armed conflict.¹¹⁶ In the post-Cold War era it has largely succeeded. According to two important datasets of armed conflict,¹¹⁷ there were ten major inter-state armed conflicts between 1990 and 2010.¹¹⁸ All but two of these were addressed in one form or another by the UN Security Council, which took actions ranging from authorizing intervention to supporting regional peace processes.¹¹⁹ The Council's involvement has not been episodic but holistic, as it regularly addresses all aspects of armed conflict from inception to termination.¹²⁰ It seeks to mediate disputes that appear likely to result in armed conflict; authorizes responses to cross-border incursions; condemns violations of humanitarian law in the course of armed conflicts, including referring matters to the International Criminal Court; assists in negotiating ceasefires and eventual peace agreements; and, as has been noted, dispatches reconstruction missions to post-conflict states.¹²¹ The UN (via Security Council action) has moved well beyond simply responding to aggression to deploy sophisticated strategies of prevention, mediation, reconciliation, reconstruction, and exit from conflict zones.¹²²

This move to multilateralism has been particularly evident at the post-conflict stage.¹²³ The UN has become the indispensable actor in such transitional

116 In Thomas Franck's words, the central purpose of the UN collective security system 'is to replace the outmoded, dangerous national self-reliance on unilateral force with a workable global police system, capable of protecting the weak against the strong and of responding, quickly, with levels of force appropriate to a specific circumstance of lawlessness'. Thomas M. Franck and Faiza Patel, 'UN police action in lieu of war: "The old order changeth"', in *American Journal of International Law*, Vol. 85, No. 1, 1991, p. 73.

117 The Correlates of War Project, available at: <http://www.correlatesofwar.org> (last visited 16 March 2012) and the Uppsala Conflict Data Program/Peace Research Institute Oslo, available at: <http://www.prio.no/CSCW/Datasets/Armed-Conflict/UCDP-PRIO/> (last visited 16 March 2012).

118 The major armed conflicts were the Gulf War (1991), the Bosnian War of Independence (1992), the Azerbaijan–Armenia War (1993–1994), the Eritrea–Ethiopia War (1998), the Kosovo Conflict (1999), the US invasion of Afghanistan (2001), the US invasion of Iraq (2003), and the Eritrea–Djibouti conflict (2008). India and Pakistan had several conflicts during this period and they are treated differently by the two datasets.

119 The Security Council did not take any action on the Kashmir conflict between India and Pakistan, which flared into armed conflict ten times during this period, or on the Ecuador–Peru Cenepa Valley War of 1995. The Cenepa conflict was resolved by a regional treaty group, the Protocol of Rio de Janeiro, and guaranteed by a monitoring mission dispatched by the Protocol member states: see Glenn R. Weidner, 'Operation Safe Border: the Ecuador–Peru crisis', in *Joint Forces Quarterly*, Spring 1996, pp. 52–58.

120 See the varied discussions in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, Oxford University Press, Oxford, 2008.

121 See generally, Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*, Cambridge University Press, Cambridge, 2006.

122 Touko Piiparinen, *The Transformation of UN Conflict Management: Producing Images of Genocide from Rwanda to Darfur and Beyond*, Routledge, London and New York, 2010.

123 Thorsten Benner, Stephan Mergenthaler, and Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?*, Oxford University Press, Oxford, 2011; Michael W. Doyle and Nicholas

operations, displaying an evident learning curve and increasing store of institutional expertise. To ensure the organization continues to learn from both its successes and its failures, in 2005 the Security Council created the Peacebuilding Commission, with a mandate to ‘bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery’, as well as to ‘focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict’.¹²⁴ Reviewing the UN post-conflict record in 2006, Doyle and Sambanis concluded that the organization is most successful when it is involved in all aspects of a transition from conflict resolution to stable peacetime governance.¹²⁵ A *greater* role for the United Nations thus *enhances* the effectiveness of post-conflict reconstruction.

With the entire trajectory of international conflict management moving toward collective responses, and with the UN more experienced at reform than any national military (including that of the United States), an expansion of an occupier’s prerogatives via occupation law seems a throwback to a time when collective options were either non-existent (before World War II) or non-functional (the Cold War era). Enhancing unilateralism is out of touch with the many areas in which international law in the post-World War II era has refused to license unilateral action, even when that action is described as essential to achieving humanitarian objectives. Examples include a general rejection of unilateral humanitarian intervention, a reluctance to endorse broad conceptions of universal jurisdiction, and refusal to recognize human-rights-inspired exceptions to sovereign immunity in national courts. It is also out of touch with the many ways in which the Security Council has integrated human rights and democracy concerns into its strategy for post-conflict states. Indeed, the Security Council has pursued these objectives to such an extent that some scholars argue that they are being introduced too quickly into politically fragile societies.¹²⁶ In the early twenty-first century, enhancing unilateral authority over domestic affairs is the real anachronism.

Of course, the multilateral option will not always be available. Vetoes by permanent members, a lack of political will, local resistance to reform, and a host of other factors may all render the Security Council incapable of approving reforms. As of the time of writing, the Security Council’s inability to address the Syrian crisis in a meaningful way seems a case in point. But this observation does not necessarily provide affirmative support for the unilateral option, for the Security Council may be unavailable on fewer occasions than might be supposed. If an occupier has received Security Council approval for an initial use of force for the purpose of transformation, the Security Council is quite unlikely to refuse support for the

Sambanis, *Making War and Building Peace: United Nations Peace Operations*, Princeton University Press, Princeton, 2006.

124 UNSC Resolution 1645, 20 December 2005, para. 2.

125 M. Doyle and N. Sambanis, above note 123, pp. 349–350: ‘The defining characteristic of all the successful operations is that they each achieved a comprehensive peace agreement – one involving the UN in the entire peace process, from the signing of the first cease-fire to the restoration of the last structures of government’.

126 See Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict*, W.W. Norton & Company, New York, 2000.

transformation itself. Security Council refusal only seems likely where an occupier has either failed to seek approval at all for the intervention or approval was sought and refused.¹²⁷ In such cases, the Security Council would not be asked to approve reforms until after an occupation had become a *fait accompli*. At that point, with the occupier in place, many of the strongly held reasons why Security Council members might have opposed the initial intervention would lose their potency. The invaded state's sovereignty would have been compromised, the occupier would have gained a foothold in a region from which certain Security Council members might want it excluded, and the geopolitical consequences of the intervention, if any, would have occurred. None of those feared eventualities could be reversed by opposing a resolution sanctioning reform in the territory. Perhaps more importantly, the Security Council would be given an opportunity to dictate the parameters of the occupation. In short, the incentives in such circumstances would seem to be aligned against Security Council refusal to approve reforms. The limited possibility that the multilateral option might fail thus provides only weak support for radically expanding the unilateral option.

Seen in this light, the conservationist principle is not a proxy for international law abdicating responsibility for needed legal change in occupied territories. It is instead a limitation on unilateral self-help that finds much support elsewhere in contemporary doctrine.

Conclusions

The Iraq occupation spawned an important debate over the role of occupiers in territories in substantial need of legal reform. The central problem was not the one traditionally facing occupation law: how to protect inhabitants from a rapacious or brutal occupier that subordinates their wellbeing to its own political objectives. It was rather what to make of an occupier that seeks to *enhance* the inhabitants' wellbeing. Some commentators found little reason to prevent such an occupier from legislating new standards of human rights and democratic government now well established in international law. In particular, the conservationist principle that restrained such supposedly beneficial legislation was anachronistic. It was inconsistent with post-World War II occupation practice, failed to follow the lead of UN-authorized post-conflict reconstruction missions, and was incompatible with an occupier's extra-territorial human rights obligations.

Each of these grounds for declaring the conservationist principle an anachronism, however, turned out to be substantially overstated. Iraq was the only case in the era of Geneva law in which an occupier has legislated for an explicitly transformative purpose. UN-authorized missions, while seeking similar goals, differ

127 An occupier might not seek Security Council approval either because it might believe it to be futile or because it believed it was acting in self-defence, for which no Security Council approval is needed. Article 51 of the UN Charter does require states acting in self-defence to report their actions immediately to the Security Council.

in significant ways from unilateral occupations, which make their invocation as legal precedent highly problematic. And the extra-territorial application of human rights treaty obligations has been used only to restrain occupiers from committing or tolerating abuses. No international court or tribunal has found an occupier in violation of its treaty obligations for failing to legislate in foreign territory it controls.

None of these responses to the supposed emergence of transformative occupation is dispositive in the sense that it reveals transformation to be necessarily incompatible with contemporary occupation law or that state practice shows definitively negative reactions to particular cases of transformation. But the bar need not be set that high. It is sufficient for the purposes of the argument I have made that these claims are only moderately persuasive. That is because they carry a substantial burden of showing why the legislative powers of occupiers should be exempt from the general trend of multilateralizing all aspects of armed conflict. The arguments supporting transformative occupation fail to carry this burden.