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# The Antinomies of Transformative Occupation

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## Abstract

*In this article, the author sketches a preliminary conceptual history of the idea of belligerent occupation by situating its emergence in the particular conditions of the European land order as it evolved after the Congress of Vienna in 1815. He argues that the development of occupatio bellica as a legal institution can be seen as part of the wider effort to re-found and restore the concrete spatial order of the jus publicum Europaeum, in response to the twin perils of revolutionary war and wars of liberation. He develops an analogy between the classical concept of belligerent occupation and the Roman institution of commissarial dictatorship. He contends that the US occupation of Iraq is accurately regarded as a 'transformative' occupation, which is analogous to a shift from commissarial to sovereign dictatorship. Sovereign dictatorship and transformative occupation are fraught with political risk, as their success depends on a precarious dialectic of subordination and legitimation.*

When the French in 1792 invaded Italy, they had no scruple in summoning the invaded populations to repudiate all allegiance to their sovereigns . . . Nys may tell us that the French generals 'limited themselves' to breaking the ties between invaded peoples and their princes and to convoking assemblies to determine the form of government. There is no doubt that the assemblies would never have been permitted to reinstate the princes, or to establish any form of rule distasteful to the Republic; it was practically a reversion to the old type of conquest by occupation; the later decree [ . . . ] directing the military authority to suppress all existing authorities, taxes, feudal government and privileges, in reality goes very little further. The whole drastic proceeding was a consequence of the breaking away of France from the sphere of international law, and of her desire to replace it by a new Law of Nations of which the first article should be – 'no state may be organized on any but a soi-disant republican system.' It was not that a monarchical state was necessarily, as she expressed it, her enemy; it was not even a lawful enemy.<sup>1</sup>

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<sup>1</sup> Baty, 'The Relations of Invaders to Insurgents', 36 *Yale LJ* (1927) 966, at 983.

## 1 Introduction

Concepts have histories. They emerge and are given determinate content through social relations, but the relationship between social reality and conceptual history is complex. Reality might have ‘changed long before the change was conceptualized, and concepts might likewise have been formed to set free new realities’.<sup>2</sup> As Carl Schmitt was acutely aware, the conceptual content of international law cannot – on pain of either redundancy or pure indeterminacy – be far removed from concrete relations of power and space between states.<sup>3</sup> The arguments for the legality of the United States’ invasion of Iraq as ‘preventive self-defence’ were tenuous at best<sup>4</sup> and did not receive wide acceptance from the preponderance of states.<sup>5</sup> However, the ensuing military occupation of Iraq was one of the few self-declared<sup>6</sup> belligerent occupations since the Second World War,<sup>7</sup> revivifying a category of international law which had fallen from use in the language of state practice.<sup>8</sup> The concept of belligerent occupation, born of the nineteenth century intra-European land order, was to be applied as the legal framework regulating an ambitious project of transforming the material and formal constitution of the Iraqi state. It was quickly observed by commentators that the determinate content endowed to the concept of belligerent occupation by its 19th-century context of formation was inadequate to the US objective of ‘occupation as liberation’.<sup>9</sup> Noting that, since the end of the Cold War, international institutions had authorized and promoted transformational ‘state-building’ projects with minimal reference to occupation law,<sup>10</sup> some advocated that the scope of permissible action under occupation law should be expanded if the occupied society requires ‘revolutionary changes in its economy (including a leap into robust capitalism), rigorous implementation of international human rights standards, a new constitution and

<sup>2</sup> R. Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (2002), at 23.

<sup>3</sup> C. Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum* (2003), pt. IV, chap. 1.

<sup>4</sup> See Bhuta, ‘A Global State of Exception? The United States and World Order’, 10 *Constellations* (2003) 371, at 372.

<sup>5</sup> During the Security Council debate concerning the use of force against Iraq (open to Security Council members as well as non-members) convened on 26 and 27 Mar. 2003, the ‘overwhelming majority’ of states condemned the US attack as illegal and called on the Security Council to ‘end the illegal aggression’: UN Press Release SC/7705, 4726th meeting, 26 Mar. 2003.

<sup>6</sup> After an initial reluctance to refer to the presence of their military forces in Iraq as constituting an ‘occupation’, the US and UK representatives to the UN notified the Security Council that their respective countries considered that the international laws of belligerent occupation applied: Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/2003/538 (2003). This legal position was confirmed by the Security Council in Resolution 1483 of 22 May 2003: UN Doc. S/RES/1483 (2003).

<sup>7</sup> Chesterman, ‘Occupation as Liberation: International Humanitarian Law and Regime Change’, 18 *Ethics and International Affairs* (2004): 51, at 51; E. Benvenisti, *The International Law of Occupation* (rev. edn., 2004), at pp. ix–xiv, 149.

<sup>8</sup> See generally Roberts, ‘What is a Military Occupation?’, 55 *BYBIL* (1985): 249.

<sup>9</sup> Scheffer, ‘Beyond Occupation Law’, 97 *AJIL* (2003): 842, at 842; Benvenisti, *supra* note 7, at p. viii.

<sup>10</sup> See, e.g., the cases of Bosnia-Herzegovina, Kosovo, and East Timor, discussed in S. Chesterman, *You, the People: The United Nations, Transitional Administration and State-Building* (2004), chaps. 1–2.

judiciary, and a new political structure (most likely consistent with principles of democracy) . . .'.<sup>11</sup> Consistent with the contemporary revival of what Simpson terms 'liberal anti-pluralism', the objective of instituting – even imposing – a democratic governance regime where previously there was none is asserted as the value relative to which positive legal rules should be adapted.<sup>12</sup>

It may be that the revision of occupation law which is argued for is, like Hegel's Owl of Minerva, simply a recognition of a reality which has already formed.<sup>13</sup> But if this is the case, it may also be an opportune moment to re-examine the provenance and evolution of the idea of belligerent occupation, and ask what is implied in giving a legal-conceptual imprimatur to the project of 'transformative occupation'. In this article, I sketch a preliminary conceptual history of the idea of belligerent occupation by situating its emergence and conceptual determinacy in the particular conditions of the European land order, as it evolved after the Congress of Vienna in 1815. The conceptual history presented here is not complete, and does not trace in an exhaustive manner the usages and practices of 'belligerent occupation'. It is a structural-functional (rather than historico-genetic) account, which tries to elucidate the political and social *conditions of possibility* for the emergence of the category of 'belligerent occupation', and reflects on how these concrete relations of power and space might explain its conceptual content. As such, I depart from the common historical account which narrates the emergence of belligerent occupation as part of the progressive 'humanization of warfare' by European civilization. Instead, I argue that the development of *occupatio bellica* as a legal institution can be seen as part of the wider effort to re-found and restore the concrete spatial order of the *jus publicum Europaeum*, in response to the twin perils of revolutionary war and wars of liberation. The concept of *occupatio bellica* crystallized the equilibration of a set of competing geopolitical interests and conflicting principles of political legitimacy, and formed a functional mechanism by which the problem of intra-European land appropriation could be mediated. Its (internal and external) order-conserving function leads me to develop a parallel between the classical concept of *occupatio bellica* and the domestic constitutional law idea of a state of exception, wherein the role played by the occupying power is analogous to that of a commissarial dictator.

<sup>11</sup> Scheffer, *supra* note 9, at 849. For evidence concerning an earlier effort to induce a 'leap into robust capitalism', see R. Service, *Russia: Experiment with a People, from 1991 to the Present* (2002).

<sup>12</sup> G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2003), at 55, 299–316. For a more strident version of the claim that the Occupying Powers were legally entitled to transform the political order in Iraq, see Yoo, 'Iraqi Reconstruction and the Law of Occupation', 11 *U California Davis J Int'l L and Policy* (2004) 7. Yoo's argument concerning the legal bases for this entitlement is tenuous, and based on a selective reading of the relevant Security Council Resolutions. Compare Fox, 'The Occupation of Iraq', 36 *Georgetown Journal of International Law* (2005 forthcoming) 195. and Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', *EJIL* this issue at 723.

<sup>13</sup> Hegel, 'Preface', in G.W.F. Hegel, *The Philosophy of Right* (trans. Knox, 1967): 'Philosophy, as the thought of the world, does not appear until reality has completed its formative process, and made itself ready. History thus corroborates the teaching of the conception that only in the maturity of reality does the ideal appear as counterpart to the real, apprehends the real world in its substance, and shapes it into an intellectual kingdom. . . . The owl of Minerva, takes its flight only when the shades of night are gathering.'

The shift from the classical concept of belligerent occupation to the endorsement of ‘transformative occupation’ has certain elective affinities with a shift from commissarial to sovereign dictatorship. Yet this move is fraught with political risk, as it implies that the occupant must achieve a much higher threshold of effective power over the territory and its inhabitants: rather than preserving an extant material and formal order as a temporary measure, the occupant must create conditions under which a new political order can be established and legitimated. The capacity to impose a new order that is resilient depends on a precarious dialectic of subordination and legitimation. In the concluding sections of this article, I contend that the US attempt to realize a transformative model of military occupation in Iraq has failed because of its inability to obtain the degree of subordination – by force, acquiescence or consent – necessary to ensure sufficient normality and stability for the legitimation of the new order. The heavy burdens of legitimation and subordination entailed by the transformative vision of military occupation reveal the antinomies of democratic imposition under conditions of military dictatorship.

## 2 Belligerent Occupation and the Mediation of Territorial and Constitutional Change

The notion of ‘military occupation’ occupies an anomalous place within the classical international law of war rights and territorial acquisition. Unlike the post-United Nations Charter legal environment,<sup>14</sup> classical international law did not restrain the state’s right to go to war against another state, or to acquire legal title to the territory of another state by means of war. Although the actual practice of intra-European land appropriation in the 17th and 18th centuries was complex,<sup>15</sup> acquiring effective control over a territory was recognized as a sufficient legal basis to assert a right of conquest and obtain full sovereign rights over it.<sup>16</sup> In medieval doctrine, this entitlement was based on the identity of *imperium* and *dominium*, in which a lord’s territory was his private property and the inhabitants’ allegiance to a prince implied the latter’s reciprocal obligation to maintain his territory against foreign invaders.<sup>17</sup> Seizing effective control of the prince’s territory severed the foundation for allegiance

<sup>14</sup> See generally UN Charter, Arts. 2(4) and 51; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), UN Doc. A/5217 (1970) at 121.

<sup>15</sup> See Baty, *supra* note 1, at 966–968, where he doubts the commonly formulated proposition that seventeenth and eighteenth century international law permitted an invader to assume sovereign rights over territory upon achieving effective control.

<sup>16</sup> S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law* (1996), at 8–9; H. Kelsen, *General Theory of Law and State* (1961), at 215; von der Heydte, ‘Discovery, Symbolic Annexation and Virtual Effectiveness in International Law’, 29 *AJIL* (1935): 446, at 448, 450. J.H.W. Verzijl, *International Law in Historical Perspective – Part IXA, The Laws of War* (1978), at 151.

<sup>17</sup> ‘[T]he community of a kingdom exists for the sake of protection and defence . . . . If something within the kingdom ceases to be under the king’s actual protection, there is nothing to be said other than that the object in question ceases to be within the kingdom and take part in the community of the same’: Aegidius Colonna, *Tractatus quomodo reges et principes possunt possessiones et bona regni peculiariter ecclesiarum elargiri* (1555), i, fol.37; Korman, *supra* note 16, at 30.

between a prince and his subjects, and entitled the conqueror to demand an oath of allegiance from the inhabitants and exercise dominion over the prince's territory. By the time of Vattel, the differentiation between the prince and his subjects had developed to the point where the presumed identity between public and private property was diminished,<sup>18</sup> and the right of the invader to incorporate territory into his sovereign domain was 'perfected' only after a treaty of peace.<sup>19</sup> Verzijl similarly observes that, after the Treaties of Utrecht (1713), effective occupation of territory was construed as 'operating a change of sovereignty under the *condition suspensive* of a peace treaty with retroactive effect'.<sup>20</sup> But no characterization of 'belligerent occupation' as a distinct legal category, conferring specific rights and obligations and distinguishable from sovereign power, emerges until after the end of the Napoleonic Wars and the reconstruction of the European order at the Congress of Vienna in 1815.<sup>21</sup>

Lauterpacht dates the first usage of 'belligerent occupation' to 1844, in the writings of the German publicist Hefter.<sup>22</sup> *Occupatio bellica* develops as a legal status defined in contraposition to *debellatio*.<sup>23</sup> The former is quintessentially a temporary state of fact arising when an invader achieves military control of a territory and administers it on a provisional basis, but has no legal entitlement to exercise the rights of the absent sovereign.<sup>24</sup> The latter is a legal category describing a condition of 'subjugation' in which the original sovereign is not merely temporarily incapacitated from exercising his powers due to the presence of the occupying military forces, but is completely defeated: his institutions of state destroyed, his international legal personality dissolved, with no allies continuing to fight on his behalf.<sup>25</sup> *Debellatio* implies, in

<sup>18</sup> E. Vattel, *The Law of Nations* (English edn., 1849), Bk. III, chap. XIII. At §200, Vattel differentiates between the property of the defeated sovereign and the property of 'private individuals'. The former may be seized by the conqueror, but not the latter; private individuals owe the conqueror their allegiance to the new order he imposes. Schmitt notes that European wars of the 17th and 18th centuries were pursued largely as wars of succession. The 18th century occupier took the place of the former sovereign, but 'largely left in tact the former law, in particular private law and the societal structure as a whole': Schmitt, *supra* note 3, at 201.

<sup>19</sup> Vattel, *supra* note 18, §197.

<sup>20</sup> Verzijl, *supra* note 16, at 151.

<sup>21</sup> As late as 1813, US and English courts held that military occupation conferred the 'fullest right of sovereignty' on the occupant: *US v Rice*, 4 Wheaton 254 (1812); *The Foltina*, 1 Dodson 451 (1813) ('No point is more clearly settled in courts of common law than that a conquered territory forms immediately part of the King's dominions').

<sup>22</sup> L. Oppenheim, *International Law: A Treatise, Volume 2: War, Peace and Neutrality* (ed. H. Lauterpacht, 5th edn., 1935), at 344.

<sup>23</sup> Korman, *supra* note 16, at 110.

<sup>24</sup> W.E. Hall, *A Treatise on International Law* (1884), at 444; Actes de la Conférence Réuni à Bruxelles, du 27 Juillet au 27 Août 1874, pour Régler les Lois et Coutumes de la Guerre, *Nouveau Recueil Général de Traités*, 2nd series, 1879–1880, IV, 219–224, Art. 41 (the Brussels Declaration); 'Cinquième Commission – Réglementation des Lois et Coutumes de la Guerre', 5 *Annuaire de l'Institut de Droit International* (1881) 159 (the Oxford Code), Arts. 6, 41; Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Arts. 42–43 (The Hague Convention of 1899); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 Oct. 1907, Arts. 42–43 (The Hague Convention of 1907).

<sup>25</sup> Verzijl, *supra* note 16, at 470, 480; Benvenisti, *supra* note 7, 92–93; Roberts, *supra* note 8, at 267–288.

other words, a certain *quality of subordination* that is achieved by the invader, and which permits him to re-found the political order of the territory afresh. Full sovereignty over territory was thus obtained either through a thorough destruction of the juridical and political institutions of the sovereign and the state, or by a treaty of cession at the formal conclusion of the war in which an orderly transfer of populations and allegiances was effected.

In contrast to *debellatio*, *occupatio bellica* is an intermediate status between invasion and conquest, during which the continuity of the juridical and material constitution is maintained. The authority of the occupant derives purely from his factual power – his military capacity to exercise functions of administration and issue enforceable commands, rather than any sovereign right. The paradox of exercising a part of the sovereign's rights (control over public property, maintenance of order) in absence of legally recognized sovereign authority was explained by publicists and jurists as international law's accommodation of the sheer facticity of the occupant's military power of command. Thus, Funck-Brentano and Sorel write that the authority exercised by the occupant is based only on the force at his disposal and exists only where this physical force manifests itself,<sup>26</sup> while Hall insists that 'rights which are founded on mere force reach their natural limit at the point where force ceases to be efficient. They disappear with it; they reappear with it; and in the interval they are non-existent.'<sup>27</sup> Correlative with international law's recognition of the occupant's factual power of command, however, was the imposition of an obligation to restore and ensure public order, respect the property rights of private citizens and refrain from interfering in private economic relations governed by contract and other financial laws in force in the territory.<sup>28</sup> The occupant is entitled to seize moveable public property, but has only use-rights (for the duration of the occupation) in relation to public immoveable property. Subject to derogation only in response to military necessity, the occupant is effectively obliged to preserve the economic order of the territory.

The ordinary laws of the territory might be partially suspended in the name of military necessity (such as to ensure the security of the occupying military forces) or provisionally supplemented in order to meet the exigencies of preserving order under conditions of war, but otherwise the law in force in the territory was to be respected by the occupant unless 'absolutely prevented'.<sup>29</sup> Crucially, the fundamental principle of occupation law accepted by mid-to-late 19th-century publicists was that an occupant could not alter the political order of territory.<sup>30</sup> All laws implicating the population's

<sup>26</sup> T. Funck-Brentano and A. Sorel, *Précis du Droit des Gens* (1877), quoted in D. Graber, *The Development of the Law of Belligerent Occupation, 1863–1914* (1949), at 50.

<sup>27</sup> Hall, *supra* note 24, at 444. See the Brussels Declaration, *supra* note 24, Art.1, the Oxford Code, *supra* note 24, Arts.6, 41; The Hague Conventions of 1899 and 1907, *supra* note 24, Art. 42

<sup>28</sup> The Brussels Declaration, *supra* note 24, Arts. 6, 38; the Oxford Code, *supra* note 24, Arts. 1, 49, 54; The Hague Conventions of 1899 and 1907, *supra* note 24, Arts. 23(g), (h), 46, 53.

<sup>29</sup> The Hague Conventions of 1899 and 1907, *supra* note 24, Art.43.

<sup>30</sup> See Graber, *supra* note 26, at 124–153; G. von Glahn, *The Occupation of Enemy Territory* (1957), at 276. It is noteworthy that late 18th century and early 19th century texts, such as G.F. von Martens'

political relationship with the former sovereign – such as those conferring political privileges or mandating conscription – could be suspended, but not enforced *vis-à-vis* the occupant. The political constitution could similarly be suspended to the extent that it interfered with the occupant's entitlement to protect its forces and pursue legitimate war aims, provided that the occupant did not attempt to impose obligations akin to duties of allegiance or loyalty on the occupied population. The population was deemed to owe a factual, rather than legal, duty of obedience to the occupant, arising out of an acceptance of the occupant's power to enforce his commands and in return for the preservation of public order.<sup>31</sup> Thus, as Schmitt observed, the legal institution of *occupatio bellica* recognizes a direct relationship of protection and obedience between the occupying power's military commandant and the territory's inhabitants,<sup>32</sup> potentially mediated by local laws and institutions but in the last instance arising from the occupant's 'naked power',<sup>33</sup> which is at once legitimated and constrained by international law's precarious balance of 'military necessity' and order-conservation.

The characterization of belligerent occupation as a legally sanctioned extra-legal power that is plenary in its mandate to pursue specified aims (military victory and order-preservation), but constrained in its *order-constitutive* authority, invites an obvious comparison with the Roman public law institution of commissarial dictatorship. Fraenkel notes that the occupying power's entitlement to preserve order and protect the security of its military forces is analogous to the police power of the Executive in 'continental political theory',<sup>34</sup> while 19th-century publicists such as Hall and Lieber recognized the law of occupation as a variety of martial law transposed to the international plane.<sup>35</sup> Like the Roman commissarial dictator, the military

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1795 *Summary of the Law of Nations*, do not use the language of 'belligerent occupation'. Rather, Martens refers to the 'rights of the conqueror', which include the right to subject conquered inhabitants to his domination, 'to make them swear fealty to him, [and] to exercise certain rights of sovereignty over them . . .'. The conqueror is 'not obliged to preserve the constitution of a conquered country or province, nor to leave the subjects in possession of the rights and privileges granted them by their former sovereign . . .': G.F. von Martens, *Summary of the Law of Nations founded on the Treaties and Customs of Modern Nations of Europe* (trans. W. Cobbett, 1795), at 286–287. The absence of any discussion, as late as 1801, of the distinction between the rights of a conqueror and the rights of a military occupier tends to reinforce my argument that 'belligerent occupation' as a legal institution arises only after the Congress of Vienna. I am indebted to Professor Martti Koskeniemi for directing me to G.F. Von Martens' text.

<sup>31</sup> von Glahn, *supra* note 30, at 30–34.

<sup>32</sup> Schmitt, *supra* note 3, at 206.

<sup>33</sup> J. Stone, *Legal Controls of International Conflict* (1954), at 723; von Glahn, *supra* note 30, at 34, 234.

<sup>34</sup> E. Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918–1923* (1944), at 194–195.

<sup>35</sup> US War Department, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (24 Apr. 1863), Arts. 1–4; Hall, *supra* note 24, at 431 note 2; de Watteville, 'The Military Administration of Occupied Territory in Time of War', 7 *Transactions of the Grotius Society* (1921) 133, at 143. Lieber's code, considered the first effort to codify and apply the law of belligerent occupation, was famously applied by the Union army during the US Civil War. The concept of 'military necessity' (defined by Lieber in his code), was also invoked by Lincoln in the domestic political environment to justify the expansion of Presidential powers at the expense of the legislature: see A. Arato, *A Conceptual History of Dictatorship and its Rivals*, manuscript of 23 June 2003, at 26. My thanks go to Professor Arato for providing me with a draft of this book.

commander or administrator exercises a ‘complete authority’<sup>36</sup> that unifies the different limbs of constituted power,<sup>37</sup> and suspends the normal legal order on a temporary or provisional basis with the exclusive purpose of ‘bringing about a concrete success’<sup>38</sup> – a return to the state of law in the case of the Roman dictator, or military victory in the case of the military commander. Schmitt, as usual, gets to the heart of the matter when he points out that in *both* a state of exception and *occupatio bellica*, there were ‘no *juridical* answers to any of the important questions consistent with the real circumstances’.<sup>39</sup> The procedures and powers of the dictator are given content by the *concrete situation* that he is called upon to meet. Analogously, the notion of ‘military necessity’ as a regulative principle in international law expands and contracts, depending on the actuality of the threat to be contained and of the enemy to be defeated.<sup>40</sup> Von Glahn writes that ‘the interests of the occupant are paramount and every act and measure undertaken by military government has to be judged by the yardstick of military necessity and usefulness in concluding the conflict successfully and preserving order in the occupied area’.<sup>41</sup> Nineteenth and early 20th-century commentators noted that the twin imperatives of military necessity and order-preservation allowed the occupier to extend his control ‘over practically all fields of life’,<sup>42</sup> particularly if faced with local resistance to his military control.<sup>43</sup> Spaight observes that ‘the secret of successful occupation is really the disciplining of the conglomeration of more or less disaffected persons who made up the population of an occupied province’,<sup>44</sup> and in 19th-century law the measures permitted to bring about this disciplining included collective penalties, the taking and execution of hostages,<sup>45</sup> and

<sup>36</sup> von Glahn, *supra* note 30, at 265.

<sup>37</sup> US Army Field Manual, 1940: ‘[t]he exercise of military government is a command responsibility, and full legislative, executive and judicial authority is vested in the commanding general . . . By virtue of his position, he is the military governor of the occupied territory, and his supreme authority is limited only by the laws and customs of war.’

<sup>38</sup> C. Schmitt, *Die Diktatur*, quoted in J. P. McCormick, *Carl Schmitt’s Critique of Liberalism* (1999), at 124.

<sup>39</sup> Schmitt, *supra* note 3, at 207.

<sup>40</sup> Military necessity in the first half of the 20th century was the rule under which, subject to the principles of humanity and chivalry, a belligerent was justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money: US Army Field Manual, 1940. Similarly, in *New Orleans v Steamship Co.*, 20 Wallace 387, the US Supreme Court held that ‘the occupying power . . . may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exercised in such cases, save those which are found in the laws and usages of war.’

<sup>41</sup> von Glahn, *supra* note 30, at 265.

<sup>42</sup> E. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), at 86.

<sup>43</sup> Droop, ‘On the Relations between an Invading Army and the Inhabitants’, *3 Papers Read before the Juridical Society* (1871) 705.

<sup>44</sup> J. Spaight, *War Rights on Land* (1911) at 323. As Nabulsi comments, the notion of military necessity was invoked by all 19th century military occupiers to justify a variety of punitive measures against inhabitants: K. Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (1999), at 29–30.

<sup>45</sup> See, e.g., US Army Field Manual, 1940, Art. 358(d), permitting the taking and execution of hostages to prevent assassination of members of the occupying forces. Similar provisions can be found in the early 20th century military manuals of Great Britain and France. Spaight, *supra* note 44, at 349–50; Stone, *supra* note 33, at 702.



reprisals.<sup>46</sup> Occupation forces were expected and entitled to be ‘severe’<sup>47</sup> in as much as pacification was necessary to the carrying out of legitimate military operations and the efficient administration of the territory: ‘in military government, the mission is paramount and controls the form’.<sup>48</sup> Nevertheless, an important limitation remained: neither the commissarial dictator nor the belligerent occupant exercises constituent power, and are thus the opposite of the sovereign dictator: the former uses unlimited power in extraordinary circumstances to bring about the termination of his power, while the latter uses unlimited power over an indeterminate duration to create a radically new order.<sup>49</sup>

Andrew Arato observes that the Roman dictatorship was an ‘institutional attempt to solve the problem of republican order within a republican identity’.<sup>50</sup> I suggest that the peculiar legal institution of *occupatio bellica* should be understood as a legal product of the 19th-century European political order’s preoccupation with modulating the problems of territorial and constitutional change within Europe. As a matter of principle and practice, belligerent occupation in its 19th-century manifestation was applied exclusively to land wars between European sovereigns. A state of belligerent occupation could arise only in the context of a state of war, and only sovereigns could declare war upon one another. Sovereignty was a ‘gift of civilization’<sup>51</sup> and was, almost exclusively, a recognized attribute only of members of the ‘European family of states’.<sup>52</sup> The anomalous (from a classical international law point-of-view) distinction between effective control and sovereign rights over territory which lies at the heart of the law of occupation, and the law’s enjoining of fundamental constitutional change by the military occupant, had no application to colonial wars or ‘police actions’ against less civilized – and therefore non-sovereign – peoples and territories.<sup>53</sup> Hence, the British deemed military occupation a sufficient basis to assert sovereign rights, such as the right to demand allegiances, over the territories of Egypt seized from the Ottoman Empire,<sup>54</sup> while Russia declared the laws of military occupation to have no application to its acquisition of Bulgaria from the Turks.<sup>55</sup> After all, reasoned Feodor de Martens (one of the leading proponents of the laws of land warfare), the very point

<sup>46</sup> Most of these measures have now been specifically proscribed by the 1949 Geneva Conventions.

<sup>47</sup> von Glahn, *supra* note 30, at 264; de Watteville, *supra* note 35, at 150.

<sup>48</sup> Gabriel, ‘The American Experience with Military Government’, 37 *American Political Science Rev* (1943) 417, at 437. Davidonis comments that the ‘logical conclusion’ of the principle of military necessity was an enlargement of the occupant’s powers, particularly where the inhabitants of occupied territory are not ‘docile’: Davidonis, ‘Some Problems of Military Government’, 38 *American Political Science Rev* (1944) 460, at 470–472.

<sup>49</sup> McCormick, *supra* note 38, at 130; Arato, *supra* note 35, at 44.

<sup>50</sup> *Ibid.*, at 2.

<sup>51</sup> M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2001).

<sup>52</sup> P. Schroeder, *The Transformation of European Politics, 1763–1848* (1994), at 9; Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law’, 40 *Harvard Int’l LJ* (1999) 1.

<sup>53</sup> Korman, *supra* note 16, at 56, 61.

<sup>54</sup> Baty, *supra* note 1, at 973. See also Chatterjee’s fascinating account of the British annexation of Awadh: Chatterjee, ‘Empire after Globalization’, *Economic and Political Weekly*, 11 Sep. 2004.

<sup>55</sup> Graber, *supra* note 26, at 133.

of the war was to liberate a population from the antiquated and despotic constitutional system of the Ottoman Empire, and it would therefore be senseless to refrain from introducing a modern social and legal order.<sup>56</sup> The Russian action was ‘approved by many observers’.<sup>57</sup> Similarly, the strict division between public and private property encoded in the law of occupation was not sensibly applied to peoples and civilizations whose chieftains were not ‘public authorities’ in any sense recognized by European law, and whose social orders did not themselves distinguish common and private property in the manner of European states. Thus, occupation law’s restraints on seizing private property as the dominium of the occupant were predicated on a common – Eurocentric – standard of a constitutional order that distinguished between public and private law, and between state and state-free (economy, property) society.<sup>58</sup>

When placed in the context of late 18th and 19th-century European politics, these characteristics of *occupatio bellica* take on a functional intelligibility. The French Revolution, and the subsequent revolutionary and Napoleonic wars, challenged the legal foundations of the 18th-century intra-European political order and threatened to permanently transform the nature of European warfare. The revolutionary government in France renounced the right of conquest, and offered instead ‘fraternity’ with peoples who rejected the dynastic principle of legitimacy in favour of popular sovereignty. International conflicts over treaties and defined legal rights thus became struggles over fundamental political principles, in which the French claimed that rights based on popular sovereignty transcended those based on treaties.<sup>59</sup> Instead of annexing territories which came under their effective control, French armies replaced the religious and dynastic political authorities with popular committees, under revolutionary guidance from France. In other words, the revolutionary wars, and the Napoleonic wars that followed them, initiated *constitutional change* in place of conquest and (under Napoleon in particular) attempted to radically transform the nature of the state and the accepted bases for territorial control.

Revolutionary warfare also brought with it the phenomenon of the ‘nation-in-arms’, in which the total human resources of a territory were potentially mobilized in the name of patriotic duty. Napoleon’s enlistment of inhabitants of recently annexed or ‘liberated’ territories to fight on behalf of the Empire exacted a new and potentially destabilizing kind of allegiance from the populace, that of national citizenship. Koselleck notes that by the beginning of the 19th century, the notion of a national ‘*bildung*’, and associated ideas of an integrative relation between a people, a heritage and a territory, were emerging as political ‘metaconcepts’.<sup>60</sup> In 1808–1809, in the middle of the Napoleonic wars, Viennese newspapers extolled the unique relation that a human has with his fatherland, and the undesirability of foreign rule because of the

<sup>56</sup> Schmitt, *supra* note 3, citing Martens, *supra* note 30, at 215.

<sup>57</sup> Graber, *supra* note 26, at 258, note 1.

<sup>58</sup> Stone, *supra* note 33, at 698, 727; Feilchenfeld, *supra* note 42, at 10–11, 25.

<sup>59</sup> Schroeder, *supra* note 52, at 72.

<sup>60</sup> Koselleck, *supra* n. 2, at 171–207.

close relationship between the native political system of one's land and the customs and traditions that one shares with the inhabitants of the land.<sup>61</sup> The Austrian elites, inspired by the Spanish *guerillero* resistance to Napoleonic rule, created a civil militia (*landwehr*) for the defence of 'the fatherland', and engaged poets and writers (such as Friedrich Schlegel and his brother) to propagate patriotic sentiment and mobilize the populace against Napoleon.<sup>62</sup> In a dialectical movement that neither Hegel nor Marx would fail to notice, the reaction's determination to defeat Napoleon led them to cultivate and unleash forces that would in the future erode their own legitimacy: 'shared resentment of Napoleon could metamorphose into the proto-nationalism that was to prove a major source of instability in Restoration Europe... When they employed national rhetoric, [ousted rulers] implicitly recognized that popular will rather than dynastic right was the basis of sovereignty.'<sup>63</sup> Moreover, although the Austrian and Prussian attempts to incite a patriotic war were unsuccessful relative to the Spanish partisan campaign, both the revolutionary nation-in-arms, and the reactionary effort of fomenting popular resistance, undermined classical international law's presumption of warfare as 'cabinet matter' conducted between aristocratic warrior castes or professional soldiers. Clausewitz recognized patriotism as a powerful military asset, but military scholar Werner Hahlweg notes that the endorsement of armed civilian resistance against the existing order (even when embodied in a foreign occupation) was also deeply dangerous, because it was 'something simultaneously outside the legal state'.<sup>64</sup>

The defeat of Napoleon confronted the Great Powers with the challenge of re-founding an international legal and political order that was capable of stabilizing and moderating the contradictory historical and political tendencies unleashed by two decades of war and revolution. The Congress of Vienna was, in this sense, less a 'restoration' than a re-constitution, which repudiated the revolutionary imperative of universalizing a specific political order while simultaneously tolerating the continuation of constitutional settlements that incorporated changes wrought by the revolution, retained Napoleonic institutions, or endeavoured to wholly reject the revolutionary era.<sup>65</sup> The stabilization of political plurality within an agreed range of territorial and institutional parameters was at the heart of the new order. Just as the Peace of Westphalia bracketed the religious question, the Vienna settlement tried to bracket the constitutional question and create a spatial regime which permitted the

<sup>61</sup> W. Langsam, *The Napoleonic Wars and German Nationalism in Austria* (1930), at 19.

<sup>62</sup> *Ibid.*, at 93.

<sup>63</sup> Laven and Riall, 'Restoration Government and the Legacy of Napoleon', in D. Laven and L. Riall (eds.), *Napoleon's Legacy: Problems of Government in Restoration Europe* (2000), at 6.

<sup>64</sup> Hahlweg, cited in C. Schmitt, *Theory of the Partisan* (1965), translated in 127 *Telos* (2004) 11, at 41. For further evidence of military concern at the emergence of partisan warfare and the threat it represented for standing armies, see Nabulsi, *supra* note 44, at chaps. 2–4.

<sup>65</sup> M. Broers, *Europe After Napoleon: Revolution, Reaction and Romanticism, 1814–1848* (1996), at 13. Simpson notes that the pre-Revolutionary territorial boundaries of various principalities and kingdoms were 'little respected' by the restoration: states were divided, territories amputated, and principalities confederated: Simpson, *supra* note 12, at 113.

coexistence of absolutism, liberal parliamentarism and enlightened authoritarianism in a kind of *complexio oppositorium*, preserved by a system of treaties that 'legalized' the hegemony of the Great Powers.<sup>66</sup> As Broers observes:

The cooperation and competition of the Great Powers preserved the territorial integrity of the intra-European borders from reimposition of the uniform, internationalist doctrines of the French Revolution. In practice, this meant that existing rulers could not be overthrown by their own subjects or an outside power, and in no circumstances could they be replaced by anything resembling the revolutionary regimes of pre-1814. Within these limits, the states could evolve by their own volition.<sup>67</sup>

I suggest that it is this equilibration of ideological-political conflict and geopolitical interest that explains the determinate content of the concept of belligerent occupation. The debt to the experience of Napoleonic rule is apparent in *occupatio bellica's* basic distinction between the occupant's authority and sovereign right, which presupposes the possibility of a clear demarcation between a sovereign, a state administration (falling into the hands of the occupant) and a people under occupation. Napoleonic rule was a 'major catalytic agent'<sup>68</sup> for the centralization and modernization of the state, and at efforts at sweeping away the institutional remnants of feudal society. In France, and to greater or lesser degrees in other polities that had come under Napoleonic rule, the social and material bases for a distinct legal conception of the state as a moral and juridical person were set in place:<sup>69</sup> the model of a centrally controlled, hierarchical and uniform administration which assumed that 'the executive chain descends without interruption from the minister to the administered and transmits the law and the government's orders to the furthest ramifications of the social order'.<sup>70</sup>

By enjoining the occupant from changing the political order of the occupied territory, and by interdicting the legal transfer of sovereignty until the state of war was formally concluded, the legal category of belligerent occupation effectively facilitated the mediation of territorial and constitutional change. A state of war could not be concluded until all allies had ceased to fight on behalf of the state the territory of which was occupied, and hence, through the intermeshing web of alliances between Great Powers and smaller states, the negotiated concurrence or acquiescence of the Great Powers was a practical precondition for the appropriation of territory. The revolutionary transformation of the domestic order of a state through the intervention of another state was effectively bracketed, making possible the coexistence of two contradictory principles of political legitimacy – the dynastic and the popular democratic.

<sup>66</sup> *Ibid.*, at chap. 4. Schroeder, *supra* note 52, at 578.

<sup>67</sup> Broers, *supra* note 65, at 11.

<sup>68</sup> *Ibid.*, at 379.

<sup>69</sup> Schroeder notes that the notion of the state as a juridical person was essential to the stability of the treaty system underpinning the 1815 settlement. Treaties came to be accepted as binding *on the state* rather than the person of the sovereign, and thus survived the death of the prince. The state had become the proper subject of sovereignty: *supra* note 52, at 579.

<sup>70</sup> Laven and Riall, *supra* note 63, at 2; John, 'The Napoleonic Legacy and Problems of Restoration in Central Europe: The German Confederation', in Laven and Riall (eds.), *supra* note 63, at 83–96.

The consolidation of territorial boundaries along ‘national’ lines over the course of the 19th century was equally compatible with occupation law’s preservationist imperative, which could be interpreted anachronistically (and often was) as an embrace of the intrinsic connection between a people and their ‘soil’ and of their inherent right to determine their own political future. Similarly, the codification of the laws of land warfare aimed to revive classical international law’s clear distinction between combatant and non-combatant, reflected in occupation law’s delegitimation of civilian resistance (such as its circumscription of the *levée en masse*) and its authorization of severe measures to deter partisan and irregular combatants.<sup>71</sup>

### 3 Transformative Occupation and Sovereign Dictatorship: The Dilemmatic of Subordination and Legitimation

The law of belligerent occupation did not fare well in an epoch of total war. Mechanized aerial warfare, and the full engagement of a state’s economy and society in the war effort made the distinctions between ‘private property’ and appropriate military objects unsustainable. The work and wealth of ‘private’ economic actors were indispensable to war production, and victory over another state that had placed its entire economy and society on a war-footing implied not just the defeat of its armed forces, but the debilitation of the state’s institutional and economic capacities. Even if the occupying state did not expressly aim to overthrow the enemy’s social order, it was hard to imagine that the order would survive the measures necessary to bring about defeat. The First World War shattered what remained of the Vienna settlement, and led to a peace settlement which consciously revised external territorial boundaries while internal constitutional revolutions remade political systems across Central and Eastern Europe. At the same time, the ‘well-ordered police state’ of the 19th century had given way to a range of interventionist state-forms, from social democracy to fascism and communism, blurring or collapsing altogether the presumption of ‘state’ and ‘state-free’ society on which occupation law was based.

By the middle of the 20th century, and in the wake of a second total war that transformed economies and societies, jurists wrote with some scepticism about the concrete determinacy and relevance of the idea of *occupatio bellica*. Feilchenfeld commented that the ‘old rules’ were essentially defunct by 1914, and that the only reason they were not denounced between 1918 and 1935 was that ‘they were not tested again through major occupations resulting from major wars’.<sup>72</sup> Stone similarly noted that the social, economic and political foundations for the institution of belligerent occupation had disappeared,<sup>73</sup> but concluded that the rules survived ‘as a result of two contending imperatives: Allies concern in both world wars to fix Germany with guilty violations of the rules, and Germany’s desire . . . to exploit the great leeways for occupation *machtspolitik* left by the rules’.<sup>74</sup> It was widely accepted that new political

<sup>71</sup> See Nabulsi, *supra* note 44, at 21–36 and Droop, *supra* note 43.

<sup>72</sup> Feilchenfeld, *supra* note 42, at 23.

<sup>73</sup> Stone, *supra* note 33, at 727

<sup>74</sup> *Ibid.*

orders imposed by the US on Germany and Japan entailed an exercise of power which exceeded the bounds of occupation law.<sup>75</sup> The conclusive considerations justifying the exercise of this power were self-evidently not legal, but political: the turning of former enemies into allies, and their economic and political reintegration into the emergent 'Western bloc' of anti-communist states. The factual circumstances which made possible this exercise of sovereign power (equivalent to conquest, but without annexation) were inherent in the aftermath of total war and total defeat. Germany was reduced to a condition of *debellatio*, in which its state institutions and constitutive order were destroyed and its population exhausted and demoralized. Japan's institutional continuity was preserved, but the capitulation of the Emperor, the exhaustion of the populace and the shadow of nuclear annihilation assured the cooperation of political elites. Thus, in both cases, the exercise of sovereign power by a foreign state was rooted firmly in the completeness of the subordination achieved over the defeated territory and the acquiescence of its inhabitants.

The humanitarian concerns encoded in occupation law were reaffirmed and strengthened in the Fourth Geneva Convention of 1949, which specifically prohibited certain kinds of violence against civilians (such as reprisals and hostage-taking) that had previously been accepted under the law of war.<sup>76</sup> But the preservationist principle at the heart of occupation law seemed particularly anachronistic in light of the new geopolitical landscape after World War Two, in which the antagonists oversaw two 'large areas' within which their respective economic and political principles were applied and upheld. In this environment, as Stalin recognized with brutal clarity, 'whoever occupies a territory also imposes on it his own social system. Everyone imposes his own system as far as his army can reach.'<sup>77</sup> The law of occupation was redundant, in a sense, because there was no longer a single spatial order within which competing principles of legitimacy had to be mediated. There was instead a global order of two domains, and a series of proxy confrontations in the hinterlands of each. Neither power considered its interventions within its own *grössraum* as 'occupations', relying instead on 'invitations' from local political forces and other kinds of indirect control. Perhaps wary of a *tu quo que*, the Cold War powers do not appear to have actively resuscitated the notion of belligerent occupation, even in respect of their adversary's conduct: if the Soviet Army in Budapest and Prague was an 'army of occupation', so too was US military presence in Saigon and Seoul. Roberts noted in 1985 that the plurality of kinds of intervention undertaken during the Cold War, and

<sup>75</sup> See, e.g., Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', 39 *AJIL* (1945) 518, at 518, and von Glahn, *supra* note 30, at chap. 21; Benvenisti, *supra* note 7, at 93; Roberts, *supra* note 8, at 269–271; Jennings, 'Government in Commission', 23 *BYBIL* (1946) 112, at 122, 133–139.

<sup>76</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, which came into force on 21 Oct. 1950. See Nabulsi, *supra* note 44, chap. 1, for an account of the discussions in Geneva. There appears to have been little discussion of the relevance or application of the preservationist principles of occupation law, and more concern with the vexed question of the legal status of partisan resistance fighters.

<sup>77</sup> Stalin, quoted in Chesterman, *supra* note 7, at 51.

the reluctance to invoke the law of occupation, led the category to lose much of its determinacy as a concept capable of clear application.<sup>78</sup>

Security Council Resolution 1483 expressly recognized the US and UK as ‘occupying powers’ in Iraq,<sup>79</sup> and required them to comply ‘fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907’.<sup>80</sup> The Security Council resolution’s declaration of the applicability of the law of occupation to the situation in Iraq returned the question of the content of *occupatio bellica* to the centre of international politics. Resolutions authorizing peacekeeping and ‘state-building’ missions under international auspices throughout the 1990s had been conspicuously silent on the application of occupation law, an implicit recognition that the emergent phenomenon of ‘internationalized transitional administration’ could not be subsumed under the laws of belligerent occupation.<sup>81</sup> The Security Council’s explicit reference to occupation law in Resolution 1483 could thus be interpreted as an effort at restraining the occupant’s authority to unilaterally undertake a ‘transformative occupation’, and careful legal analyses have offered persuasive reasons to construe Resolution 1483 and 1500 as not entitling the US and UK to derogate from the preservationist core of occupation law.<sup>82</sup>

But the Security Council resolutions are also political documents, expressing a *modus vivendi* between the US and UK, and the Security Council permanent members which had strongly opposed the war.<sup>83</sup> Hence, Resolution 1483 and 1500 are sufficiently ambiguous to permit a colourable claim of legitimation – if not legalization – of the idea that the occupying power is authorized, in the interests of the population, to exceed its order-preserving functions and embark on a project of state-building. The resolutions exhorted, without specifically mandating, the occupying powers to set in motion (with the ‘advice’ and ‘assistance’ of the United Nations’ Special Representative) a process for the formation of a new political and economic order, including the

<sup>78</sup> Roberts, *supra* note 8, at 299–301. an anomaly in the post-war non-application of occupation law is the Israeli occupation of Gaza, the West Bank of the Jordan River, East Jerusalem and the Golan Heights. The practice and opinion of member states of the United Nations, and of the UN Security Council, reflects a clear view that the international law of belligerent occupation applies to the Israeli-occupied territories, although Israel denies the *de jure* application of the Fourth Geneva Convention (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 93). Several other instances of the use of force resulted in General Assembly statements and resolutions which applied the label ‘occupation’, such as the presence of Turkish forces in northern Cyprus and Vietnamese forces in Cambodia/Kampuchea after the invasion of Dec. 1978; Roberts, ‘Prolonged Military Occupation: The Israeli Occupied Territories since 1967’, 84 *AJIL* (1990) 44, at 48–51. It appears, however, that only the Israeli case provides an example of an occupying power expressly (though selectively) applying the laws of belligerent occupation as the framework for its military activities over a long period of time. At the same time, as Adam Roberts has noted, the lengthy duration of the occupation and the Israeli policy of establishing population settlements in the territories represent a challenge to belligerent occupation law’s emphasis on the provisional and temporary nature of the occupation: Roberts, this note, at 96–98.

<sup>79</sup> S.C. Res. 1483, UN SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

<sup>80</sup> *Ibid.*, para. 5.

<sup>81</sup> Chesterman, *supra* note 10, at 7. Scheffer, *supra* note 9, at 852.

<sup>82</sup> See Fox, *supra* note 12, and Sassoli, *supra* note 12.

<sup>83</sup> Grant, ‘The Security Council and Iraq: An Incremental Practice’, 97 *AJIL* (2003) 823, at 823, 827.

establishment of ‘national and local institutions of representative government’, the promotion of ‘economic reconstruction and the conditions for sustainable development’ and the promotion of ‘legal and judicial reform’.<sup>84</sup> The claimed legitimacy of imposing a new institutional and constitutional structure was also strengthened by emergent practice of the international administration of territories that has emerged since the end of the Cold War. In Cambodia, Bosnia-Herzegovina, Kosovo and East Timor, treaties or Security Council resolutions established internationalized administrations which undertook to exercise, to a significant degree, sovereign powers over the territories in question.<sup>85</sup> These genuinely international governance structures were not completely subordinate to the controlling power and financial resources of one state – as in the case of the US occupation of Iraq – and thus may be optimistically regarded as exemplifying the mediation of interest-driven power politics through international law and multilateral institutions.<sup>86</sup> However, their emergence also coincided with a renewed willingness to consider some states or territories as properly subject to international tutelage or undeserving of full sovereign equality – either because of their undemocratic government or their ‘rogue status’ as persistent violators of international law (or both).<sup>87</sup> By the time the terrorist attacks of 11 September 2001 induced a ‘forward-leaning’ posture in favour of military intervention and ‘regime change’, both the ideological and technical-practical bases for ‘transformative occupation’ were well developed.

The US made it clear early in the occupation that *it* would determine the proper allocation of competences and roles in the transformation of Iraq, rejecting any substantial political coordination or oversight function for the UN<sup>88</sup> and ‘retaining something akin to plenary power within the transition; if a controversy were to arise as to which component of the transition is properly to perform some specific function, it would seem to be [the occupying power’s] task definitively to allocate competence’.<sup>89</sup> In other words, the final power of decision over the form and substance of the transitional process was retained by the US-controlled Coalition Provisional Authority (CPA). The CPA exercised this power of decision extensively, promulgating hundreds of orders and regulations which went far beyond the exigencies of preserving order and ensuring compliance with international law. As Fox has documented in his detailed review of the scope of CPA legislation, the occupying powers sought to radically remake economic life in Iraq and completely retrench the established role of the state in production and distribution of goods and services.<sup>90</sup> The CPA established and

<sup>84</sup> Security Council Resolution 1483, *supra* note 79, para. 8.

<sup>85</sup> See generally Chesterman, *supra* note 10.

<sup>86</sup> Although, as Chesterman notes, for the most part these administrations created new orders through forms of imposition, with greater or lesser degrees of local elite involvement: *ibid.*, at 239.

<sup>87</sup> Simpson, *supra* note 12, at chap. 10; Alvarez, ‘Hegemonic International Law Revisited’, 97 *AJIL* (2003) 873, at 873; Yannis, ‘The Concept of Suspended Sovereignty in International Law and its Implications in International Politics’, 13 *EJIL* (2002) 1037, at 1040–1042.

<sup>88</sup> Diamond, ‘What Went Wrong in Iraq’, 83 *Foreign Affairs* (2004) 34, at 46–47.

<sup>89</sup> Grant, *supra* note 83, at 853.

<sup>90</sup> Fox, *supra* note 12, at 16–22.



appointed the Interim Governing Council (IGC) as an Iraqi organ of 'interim administration', but the IGC lacked both decision-making and implementation powers, and its legislative proposals were subject to CPA veto. Feldman recalls that '[t]he Governing Council governed no-one. Its "decisions" were more in the nature of recommendations. While it named technocrat transitional ministers to run Iraq's various ministries, the Governing Council [had] little or no say in the ministries' day-to-day operations.'<sup>91</sup> Under the shadow of the CPA's veto, the IGC negotiated the Transitional Administrative Law (TAL) but lacked the legal or political representative capacity to proclaim or enforce it as an 'interim constitution'. In the days before the dissolution of the CPA and formation of a (CPA-appointed) 'interim government' under Iyad Allawi, the CPA issued orders addressing the post-occupation period, which stipulated critical political procedures such as the electoral law, the political parties law and criteria disqualifying individuals from holding political office. All rules and orders created by the CPA were maintained in force by the Transitional Administrative Law, and can only be overturned by a politically cumbersome 'opt-out' procedure.<sup>92</sup>

The real constituent power behind the creation of the new Iraqi political system – and the sole arbiter of exceptions to it – was the United States.<sup>93</sup> It would appear that the US invasion of Iraq has revived the category of *occupatio bellica*, but not the essential distinction between sovereign power and occupant authority. Rather, through its effective exercise of political power in multilateral fora such as the Security Council, the US obtained a reasonable degree of international acquiescence in its project for 'transformative occupation'. It carved a space in which the exercise of sovereign power over Iraq was, if not mandated, then tolerated, by the European bloc which had strongly opposed the war. The concrete result was that the US achieved a relatively free hand, at the international level, to exceed the limits imposed by the conservationist principle of occupation law. In its transformative vision, the military occupation of Iraq shifted from a category analogous to commissarial dictatorship, to one which approximated a sovereign dictatorship, wielding plenary power to institute a new constitution, both formal and material. Like a sovereign dictatorship, transformative occupation exceeds the legal order that authorizes its provisional assumption of control, in the name of 'a new and better order'. It derives its legitimacy, in other words, from *the promise of the order to come*, a horizon of expectation that is invoked to relativize the legal rules which bind it in the present. The occupying power as sovereign dictator essentially undertakes a gamble, in which the illegality of the present will become moot or even cured by the concrete legitimacy of the future order: *ex factis jus oritur*, or as Machiavelli put it, 'when the act accuses him, the result

<sup>91</sup> N. Feldman, *What We Owe Iraq* (2004), at 110. See also Diamond, 'Lessons from Iraq', 16 *J Democracy* (2005) 9.

<sup>92</sup> Transitional Administrative Law, Art. 26(C).

<sup>93</sup> For a detailed account of the ways in which the US controlled the evolution of the transitional political framework in Iraq, and of its decisive capacity to change the direction of that framework in accordance with its needs to manage crises, see Arato, 'Interim Imposition', 18 *Ethics and International Affairs* (2004) 25, and Arato, 'Bush v. Sistani', 11 *Constellations* (2004) 174.

should excuse him'. However, because the 'concrete success' to which the military occupant qua sovereign dictator is oriented is nothing less than the concretization of a new political order, he assumes a much greater burden than simple military victory: he must bring about a certain quality of subordination, under which conditions receptive to the fostering of a new order can take root. As noted above, in the case of Japan and Germany, this degree of subordination was achieved by exhaustion or acquiescence.

The dilemma of attempting to exercise constituent power through military occupation arises from the reality that, in the last instance, the occupant's authority derives from pure facticity – something well-recognized by the jurists who rationalized and refined the 19th-century concept of belligerent occupation. The occupant's ability to legitimate a new order in place of the old depends on his capacity to engender among the occupied population the belief, *post facto*, in the legitimacy of the occupant's 'naked power' as a precondition for the new basic norm to which the occupied is subjected. To the extent that the occupant is rendered incapable of normalizing its constitutive coercion – and thus allowing the coercion to become less visible – it continues to inhabit a 'zone of risk' in which its capacity to produce a firm basis for political legitimation is either static or constantly diminishing.

According to a recent military inquiry, there were 15,257 attacks against Coalition Forces throughout Iraq between July 2004 and March 2005.<sup>94</sup> The success of the insurgency in Iraq has been to prevent the consolidation of normality, and thus, to constrain the occupant's opportunity to create the conditions under which its imposition will be acquiesced in. The resistance, aided in no small part by the occupying powers' failure to undertake effective advance planning to restore services and guarantee security,<sup>95</sup> has successfully employed the twofold tactic of compelling occupying forces to treat the occupied population as the enemy, and encouraging the alienation of the population from both the occupant and the political structures which the occupation has created. The invisibility and indistinguishability of the 'terrorist' or insurgent from the general population, and the devastating effectiveness of terrorist bombings, invites counter-terror from the occupant – either in the form of widespread arbitrary detention, torture (in a desperate effort to make the invisible visible and penetrate the opacity of the insurgent enemy) or highly intrusive raids and searches. The insurgent cannot function without the consent or acquiescence of the occupied population,<sup>96</sup> and thus the occupant tries to cleave combatant from non-combatant by raising the costs of non-cooperation with the occupier.<sup>97</sup> But in so doing, the occupant forces the population to *choose who it regards as the real enemy*.

<sup>94</sup> Report of Inquiry into the death of Nicola Calipari, 2 May 2005.

<sup>95</sup> This has been widely documented, but see generally Diamond, *supra* note 88, for a summary; General Accounting Office, *Rebuilding Iraq* (2004).

<sup>96</sup> Johnson, 'Civilian Loyalties and Guerilla Conflict', 14 *World Politics* (1962) 646.

<sup>97</sup> E.g., the rationale for aerial bombardment of 'terrorist safehouses' in Fallujah in Oct. 2004 was explained as follows: "[i]f there are civilians dying in connection with these attacks, and with the destruction, the locals at some point have to make a decision," one Pentagon official said, "Do they want to harbor the insurgents

The structure of the relationship between occupant and insurgent is thus the structure of a gamble, in which the strategy of the insurgent is a kind of mirror of the occupant's response. The insurgent also tries to raise the costs of collaboration and so deny the multiplication of sites and opportunities in which the population might be encouraged to accept the constitutive coercion of the occupier. Instead, the insurgent seeks to coerce a different, thinner, kind of acquiescence: a depoliticization and reluctance to make political decisions, bred by constant insecurity, fear of both sides and perpetual abnormality.<sup>98</sup> The insurgent tactic of attacking essential infrastructure, in order to disrupt reconstruction and the restoration of essential services, can be seen as forming part of a strategy of ensuring a permanent state of abnormality<sup>99</sup> so as to prevent an exit from the occupant's state of exception. The coercive power of the occupant can thus never recede into the background, but is always visible and present – a constant reminder of the foreign provenance of the new political environment. As long as such a condition persists, the insurgent does not necessarily win, but the occupant cannot but lose. As Chalmers Johnson recognized in 1962, the willingness of the population to support the insurgent 'is not necessarily related to the ultimate goals of the guerilla leadership. . . . The population will support the guerillas if it is convinced that the guerrillas are operating effectively against the enemies of the people.'<sup>100</sup>

## 4 Conclusion

The US experiment with sovereign dictatorship in Iraq has clearly failed to create and stabilize a new order. Many historical and political factors have contributed to this failure, but I have argued that using a military occupation as a vehicle for democratic imposition is, by its very nature, contradictory and fraught with a high risk of failure. The success of transformative occupation is precariously dependent on the quality of the subordination that it achieves over the occupied territory, and the military occupier qua sovereign dictator therefore locates itself in a paradox: it has to subordinate before it can legitimate effectively, and the more it tries to subordinate, the harder becomes the legitimation. An interview study conducted in July 2003 revealed a deep mistrust of US intentions among the Iraqi population,<sup>101</sup> but a willingness to cooperate for a limited period of time, provided concrete improvements in daily life (such as

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and suffer the consequences that come with that, or do they want to get rid of the insurgents and have the benefits of not having them there?": Shanker and Schmitt, 'Terror Command in Falluja is Half Destroyed', *NY Times*, 13 Oct. 2004. See also M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977), at 189–193.

<sup>98</sup> See, e.g., Tavernise, 'Iraq's Violence Sweeps Away All Norms', *NY Times*, 6 May 2005, A1.

<sup>99</sup> Hashim, 'Iraq's Chaos: Why the Insurgency Won't Go Away', *Boston Review*, May 2004, available at <http://bostonreview.net/BR29.5/hashim.html>

<sup>100</sup> Johnson, *supra* note 96, at 657.

<sup>101</sup> International Center for Transitional Justice and the Human Rights Center, University of California at Berkeley, *Iraqi Voices: Iraqi Attitudes Towards Transitional Justice and Social Reconstruction* (2004). The author was a co-investigator and author of the report.

security and essential services) were forthcoming. This narrow window of opportunity for cooperative stabilization quickly shut.<sup>102</sup>

The profound difficulties encountered by the US in realizing its vision of ‘transformative occupation’ has put into question whether the legal recognition of such a notion is either desirable or useful. I contended in the first part of this article that the law of belligerent occupation is indeed inappropriate for situations in which the occupant wishes to exercise sovereign power and remake the state, having its origins in the stabilization of the 19th-century European order. By maintaining attempts at ‘transformative occupation’ as outside legality and within the realm of sheer political power, we are, of course, unlikely to impose any real constraint on those states which possess substantial political power. But at the same time, we maintain one of the most important legacies of the 19th-century legal order: the formal sovereign equality of states, and a (formal) rejection of any one state’s legal entitlement to impose a single model of political order. Just as the concept of *occupatio bellica* crystallized in the conflict between the dynastic and the popular-sovereign principles of political legitimacy, it seems that the future content of the law of occupation is hinged between imperial democratization (and the supporting framework of liberal anti-pluralism) and the pluralistic notion of nation-state self-determination.

<sup>102</sup> See the evidence of Ahmed Hashim to the Senate Foreign Relations Committee, 21 Apr. 2004, available at <http://foreign.senate.gov/testimony/2004/HashimTestimony040421.pdf> and Hashim, ‘The Sunni Insurgency in Iraq’, available at <http://www.mideasti.org/articles/doc89.html>