New Modes and Orders: Is a Jus Post Bellum of Constitutional Transformation Possible or Desirable?

Nehal Bhuta

Brave Belgian nation! We enter your territory to help you plant the tree of liberty, without meddling at all in the constitution that you wish to adopt. *As long as you establish the sovereignty of the People and renounce living under any despots whatsoever*, we will be your brothers, your friends, your supporters. We will respect your proprieties and your laws.[1]

Where unfortunately some province, city or town would be depraved enough by slavery to fail to seize enthusiastically the tree of liberty that the French want to establish … then this province, this city, this village will be treated like the vile slaves of the house of Austria.[2]

To make in cities new governments with new names, new authorities, new men; to make the rich poor, the poor rich … to build new cities, to take down those built, to exchange the inhabitants from one place to another; and in sum, not to leave anything untouched. […] I do not know whether this has ever occurred or whether it is possible. [It would be] a very cruel enterprise or altogether impossible.[3]

Introduction

At the outbreak of the Russo-Turkish war of 1877-78, the Russian Imperial Senate decreed that Russia committed itself to upholding the 1864 Geneva Convention and to observing the general principles of the 1874 Brussels Conference's "Proposed Laws for Land Warfare" – even though the latter remained a non-binding draft treaty text.[4] Included in the Brussels' Declaration was an early draft codification of the law of belligerent occupation, with its basic constitutive principle that the occupant must maintain the laws in force in the occupied territory unless absolutely prevented.[5] Belligerent occupation as a legal institution was, and is, predicated on the notion that a military occupier cannot exercise sovereign rights over the occupied territory, and thus has a legislative competence limited by international law. Certainly, permanent constitutional change was enjoined, although the occupier might lawfully suspend the occupied territory's constitutional and political order for the duration of the occupation, where military necessity required it.[6]

Despite British consular claims of Russian "atrocities" – apparently motivated by power political interests[7] – it seems that the Russian army in its 1877-8 campaign set a

---

[1] General Charles Francois Dumouriez, upon the entry of the French army into Belgium, 1792, quoted in Chimène Keitner, *The Paradoxes of Nationalism* (2007) 110 (emphasis mine).
[2] General Charles Francois Dumouriez, 1793, quoted in ibid 114.
[3] Machiavelli, *Discourses*, Book I, pp. 47-61. (Chicago 1996 ed.)
[4] Peter Holquist, "From Expulsion to 'Civilian Affairs': Russian Policy from the Conquest of the Western Caucusus (1860-1864) to the 1877-78 Russo-Turkish War," paper presented to Centre d'études du Monde russe, soviétique et post-soviétique, Ecole des hautes etudes en sciences sociales, Paris, May 28, 2004. Thanks to Professor Holquist for permission to cite his paper.
[5] Brussels Declaration, Art 41. Oxford Code of 1881, Arts 6, 41; Hall, A Treatise on International Law, 1884, at 444.
[6] See generally the sources cited in Bhuta, Antinomies of Transformative Occupation, 16 EJIL (2005) 721, at 726 (notes 26-30).
[7] Holquist, above n 4, 17.

new standard for compliance with the laws of war. In September 1877, the Institute for International Law issued a finding that praised Russian observance of the laws and customs of war and condemned Ottoman violations.[8] But in one crucial respect, Russia rejected the application of the Brussels' Declaration. In its occupation of Bulgaria after the retreat of Ottoman forces, Russia departed from the fundamental conservationist imperative of occupation law and engaged in a transformation of the existing legal and administrative structures. The rationale for this non-observance of occupation law derived, in Russia's view, from the object of the war: rather than advance Russian self-interest, the war aimed at the liberation of Bulgarians from the antiquated and despotic constitutional order of the Ottomans. Occupation law's requirement that the occupier restore and preserve order and "la vie publique" did not apply because the territory was "in a state of anarchy under Turkish rule and, in any case, lacked any properly constituted civic organs."[9] In short, in Russian eyes there was no proper public order and life to preserve. Rather, the liberationist objective of the war obliged the Russians to ensure for the population "those sacred rights, without which the peaceful and proper development of your civic life is inconceivable." The occupation therefore sought to establish "independent national administration in Bulgaria, founded on the principles of self-government and satisfying the spirit and needs of the people summoned to their new life."[10]

Holquist notes that the reforms enacted by the tsarist occupation regime in Bulgaria paralleled those that Alexander II and his bureaucrats had been pursuing at home, but which had lost momentum by 1877. Bulgaria was thus a "laboratory" for these civic reforms, implemented by reformist bureaucrats in the newly established "civilian affairs" branch of the army.[11] Feodor de Martens, the leading Russian proponent of the laws of war and a central participant in the 1874 Brussels Conference, condoned the Russian departure from this aspect of the Brussels Declaration as consistent with the noble aims of the war,[12] – although he conceded that the "Russian government knew more about Ceylon than it did about the existing administration of Bulgaria and the wishes of its inhabitants."[13]

The Russian explication of the rationale for its transformative project in Bulgaria finds a not-so-faint echo in contemporary developments. Whether framed in terms "nation-building,"[14] "neo-trusteeship,"[15] "jus post-bellum"[16] or "transformative occupation,"[17] there has been renewed interest in deriving a legal framework governing fundamental political change under various forms of foreign territorial administration.[18]

---

[8] Ibid.
[9] Holquist, above n 4, 21.
[10] Proclamation of Tsar Alexander II to the Bulgarians, translated and cited in Holquist, above n 4, 18.
[11] Holquist, above n 4, 18.
[12] Feodor de Martens, cited in Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (2003) p. 215. Graber notes that the Russian actions were "approved by many observers." Doris Graber, *The Development of the Law of Belligerent Occupation, 1863-1914* (1949) at 258, note 1.
[13] Holquist, above n 4, 21.
[14] E.g., Feldman.
[15] Fearon and Laitin.
[16] Stahn EJIL 2006.
[17] Scheffer 2003; Roberts 2006.
[18] Dann and al-Ali 2006.

Despite a variety of ad hoc developments (mostly through the Security Council),[19] the idea of constitutional transformation under the territorial administration of a foreign power presently remains in deep tension with the cardinal principles of the post-Second World War international legal *nomos*: non-intervention (and a concomitant acceptance of a plurality of acceptable forms of political legitimation), sovereign equality, and self-determination *qua* decolonization and non-alien domination.

I have previously argued that the law of belligerent occupation, with its prohibition on constitutional change in the occupied territory at the hands of the occupying power, can be understood as crystallizing in the aftermath of the French revolutionary and Napoleonic wars, as part of the re-founding of the intra-European land order.[20] The Vienna settlement of 1815 repudiated the French revolutionary claim that the universalization of popular sovereignty (the planting of "the tree of liberty") was a principle of international order that transcended all others. Against this substantive conception of international legitimacy, the post-1815 order consecrated – among European states, at least – an order in which plural forms of political order[21] could co-exist and in which the revolutionary transformation of one state's constitutional order by another was restrained by the legalized hegemony of the Great Powers.[22] In the aftermath of decolonization, the current international order has effectively universalized this aspect of the 1815 *nomos* through the concepts of sovereign equality and non-intervention, both of which imply that the international order permits the coexistence of a considerable plurality of forms of political legitimation – although the *conduct* of governments within polities is subject to certain universal norms such as human rights law and international criminal law.

The proposition that international law and the law of belligerent occupation can and should be adapted to promote not just constitutional transformation, but a *particular vision* of domestic constitutional order, anticipates a return to a radically more substantive concept of international order. This vision goes further than capacious and somewhat malleable notions such as "democracy," "political participation" and "development" to a highly specific conception of the good polity and economy: "revolutionary changes in [the] economy (including a leap into robust capitalism), rigorous implementation of international human rights standards, a new constitution and

---

[19] It is not accurate to classify all forms of foreign territorial administration involving the presence of armed forces as "belligerent occupation". That is, there are critical legal and *political* differences between, for example, Cambodia, East Timor and Kosovo on the one hand, and Afghanistan and Iraq on the other. To lump all these cases together in an undifferentiated concept such as the "de facto law of occupation" ignores the fact that not all "nation-building" enterprises are belligerent occupations and not all belligerent occupations involve "nation-building." This overly-general concept of occupation simply begs the question of *whether* a legal imprimatur should be given to constitutional transformational projects except on a case-by-case basis, by disregarding the differences in legal form (and underlying this, the differing constellation of political factors) that characterize various territorial administrations. For example of this error, see in particular Grant Harris, "The Era of Multilateral Occupation" 24 Berkeley Journal of International Law (2006).

[20] Bhuta, Antinomies of Transformative Occupation.

[21] Such as absolutism, liberal parliamentarism and enlightened authoritarianism.

[22] M. Broers, *Europe After Napoleon: Revolution, Reaction and Romanticism, 1814-1848* (1996) 11; Gerry Simpson, *Great Powers and Outlaw States*.

judiciary ….”[23] A justification for promoting this vision of domestic order is the decidedly *sociological* claim that the creation of governments based on “popular sovereignty held by individuals instead of states or elites”[24] are most likely to “remove the causes of violence”[25] that may have brought about the territorial administration. As Bain observes in his history of the concept of trusteeship, such justifications have a strong affinity with the rationales for the maintenance of dependent territories during the colonial epoch:

> A society that is paralyzed by disorder or falls into a state of unconscionable tyranny must be instructed in becoming a good society … This project entails nothing less than reconstructing public life, radically if necessary, so that it is consistent with the highest standards of internationally recognized human rights, adheres to democratic principles of governance, and results in the creation of a market-based economy … It is difficult to see how this arrangement differs substantially from Lugard’s view that political development in British Africa should allow the greatest possible measure of liberty and self-development, ‘subject to the laws and policy of the [British colonial] administration.’[26]

But the idea of instituting this vision of the good constitutional order is also claimed to be a means of *realizing* another fundamental principle of the contemporary international order: self-determination.[27] Thus, Roberts contends that occupying powers can justify certain policies as “the best way to meet certain goals and principles enshrined in human rights law, *including the right to self-determination*.”[28] Roberts maintains that “of all the parts 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 … reflecting as it does the sense that democracy and self-determination … constitute not only an important part of the human rights package, but also an acceptable means of hastening the end of an occupation.”[29] Political theorist Jean Cohen expresses far more skepticism about the risk of expanding the legislative authority of an occupying power “in name of democratic regime change” or human rights promoting reforms,[30] but also seeks to find a place for the law of self-determination as a *regulative* principle curbing the authority of the would-be transformative occupant. She argues that the conservationist principle of occupation law must be read in light of self-determination to ensure the “internal sovereignty of the people, which … cannot be confiscated by or regulated by outsiders.”[31] Her call is for a project of legal codification of a jus post-bellum that would

---

[23] Scheffer 2003, p.849. For an even more strident version, see Henry H. Perritt Jr, “Structures and Standards of Political Trusteeship” 8 UCLA J. Intl. L. and F. Aff. 385 (2003).
[24] Stahn 936. It is worth noting in passing that even the most advanced “actually existing” capitalist democracies do not conform to the notion that “popular sovereignty” is held by individuals rather than elites: see Dahl, *Polyarchy*; Zolo, *Democracy and Complexity*; Schumpeter, *Capitalism, Socialism and Democracy*.
[25] Stahn 2006, 941.
[26] William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (2003) 162 (footnote omitted). For an account of British justifications for the extension of the empire to India, and the role played by the specter of scandal and disorder, see Nicholas Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (2006).
[27] See Stahn 2006 p. 941.
[28] Roberts 2006, p. 620 (emphasis added).
[29] *Ibid* 621.
[30] Jean Cohen, “The Role of International Law in Post-Conflict Constitution-making: Towards a Jus-Post Bellum for ‘Interim Occupations’”, forthcoming, *New York Law School Journal of Human Rights*.
[31] Ibid.

provide a set of rules and procedures governing the relationship between occupier or administrator and the population of a territory, in order to ensure that constitutional change is indeed a product of the internal sovereignty of the people. The source of this set of legal rules is unclear in Cohen's proposal, but the implication is that the rules would derive from the principle of self-determination.

Roberts' and Cohen's positions are different in critical respects, but both place a version of "self-determination" at the center of an attempt to reconcile "transformative occupation" (or similar projects) with the cardinal principles of international order. For Roberts, an occupant or administrator's program to institute a political order involving free elections and "multiparty democracy" appears to *constitute* a means of realizing self-determination. For Cohen, self-determination must regulate the process by which the population of the territory design and institute their political order, with as little involvement of the occupant or administrator as possible and certainly no prescription of constitutional substance. Uniting both of these uses of self-determination is the idea that its content involves *popular sovereignty* as the legitimating principle of domestic political order.

Can a project of constitutional transformation under occupation or administration be consistent with, or even a means of realizing self-determination? Can the international law of self-determination provide determinate legal rules to regulate the role of a foreign occupant in the creation of a new constitutional order, and can it impose any real restraints on the factual power of the occupant to promote its own vision of the good constitutional order? The first part of this paper seeks to answer these questions by undertaking an analysis of the relationship between the law of occupation and the law of self-determination. The paper suggests that although the law of self-determination has as a normative presupposition a notion of popular sovereignty, it presently contains almost no determinate rules outside the decolonization context as to how to determine the "will of the people" in the creation of a new domestic political order. As such, it is difficult to envisage how self-determination as an international legal principle could be the basis for rules that restrain what is effectively a plenary power exercised by a would-be transformative occupant in managing the process of transforming the constitutional order of a state.

The second part of the paper asks more fundamentally whether a set of rules or principles governing the creation of a new constitutional order under occupation or administration is even *possible or desirable*. I suggest that, in order to answer the question of the proper role of international law in regulating constitutional transformation under occupation or internationally supervised state-building, we must first re-examine the relationship between "state and constitution", and between "state-making" and "constitution-making." This inquiry will in turn shed light upon whether the nature of "state-making and constitution-making" is something can be usefully regulated by legal rules, and in addition, whether *international law* should be the vehicle for the prescription of such rules for *this kind* of activity. Hence, as part of answering the question, "should foreign-led constitutional transformation be subjected to legal rules," I also try to answer two related questions: what do we *do* when we make a constitution in these circumstances and who is the proper *agent* (be they individuals or collectivities) of constitution-making, and; to the extent that foreign actors are involved in this, is it desirable for international law to develop norms regulating their behaviour. "Desirability"

is considered from two points of view: the desirability of such rules from the point of view of the success or failure of producing a new state-and-constitutional order (i.e. will the rules help or hinder?), and; the desirability from the point of view of the normative structure of international law – are there costs involved for the nature of international law as "inter-public law",[32] if we formulate international law rules that prescribe particular modes and methods of political legitimation? Hence, part of what is at stake in all of this is the future "geology"[33] of international law and the kinds of political values it should (or should not) embrace.

Part I: Self-determination and Popular Sovereignty

The idea of "the sovereignty of the people" as a principle of domestic order first develops real political and polemical potency in England's 17th century power struggles between Crown and Parliament.[34] Morgan reminds us that the principle of popular sovereignty established the *fiction*, not the reality, of the people as the sole basis for the legitimacy of a form of government: popular sovereignty remained, "like the fictions that preceded it, a way of reconciling the many to the government of a few."[35] Moreover, the history of the use of the concept during the English revolutions of the 17th century demonstrated that "popular sovereignty did not necessarily dictate one form of government rather than another … The sovereignty of the people offered no obstacle to the restoration of the king."[36]

But like all powerful political fictions, popular sovereignty developed a life and logic of its own. France's 1789 Revolution first actualized the modern concept of constitution[37] as a document of superior normativity that establishes the legal rules for political government.[38] The legitimacy of this document derived from its status as the means of instituting the purported sovereign will of the people. In the formulation of the most incisive theorist of the revolution's founding moment, Abbe Sieyès,[39] the constitution's authority flows from "the nation's" singular entitlement to determine the laws by which it governs itself. This formulation endows the nation with "active, immediate sovereignty"[40] and an "inalienable and unitary common will" that existed prior to all constituted institutions. Indeed, the nation was "part of a natural order, prior to all history."[41] As Baker observes, Sieyès construction of the nation is fictional in as much as it inverts the historical reality of the relationship between the nation and the absolutist state: "the nation, created in the course of centuries by the persistent efforts of the

---

[32] I will return to the notion of international law as "inter-public" law in Part II, below.
[33] Weiler, The Geology of International Law, 2004.
[34] Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988).
[35] *Ibid* 90
[36] *Ibid* 81-2.
[37] Arato, "The Externally Imposed Revolution and its Destruction of the Iraqi State", manuscript, 2007. My thanks to Professor Arato for providing me with a copy of his manuscript. By contrast, the pre-18th century concept emphasized an empirical order of existence of an entity, its arrangement, its mode of being, or disposition, as in the constitution of the human body: Keith Baker, "Constitution" in Furet and Ozouf, eds, A Critical Dictionary of the French Revolution (1989) 481.
[38] Schmitt, *Verfassungslehre*, Chapter 6.
[39] Sieyes, What is the Third Estate?
[40] Keith Baker, "Sovereignty" in Furet and Ozouf, eds, *A Critical Dictionary of the French Revolution*, 850.
[41] Ibid.

monarchical state, now became metaphysically prior to it."[42] Schmitt similarly notes that "on the European continent, these fundamental ideas of political unity and national determination arose as the result of the political determination of the absolute monarchy".[43] Nevertheless, the idea that the people – presupposed as a politically existing entity and conscious of their political unity – are the bearers of the *pouvoir constituent* emerged as "the political dogma of the entire subsequent period".[44]

The French revolutionaries quickly extended the logic of national determination beyond the French nation. The universalizing logic of the ideas that nations are natural, not historical, orders and that only popular sovereignty can be the basis for true liberty meant that the revolutionaries saw their principles "as relevant not only to the French nation, but also to humanity as a whole."[45] The revolutionary conception of international order that flowed from these domestic principles was of an international family of sovereign *peoples*, rather than a society of existing states.[46] Implicit in this normative logic is also the idea of the *nation*-state, in which the territory of a state corresponds to the (pre-existing and ahistorical) national peoples that inhabit it. Thus, the idea of national self-determination in French revolutionary thinking, and its construction of "the nation" as *pouvoir constituent*, lay at "the intersection of domestic and international politics and is in fact *constitutive* of the boundary between them. In the French Revolutionary model, domestic constitutive principles were a matter of international concern."[47]

Although the Vienna settlement effectively banished the revolutionist conception of international legitimacy from the *jus publicum Europaeum*, the idea that the "nation" *qua* collective will of the population constitutes the foundation for the legitimacy of domestic political order was developing as a political "metaconcept."[48] The reaction's efforts to mobilize armed popular resistance to the Napoleonic armies rested on an invocation of "nation-ness" and the undesirability of foreign rule,[49] and allowed for the implication that "popular will rather than dynastic right was the basis of sovereignty."[50] As in the English Civil War, the fiction of the "people's will" was invoked *both* by revolutionaries and restorationists, to justify their particular form of rule.[51]

It was in this 19th century European context of competing and contradictory principles of political legitimation that the legal institution of *occupation bellica*

---

[42] Ibid.
[43] Schmitt, VF, Chapter 6.
[44] Ibid.
[45] Keitner 2007, p.89.
[46] P. Schroeder, *The Transformation of European Politics, 1763-1848* (1994) 72.
[47] Keitner, p.88.
[48] Koselleck, "On the Anthropological and Semantic Structure of Bildung" and "Three *bürgerliche* Worlds? Preliminary Theoretical-Historical Remarks on the Comparative Semantics of Civil Society in Germany, England, and France" in *The Practice of Conceptual History: Timing History, Spacing Concepts* (2002), chh 11-12.
[49] W. Langsam, *The Napoleonic Wars and German Nationalism in Austria* (1930). See also Schmitt, *Theory of the Partisan*.
[50] Laven and Riall, "Restoration Government and the Legacy of Napoleon" in Laven and Riall, eds, *Napoleon's Legacy: Problems of Government in Restoration Europe* (2000) 6.
[51] See Morgan, Chapter 3. Keitner notes, "The French Revolutionaries … succeeded in popularizing the ideal of self-determination in international political discourse, both through their own rhetoric and practice, and through reactions against it." (118).

emerged.[52] Its rule against the exercise of sovereign rights by the occupying power implies that sovereignty continues to reside with the departed government of the territory, unless the territory is subsequently ceded by peace treaty or the sovereign is completely defeated and no allies continue fight on its behalf (*debellatio*). The conservationist principle of occupation law entailed no particular commitment to the idea that the population of the territory was the repository of sovereignty. Rather, by consecrating the legitimacy of the pre-occupation *status quo*, the principle was equally amenable to parliamentary, absolutist or authoritarian forms of government. Thus, at the time of their emergence as, respectively, legal and political concepts, belligerent occupation and national self-determination had no necessary relation to each other: the former was a legal institution, while the latter was one of a variety of contested concepts of domestic political legitimacy.

Self-determination reemerges as a potential principle of international order with the final collapse of the 1815 settlement and in the aftermath of the first "total war" of the 20th century. Wilsonian self-determination,[53] with its contradictory impulses, illustrated the tensions between pluralist and substantivist trajectories in the notion of self-determination as an *international legal* principle. Wilson's use of the term oscillated between a notion of government based on the consent of the governed (by which he seemed to mean *liberal* constitutional democracy or tutelary democracy for colonized peoples),[54] consent of the population to territorial change or changes of sovereignty over them,[55] and the principle that territory should follow "nationality".[56] The application of the principle in the inter-war period was equally uneven,[57] with its status as a legal rule famously rejected by the Aaland Islands Committees.[58] Where it was invoked, it was as a principle governing territorial divisions of populations and the distribution of competences to govern them, rather than as a demand that newly formed states adopt democratic forms of government.[59]

External Self-Determination and Popular Sovereignty

When the "self-determination of peoples" was finally enshrined in the United Nations Charter as a directive principle of the post-Second World War legal order, it

---

[52] See Von Glahn; Lauterpacht/Oppenheim; Graber.

[53] Pomerance notes that the popularization of the term self-determination was the consequence of the platform of another revolution, the Bolshevik one. Wilson's espousal of the principle was "reactive to both Bolshevik initiatives and war time exigencies". Pomerance, "The United States and Self-Determination: Perspectives on the Wilsonian Conception" 70 Am J Int L. 1 (1976), 2. Cassese points out that the Bolshevik idea of self-determination was a revolutionary principle in the service of a substantive outcome: the achievement of socialism. For Lenin, self-determination of colonial territories would also catalyze the social forces necessary to advance social revolution: Cassese, *Self-Determination of Peoples* (1995) p.20-1.

[54] Pomerance, 15 n. 75, 17, 19. Pomerance notes that "Wilson's prewar thought on self-government was thus a vague amalgam of what may be termed 'internal self-determination' (the freedom to choose one's own form of government), universal democracy and the tutelage of primitive peoples toward ultimate self-rule." (17).

[55] Ibid 18, 20.

[56] Cassese, *Self-Determination* (1995) 20.

[57] Pomerance, 20-27; Anthony Whelan, "Wilsonian Self-Determination and the Versailles Settlement" 43 ICLQ 99 (1994).

[58] Aaland Islands Question (1921).

[59] Cassese, 27.

remained undefined. Cassese records that the preparatory work indicate that the "Wilsonian dream of representative governments for all was not contemplated."[60] Rather, the notion of "self-government" associated with self-determination in the debates was non-foreign rule or non-foreign domination. In its initial phase (1945 to 1973), the evolution of self-determination as a legal principle of the international order shared a close conceptual kinship with the principles of sovereign equality and non-intervention, and tended to reinforce and reproduce a plurality of principles of political legitimation.

The post-war United Nations practice established self-determination as the right of non-self-governing peoples and the populations of dependent territories to a free choice as to their political status. That is, the right of the population of colonial territories to a choice as to independence, free association with their metropolitan power, or integration.[61] The "people" entitled to self-determination in these circumstances constituted the entire population of the territory,[62] the borders of which remained unaltered by virtue of the principle of *uti posseditis juris*. The method of determining the "genuine will of the people" was straightforward: a plebiscitary choice between independence and some other status, or some form of commission of inquiry under UN auspices.[63] The outcome of the free choice was, more often than not, statehood, at which point the principle of self-determination is "represented by the rule against intervention in the internal affairs of that state and in particular in the choice of *form* of government of the state."[64]

In this "external" form of self-determination, embodied in the practice of decolonization, "the will of the people" relevant to international legal rules pertains only to the political status of the territorial entity to which the people belong.[65] "Popular sovereignty" is a presupposition of external self-determination, but only in a thin procedural manifestation: the yes or no choice of a plebiscite concerning the question of the *international status* of the polity, rather than its constitutional order. Once the choice is made, and if the choice is statehood, self-determination prescribes an injunctive rule *against* external interference in the domestic organization of political order.[66] The principle of non-intervention speaks of a state's *choice* of a "political, economic, social and cultural system, and the formulation of foreign policy"[67] but prescribes nothing

---

[60] Ibid 40.
[61] GA Res 1514; Crawford, *Creation of States* (2006)
[62] Julie Ringelheim, "Considerations on the International Reactions to the 1999 Kosovo Crisis", *Revue Belge de Droit Internationale* (1999/2) 475, 491; Jean-Francois Gareau, "Shouting at the Wall: Self-determination and the Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory", 18 *Leiden Journal of International Law* 489 (2005) at 509.
[63] A. Rigo Sureda, *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* (1973) 303; Cassese, 76-8, observing that "only in a few cases did the UN fail to organize such plebiscites."
[64] Crawford, *Creation of States* (2006) 128 (emphasis mine).
[65] Jean Salmon, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?" in C Tomuschat, ed, *Modern Law of Self-Determination* (1993) 253, 257-8.
[66] Simma et al, eds, *The Charter of the United Nations: A Commentary* (2002) p.56; Friendly Relations Declaration, The principle of equal rights and self-determination of peoples: "The relevant paragraph reads: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."
[67] *Nicaragua*, para. 205.

concerning the means and methods by which these choices are made. One could read into the word "choice" a residual element of the "will of the people," but the phrase would have no determinate *legal* content. And as noted above, the *political* content of the "will of the people" is highly flexible.

A straightforward extension of the concept of external self-determination is that it is violated by military occupation or other forms of "alien domination," except where the use of force was justified under Article 51 of the UN Charter *and* the occupation is restricted to the time period and extent necessary to repel aggression.[68] To the extent that external self-determination is a right of those peoples to be free from "alien domination, subjugation and exploitation,"[69] this would include freedom from military occupation "as the least controversial category."[70]

Internal Self-Determination and Popular Sovereignty

A. Contrastive Definition

The "internal" aspect of self-determination remains far less clear in international law and practice.[71] The most common scenario occasioning discussion of internal self-determination involves the situation of an ethnic, racial, linguistic or national group within an existing state that is a denied a certain respect for its situation.[72] The denial might range from discrimination and systematic exclusion from political life on the basis of race or ethnic group, to systematic persecution through violations of basic rights to life, liberty and bodily integrity.[73]

The international law of self-determination seems to countenance three possibilities as a response to such a situation.[74] First, where the excluded group is a racial group and constitutes a substantial part or even a majority of the population of the state, "self-determination" as formulated in the "safeguard clause" of the Friendly Relations Declaration[75] may require such changes in the political form of government as necessary to ensure that the government "represents" the population of the territory without discrimination on the basis of race, creed or color.[76] Clearly formulated with the apartheid regimes in mind,[77] the realization of the right to self-determination in this scenario would seem to entail the *removal* of formally discriminatory laws and

---

[68] Cassese, p.55, 90-99; Gross, Michaeli and Ben Naftali (2005); Quebec Secession Reference, paras 143-4.
[69] FRD, The principle of equal rights and self-determination of peoples (b).
[70] Cassese, 91.
[71] Crawford, "The Right to Self-Determination in International Law: Its Development and Future" in Alston, ed, *The Law of Peoples*, p.10.
[72] Simma et al, 60; Nowak, ICCPR Commentary (2005 ed.) p.
[73] See for example the discussion in Sup Ct Canada, Quebec Reference, para 138
[74] It is in this context that the problem of defining the "self-determination unit" (that is, the "people" who are the beneficiaries of the right) is usually the most vexing. Much ink has been spilt over this issue, but it is not necessary for the purposes of this paper's argument to delve into it.
[75] Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (1970). The clause reads:
"Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."
[76] Friendly Relations Declaration; Crawford, *Creation of States* (2006), p.118.
[77] Cassese, p.124

institutions which disenfranchise the racial group and impede its access to national institutions. The "safeguard clause" of the Friendly Relations Declaration thus implies that systematic discrimination against a (majority) racial group along the lines of apartheid constitutes an *absence* of self-determination.

Second, a definable sub-state group might gain international recognition of its demand for a special political status within a state,[78] where this status is linked to the resolution of a conflict which has become of concern to surrounding states or the international community more broadly. Thus, as Ringelheim concludes in her carefully documented review of international responses to the status of Kosovo between 1996 to 2000, there is little support among states for a *right* to autonomy for internal ethnic groups.[79] However, a negotiated autonomy regime may be linked to a framework of conflict resolution required by the Security Council or regional international organizations in their efforts to restore international peace and security.[80]

Third, a sub-state group that successfully and effectively secedes from the state might receive recognition of its newly-formed state by the international community. Despite a deep-seated reluctance to accord any "right" of secession, a sub-state group which is totally excluded from the political system and suffers systematic and egregious human rights violations at the hands of state authorities, with no prospect of effective remedies, could be accepted as having an entitlement to form its own state as a last resort.[81]

Each of these dimensions of internal self-determination, based on the "oppressed sub-state group" scenario, is essentially *contrastive*. That is, their determinacy as legal rules derives from being able to establish the *absence* or *negation* of a state of affairs (discrimination and denial of equal participation on the basis of race, systematic denial of basic human rights and so forth). As such, they provide almost no prescriptive rules for the domestic constitutional order of a territory as a whole – indeed, "internal" self-determination does not even appear to establish a *right* to some form of autonomy for a sub-state group. At best, the Friendly Relations Declaration requires that racial groups have equal rights to participate in national governmental processes.[82] Cassese's review of the state of the law concerning "internal self-determination" leads him to conclude, rightly in my view, that it contains little or no positive guidance as to *how* the principle of "internal self-determination" might be realized or the *options* that might be available to

---

[78] Cassese, pp. 99-107.

[79] Ringelheim, p. 510, citing a rejection by the "vast majority of states" on the Third Committee of the General Assembly, of a Lichtenstein proposal to guarantee autonomy for sub-state communities through the concept of self-determination.

[80] Ibid 525-8. Ringelheim points out that "international reactions towards Kosovo demonstrate that so long as the situation does not threaten regional stability, states will remain reluctant to support a special status for an ethnic group in another state, even if members of that group are victims of discrimination and human rights violations." (at 542).

[81] Crawford 2006, 141 (discussing Bangladesh); Ringelheim, p.497; Gareau, p.507; Quebec Secession Reference, para. 138, 143-4. Aaland Islands Commission of Rapporteurs, observing that secession may be a remedy of last resort for an oppressed minority where the state lacks either the will or power to enact and apply just and effective guarantees.

[82] Cassese, 114, 124. Crawford 2006: "According to this formula, a state whose government represents the whole people of a territory without discrimination of any kind – on the basis of equality and without discrimination on the basis of race, creed or color – complies with the principle of self-determination in respect of all its people and is entitled to the protection of its territorial integrity." (118).

the "oppressed population" said to benefit from the principle.[83] This seems to reinforce my argument that while internal self-determination clearly forms part of the wider principle of self-determination in international law, its evolution by reference to particular historical cases (such as the South African apartheid regime) leaves it largely indeterminate as a source of rules for the design of a constitutional order or the means and manner of instituting "popular sovereignty." At best, it can be said that the principle *rules out* certain things, such as systematic and explicit racial discrimination in the structures of government.

B. Teleological Interpretation

A more institutionally prescriptive notion of internal self-determination emerges from one might call the "teleological" reading of the right. This reading, which is based on Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), revives that aspect of "Wilsonian" self-determination which emphasized the "consent of the governed" as the content of the norm. As noted above, Wilson's use of the "consent of the governed" seemed to imply a liberal constitutional model of the American kind – some kind of pluralist liberal democracy or polyarchy. This interpretation of self-determination reemerges in the international debate as part of the Cold War ideological contestation over the relative virtue of the two political and economic systems in confrontation: against the success of the Soviet and emergent Third World bloc in promoting self-determination as decolonization (and, *sub silentio*, social revolution), the Western bloc emphasized that the principle entailed "legitimate, lively dissent and testing at the ballot box with frequent regularity."[84] Self-determination *qua* liberal democracy was thus initially a polemical counter-concept to self-determination *qua* decolonization and "third worldism". But the argument also reflected the several normative possibilities inherent in self-determination.

Common Article 1 of the two Covenants states that "All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[85] The "teleological" reading of Article 1 treats it as a "summation" of the rights to civil and political freedom contained in other parts of the ICCPR, such as the right to freedom of expression (Article 19) and the right to political participation (Article 25). Thus, Cassese contends that Article 1 can be read as a "manifestation of the totality" of rights embodied in the ICCPR,[86] which require that people "choose legislators and political leaders, free from

---

[83] Cassese, p. 124.

[84] US Delegate to the 3rd Committee of the GA, 25 December 1972, cited in Cassese, p.46; see also statement of the West German delegate to the GA, 1978: "The right of self-determination was indivisible from the right of the individual to take part in the conduct of public affairs … The exercise of the right to self-determination required the democratic process which, in turn, was inseparable from the full exercise of human rights as the right to freedom of thought." (cited in Allan Rosas, "Internal Self-Determination" in Christian Tomuschat, ed, *Modern Law of Self-Determination* (1993) p.239.

[85] Art 1(1).

[86] Cassese 53. Similarly, Crawford summarizes this interpretation of internal self-determination as follows: "If you regard self-determination as essentially a summary of other rights, then a key right to self-determination is the right to participate democratically in the political system to which you belong, and to participate in discussions as to its future. On this view, self-determination is a continuing right, the

manipulation and undue influence." In Cassese's treatment, this implies a pluralist liberal democracy with competitive elections.[87] The *normative* logic of this argument is very attractive, emphasizing as it does a strong reading of the "popular sovereigntist" content of the right to self-determination, and construing the right as one of continuous, participatory self-government and societal autonomy. However, the contention that this politico-philosophical logic is replicated in the *international legal content* of the principle is less persuasive.

Article 1 refers a people's right to freely determine their political *status*. "Political status" is a notion that encompasses several possibilities: free choice of a political *system* (populist democracy, liberal democracy, plebiscitary dictatorship); free choice of "rulers," which could mean a regime *or* a government[88] (electing Democrats over Republicans, or choosing the Chinese Communist Party as the enduring representative of the peoples' will); or a free choice of government within the context of an already-established political regime. A people's right to choose their political status does not of itself imply liberal pluralist democracy,[89] unless one confines the meaning of "status" to a free choice of *government*.

Similarly, the right to political participation contained in Article 25 of the ICCPR "does not distinguish among such political systems as liberal democracy, democratic socialism, corporatism or communism."[90] Indeed, the drafting history of the right reflects the concern by states on *both* sides of the Cold War ideological divide to ensure that their own system of political order was not "in instant violation of Article 25."[91] The resulting formulations in the treaty text are, and were intended to be, compatible with a variety of electoral regimes and theories of political participation.[92] Perhaps the highest one can put it is that Article 1 and the political rights contained in the body of the ICCPR require *some* notion of the *consent of the governed* as essential to the creation and maintenance of a domestic political system under international law.[93] Some concept of popular

---

collective expression of the individual rights of the members of each political society." Crawford, "The Right to Self-Determination in International Law: Its Development and Future", p.25.

[87] See also Allan Rosas, "Internal Self-Determination" in C Tomuschat, ed, *Modern Law of Self-Determination* (1993), p.225-251: "Article 1 … expresses a collective right which is not subject to the right of individual complaint under the First Optional Protocol of the Civil and Political Covenant. But as all human rights, it is of a continuing character and is not extinguished by the fact that the people has once been allowed to have its say. The people should be allowed to determine continuously its agreement with the system of governance." (248).

[88] Here I adopt Andrew Arato's analytical distinction between regime and government: a regime is the institutional structure of the state and government. A government refers to the functional branches of political power and the persons who control them. See Arato, "The Externally Imposed Revolution and its Destruction of the Iraqi State".

[89] Salmon, p.279-80.

[90] Henry Steiner, 1988, p.87.

[91] Steiner, 93.

[92] Nowak, 2005, p.570.

[93] In a series of observations in the 2006 edition of his *Creation of States in International Law*, Crawford demonstrates the relative thinness of the notion of consent implied in self-determination. Thus, he states at that "in its positive form, [self-determination] does not require a democratically organized government but rather a system of government instituted with the approval of the majority of the people concerned." At 333, he concludes that a people's right to self-determination cannot be "circumvented" by granting independence to an "unrepresentative minority." But at the same time, self-determination "does not necessarily imply the establishment of a democracy on the principle of one vote, one value … The

sovereignty thus unites Articles 1 and 25,[94] but the content of the concept is not really determinate.[95]

The Human Rights Committee's practice has not embraced the strong teleological reading of Article 1 as a *summa* of political rights in the ICCPR. The Committee accepts the connection between Article 1 and Article 25, but notes that "the rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the [right to self-determination], peoples … enjoy the right to *choose the form* of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs."[96] In its Concluding Observations on State Party Reports since 1991, the Committee has, with one exception, not associated the exercise of rights under Article 25 with Article 1.[97] In that concluding observation, regarding the Republic of Congo, the Committee expressed its concern that a postponement of general elections for a new government and of a referendum on a new constitution would deprive Congolese citizens of their rights under articles 1 and 25.[98] Interestingly, the context of this concluding observation was the aftermath of a civil war and the ratification of a new constitution draft was part of a mediated peace process. The Committee's brief remarks indicate that, at minimum, it considers the right to self-determination to be *relevant* to the process of creating a new constitutional order. By the same token, the right would appear to be satisfied by the relatively thin procedural obligation to ensure a referendum on the new constitutional text, and general elections, in accordance with principles of universal suffrage. Hence, the *legal content* of popular sovereignty implied here is similar to that implied by the plebiscitary practice of external self-determination: a yes or no choice concerning a draft constitutional text; the rule appears to have little to say about the *process of generating* the text itself – a process which entails the *constituting* of the constituent-power.

---

administering authority has a measure of discretion in determining the persons in the territory to whom the grant will be made." The limit of this discretion appears to be that the government to which the authority hands power can "fairly be said to be representatives of the people."

[94] Thus Nowak contends that states based on absolutist monarchical systems, a "Führerprinzip" or similar autocratic structure would violate Article 25(a). Nowak, p.570.

[95] Nowak observes: "[T]he substance of many of the obligations [contained in Article 25], particularly with regard to positive obligations to ensure political rights, is quite relative, and often only in the nature of an "obligation of conduct" or a procedural guarantee. This has to do with the fact that there is only general agreement in the world as to what is in substance meant by democracy." (590).

Similarly, General Assembly Resolutions concerned with "Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections" (GA Res 45/150 of 18 December 1990, adopted 129-8-9, and GA Res 46/137 of 17 December 1991, adopted 134-4-13) stress that determining the will of the people requires periodic and genuine elections, but also underline that "there is no single political system or electoral method that is equally suited to all nations and their people" and that enhancing the effectiveness of elections "should not call into question each State's sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states."

[96] HRC, GC 25, para 2 (emphasis mine).

[97] It is noteworthy, however, that the Committee's observations between 1991 and 2007 have consistently "welcomed" the creation of "democratic institutions" or "progress towards democracy" and have consistently expressed "concern" over government action that impedes pluralism of political parties. [list of committee reports reviewed, here]

[98] CCPR/C/79/Add.2, 27/03/2000, para 20.

Conclusion

The foregoing discussion suggests the conclusion that the international law of self-determination does imply "popular sovereignty," but in a highly under-determined manner. Such positive rules and established practices as do exist embody a thin, procedural manifestation of the "will of the people" – a manifestation that can only express itself in a yes or no choice over a pre-agreed (usually binary) set of possibilities, such as independence or continued association with the colonial state, or adoption or rejection of a draft constitutional text.[99] In its external form, self-determination concerns not the internal constitution of political order, but the political status of a territory and population and the international distribution of competences to govern the population. In its internal mode, self-determination is largely a contrastive definition which provides relatively little guidance as to the form of an internal political order and, most relevant to this argument, *no* guidance as to the process of creating that order. Notwithstanding some evidence that "democracy" has become something of an ill-defined *primus inter pares* of principles of political legitimation, it cannot be said that rules of self-determination contain concrete prescriptions about the form of political system obligated by international law.

One reason for the lack of determinacy of self-determination as popular sovereignty may be its peculiar, janus-faced nature as an international legal principle: on the one hand, its external aspect is cognate with the principle of non-intervention and a sovereign, territorially-based entitlement to non-interference in the choice of political and social system – a legacy of the universalization of the 19th century legal order.[100] On the other hand, its internal aspect reiterates the idea of a population's choice of political system and thus appears to encode a specific principle of political legitimacy – popular sovereignty. The tension implied in uniting these two sets of potentially contradictory ideas under one legal principle tends to diminish the concreteness of the norm itself.

Part II: Belligerent Occupation, Self-Determination and Constitutional Change

The relationship between belligerent occupation and self-determination is at once simple and complex. In its external aspect, self-determination reinforces the principles of territorial integrity, non-intervention, and non-acquisition of territory by force.[101] A people whose state or territory is subject to military occupation is under a form of "alien domination,"[102] and the people are thus the beneficiaries of a right to self-determination. A military occupation that is not a result of a defensive use of force within the meaning of Article 51 of the UN Charter, or continues longer than necessary to repel an act of aggression, violates the population's right to self-determination and may even be regarded as an "illegal" occupation.[103] Thus, in this simple scenario, the right of self-determination is realized when the foreign military forces withdraw and the

---

[99] Suski, in his excellent review of the concept of referendum, points out that such referenda can be classified as "passive and pre-regulated": Markku Suski, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (1993), p.32

[100] Footnote here to Keene (2002), and his observation that there always existed two contradictory principles of order: equality and hierarchy.

[101] See generally Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (2006) pp.101-128.

[102] Friendly Relations Declaration.

[103] See the discussion in Gross, Ben-Naftali and Michaeli (2005).

internationally-recognized sovereign of the territory returns.[104] There does not seem to be any requirement that the sovereign be democratically legitimated by a particular standard in order to resume its control over the territory, provided that it continues to benefit from wide international acceptance.[105] Thus, there was no question that, upon the termination of the Iraqi occupation of Kuwait, the Emir of Kuwait would resume his position as head of state and the pre-existing constitutional order would revive.[106]

Beyond this scenario, however, the relationship between belligerent occupation and self-determination becomes unclear. A foreign invasion that inaugurates a long-running armed conflict between foreign-backed proxies and armed resistance groups[107] might produce such a lengthy abeyance of internationally-recognized sovereign authority that the withdrawal of the foreign forces cannot be equated with the realization of self-determination. Yet, as we have seen, the principles of self-determination provide little guidance on what should happen at that moment beyond an indeterminate and highly flexible notion that the new order should benefit from the consent of the people or "representatives" of the people.

In fact, the political reality of such a scenario will mostly likely be that the withdrawal of foreign troops will occur in parallel to a mediated or arbitrated agreement between the major armed groups, leading to a political settlement followed by elections.[108] But to speak of such arbitrated processes as self-determination is only to highlight the flexibility of the notion of popular sovereignty underlying the legal principle. In the "arbitrated elections" model, self-determination is deemed realized by "free and fair elections" of a new government, after an interim period of "representative" government composed of representatives of the key armed groups and factions. The "representativeness" of the interim government is not the representation characteristic of democratic legitimation,[109] but of the effective sociological legitimacy (namely, the capacity to mobilize a portion of the populace and deploy fighters) that the armed groups have by virtue of their military success as partisans.[110] Their incumbency in turn gives them considerable influence and leverage in subsequent electoral contests. The people's "choice" in such contexts is thus a choice among leaders bequeathed by the legacy of armed conflict, rather than any notional "market" in policies and political values.

---

[104] Cassese, p. 131.

[105] Thus, Crawford concludes that "neither [the cases of] Sierra Leone nor Haiti support the proposition that an *established* undemocratic government is not entitled to rely on the principle of non-intervention or that unilateral force can be lawfully used against it with a view to its displacement." (2001, p.46).

[106] Salmon, p.274

[107] Such as occurred in Afghanistan and Cambodia.

[108] Salmon, p.273; Cassese, p.148; Roth, p. 357-389. See GA Res 43/20, 44/15, 45/12 (Afghanistan) and GA Res 44/22 and 48/18 (Cambodia).

[109] As Pitkin points out, the concept of "representation" is not limited to democratically-legitimated government. Representation may be absorptive (the king represents the people by acting on their behalf and in their best interests) or substitutive (based on mandate): see Hanna Pitkin, *The Concept of Representation* (1967).

[110] For this reason, I cannot agree with Antonio Cassese's description of these processes as amounting to an "internal democratic process of free choice" by which "the whole people freely [chooses] its institutions and rulers…" (Cassese p.148). For an example of this kind of sociological legitimacy, see Tania Hohe, "Totem Polls," International Peacekeeping 2002; see also recent report by ICG on Iraqi elections, January 27, 2009.

Nevertheless, one implication of the "arbitrated elections" model of self-determination after belligerent occupation – at least as practiced in Afghanistan and Cambodia – is that a prerequisite for the process is the departure of the invading foreign troops (which may be replaced by a peacekeeping force agreed upon by all parties to the settlement).[111] Hence, it may be concluded that, in the context of a foreign invasion, the complete withdrawal of the invading foreign forces is a precondition for the "realization" of self-determination if not a sufficient condition.

Maintaining the scenario in which no internationally-accepted sovereign can resume authority over the territory, what if the invading foreign forces, as belligerent occupiers, claim the authority to facilitate or assist the territorial population's self-determination? Article 47 of the Fourth Geneva Convention prevents an occupier from asserting the non-applicability of the Convention on the grounds that the occupier has annexed the territory, or because its presence has been "agreed to" by local authorities that the occupier itself has created.[112] As the commentary observes, this article does not of itself prohibit the creation of new institutions, but is a protective measure to ensure that an occupied population is not deprived of its protections under occupation law by virtue of agreements between those institutions (or the former government) and the belligerent occupier.[113] Thus, the claim that Article 47 implies respect for the underlying population's right to self-determination and sovereignty, seems to go to far. Article 47 is not a clear prohibition on creating a proxy government or new political institutions; it rather limits the legal competence of these new institutions to terminate the state of occupation. As the Commentary points out, the principal source of the rule against fundamental legislative and institutional change is not Article 47 but Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Conventions. Do either of these provisions permit the occupier to engage in political transformation in the name of facilitating or promoting the occupied population's right to self-determination?

Article 43 of the Hague Regulations requires a belligerent occupant to respect, "unless absolutely prevented," the laws in force in the occupied territory. This obligation is paired with the obligation to "re-establish and insure," as far as possible, public order (*la vie publique* in the French text) and safety. The legislative competence of the occupying power was expanded somewhat by Article 64 of the Fourth Geneva Convention, which acts as *lex specialis* to the more general obligation in Article 43 of the Hague Regulations.[114] Article 64 authorizes the occupying power to alter the laws in force in order to fulfill its other duties under the Fourth Geneva Convention, to maintain

---

[111] It is noted in passing that this scenario is no longer a belligerent occupation but an *occupatio pacifica*, in which the various domestic groups recognized as having a say in the sovereignty of the country "consent" to the presence of a peacekeeping force, and the mandate for political change is provided through the negotiated concurrence of these parties and an international organization or concert of powers. Thus, in my view, situations such as Cambodia are qualitatively different to situations such as Iraq, where the belligerent occupier itself inaugurates and supervises the constitutional change.

[112] GC IV, Art 47.

[113] Commentary to GC IV, Art 47.

[114] Dinstein, "Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding", Fall 2004, Harvard Program on Conflict Resolution, p.5; Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" (2005) 16 *European Journal of International Law* 661, 669. The Commentary to this Article of the Fourth Convention emphasizes that Article 64 is only a more detailed enumeration of the kinds of circumstances that are envisaged by the Hague Regulation's prohibition on the legislative change "unless absolutely prevented." (at p.337)

the orderly government of the territory, or to ensure the security of the occupying power. There is some acceptance that Article 64 provides the occupying power with leeway to amend or repeal existing laws in order to ensure that it does not violate its own human rights and humanitarian law obligations (by, for example, enforcing a law that permits torture or inhuman treatment, or which mandates racial discrimination).[115] But this does not permit the occupier to transform the entire political and legal order in the name of implementing human rights standards; at most, a case could be made that the occupier is entitled to abolish an existing legal order because the legal order as a whole so embodies the political principles of the defeated enemy, that its de jure continuity represents a threat to the security of the occupier.[116] Some doubt whether the occupier could really go so far,[117] but those who accept this possibility acknowledge that, even if the occupier could retrench the entire legal order, it is not authorized to devise the means of *replacing* it.[118] The occupier might legislate to ensure the right to be free from torture, but cannot legislate to "implement" the population's right to self-determination through the creation of a new order: "[this right] is too closely linked to the wishes of the people *and the ways in which this right can be satisfied are too manifold*. Some would say that the very fact of occupation is incompatible with the right to self-determination. The best way to respect it for any occupying power is not to legislate but to withdraw…"[119]

Thus, when it comes to how an occupier might establish a new political order after the destruction of an old one, the law of military occupation is silent, in what might be characterized as an instance of material *non-liquet*.[120] For the most part, the law of occupation deals with such a possibility by simply prohibiting it, rather than through rules that regulate but also thereby authorize constitutional transformation. The rationale behind this preference for prohibitive rather than regulative rules in this area is relatively easy to discern: irrespective of an occupying power's proclaimed benevolent intentions, in the end the application of law of occupation relies on the auto-interpretation of the occupier, who is very unlikely to be subject to review by some higher instance with compulsory authority. The occupier's interpretation of its powers is not subject to real challenge or revision while the occupation lasts. Thus, any expansion of the occupier's legislative competence may greatly expand the real, effective, scope of the occupier's discretionary powers, and simultaneously expand the range of intermediate steps that the occupier might take in order realize its expanded aims. If the transformation of a territory's political order – or even the *facilitation* of such transformation[121] – is brought

---

[115] Sassoli, p.676. Fox, Humanitarian occupation, 245-6, citing US army field manual, NZ Army field manual and Canadian field manual.

[116] The Nazi legal order, with its norm of fuhrerprinzip and racial hierarchies, is often cited as an example of such an order.

[117] Dinstein, p.10.

[118] Sassoli, 677.

[119] Sassoli, 677.

[120] A material non-liquet refers to a situation where the legal rules and principles are unclear or insufficient in relation to a concrete case or when the law is silent on a certain matter. In classical international law, this was not regarded as necessarily anomalous or undesirable – it might have reflected an underlying political reality in which non-rule governed modes of resolving a conflict or situation was to be preferred: see Julius Stone, "Non-Liquet and the Function of Law in the International Community," 1959, BYBIL, 124-161.

[121] In such circumstances, the power to determine the procedure for the establishment of a new political order and institutions could easily be wielded to decisively shape the forms of that order itself, as arguably happened in Iraq.

within the range of objectives authorized by international law, the distinction between the limited and unlimited legislative authority of the occupier will be very difficult to maintain, and the line between sovereign and non-sovereign powers will also blur.

The practice of the Security Council in its authorization of various "state-building" missions has not filled this gap in the law, because it has not purported to override or amend – even implicitly – the law of belligerent occupation.[122] Rather, UN state-building has proceeded along a parallel track of case-by-case authorization through Security Council resolutions, predicated on the (substantive or formal) consent of parties to the conflict in the territory.[123] As such, UN missions are not belligerent occupations within the meaning of the laws of war – even though in contexts such as the Congo (1960-64), Somalia (1992-95), Haiti (1994-2000, 2004-), East Timor (1999-2002, 2006) and Kosovo (1999-) some phases of the operations were in substance very similar to belligerent occupations (foreign military presence, combat operations, and a lesser or greater degree of direct involvement in governmental activities).[124] Hence, while it may be argued that this practice has given rise to a nascent *policy idea* of "humanitarian occupation"[125] outside of the pre-existing legal institution of *occupatio bellica*, it cannot be said that the *law* of belligerent occupation has somehow changed to include means for constitutional transformation in the name of instituting liberal democracy or some other desired political order. Moreover, the Security Council's resolutions in each of these cases incorporate different modalities of establishing new political regimes, depending on the "facts on the ground" as encountered by the relevant mission. For example, the Resolution (1999) establishing the United Nations Transitional Administration in East Timor – one of the most comprehensive state-building missions, endowed with plenary executive, legislative and judicial authority – simply authorizes the mission to create "capacity for self-government" and to "consult and cooperate" with the East Timorese people "with a view to the development of local democratic institutions."[126] By contrast, Resolution 745 (1992) creating the United Nations Transitional Authority in Cambodia decided that it was "vital" that general elections be held in Cambodia by May 1993, reflecting the underlying agreement by the warring parties to a procedure that involved election of a Constituent Assembly responsible for drafting a new Constitution.[127] In the interim, UNTAC would administer the state administration created during the rule of the Vietnamese-installed Hun Sen.[128]

Part III: What is a State and How Do We Make One? State-Building, Democratic Legitimacy and the Problems of Political Order

---

[122] For an argument concerning Security Council Resolution 1483, see Fox, 2005, GJIL and Robert Kolb, "Occupation in Iraq and the Powers of the UN Security Council," International Review of the Red Cross, Volume 90, No. 869, March 2008, pp.29-50.

[123] Fox rightly points out that in certain cases, the notion of "consent" to a UN mission is strained: see Fox, 2008.

[124] See Roberts, Transformative Occupation, p.604.

[125] See, eg, Fox 2008.

[126] SC Res 1272, paras 3 and 8. The means of constitution-making ultimately chosen by the UN's Special Representative was to convene a Constituent Assembly, elected by means of proportional representation: see UNTAET Regulation 3/2002.

[127] Lise Howard, UN Peacekeeping in Civil Wars, Cambridge 2008.

[128] Gottesman, 2003.

If the Security Council practice – and associated policy literature produced by the Secretariat – can be said to crystallize something, it is perhaps the idea that "democracy" (largely undefined) is a palliative method for the resolution of the political conflicts underlying the conflicts giving rise to the intervention.[129] The repeated association of "peace" and "democratization" (understood as multiparty elections and formally democratic institutions) in the repertoire of the Security Council has been extrapolated in the Secretariat's policy literature into an equation of "state-building" with "democracy-building," with "peace-building." Building (liberal) democratic institutions is posited as both the means to and *terminus ad quem* of successful state-building after severe internal conflict.[130] The underlying sources of the conflict that precipitated the intervention were diagnosed in terms of "state weakness" or "state-failure," which in turn was understood as flowing from a lack of *democratic* legitimacy on the part of the prior state institutions: "A consensus emerged among Security Council member states and in the Secretariat that democratic institutions could effectively address the causes of civil war."[131] Democratic legitimacy was seen as the form of legitimation most needed for new, "post-conflict" institutions. In the context of Cambodia, Lise Howard notes that "since the UN and most of the interested external parties defined the basic problem causing the war as one of institutional legitimacy, elections were seen to be the best way to install a more legitimate government."[132]

Institutions designed along liberal democratic lines and legitimated through democratic procedures were considered the surest foundations for "cooperative politics" because of their basis in the consent of the population, expressed through electoral mechanisms (election, referenda, etc). Liberal democratic institutions were thus assumed to have a propensity for self-stabilization over time,[133] because their embedded values and procedures required cooperative mediation of different interests – thus preventing a return to conflict by aggrieved parties. Participatory governance will "help warring parties to move their political and economic struggles into an institutional framework where a peaceful settlement process can be engaged …"[134] A contractarian ideal of political order is sometimes invoked, in which state failure is attributed to the state's poor governance (corruption, human rights violations, lack of democratic legitimacy) and the resultant inability of the state to uphold its end of the purported social contract between government and governed. The return of order thus requires a renewal of this "contract" by establishing participatory governance and enhancing inhabitants "ownership" over state institutions – where ownership seems to imply some kind of rationalized, cognitive

---

[129] For further elaboration, see Nehal Bhuta, "Against State-Building", 2008, Constellations, Vol. 13.

[130] See Boutros-Ghali, Agenda for Peace; and Kofi Annan, "No Exit without Strategy: Security Council decision-making and the closure or transition of United Nations Peacekeeping Operations," S/2001/391 (2001) p.2; Cogen and Brabandere, 669.

[131] Fox 2008, p. 46. See further Bhuta, Against State-Building.

[132] Howard, p.138. See also William Maley, "Democracy and Legitimation: Challenges in the Reconstitution of Political Processes in Afghanistan" in Hilary Charlesworth, Brett Bowden and Jeremy Farrall, eds, *The Role of International Law in Rebuilding Societies After Conflict*, 2009, Cambridge UP forthcoming.

[133] Some "realists" concede that these institutions may have to be staffed and or supported by international personnel for some indeterminate period of time before they can take root, but on the assumption that the endogenous characteristics of the institutions will eventually lead them to become stable and effective. An example of this kind of argument is Paris, At War's End.

[134] SG Report 2001. See also Agenda for Democratization, para 17-18.

consent to the political institutions of government, which can be engendered when these institutions act in accordance with good governance norms such as transparency, efficiency, rule-following and due process.[135]

The political theory of contemporary state-building, then, contains several inter-connected (but incompletely articulated) claims. One is that a state order should be conceived in terms of (or sometimes is equated with) formal institutions of governance, authorized and defined by laws (including a fundamental law, such as a constitution). A second is that democratic legitimacy (or, more accurately, that form of legitimacy generated by various electoral procedures) is effective for the purposes of stabilizing new institutions.[136] A concrete state order is expected to *flow from* the effective application of normative principles of a certain kind to the design of that order's institutions. If this is right, then would-be state-builders or transformative occupiers should seek ways to maximize the generation of democratic legitimacy,[137] in particular when overseeing the production of the territory's constitution or basic law. This would strengthen the case for a "jus post-bellum" that binds the transformative occupier to a strategy of maximizing democratic procedures in the selection of institutional design mechanisms. For example, a directly elected constituent assembly could be mandated by international law as the preferred means of creating the body tasked with writing the constitution, on the grounds that it is this body which is most likely to be perceived as "legitimate" and therefore capable of creating a new political order, expressed in the form of the constitution.

The question immediately arises, however: is this an appropriate way to understand how a new political order is founded and stabilized? Is it an appropriate understanding of political order itself? Some of the claims for liberal democratic institutions that are made in the literature on "post-conflict reconstruction" fit Samuel Huntington's description of "Webbism," a tendency to ascribe to a political system qualities which are assumed to be its ultimate goals rather than qualities which actually characterize how it functions.[138] *Successful* and *entrenched* liberal democratic institutions may well mediate or displace social conflict in ways that contain or sublimate violent disorder, but it is difficult to disentangle the direction of causality between institutional stabilization and conflict mediation. Does the institution attain stability and become a venue for "normal" politics because it induces cooperation between powerful social forces, or is it because those forces have established a modus vivendi – for exogenous reasons – that an institution survives and functions at all?[139] Merely designing an institution along liberal democratic lines is no guarantee that it will generate the *political behaviour* characteristics of liberal democratic politics.[140]

What, then, is the relationship between "state" and "institution" and between "constitution-making" and "state-making"? This is in part an empirical question, but it is also a question of political theory: what theoretical vantage point clarifies what we do

---

[135] See Fox, chh 2&5 and Stahn, Introduction and 753-761.

[136] See for example, the claim by D'Aspremont: "[A] government that rests on democratic elections … will enjoy a much stronger internal effectivité." Jean D'Aspremont, "Post-Conflict Administrations as Democracy-Building Instruments" (2008) 9 *Chicago Journal of International Law* 1-16, at 15.

[137] The notion that democratic legitimacy (however defined), "local ownership" and "participation" are essential to state-building has become a *doxa* in this literature.

[138] Huntington, *Political Order in Changing Societies*, p.35.

[139] See Pierson, *Politics in Time*, chh. 4, 5 and 6.

[140] See Przeworski, Do Institutions Matter?, Government and Opposition, 2004.

when we "make" a state? What notions of "legitimacy" are at work? While the state-building literature tends to equate state and constitution, and state and institutions, re-examining the relationships between these phenomena holds out a promise of telling us something about the proper role of legal norms in creating new political orders. In turn, it helps answer the question posed by this paper – should international law prescribe rules for constitutional transformation as part of a *jus post bellum*?

A. Founding New States – An Old Problem in Political Theory

The post-conflict "state-building" literature's conflation of "state-making" and "institution-making" is potentially misleading. Certainly, no state order can exist without institutions; in this sense, Kelsen is right to say that the *concept* of state presupposes a valid legal order authorizing the ruler functioning as an instance of the state.[141] But merely creating institutions through legal enactments cannot amount to a concrete state order. A fundamental characteristic of any existing state order is *effective* power, manifested in the successful capacity to dominate a territory and population, and thereby enforce commands.[142] The authority claimed for this effective power is predicated on a *claim* to legitimacy, but only if the claim is successful (that is, acquiesced in[143]) can effective power translate into stable domination – a state capable of consistently maintaining its power and authority. In the stabilization of a state order, cognitive, voluntaristic "consent" of each and every subject to the claimed authority for the exercise of power is less significant than the empirically general acquiescence of the population in the means by which power is exercised and commands enforced (or permissions granted).[144]

A state is necessarily a normative order, in the sense that the exercise of power is based on a claim to authority articulated through norms deemed valid. But in the last instance, as even Kelsen (despite his efforts to banish the dualism of state and law)[145] accepted, the validity of a state order *qua* legal order depends upon a social-political order[146] that is "by and large efficacious."[147] In a normative sense, the state *qua* legal order derives its validity from the basic norm. Famously, the basic norm is not a law and

---

[141] Kelsen, General Theory, p. 187.

[142] Weber, Economy and Society, Vol 1, pp.30-53; see Poggi, *Forms of Power*, for a re-reading and defence of Weber's notions of power and domination.

[143] Ibid, especially pp. 53-56.

[144] Kelsen, Foundations of Democracy, *Ethics* Vol 66, 1955, p.76; see also Philip Abrams, "Notes on the Difficulty of Studying the State" (1988) 1 *Journal of Historical Sociology* 58-89, at p.68: 'the state can be understood as the device in terms of which subjection is legitimated; and as an ideological thing it can actually be shown to work like that. It presents politically institutionalized power to us in a form that it is at once integrated and isolated and by satisfying both these conditions it creates for our sort of society an acceptable basis for acquiescence. It gives an account of political institutions in terms of cohesion, purpose, independence, common interest and morality without necessarily telling us anything about the actual nature, meaning or functions of political institutions."

[145] General Theory, 187-191. For an intellectual history of the dualism of state and law in German legal theory, see Jo Eric Khushal Murkens, "The Future of *Staatsrecht*: Dominance, Demise or Demystification," (2007) 70 *Modern Law Review* 731-758.

[146] Once again, Kelsen attempts to insist on the identity of law and state as he contends that "the State is a politically organized society *because* it is a community constituted by a coercive order, and this coercive order is the law." (190) But, law as a coercive order requires efficacy, leaving the possibility of a dualism "between the validity and the efficacy of the legal order." (191)

[147] Ibid 120.

is not created in a legal procedure by a law-creating organ. Thus, it is not a constitutional law.[148] Rather, the basic norm is a place-holder for the factual, historical reality by which a political order established itself as simultaneously efficacious *and* legitimate; "validity" and "efficacy" converge on a single point, the basic norm, which has the somewhat magical quality of combining normativity and facticity within itself: it is empirico-transcendental. The basic norm validates the legal order, not because it embodies some higher reason or democratically-authorized consent, but because its content is "determined by the facts through which an order is created and applied, to which the behaviour of the individuals regulated by this order, by and large, conforms."[149] The successful creation of a new state order is thus coextensive with a new basic norm and a new legal order but crucially, the very idea of a new basic norm implies an *efficacious order of supremacy and subordination* – the successful generalization of coercive rules, which become valid norms by virtue of the *success* of those who create the new order:

> It is … irrelevant whether or not this replacement [of the old order] is effected through a violent uprising against those who individuals who so far have been the "legitimate" organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people, or through action from those in government positions. …
> … *If they succeed*, if the old order ceases, and the new order begins to be efficacious … this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed.[150]

The question of *how* or in *what circumstances* a new order of supremacy and subordination emerges and stabilizes itself is of little interest for Kelsen. Because a juristic analysis of the state presupposes the "by and large" successful consolidation of power in the name of the state, it focuses on the immanent logic of the norms through which state power is transmitted and reinforced. But Kelsen's terse account of what is implied by the change of basic norm does point us towards an important insight: that in the liminal period between one order and another, the distinction between coercive power and legitimate authority is blurry. And, that in contexts of radical institutional transformation – such as revolutions or transformative occupation – subordination and legitimation are two sides of the same coin. The problem of all revolutions is the problem that new institutions – however legitimate from some abstract normative standpoint – are "built on quicksand"[151] unless the new claim of political authority is imbricated with effective power; during these times "power-and-authority" is a kind of composite, a sociological datum that fuses facticity (the capacity to coerce, compel or oblige) with validity (the authority to legitimate, rationalize, or normalize). Creating new orders is a precarious and highly uncertain balancing act between the capacity to rule and the vindication of the claim to rule; mere force without authority engenders only expediency and a contingent modus vivendi, but normative claims without the capacity to subordinate become empty (and short-lived) philosophizing.

---

[148] General Theory, p.116.
[149] Ibid 120.
[150] 117-118. (my emphasis).
[151] Hannah Arendt, On Revolution, p.163. See also Claus Offe, "Designing Institutions in East European Transitions" in Robert Goodin, ed, *The Theory of Institutional Design* (Cambridge University Press, 1996) pp. 199-219.

It is this composite of "power-and-authority" that underlies Weber's sociological notion of legitimacy. Custom, convention and habit successfully coordinate and regulate action because they fuse 'is' (this is how we do things here) with 'ought' (this is how we ought to do things). While the philosopher is right to observe that this is a *logical* fallacy, for Weber it is nonetheless a sociological phenomenon: "In consequence of the constant recurrence of a certain pattern of conduct, the idea might arise in the minds of the guarantors of a particular norm, that they are confronted with … a legal obligation requiring enforcement. … Particularly in the field of the internal distribution of power among organs of an institutional order, experience reveals a continuous scale of transitions from norms of conduct guaranteed by mere convention to those which are regarded as binding and guaranteed by law. … It should be clear that, from the point of view of sociology, the transitions from mere usage to convention and from it to law are fluid."[152] There can be no rigid distinction between the validity and lack of validity of a given order;[153] really-existing social orders can engender a belief in their validity by virtue of their capacity to normalize (regularize, reproduce) certain patterns of conduct: "the mere fact of the regular recurrence of certain events somehow confers on them the dignity of oughtness."[154]

Famously, Weber differentiated between different ideal types of legitimate domination (rational, traditional and charismatic), each characterized also by a corresponding pure type of authority (i.e. mode of legitimation) when successful.[155] What all these forms of domination and authority have in common is that, at a higher level of generality, they comprise specific kinds of *sociological* legitimacy that are historically discernable in the real social orders that Weber studied. In other words, the extent to which bureaucratic-rational, as opposed to patrimonial or charismatic (religious or democratic), legitimation succeeds in stabilizing domination is a contingent outcome of the historical circumstance under consideration. Moreover, in any real historical context, actual beliefs in the legitimacy of an order and a population's willingness to acquiesce in

---

[152] Weber, Economy and Society, Vol 1, 323-325, .

[153] Ibid, 32.

[154] Ibid 326, see also 327: "The transition from the merely unreflective formation of a habit to the conscious acceptance of the maxim that action should be in accordance with a norm is always fluid. The mere statistical regularity of an action leads to the emergence of moral and legal convictions with corresponding contents. The threat of physical and psychological coercion … imposes a certain mode of action and thus produces habituation and thereby regularity of action."

[155] Because the notion of "ideal type" is used so promiscuously these days, I reiterate Weber's understanding and his cautions as to its use: An ideal type is one means of reconstructing the subjective meaning of social action, through the formulation of a "pure type (ideal type) of a common phenomenon. The concepts and 'laws' of pure economic theory are examples of this kind of ideal type … In all cases [of social action], rational or irrational, sociological analysis both abstracts from reality and at the same time helps us understand it, in that it shows with what degree of approximation a concrete historical phenomenon can be subsumed under one or more of these concepts. For example, the same historical phenomenon may be in one aspect feudal, in another patrimonial, in another bureaucratic, and in still another charismatic. In order to give precise meaning to these terms, it is necessary for the sociologist to formulate pure ideal types of the corresponding forms of action which in each case involve the highest possible degree of logical integration by virtue of their complete adequacy on the level of meaning. But precisely because this is true, it is probably seldom if ever that a real phenomenon can be found which corresponds exactly to one of these ideally constructed pure types." Economy and Society, Vol 1, p. 9, 20-21.

it, will be composed of different "types" of authority acting together.[156] For example, Weber observes that "in the case of 'legal authority,' it is never purely legal. The belief in legality comes to be established and habitual, and this means it is partly traditional … Furthermore, it has a charismatic element, at least in the negative sense that persistent and striking lack of success [in enforcement] may be sufficient to ruin any government, to undermine its prestige, and to prepare the way for charismatic revolution."[157]

Thus, while normative and contractarian approaches to the legitimacy of a political order understand it as deriving from coherence with normative principles that are rationally generalizable and (in principle) agreed to by the population subjected to that order, the historical-sociological approach understands it as a product of a social and historically-determined context, articulated through historical forms, and not graspable outside a "given societal and motivational constellation and without an understanding of its historicity."[158] This is not to deny that states do, and historically always have, framed the exercise of public power through normative frameworks that appear rationally justifiable. However, the sociological lens would lead us to be doubtful that such rational (and rationalizing) theoretical constructions amount to the *foundation* for a state's capacity to authorize domination. Rather, these constructions *represent* the state's successful achievement of legitimate domination, and describe the state's own account of its political legitimacy. Of course, to the extent that the state describes itself in generalizable terms, it provides an account of its functioning that might be tested against its actual functioning, and thus a vernacular for the contestation of the exercise of political power.[159] Normative frameworks of political philosophy, then, would seem to be of most significance *once a state order* is successfully established. The differentiation of power and legitimacy or facticity and validity *presupposes* a more-or-less consolidated order in which the political realm has achieved a degree of autonomy.

But where the old body politic has collapsed or been retrenched, the problem of legitimacy ceases to be clearly differentiated from power. Arendt makes this point in her reflections on revolution, where she observes that revolutions are tasked "to establish a new authority, unaided by custom and precedent and the halo of time immemorial, [and so] they could not but throw into relief with unparalleled sharpness the old problem … of the source of and of the origin of power … which would bestow legitimacy upon the powers that be."[160] An example of the power-and-authority needed to erect new foundations was, in Arendt's view, to be found in the Roman understanding of the coincidence of *authority*, *tradition* and *religion* necessary for the successful founding a new political order. Inherent in the Roman conception of foundation is the notion that "all decisive political changes were *reconstitutions* – reforms of old institutions and the retrievance of the original act of foundation." The Roman dictator charged with re-founding order was not a "fabricator" of order out of human *materiel*; he was rather an

---

[156] Ruling organizations which belong only to one or another of these pure types are "very exceptional": Economy and Society, p.262-3.
[157] Ibid 263.
[158] Christopher Thornhill, "Towards a historical sociology of constitutional legitimacy," *Theory and Society*, Vol. 37, 2008, 161-197, 168.
[159] In the formation of western European states, law became one such vernacular, as the idea of a generalizable "public" law was itself engaged as a means of authorizing political power across a territory (e.g., the Prince as *legibus solutus*). See, for example, Unger, *Law in Modern Society*.
[160] Arendt, On Revolution ,160.

augmenter[161] of existing sources of authority and power, even as some innovation is introduced to re-stabilize an order that had fallen out of balance.[162]

Who or what would be capable of generating or engendering the power-and-authority necessary for such a task? This is a question that Machiavelli, Schmitt and Arendt all address, and while each posits the answer through a different figure or political phenomenon (the Prince, the constituent power, the power of joint action), what is interesting for our purposes here is that each theorist elucidates distinct but complementary understandings of the challenge of founding new orders.

For Machiavelli, the founding of new orders poses profound epistemological and practical challenges: it is necessary to understand an opaque and shifting matrix of forces, modes of legitimation and practices of social power, and to also somehow repeatedly intervene in this uncertain terrain in order to aggregate power and authority, so as to stabilize an order of supremacy and subordination.[163] The figure who might be able to successfully establish a new order is the new Prince, but his predicament is very difficult.[164] For Machiavelli, all states are ultimately founded on a primordial act of force, but the established ruler (*principe naturale*) can rely on custom, habit and tradition to maintain the acquiescence of his subjects[165] – provided, of course, that he does not act recklessly and make too many internal enemies or does not suffer from adverse *fortuna*.[166] The *principe naturale* benefits from the fact that the people are used to obeying one of his lineage, so that their inherited responses "operate to legitimate everything he does, and he must step very far out of line before this conditioned structure ceases to work in his favour."[167] Implicit in Machiavelli's contrast of the condition of the *principe naturale* with the *principe nuovo* is the understanding that "use, tradition and second nature" are essential modes of creating order. The predicament of the new prince is that he cannot immediately rely upon the historically-determined "second nature" of the people's acquiescence in the old order. Instead, he needs extraordinary talent, virtue, energy and astuteness to be able to recognize the exigencies of the situation, and to act appropriately to respond to them. This might involve the use of various tactics and strategies, such as forming alliances and co-opting or eliminating enemies, as well as the judicious use of symbols, myths and ideology to impress upon subjects the rightness of one's rule.[168] But Machiavelli's continuous use of conditional and qualified maxims of

---

[161] As Arendt points out, the latin root of authority is *augere*, to augment or increase: 201.
[162] Ibid, 202.
[163] See *Discourses* (1996 Chicago edition), pp. 29, 35, 46, 51, 61, 70, 182. "For government is nothing other than holding subjects in such a mode that they cannot or ought not offend you. This is done by either securing oneself against them altogether, taking from them every way of hurting you, or by benefiting them in such a mode that it would not be reasonable for them to desire to change fortune." (182).
[164] The Prince, ch. 6, para. 23-4
[165] Beiner, "Machiavelli's new prince ad the Primordial Moment of Acquisition," (2008) 36 *Political Theory* 66-92; JGA Pocock, "Custom and Grace, Form and Matter: An Approach to Machiavelli's Concept of Innovation," in M. Fleisher, ed, *Machiavelli and the Nature of Political Thought*, 1972, Athenaeum.
[166] Pocock sums up the Machiavellian concept of fortuna: "The name of a deforming force which reduced everything to disorder in time; an important source of her power was the inability of human reason to reduce temporal existence to rationality…": Pocock, ibid, p.161.
[167] Ibid, 168.
[168] See for example Machiavelli's discussion of the uses of religion: "And truly there was never an orderer of extraordinary laws for a people who did not have recourse to God, because otherwise they would not

prudent action reminds us that founding new orders is inherently precarious and uncertain. Success is "aleatory," in Althusser's phrase,[169] an unpredictable combination of *fortuna* and *virtu*. The reader of the Prince, addressed as the potential political actor faced with the task of making a state,[170] is constantly denied the possibility of stepping outside the matrix of forces, partial perspectives and contradictory tendencies; there is no safe moral or theoretical vantage point from which to obtain a synoptic view of the terrain, no intrinsic principle or strategy of mastery insulated from change of fortune, and no escape from the contradictory need to at once maintain allies, marginalize enemies and win the loyalty of the people.

Historicity, contingency and the relationship between power and authority are also themes evident in Schmitt's writing. The specter haunting Schmitt's conceptions of state, constitution and the political is that of incipient civil war and state dissolution, and for this reason his inquiries into the question of who or what might be capable of producing a new order are relevant to our concerns here. A central question in Schmitt's constitutional writings is how to create and stabilize a new state order, in the wake of the collapse of the old order and in the face of powerful contending social forces, each seeking to impose their own comprehensive vision of the state. Schmitt's distinction between constitution and constitutional law[171] directs us to the idea that an effective legal order leans on or presupposes a concrete state order, a relationship of supremacy and subordination that is capable of stabilizing institutions, enforcing law and preserving the unity of the polity against centrifugal political powers.[172] This state order exists as an emanation or expression of "the concrete, collective condition of political unity and social order of a particular state."[173] A state can never emerge from a "contract," but only through the production of a "political unity," organized around some representative figure,[174] entity or body. The idea of "political unity" in Schmitt is sometimes read as necessarily *volkish* or implying ethnic homogeneity, but a careful reading of his Constitutional Theory[175] indicates that for Schmitt, the production of "political unity" is a contingent, historically-determined process and can be engendered by a variety of actors and entities, depending on the epoch under consideration. Thus, he comments that "in most European states, political unity was the work of princely absolutism,"[176] a laborious and centuries long exercise of "overcoming of the legitimacy of the (feudal and estate-based) status quo at that time."[177] The age of democratic revolution wrought a substitution for who and what could potentially embody political unity in European states

---

have been accepted. For a prudent individual knows many goods that do not have in themselves evident reasons with which one can persuade others." (*Discourses,* p.35).

[169] Althusser, *Machiavelli and Us*.

[170] Ibid, last chapter; Breiner, p. 86.

[171] See Constitutional Theory, chapter 2.

[172] See Schmitt, Constitutional Theory, chapters 1, 6.

[173] Chapter 1.

[174] On the concept of representation in Schmitt, see Constitutional Theory, ch 16: and Duncan Kelly, "Carl Schmitt's Political Theory of Representation," 2004, *Journal of the History of Ideas*, 113-135.

[175] See also the Crisis of Parliamentary Democracy, where Schmitt makes it clear that "homogeneity" can be entirely constructed, not natural.

[176] Ch 6.

[177] Ibid.

during the 19th century, replacing the monarch with the people as the "bearer of constitution-making power."[178]

But, like Machiavelli's new prince, the people as constitution-making power could no longer rely on the foundations of tradition, religion and custom upon which the absolutist princes rested their claims of power, authority and representation.[179] Instead, in order to found a state and give it a constitution (in Schmitt's sense), the people must be a "politically existing entity … brought to political consciousness and capable of acting."[180] The people as constitution-making power entails a *capacity* to make an existential, authoritative decision about the state form; that is, about the "concrete type of supremacy and subordination, because there is in social reality no order without supremacy and subordination."[181] *One way* in which the people attain this capacity is when they recognize themselves as a politically-existing entity such as "the nation,"[182] *and* some set of persons or body achieves the real, effective status as the *representation* of that political unity: "in every state, there must be persons who can say *L'etat c'est nous.*"[183] The attainment of this unity *and* some entity or person's real, effective ability to claim to represent this unity, are the contingent outcomes of historical and social forces; a "nation" cannot be brought into existence by an electoral procedure, and no "normative event, process or procedure" can ensure "representation" in the sense that Schmitt means here.[184] Rather, as he observes in the case of France, the political reality of "the nation" as invoked against the King by the revolutionaries of 1789 "arose as a result of the political determination of the absolute monarchy"… "Historically, [France's political existence as a nation] first became possible after France had become a state unity through the absolute monarchy…"[185] The National Assembly's claim to represent the people was only partially effective, with King contesting its authority to give a new constitution to France: "the issue who represented the nation by the issuance of the constitution, the National Assembly or the King, was a clear question of power …"[186]

For Schmitt, then, the bearer of the constituent power is the actor or entity whose "power or authority" *is capable* of making the "concrete, comprehensive decision over the type and form of its own political existence." That is, the constituent power is that power or authority amounting to a capacity to create and maintain a concrete, collective condition of political unity and social order, an order of supremacy and subordination. In his footnote to the phrase "power or authority", Schmitt comments that "[c]oncepts such as sovereignty and majesty by necessity always correspond only to effective power. Authority, but contrast, denotes a profile that rests essentially on the element of *continuity* and refers to tradition and duration. Both power and authority are effective and

---

[178] Constitutional Theory, Ch 6.
[179] See ch 22, The theory of Monarchy.
[180] Ch 6.4.
[181] Chapter 6.
[182] See especially the discussion in chapter 8.
[183] In Schmitt's theory, political unity can be achieved and effective only through either real, substantive identity among the people of a polity (the principle of identity), or when the unity of the people is represented by actual men (the principle of representation). The state form in Schmitt's sense arises as the realization of these principles: chapter 16.
[184] Chapter 16.
[185] Chapter 8.
[186] Chapter 8. See also Baker, "Fixing the Constitution" in Inventing the French Revolution.

vital in every state combined with one another. … According to Victor Ehrenberg … [authority] denotes something 'ethical social,' a position oddly mixed together from political power and social prestige,' which 'rests on and supplements social validity."[187]

Schmitt's stylized notions of "decision" and "political will" create an impression of instantaneity in the production of political order, a once-and-for-all choice by some kind of mystical collective subject endowed with constituent power. But his elaborations make it clear that who or what holds the power or authority required to exercise the constituent power is an open question: a National Assembly or a Bonaparte might equally successfully create a new political order in the name of the people, if they succeed in establishing their representative character and if the people acquiesce.[188] Exactly how a given person or entity acquires this capacity is a question for history, not constitutional theory.[189] Schmitt's constitutional theory points us towards historical (if highly stylized)[190] types of state order and their corresponding subject of constitution-making power: the king may be the bearer of constitution-making power (in a monarchy), as may be a circle of certain families or a minority (in an aristocracy or oligopoly).[191] The potential of the people as constitution-making power rests on the historical emergence of the people as category *capable of* – viz. bearing the necessary power and authority – to produce a new order. But this emergence also brings with specific crises of order-maintenance and order-production, flowing from the dissolution of the sinews of custom, tradition and habit that stabilized earlier orders; constitution-making in the epoch of the people as constitution-making power is precarious and the sources of power-and-authority fragile.[192] How do we know who is capable of making good on their claim, "*L'etat c'est nous*"? Only an understanding of the concrete situation in that territory and society – the balance of forces, the modes of social power and sociological legitimacy, the means of forming political will – can help us to answer that question. One implication of this reading of Schmitt is that successful creation of a new order requires the identification of the loci and sources of effective social power in any particular time and place.

Arendt also recognized the difficulties of creating political order where the people have replaced the king as constituent power. In *On Revolution*, she contrasts the

---

[187] Note 1 to Chapter 8.

[188] It is important to recall that for Schmitt "the people" can act at most through acclamation (chapter 8) but can also "decide" through "tacit consent" to an accomplished fact: see discussion of Bonapartist plebiscites, chapter 8, and chapter 9 ("the tacit consent of the people is also always possible and easy to perceive.")

[189] The historical contingency of the production of political unity is apparent in Schmitt's account of the relationship between state, representation and political unity: "There is, therefore, no state without representation because there is no state without state form, and the presentation of the political unity is an intrinsic part of the form … Presentation, however, need not be [a] production of the political unity. It is possible that the political unity is first brought about through the presentation itself." (241).

[190] As many commentators have pointed out, Schmitt's stylizations are not innocent. He was a committed antagonist of liberal parliamentarism, and it emerges from his theory as wholly incapable of meeting the demands of creating and maintaining political order after the end of the Kaiserreich. There could, of course, be no return to monarchical principles, but Schmitt aspires to turn a democratic state form into one capable of embodying the political unity needed to relativize all other social and political conflicts. The path to this strong political order lay, it seems, through a strong presidentialism that could successfully claim to represent the political unity of the people.

[191] 129-130.

[192] Schmitt's 3rd definition of Constitution in chapter 1 is suggestive of this:

American revolution's success in establishing a stable order with the French revolution's predicament that "none of [the revolution's] constituent assemblies could command enough authority to lay down the law of the land."[193] The historical consequence of absolutism in France, according to Arendt, was to bequeath operative concepts of power and authority shaped in the image of the absolutist king: the king's will "was source of both law and power – thus, the law was made powerful and power made legitimate."[194] When "the nation" was substituted for the king as the constituent power, "the old understanding of power and authority … almost automatically led the new experience of power to be channeled into concepts which had just been vacated."[195] But absolutism had "clouded the risk of founding modern orders" because it had been able to rely upon the heredity institution of kingship and its foundations in a mix of custom, tradition and religion. This solution was not available to the new constituent power in France, unmasking what Arendt calls "the most elementary predicament of all modern political bodies, their profound instability …"[196] The will of the multitude was a "quicksand" that could stabilize a new order only when "someone was willing to take the burden or the glory of dictatorship upon himself."[197] 1789 leads inexorably to Bonaparte and his plebiscites.

Arendt's diagnosis of the dynamics of order-creation here comes strikingly close to Schmitt's: the people as constituent power must solve the problems of power, authority and representation if they are to succeed in creating a new order. But if both Arendt and Schmitt recognize Bonapartist plebiscitary dictatorship as one possible outcome of this vortex, Arendt clearly regards it as a pathological result, revealing the tragic historically-conditioned risks of modern political forms. In the American revolution, she finds an alternative historical experience that gave rise to the requisite forms of power and authority to consolidate the new order. She notes that the legacy of English monarchical authority in America was readily distinguishable from that of the Bourbons: "[T]he American revolution grew out of a conflict with a limited monarchy … the King had already relinquished *potestas legibus soluta* one hundred years earlier."[198] What this leads to is a very different historical determinacy for the operative concepts of power and authority. Political power was already organized into "authorized political bodies, which were the agents of the state after the Revolution – they seized state power through and on behalf of their districts, countries and townships." Indeed, according to Arendt, the historical experience of the colonists and the influence of the philosophy of "covenanting" among the puritans engendered a distinct reality of power arising through joint action. This power was institutionalized through the constitution of provinces, cities, and towns over 150 years, and these were states-in-waiting, endowed with modes of effective authority and power. While I recognize that Arendt seeks to move beyond the particular experience of the colonists to formulate a more general notion of "power" as a "human attribute," her account in *On Revolution* is so closely tied to the historicity of the American colonists' experience that it seems difficult to posit the possibility of this

[193] On Revolution, p.165.
[194] Ibid, p.156.
[195] 154-5.
[196] 159. See also 183.
[197] 162.
[198] 158.

notion of power as a real, effective force, independent of substantially similar historical trajectory.

The purpose of reviewing these diverse theorists' accounts of foundings is to point to an alternative – and more complex – theory of constituting new political orders than that presupposed by the contemporary practice of "state-building." Despite deep differences in normative vision, Machiavelli, Weber, Kelsen, Schmitt and Arendt can be read as diagnosing certain elements that characterize the situation of founding new orders. A common strand to their diagnoses is the historical determination of the sources and bases of order, and the contingency and diversity of the modes of successful legitimation. Equally, they share an understanding of the inextricable – perhaps even mutually constitutive – connection between effective power and successful legitimation during these founding periods and processes, in which facticity and validity, coercion and consent, are blurred. From this theoretical vantage point, the legitimation provided through democratic or plebiscitary procedures (referenda, assemblies, elections) is only one possible mode of successful legitimation within a given historical situation and territorial space; it will not necessarily be the most significant or relevant one, and may well be marginal to the specific modes of power-and-authority at work.

B. Constitutions and the Problem of Order

"Constitution-making" in such a context entails more than one meaning. One is the drafting and promulgation of a legal document of superior normativity that regulates and facilitates the production, regulation and application of state power. But if it is to be more than a piece of paper, this document also "leans on" or presupposes a material order of social and political power – one that can be manifested in innumerable concrete social forms, practices, loci and legitimacies.[199] Thus, the second meaning of "constitution-making" here is the *coordination* and *augmentation* of these nodes of power-and-authority to be able to produce a (more or less) articulated political order across the territory and population.

Schmitt famously introduced the distinction between constitution and constitutional law, in a way that highlighted the dependence of public law on an underlying, effective, political order (in his distinctive conception, a concrete political unity); a constitutional law that did not somehow represent the substance of this order would fail to be authentically constitutional.[200] Conversely, merely introducing a new constitutional law or transforming an existing basic law will be irrelevant unless it is a result of a transformation in the sources and nature of power, authority and representation in the political life of that state.[201] Thus, "it would be incorrect to claim that through a 'simple majority decision of Parliament,' England could be changed into a soviet republic."[202]

Schmitt's account of how a new political order is founded in the modern epoch takes as its arche the experience of French revolutionary founding, understood as an

---

[199] For a related understanding, see: Stephen M Griffin, "Constituent Power and Constitutional Change in American Constitutionalism," in Neil Walker and Martin Loughlin, eds, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford, 2007, pp.49-66, at 58.
[200] Constitutional Theory, chapter 2, ch. 5.
[201] Ibid ch 10.
[202] Ibid p.146.

existential political choice by the people-qua-constituent power. But the capacity of the people to wield the constituent power – in the sense of being able to enforce and authorize an effective political order – is contingent, and Schmitt tells us little about how an effective order might emerge in the context of other peoples and territories. Nevertheless, his distinction between order-creating power and legal form, and his emphasis on acquiescence rather than "consent," steer us towards a concern to locate the sources of effective power-and-authority as the building blocks for the new order. In this sense, it is a "realist" perspective that is compatible with Russell Hardin's rational-choice inflected arguments about the nature of constitutions.[203] Hardin's constitution is not a "contract" based on consent to justifiable reasons, but an arrangement that coordinates the interests of those groups in society powerful enough to significantly disrupt order. A "constitution" in this sense establishes conventions that make it easier for us to cooperate and coordinate; once it is in place, other kinds of problems may be regulated in the context of a background order that is maintained by sufficient force to make its commands credible.[204]

A political order will successfully stabilize where the constitutional arrangements it guarantees are sufficiently advantageous to sufficiently powerful or politically effective parts of the population, for them to coordinate their interests along those arrangements; politically ineffective groups or parts of the population can be "overrun and ignored" as long as enough of those who are effective acquiesce to the coordination order. In this sense, "might" can "make right,"[205] where recoordinating on a new arrangement implies such conflictual disorder (and a possible failure to recoordinate at all) that the current state of affairs generates *acquiescence* in enough of the population to raise the costs of recoordination even more.[206] In this way, coordination on order moves from mere *modus vivendi* between powerful groups, to a more sustainable self-enforcing set of arrangements – provided, of course, the capacity to enforce the arrangements against politically marginal dissenters exists.[207]

Hardin is not necessarily sanguine about the prospects for successful coordination in any given case. More often than not, coordination orders emerge through unintended consequences and path-dependent historical trajectories. The probability that such an order will be a liberal constitutionalist order seems smaller still. Rational design might play some part in the successful perpetuation of a coordination order along liberal constitutionalist lines, but this will ultimately depend on whether the nature of the (historically and socially-determined) interests of powerful segments of the population are actually amenable to coordination along liberal constitutionalist designs, and in

---

[203] Russell Hardin, *Liberalism, Constitutionalism and Democracy* (Oxford, 1999).
[204] Hardin, ibid, pp.86-90.
[205] Hardin, "Does Might Make Right?" in J Roland Pennock and John Chapman, eds, *Authority Revisited: Nomos XXIX*, NYU Press, 1987, 201-217.
[206] Or as Hardin puts it: "In many contexts, a constitution does not even require majority support, it merely needs lack of sufficient opposition." (Liberalism, 107) Agnes Heller makes a similar point in relation to the meaning of "legitimation": "the relative number of those legitimating a system may be irrelevant if the non-legitimating masses are merely dissatisfied". Agnes Heller, "Phases of Legitimation in Soviet-type societies' in TH Rigby and Ferenc Feher, eds, *Political Legitimation in Communist States* (1982).
[207] Hardin's observation on coercion is quite acute, and one with which Weber would agree: "Sociologically, it is plausible that the response to coercion is dramatically curvilinear, so that the credible threat of coercion is all that is needed, although it might take occasional demonstrations of actual coercion to give credibility to the threat." (309).

addition, whether each segment perceives (or *misperceives*) its interests in a way that makes coordination and acquiescence possible. Hence, in the context of US constitution-making, Hardin observes that "coordination on the US constitution may have required failures of foresight that gave the constitution a chance … Had the conventioneers known what the government would do, they may not have been able to coordinate … Alas, whether we can coordinate is largely a matter of luck."[208]

Hardin's account of constitutions also clarifies the relative place of democratic legitimacy in the production and stabilization of new political orders. If political order arises out of successful coordination among politically effective groups, it is not necessary that "democratic legitimacy" will be the only or even the primary vector of "political effectiveness". Democratic procedures may fail to select those wielding other relevant kinds of social power. Proceduralized "consent" to the election of a constituent assembly may not adequately organize the forms of interest and power necessary to facilitate coordination and acquiescence.[209] Indeed, under conditions of ethnic or sect-based political conflict and mobilization, it may sharpen perceptions of conflicting interests between the relevant groups.[210] (Ironically, one of the structural conditions conducive to successful coordination may well be that bargaining representatives wield strong, monopolistic (non-democratic) power over the groups or factions that they represent). It may be, as Hardin contends, that democracy works best as a decision-method at the margins of deep political conflict but not where there is not already some background of rough coordination on order.[211]

One implication of this kind of account of constitutions and the conditions of their efficacy is that one would expect the mechanisms through which constitutional documents are drafted, and the kinds of "political goods" they embrace, to reflect the interests of politically effective groups and the concrete dilemmas of coordination and conflict faced at the time. To the extent that constitutions do not stand in some relationship to these concerns, they will fail to coordinate effective power. For example, Nathan Brown's study of Arab constitutions and constitution-making finds that Arab constitutions throughout the 19th and 20th centuries display a concern for augmenting state power, often through the organization and institutionalization of state authority. In the 19th century, constitutions principally arose through intra-elite bargains and aimed at re-organizing and rationalizing state power in order to resist imperial penetration. In the twentieth century, constitutions augmented state power and institutionalized nationalist political parties as means of consolidating political control and independence after imperial rule. [212] These constitutions did not encode liberal constitutional goods of limited government or subjective right, but this did not mean that they were merely ideological documents either: "Arab constitutions have never been routinely violated facades or mere pieces of paper unconnected with political reality … Arab regimes generally operate

---

[208] Hardin, 133, 139.
[209] William Maley, "Democracy and Legitimation: Challenges in the Reconstitution of Political Processes in Afghanistan" in H. Charlesworth, B. Bowden and J. Farrall, eds, *The Role of International in Rebuilding Societies After Conflict: Great Expectations* (Cambridge, 2009).
[210] Snyder, *From Voting to Violence*.
[211] Hardin, p. 37.
[212] Brown 2003, part I.

within plausible interpretations of constitutional texts … The question is not whether the constitution will be enforced but whose interpretation of it will be authoritative."[213]

Arab constitutions were not written in order to serve liberal constitutionalist ends, but nevertheless did in some cases become the basis for a *constitutionalist practice* of contesting and restraining state power as a by-product of other conflicts that were channeled through constitutional arrangements.[214] Brown reminds us that even in the context of recent European history (which often serves as the implicit normative model for constitutional forms),[215] the emphasis on intention, design and rationality in constitution-making overlooks the extent to which nineteenth century constitutions were "not abstract attempts to construct government based on reason. They were compromise documents among monarchists, aristocrats, liberals and democrats … they were not expressions of the 'people's will' as much as pacts made among antagonistic political forces or promises made by monarchs to forestall revolution by agreeing to a measure of political participation."[216] Constitutions aimed at preserving or re-making order can *over time* become a real basis for constitutionalist practices, but only if the survive the immediate circumstances of their own creation and "escape from, rather than reflect authors' [empirical] wills."[217]

The problem of coordination between politically effective groups will be most severe where society is divided among groups with strongly conflicting interests or programs. The conflicting interests may track ethnic or religious divisions, or entrenched economic and social interests (as they did in the U.S. Civil War), or some combination of both. Yet it is precisely in these kinds of situations that internationally-supervised or mandated "constitution-making" will occur, where no single group has "won" the conflict.[218] In those circumstances, constitutions are most likely to be "bargains" and least likely to be coherent political visions.[219] The challenge will be to find points over which the constituent groups[220] can successfully coordinate in order to provide a background order for the stabilization of new institutions. Bargaining towards points of coordination is not the same as "deliberation," and need not be an exercise of "public reason." While

---

[213] Brown, 2003, p.91, p.113.

[214] The emergence of constitutionalist practice as by-products of conflicting interests (against a background of existing order) is a dynamic that can also be found in the history of western European states: see Pierson, *Politics in Time*, pp.55-57; Weber, Economy and Society, Volume 1, pp.271-282.

[215] Brown points out that "The traditional, rationalist image of constitutionalism and constitution-writing, though abstract, is based on a specific historical experience (the first triumphs of western constitutionalism in the eighteenth century and the first attempt to write constitutions for sovereign entities at the end of the century. Yet the rationalist image bases itself on an idealized understanding of these historical experiences." (p.97).

[216] Brown 2003, 103.

[217] Ibid 102.

[218] Dann and Al-Ali. See also the Brahimi Report on Peacekeeping Operations, where the authors note that in the 1990s, the UN deployed "where conflict has not resulted in victory for any side. Conflict may be at a stalemate or is halted but unfinished."

[219] Donald Horowitz, "Conciliatory Institutions and Constitutional Processes in Post-Conflict States", (2008) 49 *William and Mary Law Review* 1213-1248, at 1230.

[220] I take this terminology from Carl Friedrich, who expressed skepticism about whether there could ever be a unitary "constituent power" and instead referred to the "constituent group" as "that part of the community wielding the de facto residuary power of changing or replacing an established order by a new constitution." Carl J. Friedrich, *Constitutional Government and Democracy* (Boston: Little, Brown, 1941) pp. 123, 126, p.136.

liberal constitution-making theorists make a virtue of necessity by arguing that groups seeking their own interests will nevertheless feel compelled to frame their claims in "public interest" terms (and so be subjected to the "civilizing force of hypocrisy"),[221] Brown points out that this a highly idealized understanding of how bargaining transpires in real constitution-making processes.[222] Real actors will not be confident in their assessment of other parties' relative strength or even the strength of allies; calculations will be tentative and shift rapidly along with the situation; the distinction between short-term and long-term interest, or between "private" and "public" concern will be hard to maintain with any clarity: "participants view the future through a gauzy veil of confusion rather than a totally opaque veil of ignorance … [M]uch of the bargaining and reasoning that does take place is extremely bad."[223] Constitution-making which occurs simultaneously with making new political orders is less about the "public good" and more about hard bargaining over interests.

For this reason, as Horowitz suggests, it is difficult to meaningfully speak of constitutional "design" under such conditions, and third parties need to be aware of the limits of their assessment of what it is rational for the parties to do from an external point of view: "In some ways, the most dangerous people in a negotiation are third parties, those with only detachment to offer. Anything a third party facilitator can point to in order to induce moderation is probably already discounted in the conflict."[224] One consequence of this caution is a skepticism about overly prescriptive rules or too rigid an insistence on particular norms that should govern the process.[225] A demand that certain political goods be part of any "good" constitution, or the claim that a democratic constitutional process is "necessary" to the "legitimacy" of the end result,[226] may simply be inapt to the particular forms of legitimacy at work between different constituent groups within a population, and dysfunctional to the bargaining problems they confront. To take one example offered by Brown, while publicity and transparency are powerful values *in abstracto*, "publicity may not deliver what is expected … Political leaders speaking in public often seek to appeal to and mobilize their own constituencies far more than they work to persuade opponents. They may seek to do so in ways that avoid alienating others, but just as often they may find that alienating others helps mobilize their own constituency."[227]

An obvious question raised by this account of constitutions and constitution-making is how a *modus vivendi* negotiated by constituent groups becomes entrenched and stabilized. One outcome of a constitution-making process that looks to coordinate mutual advantage among politically effective groups could well be a temporary "peace" among

---

[221] See, eg, Jon Elster, Claus Offe and Ulrich Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press, 1988), p.77

[222] Nathan Brown, "Reason, Interest, Rationality, and Passion in Constitution Drafting", (2008) 6 *Perspectives on Politics*, 675-689.

[223] Ibid p. 681, 683.

[224] Donald Horowitz, "Constitutional Design: An Oxymoron?" in Avi Saji and Yedidia Stern, eds, *Democratic Culture*, Bar Ilan University Press, Ramat-Gan (117-147).

[225] Horowitz, Conciliatory Processes, p.1231-1232.

[226] Such claims are not hypothetical: see Vivien Hart, "Democratic Constitution-making," United States Institute of Peace Special Report, July 2003.

[227] Brown, "Reason, Interest" etc, 679.

warlords which will collapse as soon as the balance of forces shifts.[228] This prospect cannot be ruled out, and underscores the difficulty of any attempt to simultaneously resolve the problem of order *and* establish institutions regulating the exercise of political power. But it is also doubtful whether any one model or set of normative commitments could alleviate those deep difficulties.[229] The regulative horizon of this "realist" idea of order-formation and constitution-making is not the reasoned persuasion of the relevant actors concerning some concept of "public good," but a learning process that engenders political practices which mitigate or displace deep conflicts sufficiently to avert the collapse of order: forming alliances, crafting moderate coalitions, developing cross-cutting constituencies[230] and so forth. The challenge for the realist ideal is to somehow arrive at political mechanisms of moderation which, over time, raise the costs of re-coordination. Under such circumstances, the constitution might become sufficiently "sticky" to emerge as a basis for constitutionalist practice. In this sense, one dictum of the "peace-building" literature is quite right: external actors may have to act forcefully to reinforce a fragile order in the hope that it will become self-enforcing over time. But in contrast to authors such as Paris,[231] the theoretical vantage point elaborated above suggests that there is nothing in the form of institutions per se that will conduce to self-stabilization *unless* they can become focal points for coordination between the relevant constituent groups to a sufficient degree to engender acquiescence among the preponderance of the population. Normality engenders normalization, and maybe the possibilities for greater justice.[232]

Part IV. International Law, Inter-public Law and State-Making: A Common Realism?

I have labeled the theoretical perspective developed in Part III as "realist". This is because it places the problem of order (how to achieve it and maintain it) at the heart of constitution-making and state-making. It is concerned to find ways of assimilating and moderating deep conflict between social forces or groups, rather than aspire to abstract values of justice. It suggests that during times of order-formation after radical disorder, operative concepts of "power" and "authority" or "force" and "legitimacy" are not easily distinguishable, such that one must look to the forms and sources of social power in a given context in order to also identify the forms of legitimacy that can be harnessed. The actors and social forces who have the power to rule over the population (or part of it), and the means of legitimating that rule, are those whose mutual advantage must be coordinated if there is to be a chance at the long-term stabilization of the new constitutional and state order.

---

[228] See Przeworski 1991, p.87.

[229] Horowitz, Conciliatory Institutions, p.1247-8.

[230] As Horowitz catalogues, *specific* electoral mechanisms may be engineered to promote these possibilities as a way of strengthening the new political order over time: Conciliatory Institutions, p.1224-1225.

[231] Paris, At War's End.

[232] On this idea, see Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, Vol. 33, No.2, 113-147, especially pp.116, 133, 145: "If we look at the historical development of conceptions of justice and legitimacy for the nation-state, it appears that sovereignty usually precedes legitimacy. First there is the concentration of power; then, gradually, there grows a demand for consideration of the interests of the governed, and for giving them a greater voice in the exercise of power … The battle for more political and social equality has continued ever since, but it has been possible only because centralized power was kept in existence, so that people could contest the legitimacy of the way it was being used." (145-146).

In his essay on the political theological origins of early American realism in international political thought, Nicolas Guilhot points out that mid-century realism was a "situated response" to the utopianism of inter-war liberalism.[233] Realist thinkers sharply distinguished between individual morality and the necessities of politics in part to underscore their understanding of politics as essentially conflictual and not adequately grasped in terms of absolute standards of good and evil. The aim of politics was a modicum of peace, in order to allow "progress towards *civitas dei*." The battle against the chaos and disorder "knows only limited victories." The realist insistence on the material dimensions of power emphasized both human finitude and the finite nature of the political.[234] I would suggest that these ways of thinking about politics and conflict are familiar to international law,[235] and indeed are a key to understanding its normative and practical possibilities. Benedict Kingsbury has argued that international law is best understood neither as a rationalist "law between states" nor as an incipient cosmopolitan order, but as *inter-public* law.[236] "Inter-public law" emerges from a practice of crafting and preserving law-governed relationships between entities that organize, contain and generate political power. The principles relevant to this form of law cannot be read off axiomatically from moral principles, but neither are they mere summaries of power relations. Rather, the content of these principles reflect the ways and means of crafting relationships between political entities (states, factions, estates, classes) that represent and produce public power.[237] The challenge for inter-public law is to channel, and thus help produce, public power at a higher level of spatial generality. Domestically, public law fulfilled these roles by developing a politically-sensitive method: "The essence of public law is *droit politique*. Public law has many gaps and silences to accommodate the political. In sharp contrast to conceptions of public reason [in deliberative democracy theories] … the tradition of *droit politique* argues that the public reason of public law can not be the moral reason of the community, it can only be political reason of state. The method of public law is prudential, favoring analogical reasoning, casuistry … and creates a type of knowledge that is not easily generalizable. It is the method of the trimmer."[238]

The "gaps and silences" of international law *qua* inter-public law reflects the political problematic that it confronts: conflicting principles of legitimacy in a

---

[233] Guilhot, American Katechon: When Political Theology Became International Relations Theory, Draft, April 9, 2009.

[234] Guilhot, pp.24-26.

[235] See for example Benedict Kingsbury's exploration of the normative foundations of Lassa Oppenheim's positivism, or Martti Koskenniemi's account of G.F Martens. Benedict Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law," (2002) 13 *European Journal of International Law* 401-436, p. 421, 424, 427, 428, 432-33. Martti Koskenniemi, "On International Legal Positivism – Georg Friedrich Von Martens' (1756-1821) Influence on International Law." (June 2005); Hedley Bull, "The Grotian Conception of International Society" in Martin Wight and Herbert Butterfield, eds *Diplomatic Investigations* (Allen Unwin, London, 1966), p.71, 73.

[236] Benedict Kingsbury, The Problem of the Public in International Law, October 10, 2005 [ask BK if there is a published version]

[237] See, for example, Jean Bodin in Stephen Holmes' reading: "The Constitution of Sovereignty in Jean Bodin" in Holmes, *Passion and Constraint* (1995, Chicago U P.)

[238] Kingsbury, The Problem of the Public, p.13 of MS. See also Armin von Bogdandy, "Constitutional Scholarship and Doctrine in Europe: A Historical and Sociological Account." (2005).

heterogeneous political space, the shadow of violence, and problem of generating sustainable order. This set of problems also inheres in the "constitutional politics" of foundation or moments of radical political breakdown or transformation. At this level, international law and constitutional law share more than one might expect if one only takes the vantage point of the settled and stabilized constitutional order.[239] Law of this kind neither "causes" order through compelling rational bases, nor is it only a cipher for interest. It provides categories and concepts that help contain, articulate and reproduce practices of order-construction and order-maintenance; as a result, these concepts have a normative character which seems paradoxical when considered in the abstract. They are "inside" and "outside" of power, and depending on the concrete political situation, can vacillate between being an apologia for power and pure norm.[240] But it seems that this propensity to maintain a balance between fact and norm – to transmit the "normative power of the factual" (Jellinek) but also simultaneously constitute the grammar for the intelligibility and articulation of factual power – is key to the normativity of international law, and also to understanding its possibilities and limits.[241]

If my theoretical framework for understanding the relationship between "state-making" and "constitution-making" (Part III) is persuasive, then I think it suggests that this is one area in which international law does, and should continue to, maintain a silence. That is, these circumstances are exactly those to which the *droit politique* character of international law is well-suited. An overly prescriptive rule or norm-based approach to constitution-making seems unlikely to be functional to the need to induce politically effective groups to bargain towards points of coordination, given the diverse forms of "political effectiveness" that may exist in a particular territory and the contingent conditions that might be conducive to coordination at a particular time. In the context of peacekeeping and peace-making missions in Africa, Alex de Waal points out that "if indeed 'Africa works', in large part, through neo-patrimony and lineage … [then] in the patrimonial political market place, the only semi-stable outcome is an inclusive buy-in of all elites by the best resourced actor in the market place … An institutionalized state or insurgent can nominate an official with the right position and sufficient authority to negotiate a peace agreement or implement a ceasefire. The deal can be done wholesale."[242] The challenge in many contemporary conflicts is precisely to identify those participants in a conflict who can aggregate micro- and meso-level conflicts sufficiently to "speak for" a population and bind it to a resolution.[243] A norm which demands a specific form of representation or mode of legitimacy risks demanding that mediators and peacemakers reach deep into the social and political structures of the

---

[239] See Jack Goldsmith and Daryl Levinson, "Law for States: International Law, Constitutional Law, Public Law," forthcoming, Harvard Law Review, 2009.

[240] In the case of state constitutional orders, this vacillation becomes less obvious as the order itself is stabilized and entrenched.

[241] As Martin Wight commented, "such a conception lacks intellectual conciseness and emotional appeal. The language in which it is stated is necessarily full of qualifications and imprecision … But [it may] correspond more accurately to the intractable anomalies and anfractuosities of international experience." Martin Wight, "Western Values in International Relations" in Martin Wight and Herbert Butterfield, eds, *Diplomatic Investigations*, p.89-131, p.96.

[242] Alex de Waal, "Mission without end? Peacekeeping in the African political marketplace." (2009) 85 *International Affairs*, 99-113, at 102,

[243] See Stathis Kalyvas, The Ontology of "Political Violence": Action and Identity in Civil Wars, Perspectives on Politics 2003.

conflicted territory in order to find the "right" interlocutors; a possible "wholesale" deal may become "retail" if certain groups are disqualified *a priori* on normative grounds.

By encoding values connected with a particular ideal of legitimacy, international law may be counterproductive. Moreover, a specifically liberal democratic model of constitutional politics, if embedded in international law, may diminish the "inter-public" character of international law's normativity by reducing its capacity to accommodate and integrate different modes of legitimacy and forms of social power "on the ground." Prior to the rise of "democratic peace-building," the practice of UN-sponsored peace negotiations and the corresponding posture of international law in recognizing the outcomes, appears to reflect this pragmatic acceptance of inclusion of parties irrespective of their democratic or human rights credentials.[244] In the Cambodia settlement, for example, the Khmer Rouge's history of genocidal policies did not disqualify it from a cardinal role in negotiations and the transitional "representative" government. Nor did the Khmer Rouge's participation diminish the willingness of states to recognize the Paris Accords as legitimate binding documents; when the Khmer Rouge sought to defect from the settlement, strong international support was provided to the government created under the Accords. But this implied that the agreements were regarded as binding on the participating entities, and the latter were to that extent "recognized" as proper parties to the agreed process. Their recognition as legal quasi-subjects derived from the factual reality of their political subjectivity and political power:

> The international community has … manifested a desire to accept these parties in the context of political settlements, as *capable of binding the communities in whose name they enter into political settlements*. In effect, the warring factions in an internal armed conflict, *at least when they attain a minimum level of organization, influence, and territorial control*, are accorded a limited status as subjects of international law sufficient to enable them to enter into binding legal agreements with other factions and with outside states and international organizations. Similarly, leaders of these factions are accepted as the factions' political representatives regardless of how the leaders achieved their position.[245]

None of this requires an "anything goes" approach; indeed, as argued above, it is quite compatible with trying to find mechanisms (institutional and programmatic) to moderate political behaviour so as to reduce conflict and extremist tendencies. International human rights law and humanitarian law could well still operate within and through a settlement framework as a means of providing a common vocabulary to frame and negotiate issues and articulate goals for cooperation, coordination and goal-setting. But this is distinctive from an approach that demands ex ante conformity and uses rule compliance or non-compliance as a means of disqualifying parties. This is a heuristic which tries to avoid the occasion of the veto on the grounds of an overly thick concept of political morality.[246] It tries to avoid a sharp conflict between order and justice, not by rationalizing the complementarity of order and justice at a higher level of abstraction, but by cautiously mediating the tensions between them. Temporizing, capacious and flexible concepts, gaps and silences: these are the tools and methods of an inter-public law understanding of international law's role in such situations.

---

[244] Note that this need not imply a categorical position in favour of "amnesties" or any specific position in the relative merits of "peace" versus "justice". But it does imply that at certain junctures, silence or evasion of such issues may be preferable.

[245] David Wippman, "Treaty-Based Intervention: Who Can Say No?" *University of Chicago Law Review*, Vol 62, 1995, 607-687, p.641-2. (emphasis added).

[246] See Martin Wight, "Western Values in International Relations," pp. 128.

Conclusion

This paper has attempted to answer the question of whether international law does or should contain rules governing the production of new political orders in territories under occupation or international administration. The paper first inquired whether the existing law of self-determination contained any such rules, and concluded that it does not. Self-determination does contain a kernel of "popular sovereignty" but does not prescribe either the form or substance of how decisions over the internal political organization of a territory should be made. Rather, it preserves an agnosticism towards the sources and nature of political organization, which, I have suggested, is an important "golden thread" in international law. Second, the paper concluded that the present law of belligerent occupation similarly does not provide a source of authority or of legal rules which regulate the transformation of political systems by the occupier, and indeed maintains a broad prohibition against such transformation. To the extent that political transformation has been specifically authorized by the Security Council in the "state-building" missions of the last 15 years, it is a practice that has developed in parallel to the existing law of occupation and has not amended that law. The legal basis for Security Council-authorized state-building lies in the Security Council resolutions themselves.

Should this legal void be filled? In answering this question, I have attempted to unpack and disaggregate some underlying political theoretical issues. I have argued that while the normative commitments of contemporary state-building emphasize democratic legitimacy and liberal democratic institutional forms as the cornerstone of founding and stabilizing new political orders (and resolving the conflicts that brought about disorder), an alternative theoretical and sociological perspective provides a better account of difficulties of order-creation. This account, which is developed through a re-reading of a number of political theorists whose work addresses the problem of founding new orders, stresses the mutual imbrication of effective power and legitimacy, and the historical contingency of *who* and *what* can successfully wield the constituent power. "Constitution-making" under conditions of "state-making" requires means to coordinate and concentrate effective power, and involves selecting and harnessing the forms of "power-and-authority" that could successfully establish the fact of rule and the claim of authority to rule. Unsurprisingly, achieving this coordination and selection is riddled with uncertainty and problems of knowledge. Success is "aleatory," an alchemical product of fortune and *virtú*.

If this account is right, then it has consequences for the role of legal rules. It would suggest that rules prescribing specific procedures or modes of legitimation (requiring, for example, a constituent assembly) would either be marginal or counterproductive. They would be counterproductive if they have the effect of precluding inclusion of groups and actors that bear quite different forms of social power. They may simply select the wrong agents through democratic mechanisms. Alternatively, democratic mechanisms might work best at the margins (as suggested by Hardin), but only against a background of rough coordination on order. An overly-prescriptive rule-based ideal of "jus post-bellum" may not be functional to the central dilemmas of creating new political orders.

Finally, this paper has argued at a normative level that this "silence" in international law should be read as consistent with an important dimension of international law's normativity: it's character as "inter-public law" and its capacity to

accommodate and mediate diverse forms of historically-conditioned legitimation. This feature of international law has most often been subject to the criticism that it merely ratifies extant power relations and makes "might," "right." What I have attempted to argue here is that this aspect of contemporary international law can be understood as having a distinct normative value, one which derives from a preoccupation with crafting relations of order horizontally between loci of power. While some see "democratic peace-building's" emphasis on democratic legitimation and liberal democratic institution-building as the harbinger of normative progress in international law,[247] I question whether this kind of progress may simultaneously undermine another achievement of the post-World War Two epoch: the near-elimination of the standard of civilization and the universalization of sovereign equality.

[247] For example, d'Aspremont LJIL, Ch JIL; Fox 2008.