ARTICLES

YOUR COUNTRY, MY RULES
CAN MILITARY OCCUPATIONS CREATE SUCCESSFUL TRANSITIONS?

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ABSTRACT

This article argues against the idea that successful transitions can be created in the context of transformative belligerent occupations. It explains that given the prevailing interests of occupying powers and their tendency to ignore or underestimate the needs and political participation of the local population in the transition process, military occupations are ill suited for applying precepts of transitional justice. Instead, it calls for the implementation of either international or multilateral approaches to transition both in the form of international administration of territories or the operationalization of good practices and jus post bellum concepts. In the end, however, the paper recognizes that the political situation in today’s world makes these alternatives difficult to implement in practice, even if they are desirable lege ferenda.

I. INTRODUCTION

Situations of transitional justice involve a people’s struggle to come to terms with its own past, specifically in situations where large-scale

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human rights abuses and atrocities have been committed, with aims of ultimately achieving peace, accountability, and national reconciliation. One can expect such issues to run deep within the psyche of a nation and to be a personal concern for the inhabitants of a specific country. It is, therefore, natural that much of the normative content of the international law of transitional justice revolves around the concept of “national ownership,” the idea that those best suited to deal with national crises are those who lived through it in the first place.

While national ownership remains a key concept in transitional law, there is also increasing consensus that successful transitions sometimes require significant outside actor involvement. In fact, a large portion of transitional law scholarship is focused on how to solve the conflict between local and global concerns in transitional situations. Most of these articles assume that at least some sort of “tug-of-war” exists between local and global stakeholders. However, there is one particular situation in which this “tug-of-war” is simply non-existent: transformative military occupations.

When a state is defeated by military means, international law allows the victor to assume temporary administration of its territory under the law of belligerent occupation. Under the “conservationist principle,” this body of laws obliges occupiers to respect local institutions “unless absolutely prevented.”

In recent years, however, several authors have

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3. Simon Chesterman, You the People: Transitional Justice, International Administration and State-Building 143 (2004) (stating that “[i]n order to oversee such a transformation effectively and to ensure its durability, it is essential that the local population have a stake in the creation of these structures... but final authority remains with the international presence and it is misleading to suggest otherwise”).

4. See, e.g., Triponel & Pearson, supra note 1, at 103.

5. Id.

begun to question the conservationist principle. They have instead promoted a reform of the law of occupation in order to better assist transition countries from conflict to peace. In these later cases of “transformative occupation,” the “local” interest yields entirely to “global,” or rather “foreign” concerns.

However, while proponents of transformative occupation frame their argument as one of democratization and human rights, they have not analyzed the effects that transformative occupation as a legal doctrine would have from a transitional justice approach. Indeed, occupation situations are at a significantly higher risk of completely estranging national ownership from the transition process, and lack of political participation is something generally discouraged by transitional law experts.

In this Article I will argue that, contrary to what its proponents claim, transformative occupations are not a good means for achieving successful transitions from conflict to peace, given the existing tensions between local and global interests that effectively rob local populations of their right to play a role in their own transition. As an alternative, this Article argues in favor of multilateral approaches, specifically in the form of international administration of territories, or, as a second best alternative, the articulation of good practices and general principles for occupiers to follow when faced with transition situations in occupation contexts. It should be noted, however, that given the political considerations typically surrounding both military occupations and the establishment of international transitional administrations, the outlook for improving cases of transition under occupation seems bleak at best.

This Article is divided into four sections. Part II will explain occupation both from a legal and historical perspective. Part III will explain inasmuch some suggest it refers to “military necessity” and others that it “simply require[s] sufficient justification to deviate from local legislation”) (footnote omitted).


8. See, e.g., Roberts, supra note 7; Harris, supra note 7; Fox, supra note 7.

9. Harris, supra note 7, at 2-48 (stating that in modern occupations “the occupant exercises all meaningful foreign and domestic decision-making within the occupied state and, through a simultaneous and gradual process, devolves sovereign rights as it builds institutions of the state”).

10. Triponel & Pearson, supra note 1, at 107 (“The international community now generally refers to the benefits of public participation during the planning phase as a ‘given.’”) (footnote omitted).
what policies should be pursued by occupiers in order to achieve successful transitions. Part IV will study the behavior of occupying powers throughout the 20th century as well as instances of international administration of territories, concluding that occupying countries pursuing transformative occupations have generally been unable to generate completely successful transitions from conflict to peace, and that the more multilateral or international the solution, the better the end result. Part V will offer an evaluation of the way forward and the outlook for situations of transition under occupation, arguing that given political considerations, there is little chance that the behavior of current international actors will change. Lastly, I will offer my conclusions.

II. THE LAW OF BELLIGERENT OCCUPATION AND THE JUS POST BELLUM

The modern law of occupation dates back to the early years of the 20th century and the 1907 Hague Convention on the Laws and Customs of War.11 Under the Regulations attached thereto, the occupying country had an obligation to “take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”12 This provision has come to be known as the “conservationist principle” and, at the time of its drafting, separated occupation from annexation.13 When annexed, a territory was entirely subjected to the sovereign authority of the annexing country, which could do as it pleased with the territory. Occupation, on the other hand, was seen as a transitional period between the end of actual hostilities and the signing of an ultimate peace agreement.14 During that period, the occupant was expected to act only as a surrogate of the ousted government, intervening as little as possible in the affairs of the local population.15

During occupation, changes to legislation were accepted only when the occupant was absolutely prevented from respecting existing legislation.16 As expressed by von Glahn, the predominant view under the

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11. Sassòli, supra note 6, at 2.
12. Hague Convention II Regulation, supra note 6, at art. 43.
13. Fox, supra note 7, at 238.
14. Eval Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION 27 (1993) (describing delegates to the Hague Peace Conference as conceiving occupation “as a transient situation, for the short period between hostilities and the imminent peace treaty, which would translate wartime victories into territorial concessions by the defeated party”).
15. Id.
16. Hague Convention II Regulation, supra note 6, at art. 43.
Hague Regulations was that the laws of a country had been created by its people and, therefore, were presumably the legislation best suited for them.\(^\text{17}\) This view was later confirmed by the 1949 IV Geneva Convention on the Protection of Civilian Persons in Time of War.\(^\text{18}\)

This legal framework, therefore, was unconcerned with post conflict nation-building. The conservationist principle, rather, allows only for two basic exceptions: (i) military necessity and (ii) compliance with the obligations imposed by the Geneva Conventions.\(^\text{19}\) Thus, for an occupier to modify existing institutions, changes need to be inspired by a desire to promote peace and stability in the territory or to fit the law of the occupied nation with the requirements of modern humanitarian law.\(^\text{20}\) While these exceptions are valuable tools that offer occupying countries some flexibility in the way they can handle post conflict transitions under occupation, they fall short of the kind of wholesale reconstruction endeavors that modern situations of transition demand, such as a complete institutional and legal overhaul and promotion of the rule of law. For instance, a nation in transition may require a lustration process, the organization of new municipal elections, or new economic policies that get the economy back on track. It is debatable whether such measures would be acceptable under the conservationist principle, even if they would be desirable in a traditional transitional process.

In order to solve this problem, some authors have offered the “transformative principle” approach.\(^\text{21}\) Under this principle, occupiers would need to be vested with the power to transition occupied countries into the liberal democracies that the international community

\(^{17}\) See generally Gerhard von Glahn, The Occupation of Enemy Territory 95 (1957).


[T]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention . . . . The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.


\(^{20}\) See id.

\(^{21}\) Roberts, supra note 7, at 580.
would want them to become. Its proponents claim that occupation law rests on a false assumption: that the ousted government of a territory will always have been a “legitimate power.” As the cases of Hitler’s Germany and Saddam Hussein’s Iraq would prove, sometimes a conservationist approach could simply be immoral. Occupiers would need more overarching powers to reform the laws and institutions of the territories they administer. For instance, such powers were employed by the United States and its allies during the occupation of Iraq, where they launched an aggressive campaign to reform the country’s institutions and legislation to mold them into what the allies considered to be an adequate model of economic and political development.

However, even when the transformative principle claims to be based on notions of morality and liberal democratic principles, serious and valid arguments against it can still be made. After all, such sweeping powers may end up promoting paternalistic solutions to transition, or self-interested states may end up abusing their powers by seeking to secure long-term gains from their respective war efforts. Because of these serious consequences, several authors have promoted a more elaborate and novel body of laws under the title of *jus post bellum*, in order to more fully regulate transitions from conflict to peace. *Jus post bellum* principles would, in essence, fill the gaps of occupation law, centering on issues of accountability, economic governance, stewardship, and proportionality, ensuring that occupiers and other powerful stakeholders can help states under their administration to achieve the occupied population’s transitional goals.

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22. *Id.* at 587.
23. Harris, *supra* note 7, at 57.
25. Fox, *supra* note 7, at 241, 264 (claiming that “it is one thing to say that occupiers should refrain from neglecting or mistreating inhabitants [but] it is another to grant them license to become agents of constitutional revolutions” and that “enhancing unilateralism is out of touch with the many areas in which international law in the post-World War II era has refused to license unilateral action, even when that action is described as essential to achieving humanitarian objectives”).
26. *BENVENISTI*, *supra* note 14, at 46 (BENVENISTI describes, for example, the case of the German occupation of Belgium during World War I, which, according to him, “showed that the interests of the modern occupant covered many aspects of daily life, that . . . could . . . clash with those of the local community. . . . [I]n such situations the occupant was not likely to adopt an impartial stance.”).
28. *Id.* at 76.
However, *jus post bellum* also suffers from the limitation that, as of now, it is still a developing concept with evolving normative content.\(^29\) There are valid concerns of whether *jus post bellum* is ready for practical use in the short term and, thus, it remains—at least for the time being—an aspirational objective.

In the following part, I will analyze what exactly should be aspired from transition contexts involving occupations and, later, evaluate whether transformative endeavors can generate successful transitions.

### III. Building a Successful Transition

Transition situations in the context of occupations face an important challenge: how to ensure a successful transition from crisis to stability and from conflict to peace, without having the adequate legal toolbox to do so. The law of occupation, on the one hand, requires a minimalist approach to administration of non-sovereign territory, while at the same time, practice has shown that transitions usually require profound changes in the way a country works in order to ensure success. In this part, I will delineate an end goal for transition contexts: what should an occupier do—regardless of the law—to ensure a successful transition. Once that goal has been set, it will be possible to study whether the notion of transformative occupation can meet these requirements.

First, “success” in a transitional context must be defined. Transitional justice is not an exact science and different societies will need different programs of action. A highly institutionalized country—like Germany or Japan after World War II—would require fewer efforts in the field of security than Kosovo or Iraq, where ethnic or sectarian tensions run high. Likewise, participation and ownership standards will vary from society to society. With this in mind, a transition process can be deemed successful when local populations can resume their post-conflict lives in a stable and secure environment that fosters well-being and development. Some local dissatisfaction and/or security threats can be tolerated in a successful transition. Total meltdown of the social fabric cannot.

\(^{29}\) Carsten Stahn, *Jus Post Bellum: Mapping the Discipline(s)*, 23 Am. U. Int’l. L. Rev. 311, 336, 338-39 (2007) (concluding that “problems arise when these principles are translated into a more concrete context, such as state- or nation-building. One may easily agree with the argument that principles of accountability, popular consent, and closure—the sustainable assistance beyond the point of holding elections—should form part of any *jus post bellum* framework after intervention. Yet, it is doubtful to what extent there can be a ‘blueprint’ for transitions from conflict to peace”) (footnotes omitted).
Several different factors can be seen as contributing to success in transition contexts. However, early participation of the relevant stakeholders seems to be a key factor. Indeed, it seems particularly important that the measures to be taken by the transition process have legitimacy and acceptance both by the main actors and the local population.

Indeed, “public participation during the creation of the transitional justice system paves the way for increased public participation throughout its period of operation.” The importance of public participation can be demonstrated if contrasted with other transitional processes where domestic players held much less control over their own transitions, resulting in loss of legitimacy. Rwanda is a noteworthy example of legitimacy loss. In Rwanda, the Security Council established the International Criminal Tribunal for Rwanda (ICTR) to address the gross human rights violations committed during the 1994 genocide without sufficient consultation of Rwandan civil society and insufficient outreach programs. As a result, Rwandan public opinion seems to be more in favor of local justice mechanisms, such as gacaca courts, than international ones like the ICTR. In contrast, in Cambodia, where negotiations between the government and the United Nations led to

30. Triponel & Pearson, supra note 1, at 107 (stating that “one factor that is considered increasingly important in the success of transitional justice systems is early consultation with the population about the proposed system”).


32. Triponel & Pearson, supra note 1, at 108.

33. Id. at 118.

34. Joanna Pozen, Richard Neugebauer & Joseph Ntaganira, Assessing the Rwanda Experiment: Popular Perceptions of Gacaca in Its Final Phase, 8 INT’L J. OF TRANSITIONAL JUST. 31, 51-52 (2014). See also Megan M. Westberg, Comment, Rwanda’s Use of Transitional Justice After Genocide: The Gacaca Courts and the ICTR, U. KAN. L. REV. 331, 360-61, 366 (stating that “the ICTR has been inefficient in delivering any form of transitional justice desired for the Rwandan people . . . . Additionally, the ICTR loses legitimacy in the eyes of the people because the punishment of the génocidaires convicted at the ICTR differs drastically from those convicted in Rwandan courts” and that, “[a]lthough there are shortcomings to the gacaca court process, it ultimately proves to be the more useful tool of transitional justice for the Rwandan people because of the failure of the ICTR to take local traditions into consideration”); Erin Daly, Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda, 34 N.Y.U. J. INT’L L. & POL. 355, 374 (2002) (stating that “[a]ccording to many reports, approximately 80% of the Rwandan population supports the gacaca process, at least in principle”). Gacaca courts are a form of traditional indigenous justice in Rwanda focused on communal healing.
the creation of the Extraordinary Chambers in the Courts of Cambodia (ECCC)—a hybrid tribunal composed of both Cambodian and international judges, deciding cases with a mix of Cambodian and international law—public perception towards transition was much more positive. Only 39% of Cambodians said they had no knowledge of the ECCC, and of those who did, 67% expressed confidence in the role of the tribunal. These are noteworthy numbers when compared to public perception of the Cambodian national judicial system, where only 36.1% of Cambodians trusted the court system and 60.7% said that going to court meant paying bribes to judges.

Thus, given the varied realities of transition territories and the nuanced requirements for success in each one, building a successful transition demands input from local populations. It is only by listening to local needs that outside actors will be able to devise a program of action that can ultimately achieve wellbeing for the local population.

IV. CAN OCCUPYING POWERS GENERATE SUCCESSFUL TRANSITIONS?

The previous parts have shown two key facts: (i) that participation by local stakeholders is a key factor for a successful transition and (ii) that there is a trend towards favoring increased powers for occupier countries over the territories they administer. These two facts appear incompatible. If local actors need to play a role in their own transitions, would an ever more powerful occupier really be beneficial to local populations? In this Part, I will analyze previous cases of occupation in order to determine whether, in practice, states have been able to create conditions where local ownership has manifested and in turn created successful transitions.

Specifically, I will analyze the Allied occupation of Germany after World War II, the U.S. occupation of Iraq in 2003, and the U.N. transitional administrations of Kosovo and East Timor (now the Democratic Republic of Timor-Leste). These cases have been chosen given that they represent one arguably successful case of transformative occupation (Germany); one arguably unsuccessful case (Iraq); and two examples of arguably successful international administration of territories, where legislative and executive authority over a particular territory

35. Triponel & Pearson, supra note 1, at 115.
37. Id. at 33.
was entrusted not to a state, but to an international organization under the authority of the U.N. Security Council.38

A. The Occupation of Germany

During the final years of World War II, the four major Allied powers (the United States, the United Kingdom, the Soviet Union, and France) agreed to divide Germany into four zones of occupation, each under the administration of one Allied power,39 and with Berlin jointly occupied by the Allies.40 Under this framework, supreme authority over the respective zones would be vested in the commanders-in-chief of the armed forces of each occupying power.41 Authority over the entirety of Germany would be entrusted to a Control Council, formed by all four commanders-in-chief, which was capable of enacting general legislation.42

Upon the unconditional surrender of Germany in 1945, the Allied forces refused to recognize any central German government.43 At that time, under international law, lack of recognition of a government following complete military conquest of a nation—and without any organized resistance by either its citizens or its soldiers—usually implied the concept of subjugation or debellatio.44 Under this doctrine, complete defeat of an enemy granted the occupying country a right to

38. Kosovo and East Timor are the only two cases where the U.N. was granted complete administrative authority over a territory that ultimately achieved independence (i.e., circumstances that make them comparable to belligerent occupations). Other examples of overarching U.N. administration exist, but with different objectives or attributions. For example, the United Nations Transitional Administration for Eastern Slavonia (UNTAES) was in charge of administering the territory in order to oversee the peaceful transfer of Eastern Slavonia from Serb to Croatian control. In any case, UNTAES is also regarded as a success case. See Carsten Stahn, The Law and Practice of International Territorial Administration 285 (2010) (affirming that “[d]ue to the clearly defined purpose of the mission, and the firm consent of the principal parties (Serbia and Croatia) to the transfer of the territory, UNTAES managed to establish itself as a successful interim authority for a post-conflict society that needed international assistance”).


40. Id. ¶ 3.

41. Id.

42. Id.

43. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic (June 5, 1945), http://avalon.law.yale.edu/wwii/ger01.asp.

44. Von Glahn, supra note 17, at 275.
annex the conquered territory.\textsuperscript{45} However, the Allies did not pursue that path. Instead, the Allies announced a plan to fundamentally change the internal political structure of Germany, the economic and social life of the country, and the organization of its entire legal system.\textsuperscript{46}

This was a transformative occupation that—at least according to leading contemporaneous commentaries—lied outside the conservationist principle established by the Hague Regulations.\textsuperscript{47} Indeed, most theories regarding the legal status of defeated Germany avoided the Hague Regulations altogether.\textsuperscript{48} While \textit{debellatio} is no longer a part of modern international law,\textsuperscript{49} the question before us is whether the model of transformative occupation put in place in defeated Germany was able to generate a successful transition from war to peace, especially in terms of ownership and/or participation for the local population.

Post-war reconstruction of Germany was never a German endeavor, nor could it have been. The original Allied plan for Germany, the Morgenthau Plan,\textsuperscript{50} called for summary execution of the entire Nazi leadership\textsuperscript{51} and the deindustrialization of Germany in order to convert it into “a country primarily agricultural and pastoral in its character.”\textsuperscript{52} After these plans were made public in September 1944, however, American public opposition to the economic destruction of Germany and fears that such a plan would lead it into the hands of communism led to the collapse of the Morgenthau Plan and its replacement with

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\textsuperscript{45} Id. at 275.  \\
\textsuperscript{46} Id. at 275-76.  \\
\textsuperscript{47} Id. at 276.  \\
\textsuperscript{48} Id. at 276-77 (describing the four major schools of thought developed after the defeat of Germany as (i) conquest short of annexation of Germany, (ii) complete extinction of the German state, (iii) application of the Hague Regulations, and (iv) an evolving concept of “allied legal sovereignty.” However, Von Glahn states that the Hague Regulations theory was mostly limited to German authors within Germany).  \\
\textsuperscript{49} Fox, supra note 7, at 247.  \\
\textsuperscript{50} Letter from Henry Morgenthau, Sec’y of the Treasury, to Franklin D. Roosevelt, President of the United States of America, Suggested Post Surrender Plan for Germany (Sept. 5, 1944), http://images.library.wisc.edu/FRUS/E.Facs/1944//reference/frus.frus1944.i0010.pdf.  \\
\textsuperscript{51} Id. (planning for the summary execution of “Arch Criminals . . . whose obvious guilt has generally been recognized by the United Nations” stating that, once identified, they “shall be put to death forthwith by firing squads made up of soldiers of the United Nations”).  \\
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the Marshall Plan for economic reconstruction in 1947.\textsuperscript{53} During that time, the Allied Control Council approved a number of laws\textsuperscript{54} that kick-started a process known as “De-Nazification” of Germany, which included, among other measures: repealing Nazi laws,\textsuperscript{55} liquidating the Nazi Party,\textsuperscript{56} reorganizing the judicial system,\textsuperscript{57} eliminating military training,\textsuperscript{58} modifying marriage laws,\textsuperscript{59} and dissolving the German Army.\textsuperscript{60}

As demonstrated by the 1945 Directive to the Commander-in-Chief of the United States Forces of Occupation, this process was done at a distance. The Directive clearly stated that fraternization with German officers and population should be discouraged and that, “it should be brought home to the Germans that Germany’s ruthless warfare [has] made chaos and suffering inevitable and that the Germans cannot escape responsibility for what they have brought upon themselves.”\textsuperscript{61} The Directive also stated that Germany was not being occupied for the purpose of liberation, but as a defeated nation; and that the objectives

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\textsuperscript{53} Things We Forgot to Remember: Morgenthau Plan and Post-War Germany, BBC Radio (June 4, 2012), http://www.bbc.co.uk/programmes/b01jgj0p.


\textsuperscript{60} Control Council Law No. 34, Dissolution of the Wehrmacht (Oct. 30, 1945), \textit{reprinted in} 4 Enactments and Approved Papers of the Control Council and Coordinating Committee 63, 64 (1945), http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-IV.pdf.

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of the occupation were to prevent Germany from ever again becoming a threat to world peace as well as providing relief for the benefit of countries devastated by Nazi aggression.\textsuperscript{62}

It should be noted that Germany possessed both a highly institutionalized society and did not offer much resistance to the Allied occupation forces after its military defeat, which in part explains why reconstruction happened more smoothly than in other transitions. Due to these conditions and how rapidly Germany reintegrated into the society of nations, the occupation of Germany is commonly described as a successful transition.\textsuperscript{63} However, from a modern transitional justice perspective, the record is slightly more nuanced.

Indeed, the German transformation into a stable post-conflict society, was undertaken without active participation from the affected population, including—and especially—Holocaust survivors.\textsuperscript{64} Therefore, it appears that while the story of German reconstruction can be deemed an economic success, it was not so successful in providing closure for victims. When the Nuremberg trials were first planned, for example, their initial focus was on punishing German aggression rather than German atrocities against minorities and civilian populations.\textsuperscript{65} In fact, Jewish organizations had to exert large amounts of political pressure to include Holocaust related crimes into the trials, ultimately succeeding only after the liberation of Dachau, in April 1945.\textsuperscript{66}

Indeed, reconciliation efforts were so poor that by 1946, Jewish Holocaust survivors mostly lived in refugee camps, not wanting to return to their hometowns for fear of violent repercussions.\textsuperscript{67} In fact, the main “transitional mechanism” attempted by European and Ger-

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\item [62.] Id.
\item [63.] Thomas W. Maulucci, Jr., \textit{Comparing the American Occupations of Germany and Iraq}, 3 \textit{Yale J. of Int’l. Aff.} 120, 121 (2008) (“The basic conclusion of this literature is that American successes at ‘nation building’ are few and far between, and that Germany along with Japan represents the major exception.”) (footnote omitted).
\item [64.] \textit{James Dobbins et al., America’s Role in Nation-Building: From Germany to Iraq} 3-23 (2003), \url{http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1753/MR1753.ch2.pdf}.
\item [65.] Bass, \textit{supra} note 52, at 173-80 (“America prosecuted war crimes much as it had prosecuted the war. That is, the charges that were of greatest interest to America were those that bore directly on America: the German instigation of World War II.”).
\item [66.] Id. at 180 (“[t]he suffering of the Jews was far from the first concern of the American planners of Nuremberg”).
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man Jews in the post-war period was emigration, even against migratory restrictions set forth by the United States and Great Britain. After the State of Israel declared independence in 1948, 687,000 Jews immigrated to its territory, mostly from displaced persons’ camps in Germany, Austria, and Italy, but also from Jewish communities in Bulgaria, Poland, and Romania, among others. In fact, it took five years after the end of hostilities in Europe for a true Jewish institution to form in West Germany, called the Central Council of Jews in Germany. According to the Council’s numbers, at the time of its incorporation in 1950, little over 15,000 Jews were living in Germany, out of a total displaced population of 250,000. Moreover, Holocaust survivors living within Germany itself were so few that Germany’s reconciliation efforts immediately after the war had significantly involved populations living outside of Germany, not German nationals living within Germany.

In short, the Allied transitional scheme for Germany unilaterally approved legislation without local input and, thus, did not address the concerns of what today is considered the main party to any reconciliation process: the local population. This constitutes an important yet little discussed failure of the Marshall Plan: by modern standards, massive emigration by an affected minority group would be considered a serious flaw in the transition scheme. The Allied occupiers, however, seemed unresponsive to this issue, focusing more on controlling Jewish immigration into the Mandate of Palestine than helping them stay in Germany. Even worse, had it not been for the fortuitous collapse of the Morgenthau Plan, it would have been entirely possible for the Allied occupiers of Germany both to ignore the concerns of minority and Jewish populations, and to destroy the entire German population’s

68. Id. (“In 1948, the US Congress passed the Displaced Persons Act, which provided approximately 400,000 US immigration visas for displaced persons between January 1, 1949, and December 31, 1952. Of the 400,000 displaced persons who entered the US under the [Displaced Persons] Act, approximately 68,000 were Jews.”).


future through a process of forced pastoralization that, in the words of former U.S. President Herbert Hoover, would have required the extermination or forced displacement of 25 million Germans.74

B. The Occupation of Iraq

Almost sixty years after the occupation of Germany, and upon the military defeat of Iraq, the United States and the United Kingdom created the Coalition Provisional Authority (CPA) in May 2003 to “exercise powers of government” in occupied Iraq.75 As such, CPA Regulation No. 1 established that its aim was “to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions or representative government and facilitating economic recovery and sustainable reconstruction and development.”76

Some days later, the U.N. Security Council recognized both countries as “occupying powers under unified command” through Resolution 1483.77 Operative paragraph five of this Resolution called upon the United States and the United Kingdom to “fully comply with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”78 At least on paper, therefore, the occupation of Iraq seemed to conform to the conservationist principle and that the occupying authorities would consult on any proposed measure with the domestic population. This, however, was not the case.

The occupation of Iraq is seen as the most paradigmatic example of a transformative occupation to date.79 The CPA issued sweeping legislative reforms,80 which included the formal disestablishment of Saddam

76. Coalition Provisional Authority, Regulation Number 1 (May 16, 2003), http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.
78. Id. ¶ 5.
79. Fox, supra note 7, at 250.
80. See Fox, supra note 24, at 208-29 (providing analysis of reforms).
Hussein’s Ba’ath Party, the disbanding of the entire Iraqi Army, the establishment of new ranks and codes of military justice, the reform of criminal procedure laws to adequate them to international standards, the creation of a Ministry of Human Rights, reform of the financial sector including provisions to open Iraqi banks to foreign ownership, foreign investment, and monetary regulation.

The CPA also decided to take control over almost all of the transition process with few relevant roles left for Iraqis themselves. As stated by Larry Diamond, former Senior Adviser to the CPA in Baghdad, “obsession with control was an overarching flaw in the U.S. occupation from start to finish.” Indeed, while the CPA did appoint a Governing Council of Iraq as “the principal body of the Iraqi interim administration,” it failed in practice to give the Council any significant authority or representativeness. Thus, not only did the CPA handpick the council members, but it also failed to include tribal leaders within its


86. Fox, supra note 24, at 216-17.


92. Fox, supra note 24, at 206 (“Unofficial sources confirm the Council’s subordinate role, with many describing a CPA ‘veto’ power over all Governing Council actions.”) (footnote omitted).
ranks. Moreover, the CPA did not set forth any concrete duties for the Council, which reportedly held a purely advisory role. Indeed, the President of the Governing Council stated that U.N. Resolution 1483 “did not set out in a clear and precise manner the functions of the interim administration.” Similarly, Council Member Ghazi al-Yawar admitted in 2004 that his work at the Council was reminiscent of “the Byzantines in Constantinople, debating whether angels are male or female with barbarians at the gate.”

In this context, the Transitional Administration Law produced by the Council on advice by the CPA, which included the basis for an Iraqi Constitution, had very little—if any—public participation. The perception that the TAL was little more than an effort to manipulate the Iraqi Constitutional drafting process led to widespread resistance from Shiite leaders, resulting in their withdrawal from the transition. In fact, “the Iraqi process lacked inclusive forums for political dialogue and had both failed to devise bridges among key political actors and prevented the public from participating in the process.”

By the time control of the country was given back to the new Iraqi government in June 2004, Iraq was far from anything that might resemble a successful transition. Security issues had not been addressed, creating important problems for the newly created govern-

93. Sharon Otterman, IRAQ: Iraq’s Governing Council, COUNCIL ON FOREIGN REL. (May 17, 2004), http://www.cfr.org/iraq/iraq-iraqs-governing-council/p7665#p1 (claiming that “returned Iraqi exiles are disproportionately represented, and there is limited representation of tribal leaders, who represent a potent force in traditional Iraqi society” and that “[t]he council lacks legitimacy with ordinary Iraqis, who do not view it as independent of occupying authorities”).

94. Fox, supra note 24, at 205-06 (arguing that the CPA had the ability to ignore Governing Council objections to its decisions and that Regulation No. 6, which created the Council, stated that the CPA should consult and coordinate with the Governing Council “in accordance with Resolution 1483 [which] placed responsibility for governing Iraq with the occupying powers . . . . The reference to Resolution 1483 in Regulation No. 6, therefore, did not appear to enhance the Governing Council’s powers.”).

95. Id. at 205 n.40.


98. Sharon Otterman, Iraq: The Interim Constitution, COUNCIL ON FOREIGN REL. (Mar. 8, 2004), http://www.cfr.org/iraq/iraq-interim-constitution/p7672#p2 (“The interim constitution, also called the Transitional Administrative Law, was not submitted to the Iraqi public for comment.”).

99. Papagianni, supra note 89, at 751.

100. Id. at 753.
The transitional process overseen by the CPA and the institutions it sought to create, including the TAL itself, lacked legitimacy among the Iraqi population and key stakeholders.\textsuperscript{102} It should come as no surprise, therefore, that the U.S. involvement in military operations in Iraq only increased after June 2004.\textsuperscript{103} In fact, some of the main battles of the Iraqi insurgency, such as the Second Battle of Fallujah and the Battle of Mosul, took place in late 2004, several months after the end of the occupation.

Indeed, not only did it take almost ten years for the United States to ultimately declare an end to active hostilities in Iraq,\textsuperscript{104} but the situation it left behind was so precarious and unstable that it allowed for the rise of the Islamic State in Iraq and Syria (ISIS) in 2014, a terrorist group that has been widely described as perhaps the most monstrous terrorist group in the world.\textsuperscript{105} At the time of writing, the United States was once again militarily involved in Iraq with large swaths of Iraqi territory completely overrun by ISIS.\textsuperscript{106} Thus, from a transitional justice point of view, the occupation of Iraq was a resounding failure, with the average Iraqi in 2015 arguably being worse off than the average Iraqi in 2002. Indeed, according to the World Bank, “Iraq’s economy suffers from structural weaknesses [and] remains extremely vulnerable to the country’s ongoing security problems, which impede investment and inhibit private economic activity.”\textsuperscript{107}

\textsuperscript{101} See Diamond, supra note 90.

\textsuperscript{102} Papagianni, supra note 89, at 750-51 (“[R]ather than facilitating discussions among Iraqis on how to establish a transitional process that would lead to elections and adequate discussions on the constitution, the CPA made hasty attempts to draft Iraq’s constitution” and “[t]he TAL did not represent a wide political agreement on the country’s transitional framework and failed to draw all the key political leaders into the process.”).

\textsuperscript{103} Michael E. O’Hanlon & Ian Livingston, Iraq Index: Tracking Variables of Reconstruction and Security in Post-Saddam Iraq, BROOKINGS INST. (2011), http://www.brookings.edu/media/Centers/saban/iraq%20index/index20120131.PDF (finding that civilian casualties and insurgent attacks on coalition forces increased steadily well until 2007; similarly, U.S. troop fatality remained relatively constant through 2004 to 2006, showing a sharp increase in 2007).


Of course, lack of national ownership and meaningful participation by relevant stakeholders is clearly not solely to blame for the current crisis. However, it did lead to a perception by the population of illegitimacy and lack of representation in the entire process that facilitated the country’s descent into chaos. This not only manifested in the earlier Shiite opposition to the TAL, but also helped alienate Sunni Iraqis who rose up in arms against the Shia-dominated government, which ultimately led to the formation of al-Qaeda in Iraq and ISIS. In this sense, a more participative and representative transitional scheme may have been able to create more legitimate institutions, arguably better suited to tackle the challenges that the CPA and now the entire international community are facing.

C. The International Administration of Kosovo

As I mentioned above, however, not all transitions are undertaken through a process of military occupation. Indeed, after the 1999 North Atlantic Treaty Organization (NATO) intervention in Kosovo, the U.N. Security Council established the U.N. Mission in Kosovo (UNMIK) through Resolution 1244 on June 10th. UNMIK was supposed to provide the people of Kosovo with “provisional democratic self-government institutions.” Like in Germany and Iraq, locally-staffed governmental institutions were not in control of the transition process. However, cooperation and concern for domestic involvement seemed to become a higher priority as time progressed. Indeed, UNMIK’s mission was sustained in four pillars aimed at (i) humanitarian assistance, led by the United Nations High Commissioner for Refugees; (ii) civil administration, under U.N. leadership; (iii) democ-

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108. Fox, supra note 7, at 250 (claiming that “the occupation was extraordinarily mismanaged”) (footnote omitted); see also Diamond, supra note 90; Maulucci, supra note 63, at 125.
109. See Papagianni, supra note 89.
110. S.C. Res. 1244 (June 10, 1999).
111. Id. ¶ 10.
112. Id. ¶ 10.
113. CHESTERMAN, supra note 3 at 133 (stating that “[n]o one was under the illusion that these bodies wielded any actual power”).
ratization and institution building, entrusted to the Organization for Security and Co-operation in Europe (OSCE); and (iv) reconstruction and Economic Development, managed by the European Union (EU).

This was, therefore, a major and highly complex transitional scheme that, from the very first moment, sought to place the humanitarian needs of the population as a high priority.

Although the first six months of UNMIK saw only limited local participation via consultative and advisory mechanisms, in January 2000, UNMIK established a Joint Interim Administrative Structure (JIAS) whereby the representatives of Kosovar political forces would share provisional administrative management with UNMIK. The JIAS was comprised of four different branches, each regulated in detail by UNMIK. The first branch was the Kosovo Transitional Council, a consultative body that was to meet and converse every two weeks with the Special Representative of the Secretary-General.

The second branch was the Interim Administrative Council (IAC), which had the duty of making recommendations to the Special Representative for amendments to the applicable law and for new regulations. A Special Expert Committee on Security composed of UNMIK and Kosovo experts would offer insights to the IAC on matters of security and minority rights. The IAC consisted of eight members appointed by the Special Representative, four Kosovars (three ethnic Albanians and one ethnic Serb), and four UNMIK members. The IAC also included two observers—one representing Kosovo civil society, and one representing the Deputy Special Representative of the Secretary-General for Humanitarian Affairs. In addition, whenever the IAC took a decision by consensus or by a three-quarters majority, the Special Representative would accept the decision, unless he advised the IAC otherwise in writing within seven days, detailing the reasons for his differing decision.

117. Id.
118. Id. 115, § 2.2.
119. Id. §§ 4-7; see also Friedrich, supra note 115, at 256.

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The third branch was formed of Administrative Departments, which would act similarly to ministries and had full power to implement the policy guidelines formulated by the IAC.120 These Departments would be jointly led by a Kosovo and UNMIK Co-Head of Department, chosen by the Special Representative upon consultation with the IAC.121 Both Co-Heads were expected to take decisions jointly, but in case of disagreement the Deputy Special Representative of the Secretary General held ultimate decision power.122

The final branch were local municipal administrations led by Municipal Administrative Boards headed by an UNMIK Municipal Administrator and a Municipal Council representing the citizens of the municipality on a consultative capacity.123

The level of detail in the organization and the preponderance of a principle of joint administration paints a very different picture from the models sought both for Germany and Iraq, where a body comprised solely of occupying forces either ruled without any checks from local populations or held a very strong veto power over local transitional bodies.124

In May 2001 after negotiations with local stakeholders,125 UNMIK published Regulation 2001/9 establishing a Constitutional Framework for Provisional Self Government126 that, among many other things, called for elections of a 120-member Assembly that would later assume administration of Kosovo.127 While under the Constitutional Framework the Special Representative retained certain “reserved powers and responsibilities,”128 and problems between local and international

120. Friedrich, supra note 115, at 257.
121. UNMIK Regulation No. 2000/1, supra note 116, § 7.9.
122. Id. § 8.
123. Id. § 8.
124. See Commander in Chief Directive, supra note 61; Fox, supra note 24.
125. CHESTERMAN, supra note 3, at 154 (stating that the seven-member presidency of the assembly that took control over negotiations of the Constitutional Framework included “two members from each of the two parties with the highest number of votes, one from the party that came third, as well as one representative from the Kosovar Serb community and one from a non-Serb minority group (including the Roma, Ashkali, Egyptian, Bosniak, Turkish, and Gorani communities”).
127. Id. § 9.1.2.
128. Id. § 8.
concerns did arise,\footnote{Friedrich, supra note 115, at 259 (“For instance, the [Special Representative] denied the Kosovo Assembly the right to more decision-making power through amendment of the Constitutional Framework in July 2004. The example reflects the tensions that have existed from the beginning between local leaders who demanded a further transfer of authority and the policies of UNMIK to maintain large amounts of authority until certain standards are met by the existing institutions.”) (footnote omitted).}\textsuperscript{129} local participation in the institutions of government were much higher than in previously analyzed cases.\textsuperscript{130} For example, “the Constitutional Framework is remarkable for its detailed protection mechanisms for members of minorities.”\textsuperscript{131}

Of course, UNMIK also suffered from serious disadvantages. The Office of the Ombudsperson Institution in Kosovo, for instance, harshly criticized the lack of democratic governance in UNMIK.\textsuperscript{132} In the Ombudsperson’s own words, “UNMIK is not structured according to democratic principles, does not function with the rule of law, and does not respect important international human rights norms.”\textsuperscript{133} In particular, concerns were raised by UNMIK’s tendency to allege institutional immunity from Kosovar courts and also in its unwillingness to allow judicial review of its Regulations.\textsuperscript{134} However, the fact that an independent Ombudsperson institution that could issue such stern remarks on UNMIK was established in the first place has to count as a positive step, even if the end result was not perfect.

Indeed, after independence—and despite some political tension and occasional acts of violence among different ethnic populations—Kosovo can be described as a success story.\textsuperscript{135} The security situation in Kosovo is commonly referred to as “generally calm” and the crime rate as being in a “general declining trend.”\textsuperscript{136} The World Bank, for instance, describes Kosovo as “a potential candidate for EU membership . . . with solid economic growth performance [and] one of only four countries in Europe that recorded positive growth rates in every
year during the crisis period 2008-12.” On December 2013, Kosovo held generally peaceful and legitimate municipal elections.

D. The International Administration of East Timor

Like in Kosovo, the Security Council set up a U.N. Transitional Administration in East Timor (UNTAET) to exercise legislative and executive authority in the territory during transition to independence from Indonesia. Resolution 1272 (1999) established that there was a need for UNTAET specifically to “consult and cooperate closely with the East Timorese people.” In compliance with this mandate, and despite initial trepidations, in April 2000, UNTAET appointed Timorese deputy district administrators to work under the supervision of international administrators with broad participation from local stakeholders including political parties, the Roman Catholic Church, women, and youth groups.

However, it soon became apparent that positions as deputy administrators were not enough to satisfy the participation demands of local leaders. In response, by May 2000, the Special Representative of the Secretary-General offered Timorese leadership two options: a technocratic model with a fully Timorese administration or a political model with shared Timorese-UNTAET administration. In July 2000, and in compliance with the decision of East Timorese leadership, UNTAET adopted the political model of administration through the establishment of an all-Timorese National Council, representing major sectors of Timorese society. The Council possessed the power to initiate,
modify, and recommend draft regulations.\textsuperscript{146} Soon after, UNTAET announced that the East Timorese Transitional Administration (ETTA) would replace the Governance and Public Administration pillar of the mission, and would be referred to as “the government” from then on.\textsuperscript{147} In the end, while not without its own problems,\textsuperscript{148} UNTAET guided East Timor into successfully negotiating and drafting its new Constitution and becoming an independent state.\textsuperscript{149}

While East Timorese authorities were still unsatisfied and senior UNTAET officials later described early consultation efforts as “confused at best,”\textsuperscript{150} East Timor is generally described by the U.N. as a “success story”\textsuperscript{151} despite some post-independence political instability. The World Bank, for example, has stated that “Timor-Leste has created the preconditions for successful development” and that “[i]t has credibly emerged from a crisis of internal violence and political instability in 2006-2007, built a coalition, and increased tangible services for the population, creating hard-won political stability, absence of conflict and a new confidence in the state.”\textsuperscript{152}


\textsuperscript{147}Chesterman, supra note 3, at 139.

\textsuperscript{148}\textit{See} Stahn, supra note 38, at 343-46 (critiquing that much like UNMIK, UNTAET set up an “absolutist governing regime” and that participatory and co-governance schemes were only instituted when pressure and resentment by local political groups forced it to implement them).

\textsuperscript{149}Id. at 343 (UNTAET “provided advice to the Constitutional Assembly, and it made its own phasing-out dependent on two conditions: the adoption of the Constitution, and its successful implementation. “The phase of direct UN administration was followed by several post-independence engagements, the first being the United Nations Mission of Support in East Timor (UNMISET), which started its mandate after East Timor’s access to independence.”) (footnote omitted).

\textsuperscript{150}Id. at 139-40.


V. LESSONS LEARNED: PARTICIPATION, OWNERSHIP, AND OCCUPATION

From the analyzed cases, I have shown that political participation and concern for the opinion of local populations is a higher priority in U.N. transitional administrations than in belligerent occupations—even if there are also troubles in other respects, such as accountability. Moreover, administrators or occupants that grant local actors increased and progressive governmental access tend to generate more commitment from the relevant stakeholders towards the transition process—even if they are not completely satisfied with the results—and, thus, have a higher chance of creating a successful transition.

Ultimately, it seems that the more unilateral the transformative mission, the more incentives there are for unrestrained action by the occupiers, which in turn tempts occupiers into yielding local interests in favor of their own national interests.153 As stated by Fox:

[M]ultilateral planning for an occupation arguably produces better outcomes . . . US planning for the post-war period [in Iraq] was notoriously inept and insensitive to local concerns. It is inconceivable, for example, that a UN-led mission would have disbanded the entire Iraqi army as one of its first actions. Equally, it seems unlikely that the free-market fundamentalism driving so many of the CPA’s economic reforms would have survived Security Council consideration.154

Therefore, this should lead us to believe that there is a sliding scale from purely unilateral occupation—with the least incentives to foster meaningful participation of local populations—to purely international administration—where incentives are the greatest to promote participation. Upon these facts, therefore, the international community should strive to balance the scale of transitional justice in favor of an increased international or at least multilateral approach, placing a majority of efforts into international administration of territories, where chances of success are higher.

This, however, presents some problems. Indeed, setting up an international administration does require a very particular mix of circumstances to be present, both factual and political, in order to be a viable

153. Fox, supra note 7, at 254 ("[S]tates do not trust each other’s judgement [sic], in the absence of collective oversight, to determine when and how these norms should be implemented. They fear pretexts. The temptations for political meddling are simply too great.").
154. Id. at 253 (footnotes omitted).
transition mechanism. First, all five Permanent Members of the U.N. Security Council must agree to the mission.\footnote{U.N. Charter art. 27, ¶ 3 (stating that substantive decisions of the Security Council “shall be made by an affirmative vote of seven members including the concurring votes of the permanent members”).} Second, the mission itself has to avoid being seen as a new form of U.N. imperialism.\footnote{Steven R. Ratner, Foreign Occupation and International Territorial Administration: The Challenges of Convergence, 16 Eur. J. of Int’l. L. 695, 696 (2005) (stating that “[o]bservers have pointed out the similarities between such administrations and old-fashioned colonialism, with Roland Paris perceptively referring to them as ‘an updated version of the mission civilisatrice’”) (emphasis removed) (footnote omitted).} These two reasons are perhaps why the last ten years of UN practice have not seen anything like UNMIK or UNTAET appear again, despite their relative successes.

The international community is therefore faced with a dilemma: while unilateral action is either outwardly illegal or seriously discouraged by the U.N. Charter,\footnote{Fox, supra note 7, at 241 (“One of the singular achievements of the post-Cold War era has been a move toward realizing the UN Charter’s goal of multilateralizing armed conflict . . . [i]t has legitimized collective involvement in matters of governance and social relations that sit at the heart of states’ domestic prerogatives, and it has delegitimized unilateral efforts to the same ends.”).} the legal and international mechanisms that would allow transitions to achieve better results than unilateral action remain politically cumbersome and difficult to implement in practice.

Therefore, if the international community is to find the best possible outcome, it should have clear guidelines on what exactly it is that separates a successful transition in times of occupation from an unsuccessful one. To do this, lessons can be learned from both the transformative occupation and the international administration concepts in order to better operationalize the \textit{jus post bellum} principles.

The first thing that must be acknowledged is that the notion of sovereignty has radically changed in the last decades. Under traditional international law, the sovereign’s authority over occupied territory was considered to be suspended on account of its displacement from its territory (\textit{i.e.}, a government in exile could not exercise actual control of the territory), so authority is conferred to the government that is actually exercising power over the territory.\footnote{Benvenisti, supra note 14, at 68-69.} This paradigm, however, forgets that in modern international law sovereignty is not assigned to a
particular government, but to the people themselves.  
Understanding sovereignty in these terms makes clear the fundamental point of any successful transition: that the future path a country will follow necessarily requires the input of the people who live in it. This presents the question, however, of how to achieve meaningful participation without furthering the domestic problems that gave rise to the reform in the first place. Indeed, a balance between centralized control by transitional administrators and local ownership needs to be struck. Absolute centralization of decision-making processes leads to delegitimization, but complete ownership will lead to chaos. Instead of being black and white, a well-organized and successful transition should be seen as a combination of varying degrees of centralization and ownership depending on the level of government (local, regional, and national) and the specific timing of the transition.  
This of course would require the application of a principle of proportionality, where “[t]he scope of reforms taken in pursuit of establishment of a durable peace must be proportionate to the legal end goals of the occupations or peacebuilding missions in question.” In order to achieve this proportionality requirement, a comparison between transformative occupations and international administration situations would suggest that shared responsibility would achieve good results. This means that international administrators and local populations would share, or at least actively discuss, decision-making in

159. Jean L. Cohen, The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for “Interim Occupations,” 51 N.Y.L. SCH. L. REV. 497, 522 (2006-2007) (stating that “[i]f it is no longer assumed that the ousted government is necessarily the holder of sovereignty, and if the occupying power does not claim permanent sovereignty (annexation), then it is up to the citizenry of an intact territorial state to authorize the new representative of popular sovereignty”).  
160. Id. at 525 (stating that “the conservation principle requires that major transformations occurring in the context of an occupation must be accomplished by the people themselves—through their representatives, not the occupying authority”).  
161. CHESTERMAN, supra note 3, at 143-44 (stating that it is a mistake to consider strong central authority in UNMIK, UNTAET, and other entities as politically unpalatable and that transfers to local populations “should be seen as the incremental completion of the administration’s mandate [which], in turn, suggests that power should generally be transferred first at the lower tiers of government, with careful attention paid to making clear what the relative capacities of local and international institutions are at each stage of the mission”) (footnote omitted).  
162. Boon, supra note 27, at 82.  
transition contexts, even if ultimate authority rests with the international community. There is no reason, other than political interests, why occupying states could not follow a similar path. Moreover, because many unilateral occupations are often illegal under international law, local populations tend to be wary of any measures promulgated by their occupiers. A greater role for domestic actors would increase trust in the occupying forces among the local population.

Of course, such a solution is very difficult to put in practice. Occupying powers after all do face incentives to satisfy their own interests before those of the local population. This would in theory offer a bleak outlook for transitions under occupation. In order for these good practices to be successfully implemented, occupier states would need to learn from the successes in Kosovo and Timor-Leste and acknowledge that, in the long run, political participation and ownership generates less costs than strategic and interested unilateral action. This, of course, is an enormous challenge in and of itself, one that would require a concerted effort from the international community as a whole. Therefore, in the short term, this probably means that in a world of self-interested states, military occupation will continue to be an area where successful transitions will be rare. However, a well-established set of principles and good practices might deprive bad occupiers “of the claim to legal legitimacy when [they impose] institutions on occupied populations without genuine participation or consent.” Thus, in the long-term, this set of good practices might be able to modify occupier state behavior and set the stage for the improvement of transition schemes under occupation, thus generating more successful cases in the future.

VI. Conclusion

It is clear that unilateral military occupations are particularly unsuited to promote a successful transition from war to peace, given their

164. Inter-state use of force that begins as a result of humanitarian intervention or regime change intervention is illegal under modern jus at bellum, regardless of their stated objectives. See Simon Chesterman, Just War or Just Peace?: Humanitarian Intervention and International Law 235 (2001) (stating that the use of force under international law is legal only on two exceptions: self-defense and U.N. Security Council authorization, leaving little room for legal unilateral action under international law, save perhaps in cases of humanitarian intervention, a debatable third option advanced by certain scholars for cases of gross human rights violations; the author concludes however that “[t]here is, in short, minimal state practice and virtually no opinio juris that supports a general right of humanitarian intervention”).

165. Cohen, supra note 159, at 522.
tendency to ignore participation and ownership from the local populations in their plans. On the other hand, international transitional administrations—while not perfect—are much better at engendering the participation that successful transitions require. However, given political considerations, the complexity of the process by which international administrations are created, and concerns regarding the image of the U.N. as an anti-colonialist entity, international administration of territories will remain, at least for the time being, a rare occurrence. As such, unless instances of military occupation can generate a much more participatory and uninterested environment, reminiscent of similar actions in international administration of territories, cases of unilateral occupation will remain unable to generate successful transitions from war to peace.