LAYING THE FOUNDATIONS FOR *JUS POST BELLUM*: THE CONSERVATIONIST PRINCIPLE IN THE LAW OF OCCUPATION AS A FOUNDATION FOR A FOURTH ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS*

Abstract

This article examines the law of occupation in international humanitarian law in the light of the Conservationist Principle. It examines the legal as well as theoretical framework and practice of post-conflict occupation and non-conflict related occupation. The article argues that the lack of a comprehensive legal framework regulating post-conflict occupation, especially after cessation of conflict but before peace, is a serious international law problem which has resulted in mishandling of the political and economic futures of several occupied territories. It argues that the current approaches and models, including the human rights based approach and reliance on UN Security Council Resolutions have significant shortcomings and limitations. A new more comprehensive approach is therefore necessary that will protect the rights of the occupied people to self-determination while ensuring the sovereign equality and territorial integrity of states. Without amplifying the specific contents, the article argues for the adoption of a 4th Additional Protocol to the Geneva Conventions. We also theorized the foundational principles that should guide its formation and drafting.

Keywords: Jus Post Bellum, Conservationist Principle, Law of Occupation, Geneva Convention

1. Introduction

There is a new task for international humanitarian law scholars and practitioners. The task is to define *jus post bellum* (law after war). While *jus ad bellum* (law on recourse to force) contained in the United Nations Charter and *jus in bellum* (law governing the conduct of hostilities) captured in the four Geneva Conventions and their Additional Protocols remain relevant, the spate of transformative military interventions, peace-keeping missions, and belligerent occupations have made obvious a gap in law that requires filling.[1] This article argues for the creation of a fourth Additional Protocol to the Geneva Conventions that specifically deals with *jus post bellum* (that is, the period after conflict, but before peace is fully restored). This proposed additional protocol will cover all cases of occupations arising from foreign incursions to the territory of another state, whether through unilateral act of a state(s) or UN Security Council multilateral interventions under Chapter VII of the UN Charter. We argue that the *Conservationist Principle* contained in the present laws of occupation embodied in the 1907 Hague Regulations, the four Geneva Conventions and their Additional Protocol is a good place to begin laying the foundation of a new *jus post bellum*. This article takes the conservationist principle further by advocating that it be interpreted in light of established international law principles of self-determination and sovereign equality of states limited by rules prohibiting genocide and other forms of mass atrocities. To achieve the above, this article discusses in Section 1 the Conservationist Principle of the law of occupation, highlighting its limitations and why it has been disregarded in practice. In Section 2, we examine the practice in the subject area of occupations. This section reviews a combination of belligerent occupations and UN led interventions showing the absence of consistency in law and practice. The goal here is to show the need for a uniform body of law to guide these situations. Finally, in Section 3, as a step forward, we demonstrate that the Conservationist Principle offers a good foundation upon which to design a uniformed *jus post bellum*. In addition, we argue that this overarching conservationist principle may need to be interpreted and operated in light of international law principles of right to self-determination and sovereign equality of states limited by the prohibition against commission of genocide and other forms of mass atrocities. It is not our goal in this article to define what the express contents of this proposed 4th Additional Protocol may be. Our goal is to theorize the foundational principles that should guide its formation and drafting.

2. The Law of Occupation and the Conservationist Principle

The current law of occupation is contained in the 1907 Hague Regulations, the four Geneva Conventions and the Additional Protocols. Of more relevance are the 1907 Hague Regulations, the fourth Geneva Convention (GCIV), and the first Additional Protocol (API).[2] This body of law described as a bill of rights for occupied population encapsulates the conservationist principle of the law of occupation.[3] The conservationist principle is the bedrock

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[1] K.E. Boon, Obligations of the New Occupier: The Contours of Jus Post Bellum [2009] (31)(1) *Loyola of Los Angeles International & Comparative Law Review*, 57.

[2] Regulations Respecting the Laws and Customs of War on Land 1907; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1977.

[3] B. Eyal, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 49.

of the law of occupation.[4] It is to the effect that an occupied territory shall not be subjected to legal, political, social, or economic transformation by the occupying force. The conservationist principle is founded on the twin ideas that occupations are temporal and that a state cannot be annexed through the use or threat of use of force.[5]

The Hague Regulation advocates for the maintenance of the *status quo ante*. This is captured in Article 43: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' It recognises the occupied state's right to sovereignty, advocates that the occupier shall not make wide legal or political changes, and annexation of occupied territory is prohibited. The occupier is only considered a trustee of the ousted sovereign.[6] Of the fifteen provisions on occupation in the Regulation, only three offered specific provision to civilians.[7] The rest were geared towards maintaining the properties of the state. The over one hundred-year-old law reflects a period when sovereignty was deemed to solely reside in the head of governments and not the people. Thus, it is expected that after occupations, the state should remain largely as it were before an invasion. The Hague Regulation however recognises the right of annexation where the victory over the weak state is complete and total – *debellatio*.[8]

The fourth Geneva Convention (GCIV) is more relaxing in the maintenance of *status quo ante*. While it still maintains the conservationist principle, it grants the occupier the right to change laws that may prevent the application of the convention or laws that may prevent it from maintaining security in the occupied territory.[9] It contains a wide range of social and economic duties considered to be owed from the occupier to the occupied. It contains provisions that require the occupying power to provide food, medical supplies, educational facilities for the occupied population.[10] API goes further to offer more protection to an occupied population. The twin reasons of maintenance of *status quo ante* and socio-economic responsibilities conferred on occupiers explain why states who are in occupation would rather deny it. This is because in some cases, maintenance of *status quo ante* may not be favourable either to the population occupied or the occupier, or both.[11] We agree with Gary Bass that in dire circumstance, it may be necessary to upturn the government of a state. An example of this is where the government of a state has been operating a genocidal policy. Such government cannot be allowed to continue to be in power by the international community.[12] It would have been unthinkable to leave the Hutus in control of Rwanda after the 1994 Genocide. In the same vein, it would have also been poor strategy to exclude them in the formation of a new government. As the exclusion of Sunnis in Iraq has shown, exclusion is never a good policy no matter how undemocratic a people are.[13] Exclusion festers animosity and future conflicts. For other situations, the responsibilities expected from the occupier may be quite overwhelming as to place too much economic burden on the occupant. This is a plausible reason Israel denies its continued occupation of Gaza.[14]

Regardless of these limitations present in the conservationist principle, it establishes the principle of inalienability of the sovereignty through occupation and does not support transformational occupations. Accordingly, we argue that the conservationist principle should remain an overarching principle of the proposed new law of occupation.

3. The State of Practice

We begin this Section by stating that the above discussed conservationist principle only applies to cases of occupation of a territory by the armed forces of another state(s). The International Court of Justice (ICJ) has

[4] For further discussion on the conservationist principle, see K.E. Boon, The Future of the Law of Occupation [2008] *The Canadian Yearbook of International Law*, 107; J.L. Cohen, The Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations [2006] (51)(3) *New York Law School Law Review* 497; N. Bhuta, The Antinomies of Transformative Occupation [2005] (16)(4) *The European Journal of International Law* 721.
[5] Cohen (n4) 497, 504-507.
[6] ibid 507.
[7] Articles 44, 46, and 52 Hague Regulations.
[8] Eyal (n3) 44.
[9] See Article 64 GCIV.
[10] See Articles 47-78 GCIV.
[11] C. Stahn, 'Jus Post Bellum: Mapping the Disciplines' in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to Peace* (T.M.C Asser Press, 2008) 106-107.
[12] G.J. Bass, 'Jus Post Bellum' [2004] (32)(4) *Philosophy & Public Affairs*, 384, 396-403.
[13] A. Arato, Post-Sovereign Constitution-Making and It's Pathology in Iraq [2006] (51)(3) *New York Law School Law Review* 535.
[14] For a detailed discussion on the occupation of Palestine by Israel, see A. Imseis, On the Fourth Geneva Convention and the Occupied Palestinian Territory [2003] (44)(1) *Harvard International Law Journal* 65.

copiously discussed when an occupation occurs in few cases.[15] The current law of occupation is not *de jure* applicable to Security Council authorised interventions. The latter interventions usually have the focus of transforming the legal, political, social, and economic climate of states on the receiving end of its interventions. However, as we shall show below, even in situations where the law of occupation should ordinarily apply, it has been disregarded repeatedly. Instead, these occupations are also transformational.[16] We begin with the occupations after World War II (WWII). The allied powers in their occupations after WWII had the singular focus of transforming the conquered territories.[17] Thus, the maintenance of *status quo ante* contained in the Hague Regulations were ignored. While the allied forces did not set out to annex the conquered territories, they conducted major political and legal reforms.[18] Understandably, it would have been unthinkable for the allied forces to leave in place the system and laws that legalized the genocidal acts of the Nazi. It is based on situations like this that Gary Bass argues that a transformative occupation is necessary in a genocidal state.[19] However, the question is, is it only in genocidal states that transformative occupation is accepted even though not backed by law? Practice answers in the negative.

In June 1967, after the six-day war, Israel became occupiers of East Jerusalem, Gaza Strip and West Bank which are together called the Occupied Palestine Territory (OPT).[20] Even though, initially Israel agreed it was going to apply the law of occupation to the OPT, it later restated its position. Its latter position was that it cannot apply the law of occupation to OPT because the ousted authorities (*i.e*., Egypt and Jordan were not legitimate sovereign authorities. More so, since it won over the territories in fighting a war of self-defence, it cannot be expected to treat its enemies with magnanimity. Israel thus argued that it would only apply GCIV *de facto* to the extent of protecting civilians but disagreed with the conservationist approach and the temporal nature of occupation the principle envisages. This argument put forward by Israel is why this article disagrees with just war theorists like Brian Orend who argue that the justness of an occupation should be tied to the justness of the war. Agreeing with Brian would mean that, if Israel indeed was just in self-defence, it is also just in its perpetual occupation of Palestine. This we believe cannot be the case. The justness of war must be separated from the justness of how war is fought, then these two justices separated from the justice after war, at least to the extent of protection of civilians.

A discussion on occupations will be incomplete without a discussion of the occupation of Iraq. Although we are aware of the various arguments as to the legality or otherwise of the invasion, an analysis of them is clearly outside the scope of this article.[21] While the actual war lasted less than two months,[22] the *de facto* occupation of Iraq has lasted much more.[23] The occupation officially began on 8 May 2003 when the US announced the Coalition Provisional Authority (CPA).[24] The Security Council through its Resolution 1483,[25] declared the US and UK as occupying forces and stated that they should obey the law of occupation.[26] In the same vein, the resolution grants the power to the occupiers to undertake economic, social, legal, and political transformation of Iraq.[27] The CPA through military orders overhauled the whole of Iraq's political, legal, social, and economic outlook.[28] The occupation of Iraq officially ended after 14 months with the formation of an interim government, which was given

[15] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion [1971] ICJ Rep 16; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 116; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep 136.
[16]K.E. Boon, The Future of the Law of Occupation [2008] *The Canadian Yearbook of International Law* 107.
[17] See Eyal (n3) 177-216 .
[18] ibid.
[19] G.J. Bass (n12) 396-403.
[20] Imseis (n14) 95.
[21] See B. Eyal, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) for robust discussion the arguments.
[22] G.H. Fox, 'The Occupation of Iraq' [2005] (36)(2) *Georgetown Journal International Law* 195, 202.
[23] J. Garamone, 'U.S. Completes Troop-Level Drawdown in Afghanistan, Iraq' US Department of Defense News (United States, 15 January 2021) <https://www.defense.gov/Explore/News/Article/Article/2473884/us-completes-troop-level-drawdown-in-afghanistan-iraq/#:~:text=Troop%20levels%20in%20Iraq%20and,operations%20started%20there%20in%202001.> accessed 29 March 2022.
[24] Fox (n22) 202.
[25] Security Council Resolution 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).
[26] ibid para 5.
[27] Fox (n22) 203; Security Council Resolution 1483 (n 26).
[28] See Fox (n22) for a detailed explanation of the full extent of CPA's transformation of Iraq.

the power to ask the occupiers to leave when they are ready.[29] However, US forces are still presently in Iraq.[30] More so, the transformation has not yielded positive returns as the conflict has continued to metamorphose since the initial invasion.[31] It is argued that this failure is because the US did not prepare for the occupation.[32] We doubt if this fully explains the circumstance. We do posit that the Iraq occupation is an example of why transformative occupations may not always be a right approach and why victor states should not be allowed to impose their politics or ideals on occupied states as a matter of right.

Other occupations include Russia's occupation of parts of Georgia- South Ossetia and Abkhazia,[33] Turkey's occupation of Northern Cyprus since 1974[34] and parts of northern Syria since 2016.[35] For Russia, it argues that it is not in occupation as it declares that the occupied territories are independent states and not part of Georgia and its presence on the territory is with the consent of the independent states.[36] Turkey also has a similar position over Northern Cyprus arguing that it is an independent state called the Turkish Republic of Northern Cyprus.[37]

Outside the above situations that fall under the laws of occupations are UN missions. An example of this is the United Nations Assistance Mission in Afghanistan (UNAMA).[38] Others include the United Nations mission in East Timor and Kosovo.[39] Apart from the United Nations presence in Afghanistan, the US has its own separate presence where it claims to be fighting the war against terror.[40] All these situations have been transformational in approach. We argue that these UN Missions are in fact of substantial influence on the so-called *de jure* occupations. For example, the Security Council Resolution 1483 on Iraq reflects its earlier resolutions on UN missions in Kosovo and East Timor which were very transformative.[41] In fact, it is a plausible argument that UN missions are the testing ground for transformative occupations and thus, it is important to have a uniform law that captures all these situations.

4. Going Forward: The Case for *Jus Post Bellum*

There have been calls in various quarters for *jus post bellum*; the approach differs among international law scholars[42] and just war theorists (JWT)[43] and differs among scholars in both fields. According to Carsten Stahn,

[29] See Security Council Resolution 1546, U.N.S.C. 4987 Mtg, UN Doc. S/RES/1546 (2004).
[30] Garamone (n23).
[31] RULAC Geneva Academy, 'International Armed Conflict in Iraq' <https://www.rulac.org/browse/conflicts/international-armed-conflict-in-iraq#collapse2accord> accessed 29 March 2021; RULAC Geneva Academy, 'Non International Armed Conflict in Iraq' <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-iraq> accessed 29 March 2021.
[32] M.R. Hover, 'The Occupation of Iraq: A Military Perspective on Lessons Learned' [2012] (94) (885) *International Review of the Red Cross*, 339.
[33] A. Bellal (ed), *The War Report: Armed Conflicts in 2018* (Geneva: Geneva Academy 2019) 32.
[34] ibid.
[35] ibid.
[36]RULAC Geneva Academy, 'Military Occupation of Georgia by Russia' <https://www.rulac.org/browse/conflicts/military-occupation-of-georgia-by-russia> accessed 29 March 2021.
[37] RULAC Geneva Academy, 'Military Occupation of Cyprus by Turkey' <https://www.rulac.org/browse/conflicts/military-occupation-of-cyprus-by-turkey> accessed 29 March 2021.
[38] C. Garraway, 'The Relevance of Jus Post Bellum: A Practitioner's Perspective' in C. Stahn and J.K.. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to Peace* (T.M.C Asser Press 2008) 155.
[39] ibid.
[40]RULAC Geneva Academy 'Non-international Armed Conflicts in Afghanistan' <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-afghanistan> accessed 29 March 2021.
[41] Cohen (n5) 512.
[42] For different positions among international law scholars see, A. Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' [2003] (44)(1) *Harvard International Law Journal*, 65; N. Bhuta, 'The Antinomies of Transformative Occupation' [2005] (16)(4) *The European Journal of International Law*, 721; J.L. Cohen, 'The Role of International Law in Post-Conflict Constitution-Making toward a Jus Post Bellum for Interim Occupations' [2006] (51)(3) *New York Law School Law Review,* 497; A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' [2006] (100) *The American Journal of International Law*, 580; K.E. Boon, 'Obligations of the New Occupier: The Contours of Jus Post Bellum' [2009] (31)(1) *Loyola of Los Angeles International & Comparative Law Review*, 57; B. Eyal, *The International Law of Occupation* (2nd edn, Oxford University Press, 2012); A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge: Cambridge University Press, 2017).
[43] For different positions among just war theorists see, G.J. Bass, 'Jus Post Bellum' [2004] (32)(4) *Philosophy & Public Affairs*, 384; R.P. DiMeglio, 'The Evolution of the Just War Tradition: Defining Jus Post Bellum' [2005] (186) *Military Law Review*, 116; C. Bell, 'Peace Settlements and International Law: From Lex Pacificatoria To Jus Post Bellum' in N. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (Cheltenham UK: Edward Elgar Publishing, 2013); B. Orend, 'Jus Post Bellum: A Just War Theory Perspective' in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to* Peace (T.M.C Asser Press, 2008); L. May and A.T. Forcehimes (eds), *Morality, Jus*

a reason for the argument for a *jus post bellum* by JWT is to complete the tripartite justice of war – *jus ad bellum and jus in bello,* and *jus post bellum*.[44] Also, Brian Orend, a JWT argues that the justice of war is incomplete until the matter of what happens after war is determined.[45] He further argues that *jus ad bellum and jus in bello,* and *jus post bellum* must be considered jointly and failure in one is failure in all. In discussing Kant's position on justice after war, Brian argues that once you are an aggressor, 'everything is lost to you morally'.[46] While this position is morally sound, it is quite problematic legally and indeed dangerous for civilians in *de facto* or *de jure* occupied territories. The danger lies in the fact that an occupier who is condemned to have failed whether in *jus ad bellum* or *jus in bello* may not see the need to do so much in further protecting the population. We argue that the liabilities for *jus ad bellum, jus in bello* and *jus post bellum* be considered separately. More so, occupations are not necessarily tied to an earlier armed conflict.

Furthermore, Brian posits that in *jus post bellum,* the victor has a responsibility of reconstructing the occupied state.[47] This argument for an automatic right or responsibility to reconstruct the occupied state is in disregard of the sovereign equality of states and the right to self-determination of the people. Also, while it may be morally right to expect that a powerful and wealthy state will help in rebuilding a state conquered after a war, it is not a legally sustainable position. The advocacy already assumes that the victor is a much more powerful state that is set to 'save' a weak state. This may not be the case. One wonders what Vietnam could have done to rebuild Cambodia following its occupation of the latter in 1978.[48] Thus, the law cannot afford to be too ambitious as to create obligations that cannot be fulfilled by all nations regardless of economic or political stature. More so, where transformational occupation is achieved by overcoming the will of the people through force, resentment is bound to arise from the occupied population. This in turn leads to further conflict.[49] Finally, the neo-colonialist tendencies of transformative occupations cannot be overlooked.[50]

Among international lawyers, different theories have been posed for *jus post bellum*. It has been argued that the law of occupations should be left as it is while we look to international human rights law to fill the gap in the law.[51] Giving credence to this position is that the International Court of Justice (ICJ) has held that ICCPR and ICESR are applicable during occupations.[52] Similar decision, on the application of ECHR was also reached by the ECtHR in *Al-Skeini*, a case based on the Iraq occupation.[53] While we agree that human rights provisions can assist in filling the gap in interpretation of humanitarian law during occupations, we disagree that such filling of the gap is sufficient to bring UN missions within the purview of the law of occupations. More so, this argument suggests that transformative occupations are the way to go in every case, and that as long as individuals' civil, political, economic, social and cultural rights are upheld, the right of self-determination of these individuals as a people is of no consequence. We argue that this cannot be the case. The right to self-determination is as much important as individual human rights.

Post Bellum, and International Law (Cambridge University Press, 2012); C. Bell, 'Post-Conflict Accountability and the Reshaping of Human Rights and Humanitarian Law' in O. Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, 2011); J. Gallen, 'Jus Post Bellum: An Interpretive Framework' in C. Stahn, J. Easterday and J. Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014); J.S. Easterday, 'Peace Agreements as Framework for Just Post Bellum' in C. Stahn, J. Easterday and J. Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014); L. May, 'Jus Post Bellum, Grotius, and Meionexia' in C. Stahn, J. Easterday and J. Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford University Press, 2014).

[44] C. Stahn, 'Jus Post Bellum: Mapping the Disciplines' in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to* Peace (T.M.C Asser Press, 2008) 102.

[45] B. Orend, 'Jus Post Bellum: A Just War Theory Perspective' in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to* Peace (T.M.C Asser Press, 2008) 31-52.

[46] ibid 34-37.

[47] ibid 42-48.

[48]See P. Penh, 'Vietnam's Forgotten Cambodian War' *BBC* (United Kingdom, 14 September 2014) <https://www.bbc.co.uk/news/world-asia-29106034#:~:text=Vietnam%20launched%20an%20invasion%20of,massacring%20civilians%20and%20torching%20villages.> accessed 29 March 2022.

[49] For example, Iraq and Palestine.

[50] J.L. Cohen (n 5) 519.

[51] A. Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' [2006] (100) *The American Journal of International Law*, 580.

[52] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

[53] *Al Skeini v United Kingdom* (2011) 53 E.H.R.R. 18; See Andrew Williams, 'The Iraq Abuse Allegations and the Limits of UK Law' [2018] *Public Law,* 461 for a critical analysis of the *Al-Skeini* case.

Moreover, the application of human rights during occupations is not without complications. According to Charles Garraway,[54] a military lawyer in the British forces, human rights application raises issues such as the confusion as to when it starts operating especially in situations where fighting continues.[55] Also, in matters of detention, he raises the question of whether the occupier has a duty to build new prisons for detainees in an occupied territory in line with international human rights standard that may in the end be better than where majority of the innocent population live.[56] These are salient points of concern. Thus, it cannot be taken for granted that human rights law can fill the gap created in practice by transformative occupations.

Another argument that has been raised is that Security Council Resolutions (SCR) may be used to fill the lacuna in the law.[57] The argument along this line relies on SCR on Iraq, especially how the resolution expanded what an occupation entails and determined the technical ending of the occupation.[58] While this article will not go into all the issues raised by that resolution, we will point out why SCRs are not the solution. The Security Council is a political institution, and with the veto power of its permanent powers, they mostly serve their interests. The tendency of the Security Council to do as it please is reflected in its tragic delay to act during the Rwanda Genocide and its disinterest in Darfur.[59] Moreover, there is no accountability mechanism to monitor the institution. Thus, such a political institution cannot have unilateral power to decide the legal principles that govern the law of occupation. We argue that while the Security Council maintains its Chapter VII powers, the new *jus post bellum* will cover its ordered multilateral interventions.

Jean Cohen has a different approach on the way forward for *jus post bellum*.[60] We align with his argument. Jean's position is that while there is an acknowledgement that the current laws of occupation are indeed outdated, transformative occupations are not the way to go; occupations must continue to be regarded as a temporary situation; and the occupier must always know that the longer the occupation, the more it loses legitimacy. More so, an occupation cannot be a means of furthering political or economic policy.[61] We posit that this position is apt towards developing an all-encompassing *jus post bellum*.

We argue for a *jus post bellum* that maintains the conservationist position of the current law of occupation but with a more developed understanding. The right to self-determination of a people must be clearly set out in the new law.[62] That is even where a state is under occupation, the people of the territory must be recognised as having and retaining their right to determine their political future. Thus, the people of a state should be able to determine to what extent they desire transformation. Therefore, the first duty of an occupier should be to ensure that the people of that territory are able to come together to elect or appoint representatives. Major decisions should not be taken by occupiers without the consent of the occupied. Although, this may also be challenging in practice as it may be difficult to negotiate where there is power imbalance, regardless, we think this a good place to start. For example, in Iraq, the wide range of powers exercised by the CPA was excessive. Even though, an interim government was formed, a large part of the population was side-lined (for example, the Sunnis) and major decisions were taken by the CPA. Also, the entire economic state of Iraq was turned upside down.[63] This total and complete disregard for the right of Iraq people to jointly determine their future has continued to cost the people of Iraq so much.[64] It may be argued that the failure of the transformational occupation of Iraq is a matter of inadequate preparation and poor strategy by the CPA and not a matter of law.[65] Notwithstanding, if the current laws of occupation were clear, the CPA would have had clarity of direction from the first instance and realized it was not its place to determine the future of the people of Iraq. Also, the Security Council would not have blatantly stepped outside the purview of the law with its Resolution 1483. However, with the colonial history of many states which brought different 'peoples' together as one state, identifying who a 'people' is and what their determination is will be a challenge. For example, applying the principle of self-determination may lead to different implications

[54] C. Garraway, 'The Relevance of Jus Post Bellum: A Practitioner's Perspective' in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to* Peace (T.M.C Asser Press, 2008) 153-162.
[55] ibid 154-169.
[56] ibid.
[57] K.E. Boon (n1) 72-75.
[58] Security Council Resolution 1546 (n31) declared the end of the occupation with the formation of the interim government.
[59] K.E. Boon (n1) 74.
[60] J.L. Cohen (n5) 497-532.
[61] ibid.
[62] See Article 1(2) UN Charter; Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations GA Resolution 2625 (XXV) of 24 October 1970.
[63] See G.H. Fox (n22).
[64] See RULAC Geneva Academy (n 33) on the continued armed conflict in Iraq.
[65] See M.R. Hover (n34).

for the people of South Ossetia and Northern Cyprus who have claimed their independence from Georgia and Cyprus, respectively. Thus, for situations like South Ossetia and Northern Cyprus where these territories wish to remain separated from their original States, there is a need to balance the right of these people to determine their future and the principle of sovereign equality of states discussed below.

Another underlying principle that should be central to the new *jus post bellum* is sovereign equality of states. The principle of sovereign equality is to the effect that all states are equal. It is firmly entrenched in the UN Charter.[66] That is, even where occupations happen, the occupying force recognises that the occupied state remains an independent state. Therefore, an occupying power's approach to an occupation is to leave the occupied territory as soon as possible. However, there is a balance between sovereignty of nations and cosmopolitanism. That is, the sovereignty of states is limited by other international law principles. For example, a state cannot in the name of its sovereignty commit crimes against humanity nor fight aggressive wars. The import of this for *jus post bellum* is that, where war is fought to liberate a people from a dictatorial government that disregards the rights of its citizens, such government cannot expect it would continue to exist. Notwithstanding, the government is not the same as the people. Thus, the people do not lose their right to self-determination nor does the state cease to exist. Therefore, in such a case, after ousting the power, the victor should know that what happens afterwards should solely be the decision of the people.

5. Conclusion

We have in this article argued for a Fourth Additional Protocol to the Geneva Conventions that deals with *jus post bellum* (*i.e*., law after war). This is to ensure a uniformity of law to guide the period after conflict but before peace. We have shown the inconsistencies in law and practice evidenced by the transformational occupations from Palestine to Iraq, to the UN led intervention in East Timor, Kosovo, and Afghanistan, among others. These situations all stand contrary to the conservationist principle encapsulated in the 1907 Hague Regulation and GCIV. It has been posited here that the new *jus post bellum* should retain an overarching conservationist principle which recognises the temporary nature of occupations and the inalienability of sovereignty through threat or use of force. We have argued that this conservationist stand should be supported with the international law principles of self-determination and sovereign equality of states limited by the prohibition against perpetuating mass atrocities. This article is not an attempt to determine the content of the proposed law.[67] Rather, we have laid the foundation upon which further discussions can be taken up. Going forward, we recommend that there is a need for empirical study to determine how this law will be most effective. The experience of Iraq, Palestine and Afghanistan are a good place to begin.

[66] See Article 2(1) UN Charter; Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations GA Resolution 2625 (XXV) of 24 October 1970.

[67] For suggestions on content of a proposed *jus post bellum* see, C. Stahn, 'Jus Post Bellum: Mapping the Disciplines' in C. Stahn and J.K. Kleffner (eds), *Jus Post Bellum: Towards a Transition from Conflict to* Peace (T.M.C Asser Press, 2008); C. Stahn, 'Jus Post Bellum: Mapping the Discipline(s)' (2008) 23 *American University International Law Review*, 311.