The Tyranny of Strangers: Transformative Occupations Old and New

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Abstract

In the aftermath of the US led invasion of Iraq in 2003 considerable attention was given to the apparent emergence of a new type of belligerent occupation – the 'transformative occupation' which apparently challenged the traditional assumptions of the law of occupation. The suggestion here is that, as an examination of the British occupation of Mesopotamia between 1914-1924 reveals, the 'transformative occupation' is by no means a new institution, but is to be associated with a tradition of thought and practice in which belligerent occupation is tied to both colonialism and the inter-war Mandate System, and whose legacy is critical for understanding the role of occupation law today.

> O! People of Baghdad. Remember that for twenty-six generations you have suffered under strange tyrants who have ever endeavoured to set one Arab house against another in order that they might profit by your dissensions. Therefore, I am commanded to invite you, through your Nobles and Elders and Representatives, to participate in the management of your civil affairs in collaboration with the Political Representatives of Great Britain who accompany the British Army so that you may unite with your kinsmen in the North, East, South and West in realizing the aspirations of your race.[1]

> Lord Curzon: 'I should put in a British administrator, but not declare a protectorate… We shall have an administrator in any case behind the façade of Arab Government.'
> Mr Balfour: 'What do we mean by protectorate? Did we have one in Egypt before the war?'
> Lord Robert Cecil: 'No certainly not.'
> Mr Balfour: 'What had we?'
> Lord Robert Cecil: 'No one knows, but we had not a protectorate.'[2]

> 'Everybody knows what a modern "protectorate" is; it is a mere synonym for a colony to which one refuses the rights of citizenship'.[3]

1. Introduction

One of the themes to emerge in scholarship in the aftermath of the US-led invasion of Iraq in 2003 was whether it had exemplified or instantiated a shift in the character of the law of military occupation.[4] Whether, to use the term coined by David Scheffer in his influential article from 2003,[5] it seemed to authorize, or

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[1] Proclamation of General Maude, 19th March 1917, *Proclamations,* 1914-1919, Proclamation No. 9, pp. 5-6.

[2] War Cabinet's Eastern Committee, 27th November 1918, p. 7.

[3] T Baty, 'The Relations of Invaders to Insurgents' 36 *Yale Law Journal* (1927) 966, 976.

[4] The basis of the occupation was set out in UNSC Resn. 1483 (May 22, 2003), 42 ILM (2003) 1016.

[5] D Scheffer, 'Beyond Occupation Law' 97 *American Journal of International Law* (2003) 842.

inaugurate, a new category of occupation—the transformative occupation—whose rationale was not to conserve, or maintain intact existing laws and economic arrangements pending a treaty of peace (as was characteristically required by article 43 of the Hague Regulations[6] and the Fourth Geneva Convention of 1949[7]) but rather to transform them into something else. To promote democracy, human rights, to enable regime change and encourage legal and judicial reform.[8]

For the most part, those who have engaged with the subject have, by no means, been converts to the cause.[9] Scheffer, for his part, was largely critical of Security Council Resolution 1483[10] that authorized the regime of occupation undertaken by the Coalition Provisional Authorities on the grounds that the law of belligerent occupation was simply ill-suited to the ends sought by the regime.[11] Fox, in similar

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[6] Regulations Respecting the Laws and Customs of War on Land, annex to Convention IV Respecting the Laws and Customs of War on Land, 18th October 1907, 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').

[7] Convention Relative to the Protection of Civilian Persons in Time of War, 12th August 1949, art. 64.

[8] See generally, N Bhuta, 'The Antinomies of Transformative Occupation', 16 *European Journal of International Law* (2005) 721; S Power, 'The 2003-2004 Occupation of Iraq: Between Social Transformation and Transformative Belligerent Occupation' 19 *Journal of Conflict and Security* (2014) 341; G Fox, 'Transformative Occupation and the Universalist Impulse' 94 *International Review of the Red Cross* (2012) 237; A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' 100 *American Journal of International Law* (2006) 580; C McCarthy, 'The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq' 10 *Journal of Conflict and Security Law* (2005) 43; S Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' 16 *European Journal of International* Law (2005) 694; M Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' 16 *European Journal of International Law* (2005) 661; E Benvenisti, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective', 1 *Israeli Defense Forces Law Review* (2003) 19; K Kaikobad, 'Problems of Belligerent Occupation: The Scope of Powers exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004' 54 *International and Comparative Law Quarterly* (2005) 253; J Yoo, 'Iraqi Reconstruction and the Law of Occupation', 11 *University of California Davis Journal of Internaitonal Law and Policy* (2004-5) 7.

[9] The 'cause' here is best represented by Yoo (2004-5) who concludes that 'Internaitonal law provides the United States with ample authority to establish a new Iraqi constitution and democratic governmental institutions as part of its duty to secure public safety in Iraq, protect the basic human rights of Iraqis, and restore international peace and security.'

[10] SC Resn. 1483, 22 May 2003.

[11] Scheffer (2003), 859 ('The legal environment in Iraq would be better rationalized with a fresh UN mandate setting forth the responsibilities and mission objectives of the military powers operating in Iraq and by establishing UN civilian administrative functions that would assume powers held by the Authority under Resolution 1483.'). To similar end see McCarthy, (2005). Glazer takes this point in a slightly different direction arguing that many of the subsequent problems could be traced to an unwillingness of the US to

vein, took the view that whilst the humanitarian objective was sound enough, seeking to achieve it by way of unilateral military occupation threatened to undermine the legitimacy of transformation projects more generally.[12] Others, such as Roberts and Bhuta, were somewhat more critical about the transformational agenda being promoted. There was 'ample ground', as Roberts noted, for skepticism about the proposition that 'democracy can be spread by the sword',[13] and for Bhuta it appeared to herald the revival of a species of 'liberal anti-pluralism'.[14] But a common theme nonetheless has been that the legal terrain of belligerent occupation has shifted subtly since 1945 and that case of Iraq was in some ways exemplary. The CPA orders for the De-Ba'athification of Iraqi Society, for the abolition of key institutions of the Iraqi state, and for the extensive transformation of the economy, all pointed to an apparent contradiction between the conservative thrust of occupation law and the more radical transformative agenda being pursued in Iraq.

Many commentators—and Roberts is exemplary here—have sought to occupy an uncertain middle ground that eschewed both an outright endorsement of transformative occupations[15] and a straightforward critique of their illegitimacy when measured by the terms of the Hague Regulations and Fourth Geneva Convention.[16] Many indeed, have assumed a posture of cautious counsel—either endorsing the transformative goal, but criticizing the means,[17] or expressing skepticism as to the ends, but offering prudential observations as to the means by which those ends might be achieved.[18] One needs to be conscious, we are reminded, of the limits of what an 'invader' might do, be cautious about claiming to 'liberate' territory or imagine that democratic transformation will constitute a panacea for all forms of social ills. Efforts should be made to bring such occupations within the boundaries of law—even if that ultimately means changing the law of occupation to bring it into line with 'changed circumstances, perceptions and expectations'.[19]

Running through most such accounts is the shadow of a colonial past, faintly erased. For Scheffer, this entailed reading Resolution 1483 as having the objective of pulling Iraq 'out of its repressive past' and returning it 'to the community of civilized nations'.[20] For others, by contrast, it has taken the form of a suspicion that the language of 'liberation' or of the promises offered by 'democratic' rule were unlikely to be received without some measures of skepticism by the

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abide by the law of occupation. D Glazer, 'Ignorance is Not Bliss: The Law of Belligerent Occupation and the US Invasion of Iraq' 58 *Rutgers Law Review* (2005) 121.

[12] Fox, (2012) 241.

[13] Roberts, (2006) 579-580.

[14] Bhuta (2005), 723 (referring to the term as used by G Simpson, *Great Powers and Outlaw States* (2003) 299).

[15] Roberts (2006) 620

[16] *Ibid,* 589

[17] See e.g. Scheffer (2003), Fox (2003), Sassoli (2005), and McCarthy (2003).

[18] Bhuta, (2005) 739-40.

[19] Benvenisti (2003) 38.

[20] Scheffer (2003) 844.

occupied population.[21] Yet, for all the contextual subtlety of the critique of the Iraqi occupation of 2003-11, only few have ventured to examine the parallels that might exist with the earlier British occupation of Iraq (Mespotamia) in 1914-20,[22] and even fewer to engage with the incipient relationship between the practice of belligerent occupation, on the one hand, and imperial policies of colonization and control on the other.[23]

The suggestion here is that, as an examination of the British occupation of Mesopotamia between 1914-1924 reveals, there have always been strong continuities between the practice of belligerent occupation and formal modalities of colonial rule. As will become evident, by conceptualizing its occupation of Mesopotamia as a form of liberation, the British effectively reconceived the function of belligerent occupation, reimagining it as a form of trusteeship in which the animating conditions of occupation were reinterpreted as duties of rule, and in which the occupying power (as it saw it) would be tasked with the arduous work of developing, reforming and modernizing the territories in question. The occupation of Mesopotamia, in other words, not only brought to the fore an inexplicit alignment between what appeared to be two disjunctive systems of rule—belligerent occupation on the one hand, and colonial rule on the other—but exposed the perilous relationship between the regime of belligerent occupation and its own conditions of possibility.

2. The Preconditions of Belligerent Occupation

Most accounts of the emerging institution of military occupation characteristically trace its most immediate origins to the early 19th Century, as an institution emerging out of the revolutionary wars of the Napoleonic era.[24] Up until that time, the general assumption was that the military occupation of an area would result in an immediate transfer of sovereignty—that the conquering power would obtain sovereignty over the territory entitling it to claim ownership of all public property[25] and demand, in equal measure, the allegiance of the population.[26] By

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[21] Roberts, (2006) 620

[22] For general comparisons between the two occupations see P Sluglet. 'Imperial Myopia: Some Lessons from Two Invasions of Iraq' 62 Middle East Journal (2008) 59; A Carcano, *The Transformation of Occupied Territory in International Law* (2015).

[23] There is a literature that certainly attends to such continuities. See, in particular, R Parfitt, *The Process of International Legal Reproduction* (2019); K Rittich, 'Occupied Iraq: Imperial Convergences?' 31 Leiden Journal of International Law (2018) 479; A Anghie, 'The War on Terror and Iraq in Historical Perspective', 43 *Osgood Hall Law Journal* (2005) 45. Benvenisti also notes that Hague Law became a pretext for the re-establishment of colonial rule in Indonesia and Viet-Nam after the retreat of the Japanese in 1945. E Benvenisti, *The International Law of Belligerent Occupation* (2nd ed. Oxford UP, 2012) 97.

[24] See eg. E Benvenisti, 'The Origins of the Concept of Belligerent Occupation' 26 *Law and History Review* (2008) 621; J Stone, *Legal Controls of International Conflict* (1954) 693-4; Y Dinstein, *International Law of Belligerent Occupation* (2009) 8; M Stirk, *A History of Military Occupation from 1792 to 1914* (Edinburgh UP, 2017) 5; Bhuta (2005) 725.

[25] See eg. E de Vattel, bk III, ch. V ('Immovable possessions, lands, towns, provinces etc become the property of the enemy who makes himself master of them'). See further *The Foltina*, 165 Eng. Rep. 1374, 1375 (1814).

[26] C Schmitt, *The Nomos of the* Earth (2006) 200.

the early 19th Century, however, the idea had started to emerge (most visibly recorded in the work of Heffter[27] and then later in the Leiber Code of 1863[28] and the Brussels Conference of 1874[29]) that mere military occupation would not, in itself, result in a transfer of sovereignty. Rather, it constituted a provisional regime of factual occupation that left untouched the question of sovereignty and, as a consequence, brought with it certain constraints upon the authority of the occupant.[30] Occupying powers were not entitled to conceive themselves as sovereign, claim rights of ownership in relation to public resources,[31] nor were they empowered to demand the allegiance of the occupied population.[32] Those were matters that could be only be determined once military operations ceased—either with the vanquishing of the enemy (*debellatio*) or the conclusion of a treaty of peace.[33] In the meantime, as came to be recognized in the Regulations annexed to the Hague Convention (IV) of 1907,[34] the occupying authorities enjoyed a range of strictly limited powers: the right to 'restore and ensure… public order and safety',[35] to collect 'taxes, dues, and tolls imposed for the benefit of the State',[36] requisition services,[37] 'take possession' of such movable property of the state for purposes of military operations[38] and act as 'administrator and usufruct' of any immovable public property.[39] The 'lives of persons, and private property' were to be respected[40] as was the property of 'institutions dedicated to religion, charity and education', and 'historic monuments' and works of 'art and science'.[41]

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[27] A Heffter *Das Europäische Völkerrecht* (1844). See also H Halleck, *International Law* (1861) ch XXXII.

[28] F Leiber, 'Instructions for the Government of Armies of the United States in the Field' General Order No. 100 (1863). See further D Graber, *Development of the Law of Belligerent Occupation 1863-1914* (1949) 5.

[29] *Project of an International Declaration Concerning the Laws and Customs of War*, (Aug. 27 1874), 1 *American Journal of International Law Supplement* (1907) 96. See also Institut de Droit International *Manuel des lois de la guerre sur terre* (Oxford 1880).

[30] Benvenisti describes the emergence of the regime as taking place in two steps: first 'the recognition of the principle of the inalienability of sovereignty through sheer force', secondly through 'the recognition of… [a conservationist principle] which seeks to protect the bases of power of the ousted government'. Benvenisti (2008) 628. Hall speaks, in that same guise, of the rights of the sovereign being left 'intact'. W Hall, *Treatise on International Law* (1917) 497.

[31] Leiber Code, articles 34-39; Oxford Manual, articles 50-60 (subject to the general proviso that resources may be used so far as necessitated by the exigences of warfare); Hague Regulations, articles 43-56.

[32] Oxford Manual, articles 46-7; Hague Regulations, article 45. For the view, however, that the occupying authorities were empowered to claim a 'duty of allegiance' on the part of the occupied population see Halleck (1861) 336.

[33] See, *American Insurance Co v 356 Bales of Cotton* 26 US (1 Pet) 511, 540 (1828) per CJ Marshall.

[34] Hague Convention on the Laws and Customs of War on Land (Hague IV) (1907).

[35] *Ibid,* Article 43.

[36] *Ibid,* Article 48.

[37] *Ibid,* Article 52.

[38] *Ibid*, Article 53.

[39] *Ibid*, Article 55.

[40] Article 46.

[41] Article 56.

Whilst the bare bones of this new conceptual apparatus were clear enough its rationale, as Bhuta explains, was to be found in two, dichotomous propositions. One of these was the (then revolutionary) idea that it was for the general populace to determine their own political future. The concept of popular self-rule (what would later be referred to as national 'self-determination') disqualified the straightforward annexation of conquered territory not simply because it violated the 'inalienable rights' of the conquered populace[42] but also, one may speculate, because it would potentially disturb the political equilibrium in the constitutional order of the state acquiring the territory.[43] The other, and largely contradictory, proposition was that the legitimation of territorial change would depend upon the authorization or acquiescence of the Great Powers whose benediction was vital for purposes of maintaining the European balance of power. 'By enjoining the occupant from changing the political order of the occupied territory, and by interdicting the legal transfer of sovereignty until the state of war was formally concluded' Bhuta was to explain, enabled the legal category of belligerent occupation to operate as a 'mediating device' giving succor to both ends—both to demands for revolutionary change and for the conservation of the (dynastic) *status quo*.[44] Its key feature, thus, was its suspensive quality—placing the question of sovereignty (to use McNair's words) into 'abeyance'[45]—limiting the rights of the occupant to those that appeared necessary for the maintenance of its factual control, and imagining the possible 'return' of the territory to its rightful owner.

That the emergent regime of belligerent occupation was premised upon 'a negation of the identity of the status of the Occupant with that of Sovereign',[46] as Julius Stone was to put it, provided only a partial explanation for the regime as it was to develop. It certainly seemed to imply that the occupying authorities were constrained to act within certain limits. It did not, however, provide much explanation as to the content of those limits. What was more significant, as Carl Schmitt was to observe, was that the regime was conditioned upon the idea that the intra-European warfare which it sought to regulate was a war of combatants: 'a struggle' as he put it 'between mutually state-organized armies, which sought to circumscribe a purely military sphere from all others—the economy, culture, intellectual life, church and society.'[47] This 'bracketing' of warfare gave expression in the first place to the Rousseau-Portales doctrine: the idea that warfare was to be conceived as a battle between two governments conducted through the medium of their armed forces, not a battle that brought into contestation two peoples. Insofar, however, as it brought into play a distinction between the government and people, so also did it give implicit recognition to a set of other

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[42] Benvenisti, (2008) 628.
[43] Arendt H., 'Imperialism, Nationalism, Chauvenism 7 The Review of Politics (1945) 441, p. 445 who speaks of the 'inner contradiction between the body politic of the nation and conquest as a political device'.
[44] Bhuta (2005) 732.
[45] A McNair, Separate Opinion, *International Status of South West Africa* Advisory Opinion, ICJ Reports (1950), 128, 150. Baty suggests that the occupant enjoyed 'a "quasi-sovereignty," investing the invader with large powers, but not altering the national character of the territory and inhabitants'. Baty (1927) 973.
[46] Stone (1954) 727.
[47] Schmitt (2006) 207

distinctions: between the combatant and the non-combatant, the public and the private, the political and the economic, and between the secular and the religious.

Underlying this formation, as Kunz later observed, was a conception of warfare that was itself premised upon a supporting architecture of ideas: of 'democracy, capitalism, economic liberalism, the principle of the sanctity of private property, the strict distinction between private enterprise and economic activities by the states'.[48] And in that context, the regime of belligerent occupation appeared to be concerned, less with a desire to limit or forestall the annexation of territory (that, after all, was always a possibility), than to ensure that the domain of private affairs (the economy, the family, religious or cultural institutions etc.) should be insulated not only from the ongoing conditions of inter-state conflict[49] but from governmental intervention *tout court*. For even in case of territorial change, as Schmitt points out, it was assumed that the 'international economic order—the liberal market sustained by private entrepreneurs and businessmen… —retained all the international safeguards that it needed to function' in virtue of a 'common standard of liberal constitutionalism'.[50]

If, for Schmitt, such ideas formed the backdrop to the rules of occupation, they also operated as its conditioning assumptions. Belligerent occupation, he was to maintain, could only be operationalized in contexts in which the standard of liberal constitutionalism was held in common. Where it was lacking, he suggested, it remained ineffective. Thus, he explains, whilst Fedor Fedorovich Martens had been a vocal advocate for the regime of belligerent occupation at the 1874 Brussels Conference, he had nevertheless dismissed its application in relation to the Russian occupation of Ottoman territory in 1877 on the grounds that the elimination of Islamic institutions constituted one of the war aims of the Russian government.[51]

Schmitt's conclusion that the regime of belligerent occupation was only to come into play in the context of European warfare is, indeed, a widely shared assumption.[52] As Bhuta observes, 'belligerent occupation could arise only in the context of a state of war' between sovereign states.[53] Since sovereignty, however, was in Koskenniemi's words, a 'gift of civilization',[54] and since non-European states were deemed not sufficiently civilized to be regarded as 'sovereign', not only were the laws of war regarded as inapplicable in relations with the non-European world, but so also was the doctrine of belligerent occupation. The idea of 'occupation' thus, had two distinct connotations: one concerned the occupation of (sovereign) European territory in time of war (belligerent occupation); the

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[48] J Kunz, 'The Chaotic State of the Laws of War and the Urgent Necessity for their Revision', 45 *American Journal of International Law* (1951) 37, 40.
[49] Schmitt (2006) 208.
[50] Schmitt (2006) 197.
[51] *Ibid,* 209.
[52] See eg. Benvenisti (2008) 623, 647; A Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge UP, 2017) .
[53] Bhuta (2005) 729
[54] M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge UP, 2001).

other concerned the occupation of what was deemed to be 'non-sovereign' space (covering much of the non-European world) in which the doctrine of 'effective occupation' would operate, alongside that of cession, and conquest, as a ground for the acquisition of sovereignty. Occupation, in other words, either 'suspended' sovereignty, or enabled its extension (and 'erasure', perhaps) depending upon its place of operation.

Whilst it is certainly evident that, up until 1914 at least, European powers were unwilling to admit that the rules of 'civilised warfare' would be applicable in relation to warfare in the colonial or semi-colonial periphery,[55] and that the 'effective occupation' of non-European territory, in the phraseology of the Berlin Conference of 1884-5, was liable to be treated as a awarding the occupant a firm title in sovereignty, it is also very clear that regimes of military occupation falling short of annexation were relatively common in the non-European world. The military occupations of Cuba (1898-1901), Guam (1898-1900), Puerto Rico (1898-1900), the Philippines (1898-1902),[56] Haiti (1915-1934),[57] the Dominican Republic (1916-24)[58], Egypt (1882-1914),[59] Cyprus (1914-25), Palestine (1918-20)[60] and Mesopotamia (1914-1920) all appeared to call into question the divisional architecture of occupation elaborated above. On the one hand, such occupations did not uniformly materialize themselves in the form of claims to sovereignty[61] and in several cases explicitly drew upon the Hague rules governing belligerent occupation. On the other hand, however, they also shared many similarities with regimes of colonial rule elsewhere in the world, in which the perceived demands of 'tutelage' (vis the re-configuration of the local social, economic and political environment) were placed in front of a promise of independence. Indeed, what will become clear from our examination of the Mesopotamian occupation of 1914-1918, is that the overall telos of the regime of belligerent occupation—to stabilize a system of European liberal

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[55] As often noted, the British Military Manual of 1914 expressly confined itself to warfare between 'civilised' powers. See more generally F Mégret, 'From "Savages" to "Unlawful Combatants": a Postcolonial Look at International Law's Others', in A Orford, *International Law and its Others* (Cambridge UP, 2006) 265.

[56] See C Magoon, *The Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States* (2nd ed. 1902)

[57] See A Millspaugh, *Haiti Under American Control 1915-30* (1931); H Schmidtt, *The United States Occupation of Haiti 1915-34* (1995); L Dubois, *Haiti: The Aftershocks of History* (2012) 204-264.

[58] See Proclamation of the Military Occupation of Santo Domingo by the United States, Nov. 29, 1916, 11 *American Journal of International Law* Supplement (1917) 94. Generally, E Tillman, *Dollar Diplomacy by Force: Nation-Building and Resistance in the Dominican Republic* (2016)

[59] See A Genell, *Empire by Law: Ottoman Sovereignty and the British Occupation of Egypt, 1882-1923* (unpublished PhD, 2013).

[60] N Bentwich, 'The Legal Administration of Palestine under the British Military Occupation' 1 *British Yearbook of International Law* (1920-21) 139

[61] In case of Guam, Puerto Rico and the Philippines, the US did, indeed, claim to exercise sovereign authority in the aftermath of the Spanish-American war albeit the case that in the latter instance that claim was actively opposed by the Philippines independence movement. Similarly, the British purported to 'annex' Cyprus in 1914 which was later recognised by Turkey in the Treaty of Lausanne 1923.

constitutionalism—was not so much to be displaced in locales such as Mesopotamia/Iraq, as simply reconceptualized as its objective. That sovereignty had to be built rather than returned meant the abandonment of any pretense to maintain the social or political status quo, and encouraged the forging of a conceptual alignment between the institution of belligerent occupation and the principle of trusteeship that was to underpin the Mandate system in the inter-war years.

3. The Occupation of Mesopotamia 1914-1922

On 16th October 1914 the first Brigade of Indian Expeditionary Force 'D' was dispatched to the Gulf shortly prior to the declaration of war with Turkey (5th November) with instructions to protect the oil-installations of the Anglo-Persian Oil Company at Abadan.[62] The following month the Expeditionary Force landed at Fao and advanced up the Shatt-al-Arab waterway towards Basra which it occupied on 22nd Nov 1914 setting up, in the process, a new civil administration in the cabin of a small launch moored in a creek near the consulate at Basra.[63] Having established a base in Basra, British forces moved forward, in incremental steps, towards Baghdad, suffering a major set-back in 1916 when the besieged 6th Indian Division was forced to surrender to the Ottomans at Kut al-Amara. Following a reorganization in which the War Office took over operational and administrative control from the Government of India, a new Mesopotamian Expeditionary Force under command of General Maude resumed the offensive capturing Baghdad on 11th March 1917 and Kirkuk in 1918. Whilst the Armistice of Mudros formally brought hostilities with the Ottoman Empire to an end on 30th October 1918, British forces continued operations against the remnants of resistance, occupying Mosul a few days later.[64] By the end of 1918, then, the the occupying forces had taken control of the three provinces of Basra, Baghdad and Mosul, and its civil administration thereby assumed responsibility for a territory of 150,000 square miles, and a population of nearly 3 million.[65]

In the immediate aftermath of the war, the Mesopotamian Civil Administration continued as the de facto government in Iraq pending the outcome of negotiations in Paris and elsewhere concerning the final 'destiny' of Ottoman Territories. Following the San Remo Conference in 1920 at which Britain was awarded the mandate to govern Iraq pending its independence, the administration was

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[62] F. Moberly, *History of the Great War: The Campaign in Mesopotamia 1914-1918* (HMSO, 1923), I, 99-101; G. Bell *Report of the Commission Appointed by Act of Parliament to Enquire into the Operations of War in Mesopotamia* (HMSO, 1917) 12. For the background see S Cohen *British Policy in Mesopotamia 1903-14* (1976); D Fieldhouse *Western Imperialism in the Middle East 1914-1958* (2006) 36-66.

[63] A Wilson, 'The Laws of War in Occupied Territory', 18 *Transactions of the Grotius Society* (1932) 17.

[64] C Tripp, A History of Iraq (3rd ed 2007) p. 32.

[65] *Ibid*.

immediately confronted by a significant uprising informed, in part at least, by the belief that Britain had reneged upon its earlier promises for Iraqi independence.[66] Whilst subsequent reforms were made to the governing structures of what was to become the Iraqi state to allow for great local representation and control, significant elements British administration were to remain in place through the installation of King Faisal in 1921, until the formal inauguration of the mandate in 1924[67] following the conclusion of a treaty of alliance between Iraq and Britain.[68] From that time onwards, until Iraqi independence in 1932,[69] British superintendence of the new state continued through the 'advice and assistance' of the High Commissioner and his network of resident advisers, securing British interests behind what was effectively a façade of Arab self-rule.[70]

On the day of the initial occupation of Basra in 1914, Sir Percy Cox, 'political advisor' and soon to be head of the civil administration, issued a proclamation in which it was declared that:

> 'The British Government has now occupied Basra, but though a state of war with the Ottoman Government still prevails, yet we have no enmity or ill-will against the population, to whom we hope to prove good friends and protectors. No remnant of the Turkish administration now remains in this region. In place thereof the British flag has been established, under which you will enjoy the benefits of liberty and justice both in regard to your religious and to your secular affairs.'[71]

This was neither an unequivocal statement of liberation, nor did it display an intent to hold Basra as British territory (although the 'establishment' of the British flag was undoubtedly resonantly symbolic).[72] Indeed, it was by no means clear to Cox, himself, as to what the British intentions were.[73] His own view, alongside that of the Viceroy of India, was that the 'permanent occupation' of Basra should be

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[66] See generally A Kadhim, *Reclaiming Iraq: The 1920 Revolution and the Founding of the Modern State* (2012); K Ulrichsen, 'The British Occupation of Mesopotamia, 1914-22' 30 *Journal of Strategic Studies* (2007) 349; Tripp (2007) 39-43; Fieldhouse (2006) 86-8.

[67] LNOJ (1924) 1346.

[68] The original Treaty of Alliance between Great Britain and Iraq was signed on October 10th 1922, 35 LNTS 13. This treaty, however, was amended by a protocol of 1923 that shortened its duration from twenty years to four years from ratification of peace with Turkey, 35 LNTS 18. As Tripp observes, the purpose of the treaty was to give 'the appearance of a normal relationship between two sovereign states' the reality of which was very different (p. 51).

[69] The mandate was finally terminated following the admission to Iraq to the League of Nations on October 3, 1932. See generally, M Hudson 'The Admission of Iraq to Membership in the League of Nations' 27 *American Journal of International Law* (1933) 133; R Emerson, 'Iraq: The End of a Mandate' 11 *Foreign Affairs* (1933) 355; S Pedersen, 'Getting out of Iraq – in 1932: The League of Nations and the Road to Normative Statehood', 115 American Historical Review (2010) 975.

[70] See generally, P Ireland, *Iraq: A Study in Political Development* (Jonathan Cape, 1937).

[71] Moberly (1923) 131; Bell (1917), 3; Sluglett (1976) 37.

[72] Ireland, (1937) 96: 'The entire situation was a contradiction in terms. The Expeditionary Force was invading enemy territory with the population of which the British Government was not at war.

[73] *Ibid*, p. 133.

quickly proclaimed in order to establish British 'supremacy in the Persian Gulf' and 'consolidate' its position, and that a decision to that effect should be made as soon as possible.[74] The Asquith government in London, however, prevaricated.[75] It advised that in the overall context of the war, 'it would be utterly contrary' to the assurances that had already been given to other Entente powers 'if occupation of any conquered country were at once announced to be permanent, without waiting for the final settlement to be made at the close of war.'[76] Whilst, thus, it did not entirely rule out the idea that Basra might made a British possession at some point in the future,[77] for the duration of the war at least, it would have to be treated as occupied territory within the meaning of the term as laid down in the Hague Regulations.[78] As such, the 'existing structure of government and local agency should be retained as far as possible'[79] and the administration would assume an entirely provisional form. 'Neither public nor private property' as Arthur Hirtzel advised, were liable 'to be confiscated.'[80]

Despite clear acknowledgement that the occupation of Mesopotamia would be governed by the terms of the Hague Regulations,[81] this was immediately qualified in one important respect. Whilst the British were determined to avoid any suspicion, on the part of its allies, that it was intending to annex the territory of Mesopotamia prior to any peace settlement, it was also clear that the territory would not be returned to the Turkish government. As early as 1914 Cox had intimated to the Viceroy that 'we could not possibly allow the Turks to return after accepting from Arabs co-operation afforded on the understanding that the Turkish *regime* had disappeared for good'.[82] That understanding, indeed, merely hardened over time such that by 1918 it was declared to be 'scarcely thinkable' that Britain should 'allow a country of such historic associations and future

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[74] Telegram, Viceroy to Secretary of State for India, 7th December 1914; Moberly (1923) 139-40.

[75] Tripp observes that in 1914 'there was no clear idea either in London or in India about the political future of Mesopotamia'. Tripp, (2007) p. 31.

[76] Bell (1917) 15. See also, Crowe to Under Secretary of State, 'Basra administration', December 15th, 1914, 81737/14, 4097/1914.

[77] Dodge notes that until 1918 'the consensus of British official opinion held that Basra… would be annexed after the war.' T Dodge, *Inventing Iraq: The Failure of Nation Building and a History Denied* (2003) 9.

[78] Formally speaking, the Ottoman Empire was not party to the Hague Conventions in 1914. The British government accepted, however, that the obligations under the Hague Regulations were applicable nonetheless as forming part of customary international law. The customary status of the Hague Regulations was confirmed in the judgment of the International Military Tribunal (Nuremberg), 1946, 41 *American Journal of International Law* (1947) 172, 248-9, and that of the International Military Tribunal for the Far East (Tokyo) 148, 15 *International Law Reports* 356, pp. 365-6.

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[80] Hirtzel to Selwyn, 23rd December 1915, 4097/1914 'Basra Administration'.

[81] A Wilson, *Loyalties: Mesopotamia 1914-1917* (Oxford UP 1930) 67; W White, *Process of Change in the Ottoman Empire* (1937) 186; A Carcano, *The Transformation of Occupied Territory in International Law* (2015).

[82] Telegram 23rd November 1914, Moberly, (1923) p. 134.

economic possibilities to revert to the blighted conditions under which it has stagnated for centuries past.'[83]

The animating rationale, here, was twofold. In the first place, the British had settled, from a very early stage, upon the idea that Ottoman rule over Mesopotamia was that of a foreign power, in which it had subordinated the local Arab population, imposing its language and laws, displacing the traditional authority of the Sheikhs over the Arab populations.[84] Coupled with this, was the idea that the Ottoman administration had been largely inept, beset by endemic 'corruption, fraud and violence',[85] and had left Mesopotamia in a 'state of political stagnation and economic decay.[86] The imagined rubric of 'Oriental Despotism', as Dodge puts it,[87] not only informed the unwillingness of the British to countenance the return of the territories to the Turks but also shaped, as we shall see, the administrative policies pursued by the Civil Administration.

In the second place, despite the clear, ongoing, desire of the government in India to retain a controlling interest in the government of the Arabian peninsula (through, in particular, the vaunted annexation of Basra and perhaps Baghdad with it), the British government and foreign office were increasingly convinced of the need to give some recognition to the Arab demands for independence. In large part this was in recognition of the promises made to the Arab peoples in the Husein-McMahon correspondence of 1915[88] (in which the British government pledged 'to recognize and support the independence of the Arabs' and assist them in establishing 'suitable forms of government' in the region in return for their assistance in the war on the Ottomans[89]). In part also it was in recognition of a concern that the straightforward assertion of British rule—whether in the form of annexation or the establishment of a protectorate—was unlikely to sit well with allied powers let alone the local population. So by 1918, both the British and the French had, in public at least, largely fallen in line with the position of President Wilson,[90] asserting that one of their key war aims in the East was the 'complete and definitive liberation of the peoples so long oppressed by the Turks and the

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[83] Ibid, para. 4.

[84] Wilson, *Loyalties* (1930) 11 (One of the key military objectives was to promote a 'cleavage' between 'the Turk and his government, and the Arab population. The former we sought to destroy, with the latter we desired to be friendly, if they would reciprocate')

[85] Moberly, (1923) 17.

[86] A Wilson, *Loyalties* (1930) 2.

[87] Dodge (2003) 43.

[88] See generally E Kedourie *In the Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and its Interpretations* (2000).

[89] A key caveat given in respect of the pledges made by the British to the Sherif of Mecca relating to Mesopotamia made clear that: 'With regard to the Vilayets of Baghdad and Basra, the Arabs will recognize that the established position and interests of Great Britain will necessitate *special measures of administrative control* in order to secure these territories from foreign aggression, to promote the welfare of the local populations and to safeguard our mutual economic interests.'

[90] President Wilson, Fourteen Points, 8th January 1918. Point XII asserted that 'the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development.' See generally Dodge, (2003) 5-20.

establishment of national Governments and Administrations drawing their authority from the initiative and free choice of indigenous populations.'[91] Even Mark Sykes, co-author of the earlier secret Sykes-Picot agreement that had devised the future division of the Middle East between British and French spheres of influence,[92] was to note the shift: 'imperialism, annexation, military triumph, prestige, White man's burdens, have been expunged from the popular political vocabulary' and, as a consequence, '[p]rotectorates, spheres of interest or influence, annexations, bases etc. have to be consigned to the Diplomatic lumber-room.'[93]

The vaunted role then of the British occupying forces as 'the liberators of oppressed nations' did not rule out entirely the maintenance of British rule and control behind what was referred to as a 'façade' of Arab rule.[94] Indeed, even as the British prepared the ground for the establishment of an independent Iraqi state through the medium of the Mandate, the idea remained that this would be an alternative means by which British influence in Iraq could be maintained.[95] Nevertheless, the two key objectives—that of remedying the deficiencies of Turkish misrule and preparing Iraq for some form of 'indigenous administration'—had necessary consequences in the meantime for the conduct of the civil administration, and put in question the operative conditions for the Hague regime governing occupation.

The central precept of the Hague Regulations, as noted above, was that the occupying authorities should respect 'unless absolutely prevented, the laws in force in the country' whilst taking such measures as were possible 'to respect and ensure… public order and safety'.[96] The immediate difficulty experienced by the British administrators was that many of the key Turkish officials—including judges, policemen, revenue officials and customs agents—had fled in the face of advancing British troops, leaving the British with a critical shortage of local knowledge and expertise.[97] This was particularly problematic in respect of the

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[91] Anglo-French Declaration, November 8th, 1918. Shortly before the armistice with Turkey, Reginald Wingate, then High Commissioner in Egypt had also spelt out to King Hussain, British policy in relation to the Middle East (4th Feb. 1918):
'His Majesty's Government along with their Allies stand for the cause of the liberation of the oppressed nations, and are determined to stand by the Arab peoples in their struggle for the reconstruction of an Arab world in which law shall once again replace Ottoman violence, and unity the artificial rivalries promoted by Turkish officials…. Liberation is the policy His Majesty's Government have pursued and intend to pursue with unswerving determination by protecting such Arabs as are already liberated from the danger of reconquest, and assisting such Arabs as are still under the yoke of the oppressor to obtain their freedom.'

[92] See, Kedourie, (2000) 159-84.

[93] Mark Sykes 'Our Position in Mesopotamia in Relation to the Spirit of the Age' FO 800/22. (Quoted in Dodge, (2003) 13).

[94] See Curzon, War Cabinet's Eastern Committee, 27th November 1918, p.7.

[95] Dodge (2003) p. 15; Pedersen (2010) p.

[96] Article 43.

[97] Bell, (1917) 5-6; Wilson, (1930) 11 ('No remnant of Turkish administration remained: Turkish officials, high and low, had almost without exception decamped, often with the most essential records.').

administration of justice given the absence, within the British forces, of knowledge of the relevant Turkish civil and criminal codes.[98] As Bonham Carter, the Senior Judicial Officer in Baghdad, was later to observe:

> 'According to the theories of International law, upon the occupation of an enemy country, local criminal law should be continued, if this is possible and consistent with the welfare of the Army of Occupation. In Iraq this was obviously impossible, both because few British officers are acquainted with Turkish and because Ottoman Law requires a multitude of courts, enquiring magistrates and prosecutors, much in excess of what could be provided, whether from the army, or from the officials of the former Government. But apart from this, the Ottoman Penal Code is ill-arranged, incomplete and difficult to interpret, while the Ottoman Criminal Procedure Code, however suitable an instrument it may be for other more advanced and populous parts of the Ottoman Empire, is over-complicated and *ill-adapted for application amongst the backward rural and nomad population of Mesopotamia*.'[emphasis added][99]

For all the concern here with the disorderly and inefficient nature of Ottoman law, and the lack of British expertise, it is the final sentence that is most revealing: recalling, in the language of 'ill-adaption', both the idea that Turkey was, itself, an alien power, and the idea that Mesopotamia was a territory in need of beneficial intervention by third parties. Both of these ideas came to be central for purposes of the British reconfiguration of the judicial administration of the territory. New codes of law and processes of administration could be introduced, not only because the existing law was held to be disorderly, inefficient, and impossible to implement, but also because in practice there was no real difference between one 'alien' law and another. Both were equally foreign to the native Arab population, it was reasoned, and the key advantage of the new codes were that they were (apparently) more attentive to the needs and interests of that population.[100]

From the outset, then, the British largely abandoned any pretense to maintain in force existing law. Working in what they perceived to be a political and legal vacuum, the occupying authorities sought to establish and maintain 'the kind of administrative machinery with which they were familiar'.[101] In the first stage 'an intricate mass of detailed orders, proclamations and notices issued under the authority of the General Officer Commanding' were introduced 'enforced for the most part by military police and military courts.'[102] These ranged from 'the control of rents, and foodstuffs, the restriction of movement of persons and of rivercraft', to orders that carriage owners and boatmen 'shall in all cases give preference to British Officers, European ladies and government servants''.[103] Controls on arms,

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[98] Ireland, (1937) 81.
[99] Bonham Carter, Annual Report 1918, in Bell (1917) 95.
[100] Bell, (1917) 94, 101.
[101] P Sluglett, *Britain and Iraq 1914-22* (1976), p. 14; Dodge, (2003) xi (The British 'interacted with Iraqi society on the basis of what they thought it *should* look like. In lieu of detailed investigations and engagement with actual conditions and practices, Iraq was understood through the distorted shorthand supplied by the dominant cultural stereotypes of the day.')
[102] Ireland, (1937) p. 74.
[103] Ibid.

liquor and drugs were supplemented by 'minute sanitary regulations prescribing floor space per animal in stables or rewards for bringing in dogs for destruction.'[104]

Once the accompanying Civil Administration had properly established itself, the range of innovations proceeded apace many of which were modelled upon British experience in India.[105] A new Iraq police system was established,[106] the Indian rupee was introduced as official currency as were Indian postal stamps,[107] and new passports were issued to the inhabitants.[108] Revenue laws were overhauled,[109] and an Iraq Occupied Territories Code was introduced in 1915 modelled upon laws in force in India establishing a system of civil and criminal courts.[110] Of more lasting significance, however, was the introduction of a set of Tribal Criminal and Civil Dispute Regulations in 1916[111] which placed both legal and political authority in rural areas in the hands of nominated landed sheikhs whose fealty to the administration was underpinned by a system of subsidies (supplemented, at a later stage, by the threat of aerial bombardment). [112] In addition to creating a new juridical divide between the urban and rural areas (which earlier Turkish reforms had previously tried to eliminate), the Regulations reconfigured the political landscape, introducing what was effectively a system of indirect rule[113] modelled upon the regime devised for Baluchistan by Sandeman.[114] The picture, ultimately, was fairly clear—this was to be a form of administration largely indistinguishable from formal colonial rule, and in which the rubric of 'occupation' cast no great shadow over the perceptions of the administrators as to what kinds of interventions they might make within the territory. Indeed, Arnold Wilson, Acting Civil Commissioner in Mesopotamia between 1918 and 1920, was to later reflect that the Hague regulations seemed to be of little practical significance: 'they prohibit' he suggested 'what no British Army would contemplate doing' and, in any case, 'inculcate the obvious.'[115]

5. Dis-placed Occupation

Two particular features of the British occupation of Mesopotamia are of particular significance. First, despite the evident injunction to 'upset as little as possible the normal life of the inhabitants', as Gertrude Bell made clear in her laudatory Parliamentary Report of 1920, the occupation was not one informed by a sense of

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[104] Ibid, p. 75.
[105] Dodge, (2003) 63; Ulrichsen, (2007) 356; Tripp, (2007) p. 38.
[106] Wilson, (1930) 13-14.
[107] Ibid, p. 82; Bell, (1917) 121.
[108] Wilson, (1930) 12.
[109] Bell, (1917) 6; Wilson (1930) 70.
[110] Bell, 90-103; Ireland, pp. 82-3. This was supplemented by separate penal and criminal procedure codes in Baghdad—the former being based upon the Ottoman Code as amended by reference to the Egyptian Penal Code, the latter being based upon the Sudan Penal Code which itself was based upon the Indian Penal Code.
[111] See Wilson (1930) 68-9.
[112] Ulrichsen (2007) 357.
[113] Sluglet, (1976) 170-1; Fieldhouse, (2006) 74.
[114] Dodge, pp. 120-129; Fieldhouse, (2006) 74-6.
[115] Wilson (1932) p. 18.

restraint, or of deference to the pre-existing political and social order. The report extols the many and varied reforms introduced by the civil administration during the period up until the revolt of 1920. It explained, in some detail, how the civil administration had overcome the 'corruption' and 'inefficiency' of the Turkish administration[116] reforming fiscal and revenue collection processes,[117] servicing the Ottoman public Debt,[118] establishing schools,[119] hospitals,[120] and a public press,[121] and introducing programmes of agricultural development and irrigation.[122] Throughout, what informed the policies of the British administration, was not a concern to preserve the status quo, but rather to introduce such reforms as seemed necessary to enable its economic, social and political development at the same time as catering to the (present and future) needs of the British government. This was, in other words, no light touch administration, but one informed by the precepts of what the British took to be enlightened colonial rule.[123]

The second notable feature is the way in which the regime of military occupation segued, in almost seamless manner, into the mandate regime. As Bentwich put it, the military occupation 'was transformed into a civil government under a British Civil Commissioner very shortly after the occupation of Baghdad in 1917'; and by the end of 1920 simply 'received a more permanent character' under the administration of the returning High Commissioner Sir Percy Cox.[124] In many senses this was entirely comprehensible as the same limits appeared to condition each regime: in neither case did the administering power enjoy the right to annex the territory; sovereignty was held to be in abeyance; the territory was held to be administered on a provisional basis in the mutual interests of both the occupying power and the inhabitants themselves; nationality was not to be imposed; and legal and administrative reforms limited wherever possible in the interests of the population.[125] Indeed, as Arnold Wilson was to suggest, their rationale appeared to be identical. The first principle that should govern such occupations, he was to argue, was that 'enemy territories in the occupation of the armed forces of another country constitute (in the language of article 22 of the League of Nations Covenant) a sacred trust, which must be administered as a whole in the interests

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116 Bell (1917) 6.
117 Ibid, 6-10.
118 Ibid, 14.
119 Ibid, 103-7.
120 Ibid, 112-4.
121 Ibid, 19.
122 Ibid, 77-82.
123 Cf. F Lugard, *The Dual Mandate in British Tropical Africa* (1922) pp. 618-9.
124 N Bentwich, 'Mandated Territories: Palestine and Mesopotamia (Iraq)' 2 *British Yearbook of International Law* (1921-22) 48, p. 50. He goes on to comment that 'it is the enlightened policy of a mandate, still imperfect in its legal foundation, which guides the Administrator, and is allowed to prevail over the strait confines of the powers of a temporary military occupant to further the development of the occupied territory.'
125 For a description of the Mandate regime see Q Wright, *Mandates Under the League of Nations* (1930); A Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 115ff.

both of the inhabitants and of the legitimate sovereign or [importantly] the duly constituted successor in title'.[126]

At this point what might, at the outset, seem to have been two radically disjunctive systems of rule, appear to have found some common ground: both instituted a form of trusteeship—the administration of the affairs of a dependent people in their own interests. But insofar as the transformative characteristics of the Mesopotamian occupation seemed to depart from the conservative precepts of the Hague Regime, it might only be thought to instance a case apart, or a *mala fides* blurring of two different conceptual forms of rule. However, if we return to Schmitt's account of the emergence of the institution of the regime of belligerent occupation, and what he took to be the operative pre-suppositions underpinning it—broadly speaking, the existence of a common conception of liberal constitutionalism—then what appears to have occurred, is not a displacement of those ideas, but rather their internalization into the regime of occupation itself, as one of its sustaining rationales. What Schmitt took to be pre-supposed, became what was to be achieved: the rule of law, efficient secular administration, secure rights in property, the maintenance of a distinction between public and private, and the guarantee of an 'open door' to international commerce. Belligerent occupation, in other words, was to be turned inside out like a glove, sustaining itself in the effort to establish its own conditions of possibility.

This subtle reconfiguration of the telos of occupation took place largely by way of an equally subtle re-formulation of the 'suspensive' characteristics of the regime of occupation itself. For the most part, the Hague regulations were written in a language that pre-supposed that 'sovereignty', even if it was momentarily displaced by the *de facto* authority of the occupying forces, nevertheless remained in the hands of the State whose territory was occupied (the 'legitimate power' as article 43 expressed it). In Mesopotamia, however, as elsewhere in Palestine and Cuba,[127] the claim that the occupying forces had held the territory as 'liberators', was again not to dispense with the question of sovereignty, or allow the occupants to claim it for themselves, but to re-situate that sovereignty in the self-determining aspirations of the occupied population. Whilst, in other words, it still invoked a distinction between the factual authority of the occupying powers and a sovereignty that existed in some other hands, the realignment of the 'true locale' of sovereignty provided grounds not just for the elimination of the remaining vestiges of Turkish rule, but for the introduction of wide-ranging reforms and the violent suppression of resistance in the apparent 'interests' of the occupied population.

If these two analytical devices—the inversion of belligerent occupation and the re-alignment of sovereignty—enabled a smooth transition from war to peace, from the belligerent occupation of Mesopotamia to the Mandate for Iraq (and thence to independence), they illuminated, at the same time, the configurative power of the institution of belligerent occupation to sustain itself in the interstices

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[126] Wilson, (1932) 29. For a similar conclusion in relation to the US occupation of Cuba see *Neely v Henkel (No. 1)* 180 US 109 (1901)120.
[127] Magoon (1902) 31-2.

between war and peace, colonial rule and sovereign independence. Indeed, its very legibility as a mode of rule might seem to be found precisely in its ability to do that—its ability to normalize the exceptional, to make durable the temporary expedient, and to authorize the tyranny of strangers in the name of the oppressed.

6. Conclusion

Arnold Wilson's invocation of the idea of belligerent occupation as being governed by a 'sacred trust' points to an essential continuity—both in practice and in theory—between the regime of belligerent occupation as it came to be operationalized in Mesopotamia with that of the Mandate system. Both instantiated suspensive systems of occupation, both could be conceptualized through the medium of the trust, both imagined the possibility of a harmony of interests between the occupied population and occupying forces, both looked towards the 'liberation' of the occupied population at some unspecified moment in the future. And so far as that is the case, the revival of the idea of a transformative occupation in the early 21st Century in the hands of the Coalition Provisional Authority is, as Dirk Moses amongst others have noted, just to point to the obvious continuities of an enduring imperial formation.[128]

I think there are wider points to be made here, however. In the first place we might observe that the military occupation of Mesopotamia (and Palestine) seemed to invert the structures of thought that initially underpinned the Hague Regulation regime. If its original rationale had been to insulate European commerce and industry from the debilitating effects of intra-European warfare, but yet enable the straightforward annexation of non-European soil, that analysis is turned upside down. In the European context, the shift towards total warfare in the first half of the 20th Century was to render the kinds of distinction upon which the regime depended increasingly untenable—blurring the distinctions between civilian and combatant, state and society, the political and the economic—to the point at which, by the middle of that Century, many European scholars regarded it to be an essentially anachronistic institution.[129] In the non-European context, by contrast, belligerent occupation has survived as a far more enduring mode of rule, becoming entangled with the conditionalities of claims to sovereignty and self-determination (eg in Palestine and Western Sahara), finding its continued, provisional, justification in its own apparent permanence. As in Mesopotamia, the very fact of occupation seems to provide its own ground for legitimacy—becoming the very metric by which an occupied population might enjoy a right of self-determination but yet not exercise that right, and by which a foreign occupant might rule in absence of any sovereign right to rule.

In the second place, it would appear that the distinction between transformational and conservative occupations that structures the contemporary discourse—even if, appropriately enough, it may be read as a criticism of the reconfiguration of the Iraqi economy in the hand of the CPA—tends to hold onto to an imaginary that, in some ways, undergirds the reforms that are taken as the object of critique. For

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[128] D Moses, 'Empire, Resistance and Security: International Law and the Transformative Occupation of Palestine', 8 *Humanity* (2017) 379, 381.

[129] See e.g, Schwarzenberger, p. 12; Stone (1954) 727.

behind the programmes of economic liberalization, market reform and privatization that were put into operation in Iraq, is precisely the same imaginary that underwrote the Hague regime in the first place—these were matters that fell outside the field of proper governmental authority and intervention, albeit with the proviso that where the underlying rules were not conducive to those ends, they had to be legislated into place. If anything, then, the activities of the CPA did not so much fall foul of the Hague or Geneva regimes of belligerent occupation, so much as expose their precarious, and no doubt imperial, foundations.[130]

[130] For an effective analysis of the imperial dimensions of the CPA reforms see Rittich (2018).