

**Territorial Conquest: Its Prevalence, Demise, and Resurfacing:
1880s – The Present**
by Gilad Ben-Nun

Abstract

This article traces the historical ebbs and flows in international attitudes towards aggressive territorial conquest from its implicit legal acceptance prior to the League of Nations, to its contested nature during the interwar period, through to its demise during the Cold War, and finally to its current resurgence. During the interwar period, military occupation's nature was deeply contested between universalists such as the Holocaust-Surviving Rabbi Dr. Georg Cohn, who saw opposition from vile „Machtrecht“ jurists such as Carl Schmitt. To him – military occupation was a legitimate surrogate to the old-school's idea of forceful conquest now demised. Largely abandoned during the Cold war, it has recently resurged as seen in Russia's invasion of Ukraine and its forceful annexation of Crimea, thus exhuming Schmitt's long-buried ideas. The longue durée optic of forceful territorial acquisition, elaborated along this article helps contextualise these current events, against their century-old historical-intellectual backdrop.

Aggressive Conquest and Territorial Title

To current onlookers, the idea that a state can simply invade another state and claim sovereign title to parts of its territory – seems anathema. Russia's 2014 invasion of Eastern Ukraine, and its unilateral annexation of the Crimean Peninsula that same year, have been declared as illegitimate by the U.S. and the EU, amongst other countries. Rather than a one-off event, Russia's abrasive conquest and annexation of Crimea follows a policy-pattern first detected back in 2008 as it invaded Georgia. Russia's military occupation of Georgia's Ossetia and Abkhazia regions has by now acquired a stringent degree of permanency. Lest we assume that such international behaviour is uniquely Russian, one should note that in fact, since China's invasion and annexation of Tibet in 1950, the international agenda has never really been relieved from instances whereby states have resorted to

forceful military aggression for the sake of territorial aggrandizement. Israel's pressured retreat from its 1956 swift conquest of the Sinai Peninsula and the Gaza strip, hardly lasted nine years, when in 1967, it reconquered these territories, in addition to East Jerusalem, the Golan Heights and the entire Palestinian West Bank. Turkey's 1974 invasion of Northern Cyprus, which was accompanied by the establishment of puppet regime there, has remained intact ever since. So has Morocco's hold over the Mauritanian territory of Western Sahara, which it occupied militarily back in 1975. To date, and with the exception of Israel's withdrawal from the Sinai Peninsula and the Gaza strip, none of the conquerors of the above-mentioned regions has ever relinquished its hold over his territorial fruits of conquest. Seen from this perspective, Russia's 2008 and 2014 conquests seem rather unexceptional, as they merely condone an already-existent international trend of the permanency of military occupations.

And yet, when compared retrospectively against virtually all preceding historical periods, the second half of the 20th century was most probably one of the periods least prone to aggressive conquest. From Persia, through Greece, to the Roman Empire; and from the Arab Conquest, through the European crusades, the 15th century colonization of the „new world“, the 17th-century Thirty-Years War, and the 19th century's „scramble for Africa“ – conquest has been endogenic to human conduct – an inseparable factor in man's social evolution. Historically, the idea that aggressive territorial conquest by military means triggered the transfer of that territory's sovereign title from the loser to the victor's ownership, was the standard legal norm – from time immemorial. From Rome's destruction and conquest of Carthage (145 B.C.) to the Fashoda Incident in 1898, international law had always regarded violent conquest as *the* recognized means for territorial appropriation. The answer to conquest – was simply counter-conquest. And once such a counter-conquest succeeded, international lawyers simply bestowed their measure of legality upon that newly-created, or recently-restored territorial reality. Not until the 20th century, fol-

lowing the establishment of the League of Nations and its nucleus of international multilateralism – was the legitimacy of forceful conquest ever seriously questioned.

WWI, Self Determination, and the Demise of Conquest: 1919-1928 Treaties – are often born out of traumas. The 1555 Peace of Augsburg - „Cuius regio, eius religio“ [he who rules - determines the religion] followed the German Reformation wars; The Peace of Westphalia (1648) – came after the 30-years’ war; The 1948 Genocide Convention – ensued after the Jewish holocaust; Responsibility to Protect (1999) – after Rwanda and Srebrenica. Much of the same can be said of the establishment of the League of Nations a century ago (1919). Prior to WWI, the world had never witnessed killing on such an industrial scale. „The War – to End all Wars“ was meant to put an end to aggressive conquests. Bismarck’s slogan: ‘Macht geht vor Recht’ [Power predicates law] was to be substituted with the *Pax Romana*’s famous maxim: ‘Ex injuria jus non oritur’- [unjust acts shall not establish law].¹ All the while, in a set of secret treaties drafted between 1915 and 1917, British and French diplomats envisaged a partitioning of the remaining territories of the Ottoman, German, and Hapsburg Empires amongst them, as disposable ‘booty’ and spoils of war for them as victors. Yet in March 1917, the unexpected happened: Russia’s Tsarist regime was overthrown – and a revolutionary government was swiftly established there. On April 10th, 1917, the Russian provisional government announced that: ‘free Russia does not aim at dominating other nations, at depriving them of their *national patrimony*, or at occupying by force foreign territories’.²

Much has been written about World War I’s so-called „Wilsonian Moment“. Yet in fact, the shift towards the self-determination of peoples was initially not American but Bolshevik. Two weeks after their revolution of 7th November 1917, it was Leon Trotsky who shamed Britain and France with the publication of their secret annexation treaties from

1915, referring to these as ‘egregious specimens of the secret diplomacy of Imperialism, with its dark plans of conquest and its robber alliances and deals’.³ One day later, on November 8th 1917, Lenin insisted that ‘an immediate peace without annexations’, is what Soviet Russia now desired.

Conquest’s Dishonest Surrogates: International Mandates and Military Occupation

Nevertheless, in 1918, it was Woodrow Wilson who first framed the demise of conquest thanks to the over-ridingness of the principle of self-determination. ‘There shall be no annexations’ Wilson said since ‘peoples are not to be handed about from one sovereignty to another by an international conference’. In the post war era, so he claimed, every territorial settlement had to be made ‘in the interest and for the benefit of the populations concerned, and not as part of any mere adjustment or compromise of claims amongst rival States’.⁴

While Lenin and Wilson’s visions for a world devoid of conquest chimed as sweet music to Germany’s defeated ears, Britain and France would have nothing of it. If territorial annexation was no longer internationally- attainable, then other means for territorial acquisition could be construed. French interests in North Africa and Syria, and British interests in the locomotion of oil from Iraq to the Mediterranean had to be accommodated for. Consequently – the League of Nations’ Mandate system was created. Britain might not have been the *owner* of the Near East from Iraq to the Mediterranean – but it was its *custodian*. And as such – it had full sovereignty over this territory through which the oil in its Trans-Arabian Pipeline now flowed. In Cameroon, land was not *leased* to British colonial plantation farmers. It was *sold* to them.⁵

Europe, however, was a different story. And what could *legally* be done to „natives“, was deemed unworthy of pink-skinned Europeans.

³Ibid., p. 137.

⁴Ibid., p. 138

⁵Susanne Pedersen, *The Guardians: The League of Nations and the Crisis of Empire*, Oxford 2015, p. 380

¹Robert Langer, *Seizure of Territory*, Princeton 1947, p. 290

²Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford 1996, p. 135-6.

Alsace and Lorraine returned to victorious France. Yet the French demand for *annexation* of the Rhineland was rejected outright by Wilson. Back in the 17th Century, Louis XIV ordered Comte de Mélac to 'burn the Palatinate' („brûlez le Palatinat“) and turn the Rhineland into a desert so as to render this territory as a security buffer against future German aggression. A quarter of a millennium later, and with the Rhineland firmly ethnically German (as opposed to Alsace and Lorraine), a transferal of its sovereignty to France solely due to security concerns was no-longer viable. In the wake of the new international realities of self-determination, a new legal concept was firstly devised especially for the Rhineland: *Military Occupation*.

Under Versailles's treaty-stipulations, the Rhineland would remain under French military control for a 15-year period, while formally – still belonging to Germany. Were Berlin to default on its unimaginable reparative payments to France and Belgium, the latter would be allowed to extract their payments directly from the Rhineland. Thus in 1923, as Germany defaulted on its impossible payments, and with the Rhineland not yielding enough income for their deliberately-unimaginable indemnities, France and Belgium also invaded the Ruhr, extracting the rest of their debts through that region's iron-ore deposits. Pounding the German occupied population to dust, Germany eventually resorted to the evacuation of some 300,000 malnutrition children out of the Ruhr and the Rhineland eastwards, curing them from nutrition-based bone diseases such as rickets. Belgium's occupational policies for the Ruhr suddenly mirrored those it executed in the Congo basin – its soldiers now officially redeployed from Brazzaville to Wuppertal.⁶ To local populations in Africa and Europe alike, military occupation turned out to be equally cruel.

The period following the League of Nations' establishment seemed like International Law's ultimate heyday. All *political* problems – it seemed - could be miraculously worked over through seemingly-

⁶William Rasch, Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland, in: The New Centennial Review, 8 (2008) 1, pp. 57-79, at p. 65 n.8.

objectivist legal means. Moving from problem to problem, treaty by treaty, The League's utopian legalists assumed they were creating a new world where legal papering would amend what on-the-ground realities could not. Labouring tirelessly for a multilateral collective security, in 1928, the French and U.S. foreign ministers concluded the Briand-Kellogg Pact outlawing wars of aggression. The very first country to adopt this Pact was none other than Germany. Gustav Stresemann swiftly convinced the German Cabinet of its future merits for Germany in Europe.⁷ States – were no longer allowed to aggressively transgress their internationally-recognized borders and violate the recognized territorial integrity of other states. Universalist Humanism seemed to finally reign in Power-Politics.

The carriers of this new legalism were pacifist international jurists such as the Danish Georg Cohn, who back in 1922 elaborated the non-recognition principle (later known as the „Stimson Doctrine“). It stated that territorial changes brought about by military force shall not be recognized by the League's member states.⁸ Yet even Cohn admitted, unfortunately, that the Kellogg pact *did not outlaw* military occupation. War was no longer legal. Yet France's starvation of the Ruhr for the sake of her unjustified German debts, or Britain's massacring of Indians in Amritsar so as to keep the Indian sub-continent subjugated for the benefit of British imperial interests – were legal and valid. War might have been outlawed. Yet vile and cruel hand of military occupation was here to stay.

Carl Schmitt's Realist Reframing of Territorial Appropriation - Großraumordnung

Enter Carl Schmitt - International Law's „Prince of Darkness“. In 1928, the very same year of the Kellogg Pact's conclusion, Schmitt began to ponder the discrepancies between war's illegality and military occupation's continuing validity. Himself a resident of the Rhineland, Schmitt

⁷Oona Hathaway / Scott Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World, New York 2017, p. 223

⁸Gilad Ben-Nun, The 4th Geneva Convention for Civilians: The History of International Humanitarian Law, London 2019, p. 97-127.

observed first-hand just how cruel military occupation could be. As he set out to formulate a conceptual framework which might make sense of what he saw in the world, Schmitt gradually alluded to two concepts which would later form the bedrock of his thinking: *Nomos* and *Grossraum*. Multilateral systems - he thought - required rules (nomos in Greek) – and norms which could bind their member states. With the world now fully-global, the international system must have implicitly subscribed to some sort of *Nomos of the Earth*. Looking around him – Schmitt pondered what this *Nomos* really entailed.

His answer was simple: *Grossraum Theory*. As Schmitt saw it, the world was *already divided* into regional hegemony who subjugated smaller states within their recognized hemispheric realm into a non-equal subjugated Patron-client relationship. Japan's *Grossraum* was Asia, the U.S.' was the western hemisphere as per the Monroe Doctrine. The High Seas were dominated by the British Navy. Central Asia had already become the Soviet realm of the Slavs. Europe – Schmitt thought - was rightfully destined to become Germany's *Grossraum*. To be sure, Schmitt did not invent the concept of *Grossraum*, but rather borrowed it from spatial economics of the late 19th and early 20th century. For the development of the European railway network to the construction of cross-boundary electric grids, by the early 20th century, the benefits of large-scale economic and infrastructural networks had become evident to all. Nor was Schmitt the initiator of the idea of „Nation State-to-Empire“ which several thinkers already toyed with before him. Nevertheless, Schmitt's profound originality rested in his ability to *translate* these concepts into international law, and construct out them a homogenous intellectual superstructure so as to serve his *Machtrecht* vision.

That *Grossraum* was premised on a harsh and violent subjugation of peoples within it by the hegemon was all too clear to Schmitt. He did not wish for violence as such. He simply looked around him and depicted what he saw. Violence – was what France executed in the Rhineland. It was what the U.S. maintained in Latin America and in its

grip over the Philippines. It was what Japan exercised in Manchuria, and what Italy used to subjugate Ethiopia. Violence against natives under military occupation – was being recognized as internationally-legitimate the world over. As Hitler rekindled German military might and drove France out of the Rhineland, justice seemed to Schmitt to finally come to the fore. Was the British violent crushing of the Palestinian revolt (1936-39) more legitimate than the 1938 *Anschluss* of Austria? In Austria at least – no bombardment of civilians was required. In Palestine, British military engineers exploded the entire ancient city of Jaffa in their subjugation of the Palestinian uprising there. The 1933-36 French crushing of the *Étoile Nord-Africaine* in Algeria was factually far more violent than the German subjugation of the Sudetenland and later Bohemia and Moravia. In the world he saw, military occupations legitimized the use of violence which war could no longer accomplish. Schmitt's contemporary proponents who praised the Kellogg Pact's such as Hersch Lauterpacht and Arnold McNair should have been more careful in what they wished for – he thought. Military occupation could be just as cruel as war. Unfortunately, even in 2019, utopian jurists such as Oona Hathaway and Scott Shapiro seem bent on overlooking military occupations' vile surrogate qualities to conquest, as they conveniently avoid any mention of this very term in their current account of the Kellogg Pact's history.

The U.N. Post WWII: American Hegemony and Military Occupation's Temporary Demise

By the end of WWII, the violent ramifications of Schmitt's *Grossraum* theory had come full circle. Between the German execution of the Jewish holocaust and the wholesale killing of occupied civilians in France and in the Balkans; between the Japanese rape of Nanjing and the total annihilation of Manila (Feb-Mar 1945) - military occupation had become synonymous with the occupier's licence for unabated atrocities. If aggressive conquest had already been demised back in 1928 – now was the turn of military occupation.

Nowhere was territorial demised more – than in International Red

Cross' 4th Geneva Convention for Civilians, drafted between 1946 and its signature on August 1949. In case of armed conflict – so stipulated the Geneva Conventions' new Common Article 3, certain actions, such as summary executions, reprisals, hostage-taking, torture and sexual enslavement of women would be permanently prohibited – in any place and at any time whatsoever. Occupiers also would no longer be allowed to transfer portions of their own population to territories they conquered. Little surprise that the single-handed author of this clause in the 4th Geneva Convention (Article 49 paragraph 6) – was none other than Rabbi Dr. Georg Cohn.⁹

One would be hard-pressed to understand the unfolding of colonialism in Africa and Asia without this understanding. The British-French-Israeli conquest of the Sinai during the 1956 Suez Canal Crisis could simply no longer be tolerated. And while Soviet hegemony certainly allowed for military invasion and intervention (1953 – Berlin, 1956-Budapest, 1968 – Prague), it was no longer primarily bent on territorial expansion. Between the end of the allied occupation of Germany (1949) and the fall of the Berlin Wall (1989), military occupation resulted in permanent colonization only three times: in Israel's occupation of Palestine and the Golan (1967), in Turkey's occupation of Northern Cyprus, and in Morocco's grip on Western Sahara. With the benefit of historical hindsight, one could safely claim that the period between 1949 and 1989 was the one least prone to aggressive territorial appropriation by states – in perhaps all of human history.

The Resurgence of Conquest Post 1989 - the End of Pax Americana
The international campaign against Saddam Hussein's Iraqi invasion of Kuwait in 1991 signalled the height of multilateralism's execution of its anti-aggressive principles of international collective security. The international interventions in the former Yugoslavia (1993-1995), in Kosovo (1998-1999), and the U.N.'s successful handover of East Timor to its independence (2001) followed suit on the Iraqi 1991 blueprint. In all these efforts, and notwithstanding the bitter international con-

⁹Ibid., pp. 97-158

troversies they triggered (NATO's 'go it alone' policy in Kosovo), one could safely claim that none of these military interventions had any measure of territorial aggrandizement.

That all changed rather radically with the U.S. Britain's 2003 unmerited invasion of Iraq. In contrast to their invasion of Afghanistan, on the backdrop of Al Qaeda's September 11th attacks, the U.S.-led invasion of Iraq was seen solely as a 'classical' territorial expansionist effort to conquer Iraq's vast oil resources. The U.S.' liberation of the genie of territorial fetish out of his bottle in 2003 opened the way for others to follow. Russia's 2008 invasions of Georgia and its 2014 invasion of Ukraine and annexation of Crimea cannot be understood without the precedent laid forth by the U.S. and the U.K. in Iraq.

From the historical vantage point, the current resurgence in the territorial aggression seems rather reminiscent of the interwar period. On the backdrop of a global economic recession (2008), the rise of autocratic rulers in states with territorial aspirations for aggrandizement, coupled with a weakening of the international multilateral system, all seem alarmingly reminiscent of the 1930s. During the interwar period – the U.S. never joined the League of Nations. In 2018, the U.S. has departed both from UNESCO and from the U.N. Human Rights Council. John Bolton – the U.S. National Security Advisor has recently vowed to shut down the International Criminal Court in The Hague. The U.S. has also recently departed from UNRWA.

Are we seeing the end of the international multilateral system? To be sure, its 20th-century ascendance directly juxtaposed conquest - whose demise was brought about by this system's rise. While international circumstances are undoubtedly different nowadays, to those of the 1930s, it is the *irrelevance* with which conquest is internationally viewed - that is most worrisome. Carl Schmitt's *Grossraum* realization, that larger hegemons will subjugate smaller states within their immediate territorial hemisphere has certainly not dissipated. In fact – *Grossraum's* tenets are still very much alive and kicking.¹⁰

¹⁰Stefan Troebst, Storage Medium of Conflict Memory: Eastern Europe's Imprint on

Notes:¹¹ Robert Langer, *Seizure of Territory*, Princeton 1947, p. 290¹² Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford 1996, p. 135-6.¹³ *Ibid.*, p. 137.¹⁴ *Ibid.*, p. 138¹⁵ Susanne Pedersen, *The Guardians: The League of Nations and the Crisis of Empire*, Oxford 2015, p. 380¹⁶ William Rasch, *Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland*, in: *The New Centennial Review*, 8 (2008) 1, pp. 57-79, at p. 65 n.8.¹⁷ Oona Hathaway / Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, New York 2017, p. 223¹⁸ Gilad Ben-Nun, *The 4th Geneva Convention for Civilians: The History of International Humanitarian Law*, London 2019, p. 97-127.¹⁹ *Ibid.*, pp. 97-158²⁰ Stefan Troebst, *Storage Medium of Conflict Memory: Eastern Europe's Imprint on Modern International Law*, in: Annalisa Ciampi / Gilad Ben-Nun (eds.), *History and International Law: An Intertwined Relationship*, Cheltenham 2019, pp. 156-174, here p. 161.

Aggressive Conquest and Territorial Title

Modern International Law, in: Annalisa Ciampi / Gilad Ben-Nun (eds.), *History and International Law: An Intertwined Relationship*, Cheltenham 2019, pp. 156-174, here p. 161.

¹¹Robert Langer, *Seizure of Territory*, Princeton 1947, p. 290

¹²Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford 1996, p. 135-6.

¹³*Ibid.*, p. 137.

¹⁴*Ibid.*, p. 138

¹⁵Susanne Pedersen, *The Guardians: The League of Nations and the Crisis of Empire*, Oxford 2015, p. 380

¹⁶William Rasch, *Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland*, in: *The New Centennial Review*, 8 (2008) 1, pp. 57-79, at p. 65 n.8.

¹⁷Oona Hathaway / Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, New York 2017, p. 223

¹⁸Gilad Ben-Nun, *The 4th Geneva Convention for Civilians: The History of International Humanitarian Law*, London 2019, p. 97-127.

¹⁹*Ibid.*, pp. 97-158

²⁰Stefan Troebst, *Storage Medium of Conflict Memory: Eastern Europe's Imprint on Modern International Law*, in: Annalisa Ciampi / Gilad Ben-Nun (eds.), *History and International Law: An Intertwined Relationship*, Cheltenham 2019, pp. 156-174, here p. 161.

To current onlookers, the idea that a state can simply invade another state and claim sovereign title to parts of its territory – seems anathema. Russia's 2014 invasion of Eastern Ukraine, and its unilateral annexation of the Crimean Peninsula that same year, have been declared as illegitimate by the U.S. and the EU, amongst other countries. Rather than a one-off event, Russia's abrasive conquest and annexation of Crimea follows a policy-pattern first detected back in 2008 as it invaded Georgia. Russia's military occupation of Georgia's Ossetia and Abkhazia regions has by now acquired a stringent degree of permanency. Lest we assume that such international behaviour is uniquely Russian, one should note that in fact, since China's invasion and annexation of Tibet in 1950, the international agenda has never really been relieved from instances whereby states have resorted to forceful military aggression for the sake of territorial aggrandizement. Israel's pressured retreat from its 1956 swift conquest of the Sinai Peninsula and the Gaza strip, hardly lasted nine years, when in 1967, it reconquered these territories, in addition to East Jerusalem, the Golan Heights and the entire Palestinian West Bank. Turkey's 1974 invasion of Northern Cyprus, which was accompanied by the establishment of puppet regime there, has remained intact ever since. So has Morocco's hold over the Mauritanian territory of Western Sahara, which it occupied militarily back in 1975. To date, and with the exception of Israel's withdrawal from the Sinai Peninsula and the Gaza strip, none of the conquerors of the above-mentioned regions has ever relinquished its hold over his territorial fruits of conquest. Seen from this perspective, Russia's 2008 and 2014 conquests seem rather unexceptional, as they merely condone an already-existent international trend of the permanency of military occupations.

And yet, when compared retrospectively against virtually all preceding historical periods, the second half of the 20th century was most probably one of the periods least prone to aggressive conquest. From Persia, through Greece, to the Roman Empire; and from the Arab Conquest, through the European crusades, the 15th century coloniza-

tion of the „new world“, the 17th-century Thirty-Years War, and the 19th century's „scramble for Africa“ – conquest has been endogenic to human conduct – an inseparable factor in man's social evolution. Historically, the idea that aggressive territorial conquest by military means triggered the transfer of that territory's sovereign title from the loser to the victor's ownership, was the standard legal norm – from time immemorial. From Rome's destruction and conquest of Carthage (145 B.C.) to the Fashoda Incident in 1898, international law had always regarded violent conquest as *the* recognized means for territorial appropriation. The answer to conquest – was simply counter-conquest. And once such a counter-conquest succeeded, international lawyers simply bestowed their measure of legality upon that newly-created, or recently-restored territorial reality. Not until the 20th century, following the establishment of the League of Nations and its nucleus of international multilateralism – was the legitimacy of forceful conquest ever seriously questioned.

WWI, Self Determination, and the Demise of Conquest: 1919-1928 Treaties – are often born out of traumas. The 1555 Peace of Augsburg - „Cuius regio, eius religio“ [he who rules - determines the religion] followed the German Reformation wars; The Peace of Westphalia (1648) – came after the 30-years' war; The 1948 Genocide Convention – ensued after the Jewish holocaust; Responsibility to Protect (1999) – after Rwanda and Srebrenica. Much of the same can be said of the establishment of the League of Nations a century ago (1919). Prior to WWI, the world had never witnessed killing on such an industrial scale. „The War – to End all Wars“ was meant to put an end to aggressive conquests. Bismarck's slogan: 'Macht geht vor Recht' [Power predicates law] was to be substituted with the *Pax Romana's* famous maxim: 'Ex injuria jus non oritur' - [unjust acts shall not establish law].²¹ All the while, in a set of secret treaties drafted between 1915 and 1917, British and French diplomats envisaged a partitioning of the remaining territories of the Ottoman, German, and Hapsburg

²¹Robert Langer, *Seizure of Territory*, Princeton 1947, p. 290

Empires amongst them, as disposable 'booty' and spoils of war for them as victors. Yet in March 1917, the unexpected happened: Russia's Tsarist regime was overthrown – and a revolutionary government was swiftly established there. On April 10th, 1917, the Russian provisional government announced that: 'free Russia does not aim at dominating other nations, at depriving them of their *national patrimony*, or at occupying by force foreign territories'.²²

Much has been written about World War I's so-called „Wilsonian Moment“. Yet in fact, the shift towards the self-determination of peoples was initially not American but Bolshevik. Two weeks after their revolution of 7th November 1917, it was Leon Trotsky who shamed Britain and France with the publication of their secret annexation treaties from 1915, referring to these as 'egregious specimens of the secret diplomacy of Imperialism, with its dark plans of conquest and its robber alliances and deals'.²³ One day later, on November 8th 1917, Lenin insisted that 'an immediate peace without annexations', is what Soviet Russia now desired.

Conquest's Dishonest Surrogates: International Mandates and Military Occupation

Nevertheless, in 1918, it was Woodrow Wilson who first framed the demise of conquest thanks to the over-ridingness of the principle of self-determination. 'There shall be no annexations' Wilson said since 'peoples are not to be handed about from one sovereignty to another by an international conference'. In the post war era, so he claimed, every territorial settlement had to be made 'in the interest and for the benefit of the populations concerned, and not as part of any mere adjustment or compromise of claims amongst rival States'.²⁴

While Lenin and Wilson's visions for a world devoid of conquest chimed as sweet music to Germany's defeated ears, Britain and France would have nothing of it. If territorial annexation was no longer

²²Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice*, Oxford 1996, p. 135-6.

²³*Ibid.*, p. 137.

²⁴*Ibid.*, p. 138

internationally- attainable, then other means for territorial acquisition could be construed. French interests in North Africa and Syria, and British interests in the locomotion of oil from Iraq to the Mediterranean had to be accommodated for. Consequently – the League of Nations’ Mandate system was created. Britain might not have been the *owner* of the Near East from Iraq to the Mediterranean – but it was its *custodian*. And as such – it had full sovereignty over this territory through which the oil in its Trans-Arabian Pipeline now flowed. In Cameroon, land was not *leased* to British colonial plantation farmers. It was *sold* to them.²⁵

Europe, however, was a different story. And what could *legally* be done to „natives“, was deemed unworthy of pink-skinned Europeans. Alsace and Lorraine returned to victorious France. Yet the French demand for *annexation* of the Rhineland was rejected outright by Wilson. Back in the 17th Century, Louis XIV ordered Comte de Mélac to ‘burn the Palatinate’ („brûlez le Palatinat“) and turn the Rhineland into a desert so as to render this territory as a security buffer against future German aggression. A quarter of a millennium later, and with the Rhineland firmly ethnically German (as opposed to Alsace and Lorraine), a transferal of its sovereignty to France solely due to security concerns was no-longer viable. In the wake of the new international realities of self-determination, a new legal concept was firstly devised especially for the Rhineland: *Military Occupation*.

Under Versailles’s treaty-stipulations, the Rhineland would remain under French military control for a 15-year period, while formally – still belonging to Germany. Were Berlin to default on its unimaginable reparative payments to France and Belgium, the latter would be allowed to extract their payments directly from the Rhineland. Thus in 1923, as Germany defaulted on its impossible payments, and with the Rhineland not yielding enough income for their deliberately-unimaginable indemnities, France and Belgium also invaded the Ruhr,

²⁵Susanne Pedersen, *The Guardians: The League of Nations and the Crisis of Empire*, Oxford 2015, p. 380

extracting the rest of their debts through that region’s iron-ore deposits. Pounding the German occupied population to dust, Germany eventually resorted to the evacuation of some 300,000 malnutrition children out of the Ruhr and the Rhineland eastwards, curing them from nutrition-based bone diseases such as rickets. Belgium’s occupational policies for the Ruhr suddenly mirrored those it executed in the Congo basin – its soldiers now officially redeployed from Brazzaville to Wuppertal.²⁶ To local populations in Africa and Europe alike, military occupation turned out to be equally cruel.

The period following the League of Nations’ establishment seemed like International Law’s ultimate heyday. All *political* problems – it seemed - could be miraculously worked over through seemingly-objectivist legal means. Moving from problem to problem, treaty by treaty, The League’s utopian legalists assumed they were creating a new world where legal papering would amend what on-the-ground realities could not. Labouring tirelessly for a multilateral collective security, in 1928, the French and U.S. foreign ministers concluded the Briand-Kellogg Pact outlawing wars of aggression. The very first country to adopt this Pact was none other than Germany. Gustav Stresemann swiftly convinced the German Cabinet of its future merits for Germany in Europe.²⁷ States – were no longer allowed to aggressively transgress their internationally-recognized borders and violate the recognized territorial integrity of other states. Universalist Humanism seemed to finally reign in Power-Politics.

The carriers of this new legalism were pacifist international jurists such as the Danish Georg Cohn, who back in 1922 elaborated the non-recognition principle (later known as the „Stimson Doctrine“). It stated that territorial changes brought about by military force shall not be recognized by the League’s member states.²⁸ Yet even Cohn

²⁶William Rasch, *Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland*, in: *The New Centennial Review*, 8 (2008) 1, pp. 57-79, at p. 65 n.8.

²⁷Oona Hathaway / Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World*, New York 2017, p. 223

²⁸Gilad Ben-Nun, *The 4th Geneva Convention for Civilians: The History of Interna-*

admitted, unfortunately, that the Kellogg pact *did not outlaw* military occupation. War was no longer legal. Yet France's starvation of the Ruhr for the sake of her unjustified German debts, or Britain's massacring of Indians in Amritsar so as to keep the Indian sub-continent subjugated for the benefit of British imperial interests – were legal and valid. War might have been outlawed. Yet vile and cruel hand of military occupation was here to stay.

Carl Schmitt's Realist Reframing of Territorial Appropriation - Großraumordnung

Enter Carl Schmitt - International Law's „Prince of Darkness“. In 1928, the very same year of the Kellogg Pact's conclusion, Schmitt began to ponder the discrepancies between war's illegality and military occupation's continuing validity. Himself a resident of the Rhineland, Schmitt observed first-hand just how cruel military occupation could be. As he set out to formulate a conceptual framework which might make sense of what he saw in the world, Schmitt gradually alluded to two concepts which would later form the bedrock of his thinking: *Nomos* and *Grossraum*. Multilateral systems - he thought - required rules (nomos in Greek) – and norms which could bind their member states. With the world now fully-global, the international system must have implicitly subscribed to some sort of *Nomos of the Earth*. Looking around him – Schmitt pondered what this *Nomos* really entailed.

His answer was simple: *Grossraum Theory*. As Schmitt saw it, the world was *already divided* into regional hegemonies who subjugated smaller states within their recognized hemispheric realm into a non-equal subjugated Patron-client relationship. Japan's *Grossraum* was Asia, the U.S.' was the western hemisphere as per the Monroe Doctrine. The High Seas were dominated by the British Navy. Central Asia had already become the Soviet realm of the Slavs. Europe – Schmitt thought - was rightfully destined to become Germany's *Grossraum*. To be sure, Schmitt did not invent the concept of *Grossraum*, but rather borrowed it from spatial economics of the late 19th and early 20th

century. For the development of the European railway network to the construction of cross-boundary electric grids, by the early 20th century, the benefits of large-scale economic and infrastructural networks had become evident to all. Nor was Schmitt the initiator of the idea of „Nation State-to-Empire“ which several thinkers already toyed with before him. Nevertheless, Schmitt's profound originality rested in his ability to *translate* these concepts into international law, and construct out them a homogenous intellectual superstructure so as to serve his *Machtrecht* vision.

That *Grossraum* was premised on a harsh and violent subjugation of peoples within it by the hegemon was all too clear to Schmitt. He did not wish for violence as such. He simply looked around him and depicted what he saw. Violence – was what France executed in the Rhineland. It was what the U.S. maintained in Latin America and in its grip over the Philippines. It was what Japan exercised in Manchuria, and what Italy used to subjugate Ethiopia. Violence against natives under military occupation – was being recognized as internationally-legitimate the world over. As Hitler rekindled German military might and drove France out of the Rhineland, justice seemed to Schmitt to finally come to the fore. Was the British violent crushing of the Palestinian revolt (1936-39) more legitimate than the 1938 *Anschluss* of Austria? In Austria at least – no bombardment of civilians was required. In Palestine, British military engineers exploded the entire ancient city of Jaffa in their subjugation of the Palestinian uprising there. The 1933-36 French crushing of the *Étoile Nord-Africaine* in Algeria was factually far more violent than the German subjugation of the Sudetenland and later Bohemia and Moravia. In the world he saw, military occupations legitimized the use of violence which war could no longer accomplish. Schmitt's contemporary proponents who praised the Kellogg Pact's such as Hersch Lauterpacht and Arnold McNair should have been more careful in what they wished for – he thought. Military occupation could be just as cruel as war. Unfortunately, even in 2019, utopian jurists such as Oona Hathaway and Scott

Shapiro seem bent on overlooking military occupations' vile surrogate qualities to conquest, as they conveniently avoid any mention of this very term in their current account of the Kellogg Pact's history.

The U.N. Post WWII: American Hegemony and Military Occupation's Temporary Demise

By the end of WWII, the violent ramifications of Schmitt's *Grossraum* theory had come full circle. Between the German execution of the Jewish holocaust and the wholesale killing of occupied civilians in France and in the Balkans; between the Japanese rape of Nanjing and the total annihilation of Manila (Feb-Mar 1945) - military occupation had become synonymous with the occupier's licence for unabated atrocities. If aggressive conquest had already been demised back in 1928 – now was the turn of military occupation.

Nowhere was territorial demised more – than in International Red Cross' 4th Geneva Convention for Civilians, drafted between 1946 and its signature on August 1949. In case of armed conflict – so stipulated the Geneva Conventions' new Common Article 3, certain actions, such as summary executions, reprisals, hostage-taking, torture and sexual enslavement of women would be permanently prohibited – in any place and at any time whatsoever. Occupiers also would no longer be allowed to transfer portions of their own population to territories they conquered. Little surprise that the single-handed author of this clause in the 4th Geneva Convention (Article 49 paragraph 6) – was none other than Rabbi Dr. Georg Cohn.²⁹

One would be hard-pressed to understand the unfolding of colonialism in Africa and Asia without this understanding. The British-French-Israeli conquest of the Sinai during the 1956 Suez Canal Crisis could simply no longer be tolerated. And while Soviet hegemony certainly allowed for military invasion and intervention (1953 – Berlin, 1956-Budapest, 1968 – Prague), it was no longer primarily bent on territorial expansion. Between the end of the allied occupation of Germany (1949) and the fall of the Berlin Wall (1989), military occupation resulted in

permanent colonization only three times: in Israel's occupation of Palestine and the Golan (1967), in Turkey's occupation of Northern Cyprus, and in Morocco's grip on Western Sahara. With the benefit of historical hindsight, one could safely claim that the period between 1949 and 1989 was the one least prone to aggressive territorial appropriation by states – in perhaps all of human history.

The Resurgence of Conquest Post 1989 - the End of Pax Americana

The international campaign against Saddam Hussein's Iraqi invasion of Kuwait in 1991 signalled the height of multilateralism's execution of its anti-aggressive principles of international collective security. The international interventions in the former Yugoslavia (1993-1995), in Kosovo (1998-1999), and the U.N.'s successful handover of East Timor to its independence (2001) followed suit on the Iraqi 1991 blueprint. In all these efforts, and notwithstanding the bitter international controversies they triggered (NATO's 'go it alone' policy in Kosovo), one could safely claim that none of these military interventions had any measure of territorial aggrandizement.

That all changed rather radically with the U.S. Britain's 2003 unmerited invasion of Iraq. In contrast to their invasion of Afghanistan, on the backdrop of Al Qaeda's September 11th attacks, the U.S.-led invasion of Iraq was seen solely as a 'classical' territorial expansionist effort to conquer Iraq's vast oil resources. The U.S.' liberation of the genie of territorial fetish out of his bottle in 2003 opened the way for others to follow. Russia's 2008 invasions of Georgia and its 2014 invasion of Ukraine and annexation of Crimea cannot be understood without the precedent laid forth by the U.S. and the U.K. in Iraq.

From the historical vantage point, the current resurgence in the territorial aggression seems rather reminiscent of the interwar period. On the backdrop of a global economic recession (2008), the rise of autocratic rulers in states with territorial aspirations for aggrandizement, coupled with a weakening of the international multilateral system, all seem alarmingly reminiscent of the 1930s. During the interwar period – the U.S. never joined the League of Nations. In 2018, the U.S.

²⁹Ibid., pp. 97-158

has departed both from UNESCO and from the U.N. Human Rights Council. John Bolton – the U.S. National Security Advisor has recently vowed to shut down the International Criminal Court in The Hague. The U.S. has also recently departed from UNRWA.

Are we seeing the end of the international multilateral system? To be sure, its 20th-century ascendance directly juxtaposed conquest - whose demise was brought about by this system's rise. While international circumstances are undoubtedly different nowadays, to those of the 1930s, it is the *irrelevance* with which conquest is internationally viewed - that is most worrisome. Carl Schmitt's *Grossraum* realization, that larger hegemony will subjugate smaller states within their immediate territorial hemisphere has certainly not dissipated. In fact – *Grossraum's* tenets are still very much alive and kicking.³⁰

³⁰Stefan Troebst, Storage Medium of Conflict Memory: Eastern Europe's Imprint on Modern International Law, in: Annalisa Ciampi / Gilad Ben-Nun (eds.), History and International Law: An Intertwined Relationship, Cheltenham 2019, pp. 156-174, here p. 161.