CONSTITUTIONALISM AS POSTWAR INTERNATIONAL LAW

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ABSTRACT

This thesis inquires into the significance of the histories of constitution-making in Germany and Japan for international practices of constitution-making after conflict, and for the discipline of international law. It argues that, in offering constitutionalism as a solution to the problems of civil war and conflict in the decolonised world, contemporary scholarship on international law and constitution-making draws on a tradition that was developed during the post-World War II era in relation to the occupations of Germany and Japan. That tradition represents a rejection of material accounts of the causes of war and imperial aggression, and more radical visions of economic redistribution and political self-determination. In invoking these histories, international legal scholars reproduce an understanding of constitutional forms as an object of legal analysis and of technical reproduction, distinct from broader economic and political choices about the government of a society and about the international legal order in which that society exists. By exploring this tradition, this thesis seeks to denaturalise internationally-directed constitutional transformation, paired with economic liberalisation, as a technique for managing the postwar state.

The Introduction sets out the paradox of the internationalisation of constitution-making, on the one hand, and the idea of constitutions as a lawful means of governing a public, on the other. It gives an account of the method of inquiring into the way the discipline of international law has sought to invoke the histories of constitution-making in Germany and Japan to resolve this paradox, which I term 'discipline as method'. Chapter 1 describes the field of international law and constitution-making, and sets out the significance of the histories of constitution-making in Germany and Japan for the discipline of international law. Chapter 2 explores the emergence of a tradition of constitutional thought in international law in the postwar period, articulated in opposition to economic and material accounts of empire, by reference to the work of three lawyers: Quincy Wright, Ernst Fraenkel and Carl Friedrich. Chapter 3 describes the conduct of the Allied occupations of Germany and Japan, reading Allied practices and debates, and the making of constitutions, through competing ideas of the requirements of peace in the aftermath of imperial aggression. The thesis concludes by reflecting on what knowledge of this tradition offers for the discipline of international law.

DECLARATION

This thesis comprises original work towards the Master of Philosophy (Law). Due acknowledgement of all materials used has been made in the text. The thesis is fewer than 50,000 words, exclusive of bibliography and frontmatter.

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A brief note on language: Japanese names have been rendered in the form used by the relevant author or source cited, both in terms of name order and romanisation. Any errors, as ever, remain my own.

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INTRODUCTION

I CONSTITUTION-MAKING AS INTERNATIONAL LEGAL TECHNIQUE

A *Overview*

Over the course of the last half century, civil war and conflict in the decolonised world has come to be seen as a threat to international peace and security.[1] International lawyers, who since at least 1945 have understood a central task of international law to be the maintenance of that peace, have developed a raft of legal practices designed to limit the severity of such conflict, to manage its consequences, and to prevent its occurrence. One such practice is the international practice of constitution-making.

That practice — the practice of reshaping the legal order of a state through the revision of constitutions, or the making of new ones — has occupied the imagination and vocabulary of international law and lawyers over the past two decades. Scholars have commented that '[c]onstitution-making, traditionally the hallmark of sovereignty and the ultimate expression of national self-determination, is increasingly becoming an object of international law'.[2] So too has the promotion of international peace and security through constitution-making become a more explicit concern of international diplomatic, economic and military interventions in the decolonised world.[3] International institutions, organisations, and advisors are involved in a number of state constitution-making processes.[4] To varying degrees, the language of international law also shapes and makes demands of these processes, articulates justifications for practices of sanction

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[1] See David Armitage, *Civil Wars: A History in Ideas* (Alfred A Knopf, 2017); Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge University Press, 2017); 'Laureate Program in International Law' <www.lpil.org>.

[2] Philipp Dann and Zaid Al-Ali, 'Internationalized Pouvoir Constituant: Constitution-Making under External Influence in Iraq, Sudan and East Timor' (2006) 10 *Max Planck Yearbook of United Nations Law* 423, 424.

[3] For example, in the administration of East Timor, the US occupation of Iraq, or the diplomatic efforts of the UN Special Envoy to Syria in convening the Syrian Constitutional Committee.

[4] On institutions, see Vijayashri Sripati, *Constitution-Making under UN Auspices: Fostering Dependency in Sovereign Lands* (Oxford University Press, 2020). I regret that I was unable to obtain a copy of this book before submission. On organisations, see, eg, International IDEA, 'What We Do' https://www.idea.int/our-work#whatwedo. On advisors, see, eg, Max Planck Foundation for International Peace and the Rule of Law, 'Projects' <http://www.mpfpr.de/projects/>; Constitution Transformation Network, 'Research' <https://law.unimelb.edu.au/constitutional-transformations#research>; The Center for Constitutional Transitions, 'Our Work' <http://www.constitutionaltransitions.org/what-we-do-2/>.

or intervention that enable them, and seeks to preserve their outcome through internationalised mechanisms for protection and supervision.[5]

This thesis examines contemporary scholarship on constitution-making as a technique of states and of international organisations and institutions that understand themselves to be working toward international peace and security. Over the last two decades, international legal scholars have articulated ways in which international law and lawyers might direct the work of constitution-making after conflict, as well as how we might understand it. The internationalisation of practices of constitution-making might, however, be thought to give rise to a paradox. Constitutions have traditionally been thought of as an expression of the popular will of a national public, given effect through law in order to found, and limit, the modern nation-state.[6] How can it be, then, that constitutions are a concern of international law and lawyering?

In this thesis, I suggest that in order to overcome this paradox, and to sustain the idea of constitutions as a technique of international peace and security, this scholarship draws on a tradition of constitutional thought and practice that was developed during the postwar era and the occupations of Germany and Japan. In that tradition, international practices of constitution-making are described as part of an emerging anti-imperialist internationalism, and as a means through which international actors may manage aggression and maintain peace. I argue that that tradition represents a rejection of material and economic accounts of the causes of war and imperial aggression, and more radical visions of economic redistribution, social ownership and political self-determination, in favour of internationally-managed constitutional transitions. I further argue that the consequences of that inheritance persist in the discipline of international law, through framing political and legal debates over international constitution-making as debates over questions of agency and security, and through a separation of constitutional questions from an explicit consideration of the economic choices that societies might make after conflict.

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[5] Dann and Al-Ali, above n 2, 424; Christine Bell, 'Introduction: Bargaining on Constitutions — Political Settlements and Constitution-Building' (2017) 6 *Global Constitutionalism* 1, 18.

[6] See Cheryl Saunders, 'International Involvement in Constitution Making' in David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar, 2019) 76. But see Günter Frankenberg, who suggests that the act of constitutional founding is itself constitutive of an idealised people: *Comparative Constitutional Studies: Between Magic and Deceit* (Edward Elgar, 2018) 10.

My argument proceeds as follows. In the Introduction, I set out the research problem of this thesis, and the way in which I chose to explore this problem, which I describe as 'discipline as method'. Through taking discipline as method, I set out a way of exploring the histories and anxieties driving the discipline of international law, and provide an account of what writing new disciplinary histories of international law might offer.

In Chapter 1, I describe the field of international law and constitution-making, and offer a reading of how scholars have articulated the role of international law in relation to these practices. I then turn to an analysis of the history of constitution-making in Germany and Japan, and its significance for the discipline of international law. I argue that scholars articulate constitution-making as an aspect of the maintenance of peace and security by international actors. I suggest that this disciplinary articulation supports the demarcation of constitutionalism as an object of international law, distinct from its interrelationship with economic choices and political projects, and propose that exploring the histories of Germany and Japan provides a productive way of exploring and unsettling that demarcation.

In Chapter 2, I describe the emergence of a tradition of constitutional thought in international law during the middle part of the twentieth century. I argue that constitutionalism represented an alternative to occupation, as a way of understanding the work that international law might do after war. With reference to the work of three lawyers — Quincy Wright, Ernst Fraenkel and Carl Friedrich — I explore three elements of constitutional thought in international law. These are, first, constitutional transformation as a response to imperial aggression; second, constitutionalism as a juridical, rather than economic, way of comprehending empire; and third, dictatorship as a means by which international actors could effect constitutional reform. I show that each of these elements of constitutional thinking in international law was articulated in opposition to economic and material accounts of empire, and as a vision of law for a postwar and purportedly post-imperial world.

In Chapter 3, I describe the conduct of the Allied occupations of Germany and Japan. I suggest that tracing constitution-making as a practice of international administration, through an examination of Allied practices, policies and statements, and the responses of German and Japanese actors, offers a way of exploring competing ideas

of the requirements of peace in the aftermath of imperial aggression. I suggest that, in Japan, Allied commitments to political self-determination and corporate deconcentration gave way to forms of economic development and internationally-managed constitutional change. In Germany, I argue that Allied ideas of self-determination and removing the economic base of aggression were replaced, in the case of West Germany, by federalist government and an internationally-supervised process of constitutional drafting, along with the prioritisation of economic development.

In the Conclusion, I return to the work of constitution-making as a technique of international law, in order to explain its relationship to the tradition formed during the postwar period. I then begin to think about reimagining the work that international law might do as a way of understanding the world, and the implications of this for the place of international lawyers within it.

B *The Research Problem*

When I refer in this thesis to the international practice of constitution-making as a technique of peace and security, I mean involvement by states, international institutions or organisations (including non-governmental organisations) in the process of making a constitution after conflict. Constitutions, in the contemporary world, are primarily understood as the founding legal instrument of the modern nation-state.[7] Broadly conceived, the process of their making entails not only the work of drafting that instrument itself, but also the preparation for its drafting, including the creation of political bodies entrusted with responsibility for its content, and consultation with a national public about that content. It might involve the preparation of a new constitution, the amendment or significant reinterpretation of an existing constitution, or the practical implementation of a constitution.[8] In each case, what is 'international' about that process is that it involves some advice or assistance to that work,

[7] See Mark Tushnet, 'Constitution-Making: An Introduction' (2013) 91 *Texas Law Review* 1983.

[8] Some reports use the language of constitution-building to describe this broader concept. See, eg, International IDEA, *Constitution-Building after Conflict: External Support to a Sovereign Process* (May 2011) 11; Rhodri C Williams, *Constitutional Assistance and the Rule of Law in Post-Conflict Transitions: An Overview of Key Trends and Actors* (Folke Bernadotte Academy, 2013) 15.

requirements placed on that work, or in some cases direct administration of that work, by other states, international institutions, or international organisations.

These international practices of constitution-making have coincided with the creation of a body of international legal scholarship entailing some commitment to constitutionalism as a means of ending conflict or of preventing its recurrence. By constitutionalism, I mean the idea that the powers of the government of a state should be limited in some form through the law of a constitution.[9] This might entail a commitment to the separation of governmental powers, to human rights, or to a federalist or consociational structure. In each case, though, this practice involves placing *legal* limits on a government, to be supervised through legal institutions. Scholarship in this field includes international legal scholars working within the broad approaches of postwar reconstruction and peacebuilding; *jus post bellum*, or the 'law of peace'; in the tradition of global constitutionalism; or scholarship on constitution-making as transnational legal ordering.[10] In each case, this scholarship is based on the premise that, in the contemporary era, the drafting, supervision and implementation of constitutions, in service of international peace and security, is an international rather than merely national concern. Accordingly, constitution-making in the broad sense is now articulated in this scholarship as part of the work of international law.

This articulation departs in two ways from existing orthodox conceptions of nationalism and internationalism in legal thought. First, it departs from the conviction described above, held in various forms since at least the revolutions of the late eighteenth century, that a constitution should be an expression of the common will of a national public, to the exclusion of international — or imperial — influences.[11] Second, it departs from the more recent idea, hard-won by newly independent states during the era of decolonisation, that international law should recognise 'the freedom of choice of the political, social, economic and cultural system of a State', and realise that freedom

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[9] Many versions of this idea exist. See, eg, Maria Tzanakopoulou, *Reclaiming Constitutionalism: Democracy, Power and the State* (Hart Publishing, 2018); N W Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018).

[10] I sketch this work through reference to the work of, among others, Kirsti Samuels, Hallie Ludsin, Carsten Stahn and Christine Bell; Anne Peters and Mattias Kumm; and Tom Ginsburg, Terence C Halliday and Gregory Shaffer : nn 93–168.

[11] See generally Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2008).

through a commitment to the twin principles of self-determination and non-intervention.[12] The idea that international law should have some role to play in the process of constitution-making, then, represents a significant shift in and of itself, aside from more substantive ideas about what that process should look like and what international norms it should reflect. In this sense, the idea that constitution-making is part of the work of international law poses a challenge to fundamental ideas of international legal ordering, and the allocation of authority between international and national ideas of government.[13]

When I began to think about how to understand this work of constitution-making, as part of the discipline of international law, and to engage with the field of scholarship within that discipline that seeks to articulate this as an international legal practice, I first became interested in approaches that might broadly be described as 'law in context'. This is an approach that asks the question: what effect does the adoption of constitution-making as an international legal practice have in the context, or on the societies, for which it is practised? Such an approach would have the advantage of exploring the imbrication of constitution-making with other international legal decision-making processes, norms and institutional contexts, including those relating to the use of multilateral or unilateral sanctions, the recognition of governments, and the deployment of military force.[14] It would also have the benefit of exploring the relationship between the internationalisation of constitution-making, the provision of developmental assistance, and the transformation of national economies through forms of capitalisation, marketisation, and financialisation.[15] In such an environment, the dividing line between constitutional 'assistance', on the one hand, and coercion, on the other, that some scholars have sought to draw in order to demarcate their field of analysis, is difficult to maintain.[16]

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[12] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)* [1986] ICJ Rep 14, 133 [263].

[13] Anne Orford, International Authority and the Responsibility to Protect (Cambridge University Press, 2011) 26.

[14] See, eg, Kerry Rittich, 'Occupied Iraq: Imperial Convergences' (2018) 31 *Leiden Journal of International Law* 479.

[15] See, eg, Ntina Tzouvala, 'Food for the Global Market: The Neoliberal Reconstruction of Agriculture in Occupied Iraq (2003–2004) and the Role of International Law' (2017) 17 *Global Jurist* 1.

[16] Cf Jean Cohen, 'The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for Interim Occupations (2006) 51 *New York Law School Law Review* 497, 498.

As I read the literature in the field, however, it became apparent that this was a question that had, to some extent, been answered already. In the wake of the perceived failures of the constitution-making projects in the first decade of the twenty-first century, the field had been subject to both external and internal critique. Both prominent scholarship in that field, as well as the reports of international organisations and institutions, have since come to reflect an observable anxiety about what might be perceived to be processes of externally-directed constitutional 'imposition', and the problems associated with those processes.[17] At the same time, however, the field displays a continued commitment to the practice of constitution-making as a technique of international peace and security, and to articulating that practice as a defining feature of the field. In response to critiques of international intervention, the field has come to emphasise that international involvement in constitution-making is not, of itself, inherently imperial: instead, it offers a potentially emancipatory means of empowering 'local' actors against authoritarian governments, and of securing peace.[18] The 'problems' of constitutional intervention have thus come to be portrayed as problems of political and situational sensitivity, or technical knowledge.[19] They are viewed as problems of implementation, rather than problems of orientation; problems of practice, rather than problems of theory.

My awareness of this disciplinary renewal led me to turn away from an analysis of the context in which the discipline of international law was operating, toward an investigation of the animating imaginaries of the discipline itself.[20] How had it come to understand constitutions as an international legal form, and as a technique of peace and security? What narratives did the discipline tell itself about its past, in order to sustain the possibility of continuing to operate in the present? In asking these questions, it became apparent that the histories of constitution-making in Germany and Japan might offer a productive way of understanding those narratives.[21] Accordingly, the research

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[17] See, eg, *Guidance Note of the Secretary-General: United Nations Assistance to Constitution-Making Processes* (April 2009) ('*Guidance Note*'); Bell, 'Bargaining on Constitutions', above n 5, 16; Emily Hay, 'International(ized) Constitutions and Peacebuilding' (2014) 27 *Leiden Journal of International Law* 141, 153.

[18] See below nn 76–80.

[19] See, eg, Hay, above n 17, 150.

[20] On responding to renewal, see David Kennedy, 'When Renewal Repeats: Thinking against the Box' (1999) 32 *New York University Journal of International Law and Politics* 335.

[21] On tracing the uses of these histories, see below nn 174–203.

problem became: what is the significance of the histories of constitution-making in Germany and Japan for the international practice of constitution-making after conflict, and for the discipline of international law?

C *Germany, Japan, and Postwar Constitutionalism*

Following the conclusion of the Second World War, the Allied occupations in both Germany and Japan played a significant role either in drafting constitutions for the defeated states, or in setting the parameters within which that process was to take place. This section provides an introduction to those histories of constitution-making, which are explored in greater detail in Chapter 3.

Pursuant to the Berlin Declaration of June 1945, the US, the Soviet Union, the UK and the provisional government of France assumed 'supreme authority with respect to Germany', divided into four zones of occupation.[22] In July of that year, representatives of those same states, as well as of China, met in Potsdam to agree on the framework and objectives for the occupation of Germany, to settle the question of transfer of German-occupied territory, and to create an Allied Control Council for the coordination of the administration of Germany within the zones of occupation.[23] Although occupation would continue until 1955, much of the local level of German government would be restored by 1946.[24] Each of the four zonal administrations also divided the occupied territory into states, or *Länder*, with France and the US encouraging the formation of constitutions at the *Land* level during 1946–47 and exerting influence over the content of those constitutions.[25]

Deepening disagreements, however, between the Western Allies and the Soviet Union would result in the political and economic unification of the US and UK zones on

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[22] Hans Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin' (1945) 39 *American Journal of International Law* 518.

[23] The eventual agreement was executed as a communiqué by the UK, the US and the Soviet Union: 'Report on the Tripartite Conference of Berlin' (2 August 1945) in *Foreign Relations of the United States*, The Conference of Berlin (The Potsdam Conference), 1945, vol II, 1499.

[24] Boehling suggests this was partly due to the occupiers' lack of German: Rebecca Boehling, *A Question of Priorities: Democratic Reform and Economic Recovery in Postwar Germany* (Berghahn Books, 1996) 210–11.

[25] John Ford Golay, *The Founding of the Federal Republic of Germany* (University of Chicago Press, 1958) 3–6. See below n 582.

1 January 1947, with the later addition of the French zone in 1949.[26] The final documents of the 1948 London Conference (or Six-Power Conference) instructed the military governors of West Germany to authorise a constituent assembly, with delegates to be chosen by the *Länder* parliaments, to draft a constitution for popular ratification, and set out the conditions which that constitution was to meet.[27] This authorisation was communicated to the Minister-Presidents of the *Länder* on 1 July 1948.[28] The Parliamentary Council, consisting of sixty-one delegates, met over the course of the next year before the product of the drafting process was approved by the military governors, and came into effect on 23 May 1949. Although the West German State is considered to have been formed on 21 September 1949, Allied occupation would there formally endure until 1955, a year after the Federal Republic joined the newly-formed North Atlantic Treaty Organisation.[29]

At the Potsdam Conference of 1945, the US, the UK and China had also issued a declaration calling for the unconditional surrender of the Japanese armed forces. After the Japanese government's rejection of this ultimatum, and the US atomic bombing of the cities of Hiroshima and Nagasaki, the Emperor of Japan announced Japan's surrender on 15 August 1945. In signing the Instrument of Surrender on 2 September, Japan accepted the terms of the Potsdam Declaration, including the renunciation of sovereignty over Japanese territory in Korea and the Pacific. The occupation by Allied forces began two weeks after the announcement with the stationing of some 400 000 troops in Japan.[30] The lack of familiarity of the occupiers with Japanese language and society meant that direct government was impossible. Instead, General MacArthur, as Supreme Commander of the Allied Powers ('SCAP'), headed up an administration whose policies and directives were implemented through the Japanese government, which remained largely intact.[31] The difficulties faced by the occupation government were also reflected in the frequent overlap in postwar policy for the two states, to the

[26] Sometimes referred to colloquially as 'Bizonia' and later, 'Trizonia'.

[27] See below n 615.

[28] See Edmund Spevack, *Allied Control and German Freedom* (Lit Verlag, 2001) 360.

[29] Ibid 498; Josef L Kunz, 'The London and Paris Agreements on West Germany' (1955) 49 *American Journal of International Law* 210.

[30] Kaoru Obata, 'Historical Functions of Monism with Primacy of International Law: A View Based on the Japanese Experience during the Early Period of the Allied Occupation' (2006) 49 *Japanese Annual of International Law* 1, 7.

[31] Ibid 7–8.

point where sentences from US government directives to the occupying forces in Germany were accidentally replicated in those to the SCAP in Japan.[32]

In October 1945, the Japanese government appointed Matsumoto Joji, then a Cabinet Minister, to head a committee tasked with drafting a postwar constitution for Japan.[33] That committee submitted a plan for constitutional revision in February of 1946, which was rejected by the SCAP. Instead, the Government Section of the US occupation government produced a draft of a constitution for Japan within the space of only two weeks.[34] That draft was presented on 13 February of that year to representatives of the Japanese Government. After being redrafted into the Japanese language, the Japanese Diet, or legislature, voted to adopt the constitution in September 1946.[35] In November, the new Constitution was officially promulgated via an imperial rescript, to take effect in March of 1947.[36] Allied occupation forces would eventually withdraw after a formal peace agreement with the majority of the Allies came into force in April 1952.[37]

II CONSTITUTIONALISM AS POSTWAR INTERNATIONAL LAW: DISCIPLINE AS METHOD

This section provides an overview of the way I chose to go about researching the thesis, which I term 'discipline as method'. This method reflects a view that one way to understand the changing discipline of international law, and the implications of that law for diplomatic, economic and military interventions in the decolonised world, is to think and write about the way that the discipline understands its history. I suggest in this thesis that contemporary understandings of the international practice of constitution-making can be interrogated through reference to the histories of constitution-making in Germany and Japan, and the role they play within the discipline. This disciplinary

[32] Theodore Cohen, *Remaking Japan: The American Occupation as New Deal* (Free Press, 1987) 30.
[33] Koseki Shōichi, *The Birth of Japan's Postwar Constitution* (Ray A Moore ed and trans, Westview Press, 1997) 12.
[34] R W Kostal, *Laying Down the Law: The American Legal Revolutions in Occupied Germany and Japan* (Harvard University Press, 2019) 128–9.
[35] Koseki, above n 33, 111, suggests it was better characterised as a draft in its own right than a translation.
[36] *Political Reorientation of Japan: September 1945 to September 1948: Report of Government Section* (US Government Printing Office, 1949) vol 1, 111.
[37] *Treaty of Peace with Japan*, signed 8 September 1951, 136 UNTS 44, entered into force 28 April 1952.

investigation represents an effort to attend to the fact that what international lawyers consider 'international law' to be is not fixed: instead, describing the work of constitution-making as an aspect of international law represents an expansion of the discipline's activities and an adjustment of its sensibilities. I further suggest that exploring the limitations and partialities in the ways that those histories are told, and redescribing those histories, can be a productive means of exploring the shape of the discipline as it presently exists.

A *Disciplinary Histories and the Politics of International Law*

In thinking about these questions, and developing an account of 'discipline as method', I found useful the work of scholars engaged in thinking about disciplinary history, or the history of a particular discipline as it has developed as a field of scholarly engagement and as a means of doing work in the world. In the words of Peter Gordon, a discipline 'comes to understand itself by telling stories about where it has been'.[38] Such histories have two dimensions: they are *historical*, in the sense of telling us about the past, and they are also *productive*, in the sense that they contribute to the shape of that discipline as it exists today. Writing a history of international law would therefore offer one way of engaging with its disciplinary account of itself and of providing suggestions for its future.

Wolf Lepenies and Peter Weingart, in an introduction to a volume on the disciplinary histories of the sciences and the humanities, describe the work that disciplinary history might do in the following terms:[39]

> In battles for supremacy in a field, in times of uncertainty of orientation, or in conflicts over the truth claims of contradicting schools of thought a history of the discipline serves to rearrange the relative impact of past achievements, the proper evaluation of founding fathers and disciplines, heroic discoveries and consequential mistakes … A different periodization … will change the image of a discipline's history, it will restructure the memory of the past and, by way of socialization, structure the future.

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[38] Peter Gordon, *Continental Divide: Heidegger, Cassirer, Davos* (Harvard University Press, 2010) 2–3.
[39] Wolf Lepenies and Peter Weingart, 'Introduction' in Loren Graham, Wolf Lepenies and Peter Weingart, *Functions and Uses of Disciplinary Histories* (1983, Kluwer) ix, xvii.

Disciplinary history, then, is not only backward-looking but also forward-focused: it looks to history in order to do work in the present. Lepenies and Weingart identify at least three reasons that scholars might seek to tell a different history of their discipline.[40] Histories have public utility: they are a way of explaining to a broader audience the work that the discipline does, has done and ought to continue to do. Histories have research economy: they can be marshalled in support of the creation and funding of a novel area of research, thus shaping the discipline and its direction into the future. And histories have political effects, in the sense that, as Martti Koskenniemi has put it, international lawyers are also women and men with projects seeking to do work in the world: retelling the history of a discipline can smooth the way for that work.[41] Duncan Bell adds a further justification: that disciplinary history is a 'site for analysing the interweaving of knowledge, power and institutions', and thus allows for a critical engagement with the discipline's present.[42]

So, understanding the politics of a change in the discipline of international law might be done through engaging with how international law tells its history. Where then could we look for these histories? One answer might be to look to self-proclaimed histories of the discipline, or turn to the separate and specialised journals that take that history as their subject matter.[43] Such an answer, however, implies that international lawyers do not 'know' our history — that we must constantly reach outside of our normal work in order to discover it, and that it plays a marginal role in the framing of the discipline's debates.

I propose a different answer, drawing on the work of Anne Orford on the politics of international legal history. Orford writes that:[44]

> Law is inherently genealogical, depending as it does upon the movement of concepts, languages and norms across time and even space. The past, far from being gone, is

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[40] Ibid xv–xx.

[41] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002) 7.

[42] Duncan Bell, 'Writing the World: Disciplinary History and Beyond' (2009) 85 *International Affairs* 3, 9.

[43] See, eg, 'Journal of the History of International Law' <https://brill.com/view/journals/jhil/jhil-overview.xml>; 'Jus Gentium: Journal of International Legal History' <https://www.lawbookexchange.com/jus-gentium.php>.

[44] Anne Orford, 'The Past as Law or History: The Relevance of Imperialism for Modern International Law' (IILJ Working Paper 2012/2) 9.

> constantly being retrieved as a source or rationalisation of present obligation … whatever the felt urgency of breaking with the past, the past persists in custom and precedent and legal tradition.

This intimate relationship between past events and present law might suggest that the history of the discipline is to be found interleaved in the pages of international legal scholarship. A brief mention here, a footnote there, to what international law did in the past might just as well indicate the subtle narration of a discipline's task as a more sustained and overt exploration.[45] The kind of 'disciplinary' history that I wish to interrogate and redescribe is one that not only tells a story of how a discipline was constructed in the past, then, but also enables me to explore how that discipline works to construct (and re-construct) itself through the use of the past in the present.

B *Discipline as Method: International Law with and against the Grain*

The first way I use 'discipline as method' is through reading the scholarship of international lawyers and reading it 'with the grain'.[46] What I mean by this is focusing on the histories that international lawyers tell of the work that international law does and has done. I ask how the discipline understands its own history through the narration of constitution-making under occupation in Germany and Japan, how these histories play a role in the discipline's self-understanding of the work of international constitution-making, and how they enable the discipline to provide an answer to the paradox of the internationalisation of constitutional forms. Reading these histories also allows me to attend to disciplinary anxiety: to ask what has come within view, and what is left out of view, in the cultivation or consumption of a disciplinary sensibility.

The second way in which I use discipline as method is in redescribing these histories of international law.[47] This is handling international law 'against the grain'. In redescribing these histories, I seek to denaturalise constitution-making as a technique of international peace and security, and to demonstrate its historical interrelationship with

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[45] I am grateful to Lianne Boer for discussions on this subject.

[46] See Chapter 1. On reading, see Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003) 38–9.

[47] On redescription, see Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609.

rival ideas, concepts and practices of the work of international law. In Chapter 2, this is done through reading the work of international lawyers and legal advisors during the interwar and postwar periods, and describing their articulation of constitutional thought in the decline of empire. In doing so, I place the theories of constitutionalism put forward by these authors in conversation with their interlocutors, to show how ideas of constitutionalism provided international law with a means of theorising German and Japanese imperial aggression, as well as a means of rejecting material theories of the causes of that aggression. In Chapter 3, this is done by describing Allied constitution-making under occupation as part of a broader landscape of practices, policies and statements evincing competing ideas of the role of law in the aftermath of imperial aggression, and in shaping a peaceful world.

In placing the work of constitution-making in Germany and Japan in the context of broader debates about law, war, and empire, I redescribe the work that 'international law' might be seen to have done during the postwar period, in an effort to offer an account of the past and present politics of constitutionalism in international law. As I explore in Chapter 1, contemporary scholarship on international law and constitution-making separates questions of constitutionalism, as a means of achieving peace and security, from the explicit consideration of questions of political economy, or the way that law effects a particular distribution of wealth within society. Yet, as I show in Chapters 2 and 3, the very concept of constitutionalism, as a practice of resolving the problems of imperialist aggression in the postwar world, was itself only one of the competing ways of understanding the causes of that problem, and of the work that states and international actors might do to address it. Here, using discipline as method means exploring this history while attending to how that separation forms part of a persistent tradition in international law, and asking what knowledge of this tradition might offer for the future of the discipline.

CHAPTER 1

CONSTITUTIONALISM AND INTERNATIONAL LAW AFTER WAR: HISTORIES OF A DISCIPLINE

I INTRODUCTION

The discipline of international law has witnessed a long history of international practices of constitution-making.[48] The present period, however, is distinctive both in terms of the institutionalisation and professionalisation of these practices, as well as their articulation as part of the ordinary work of international law.[49] Though the most recent iteration of these practices began during the post-Cold War heights of liberal internationalism, they have not declined with what is now frequently termed the apparent crisis of the 'international rules-based order'.[50] Instead, international legal practice and scholarship has during this time exhibited 'an apparently countervailing rise in faith in constitutions and constitution-making' as a means of promoting, managing or understanding political transitions after conflict.[51] This can be observed in the systematisation and rationalisation of these practices as a form of activity for international organisations and institutions. It can also be seen in the body of scholarship inquiring into the role of international law and lawyers in regulating, facilitating or guiding this work.

In this chapter, I examine this articulation of constitutions and constitution-making as an international technique of peace and security, and the role that the histories of constitution-making in Germany and Japan perform in this project. First, I turn to the reports of international institutions and international organisations to examine how their involvement with constitutional forms is represented as an aspect of

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[48] For example, by the British in mandatory Iraq in the 1920s and after the end of formal empire in Africa, especially during the 1950s and 1960s, by the United States in Cuba at the turn of the twentieth century or in the Philippines in the 1930s, or by the Soviet Union in the 1920s.

[49] See *Guidance Note*, above n 17.

[50] On post-Cold War liberal internationalism, see generally Anne Orford, 'Embodying Internationalism: The Making of International Lawyers' [1998] *Australian Year Book of International Law* 1. On crisis, see Jutta Brunnée, 'Multilateralism in Crisis' (2018) 112 *Proceedings of the ASIL Annual Meeting* 335.

[51] Bell, 'Bargaining on Constitutions', above n 5, 18.

the broader task of ending war and conflict within, as well as between, states. Second, I map the way that international lawyers have understood the relationship of international law to these practices of constitution-making, through the images of the international lawyers as pragmatist; as cosmopolitan; and as technician. I then turn to how international lawyers have narrated the significance of the postwar history of practices of constitution-making Germany and Japan, and the uses of that history in framing this field of international legal scholarship. Despite the differences between each of the three approaches described, I argue that they each articulate constitution-making as an aspect of the maintenance of peace and security by international actors, within local contexts, and that the histories of Germany and Japan support that articulation. In so doing, international legal scholars reproduce a particular understanding of constitutional forms as an object of legal analysis and of technical reproduction, distinct from the broader economic choices that surround that object. I then explore alternative ways of theorising this history, in order to question the demarcation of constitutional and political-economic questions, and to open up a space for different and productive ways of understanding the work of international law.

II CONSTITUTION-MAKING AS INTERNATIONAL PRACTICE: LETTERS FROM THE 'FIELD'

The reports of international institutions and non-governmental organisations from the last two decades describe constitution-making as an increasingly solidified field of international engagement.[52] According to these reports, in the initial post-Cold War period, this engagement had consisted in 'ad hoc technical advising' on constitution-making by academia, conducted separately from 'opportunistic advocacy efforts' to promote human rights standards by non-government organisations.[53] However, as 'deference to national control' gave way to 'the assertion of a legitimate international interest in the outcome of constitution-building processes', these separate fields of activity coalesced into a recognisable 'new field … that seeks to support effective constitution-making processes through facilitation and expertise while

[52] See Williams, above n 8, 'Foreword', 9 (written by FBA Director General Sven-Eric Söder).
[53] Williams, above n 8, 23.

promoting the inclusion of a substantive "canon" of international norms and best practices'.[54]

Within this field, the language of 'external involvement' in constitution-making is used to capture a range of actors, forms of advice and practices of constitution-making, broadly conceived. As the Secretary-General's 2009 Guidance Note on Constitution-Making states, 'engagement in and assistance to constitution-making is increasingly … a core component' of the work of the United Nations in promoting peace, good government and development in the decolonised world.[55] Likewise, non-governmental organisations have diverted increasing resources to both constitution-making initiatives and the development of a broader 'community of practice'.[56] Within the academy, constitution-making projects and initiatives have also proliferated, whose aims include the provision of expert advice and training, and the promotion of dialogue between scholars and 'practitioners' of constitution-making.[57]

In these documents, constitution-making has largely been framed as an instrument of peacebuilding in response to the increased incidence of civil war and the persistence of this 'complex, increasingly fragmented and intractable' form of conflict.[58] The 'nature' of modern civil war, as distinct from earlier forms of conflict, is understood to necessitate an approach that eschews a 'state-centric perspective' in favour of looking *within* the state.[59] This approach characterises the main 'drivers of conflict' as attributable to the failure of the postcolonial developmental state.[60] Conflict is understood to be caused by '[w]eak leadership and governance', 'fragile institutions', 'inept public management and corruption', the dominance of 'ethnic, religious or tribal interests' to the exclusion of others, the 'mismanage[ment] or misappropriate[ion]' of

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[54] Ibid. This can be contrasted with an 'initial post-Cold War tendency to obscure the extent of UN constitutional assistance by subsuming it within less potentially controversial programming such as electoral assistance': at 26.

[55] *Guidance Note*, above n 17, 3. See further Vijayashri Sripati, 'UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989–2011' (2012) 19 *International Peacekeeping* 93.

[56] Williams, above n 8, 47.

[57] See, eg, the initiatives mentioned at above n 4.

[58] *The Challenge of Sustaining Peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture* (29 June 2015) 7 ('*Advisory Group of Experts Report*').

[59] World Bank Group and United Nations, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (The World Bank, 2018) 78.

[60] *Advisory Group of Experts Report*, above n 58, 14. Cf Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' *Humanity* (online 21 December 2019).

'natural resources', and 'failure to develop economically'.[61] Proponents of constitution-making stress that '[w]ithout strong institutions, a society lacks the channels that can peacefully manage the tensions that naturally arise and which can quickly turn — or return — to violence'.[62] International institutions have relied on empirical work to suggest that the creation of a new constitution following civil war 'reduces the rate at which civil war may reoccur' and that either 'engaging in the constitution-writing process, or the existing post-conflict political, security, economic or other conditions that enable such a process, is important for safeguarding peace'.[63] The willingness of governments to cooperate in the constitution-making enterprise, however, is suspect: these 'endeavors often take place in the context of weak or even collapsed state institutions, weak political will for reconciliation, and distrust'.[64]

As a result of this understanding of constitution-making as a task to be conducted after conflict, the field has become closely associated with the promotion of international peace and security.[65] Instead of being treated as a domestic legal and political concern, constitution-making has been understood to afford an opportunity to end conflicts occurring within states, to enable a 'peaceful political transition', and to consolidate peace.[66] Key documents produced by international institutions on constitution-making explain the contribution that it can make to peace both as a matter of the substance of constitutions, and of the processes of their development.[67] As a question of substance, constitutions are understood to entrench limits to political power, prevent corruption, protect the rights of individuals and minority groups, and provide a

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[61] *Advisory Group of Experts Report*, above n 58, 14–15. See also *Pathways for Peace*, above n 59, xxv: 'Modern conflicts arise when groups contest access to power, resources, services, and security'. See Paul Collier and Anke Hoeffler's influential 'Greed and Grievance in Civil War' (2004) 56 *Oxford Economic Papers* 563.

[62] *Advisory Group of Experts Report*, above n 58, 17.

[63] Chris Mahony et al, *Conflict Prevention and Guarantees of Non-Recurrence* (UN-World Bank Pathways for Peace Background Paper, 2017) 17. See also Elkins, Ginsburg and Melton who associate the drafting of a new constitution after conflict with 'an approximately 60 percent reduction in potential recurrence of violence' while '[t]he amendment of an existing constitution has no statistically significant impact': cited in *Pathways for Peace*, above n 59, 145.

[64] Jamal Benomar, *Constitution-Making and Peace-Building: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries* (United Nations Development Programme, August 2003) 3.

[65] See Catherine Turner and Ruth Houghton, 'Constitution-Making and Post-Conflict Reconstruction' in Matthew Saul and James A Sweeney (eds), *International Law and Post-Conflict Reconstruction Policy* (Taylor & Francis, 2015) 119.

[66] *Pathways for Peace*, above n 59, 201.

[67] *Guidance Note*, above n 17, 3. See also *Governance for Peace: Securing the Social Contract* (United Nations Development Programme, 2012) 68.

stable legal environment within which long-term planning for the future of a society can take place.[68] As a question of process, practitioners of constitution-making emphasise that the drafting and consultation period should be understood as a 'moment[] of great opportunity to create a common vision of the future of a state, the results of which can have profound and lasting impacts on peace and stability'.[69] When properly accompanied by expert assistance and 'education on constitutional principles and the constitution-making process',[70] this can be a 'transformational exercise', 'a means for the population to experience the basics of democratic governance and learn about relevant international principles and standards'.[71] Following conventional wisdom, the promotion of democracy within states is also often claimed to have the added benefit of reducing aggressive war between states.[72] Accordingly, international institutions have stressed the importance of devoting resources to this aspect of 'post-conflict recovery and reconstruction' in responding to civil war.[73]

From at least 2015, international institutions began to argue for an expanded approach to international involvement in this constitution-making, as an aspect of the broader work of building peace. Rather than being comprehended as a response to conflict, they suggested, this involvement 'need[ed] to be liberated from the strict limitation to post-conflict contexts'.[74] International involvement in constitution-making now forms an integral part of the preventive approach to conflict expressed through the language of 'sustaining peace' and adopted in 2018 by the United Nations and the World Bank. The 2015 Advisory Group of Experts described this approach as follows:[75]

> for many UN Member States and UN Organization entities alike, peacebuilding is left as an afterthought: under-prioritized, under-resourced and undertaken only after the guns fall silent. But sustaining peace is amongst the core tasks established for the

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[68] Benomar, above n 64, 3.
[69] *Guidance Note*, above n 17, 3. See also International IDEA, *Constitution-Building after Conflict*, above n 8, 10; *Pathways for Peace*, above n 59, 146.
[70] Benomar, above n 64, 11, 15.
[71] *Guidance Note*, above n 17, 4.
[72] See, eg, Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503.
[73] *Advisory Group of Experts Report*, above n 58, 8, 30.
[74] Ibid 17.
[75] Ibid 17.

> Organization by the UN Charter's vision of 'sav[ing] succeeding generations from the scourge of war.' It must be the principle that flows through all the UN's engagements, informing all the Organization's activities — *before, during and after violent conflicts* — rather than being marginalized.

This approach combines 'inclusive' constitution-making with economic work, arguing that the 'best way to prevent societies from descending into crisis … is to ensure that they are resilient through investment in inclusive and sustainable development'.[76] On this view, constitution-making can contribute to the cause of sustaining peace through designing robust state institutions, limiting the authority of the state, and promoting the inclusion of marginalised groups in government. In terms of procedure, the involvement of international actors in constitution-making is perceived to enable an inclusive process and a durable settlement, identifying a 'wider range of actors' to be consulted and engaged, and enhancing 'local ownership' of the final product.[77] In terms of substance, the involvement of international actors in constitution-making is perceived to be a means of encouraging adherence to international legal obligations and to 'international standards in general', including international human rights.[78] Finally, by providing for a stable legal environment and the security of property and contract, constitution-making can also enable the attraction of foreign investment and development.[79] In these ways, the internationalisation of constitution-making forms part of a raft of peacebuilding measures that provide for the 'root causes of violent conflict [to] be addressed', making societies more 'resilient' to future conflicts.[80]

The description of constitution-making as a field of international engagement has corresponded with a set of international practices connected to, or in support of, processes of constitutional change. International institutions have accepted that '[t]ranslating a political settlement into a more sustainable process of constitutional

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[76] *Pathways for Peace*, above n 59, xviii.

[77] Michele Brandt et al, *Constitution-Making and Reform: Options for the Process* (Interpeace, 2011) 327, iv. On local ownership, see also *Guidance Note*, above n 17, 4; *Advisory Group of Experts Report*, above n 58, 9.

[78] Williams, above n 52, 29. See also Benomar, above n 64, 14. Some recommend allocating resources to develop local capacity to promote international standards: International IDEA, *Constitution-Building after Conflict*, above n 8, 17.

[79] *Pathways for Peace*, above n 59, 33, 'The Economic Costs of Violent Conflict'.

[80] *Advisory Group of Experts*, above n 58, 11; *Pathways for Peace*, above n 59, 79.

change, institutional reform, and modified legal frameworks is complicated and often requires multiple iterations'.[81] Accordingly, they call for an increased emphasis on the surveillance and monitoring of constitutional 'implementation', as well as the initial period of constitution-making after conflict, suggesting that the process may require 'sustained, long-term attention and periodic renegotiation'.[82] This has been matched with work done by regional organisations, such as the Venice Commission, the Organisation of American States, or the African Union, to promote desirable forms of implementation of a constitutional settlement, including through forms of advice, adjudication and sanctions on members in the event of non-compliance.[83] The United Nations, acting through the organ of the Security Council as well as through the Secretary-General's executive function, has developed a practice of either the provision of constitutional assistance or, more rarely, the direct administration of constitutional transitions, following situations of conflict.[84] States have also used unilateral measures in support of constitutional change and political transition, including the threat of economic sanctions or of withholding funds for reconstruction.[85] Although the UNSG's Guidance Note of 2009 states that 'any assistance [to constitution-making] will need to stem from national and transitional authorities' requests for assistance',[86] the basis on which states and institutions recognise the authorities entitled to make such a request is contested, shifting in recent decades, away from a grounding in 'effective control' and

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[81] *Pathways for Peace*, above n 59, 144.

[82] International IDEA, *Constitution-Building after Conflict*, above n 8, 11; *Pathways for Peace*, above n 59, 144.

[83] Tom Ginsburg, Terence C Halliday and Gregory Shaffer, 'Constitution-Making as Transnational Legal Ordering' in Gregory Shaffer, Tom Ginsburg and Terence C Halliday, *Constitution-Making and Transnational Legal Order* (Cambridge University Press, 2019) 1, 6; Bell, 'Bargaining on Constitutions', above n 5, 18–19.

[84] See the UNSC resolutions relating to the situations in Namibia (1989, res 629); Cambodia (1992, res 745); Rwanda (1994, res 965); Kosovo (1999, res 1244); East Timor (1999, res 1272); Afghanistan (2001, res 1378); Burundi (2004, res 1545); Iraq (2004, res 1546); Democratic Republic of the Congo (2004, res 1565); Sudan (2005, res 1590); Nepal (2007, res 1740); Somalia (2008, res 1814); South Sudan (2011, res 1996); Yemen (2012, res 2051). Syria (2015, Res 2254); Mali (2017, res 2364); and Libya (2018, res 2434). See generally Sripati, 'UN Constitutional Assistance Projects', above n 55.

[85] On funding, see, eg, Annika S Hansen and Sharon Wiharta, *The Transition to a Just Order: Establishing Local Ownership after Conflict — A Policy Report* (Folke Bernadotte Academy, 2007) 6; International IDEA, *Constitution Building after Conflict*, above n 8, 13. On sanctions, see the example of Syria: Lesley Wroughton, 'Syria Could Face Tough Sanctions if It Blocks Political Process: US Diplomat', *Reuters*, 29 September 2018 (online).

[86] *Guidance Note*, above n 17, 5.

towards principles based on democratic legitimacy and respect for human rights.[87] The expansion in the scope and duration of constitution-making projects, as an aspect of the emphasis on achieving security through the performance of humanitarian and development activities in the decolonised world, has also corresponded with demands for additional funding and an increased emphasis on partnerships with international financial institutions and regional organisations.[88]

International actors, then, have in the first two decades of the twenty-first century described external involvement in constitution-making as a normalised field of practice, and as a normatively desirable endeavour, contributing to the resolution of civil war and conflict in the decolonised world. The expanded range of practices associated with this, however, are difficult to reconcile with a commitment to sovereign equality or the self-determination of postcolonial Third World states. Instead we can observe an uneasy marriage of 'local ownership' and 'international standards'; of international actors facilitating 'inclusion' in the constitutional settlement, as a means of realising popular sovereignty, on the one hand, and the provision of international funding, advice, assistance and supervision by a wide array of foreign states, international institutions, and non-governmental organisations, on the other. Perhaps in recognition of the tensions at the heart of this incipient 'field', many practitioners have called on international law to provide new and more legible forms of legal authority for this work of constitution-making.[89]

III CONSTITUTIONALISM AND THE WORK OF INTERNATIONAL LAW: THREE FIGURES

During the first decade of the twenty-first century, international legal scholars disagreed about what kinds of international rules, norms, or principles, might be put forward as candidates for guiding and limiting the work of constitution-making after

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[87] See Sean D Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000) 123.

[88] For example, the UN/World Bank Group collaboration beginning in 2008 with the signing of the 'Partnership Framework for Crisis and Post-Crisis Situations' and joint facilities in Yemen and Somalia: *Advisory Group of Experts Report*, above n 58, 45–6.

[89] See Brandt et al, above n 77, 327–8. See also Williams, above n 52, 34. Cf Tom Ginsburg, 'Constitutional Advice and Transnational Legal Order' in Gregory Shaffer, Tom Ginsburg and Terence C Halliday, *Constitution-Making and Transnational Legal Order* (Cambridge University Press, 2019) 26, 27.

conflict by international actors. Some suggested that customary international law and the law of self-determination was articulated at too broad a level and had 'fail[ed] to provide concrete limits or standards' for what they termed 'external influence' on constitution-making.[90] Instead, they argued that absent Security Council resolutions, or the enlivening of a legal framework such occupation, the work of international actors and institutions involved in constitution-making took place largely in the absence of legal constraints and with the potential for unchecked exercises of power.[91] Others suggested that the political and delicate process of constitution-making after conflict should continue to be the preserve of the Security Council of the United Nations. In making this argument, they cited the virtues of contingent rule-making rather than static frameworks for the prospects of constitutional '[s]uccess'.[92]

Since that time, however, and as the work of the international actors and institutions described above has continued, international legal scholars have sought to articulate ways in which the discipline of international law does or might regulate, authorise, limit or otherwise comprehend the role of international actors in constitution-making. In this part, I examine this scholarship in order to understand what sort of thinking has been necessary in order to conceive of constitution-making and constitutionalism as part of the work of international law. I observe that the 'field' accommodates a range of orientations, each illustrating a set of complex assumptions about the role of international law in the resolution of war and conflict, and offering different prescriptions for the future of the discipline.

A *The Pragmatist*

The first approach to the question of international law's relationship to internationalised forms of constitution-making I term pragmatism. To be this kind of pragmatist, I suggest, is to be primarily concerned with the effects or results of

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[90] Dann and Al-Ali, above n 2, 451.

[91] Ibid 462. This analysis persists despite the now larger body of scholarship. See, eg, Turner and Houghton, above n 65, 120 (suggesting that the 'disparate nature' of the field leads to a 'regulatory gap' for international actors); Ginsburg, above n 89, 27.

[92] Nehal Bhuta, 'New Modes and Orders: The Difficulties of a *Jus Post Bellum* of Constitutional Transformation' (2010) 60 *University of Toronto Law Journal* 799, 853.

international law — international law's ends, as opposed to its means — and to approach the task of the international lawyer accordingly.[93] Scholars working within this approach to the question have oriented their scholarship toward the *practical outcomes* of constitution-making, as a means of preventing war and ensuring peace within the decolonised world, rather than to questions of authority or of right. This encompasses optimistic accounts of the function of constitution-making that ask: what is the role of international involvement in constitution-making in a successful peacebuilding operation?[94] We might also include within this approach more sceptical investigations that ask whether constitution-making, as currently practised, is capable of creating peace in this fashion.[95] When such scholarship asks broader, more searching questions such as how international lawyers should comprehend the contemporary phenomenon of 'internationalized constitutions', it nevertheless orients this question within the practical work of peacebuilding.

This approach shares with the reports of international institutions and organisations the belief that constitution-making is central to the resolution of the problems of civil war or conflict. This belief equates the 'root causes' of civil war, which it understands as violent internal struggle within a society for government of that society, with a lack or insufficiency of constitutional order, stability, or representation.[96] Liberal constitutionalism is offered as an antidote to the violence of contemporary civil war and conflict. The process of drafting of a constitution is understood both to create an 'initial peace', or absence of conflict, while the substantive stuff of the constitution — the creation of institutions, the inclusion of rights, and mechanisms for resolving disputes through adjudication — 'maintains' a longer and more durable peace.[97] The creation of a government organised and popularly elected along liberal constitutionalist

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[93] Though the sense in which I use the term 'pragmatism' differs, I have benefited here from reading Orford, 'Embodying Internationalism', above n 50; William Dunn, *Pragmatism and the Origins of the Policy Sciences: Rediscovering Lasswell and the Chicago School* (Cambridge University Press, 2019).

[94] See, eg, Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making' (2006) 6 *Chicago Journal of International Law* 663.

[95] Hallie Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage' (2011) 33 *University of Pennsylvania Journal of International Law* 239; Kirsti Samuels and Sebastian von Einsiedel, *The Future of UN State-Building: Strategic and Operational Challenges and the Legacy of Iraq* (International Peace Academy, 2003).

[96] Ibid 149. For a critique, see Susan Marks, 'Human Rights and Root Causes' (2011) 74 *Modern Law Review* 57.

[97] Ludsin, above n 95, 244. See also Samuels, above n 94, 664.

lines is also thought to enable recognition by the international community, since it adheres to an 'internationally accepted standard of who is entitled to govern', and to promote long-term stability because of the opportunities that democratically elected governments offer for participation rather than violence.[98] The commitment of this approach to what might be thought of as substantive 'values', such as liberal constitutionalism, democracy, or popular sovereignty, is therefore secondary or supplementary to the primary *task* of constitutions: peace.[99]

The idea that constitution-making is a practice oriented toward the achievement of a particular outcome shapes the ways in which this approach discusses the work of international law in constitution-making. One part of the debate over how this task should be conducted takes place in the language of process and procedure. Emphasis is placed on the 'dilemma' of timing, or the 'sequencing' of constitutions: should the work of drafting a constitution take place before, or after, the cessation of violence?[100] What is the effect of constitutional processes done in haste, or that work to deadlines or timetables set by international bodies or actors, on 'local trust and ownership'?[101] What might the role of interim or transitional arrangements be in mediating such concerns?[102] Another strand of the scholarship takes place through the idiom of 'design': what are the appropriate arrangements for achieving a durable and inclusive constitutional settlement in the face of violence and fracture?[103] How can different 'models' of power-sharing through constitutions — federalism, consociationalism, or 'integrative governance' — contribute to this work?[104] How might law, in the form of constitutional design, effect a 'balancing' or accommodation of the different 'priorities' of international and local actors?[105]

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[98] Samuels, above n 94, 665.

[99] See, eg, Hay, above n 17, 150. On constitutions as peace settlements, see Christine Bell, 'Peace Agreements: Their Nature and Legal Status' (2006) 100 *American Journal of International Law* 373.

[100] Ludsin, above n 95 (sequencing); Turner and Houghton, above n 65, 131 (timing).

[101] Turner and Houghton, above n 65, 133.

[102] Hay, above n 17, 168.

[103] Samuels, above n 94, 671.

[104] See, eg, Samuels, above n 94, 672 ('The Choice of Constitutional Models'); Darin E W Johnson, 'Conflict Constitution-Making in Libya and Yemen'(2018) 39 *University Pennsylvania Journal of International Law* 294, 330 ('Models for Multiethnic Governance'); Hay, above n 17, 158 ('Use of Consociational Power-Sharing Arrangements').

[105] Turner and Houghton, above n 65, 131.

In these inquiries, the international lawyer here appears as much as a person *doing* work as a person doing work *lawfully*. Much of this scholarship is conducted through a combination of the general discussion of international legal principles and institutional developments with 'case studies' of constitution-making that 'allow practical insights to be drawn'.[106] The problems encountered in particular instances of internationalised constitution-making — in, for example, Liberia, Somalia, or Iraq — are depicted as lessons for the field, requiring a refinement of practice. These lessons evidence the need for 'sensitivity to context' and a 'flexible understanding of constitutions' capable of adapting practice across changed environments and political situations.[107] Such an account evidences a belief in what Günter Frankenberg has termed constitutionalism as 'marketable commodities', capable, given the proper care, of transferring and functioning across space and context.[108] Rather than evidence of a flawed methodology, these failures offer an opportunity for disciplinary renewal and in at least some accounts, a deepening of engagement: the 'problem' might be the international *actor* in constitution-making, but it might equally be its insufficient *internationalisation*.[109]

How does the 'pragmatist' view the work of international law as it relates to the endeavour of constitution-making? One answer to this is that lawyers engaged in constitution-making can draw on the materials of international law — in the form of human rights treaties, binding Security Council resolutions, or UNSG guidelines — to authorise and shape the process of constitution-making, to articulate the desirable outcomes of that process.[110] This is a form of '[b]enevolent international authority' that acts as a vehicle for the conveyance of 'international views about the structure of governance, division of power, appropriate legal standards, and vision of the nation'.[111] Following the withdrawal of international actors, international law is sometimes perceived to linger through the participation of local actors, who 'will inevitably have

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[106] Hay, above n 17, 142. See also Turner and Houghton, above n 65.
[107] Hay, above n 17, 150, 145.
[108] Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8 *International Journal of Constitutional Law* 563, 571.
[109] See, eg, Hay, above n 17, 156 (on Iraq); Samuels, above n 94, 666–7, (on Liberia).
[110] See Turner and Houghton, above n 65, 126 (Ch VII resolutions), 130 (soft law).
[111] Hay, above n 17, 144.

absorbed some of the language, expression, and principles of international law'.[112] Others have regarded the role of law after the end of the constitution-making process as one of ongoing enforcement of international norms, including through mechanisms of foreign judges or courts, requirements for joining economic organisations, and aid policy conditionality.[113] In this view, the work that international law does in constitution-making is often to enable the transmission or diffusion of desirable 'international' norms into deficient 'local' environments.[114]

Another answer is to suggest that the task of peace requires a transformation of the nature of international law itself. This might mean a departure from strict divisions between the domestic and the international, or the legal recognition of a transitional period after conflict during which the work of building state institutions is done. Christine Bell, for example, has suggested that the interaction of international legal instruments and of constitutions should be understood as a 'law of peace', which can better comprehend, or perhaps facilitate, the 'radical constitutional re-configurations' effected by peace agreements after civil war or violent conflict.[115] This provides a means of describing or systematising the transformations in the law of self-determination and of external enforcement of such agreements as part of a 'disaggregation of power' within the state and a broader 'dislocation of power' from the state towards international actors, institutions or mediators.[116]

To different effect, Carsten Stahn has proposed the adoption of a framework of *jus post bellum*, in order to accommodate law's 'preoccupation' with 'how to make peace' in the aftermath of civil war or conflict. Articulating a body of law that is concerned with the period after war (as distinct from the *jus in bello* during war or the *ad bellum* of peacetime) can offer 'organizing frameworks and principles … specifically

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[112] Ibid 146.

[113] Samuels, above n 94, 680.

[114] Cf Christine Bell, 'What We Talk About When We Talk About International Constitutional Law' (2014) 5 *Transnational Legal Theory* 241, who suggests that '[b]oth global and local actors may claim to be the best author of a polity's values, and accuse the other of particularism while claiming to be universalist': at 282.

[115] Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press, 2008) 19.

[116] Ibid 106.

geared towards the management of situations of transition'.[117] In Stahn's account, this period requires a framework that can 'regulate[] public authority directly from the perspective of individual and group rights … [rather than] through the lens of competing state interests'.[118] The *jus post bellum*, as opposed to the law of occupation, is also thought to more effectively respond to the 'growing link between the use of force and the restoration of peace' evident in the practice of states and international institutions over the last three decades.[119] International lawyers, as pragmatists, have thus taken up ideas both of transmission and transformation as a way of comprehending and systematising international law's work in relation to practices of constitution-making, and as a means of achieving peace.[120]

B *The Cosmopolitan*

A second image of the work of international law and lawyers in making and shaping constitutions I term 'cosmopolitanism'. Cosmopolitanism has long been used to signify a form of moral thinking that emphasises the worth of the individual as a human being, rather than as a member of a national community. This thinking has come to be identified with the idea of a 'global political consciousness' that is premised on the material integration of global society, and that relies on international institutions and processes of law-making for its actualisation.[121] In this sense, a broadly cosmopolitan approach to the questions of international law and constitution-making can be seen most evidently in the work of some authors associated with the field of 'global constitutionalism'.[122] This has been described as 'a field of study … [that] sees constitutionalism as a description and explanation of how the international legal and

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[117] Carsten Stahn, '*Jus ad bellum*, *jus in bello* … *jus post bellum*? Rethinking the Conception of the Law of Armed Force' (2006) 17 *European Journal of International Law* 921, 924.

[118] Ibid 928. See also Hay, above n 17, 144.

[119] Stahn, '*Jus post Bellum?*', above n 117, 931.

[120] Hay, above n 17, 144–47.

[121] Pheng Cheah, 'Cosmopolitanism' (2006) 23 *Theory, Culture, Society* 486, 486.

[122] Christine E J Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 611, 620–1. See, eg, Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman, *Ruling the World? Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009) 258.

political order is changing'.[123] It is also 'a way to normatively evaluate those changes by valorising constitutionalism as a means by which rights can be protected and responsibilities distributed in the global order'.[124] The term 'global' is used to signify that this is understood as law stretching across both the 'international' and the 'domestic' as these terms are conventionally understood by lawyers. Despite a range of internal disagreements, the global constitutionalist project in general either describes or advocates, in the words of Anne Peters,[125]

> an evolution from an international order based on some organizing principles such as state sovereignty, consensualism, non-use of force to an international legal order which acknowledges and has creatively appropriated principles and values of constitutionalism.

This project of evolution is often accompanied by an articulation of shared 'constitutional values' or normative commitments capable of guiding the form and content of that evolution.[126] Proponents of these commitments argue that they are capable of guiding a global order that 'recognis[es] difference' and 'allow[s] for the contestation of structures of domination' on the international plane.[127] They suggest that this provides a language for critiquing, and guiding, the exercise of international authority.

What is the relationship of this form of cosmopolitan thinking to state constitutions, or 'constitutions' so-called? In some influential versions of this project, the impetus for this reconceptualisation is argued to flow from a crisis of state constitutions: a 'visible de-constitutionalization' or 'hollowing out' of constitutions on the domestic level.[128] This is taken to be a result of contemporary forms of globalisation, in which 'the appearance of de-territorialized problems and the

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[123] Anthony F Lang Jr and Antje Wiener, 'A Constitutionalising Global Order: An Introduction' in Anthony F Lang Jr and Antje Wiener, *Handbook on Global Constitutionalism* (Edward Elgar, 2017) 1, 3.
[124] Ibid 3.
[125] Anne Peters, 'Are We Moving toward Constitutionalization of the World Community' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 118, 118.
[126] Anne Peters, 'Global Constitutionalism Revisited' (2005) 11 *International Legal Theory* 39, 49; Mattias Kumm et al, 'Editorial: How Large is the World of Global Constitutionalism?' (2014) 3 *Global Constitutionalism* 1, 3.
[127] Mattias Kumm et al, 'The End of "the West" and the Future of Global Constitutionalism' (2017) 6 *Global Constitutionalism* 1, 9.
[128] Peters, 'Constitutionalism Revisited', above n 126, 40; Anne Peters, 'Compensatory Constitutionalism' (2006) 19 Leiden Journal of International Law 579, 580.

emergence of global networks in the fields of economy, science, politics and law … put[] the construct of the state and state constitutions under strain'.[129] In an interdependent world, the 'externalities' produced by the decisions that states make — decisions that impact on jurisdictions and populations beyond their boundaries — require international law to limit the state's hold over legitimate authority.[130] Authors working within this tradition have argued that national 'constitutions can no longer regulate the totality of governance in a comprehensive way, and the state constitutions' original claim to form a complete basic order is defeated'.[131] In this way, the perceived failure of states to deal with modern problems, including the problem of civil war and conflict, has led to calls for those international lawyers who are also global constitutionalists to concern themselves with 'domestic constitutional standards'.[132]

The concern with these standards has also led to descriptions of, or arguments for, the reconceptualisation of international law along 'constitutionalist' lines. This entails a departure from state sovereignty as a grounding or foundational concept of international law in favour of a focus on internationalised forms of governance and the concepts along which these forms are structured.[133] The justifications for this are sometimes pragmatic: addressing a perceived need to make the performance of international institutions, which wield increased authority to deal with 'global problems', subject to increased scrutiny.[134] But they have more often been utopian: concerned with describing, as well as promoting, a stronger vision of a post-Cold War humanity united through constitutional forms.[135] Peters, for example, has suggested that we are moving toward a new international order in which 'the normative status of sovereignty is derived from humanity, understood as the legal principle that human

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[129] Peters, 'Constitutionalism Revisited', above n 126, 40. See also Erika De Wet, 'The International Constitutional Order' (2006) 66 *International and Comparative Law Quarterly* 51, 53.

[130] Kumm et al, 'How Large is the World?', above n 126, 7.

[131] Peters, 'Compensatory Constitutionalism', above n 128, 580. See also Peters, 'Merits', above n 127, 405; Kumm, 'Cosmopolitan Turn', above n 122, 261.

[132] Peters, 'Constitutionalism Revisited', above n 126, 49.

[133] See, eg, Kumm, 'Cosmopolitan Turn', above n 122, 261.

[134] See, eg, Peters, 'Constitutionalism Revisited', above n 126, 41, 44.

[135] Wouter Werner, 'The Never-Ending Closure: Constitutionalism and International Law' in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press, 2007) 329, 348–9.

rights, interests, needs and security must be respected and promoted'.[136] For the cosmopolitan thinker, although conflict provides an impetus, constitutionalism is not confined to situations of conflict or of law after war. Rather, it is a means of describing the proliferation of internationalised constitutional standards, and external influence on constitutional change, as part of an overall transformation of the legal order. In such accounts, the state remains 'an indispensable container for democratic processes', but much of its authority to make political decisions about the welfare of its people has been removed to the international plane.[137]

The cosmopolitan acknowledges the specificity of constitutionalism as a Western inheritance. But they have nevertheless aimed to tell an 'affirmative genealogy' of constitutionalism, one that is capable of underpinning the continued generalisation and administration of these ideals as a means of collective empowerment.[138] Accordingly, they have argued that international lawyers 'should give up the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations'.[139] For some, the promotion of constitutionalism as a generalised philosophy, in both a legal and a disciplinary sense, has taken on a new urgency in the context of the decline of the West and the growing influence of Asian states.[140] Like the pragmatist, the cosmopolitan views the relationship of international law to constitutions and constitutionalism as one of transformation. This transformation of international law and institutions is not primarily a practical solution to real-world problems, but a principled evolution working to transcend imperial heritages.[141] It is in this sense that the cosmopolitan views the history of international law as 'a history of constant reinvention'.[142]

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[136] Anne Peters, 'Humanity as the Alpha and Omega of Sovereignty' (2009) 20 *European Journal of International Law* 513, 514.

[137] Peters, 'Alpha and Omega', above n 136, 518.

[138] Ibid 179–80.

[139] Kumm et al, 'The End of the West', above n 127, 9.

[140] Mattias Kumm, 'On the History and Theory of Global Constitutionalism' in Takao Suami et al (eds), *Global Constitutionalism from European and East Asian Perspectives* (Cambridge University Press, 2018) 168, 170; Dieter Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press, 2016) ch 17.

[141] Kumm, 'History and Theory', above n 140, 183–4.

[142] This phrase is borrowed from Duncan Bell, 'What Is Liberalism' (2014) 42 *Political Theory* 682, 705.

C *The Technician*

A third way of understanding the work that international law and lawyers do in relation to constitutions and constitutionalism is through the figure of the 'technician'. Treating law as a technical enterprise means seeing the lawyer as a professional whose primary responsibility is to make law work. The lawyer-as-technician uses their specialised knowledge about law, and how it operates in the world, in order to achieve a particular and largely predefined function.[143] This approach can be seen in the work of some lawyers, including international lawyers, who have described constitution-making and constitutional change as a form of transnational legal ordering.

As a project, transnational legal ordering offers a new way of describing the movement of constitutionalism across borders. According to Ginsburg, Halliday and Shaffer, its contribution is to render explicit the 'long history of transnational flow of ideas about constitutions and how they should be made'.[144] Transnational legal ordering recognises that constitution-making has become an integral aspect of postwar reconstruction and peacebuilding, among other projects. It aims to systematise and comprehend the 'array of transnational influences, actors and ideas that provide the very grammar for the project' of constitution-making.[145] This systematisation provides a 'framework' for the analysis both of the legal norms that are involved in this project, and the internationalised networks, institutions, and patterns of expertise by which these norms are transmitted across national borders.[146] In doing so, it aims to correct the 'powerful myth' that a constitution is the product of a national endeavour in which a people come together to decide on the law by which that nation should be governed.[147]

One part of this shift from the international to the transnational is an increased focus on the role of advisors in constitution-making. Some have explained the role of the advisor in terms of expertise: the 'transnational nature of the process' of constitution-making, in which constitutions can be understood as directed not only

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[143] On law as technique, see Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1.

[144] Ginsburg, Shaffer and Halliday, above n 83, 1.

[145] Ibid.

[146] Ibid 2.

[147] Ibid.

internally but also externally, as a 'signal to the international community' of good government, has necessitated that states draw on the assistance of external advisors.[148] Others have explored this through the language of imposition: to what extent is the 'industry of international constitutional advisors' complicit in shaping 'global expectations' of constitutional norms which might differ from those envisaged by national governments or publics?[149] Ginsburg, Halliday and Shaffer offer a defence of the foreign advisor based on the ideal of the 'disinterested view'. They suggest, relying on the work of Jon Elster, that by drawing on knowledge removed from the 'local milieu of interests and passions', the foreign or external advisor is placed to deliver a 'constitution based on reason'.[150]

The idea that a constitution should be based on reason rather than on politics is at the heart of questions around the role of constitutional advice. Elster was writing on constitutional change and 'the mechanics of constitution-making' at the height of the many Eastern European constitutional transitions following the end of the Cold War.[151] For Elster, a professor not of law but of social science, the concern was that constitution-making tends to occur in situations of crisis. At the same time, he accepted the view that a 'key role of the constitution is to prevent the framed from acting on sudden, unconsidered impulses'.[152] How then, in 'turbulent circumstances', was it possible to ensure that constituent assemblies and constitutional drafters had the benefit of the 'rational, impartial argument' that constitutionalism requires?[153] For the international-lawyer-as-technician, like Elster, the contribution of science and scientific knowledge is critical to answering this question. One of her aims is to explore how the lawyer, armed with sensitivity to 'local context' and 'social science knowledge', might

[148] Ginsburg, above n 89, 28.
[149] Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Law and Legitimacy of Imposed Constitutions* (Routledge, 2019) 3.
[150] Ginsburg, Shaffer and Halliday, above n 83, 3.
[151] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364.
[152] Ibid 382.
[153] Ibid 394.

contribute to decisions about constitutional design through the provision of technical advice.[154]

The practice of constitutional advice implies the existence of a constitutional ideal by which real world situations can be measured and assessed. Authors taking this technical approach to the work of law in relation to constitutions have drawn on a tradition of liberal constitutionalism that they see as having emerged as a 'default design choice' for Western political systems after the Second World War.[155] Although both the constitutional text and the substantive nature of the institutions and legal relations that the constitution establishes may vary, constitutionalism thus conceived 'shares certain core characteristics' from which constitutions-in-practice may be understood as diverging.[156] At times, this includes a focus on public participation as a means of obtaining popular consent, ensuring longevity, or adhering to normative commitments.[157] For the constitution made after war or under conditions of occupation, however, this constitutionalist ideal must also include, or even prioritise, a consideration of the extent to which constitutions have been able to endure over time.[158] In this regard the technician, like the pragmatist, is concerned with questions of ordering violence and of the role of constitution-making in ensuring peace and security.

What then is the work of law, for the technician, in relation to constitutionalism and constitution-making? This question has been addressed not through the lens of 'international' but of 'transnational' law and in particular, 'transnational legal ordering'.[159] Transnational law, as a way of understanding how law governs the world, departs from international law's traditional preoccupation with the role of the state. It attempts to move beyond a concern with law as governing relations between, or within,

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[154] Ginsburg, above n 89, 45. Although Elster was sceptical of the contribution that lawyers could make: above n 151, 395. For a more recent critical perspective, see Mark Tushnet, 'Some Skepticism about Normative Constitutional Advice' (2008) 49 *William and Mary Law Review* 1473.

[155] See, eg, Tom Ginsburg, Aziz Huq and Mila Versteeg, 'The Coming Demise of Liberal Constitutionalism?' (2018) 85 *University of Chicago Law Review* 239.

[156] Tom Ginsburg, Zachary Elkins and James Melton, 'Baghdad, Tokyo, Kabul … : Constitution Making in Occupied States' (2007) 49 *William and Mary Law Review* 1139, 1142.

[157] Ginsburg, above n 89, 48. See also Vivien Hart, 'Constitution Making and the Right to Take Part in a Public Affair' in Laurel E Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace Press, 2010) 21.

[158] Aziz Huq and Tom Ginsburg, 'What Can Constitutions Do? The Afghan Case' (2014) 24 *Journal of Democracy* 114, 120; David Landau, 'Constitution-Making Gone Wrong' (2013) 64 *Alabama Law Review* 923.

[159] Ginsburg, Halliday and Shaffer, above n 83. I am grateful to Shaun McVeigh for discussion of the work that thinking transnationally might do.

states to the broader legal universe of 'transnational situations' and a wider range of actors including the individual, the corporation, and the international organisation.[160] As proposed by Shaffer, transnational legal *ordering* is an analytical construct that enables the study of how this law enables change within a nation. It does so by taking as its object 'legal norms that are exported and imported across borders and that involve transnational networks and international and regional institutions that help to construct and convey the legal norm within a field of law'.[161] Transnational legal ordering, applied to constitution-making, 'studies the role of law' in the process of ordering through constitutions, a process that 'involv[es] the use of legal form and legal institutions'.[162] This enables lawyers to 'identify moments of settlement, and to define the relationship among discrete episodes of constitutional activity'.[163]

What kinds of new questions and possibilities might this movement away from the international give rise to? For Ginsburg, Halliday and Shaffer, the construct of transnational legal ordering 'opens the possibility of imagining constitution-making and implementation as social sites for contests among competing actors'.[164] As a socio-legal mode of inquiry, they suggest it demonstrates that the 'problems' that transnational legal orders address are not politically neutral: they are 'social constructions that reflect different interests, values, perspectives, and social understandings'.[165] It has the potential to focus attention on the 'boundary work' between constitutional ordering and other forms of ordering, such as economic forms, and to uncover the many and varied relations being formed — whether relations of confrontation or relations of compatibility.[166] Through recognising the importance of legal expertise and the role of

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[160] Philip Jessup, *Transnational Law* (Yale University Press, 1956). See also Peer Zumbansen, 'Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method' in Emilios Christodoulidis, Ruth Dukes and Marco Goldoni (ed), *Research Handbook on Critical International Theory* (Edward Elgar, 2019) 473.

[161] Gregory Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2013) 5, cited in Ginsburg, Halliday and Shaffer, above n 83.

[162] Ginsburg, Halliday and Shaffer, above n 83, 7.

[163] Ibid 8.

[164] Ibid 10.

[165] It is in this sense that Ginsburg, Halliday and Shaffer claim that '[t]here is no inherent teleology in [transnational legal ordering] theory': ibid 8.

[166] See ibid 14; Mark Tushnet, 'The Globalisation of Constitutional Law as a Weakly Neo-Liberal Project' (2019) 8 *Global Constitutionalism* 29.

the advisor, it also directs attention to the professionalisation of the constitution-making enterprise and the need to consider the 'ethics of advice-giving'.[167]

As with any 'turn', however, something is also lost in the turn to the transnational. It threatens to conflate, in either descriptive or in normative terms, the 'international' into the 'local' and, in doing so, to detract from concerns of hierarchy, domination or empire. Instead of being framed through the relationship of occupier to occupied, for example, constitution-making after conflict can be presented, in transnational terms, as a matter of political contestation between different actors pursuing their own agenda.[168] Within these moments of political contestation, the role of the legal advisor is largely confined to an articulation of the technical function and effect of law, or the broader facilitation of legal change, rather than an exploration of law's limits or constraints.[169] Much of the work that the expertise of the international advisor and the expectations of international institutions *do* is presented within this scholarship as attempts at 'help[ing] to lay out options for local drafters'.[170] Instead of wielding power, advisors vie for influence, or a share of the global market, in the transnational 'competition for constitutions'.[171] Similarly, unlike the international legal scholar, the expositor of the transnational legal order does not need to contend with questions of intervention, with ideals of self-determination, or with normative justifications of transformations in the international legal landscape of the type that the pragmatist advocates. The role of the scholar, then, might also be taken to be a technical rather than a political task.

IV HISTORIES PRESENT: GERMANY, JAPAN, AND POSTWAR CONSTITUTIONALISM

Despite its internal complexities, one defining feature of this scholarship on international law and its entanglements with constitutionalism is that it continues to invoke, retell, or centre the history of the making of the German and Japanese

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[167] Ginsburg, above n 89, 46.

[168] See, eg, the framing presented in Noah Feldman, 'Imposed Constitutionalism' (2005) 37 *Connecticut Law Review* 857, nn 22–24.

[169] Cf Ginsburg, above n 89, 38.

[170] Ibid 46.

[171] Ibid 46 ('Competition for Constitutions').

constitutions. This is done treating these histories sometimes separately, sometimes together, and sometimes as part of narrating a broader shift in international law during the post-1945 era.[172] As I described above, following the Second World War, the Allies occupied both Japan and Germany in order to undertake a comprehensive program of change. If the legal relationship of the occupying powers to each nation differed after the war, the initial aims and the eventual changes effected within the defeated states had — and are remembered as having — striking similarities. Although it is difficult to capture in their totality the various forms of social, political, and economic changes set in motion by the occupying powers, they included the creation of new constitutions for both Germany and Japan as a means of effecting change. Within the renewed interest in constitution-making as a means of achieving international peace and security, the histories of Germany and Japan have been described as evidence of the transformative potential of constitution-making by international actors and for international law.

In this part of the chapter, I probe these invocations and the function that they might be understood to perform in international legal thought. In doing so, I rely on the intuition that the retelling of the postwar moment and of the histories of Germany and Japan in scholarship on international law and constitution-making, or constitutionalism, is not incidental to the work that this scholarship understands itself to be doing. Instead, I suggest that these histories offer, for international lawyers concerned with the paradox of international involvement in constitution-making, a way of responding to this disciplinary anxiety and of narrating the work of international law. Taking my cues from the function that these histories perform, I argue that this represents a productive way into a critique of the discipline as a whole. Examining these histories, and their animating effects on the discipline, allows us to move beyond present international legal debates regarding the role of the 'international' actor in the 'local' situation, to consider questions about the broader economic and structural choices that surround constitutionalism as a response to civil war and conflict.[173] In the final section of this part, I explore the possibilities of economic thinking and political economy as a way of

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[172] See Ulrich Preuss, 'Perspectives on Post-Conflict Costitutionalism: Reflections on Regime Change through External Constitutionalization' (2006) 51 *New York Law School Law Review* 467; Kumm, 'History and Theory', above n 140; Ginsburg, above n 89; Ginsburg, Elkins and Melton, above n 156.

[173] See Luis Eslava, 'The Question of Agency and Structure: Critical Realism and the Teaching of (Another) International Law' *The Law Teacher* (online 19 December 2019).

understanding the work that international law and constitutionalism has done in the decolonised world.

A *International Law and the Uses of History*

For scholars seeking to overcome the paradox of the internationalisation of constitutional forms, one way in which the histories of international constitution-making in Germany and Japan are treated as significant is through serving to indicate the possibilities of such practices in the present. Scholars asking the pragmatic question of what, in the context of internationalised constitution-making under occupation, makes constitutions 'work', have presented these histories as instances of the 'success' of such internationalised practices.[174] Scholars seeking to answer the principled question of in what circumstances these practices might be understood as desirable reform have described these histories as a 'precedent' for practices of constitutionalism aimed at the 'conversion' of a non-democratic form of government to a democratic one.[175] Although a metric for judging and measuring this success, or a theory of sources through which this might be considered a legal precedent, is not always evident, this history has been invoked in support of arguments that democratic forms of constitutional change, such as those that involve a right to public participation or that are free from conditions imposed by international actors, are not instrumentally necessary, even if politically desirable or legally arguable.[176]

On one view, the telling of these histories might seem anachronistic, in view of the imperial origins of the Second World War, and of the differing picture now given of contemporary forms of conflict and civil war and of the postcolonial state.[177] Attending to the recounting of these histories, along with ideas of their desirability and replicability, however, shows that this narration functions to harness the history of that

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[174] See, eg, Ginsburg, Elkins and Melton, above n 156, 1142; Armin von Bogdandy et al, State-Building, Nation-Building and Constitutional Politics in Post-Conflict Situations' (2005) 9 *Max Planck Year Book of United Nations Law* 579, 584.

[175] Preuss, above n 172. See also Kristen Boon, 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers' (2005) 50 *McGill Law Journal* 285, 297.

[176] Hay, above n 17, 154–5; Von Bogdandy et al, above n 174, 599–603.

[177] See above n 96.

war in order to show the effectiveness of constitution-making in averting conflict, and in building a more peaceful world. Here I am not suggesting that the precise methods of internationalised constitution-making after conflict, particularly those used in Japan, are considered — as some authors in the post-1945 era had speculated — to be replicable today.[178] Instead, what is notable is that they are presented as a significant part of a move toward a norm of the internationalisation of constitutional change, even — or perhaps especially — after forms of armed intervention. Through legal scholarship, these histories, and the practices of externally-directed constitutional change that they represent, are thus converted from an historical event into a product that travels.[179] This use of history can be observed in the language used by President George W Bush on the eve of the invasion of Iraq in 2003. He claimed that the United States[180]

> ha[d] made and kept this kind of commitment before — in the peace that followed a world war. After defeating enemies, we did not leave behind occupying armies, we left constitutions and parliaments. We established an atmosphere of safety, in which responsible, reform-minded local leaders could build lasting institutions of freedom.

In doing so, however, it also works to reframe legal arguments away from a concern with violence, military occupation, and foreign intervention in the processes of constitution-making and towards a focus on the desirable legal and political consequences of such intervention.[181]

Beyond questions of effectiveness, another way in which these post-1945 histories function in present arguments and ways of thinking about international law is as constitutive of the broader, and self-avowedly post-imperial, disciplinary project considered to have emerged during this time. The changes that were wrought by the Allies in the constitutional structures of Germany and Japan are, in these histories, presented as part of the building of an order for a world after empire. In some versions of this story, this was a significant transformation or 'constitutional moment' in which the Allies worked 'to establish the foundations for a new legal and political world

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[178] Feldman, above n 168, 857.

[179] See Frankenberg, above n 108, 572.

[180] George W Bush, 'President Discusses the Future of Iraq' (Speech delivered at the Washington Hilton Hotel, Washington DC, February 26, 2003) <https://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030226-11.html>.

[181] Preuss, above n 172; Stahn, '*Jus Post Bellum?*', above n 117, 928–9.

ultimately grounded in … constitutionalist principles'.[182] Although these principles would not come to be fully realised until the post-Cold War period, the groundwork for this shift was laid following the wartime defeat of Germany and Japan and the institutionalised forms of international life that were created in response. These principles are narrated as post-imperial in the sense of including self-determination, or the obtaining of statehood for decolonising peoples.[183] They are also seen as being post-imperial in a further sense: that statehood was simultaneously reconceptualised as 'tied to its function to respect, protect and fulfil human rights', the fulfilment of which was ensured by the turn to international institutions, in which the newly independent states would participate.[184] A key component of that order, in other words, was the 'idea that the internal structure of the state … had implications for how it would conduct its foreign policy', and that international actors might play some role in determining that structure.[185] This links these histories of constitutional transformation with the broader reimagining of the international after empire visible in the principles stated in, and legal relationships formed by, the United Nations Charter.[186]

As early as 1996, then-UN Secretary-General Boutros Boutros-Ghali outlined this way of thinking about the postwar transformations of Germany and Japan and their relevance as part of an international, rather than merely national, response to fascist and imperial aggression. He wrote that '[i]n 1945, democracy was a clear concept as defined by the Allied nations in opposition to fascism'.[187] For Boutros-Ghali, revisiting the

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[182] Kumm et al, 'The End of the West', above n 127, 7; Kumm, 'History and Theory', above n 140, 174. Bardo Fassbender, too, has argued that the preambular words of the postwar constitution of Japan are a 'perfect expression' of one set of constitutionalist ideas: *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009) 69. For the argument that 1945 is a critical moment for global constitutionalists, see Vidya Kumar, 'Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South' on *Völkerrechtblog* (27 July 2017) <https://voelkerrechtsblog.org/towards-a-constitutionalism-of-the-wretched>.

[183] Referring to the removal of former German and Japanese (and Italian) colonies and their instatement as trusteeships: Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 54.

[184] Kumm, 'History and Theory', above n 140, 174–6.

[185] Ibid 176–7, quoting President Truman.

[186] Although certain exceptions to this principle were required in order to be able to effect this transformations, these are often considered to have been limited departures: see Carsten Stahn, '*Jus Post Bellum*: Mapping the Discipline(s)' (2008) 23 *American University International Law Review* 311, 319. Cf Roberts, above n 175, 603.

[187] Boutros Boutros-Ghali, *An Agenda for Democratization* (United Nations, 1996) 6.

work that the Allies did, both in regard to the internal constitution of states and to relations between them, shows us that:[188]

> [w]ithin the original framework of the Charter, democracy was understood as essential to efforts to prevent future aggression, and to support the sovereign State as the basic guarantor of human rights, the basic mechanism for solving national problems and the basic element of a peaceful and cooperative international system [.]
>
> …
>
> [Understanding democratisation] means recognizing, as in 1945, the positive relationship between democracy and the functioning of the international system. The logic of the Charter is today made manifest …

This way of retelling these histories positions constitutional change as part of a larger effort to form national and international institutions adapted to a new and peaceful international order, now capable of being fully realised.[189] Against this backdrop, modern conflict is positioned as a departure from the 'peaceful and cooperative international system' that Boutros-Ghali described. Such histories implicitly sanction a return to the practices of peace, including the making of constitutions, that were used in the establishment of the postwar order.

Narrating the histories of Allied constitution-making in Germany and Japan further enables international lawyers to respond to and reorient concerns around the imperialism of contemporary practices. These practices of constitution-making are narrated as an aspect of the struggle against fascism, both within 'the most aggressive imperial powers of their time', and as part of the slow movement away from empire in international law.[190] In that sense, they are argued to represent 'a high point of anti-imperialism'.[191] This narration can be read as a response to critiques of constitutionalism as a practice of international law, particularly those that draw on the postcolonial tradition and TWAIL (Third World Approaches to International Law) scholarship. Such critiques have investigated how and to what extent post-conflict

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[188] Ibid 11, 23.

[189] Thomas Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995) 285: 'the thaw has unlocked the potential of the Charter's radical text'.

[190] Kumm, 'History and Theory', above n 140, 187.

[191] Ibid 187.

constitution-making can be understood as a manifestation of, and a means of maintaining, the 'unequal and exploitative relations between North and South' that characterised formal colonialism and empire in both an economic and a political sense.[192] They have positioned liberal constitutionalism as part of an overall project of international law that works to maintain the colonial legacies of the form of the modern Third World nation-state,[193] or that is systematically animated by assumptions of partial and unequal Third World sovereignty.[194] In asking these questions, international lawyers within this tradition have continued, in different ways, to search for the contemporary face of empire.[195]

Perhaps in response to this scholarship, other international lawyers have in turn recently displayed an observable anxiety about the work of constitution-making. Against such critiques, they have wielded the histories of Germany and Japan to emphasise the possibility of local agency in processes of international constitution-making. In one account, this is done through a tale of evolution that accepts that the postwar period was one where Allied states exerted considerable power and influence over these processes of constitutional drafting.[196] It portrays subsequent debates and amendments by occupied governments as a 'charade': an attempt to ensure the longevity of the document by obscuring its origins.[197] But it maintains that much has changed: constitutions are now 'collective products, not written by single individuals … [though] outsiders have always played an important role, the ultimate acts of adoption must by definition be done by insiders with the requisite political authority'.[198] Another account emphasises the effect of this agency, even during the postwar period, on the

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[192] Vijayashri Sripati, 'The United Nation's Role in Post-Conflict Constitution-Making Processes: TWAIL Insights' (2008) 10 *International Community Law Review* 411, 420. See also Sripati, *Constitution-Making under UN Auspices*, above n 4.

[193] Kajit J Bagu, *Peacebuilding, Constitutionalism and the Global South* (Routledge, 2019). See also Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16 *Leiden Journal of International Law* 1.

[194] Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambrige University Press, 2007).

[195] On mapping the different conceptions of empire in TWAIL scholarship, see Robert Knox, *A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law* (PhD Thesis, London School of Economics, 2014).

[196] Ginsburg, above n 89, 33.

[197] Ibid 33.

[198] Ibid 45, noting that 'even governments that decry the role of transnational empire are customers for transnational constitutional advice': at 39.

constitutional product. In doing so, it pictures constitutional provisions, for example, as 'the result of "tacit agreement", if not a "joint venture"'.[199] In this account, 'local' actors, even in the face of international imposition, were always strategists, working to protect key interests and to adapt constitutional forms to national circumstance.[200] Internationally-directed constitution-making, rather than being straightforwardly a process of exploitation or of domination, is told as including moments of shared interests, and even of resistance.[201]

Each of these accounts takes some form of local participation as an heuristic for assessing the politics, and possible imperialism, of this work. Kumm, for example, argues that

> to reject the argument that global constitutionalism is just the latest false universalism foisted upon the world … *[i]t becomes decisive* whether those subjected to the order generally embrace its basic principles over time, make it their own, engage with it, participate within it and, if they deem necessary, modify aspects of it as they deem fit.[202]

This depiction presupposes the ability of the international actor to determine — either alone or in conjunction with 'local' actors — answers to critical political questions, whether packaged as questions of constitutional process, design, and implementation, or as questions of cosmopolitan principle.[203] In this way, the international actor has been depicted as a reluctant intervenor: conscious of international law's colonial or imperial past, but nevertheless committed to supporting the present and future agency of 'the people', as excluded by the postcolonial nation-state.[204] Through framing questions of lawfulness as questions of agency, legal scholars have prioritised the heuristic of local participation that I described in Part II. The overall effect of this prioritisation is to recede the questions of force, inequality, exploitation, and ultimately of empire, that have animated other forms of international legal inquiry.

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[199] Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press, 2015) 73.

[200] See also Saunders, above n 6, 82.

[201] Ginsburg, Elkins and Melton, above n 156, 1163.

[202] Kumm, 'History and Theory', above n 140, 89 (emphasis added).

[203] On the question of how and on what basis international actors recognise who has authority to speak on behalf of the local, see Orford, International Authority, above n 13, ch 2.

[204] I am grateful to Fabia Veçoso and Adil Khan for discussions on this subject.

B *Understanding Constitutionalism: International Law and the Reproduction of Politics*

The field of international law and constitutionalism, as I described it in Part III, continues to be structured around questions of international intervention, on the one hand, and local agency, on the other. Each of the approaches that I outlined — the pragmatist, the cosmopolitan, or the technician — envisage international law to be, in different ways, part of a practice of constitutionalism occurring after or in response to civil war or conflict. This framing of constitutionalism carefully positions the *international* actors, institutions and advisors whose behaviour it is concerned with as separate from the *local* conflict. For the pragmatist, constitution-making is a solution engineered to end conflicts, offered and implemented by international actors in the interests of peace. For the cosmopolitan, the work of international institutions is premised on the failure of the state to perform the functions of government in an interconnected world. Similarly, the technician hopes to offer a rational view of how best to design the legal order of a state after conflict, drawing on expert knowledge and (relatively) free from political preference.

Hilary Charlesworth, examining international law and its relationship to democracy-building, has problematised this separation of the 'international' actor from the 'local' situation:[205]

> Postconflict societies carry the sense of being unruly, teetering on the edge of chaos; of a tentative redemption by the international community; and they are measured in contrast to the mature, secure, democracies of the West. In this sense, the term "post-conflict" obscures the identity of the actors involved and represents them either as the nurturers – the agents of change – or the nurtured. These categories shroud the way that the democracy-builders can be complicit in the dysfunctions that make "building democracy" necessary.

As I have shown, the conceptual separation of the process of building states from a careful examination of the economic and political environment in which those states,

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[205] Hilary Charlesworth, 'Democracy and International Law' (2014) 371 *Recueil des cours* 361.

and their societies, exist has persisted in the work of international lawyers seeking to address, from different standpoints, the question of law's role in constitution-making after conflict.

One reason for the persistence of this separation is that these are each forms of thinking compatible with a particular understanding of the 'root causes' of war.[206] Although they differ in their account of the international frameworks, actors and institutions by which this might be achieved, they each associate a specific legal instrument — the constitution — with the achievement of peace or the maintenance of order within a society. This legal instrument is taken as a distinct object of analysis that is largely separate from questions of political economy, such as how, and according to what principles, the state should regulate the movement of goods, labour, or private investment.[207] In this sense, international legal narratives of constitution-making after conflict replicate what Catherine Goetze has described as the 'missing international political economy of civil wars'.[208] For Goetze, the depoliticisation of economic choices for post-conflict statebuilders, and the corresponding

> reification of the ideal image of the nation-state … avoids analyzing the variety of formal and informal socio-economic configurations over which and within which politics take place. State failure is then simply equivalent to the failure of politics per se.[209]

To similar effect, Kerry Rittich's analysis of the occupation of Iraq has shown that it, like many other international projects, was characterised by a 'deep engagement with the project of governance', to the exclusion of economic controversies.[210] Although the occupation was accompanied by comprehensive and far-reaching neoliberal economic reforms, Rittich suggests that these were largely presented and accepted by international

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[206] See above n 96.

[207] Accepting, with Bourdieu, that 'in the social sciences, nothing is more critical than the initial carving out of one's object': Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Lauretta C Clough trans, Polity, 1998) 131.

[208] Catherine Goetze, 'Statebuilding in a Vacuum: Sierra Leone and the Missing International Political Economy of Civil Wars' in D B Monk and J Mundy (eds), *The Post-Conflict Environment: Investigation and Critique* (University of Michigan Pres, 2014) 25. Cf work in public law, such as Marco Goldoni and Michael A Wilkinson, 'The Material Constitution' (2018) 81 *Modern Law Review* 567.

[209] Ibid 33.

[210] Rittich, above n 14, 484.

institutions to be self-evidently beneficial.[211] Instead, the majority of international *political* attention was focused on the question of democratic reform and governmental change. Questions of how the Iraqi economy was to be governed, and to what extent foreign investment would be regulated, 'were so receded that the average outside observer might well have concluded that the legal concerns of Iraqis were restricted to the drafting of the new constitution and the election of representatives'.[212]

To the extent that economic questions have come into view, they have largely taken the form of an agenda for development. This agenda accepts that the causes of civil war and conflict may also be understood in economic terms, but it registers those economic concerns only in a limited sense. It pictures poverty and income inequality, dependency on exports, or natural resource wealth are the primary economic contributors to civil war and conflict.[213] As international legal scholars have shown, however, the 'national' economic situation of the decolonised world cannot be understood without reference to the international.[214] Accordingly, in doing so, this vision of the causes of civil war and conflict excludes other forms of economic and social relations from its view. The protection of foreign investment, the international structuring of trade and debt relations, the manufacture and sale of arms by Western states, or the contribution of global capitalist relations to climate crisis and environmental degradation are all absent from this picture.[215] This account of economic (and national) causes of civil war leads to a prescription for development in the national sphere, managed by international actors and facilitated by stable judicial institutions and the security of property and contract.[216] The recent cooperation between the World Bank and the UN in the approach to 'sustaining peace' in the decolonising world emblematically highlights how this agenda for development is facilitative of, or complementary to, explicit concerns with constitutional governance in the Third World.

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[211] Ibid 492. See also Tzouvala, 'Food for the Global Market', above n 15.

[212] Rittich, above n 14, 497.

[213] See, eg, Paul Collier et al, *Breaking the Conflict Trap: Civil War and Development Policy* (Oxford University Press, 2003); Collier and Hoeffler, above n 61.

[214] See Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011) 169–70.

[215] See B S Chimni, 'Capitalism, Imperialism and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17, 22–3; Sarah G Phillips, 'The Primacy of Domestic Politics and the Reproduction of Poverty and Insecurity' (2020) 74 *Australian Journal of International Affairs* 147.

[216] *Pathways for Peace*, above n 59, 166; World Bank, *Doing Business 2019: Training for Reform* (The World Bank, 2019) 3.

The risk of unruly violence means that 'local' economic conditions become international concerns to be managed, rather than political questions subject to deliberation and debate.[217]

The limited extent to which political-economic questions figure in the landscape of constitution-making, then, illustrates the partiality of the view that international institutions have taken of the 'root causes' of conflict, and of the constitution as a corresponding means of achieving peace and security. The partiality of this view also illustrates the difficulty of picturing international law as either a formalist means for restraining power or a constitutive means of generating authority. Instead, international law, and the answers it provides to questions about how to understand war and conflict, forms part of a process of 'transmission of concepts or ideas' between the different legal actors involved in the enterprise of constitution-making.[218] That transmission acts to reproduce the 'complex set of political choices' contained in approaches to the relationship between international law and constitutionalism.[219] Here, those choices involve a way of understanding war and conflict, and the role of the international actor, that reproduce a political orientation of the discipline toward constitutionalism, leaving the broader economic choices that surround that orientation and its intersection with them out of disciplinary focus.

C *Unsettling Constitutionalism: History as Critique*

Another way of telling the history of international law and postwar constitutionalism might be to resist the separation of the (international) economic and the constitutional aspects of the equation. In doing so, such a narration could draw on historically-minded critiques of constitutionalism examining how constitutions have been implicated in material relations of inequality within states and in relations of economic exploitation between states. In this section I draw on the work of both

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[217] See Eric de Brabandere, 'UN Post-Conflict Peacebuilding Activities: An Economic Reconstruction Perspective' (2015) 18 *Max Planck Yearbook of United Nations Law* 188.
[218] Anne Orford, 'Food Security, Free Trade and the Battle for the State' (2015) 11 *Journal of International Law and International Relations* 1, 24.
[219] Ibid.

international lawyers and scholars of postcolonial constitutionalism to illustrate what this perspective might contribute.

Issa Shivji, writing on the three waves of postcolonial constitutionalism in Africa, has illustrated the critical importance of economic and social context to an understanding of the work that an internationalised constitutionalism does. In the first wave, colonial powers worked to preserve their economic stake in the African continent by promoting liberal constitutions based on limited government, individual rights, and a participatory electoral process.[220] This included a right to private property, which operated to preserve the wealth and resources of settler communities, as well as in some nations to entrench the recent creation of class structures.[221] The second, Cold War-era wave of constitutional renovations gave rise to an authoritarian, presidentialist form that was reminiscent of colonial methods of administration and conducive to international visions of modernisation and social engineering.[222] In the post-Cold War era, Shivji argues that the move to liberal constitutionalism, as well as enabling political pluralism, served to facilitate and legitimise forms of marketisation and privatisation promoted by international financial institutions — paradoxically effecting a 'withdrawal of the state from the economic sphere' at the very moment that the state had come within reach of a more democratic politics.[223] Demonstrating the interrelationship between internationalised constitutional change and the distribution of wealth, property and power, as Shivji does, shows us that 'the prospect of constitutional reforms towards freer and consensual constitutional orders cannot be assessed without locating it on the larger social and economic canvas'.[224]

Christine Schwöbel-Patel has explored how constitutionalism operates to underpin and reinforce the public-private divide upon which the contemporary operation of international commerce depends. She argues that constitutionalism, in its classical form following the British and French revolutions of 1668 and 1789, instituted this divide through the circumscription of monarchical authority in favour of an emerging

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[220] Issa Shivji, *Where is Uhuru? Reflections on the Struggle for Democracy in Africa* (Fahamu Books, 2009) ch 5, 'Three Generations of Constitutions and Constitution-Making in Africa' 50.
[221] Ibid 51.
[222] Ibid 53–4.
[223] Ibid 62.
[224] Ibid 61.

merchant class.[225] Although this form of political and economic ordering later underwent significant transformations, modern forms of constitutionalism remain predicated on an essentially liberal understanding of the proper role of government, that emphasises the dual role of the state as protector both of individual freedoms and of the market as a space for economic activity.[226] On Schwöbel-Patel's account, it is precisely through its open commitment to limiting power, protecting rights and promoting an idealised vision of the social that constitutionalism on the international plane (or 'global constitutionalism') too is implicated in the 'depoliticisation of the economy' visible in the contemporary legal regimes and institutions for trade and investment.[227] This analysis demands that international lawyers look not just to debates that openly concern questions of distribution and wealth, but also to seemingly 'public' areas of law that understand themselves to be oriented toward purportedly materially neutral questions of governance and authority.

Within the field of international law more broadly, authors have sought in different ways to grapple with what I describe here as international law's dual quality.[228] By this I mean the way in which the idealised work of international law — work that is understood as humanitarian or emancipatory, alleviating suffering or containing war — has long been held separate, in both a disciplinary and in a political sense, from its more material aspects. Such material work might be seen in the way that international law has, for example, promoted legal standardisation and harmonisation, enabling the international work of commerce, communication and the movement of goods (and certain people).[229] Explorations of international law have sought to critique its more material form through, for example, interrogations of the role of private law as a form of international governance, or the logic of economic growth as a way of ensuring the

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[225] Christine Schwöbel-Patel, 'The Political Economy of Global Constitutionalism' in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar, 2017) 407, 411–12.

[226] Ibid 412–13. On the understanding of markets as requiring institutionalised forms of state protection rather than simple restraints on intervention, see also Ntina Tzouvala, 'The Ordo-Liberal Origins of Modern International Investment Law: Constructing Competition on a Global Scale' [2020] *European Yearbook of International Economic Law* 37.

[227] Schwöbel-Patel, above n 225, 418.

[228] I thank Kathryn Greenman for conversations on this idea.

[229] On international law as 'constitutive', see Gerry Simpson, 'International Law in Diplomatic History' in James Crawford and Martti Koskenniemi (eds), with Surabhi Ranganathan (asst ed), *The Cambridge Companion to International Law* (Cambridge University Press, 2015) 25.

welfare of peoples.[230] In recent years, the work of economic choices has also been foregrounded in examinations of the ways that international law engages in economic ordering and the production of material inequalities even (or especially) when it wears the clothes of rights, humanitarianism or security;[231] or when it adopts the language of authority and governance through the doctrines of state responsibility or the processes of international legal reproduction.[232]

This methodological turn has pushed the field to grapple with the ways in which the 'ideal' and 'material' faces of international law might be mutually constitutive. Probing the interrelationship between international law as it relates to security, or war, on the one hand, and commerce or trade, on the other, can help lawyers to examine the ways in which the material structures of economic liberalism, and their limits, continue to escape the artificial confines of the law that is thought to contain them.[233] Here, this prompts the inquiry of how constitutionalism, and constitutional structures, might be seen as an aspect of the broader question of how international law has managed the incorporation of the decolonised world into a global and capitalist economy, and on what terms. In other words, one of the tasks of the international legal scholar can be understood as tending to the ways in which the constitutionalist project has interacted with choices about the state's relationship to the economy, how a particular economic project might shape visions of the division between public authority and private freedom, and the material consequences and political costs of those choices.

Within this task, histories can play a role not only in exploring the connections between these two faces of international law, but also explaining how disciplinary

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[230] See, eg, Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003); Pahuja, above n 214.

[231] See, eg, Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019); Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, forthcoming 2020).

[232] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press, 2019); Kathryn Greenman, *The History and Legacy of State Responsibility for Rebels 1839–1930: Protecting Trade and Investment against Revolution in the Decolonised World* (PhD Thesis, University of Amsterdam, 2019).

[233] See Anne Orford, 'International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment' (2019) 113 *Proceedings of the ASIL Annual Meeting* 21, 26.

understandings of this duality persist. As Orford has written, the histories of international law that we have inherited operate:[234]

> to root … doctrines and institutions in the past, to provide a tradition that gives meaning to those doctrines and institutions as part of an unfolding story of progress, and to narrate the triumph of this way of understanding the world over alternative ways of understanding the world.

Interrogating the continued separation of questions of constitutional government from questions of wealth, material exploitation and empire, then, might begin by a retelling of such histories — not in order to correct the historical record, but to question this inheritance, and to make visible new ways of 'understanding the world' through law.

V CONCLUSION

I have argued that constitutionalism is a means of working toward international peace and security that is based on a particular view of the work that international law does and might do after conflict. This view is compatible with contemporary forms of economic liberalism and the depoliticisation of economic choices. Constitutionalism, as a way of understanding these practices, is underpinned by a history of internationalised constitution-making in Germany and Japan as an integral aspect of building the postwar international order. This history has been presented as a technical example of processes of internationalised constitution-making whose success has endured, and as a means of situating practices of constitutionalism within the narrative of a movement from empire to post-imperialism, as a way of understanding the development of the postwar international legal order.

This narration acts to support and reinforce the separation of the economic from the political, and to inoculate the discipline from postcolonial forms of critique. Constitutionalism is put forward as a precondition for achieving progress and as a necessary means of containing conflict. This promise of constitutionalism is a promise that is always to come, but perpetually *not yet*: as George Galindo writes, it is '[a]

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[234] Anne Orford, 'Law, Economics and the History of Free Trade: A Response' (2015) 11 *Journal of International Law and International Relations* 155, 177.

promise … projected in time [that] nourishes the future, but keeps the present starving'.[235] In the work of many international legal scholars, the fulfilment of this vision has become central, to the exclusion of other visions of the work that international law might do. Revisiting the history that underpins it allows us to revisit our understanding, as international lawyers, of the work that international constitution-making does and has done in the world. As Edward Said has written:[236]

> [s]ince the struggle for control over territory is part of that history, so too is the struggle over historical and social meaning. The task for the critical scholar is not to separate one struggle from another, but to connect them, despite the contrast between the overpowering materiality of the former and the apparent otherworldly refinements of the latter.

In the chapters that follow, I will renarrate the work of attaching meaning to constitution-making, and its entanglement with the material and economic practices of international law after war.

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[235] George Rodrigo Bandeira Galindo, 'Constitutionalism Forever' (2010) 21 *Finnish Yearbook of International Law* 137, 155.

[236] Edward Said, *Orientalism* (Vintage Books, 1979) 331.

CHAPTER 2

INTERNATIONAL LAW AND CONSTITUTIONAL THOUGHT: THEORISING EMPIRE FOR A POSTWAR WORLD

I INTRODUCTION

We have seen that international lawyers narrate constitutionalism, as a form of international thinking, through reference to the history of the postwar period and of constitutional change in Germany and Japan. For many international lawyers, this period is thought of not through the language of constitutional change but through the prism of the law of occupation. The processes of change effected by the Allies in Germany and Japan are often seen either as a violation of the law of occupation, or as a temporary, but aberrational, exception to its strictures.[237] This body of law was a way of regulating what the state could do in a given territory after war — dividing the world, in effect, into European and civilised states, on the one hand, and parts of the world that could be subjected to empire, on the other. In the mid-twentieth century, however, both this way of thinking about law after war, and this way of dividing the world for empire, came under pressure following German and Japanese imperialism and expansionism during the Second World War. In this chapter, I will describe the constitutionalist ways of understanding the work that states could do after war, and to prevent imperial aggression, that were posed in response to that pressure.

The chapter will proceed as follows. First, I will explain the body of international law that developed during the nineteenth century as a way of governing the political systems and private property during war within Europe, and of regulating imperial expansion outside of it. Second, I will describe how international lawyers turned to constitutional thought in order to answer the question of how law should respond to war and aggression, and to facilitate change in the political institutions of a territory after war. I do so through reference to the work of three figures: Quincy

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[237] See, eg, Nisuke Andō, *Surrender, Occupation and Private Property in International Law: An Evaluation of US Practice in Japan* (Oxford University Press, 1991); Gabriella Blum, 'The Fog of Victory' (2013) 24 *European Journal of International Law* 391, 403; Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press, 2nd ed, 2012) 213.

Wright, Ernst Fraenkel and Carl Friedrich. I suggest that each of these three legal scholars contributed to the development of constitutionalism as a prescription for the postwar occupations of Germany and Japan: Wright, through advocating postwar transformation as a response to imperial aggression; Fraenkel, through describing empire as a problem of constitutionalism rather than a problem of capital; and Friedrich, through theorising dictatorship as a means of constitutional transformation. I argue, first, that recovering these contributions illustrates the significance of constitutional thought to international law in the postwar moment. Secondly, I argue that these forms of constitutional thought should be viewed as deeply imbricated with political ideas about the economic and constitutional organisation of a purportedly post-imperial world.

II LAW, WAR, AND PROPERTY IN THE LONG NINETEENTH CENTURY

During the nineteenth century, European, or 'civilised', states and international lawyers formulated a body of rules for war on land that limited, among other things, the extent to which an occupying force could alter the constitutional and legal makeup of an occupied state. Known as the *occupatio bellica*, or belligerent occupation, it applied to the conduct of state forces on enemy territory during the course of wartime. During the nineteenth century, and prior to moves after the First World War to curtail its use as an instrument of national policy into the first part of the twentieth, war within Europe remained largely a sovereign right.[238] International lawyers continued to develop this body of law in order to draft rules shaping the institution of war between states and constraining its impact on the European economy, as well as governing territorial acquisition, colonialism and empire in the wider world.[239]

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[238] Regulated by neutrality law, as well as attempts to maintain a balance of power. See Quincy Wright, 'The Outlawry of War and the Law of War' (1953) 47 *American Journal of International Law* 365, 367.

[239] Doris A Graber, *The Development of the Law of Belligerent Occupation, 1863–1914: A Historical Survey* (AMS Press, 1968) 14–32. On the ways in which the conservationist principle, perceived to be at the core of occupation, was challenged during the first decade of the twentieth century, see Roberts, above n 175.

A *Property, Politics and the Law of Occupation*

International lawyers writing from the vantage point of the twentieth century considered that, despite divergences in practice and custom, the body of doctrine relating to belligerent occupation could be consolidated into two key strands.[240] The first strand was the idea that constitutional change under occupation, or change in the fundamental institutions governing political life, was to be avoided.[241] During the long nineteenth century this was a means by which European states could manage, to a degree, the political risk inherent in waging war.[242] It flowed from the position that while war continued, the belligerent occupant obtained only temporary power over the occupied territory deriving from the factual conditions of occupation and military control over territory. International law at this time continued to provide that occupation, during the course of hostilities, might end through the acquisition of territorial title, and transfer of the loyalty of its inhabitants.[243] Although the temporary authority that occupation conferred could be consolidated into sovereign right through total defeat of the enemy government, it could also cease with the end of factual control.[244] In such a case, the *jus postliminium* provided that certain acts performed by the occupant on the territory were subsequently invalid.[245] Constitutional change without sovereign title was considered to fall outside the range of permissible acts. Despite exceptions on the basis of military necessity, the fundamental idea that political institutions should remain untouched by the occupier persisted. By 1941, Feilchenfeld could write that this body of law signified that, in general, 'an occupant may not

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[240] Ernst H Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, 1942) 11; Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1905) vol II, 169.

[241] Cf the position under the Lieber Code: Graber, above n 239, 110.

[242] Benvenisti, above n 237, 109. Along similar lines, Bhuta has argued that this avoidance of political transformation was a means of accommodating both post-revolutionary and monarchical systems of government within the European legal order: Nehal Bhuta, 'The Antinomies of Transformative Occupation' (2005) 16 *European Journal of International Law* 721.

[243] See, eg, Oppenheim, above n 240, vol II, 278.

[244] Benvenisti, above 237, 94.

[245] Oppenheim, above n 240, vol II, 296.

transform a democratic republic into an absolute monarchy or engage in other measures of a similar kind'.[246]

The second critical aspect of the law of occupation was respect for the private property rights of the inhabitants of occupied territory.[247] These property rights, and the laws that sustained them, were viewed as 'non-political' matters that should be continued during the period of occupation, and for the continuance of which the law of occupation should provide.[248] Despite admitting of various exceptions, the protection of private property rights was a basic principle of occupation that stretched from the Reconstruction era to the turn of the century.[249] These rules 'guaranteed the safety of [the] propertied class from deprivation by the enemy or by the working classes, and assured foreign investors … [of] the protection of their assets'.[250] Toward the end of the nineteenth century, however, with the increasing involvement of the bureaucratic European state in the economic activity of its people, the idea of occupation as an impartial continuation of the status quo came under strain.[251] By 1941, a key concern among Western jurists was that the regime of property protection within the law of occupation protected against 'spoliation and ruination' by the foreign occupier.[252] It aimed not only to preserve the private property rights of the individual inhabitants, but also to protect the economic productivity of the territory as a whole against the growing material demands of total war.[253]

During the nineteenth century European states viewed much of the extra-European world as instrumental to the expansion of their influence and the enrichment of their citizens. Law that worked to facilitate that expansion was by the end of the nineteenth century considered to apply to those parts of the world not considered to fall

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[246] Feilchenfeld, above n 240, [327]. Or a 'liberal into a communistic or fascistic' one: [331]. See also Kelsen, above n 22, 519; Pitman B Potter, 'Legal Bases and Character of Military Occupation in Japan' (1949) 43 *American Journal of International Law* 323, 323.

[247] Feilchenfeld, above n 240, 10.

[248] Graber, above n 239, 42–67. Cf takings of public property, especially *matériel de guerre*: Feilchenfeld, above n 240, 51–61.

[249] Above n 239, 61, 68; Feilchenfeld, above n 240, 30–51, 107.

[250] Eyal Benvenisti and Doreen Lustig, 'Taming Democracy: Codifying the Laws of War to Restore the European Order, 1856–1874' (Cambridge Legal Studies Research Paper Series, 28/2017) 38.

[251] Benvenisti, above n 237, 70–2.

[252] Feilchenfeld, above n 240, [339], [74]–[85].

[253] Benvenisti, above n 237, 110.

within the purview of the *jus publicum Europaeum*, or the law of nations as it then existed between European states. Although the domination of these societies and exploitation of their natural resources and labour through colonialism in its various and violent forms had been ongoing since at least the sixteenth century, the intensification of this process during the nineteenth century saw international lawyers busily engaged in creating new doctrines to justify and explain European expansion.[254] The institution of 'belligerent' occupation, with its protections for the private property and welfare of the inhabitants, and formal requirements for annexation through military conquest or cession by treaty, was predicated on the existence of a 'constitutional order' distinguishing, in European fashion, between public law and private right.[255] International law regarded non-European peoples possessing differing systems of law, culture, and economy as either tribal or nomadic peoples, lacking in sovereignty over the lands they inhabited, or as sovereign but yet not 'civilised', and so lacking in the full range of legal rights and capacities accorded to European powers.[256] In the case of the former, classed as *territorium nullius*, occupation was considered sufficient for the foreign power to acquire sovereignty over territory, establishing settler colonies that continue to endure in various forms into the present.[257] In relation to the latter, a wide variety of legal institutions enabled the extension of European influence to these societies, including through the acquisition of sovereignty through cession and subjugation, but also through the use of unequal treaties and protectorates.[258] The overall effect of this was to transform, by the end of the nineteenth century, much of the world and its people into subjects of the European empires seeking material resources and wealth.

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[254] Anghie, above n 194, 65.

[255] Bhuta, 'Antinomies', above n 242, 729–30.

[256] See Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon, 1984); Tzouvala, *Capitalism as Civilisation*, above n 231.

[257] See, eg, Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement' (1993) 19 *Melbourne University Law Review* 7.

[258] Anghie, above n 194, 89.

B *A World after Empire? Managing Expansionism*

In the years following this period of expansion, there was an increased tendency for trade within, rather than between, the large empires that then divided much of the world. The first half of the twentieth century, particularly following the Great War, had been characterised by rising tariff barriers, imperial preferences, and restrictions on the amount of goods traded between nations.[259] At the same time, in a world of formal wars that were perceived to require raw materials, military supplies, and foodstuffs, states without empires of their own demanded access to markets and materials on liberal terms.[260] Moves toward international organisation during this period can be seen in some ways as attempts to satisfy these demands collectively. Such moves included the distribution of former German colonies as mandates after the war to emerging powers or British dominions moving toward independence, the promotion of an 'open door' trading policy within the mandates as a whole, and the broader efforts of the League to promote international trade on mostly liberal terms.[261] From the end of the nineteenth century, the Open Door policy had also been the favoured US means of securing access to foreign markets.[262]

With the contraction of the world economy from 1929 onward, states came to rely even more heavily on the colonies, implementing protectionist policies that often acted to exclude other states — including Japan — from colonial markets.[263] As the League of Nations would put it in 1942, this was a period where '[g]overnments repeatedly proclaimed their intention to pursue, policies designed to bring about conditions of "freer and more equal trade"; yet never before in history were trade barriers raised so

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[259] Ronald Findlay & Kevin H O'Rourke, *Power and Plenty: Trade, War and the World Economy in the Second Millenium* (Princeton University Press, 2009) 443*ff*.

[260] Ibid 431, 443.

[261] *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt I ('Covenant of the League of Nations'); Benjamin Gerig, *The Open Door and the Mandate System* (Allen & Unwin, 1930). See further Patricia Clavin, *Securing the World Economy: The Reinvention of the League of Nations, 1920–1946* (Oxford University Press, 2013).

[262] See Thomas McCormick, 'Insular Imperialism and the Open Door' 32 *Pacific Historical Review* 155.

[263] Richard Overy, *The Origins of the Second World War* (Routledge, 2017) 32–46. On British reliance on empire during the crisis of 1929–, see D K Fieldhouse, 'The Metropolitan Economics of Empire' in Judith Brown and Wm Roger Louis (eds), *The Oxford History of the British Empire* (Oxford University Press, 1999) vol IV, 88.

rapidly or discrimination so generally practised'.[264] It seemed that efforts to create a liberal trading regime within the context of a broader imperial world order had given way to what ordoliberal thinkers like Wilhelm Röpke described as economic nationalism, or 'the primacy of politics over economics', to disastrously violent effect.[265]

What was then described as an economic nationalism might be equally understood as an aspect of new forms of imperialism. These rival visions of empire were articulated during the interwar period through ideas of greater space and the sometimes explicitly racialised ideologies that accompanied them. In Nazi Germany, these took the form of efforts to violently assert the right of the German people to *Lebensraum*, or 'living space', in the contiguous regions in Poland and the Soviet Union to the East.[266] This expansion, coinciding with systematic efforts to exterminate the Jewish people and expropriate Jewish property within German territory itself, drew on European imperialism and settler colonialism.[267] In imperial Japan, the government proclaimed a Co-Prosperity Sphere for a Greater East Asia that was simultaneously a reaction to European colonialism and empire and an attempt to build a new economic and political order for Asia with Japan, and the Japanese people, at its centre.[268] In Japan, this kind of regional thinking stemmed from calls by Japanese intellectuals for forms of pan-Asian solidarity dating back to as early as 1894, spurred at least in part by racialised rhetoric from Western authors and practices of immigration exclusion by British Dominions and the US.[269] Both German and Japanese forms of regionalism found expression in the writings of prominent international lawyers, such as the Nazi jurist Carl Schmitt or Japanese legal scholar Yasui Kaoru, and in efforts to promote new

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[264] Findlay and O'Rourke, above n 259, 444, citing *Commercial Policy in the Interwar Period: International Proposals and National Policies* (League of Nations, 1942).

[265] Wilhelm Röpke, *International Economic Disintegration* (William Hodge & Co, 1942) 86.

[266] Adam Tooze, *The Wages of Destruction: The Making and Breaking of the Nazi Economy* (Allen Lane, 2006) 9–10. The Italian expansion into the Mediterranean and Northern Africa was propelled by the analogous concept of a *spazio vitale*: Davide Rodogno, *Fascism's European Empire: Italian Occupation during the Second World War* (Cambridge University Press, 2006).

[267] See A Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History' in A Dirk Moses (ed), *Empire, Colony, Genocide* (Berghahn, 2008) 3, 36.

[268] Jeremy A Yellen, *The Greater East Asia Co-Prosperity Sphere: When Total Empire Met Total War* (Cornell University Press, 2019) 5.

[269] See Marc Andre Matten, *Imagining a Postnational World: Hegemony and Space in Modern China* (Brill, 2016) ch V, 'Fighting the White Peril'; Naoko Shimazu, *Japan, Race and Equality: The Racial Equality Proposal of 1919* (Routledge, 1998) 69*ff*.

forms and forums of international organisation.[270] Though they were also justified by reference to the hegemonic interventions in Latin America by the United States, this charge was strenuously refuted by US commentators who stressed that the Monroe Doctrine was 'as officially defined, solely a policy of self-defense'.[271]

By the 1940s, Allied international lawyers were faced not only with rhetorical and legal challenges to empire but also the realities of a violently expansionist war within Europe, as well as Asia and Africa. Within Europe, what international lawyers perceived to distinguish the war from other conflicts was not only the scale of the violence but the many acts of 'economic spoliation' by Axis powers: the stripping from the land and its inhabitants of food, raw materials, and even slave labour.[272] For some, these acts were a violation of the Hague rules, pure and simple: these states had 'outstripped any past deviations from and violations of the laws of land warfare in their treatment of private and public property and in the commercial, economic and financial subversion of the occupied territories'.[273] For others, these practices of spoliation within Europe were partly attributable to the existing law of occupation, which as it was then structured was 'more likely to be adopted by rich and conservative states than by radical powers badly in need of the additional wealth of occupied areas'.[274] These international lawyers positioned the disregard for international rules regarding the treatment of property during occupation as part of a wider landscape of challenges to the international legal and economic order in the interwar period, including Soviet and

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[270] Matten, above n 269, 222, citing Yasui Kaoru, *Basic Concepts on the European Spatial International Law* [-Ōshū kōiki kokusaihō no kiso rinen] (1942); Carl Schmitt, 'The Großraum Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law (1939-1941)' in Timothy Nunan (ed), *Carl Schmitt: Writings on War* (Polity Press, 2011) 75. See also Madeline Herren, 'Fascist Internationalism' in Glenda Sluga and Patricia Clavin (eds), *Internationalisms: A Twentieth-Century History* (Cambridge University Press, 2016) 191.

[271] George H Blakeslee, 'The Japanese Monroe Doctrine' (1933) 11 *Foreign Affairs* 671, 676. On the continuities between the Monroe doctrine and contemporary forms of spatial and legal ordering, see Anne Orford, 'NATO, Regionalism, and the Responsibility to Protect' in Ian Shapiro and Adam Tooze (eds), *Charter of the North Atlantic Treaty Organisation together with Scholarly Commentaries and Essential Historical Documents* (Yale University Press, 2018).

[272] L H Woolsey, 'Post-War Development of International Courts' (1943) 37 *American Journal of International Law* 276, 283. See further Amanda Alexander, 'Lenin at Nuremberg: Anti-Imperialism and the Juridification of Crimes against Humanity' in Kathryn Greenman et al (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press, forthcoming).

[273] Woolsey, above n 272, 286.

[274] Feilchenfeld, above n 240, [108].

Mexican expropriation and nationalisation.[275] Addressing the American Society of International Law in 1941, Quincy Wright described this as a process whereby the

> [g]eneral equality of the opportunity to trade and moderate freedom of trade have given way to discrimination and totalitarian control of economy. As this process has developed, economic crises and wars have become worse, until the structure of not only business and government, but of civilization itself, has been gravely shaken.[276]

The problems of law, imperial expansionism and international economy, evidently, needed to be addressed together.

The maintenance and stability of a postwar economic order in a still overwhelmingly imperial world would require a means of ensuring that those states deprived of empire would not engage in further aggression in the future. As one US international lawyer, John B Whitton, would put it:

> [s]tates may sometimes make war in order to control vital raw materials, but this desire for control is itself a child of war. Consequently, international reforms designed to assure a more equitable distribution of the world's resources cannot succeed so long as states continue to plan for future wars, as they must do until they feel secure. Economic reforms are a result as well as a cause of peace.[277]

These concerns led some international lawyers to suggest that the Allies 'as occupants will be faced with the need to plan a thorough refashioning of administrative, economic, and educational systems of the countries which [they] will free from Axis rule'.[278] The work of containing aggression was also perceived by states to require some change within the political institutions of the former enemy states themselves, to a degree not obviously permitted by the extant rules on military occupation and emerging law on intervention.[279] As Feilchenfeld had put it as early as 1941, however, the Hague Regulations 'were a late codification of a body of law adopted in an atmosphere of

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[275] Ibid [68]; Quincy Wright, 'International Law and Commercial Relations' (1941) 35 *American Society of International Law Proceedings* 30, 32.

[276] Wright, 'International Law and Commercial Relations', above n 275, 31.

[277] John B Whitton, 'Security and Peace' (1944) 38 *American Journal of International Law* 434, 435.

[278] Benjamin Akzin, 'Introduction to a Study of Occupation Problems' (1943) 21 *International Conciliation* 263, 268.

[279] See the *Declarations of Moscow* (30 October 1943) and the *Protocol of Proceedings of Crimea Conference* (11 February 1945), done by the United States, the United Kingdom, and the Union of Soviet Socialist Republics.

nineteenth-century liberalism, shaped by the basic philosophy of that era, and drafted for the conditions of a nineteenth-century liberal world'.[280] It was no longer clear, he argued, that they were capable of governing the world of the twentieth century or of responding to the terms of the present crisis. They had failed to 'safeguard coherently the whole economic life of a region' or to protect against 'economic ruination' and thus were 'bound to lead to an exhaustion of resources followed by famine, revolts, and social convulsions'.[281] The question for international lawyers as the war drew to a close, then, became: how should they respond to the apparent conflict between this programme of change and the existing body of international law? Or, as Feilchenfeld had put it: 'should there be in the future a more dynamic jurisprudence more interested in the protection of functions and productive work?'[282]

III A MORE DYNAMIC JURISPRUDENCE? CONSTITUTIONALISM AS POSTWAR INTERNATIONAL LAW

In this part I explore how international lawyers and legal scholars concerned with the occupation of Germany and Japan and the development of law for a postwar world turned to constitutional ways of thought. I argue that these thinkers moved away from a concern with questions of the status of the occupied territory and the maintenance of public order, and turned to frameworks that allowed for substantive engagement with the quality of law and the design of the state through ideas of constitutionalism. I make this argument through a description of the work and thought of three lawyers: Quincy Wright, Ernst Fraenkel, and Carl Friedrich. These scholars, in conversation with military government, legal education and advocates of international organisation, promoted constitutional ways of thinking about international legal practices and articulated new ways in which these practices could be conceived of and justified.

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[280] Feilchenfeld, above n 240, [67].
[281] Ibid [53]–[55], 15.
[282] Ibid [117].

A *Quincy Wright: Constitutionalism as Transformation*

Quincy Wright, a professor of political science and then international law at the University of Chicago, had dedicated much of his career to the interdisciplinary study of war and its causes.[283] As we will see, his work refuted material theories of war and aggression in favour of a focus on the constitutional and juridical structures of the state. Part of Wright's work was an effort to articulate a legal framework for transformation, including constitutional transformation, in the aftermath of aggression. This transformation was to take place both on a grand scale, at the level of international organisation; and in particular areas, including the occupied territories following the conclusion of the war. To effect such a transformation, however, would require a new way of conceptualising war and peace, and new legal thinking on what could be done for the purpose of achieving the latter.

Wright's vision of the postwar transformation, and the thinking required to achieve it, was perhaps best articulated in his 1942 paper entitled 'Political Conditions of the Period of Transition', published in a collection of papers by the Commission to Study the Organisation of Peace.[284] The Commission, which Wright had helped to set up in 1939, was largely composed of American international relations scholars, international lawyers, historians and peace activists.[285] Their project was to set out new frameworks of international ordering in the aftermath of the failure of the League, and of colonial organisation, to prevent the outbreak of a war for territory.[286] The war had, they said, demonstrated the increasing tendency of warfare to affect neutral states, involve large-scale attacks on civilian life, and require the military mobilisation of large sections of the population.[287] In the future, they argued, nation-states could no longer depend on colonisation as a means of supporting their populations: they 'must adjust

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[283] Wright was also a consultant to the Foreign Economic Administration and State Department, and US High Commissioner for Germany in 1949-50. His major work was his *A Study of War*, seemingly influential at the time but not well remembered today. For an argument for the 'enduring relevance' of Wright's contribution to international law, see Richard Falk, 'Quincy Wright: On Legal Tests of Aggressive War' (1972) 66 *American Journal of International Law* 560.

[284] See the collection of papers presented to the Commission to Study the Organization of Peace: (1942) 21 *International Conciliation* 264.

[285] Robert P Hillmann, 'Quincy Wright and the Commission to Study the Organization of Peace' (1998) 4 *Global Governance* 485.

[286] Commission to Study the Organization of Peace, *Building Peace: Reports of the Commission to Study the Organization of Peace* (Scarecrow Press, 1973) 'Preliminary Report' 3.

[287] Ibid 2–3.

[their] problems to an earth whose geographical limits have been explored'.[288] Accordingly, 'the loose political organization of the past which rested on balance of power, on neutrality and isolation, [was] no longer adequate'.[289] Instead, members of the Commission, including Wright, dedicated themselves to planning for a new mode of international organisation in which states would renounce force except in self-defense, commit to collective security maintained through regional and worldwide force rather than individual armament, and maintain a global economy with free access to resources and goods.[290] As P E Corbett had elsewhere observed, leaving the colonies under European supervision was 'hardly adapted to the recognition of universal interest in the commerce and in the progress of the colonial territories'.[291] Central to that project was the conceptualisation of and planning for the 'transitional period' following the conclusion of the war, which needed to take place before this organisation of international society could be realised.[292]

In his paper, Wright argued that the situation of the war demanded a departure from the conventions of international law and regarding war's resolution.[293] According to Wright, the observable approach which prevailed before the beginning of the war had two main elements. First, states, through the practice of treaty-making as a method of the resolution of war, had made the 'transitional period' of the return to peace as short as possible. This practice, he said, was reinforced by the international legal position that war was 'separated from peace by an instant of time' after which the treaty went into effect, and war came to an end.[294] Second, the 'peace' to which states sought to return was defined as 'the conditions which prevailed before the war'.[295] Admittedly, more

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[288] Ibid 3. Although this did not mean abandoning colonialism altogether, but only limiting it to 'backward areas … suitable for that purpose without injury to the native inhabitants': at 8.

[289] *Building Peace*, above n 286, 4.

[290] Ibid 7.

[291] P E Corbett, *Post-War Worlds* (Institute of Pacific Relations, 1942) 182. The Institute was generously funded by philanthropic businessmen, as well as Carnegie and the Rockefeller Foundation: Tomoko Akami, *Internationalizing the Pacific: The United States, Japan and the Institute of Pacific Relations* (Routledge, 2003) 48–50.

[292] *Building Peace*, above n 286, 12–15. See also Hillman, above n 285, 491.

[293] Wright's work was heavily influenced by social science methodology in general and Chicago pragmatism in particular. See Emily Hill Griggs, 'A Realist Before "Realism": Quincy Wright and the Study of International Politics between Two World Wars' (2001) 24 *Journal of Strategic Studies* 71.

[294] Quincy Wright, 'Political Conditions of the Period of Transition' (1942) 21 *International Conciliation* 264, 264.

[295] Ibid 264.

recent peace agreements such as the Treaty of Versailles established a transitional regime of sorts in relation to the occupation, transfer of, or concessions over, German territory, as well as a number of lasting international institutions. However, their premise was, in Wright's view, an eventual return to the state of international relations that existed prior to the war.

That approach, Wright said, did not accord with present needs, in which the community of nations was faced with a 'revolutionary outbreak' against established laws, including those outlawing war. This outbreak, which 'transcend[ed] ordinary breaches of law', demonstrated the inadequacy both of the content of these laws and of the means of enforcing them, and necessitated both the suppression of aggression and a 'period of reconstruction'.[296] Nor did that approach accord with the practice of states in a broader sense, in which the conclusion of armed hostilities by armistice was followed by the prolonged decision-making processes of peace conferences, governments, and parliaments.[297] In its place, Wright proposed that 'the transitional period from violent to peaceful change be given a more definite recognition'.[298] Changes in the law of war, including the outlawry of aggressive war or the non-recognition of its gains in the Paris Pact and the Stimson Doctrine meant, Wright suggested, that the legal consequences formerly attaching to the use of force no longer applied: the ordinary definitions of and distinctions between war and peace had become 'obsolete'.[299] The present conflict, widely regarded as exacerbated by German resentment at the terms of the Versailles settlement, had also revealed the peace treaty to be a 'static instrument ill-adapted to cope with changing conditions'.[300]

The functions of this period of transition would be first and foremost to enable the discrediting of aggression as a means of conducting politics, by means of both the complete defeat of aggressor governments and the sustained occupation of their

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[296] Drawing on the American experience following the Civil War: Ibid 265-6.

[297] Ibid 264–5.

[298] Ibid 265. 'Peaceful change' was, during the earlier half of the twentieth century, synonymous with the search for new methods to resolve the problem of growing populations outside of violent struggle for land and resources: Alison Bashford, 'Population, Geopolitics and International Organizations in the Mid Twentieth Century' (2008) 19 *Journal of World History* 327.

[299] Wright, 'Transition', above n 294, 265.

[300] Quincy Wright, 'Peace Problems of Today and Yesterday' (1944) 38 *American Political Science Review* 512.

populations.[301] What this required was a 'skillful statesmanship' by the great powers, as occupiers, 'that knows how to combine decision with justice, force with persuasion, and promptness with deliberation'.[302] However, their actions during these occupations needed to avoid the characterisation of 'Anglo-American aggression' — instead presenting themselves as performing the functions of a 'police power acting in behalf of the world community'.[303] Hence, the governments responsible for the defeat of the aggressors should first perform 'emergency tasks' of administration stemming from the needs of the occupied populations, including 'the suppression of violence and lawlessness, the demobilization of armies … the setting of people to work…and the re-education of peoples in the values of civilization'.[304] Following these emergency tasks, the most important aspect of the transition would, Wright said, be the establishment of political institutions based on consent of the governed. This was to be conducted 'in accordance with the 'Anglo-Saxon tradition of gradual development' developed through imperial and colonial forms of administration which preferred 'tried practices to logical theories'.[305] Wright envisaged that the 'regime of the occupying forces governing the territory of defeated enemies' would thereby gradually evolve into an interlocking political system of 'national governments, regional unions, and world institutions'.[306]

However, he argued, '[c]are must be taken not to restore and recognize national governments prematurely', in order to avoid 'concepts of national sovereignty' that would prove problematic to these new forms of international organisation.[307] In particular, political power could not be 'transferred' to any governments of the defeated states of Germany, Italy and Japan until 'their former despotisms have been discredited and the spirit of aggression has been destroyed'.[308] In the meantime, the occupiers should focus on obtaining the consent of the occupied populace to 'democratic

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[301] Wright, 'Transition', above n 294, 267.

[302] Wright, 'Peace Problems', above n 300, 516. This position was effectively formalised in article 107 of the UN Charter.

[303] Wright, 'Transition', above n 294, 268.

[304] Ibid 268–9.

[305] Ibid 269; see also Quincy Wright, 'The Government of Iraq' (1926) 20 *American Political Science Review* 743, 743.

[306] Wright, 'Transition', above n 294, 269. This type of transition had, according to Wright, been attempted by the League, but failed because of the association of the Covenant with the treaties of peace, as well as the League's eventual failure to impose programmes of sanction and disarmament: at 270.

[307] Ibid 273.

[308] Ibid 277.

institutions'. What Wright was proposing was a new kind of transition which was aimed not simply at restoring peace but creating 'a more adequate world order'.[309] The establishment of this order required a significant departure from previous practices of peace settlement, in the form of prolonged occupation and transformation of the aggressor states.

i *International Law and the Political Economy of Transition*

The transformative techniques that Wright proposed as a means of containing aggression rested on an understanding of the relationship between law, politics, and the economy that had been fiercely contested, both in the interwar period as well as the early phases of the postwar occupations. One view, held by the Soviets, but also by advisors to the US government during the war, was that it was in significant measure the economic structure of the German and Japanese states that had led to aggression in support of imperialist expansion.[310] This was a view rooted in the Bolshevik theory of imperialism, which saw violent grabs for territory and resources as part of capital's process of reproduction.[311] The Bolsheviks had been influenced by German social democrat Rudolf Hilferding's theory of monopoly capitalism, or an economic system in which price competition led to large corporate actors with increasingly concentrated market share and capital, and therefore required a 'policy of continuous state expansion' to acquire and protect territory for investment.[312] But where Hilferding examined the economic structures of capitalism as they operated within Europe, Lenin and Bukharin described empire as a foremostly international structure.[313] They considered the European search for profit and the corresponding export of capital to non-Western territories, secured where necessary with political pressure and military force, to be directly attributable to the economic structures of the imperial metropole, and the

[309] Ibid 266.

[310] Reflected to some extent in the US position at the Nuremberg trials: see Alexander, above n 272. The Morgenthau Plan, proposing German agrarianisation, was an extreme postwar proposal that also drew on this understanding of aggression.

[311] See V I Lenin, *Imperialism: The Highest Stage of Capitalism* (1917).

[312] Knox, above n 195, 37.

[313] Ibid 37.

influence of capitalist monopolies on its foreign policy. This theory was also present in transnational resistance to colonial and imperial rule and in demands for 'economic democracy', such as those put forward by the League Against Imperialism.[314] By the interwar period, the idea that imperialism was an economic as well as a political phenomenon had gained currency among Western authors, as well as Soviet and anti-colonial thinkers.[315]

The idea that aggression should be understood as the product of economic impulses had been fiercely contested by scholars of economics, political science and law working in the United States before and during the war. Wright, along with his collaborators, was at the very forefront of this contestation. Earlier in his career, he had extolled the progressive virtues of legalised responses to of war and aggression, on the basis that international law could understand responsibility as an 'artificial creation' and therefore avoid the 'insoluble historical disputes' regarding which actors, or social forces, had caused the conflict.[316] Yet by 1927, he had sought to supplement his legal work through embarking a long and multidisciplinary project to understand the nature and causes of modern warfare — perhaps in response to those 'Marxist analysts and a few discouraged liberals' who had begun to 'attribute[] imperialism and war to the ability of acquisitive merchants and investors to utilize government power in their pecuniary interest'.[317] The end product of that project was Wright's *A Study of War*, which represented the culmination of the work of several scholars hosted at the University of Chicago for more than a decade.[318]

Although during the nineteenth century, war had perhaps rightly been understood as an economic institution, wrote Wright, the conditions of modern capitalism and trade on liberal terms 'made it no longer such'. While the German war rhetoric linked the war to 'demands for *Lebensraum*, colonies and conquest', Wright ascribed these demands not to economic structures but to '[m]otives of escape from

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[314] Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New Press, 2007) 16*ff*.

[315] Alexander, above n 272.

[316] Quincy Wright, 'Changes in the Conception of War' (1924) 18 *American Journal of International Law* 755, 766–7.

[317] Wright, 'Commercial Relations', above n 275, 30–1.

[318] Quincy Wright, *A Study of War* (University of Chicago Press, 1942). See also Waqar H Zaidi, 'Stages of War, Stages of Man: Quincy Wright and the Liberal Internationalist Study of War' (2018) 40 *International History Review* 417.

domestic depression, coupled with dubious theories concerning the economic value of protectionism and of the political control of markets and sources of raw materials'.[319] Such theories, geared as they were toward the acquisition and withholding of military power from potential enemies, were ultimately political in nature, rather than truly economic.[320] Although these attempts at economic self-sufficiency contained 'the seeds of war' because states raising barriers to trade were 'certain to injure others thereby deprived of markets', the solution that Wright proposed was not the reduction of the power of capital through forms of state control or nationalisation.[321] Rather, the economic elements of the solution were greater industrialisation and international trade on liberal terms.[322] This form of international economic organisation, Wright believed, was a continuation of the 'concepts of civilization' long expounded by international law, which, by 'separating commerce from government and insisting on some respect for the individual, had an influence in moderating the practices of war'.[323]

A Marxist theory that positioned war as the result of 'steady pressure for colonial, commercial and financial expansion' was, in Wright's view, not supported on an empirical assessment of historical evidence.[324] To the contrary, he argued that 'capitalistic enterprises in general have favoured political stability'.[325] Here, Wright relied on a new wave of British and American economic scholarship, by economists such as Lionel Robbins and Eugene Staley, suggesting that '[i]nvestors have more frequently been the unwilling instruments of a politically motivated imperialism than the concealed drivers of diplomatic or military expansionism'.[326] Robbins had considered that practices of economic nationalism were not due to the pressures of the capitalist class as a whole, but the interests of 'sectional groups' of either workers or capitalists, or both, that pushed for protectionist policies and opposed the liberalisation

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[319] Wright, *Study*, above n 318, vol I, 284.
[320] Ibid vol I, 282.
[321] Ibid vol II, 851.
[322] Ibid vol II, 1143, 1189–92.
[323] Quincy Wright, 'International Affairs: International Law and the Totalitarian States' (1941) 35 *American Political Science Review* 738, 739.
[324] Wright, *Study*, above n 318, vol I, 284–5.
[325] Quincy Wright, 'The Causation and Control of War' (1938) 4 *American Sociological Review* 461, 462.
[326] *Study*, above n 357, vol I, 284–5, citing Eugene Staley, *War and the Private Investor* (Doubleday, Doran & Co, 1935); Lionel Robbins, *The Economic Causes of War* (Cape, 1939).

of trade.[327] To the extent that the prospect of national wealth motivated the masses to support war, Wright argued that this was so removed from reality that it was better viewed as idealism rather than a truly economic cause of war.[328] His view reflected an emerging Anglo-American position that idealistic or political causes of war were more worthy of analysis: only they were capable of providing 'the abandoned spirit of self-immolation … necessary for certain military undertakings' in the total wars of the first half of the twentieth century.[329]

ii *International Law, the Aggressive State and Constitutional Transformation*

This view of the causes of war was conducive to the idea that international law might enable the 'suppression of aggression' by constitutional means. Wright believed that the formulation of international obligations to refrain from the resort to force should also be accompanied by a theory of the 'aggressive state', or the state 'which, because of its internal structure or processes and its environmental conditions, is likely to resort to force'.[330] This, he argued, should not necessarily attract moral opprobrium, but was rather the natural outcome of geopolitical forces, as a result of which

> [m]odern nations, like animals and primitive tribes, have in the evolutionary process differentiated their constitutional and military structures, each adapting its ideals and traditions to the defensive necessities of its geographical and economic position. These defensive necessities must, by the law of survival, take precedence over considerations of either welfare or civilization so long as those interested in the latter neglect to universalize the rule of law through organization.[331]

Aggression, for Wright, was a 'disease rather than an inherent characteristic' which might be cured rather than punished. But he viewed certain states, by reason of a 'tradition of military prestige, aristocratic social organization, political autocracy, and a geographical situation inviting invasion' as being 'more susceptible' to this affliction.[332]

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[327] Robbins, above n 326, 94.
[328] Wright, 'Causation and Control', above n 325, 463. Although he did accept that poverty produced by 'bad economic conditions' tended to 'provide the ground for the acceptance of aggressive doctrine'.
[329] *Study*, above n 357, vol I, 289.
[330] Wright, 'Causation and Control', above n 325, 466.
[331] Wright, *Study*, above n 357, vol I, 267.
[332] Wright, 'Causation and Control', above n 325, 467.

For Wright, constitutional forms of organisation were a means of treating this affliction. Several aspects of the constitutional state, for which he took the US as a model, were critical to this treatment. First, he argued that constitutionalism 'facilitate[d] a harmonizing of international law and municipal law through application of the former in national courts', and thus reduced conflicts between legal sovereigns.[333] Second, the separation of powers meant that the ability of the executive to wage war was restrained by legislative bodies, such as Congress, while a functional centralisation facilitated war.[334] Third, the geographical federalism of a government, such as the division of powers between state and national governments in the United States, also lent itself to peace, insofar as it reduced the intrusion of the government into private rights.[335] In summary, Wright considered that

> absolutistic states with geographically and functionally centralized governments under autocratic leadership are likely to be most belligerent, while constitutional states with geographically and functionally federalized governments under democratic leadership are likely to be most peaceful.[336]

This prescription required states to abandon neutrality, engaging in more active forms of international organisation in order to prevent 'too great concentrations of political power'.[337]

Wright's views on the role of international law in responding to aggression and facilitating transformation were informed by his writing on the unfolding situation in Manchuria. From the early twentieth century, Japan pursued a policy of empire in Manchuria through the management and exploitation of treaty-based concessions.[338] In 1931, conflict between Japanese imperialists and Chinese nationalists came to a head through an explosion engineered by Japanese army officers, which served as a pretext for invasion and colonisation.[339] Secretary of State Henry L Stimson announced in

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[333] Wright, *Study*, above n 357, vol II, 836.
[334] Ibid 838–9.
[335] Ibid 837–8.
[336] Ibid 847–8.
[337] Wright, 'Causation and Control', above n 325, 472.
[338] See Y Tak Matsutaka, *The Making of Japanese Manchuria, 1904–1932* (Harvard Asia Center, 2001).
[339] Louise Young, 'When Fascism Met Empire in Japanese-Occupied Manchuria' (2017) 12 *Journal of Global History* 274, 284–5.

response that the United States would refuse to recognise 'any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris' — a position that came to be known as the Stimson Doctrine.[340] The members of the League of Nations, after a lengthy examination by the Lytton Commission, eventually followed suit, stating that the circumstances prevented 'the maintenance and recognition of the existing régime in Manchuria'.[341] Responses from Japanese international lawyers varied, from the assertion of the Japanese right to self-defence within a regional sphere of interest to acceptance of the principle of non-recognition, if only as a provisional measure pending a 'final peaceful solution of the dispute'.[342] The League's position itself prompted the withdrawal of Japan from the League in 1933.

Wright, in his writing on the Manchurian incident, argued that any response to Japan's actions needed to consider both the institutional and constitutional dimensions of the question. On the institutional level, his view was that the Stimson Doctrine was an entirely justifiable international legal measure. It accorded with general principles of international law, which, he argued, had 'never held that naked force could secure a legal end', but required some legal instrument or measure of general recognition.[343] The actions of the League, in proposing a 'continued concert of action' among members and interested states, further supported the communitarian basis of the doctrine, which substituted for individual force 'a procedure of general consultation manifesting the will of the community of nations as a whole'.[344] As a matter of Japanese legal organisation, however, the difficulties were compounded by 'the division of authority in the Japanese constitution by which the military arm is imperfectly controlled by the civil government

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[340] 'The Secretary of State to the Ambassador in Japan (Forbes)' (7 January 1932) in *Foreign Relations of the United* States, Japan, 1931–1941, vol I, 76. See also the note from the Council of the League of Nations to the Japanese Government, cited in Kisaburo Yokota, 'The Recent Development of the Stimson Doctrine' (1935) 8 *Pacific* Affairs 133.

[341] See Quincy Wright, 'The Concept of Aggression in International Law' (1935) 29 *American Journal of International Law* 373, 378.

[342] See Inazo Nitobe, 'Japan and the Peace Pact' (Report of Radio Broadcast, 20 August 1932) cited in Quincy Wright, 'The Meaning of the Pact of Paris' (1933) 27 *American Journal of International Law* 39; Yokota, 'The Recent Development of the Stimson Doctrine', above n 340. See also Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge University Press, 2012) ch 4.

[343] Quincy Wright, 'The Legal Foundation of the Stimson Doctrine' (1935) 8 *Pacific Affairs* 439, 443.

[344] Ibid 446.

responsible for the conduct of the foreign relations of Japan'.[345] Japan's 'constitutional institutions', he argued, tended to 'act as a spur' to 'war-like activities'.[346] It was therefore 'difficult to avoid the conviction … that a development of the position of parliament and cabinet in Japan beyond the possibility of constitutional challenge by the military would be in the interest of peace'.[347] The constitutional order of the aggressor state would, in the period of transition, come to be an explicit concern of those same states tasked with building an international order for a postwar world.

B *Franz Neumann and Ernst Fraenkel: Constitutionalism against Economy*

i *Franz Neumann, Materialist Theory and Aggression as Empire*

The economic thinking about imperialist expansion and aggression that Wright had rejected also resonated in the writings and work of members of the intellectual movement now known as the Frankfurt School. Some of the members of that School, including Otto Kirchheimer, Franz Neumann and Herbert Marcuse, after emigrating to the United States from Germany, had worked in the Research and Analysis Branch of the State Department advising on how to deal with the German question after the prosecution of the war. Rather than a straightforward harnessing of academic inquiry by the state, however, the marriage of the theoretical and political commitments of the members of the School with intensely practical questions 'resulted in their work at times assuming even more critical contours'.[348] Their proposals were in many ways a radical or revolutionary imagining of the work that law might do after war.

In his work *Behemoth*, first published in 1942, Neumann had undertaken to inquire into the nature and political constitution of the Nazi 'state'.[349] Jewish, a lawyer

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[345] Quincy Wright, 'The Manchurian Crisis' (1932) 26 *American Political Science Review* 45, 47.

[346] Quincy Wright, 'Introduction' in Tatsuji Takeuchi, *War and Diplomacy in the Japanese Empire* (Doubleday, Doran and Co, 1935) xix. T

[347] Ibid xix.

[348] Raffaele Laudani, 'Introduction' in *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort* (Raffaele Laudani ed, Princeton University Press, 2013) 7–8.

[349] Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Frank Cass, 1967, first published 1942) 169. I have greatly benefited from reading Doreen Lustig's work on the relevance

by training and former legal advisor to the *Sozialdemokratische Partei Deutschlands* (the Democratic Socialist party, or 'SPD'), Neumann fled Germany in 1933 and subsequently studied for a doctorate with Harold Laski at the London School of Economics.[350] He joined the *Institut für Sozialforschung*, the institutional home of the School, in 1936. At the time, some members of the School hewed to the theory that the political and economic system of Germany was a variety of state capitalism, in which the existence of private property had been all but erased, and in which the state had achieved the 'primacy of politics' over economic forms of power and exchange.[351] Against this, Neumann had argued that Germany was best understood as an entity composed of the four 'ruling groups' — German industry, the party, bureaucracy, and the military. Each of these groups, on Neumann's account, was possessed of legislative, administrative and judicial power: there was no centralised authority that dictated the direction of politics, but only the product of the agreements and compromises between them.[352] These groups, he argued, showed that the German 'state' was no Hobbesian leviathan, but a Behemoth: able to 'control the rest of the population directly without the mediation of that rational though coercive apparatus hitherto known as the state'.[353]

Neumann's theory of the political and legal organisation of Germany flowed from his reading of the material and social structure of the German economy. Rather than German expansionism being solely guided by the political leadership and its aims, Neumann argued that 'the aggressive, imperialist, expansionist spirit of German big business unhampered by considerations for small competitors, for the middle classes, free from control by the banks, delivered from the pressure of trade unions' was 'the motivating force of the economic system'.[354] The commitment to territorial expansion

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of Neumann and Fraenkel's thought to the Industrialist trials: 'The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials' (2011) 43 *New York Journal of International Law and Politics* 965.

[350] Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923–1950* (University of California Press, 1966) 131–2. See also Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (Oxford University Press, 2003) 260.

[351] Jay, above n 350, 138–142.

[352] Neumann, above n 349, 468–70, 361.

[353] Ibid 470. To do so, Neumann undertook to analyse the material and social structure of the German economy, rejecting theory that rested solely on 'legal or administrative forms': at 224–7.

[354] Ibid 354, 361.

and a greater German legal and racial order on the basis of industrial needs under this system, according to Neumann, merely made explicit the already-existing connection between monopoly capitalism and imperial aggression.[355] It was for the satisfaction of these appetites of German business, made difficult if not impossible under a democratic system with a socialist presence, that new forms of state command of the economy and the corralling of economic activity into the network of industrial combines had been undertaken.[356] He termed this system 'totalitarian monopoly capitalism'.[357] For Neumann, its result was not the subjugation of private industry to the party, but the forming of new legal relationships and networks of collaboration between them.[358]

This diagnosis of the German condition, and of the causes of its militarism and aggression, led Neumann in turn to prescribe a particular set of responses. In order to address the causes of aggression, it was not sufficient that the party and senior bureaucracy be removed from power, or that Germany be disarmed: 'the power of the monopolistic economy must be definitely broken and the economic structure of Germany must be profoundly changed'.[359] Marcuse, too, echoed Neumann's theory in policy documents, where he argued that the 'Nazi constitutional system, if such word is allowed, is … characterized by its complete formlessness, that is by an utter lack of supreme political institutions where leaders can meet, discuss and formulate plans'.[360] Investigating whether German militarism and expansionism could be ascribed to the remnants of the Prussian aristocracy or to the German industrial corporations who had profited from the war effort, Marcuse and Neumann broadly agreed, at least in their advice to the US state, that '[t]he imperialist policy of the German Empire was chiefly the policy of the industrial bourgeoisie'.[361]

If German expansionism was the product of collaboration between the industrial and financial leadership, the Prussian aristocracy, the military and the high bureaucracy

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[355] Ibid 157.
[356] Ibid 34, 261.
[357] Ibid 261.
[358] See the editorial in the *Deutsche Volkswirt* addressing the foundation of the Continental Oil Corporation: ibid 356.
[359] Ibid 476.
[360] Herbert Marcuse, 'Possible Political Changes in Nazi Germany in the Near Future' (10 August 1943) in *Secret Reports*, above n 348, 34.
[361] Herbert Marcuse and Felix Gilbert, 'The Significance of Prussian Militarism for Nazi Imperialism' (20 October 1943) in *Secret Reports*, above n 348, 65.

— or as Neumann put it, the 'ruling class … united by bonds of marriage and material interests' — then resolution of the German question would require a reckoning with this material legacy. Any 'removal from German society of the causes of aggression' had to include the seizure of corporate property on a massive scale, land reform and the sequestration of 'large estates', the restitution of looted property and comprehensive reparations.[362] Although the Frankfurt School opposed the Morgenthau plan to deindustrialise Germany and create an agrarian society, Neumann argued nonetheless for the comprehensive conduct of reparations through taxation of the wealthy and of corporate interests, urging that 'care should be taken to avoid curtailment of vital social services'.[363] In those circumstances, he imagined that a 'fairly stable and fully acceptable government' would, in those conditions, naturally and democratically arise to take the place of the occupying powers.[364]

Essential to Neumann's vision, and that of the Research and Analysis Branch, was that the occupiers 'avoid authoritarian international administration as far as possible so as to enable a social revolution', through which a truly democratic government could be brought about.[365] He considered that in order for such a government to be democratically elected, it would be necessary to offer clarity to the German people on 'whether, to what extent, and what kind of international supervision is to be maintained over Germany after the cessation of [military government], how long it is to last, and under what conditions it is to be changed or abrogated'.[366] That government, in turn, must be 'free to enact expropriation and socialization measures and to provide for far reaching legislative acts intended to eliminate aggressive elements from German society'.[367] Only in this way could it be held to account for the creation of a peaceful

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[362] Franz Neumann, 'The Treatment of Germany' (11 October 1944) in *Secret Reports*, above n 348, 439.
[363] Franz Neumann, 'The Revival of German Political and Constitutional Life under Military Government' in *Secret Reports*, above n 348, 431.
[364] 'Treatment of Germany', in *Secret Reports*, above n 348, 445. See also *Behemoth*, above n 349, 476.
[365] Anne Orford, 'Hammarskjöld, Economic Thinking and the United Nations' in Carsten Stahn and Henning Melber (eds), *Peace Diplomacy, Global Justice and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld* (Cambridge University Press, 2014) 156, 167.
[366] 'Revival', in *Secret Reports*, above n 348, 435.
[367] Ibid 435.

Germany, including '[t]he elimination of the power of big business from economic, social, and political life'.[368]

ii *Ernst Fraenkel, the Prerogative State and Juridical Theories of Aggression*

Neumann's analysis, in emphasising the importance of a politics of material redistribution to any postwar settlement, drew from Marxist and socialist theories of imperialism. As we have seen, however, there was a competing school of thought, spearheaded by Quincy Wright in the United States, that focused on the ideal, political and ultimately juridical causes of aggression. For those that subscribed to this school of thought, a more influential exposition of the juridical–political structures that characterised the Nazi German state was the work of Ernst Fraenkel. A German and Jewish emigré who had worked as a defence lawyer during the Reich, Fraenkel's experience as having been subject to both legal and seemingly extra-legal forms of persecution had led him to theorise the Reich as an Urdoppelstaat, or 'Dual State'.[369] Fraenkel's work, though published the year prior, can be read both as a rival to Neumann's theory of the German state and to Neumann's prescription for the German question. Fraenkel theorised the state along largely juridical, rather than material lines, which centred the problem of the expansion of prerogative jurisdiction. His ultimate prescription for Germany, and for the work of the occupiers, was — in contrast to Neumann's radical economic and democratic vision — an internationally-directed idea of the restoration of the rule of law.

Fraenkel theorised that 'Nazi Germany, far from being the unitary state that the Hitler regime proclaimed it had established, consisted of two *parallel* and *contending* halves'.[370] In the prerogative state, a creature of 'unlimited arbitrariness and violence unchecked by any legal guarantees', officials exercised discretion according to political

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[368] 'Treatment of Germany', in *Secret Reports*, above n 348, 445. See also 'Revival', 431.

[369] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford University Press, 2017, first published 1941). See further Udi Greenberg, *The Weimar Century: German Émigrés and the Ideological Foundations of the Cold War* (Princeton University Press, 2014) ch 2.

[370] Jens Meierhenrich, 'An Ethnography of Nazi Law: The Intellectual Foundations of Ernst Fraenkel's Theory of Dictatorship', in *Dual State*, above n 369, xli. See further Jens Meierhenrich, *The Remnants of the Rechstaat: An Ethnography of Nazi Law* (Oxford University Press, 2018).

aims and in the circumstances of the individual case.[371] The normative state, a technical legal apparatus characterised by predictability, certainty, and the rule according to law that German capital demanded, subsisted under Nazi rule, in which it functioned 'as the legal frame-work for private property, market activities of the individual business units, all other kinds of contractual relations, and for the regulations of the control relations between government and business'.[372] It did so, however, only to the extent that it was not consumed by the prerogative state.[373] Since the two were halves of an 'interdependent whole', the normative state could not be compared to the state of law obtaining under the Weimar republic, but rather, Fraenkel argued, should be considered a beast peculiar to the period of National Socialism.[374]

Having been a lawyer in the Reich, it was perhaps only natural that Fraenkel's analysis began from — and for the most part continued through — an analysis of judicial decisions of German courts and decrees of the administration. His initial diagnosis of Germany's ills centred on an indictment of the German courts, who, 'possessing no guiding traditions in questions of constitutional law, never succeeded in establishing a claim to jurisdiction' after the Weimar Republic declared a state of siege in 1933, thus easing the way for National Socialism.[375] Under the Third Reich, there were 'no decisions on constitutional questions as such'.[376] Instead, Fraenkel argued, a series of judicial decisions had led to a position where administrative decrees, exercises of discretion, and finally the political precepts of the party prevailed over the Weimar Constitution.[377] Critically, the political authorities had the ability to decide on the limits of their own jurisdiction, and in so doing, to 'draw[] the line' between the normative and prerogative halves of the state.[378] In this sense, Fraenkel argued, there was no clear separation of functions or any area entirely free from the exercise of arbitrary power:

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[371] Fraenkel, *Dual State*, above n 369, xiii.
[372] Ibid 185.
[373] Ibid 61.
[374] Ibid 71.
[375] Ibid 6.
[376] Ibid 13.
[377] Ibid 14–16.
[378] Ibid 30, 38.

rather, under the prerogative state, 'politics is that which political authorities choose to define as political'.[379]

What accounted for the continued existence of the normative state, under which 'the legal foundations of the capitalistic economic order [had] been maintained' by the German courts?[380] Fraenkel's initial thinking on this had been influenced by Marxist and socialist legal thought, as well as by the work of his former colleague Franz Neumann, with whom he had set up a law practice in the late 1920s.[381] But the original German work refuted what he saw as some of their oversimplifications:

> We are far away from claiming that big agriculture and heavy industry raised the Hitler movement as their vassal, so to speak. The course of world history cannot be explained in such simple terms, nor can the materialist conception of history be applied in such a crude fashion.[382]

After consulting with scholars in the US on publishing for an American audience (including Carl Friedrich, who also provided comments on the manuscript) Fraenkel further distanced himself from theories of the Nazi state that emphasised the constitutive role of capital in German expansionism and aggression.[383]

Fraenkel argued that the cartels, who had sought to free themselves from political interference, were merely 'organs' of the normative state: it was the courts and the National Socialist party that were its primary guardians.[384] He described the relationship between the industrial élites and the Nazi government, in which they were heavily represented, by quoting Schumpeter's assertion that '[n]ationalism and militarism are not created by capitalism. They become, however, capitalized and, finally

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[379] Ibid 42, 68–9. To this extent, Fraenkel agreed with Schmitt's assessment that '[t]he sovereign is he who has the legal power to command in an emergency' and to determine the limits of that emergency: at 57, citing Schmitt's *Politische Theologie*.

[380] Ibid 72. See further at 76–8 (on ongoing protections for contract, property and the predictability necessary for tax assessments); 173 (on modifications to specific private property rights). With the exception of Jewish people in Germany, which were subject to the prerogative rather than the normative state: at 89.

[381] Kelly, above n 349, 260.

[382] *Dual State*, above n 369, liii.

[383] Ibid liii.

[384] Ibid 71–97.

they take their best strength out of capitalism'.[385] Fraenkel accepted that, in general, the work of arming Germany and of expansionist war had enhanced the safety of income from private property.[386] On his account, however, because of the modern 'necessity for decentralization of certain functions in any large-scale society with advanced technology', it was not industry that fuelled the prerogative state, but ultimately the prerogative state that needed private enterprise, and allowed for the normative state that sustained it.[387] This account led him to the conclusion that the true enemy was not the imperial tendencies of capitalist relations but the prerogative state that had nurtured and corrupted them, and from which they could be redeemed.

The effects of this conclusion can be observed in Fraenkel's answer to the quandary facing international lawyers after the war. How was it possible to justify transformation under occupation, avoiding the guarantee of protections to a people that had so recently emerged from fascist rule? In his 1944 writings on the Rhineland occupation after 1918, Fraenkel had anticipated the calls of international lawyers for the departure from existing rules on occupation, and sought to critique what he felt were their uncomfortable associations. The Nazi jurist Carl Schmitt, he argued, 'in justifying the measures of the Papen regime against the democratic Prussian Government, was to use the same argument, that the bearer of the police power is entitled to do whatever is necessitated "by the circumstances, by the moment"'.[388] On the other hand, given that occupation was a form of foreign domination rather than of political community, permitting a measure of self-determination through some form of popular participation in the occupation government — as would later be demanded by German lawyers — was unrealistic.[389] For law to be observed, it was necessary that law be 'in accordance with the practical requirements of occupation'.[390] In this respect, Fraenkel argued that liberal theories of political self-determination needed to give way to a temporary

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[385] Ibid 183. Schumpeter's reading was in some ways inconsistent with Fraenkel's admission that National Socialism was 'a political phenomenon arising out of the recent stage of capitalistic development in Germany': at 71.

[386] Ibid 173.

[387] Ibid 185, 207–8.

[388] Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland* (Oxford University Press, 1944) 198.

[389] Ibid 205.

[390] Ibid 96.

pragmatism: '[i]t would be a tragic mistake if conformance with the letter of international law should entail a violation of its spirit and intentions'.[391]

Fraenkel described the task of occupation, and of military government overall, as being to ensure the restoration of the rule of law. Like Wright, he opposed a view of law in which the political order of a state — particularly a fascist order — had to be maintained subject to narrow exceptions of military necessity. Was it right to say, in other words, that '"the sacred right of revolution" [is] suspended indefinitely by invasion?'[392] His answer, like Neumann's, was that the realities of foreign interference under the conditions of occupation were unavoidable: in a situation where political actors compete for pre-eminence in a future governmental order, '"[n]on-intervention is difficult to define; it is almost the same as intervention"'.[393] The task of the occupier in postwar Germany was not to preserve a situation where that very preservation was itself political. Rather, it was to 'decide what part he will take in the internal struggle for power'.[394] But the role that Fraenkel proposed for the occupier was not to support the radical vision of economic democracy and political revolution put forward by Neumann. Instead, Fraenkel's vision of the role of military government was the elimination of the 'prerogative state' and of 'German institutions that are contrary to the idea of the Rechtsstaat', along with the granting of 'civil liberties' and protection from arbitrary interference.[395] In other words, it was a narrower vision of internationally-directed political and legal reconstruction that did not account for the role of the economy in the problems of empire.

C *Carl Friedrich: Constitutionalism as Dictatorship*

If constitutionalism, rather than economic redistribution, provided part of the answer, one problem yet remained: how could democratic change be achieved by undemocratic means? This was the problem that Carl Friedrich aimed to solve. Friedrich's writings during and after the war were aimed at producing a political theory

[391] Ibid 189.
[392] Ibid 32.
[393] Ibid 32. See also 'Revival' in in *Secret Reports*, above n 348, 427.
[394] Ibid 32. In this, he wrote, he had an ally in Carl Friedrich: at 229.
[395] Ibid 230–1.

of the transformation of foreign territory under military occupation. The question that he sought to answer was how the United States' vision of democratisation of the defeated enemy states could be justified, employing as it did the authoritarian technique of political change through military government.[396] Friedrich aimed to theorise this 'new' postwar type of military occupation, a 'politico-military phenomenon whose boundaries, as a science or a profession, have not yet been defined'.[397] His answer, which he termed 'constitutional dictatorship', can be read as both an answer to the question of under what conditions an internationalised transformation could be conducted, as well as a description of a process that Friedrich had been intimately involved with.

German-born, and with a doctorate in sociology from Heidelberg, Friedrich had emigrated to the United States in 1926, in his mid-20s, and was later appointed professor of government at Harvard University.[398] In 1942, believing that a responsible bureaucracy was central to new forms of administrative government, he had helped to found the new Harvard School of Overseas Administration, designed to provide training for a new class of postwar international bureaucrats to be deployed to locations including Italy, Germany and Japan.[399] Due to his expertise in constitutional law and theory, and familiarity with the downfall of the Weimar Republic, he was later appointed governmental affairs adviser to both Military Governor of Germany Lucius Clay and the Control Council in 1948, in which capacity he was 'in constant touch' with the German Parliamentary Council, the body that would draft the German Basic Law.[400]

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[396] See Carl J Friedrich, 'Military Government and Democratization: A Central Issue of American Foreign Policy' in Carl J Friedrich (ed), *American Experiences in Military Government* (Rinehart & Company, 1948) 3, 3–4.

[397] Sydney Connor and Carl J Friedrich, 'Foreword' in Sydney Connor and Carl J Friedrich (eds), *Military Government* (American Academy of Political and Social Science, 1950) vii.

[398] See Carl Friedrich, 'Military Government and Dictatorship', in Commander Sydney Connor and Carl J Friedrich (eds), *Military Government* (American Academy of Political and Social Science, 1950) 1, 7. See also Paul Sigmund, 'Carl Friedrich's Contribution to the Theory of Constitutionalism-Comparative Government' (1979) 20 *Nomos* 32. Friedrich went on to advise on a number of constitutions, including the constitutions of Puerto Rico and the European Constituent Assembly.

[399] Greenberg, above n 369, 54–5.

[400] See Spevack, above n 28, 189. See also Edward N Peterson, *The American Occupation of Germany—Retreat to Victory* (1977). He was also previously special governmental advisor to Civil Affairs Division in the War Department, the Office of Military Government of the US, and Lucius Clay in his capacity as Deputy Military Governor from 1946–1947.

i *Military Government as Constitutional Dictatorship*

For Friedrich and his fellow travelers in the US, political and legal change under occupation represented the most effective method of disarmament. They shared with the Soviets the conviction that, against the challenge of fascism, the removal of armaments from a vanquished power would not remove the imperatives of territorial expansion for which military force was a technique.[401] Political reorganisation, along with the establishment of a form of international government, was in Friedrich's view 'the only effective guaranty for lasting peace between nations'.[402] But under what circumstances was it lawful or excusable to impose constitutional democracy through force? And how was it possible to preserve a degree of the wartime commitment to popular self-determination in the face of such aims?

Unlike many international lawyers, who had argued for temporary but expansive ideas of the occupiers' authority, Friedrich accepted that a theory of what was taking place needed to allay the concerns of an Anglo-American public that this kind of military government was an undemocratic and coercive form of rule 'more nearly akin to dictatorship than to democracy'.[403] The language of constitutionalism also offered a means of responding to German claims that the authoritarianism of military government, and the forms of violence that it enabled, was uncomfortably close to their experience of Nazi rule and the economic spoliation that had accompanied it.[404] While acknowledging that 'a certain amount' of authoritarian and terroristic measures, including slavery and execution, had occurred under Western Allied rule, Friedrich argued that the innate tendency of 'the military government of constitutional democracies' was to 'continually relax[] these controls as it moves toward the establishment of a constitutional system'.[405] It was this form of military government that he labelled 'constitutional dictatorship'.[406]

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[401] Carl Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Little, Brown and Co, 1941) (first published in 1937 as *Constitutional Government and Politics*) 81.
[402] Ibid 82.
[403] Friedrich, 'Military Government and Dictatorship', above n 398, 1. See also Carl J Friedrich, 'Military Government as a Step toward Self-Rule' (1943) 7 *Public Opinion Quarterly* 527, 531.
[404] See Friedrich, 'Military Government and Dictatorship', above n 398, 1.
[405] Ibid 1.
[406] As distinct from 'totalitarian dictatorship'. See also Clinton L Rossiter, *Constitutional Dictatorship* (Princeton University Press, 1948); Frederick M Watkins, 'The Problem of Constitutional Dictatorship' (1940)

Friedrich described 'constitutional dictatorship' as drawn from an institution that emerged in the Roman empire 'for the explicit purpose of protecting the constitution against exceptional dangers'.[407] In his major work on constitutional government, published in 1941, he had described the tendency of '[e]very modern constitution' to 'provide for a temporary concentration of powers to be used in overcoming such emergencies'.[408] Constitutional dictatorship was his term encompassing 'all such methods' of emergency rule, including the civil law 'state of siege', as well as 'martial law', 'emergency power', and what Carl Schmitt had in the interwar period described as the 'commissarial dictatorship' of earlier times.[409] Far from being a constitutional deviation, the provision for such emergency was, according to Friedrich, 'the final test' of an effective constitutionalism, since 'a government which cannot meet emergencies is bound to fall sooner or later'.[410] Unlike Schmitt, however, Friedrich sought to establish a concept of constitutional dictatorship in which Schmitt's 'exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation' took place across national borders, rather than within them.[411] In this sense, what Friedrich was proposing was a new form of international rule.

Prior to 1914, questions of occupation, as another form of international rule, were understood largely to have taken the form of the 'elaboration of basic theories on the status of occupations' rather than an interrogation of their political ends.[412] As we have seen, however, international legal scholarship on constitutional government during the interwar and postwar period had begun to shift in focus, from theories of international legal authority based on status to ones that grappled explicitly with the politics of the postwar transition. A growing number of international lawyers and administrators sought to accommodate that shift through practical readjustment of international legal rules, replacing a concern with the coincidence of *imperium* and

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1 *Public Policy* 324. Though neither Watkins nor Rossiter's theories were obviously directed to constitutional dictatorship as a form of military rule by one state over another.

[407] Friedrich, 'Military Government and Dictatorship', above n 398, 3.

[408] Friedrich, *Constitutional Government and Democracy*, above n 401, 236.

[409] Ibid 236. See also Carl Schmitt, *Dictatorship: From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (Michael Hoelzl and Graham Ward trans, Polity, first published 1921, 2014 ed).

[410] Friedrich, *Constitutional Government and Democracy*, above n 401, 250.

[411] Schmitt, *Dictatorship*, above n 409, citing Carl Schmitt, *Diktatur*, in *Staatslexikon im Auftrage der Görregesellschaft* (Herder, 1926) vol I, 1448.

[412] Feilchenfeld, above n 240, [61].

dominium with one focused on functional questions of the capacity to rule and the product of that rule.[413] Friedrich had elsewhere suggested an adjusted taxonomy of the categories of occupation: dividing pacific occupation (*occupatio pacifica*) into a preliminary and a final stage (*occupatio pacifica preliminaria* and *pacifica finalis* or *permanens*).[414] But the overall effect of his work was to suggest that the formalist focus on categories, such as the distinction between belligerent and pacific occupation, no longer accorded with the changing practice of the Allied states. Like many international lawyers at that time, Friedrich's inclination was to bypass questions of the precise source of title, and the corresponding status of the governed. He did so in order to concentrate on the 'unprecedented task' of 'building a constitutional government'.[415]

This is not to suggest that Friedrich was unconcerned with the political and juridical limits of this task. On his account, constitutional dictatorship, as a juridical form of international rule, was properly understood not as unbounded, but as tightly confined by 'constitutional provisions'.[416] These provisions, the origins of which Friedrich located in the Roman tradition, 'determine … who decides when the state of emergency exists … who is to appoint the dictator, … for how long a period such powers are to be exercised, and … for what purposes it may be employed'.[417] In other words, the conditions of restraint were not to be found in international legal instruments, such as the treaties governing the laws of war, or principles derived therefrom contained in military manuals. Instead, they were located in the authority given to the dictator and the limits placed on it by the domestic structures of the granter of that authority — in this case, the Allied states. Although the legal form of constitutional dictatorship might be understood as derived from Roman law, its political effect in the postwar period could not have been more different. While the Roman commissioner could, by design, legitimately became a permanent feature of monarchical bureaucracy, '[w]hen the constitutional dictatorship becomes permanent, it becomes unconstitutional and leads to

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[413] Orford, *International Authority*, above n 13, ch V. See, eg, F A Mann, 'The Present Legal Status of Germany' (1947) 1 *International Law Quarterly* 314, 329.

[414] Charles J Friedrich, 'Rebuilding the German Constitution, I' (1949) 43 *American Political Science Review* 461, 474. For which he was roundly mocked: see von Glahn, above n 414, 285.

[415] Friedrich, 'Rebuilding I', above n 414, 461.

[416] Friedrich, 'Military Government and Dictatorship', above n 398, 3.

[417] Ibid 3.

the perversion and eventual overthrow of the constitutional order'.[418] As articulated by Friedrich, the legality of modern constitutional dictatorship turned on its very impermanence, as well as two specific conditions that would ensure that impermanence.

The first condition was that a constitutional dictatorship should be 'established by a constitutional government' such as the United States.[419] This turn to his adopted homeland as a guarantor of international liberalism, for Friedrich, reflected a faith in the ethic of constitutionalism. Defined as the maintenance of 'effective restraints' on government through the division of power between its various branches, constitutionalism was 'the greatest achievement of modern civilization, without which little or none of the rest is conceivable'.[420] Established on the basis of enlightened liberal disagreement rather than utopian politics, this form of government was 'the result of a perpetual struggle of the better against the worse elements of humanity'.[421] His pre-war writings had argued that what was required in order to create a new and foundational law for a political community was not some revolutionary or radically democratic mobilisation of the people, understood as a totality. Instead of popular sovereignty — 'a confused expression at best' — his constitutional theory urged a focus on the 'constitutional group' that in fact exercises the 'revolutionary, residuary, constituent power of establishing a new constitution'.[422] This 'constituent power' of his constitutional theory was the ultimate insurance for the 'procedural devices' of appointment, delegation and temporal limits that attached to the use of emergency power.[423] When it came time to operationalise this theory in the international sphere, and in the context of the failure of the German elites to safeguard Weimar republicanism, Friedrich turned to the traditions of American constitutionalism and to the American electorate as a source of restraint and responsibility. 'Full, and at times sharp, even unjust, criticism', he wrote, 'by the representative bodies and by the public

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[418] Friedrich, *Constitutional Government and Democracy*, above n 401, 238.
[419] Friedrich, 'Military Government and Dictatorship', above n 398, 3.
[420] Friedrich, *Constitutional Government and Democracy*, above n 401, viii.
[421] C J Friedrich, 'The Deification of the State' (1939) 1 *Review of Politics* 18.
[422] Friedrich, *Constitutional Government and Democracy*, above n 401, 16.
[423] Friedrich, *Constitutional Government and Democracy*, above n 401, 251.

both in Britain and in the United States has tended to ensure the employment of these dictatorial powers for constitutional purposes'.[424]

The second condition was that constitutional dictatorship be instituted 'for the express purpose of re-establishing constitutional government' in the occupied territory.[425] The military government of the Western Allies, which according to Friedrich, conformed — unlike that of the Soviet zone — to those conditions, 'far from being a totalitarian dictatorship, [was] instituted precisely for the purpose of preventing its recurrence'.[426] This reflected a view that constitutionalisation of the polity itself was the only justifiable goal. Friedrich saw the US model of constitutionalism as an answer to the excesses of fascist imperialism, realised through governmental power. Like Wright, he believed that a federal constitutionalism, such as that of the United States, could 'provide for a greater diffusion of this power both by making it work slowly, and in separate localities', while at the same time avoiding the 'absolute prohibitions' that were apt to lead to violent revolution.[427] Seen properly, the military force of the Allies had been directed 'not toward imposing democracy, but toward imposing restraints upon those elements of the population who would sabotage efforts of the constitutionalists and who would seek to undermine and eventually destroy constitutional democracy'.[428] Understood as confined within these conditions, constitutional dictatorship was a form of liberation rather than an unacceptable imposition.[429]

ii *Constitutionalism as Law after Empire?*

Although constitutional dictatorship was most immediately a means of developing new legal and political institutions for domestic rule in Germany and Japan, Friedrich conceived of it as part of a larger international and post-imperial project. The setting for such a project was the tumult of the Second World War and its aftermath, a

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[424] Friedrich, 'Military Government and Dictatorship', above n 398, 7.
[425] Ibid 4. See also Friedrich, *Constitutional Government and Democracy*, above n 401, 238.
[426] Friedrich, 'Military Government and Dictatorship', above n 398, 3.
[427] Friedrich, *Constitutional Government and Democracy*, above n 401, 151.
[428] Friedrich, 'Military Government and Dictatorship', above n 398, 6–7.
[429] Ibid 7.

period of rapid and profound upheaval for international relations not seen since the collapse of the medieval empires.[430] Friedrich's most immediate postwar concern was the widespread appeal of communist politics, the implementation of which, he argued, would inevitably provoke a fascist reaction to the demise of liberal capitalism.[431] Entrenching Western forms of constitutional democracy around the world, while also instrumentally accepting a degree of socialist economic welfare and reform in order to gain popular support, was therefore essential to securing a peaceful international order: for Friedrich, it was constitutionalism or barbarism.[432] As part of this endeavour, the successful constitutionalisation of Germany — operating in tandem with its economic reconstruction — was, for both Friedrich and Clay, 'the heart of the military government enterprise'.[433]

As we have seen, Friedrich believed that it was the peculiarly American brand of this constitutionalism that provided a means of distinguishing this project from previous forms of colonialism and empire. 'How to carry forward these and similar policies, and not to become imperialist in the process', he argued, 'is the challenge confronting the United States as an occupying power today and for many years to come'.[434] At the same time, Friedrich was adamant that the 'positive obligation to forward the forces of constitutional democracy' deriving from the fact of American military government was different from the theories of 'a partisan of the Soviet Union, or a believer in a Tory philosophy of imperialism and the "white man's burden"'.[435] This was in keeping with official US urgings at the time that the proliferation of military bases across the Pacific should 'appear to be motivated by peace and collective security rather than imperialism'.[436] The new American empire was to be an empire of 'free trade' rather

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[430] Friedrich, 'Military Government and Democratization', above n 396, 6.

[431] Ibid 19–20.

[432] 'Any insistence that the economic problems of reconstruction be handled by free enterprise will put American into a reactionary camp which is occupied mostly by men who have little use for democracy': Ibid 21.

[433] Ibid 22.

[434] Carl J Friedrich, 'Preface', in Carl J Friedrich (ed), *American Experiences in Military Government* (Rinehart & Company, 1948) v.

[435] Ibid viii.

[436] Dayna Barnes, *Architects of Occupation: American Experts and Planning for Postwar Japan* (Cornell Press, 2017) 24.

than one of territorial expansion and colonial rule.[437] In the context of this endeavour, and the new forms of government that it would demand, Friedrich's suggestion that the German occupation had 'intrinsic importance … as a possible precedent' for temporary forms of international rule takes on an additional importance.[438]

Friedrich defined his theory of constitutionalism in opposition to the critiques of thinkers like the British political theorist Harold Laski, and Polish Marxist theorist and revolutionary Rosa Luxemburg, who had each asserted the linkages between constitutionalism, on the one hand, and capitalism or imperialism, on the other. For Laski, constitutionalism could be understood as an historically specific aspect of the liberal experiment that had transformed European society and government since the seventeenth century. The project of creating a global market in which men with property could thrive required, he argued, a corresponding theory of political authority in which state interference was limited 'to the narrowest area compatible with public order'.[439] Understood materially and historically, then, constitutionalism was bound up with capitalism: 'with its substitution of rule for discretion, of civil liberty for monarchical caprice, [it] is the answer of the business men to the failure of national economy to serve his needs'.[440]

For Luxemburg, imperialism, and the military violence that accompanied it, was an inevitable result of the ongoing European search for new markets, raw materials, and labour. Though this search, and the political transformations that it wrought, was often justified in the name of liberal political progress, she argued that it should properly be understood as 'little more than a vehicle for the economic process'.[441] French colonialism and liberal governmental reform in Algeria, for example, conducted in the name of 'instituting orderly and civilised conditions', was in reality self-confessedly directed toward 'the establishment of private property among the Arabs' and the

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[437] Ibid 25; Neil Smith, *American Empire: Roosevelt's Geographer and the Prelude to Globalization* (University of California Press, 2003) 19.

[438] Friedrich, 'Preface', above n 434, vii.

[439] Harold J Laski, *The Rise of European Liberalism* (Allen & Unwin, first published 1936, 1958 ed) 17.

[440] Ibid 63. On history, materialism and method, see at 17.

[441] Rosa Luxemburg, *The Accumulation of Capital* (Agnes Schwarzchild trans, Verso, first published 1913, 2003 ed) 433. See also Knox, above n 195, 160–1.

forcible enabling of a capitalist economy.[442] Seen in this light, liberal constitutionalism, and its encouragement among so-called uncivilised peoples, was merely an aspect of the 'continuous and progressive disintegration of non-capitalist organisations [that] makes accumulation of capital possible'.[443]

Friedrich rejected what he read as attempts to locate constitutionalism as an historically specific accompaniment to capitalist or imperialist rule. For him, the obligation to foster constitutional democracy was rooted in a firm belief in the universality of the principles and practices of constitutionalism. This universality entailed an even-handed rejection of both fascistic ideas of biological determinism as well as the potentially emancipatory or anticolonial attachment to national difference.[444] It was also a method of distinguishing postwar constitutionalism from pre-war empire. Although the idea of 'free institutions' had spread to America through British imperialism, the United States was the paradigmatic exemplar of this tradition of constitutionalism: in shaking off its own imperial rulers, Friedrich viewed the American Revolution, with its commitment to republicanism and individual rights, as having set in motion the constitutionalisation of the British empire itself.[445] Though practices of transformative military government also had their parallels with American pre-war forms of imperialism, in particular in the Philippines, Friedrich sought to distance his proposals from the 'implied superiority of the conqueror' that had there accompanied 'a greater moral concern … with the assumed welfare of the occupied people'. [446] Such openly racialised ideas had no place in a post-fascist world and the new, post-imperial constitutionalism that he hoped would characterise it. Such a world, he argued, 'must recognize the purely functional nature of such concepts as order and the state. Indeed, we may go so far as to assert that *the state does not exist*.'[447] This 'functional' theory of sovereignty would clear the way for recognising that the 'higher standards' of constitutionalism 'do not originate in the government, but must be imposed upon it'.[448]

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[442] Luxemburg, above n 441, 359–60.
[443] Ibid 397.
[444] See Friedrich, *Constitutional Government and Democracy*, above n 401, 24–5.
[445] Ibid 42.
[446] Friedrich, 'Military Government and Dictatorship', above n 398, 3.
[447] Ibid 29 (emphasis in original). On functionalism, and the disappearance of the language and concerns of 'status' in international law, see Orford, *International Authority*, above n 13, ch V.
[448] Friedrich, 'Deification', above n 421, 30.

What was required, in his view, was a new theory of the state which would enable the US to 'look[] at the world in terms of a common humanity and its emerging common ends'.[449]

That universalism also permitted Friedrich to incorporate aspects of the civilisational thinking that had characterised the interwar period within a framework of constitutionalism. This framework located Germany, as well as Japan, at different stages within a hierarchy of constitutional development.[450] Friedrich's American education and engagement with the US constitutional system had shaped his views on what he termed the 'less advanced stage of constitutional and democratic development in Europe'.[451] Since American military government also tended to be conducted 'according to law', at least as far as the inferior European situation required, the suspension of legal norms normally associated with military government was less problematic than it first appeared.[452] In the German context this lawfulness, combined with the tendency of military government to promote 'government more according to law', was sufficient to justify the emergency powers and wide discretion accorded to the military governor.[453] Here, Friedrich considered that administration could be relied on to lead to a revival of the 'German democratic tradition' that had existed before the Fascist period.[454]

Outside Europe, however, Japan and its territories, 'many of which have never been subject to the rule of law or anything like it', presented 'distinct problems' for military government.[455] Friedrich, and his colleagues at the School for Overseas Administration, suggested that what was called 'law' in Japan was better regarded as 'personal loyalty to leaders and obedience to official whims … a sort of advance notice

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[449] Ibid 29.

[450] On civilisational ways of thinking about the former Axis states, see generally Ricarda Torriani, 'Des Bédouins particulièrement intelligents? La pensée coloniale et les occupations française et britannique de l'Allemagne (1945–1949)' (2006) 17 *Histoire & Société* 56.

[451] Friedrich, 'Self-Rule', above n 403, 538.

[452] Ibid 538.

[453] Whose task it was to 'sort[] the genuine wheat of democracy from the chaff of political opportunism and racketeering': Ibid 541.

[454] Carl J Friedrich, 'Rebuilding the German Constitution, II' (1949) 43 *American Political Science Review* 704, 705.

[455] Friedrich, 'Self-Rule', above n 403, 532.

of official intentions that are subject to change as a result of official caprice'.[456] Not only did they regard these laws as insufficiently constant and certain to meet the very definition of law, they argued that in many cases they 'serve only as ornaments to impress the Occident or to placate local pressure groups; they are neither enforced nor honored'.[457] What they termed the 'backward' Japanese form of government — and regarded as a 'government by men' rather than law — did not so much require a departure from the laws of war as simply fail to 'fit the pattern' on which the Manual and the laws of war were premised.[458] This was not to say, however, that the 'enjoyment of free institutions' and the 'blessed state' of constitutionalism should remain 'the exclusive privilege of a highly select circle of West European nations, to which no barbarous outsider can reasonably hope to aspire' — far from it.[459] But because of the failure of the Meiji constitution to properly take root, if genuine constitutionalism was to be achieved, it would need to come as a 'revolutionary creation' from outside.[460] Paralleling the language used to justify the mandates under the League, these authors argued that for any new constitutionalism to survive the 'strain of the modern world', what would be needed was a 'framework of international agreement and cooperation' to oversee its emergence.[461]

For Friedrich, the conduct of such a task by military government was not only excusable but necessary. After all,

> what is liberation, in the democratic and constitutional tradition, but the effort to help people achieve constitutional freedom by combating and defeating those who would deny this freedom to them? To do this by the temporary and strictly defined use of military force is the essence of constitutional dictatorship. *Consules videant ne*

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[456] C J Friedrich and D G Haring, 'Military Government for Japan' in *Japan's Prospect* (Harvard University Press, 1946) 411.
[457] Ibid 411.
[458] Ibid 412.
[459] Frederick Watkins, 'Prospects of Constitutional Democracy' in *Japan's Prospect* (Harvard University Press, 1946) 306.
[460] Ibid 37. On the racialised belief that aggression was 'in the blood' of the Japanese people, see Barnes, above n 436, 18.
[461] Watkins, above n 459, 326, 329.

respublica detrimentum capiat [Let the consuls see to it that the state suffer no harm].[462]

IV CONCLUSION

I have argued that constitutional forms of international legal thought gained prominence in the middle part of the twentieth century as a way of thinking about law and war. Occupation, as a body of rules outlining how European (or 'civilised') states might govern and acquire territory, came under pressure following the crises of the interwar period and the Second World War and the rival forms of military and economic imperialism that characterised them. During this period, Allied international lawyers considered ways to reshape the international order for a postwar world. This was perceived to require a means of preventing imperial aggression, to which constitutionalism offered one solution. In this chapter I have illustrated this constitutionalist way of thinking about international law, through reference to the work of Quincy Wright, Ernst Fraenkel and Carl Friedrich.

Wright proposed a departure from older practices of peace settlement to a period of 'transition' and transformation, including constitutional transformation. He was a believer in the potential of constitutionalism to not only provide for the dispersal of power across government and geographical locations, but also to best conform to Western ideas and traditions of 'civilisation' and commerce. Such a transformation provided the answer to what he termed the 'problem' of the aggressor state. Fraenkel, too, in his analysis of the Nazi state, considered the 'problem' to be primarily the arbitrary and limitless expansion of prerogative jurisdiction, not the workings of capital. This analysis, unlike Neumann's account of empire, tended toward the institutional and constitutional as a solution to the problem of executive power, instead of radical economic change and social revolution. Friedrich, in seeking to implement constitutional order through international rule, took up concerns with limits on such rule, proposing an account in which the constitutionalism of the occupiers, and the

[462] Friedrich, 'Military Government and Dictatorship', above n 398, 7 (author's trans). See also Tetsuya Kataoka, *The Price of a Constitution: The Origins of Japan's Postwar Politics* (C Russak, 1991), 24: '[t]here was no freedom from occupation because occupation was, ipso facto, freedom and liberation'.

product of their occupation, acted as a justification for authoritarianism. For Friedrich, conscious of the rise of modern industrialism and the emerging trading order, constitutionalism also provided a means of distinguishing this rule from its imperial predecessors.

Revisiting these accounts shows the development of a constitutionalist tradition as a way of thinking about international law after war. This was a way of thinking that eschewed formalist questions of prohibitions on, or exceptions to, change effected by states within the government of occupied territory. Instead, it was concerned with the conveyance of substantive views about how states should be governed; what forms of (constitutional) democracy and (liberal) economy were necessary for the preservation of international peace; and pragmatic concerns about what the role of law — and of powerful states — should be in the creation and enforcement of that peace. This tradition can also be situated in opposition to economic and material accounts of imperialism, and more radical visions of economic redistribution and political self-determination. In their place, as we have seen, the civilisational thinking that characterised the international law of the nineteenth century persisted in constitutional thought, through an insistence on the separation of commerce from the political, and through hierarchical ideas of constitutional 'development'. In this sense, these accounts provide a means of exploring the contemporary significance of constitutional thought in international law, and its relationship to the decolonised world.

CHAPTER 3

ADMINISTERING POSTWAR INTERNATIONAL LAW: CONSTITUTION-MAKING UNDER OCCUPATION IN GERMANY AND JAPAN

There is an aphorism to the effect that the dreams of diplomacy are the nightmare of the administrator.

– Alvin J Rockwell, 1950.[463]

I INTRODUCTION

We have seen in Chapter 2 that constitutionalism, as an international legal tradition, emerged as a way of thinking about the work that law might do after war. Understood against the backdrop of competing theories of imperialism, aggression, and the causes of war, the histories of the occupations of Germany and Japan, and of their constitutions, can be read as the formulation of a partial answer to this question: what was the best way to ensure peace through law in a postwar world?[464] Both of these occupations were marked by a resolve to eliminate not only the fact of German and Japanese aggression but its underlying causes.[465] But at their outset, no clear choice had been made by the Allies as to what those causes were, or as to which understanding of empire would dictate the actions of the administrations.

This chapter will proceed through an analysis of the conduct of the Allied occupations of Germany and Japan. First, it will explore the significance of disagreements at the level of administration, rather than at the level of authorisation, for thinking about international law. Secondly, it will trace, through an examination of Allied practices, policies and statements, as well as the different positions taken within Germany and Japan, the competing ideas of what a peaceful world required in the aftermath of imperial aggression. In Japan, initial commitments to a level of political

[463] Alvin J Rockwell, 'Post-War Problems in Occupied Germany: American Democracy versus Russian Democracy' (1950) 36 *American Bar Association Journal* 359, 360.
[464] I have benefited significantly from reading Grietje Baars' *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill, 2019).
[465] Cohen, above n 32, 7.

self-determination for the Japanese people, paired with economic democratisation, gave way to capitalist forms of economic development and internationally-managed constitutional 'revolution'. In Germany, too, ideas of self-determination and removing the economic base of aggression, through the deconcentration of German industry, were replaced by directed federalism and international constraints on the constitutional process, along with the prioritisation of economic recovery. Through revisiting these practices, this chapter explores the shift toward constitutionalism as a technique of international peace and security during this period. Keeping within view those choices that were left to one side, I suggest, enables an illustration of the political possibilities, and limits, of constitutionalism as law after war.

II ADMINISTERING POTSDAM: ALLIED DECISION-MAKING AND THE POLITICAL ECONOMY OF PEACE

In July of 1945, the Allies had come together at Potsdam to create a basis for international legal authority for the occupation of Germany, as well as to outline shared policy for the direction of both that occupation and the eventual occupation of Japan. Here, the temporary consensus was that the Second World War had been motivated, on the part of the aggressors, by the resources, labour and raw materials that the violent acquisition of colonial territory could amply provide. The Atlantic Charter, as a joint statement of the Anglo-American postwar vision, promised the renunciation of territorial expansion and a commitment to certain forms of national self-determination in exchange for 'access, on equal terms, to the trade and to the raw materials of the world'.[466] At the same time, Japan and Germany, despite the destruction of the war, remained immense engines of industry, to the extent that they were referred to as the 'workshops' of Asia and Europe.[467] The aim of military government for Germany, as agreed at the Potsdam Conference, was to return it to a state of peace, understood in both economic and juridical terms.

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[466] *The Atlantic Charter: Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom* (14 August 1941).

[467] William R Nester, *Power Across the Pacific: A Diplomatic History of American Relations with Japan* (Macmillan, 1996) 234, quoting US Undersecretary of State Acheson.

To instate such a peace, the Agreement provided, first, for the 'complete disarmament and demilitarisation of Germany', including 'the elimination or control of all German industry that could be used for military production'.[468] But it also recognised that a peaceful international order would necessarily require a restructuring of the German economy in order to break up or 'decentralize' the 'present excessive concentration of economic power'.[469] Similarly, the object in relation to Japan was to permit a level of industry required to 'sustain her economy and permit the exaction of just reparations', but not one that 'would enable her to re-arm for war'.[470] This was a condemnation of the large German and Japanese industrial firms that had been so implicated in the impetus to war. Acknowledgment of the role of industry in the war sat alongside the Agreement's provision for the legal 'reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life', and the declaration that, following surrender, Japan too would undergo a period of political reconstruction aimed at the 'strengthening of democratic tendencies among the Japanese people', with occupation to endure until such time as 'there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government'.[471] Whether this reference to ideals of popular sovereignty and self-determination, in the context of economic transformation, implied a potentially radical idea of social revolution, or a narrower idea of institutional reform, was left unwritten.

Allied disagreements about the conduct of the occupations were broadly depicted as disagreements of administration, rather than articulated as questions of binding obligations.[472] To the contrary, the official Allied position taken in both Germany and Japan toward the authority of the occupations was often framed in general

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[468] See 'Proclamation Calling for the Surrender of Japan' (26 July 1945) in *Foreign Relations of the United States*, The Conference of Berlin (The Potsdam Conference), 1945, volume 2, 1474 ('Potsdam Declaration'); 'Protocol of the Proceedings of the Berlin Conference' (1 August 1945) in *Foreign Relations of the United States*, The Conference of Berlin (The Potsdam Conference), 1945, vol II, 1477 ('Potsdam Agreement'). See generally Chris Tudda, *Cold War Summits: A History, from Potsdam to Malta* (Bloomsbury Academic, 2015).

[469] 'Potsdam Agreement'.

[470] 'Potsdam Declaration'. Forms of reparations through recapture were strongly favoured by the Soviets given the German occupation had ransacked the country, they said 'almost to the last nail and thread': Herbert Feis, *Between War and Peace: The Potsdam Conference* (Princeton University Press, 1960) 257.

[471] 'Potsdam Agreement'; 'Potsdam Declaration'.

[472] On thinking about administration as a form of international rule, see Orford, 'International Territorial Administration and the Management of Decolonization' (2010) 59 *International and Comparative Law Quarterly* 227.

and expansive terms. In Japan, the US asserted, against Japanese objections, that the terms of Japan's surrender provided the occupation command with 'absolute' authority under international law to undertake measures for the pacification of Japan.[473] Attempts to construe the occupation as limited by the terms of the Agreement were largely undone by Washington's assertion to MacArthur, later published, that 'relations with the Japanese do not rest on a contractual basis but on unconditional surrender'.[474] Some Japanese lawyers, too, came eventually to argue either that the Instrument of Surrender possessed constitutional status, through which the government was legally bound by the orders and directives issued by the military command, or at the very least that the authority of the occupying forces was so wide as to be practically unlimited.[475]

In Germany, the Allied issuance of the Berlin Declaration jointly announced Germany's unconditional surrender and the Allied assumption of 'supreme authority' but expressly disclaimed 'the annexation of Germany'.[476] Allied international lawyers here framed their authority in similarly expansive terms: they argued that '[w]hatever ancient or modern theories or precedents may be advanced to describe the situation, the simple fact is that sovereign power in Germany was assumed and exercised by right of conquest accompanied by unconditional surrender'.[477] Lucius Clay, the Military Governor of Germany from 1947 to 1949 would justify this expansiveness by reference to German aggression, arguing that the conservationist protections of the Hague rules 'cannot be claimed by a state which wages aggressive total war'.[478] This too encountered resistance, including from some German international lawyers, who called

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[473] 'Major General J H Hilldring and Captain H L Pence to the Director of the Office of European Affairs (Dunn)' (18 February 1944) in *Foreign Relations of the United States*, 1944, vol V, The Near East, South Asia, Africa, the Far East, 1190 ('Hilldring-Pence Letter'). Cf the letter from Max Huber to US Secretary of State James F Byrnes, cited in Benvenisti, above n 237, 212. On objections, see 'The Swiss Chargé (Grässli) to the Secretary of State' (16 August 1945) in *Foreign Relations of the United States*, 1945, vol VI, The British Commonwealth in the Far East, 668.

[474] 'SWNCC 181/2' in *Foreign Relations of the United States*, 1945, The British Commonwealth in the Far East, vol VI, 712. Although Nester records that the Japanese government resisted and occasionally altered the implementation of SCAP directives: above n 467, 204.

[475] Obata, above n 31, 22–6, citing the views of Jiro Tanaka and Kisaburo Yokota; cf at 28, citing Ryoichi Taoka.

[476] *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers* (5 June 1945) TIAS No 1520; 60 Stat (2) 1649.

[477] Charles Fahy, 'Legal Problems of German Occupation' (1948) 47 *Michigan Law Review* 11, 12. See also R Y Jennings, 'Government in Commission' (1946) 23 *British Year Book of International Law* 112, 135; and the legal advice to the US cited in Kostal, above n 34, 27.

[478] Josef Kunz, 'The Status of Occupied Germany' (1950) 3 *Western Political Quarterly* 538, 554.

for the Allied intervention to be conducted within specific limits: namely, the avoidance of a situation of 'permanent dependency or control', and the creation of a political entity that was 'endowed with the democratic right of self-determination also against the intervening powers'.[479] That same year, the German *Jahrbuch* published a resolution of a meeting of German international law teachers proclaiming '[t]he inalienable right of self-determination of the German people', including license in questions of constitutional design, 'even as against the occupying powers'.[480] But this challenge to the occupiers' authority seemingly found little purchase either with Allied lawyers, or with the discipline more generally.

This chapter aims to interrogate the broader significance of the invocations of the history of Germany and Japan as precedents for international practices of constitution-making.[481] It seeks to denaturalise these practices by placing their development and eventuation in the wider context of the political and legal alternatives that were put forward. In illustrating the decline of forms of economic redistribution, reparations and nationalisation, it aims to show that constitutionalism's ascendance, as recalled by these histories, coincided with the disappearance of other ways of understanding the work that law might do after war. In doing so, I explore the emergence of constitution-making not primarily as a question of international authority but as an administrative technique.[482] Through this, the chapter offers an alternative reading of the significance of the history of the occupations of Germany and Japan for international lawyers today: one that moves away from a material (and international) understanding of war and its causes toward a more juridicised framing that locates these causes, and proposes techniques for their resolution, within the postcolonial nation-state.

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[479] Wilhelm Grewe, *Ein Besatzungstatut für Deutschland* (1948) 135–6, as summarised in Kurt von Laun, 'Legal Status of Germany' (1951) 45 *American Journal of International Law* 267, 281.

[480] Resolutions, *Jahrbuch für Internationales und Ausländisches Öffentliches Recht*, vol I, 1948, 7.

[481] For this reason, the chapter focuses primarily on constitution-making in West Germany, rather than the little-referenced East German constitution.

[482] On the move from administrative technique to articulation of the authority for that technique see Orford, *International Authority*, above n 13.

III FROM ECONOMIC IMPERIALISM TO CONSTITUTIONAL 'REVOLUTION': REVERSING COURSE IN JAPAN

After Japan's unconditional surrender, the United States' post-surrender policy was to undertake a prolonged occupation and comprehensive disarmament of the nation's military capability. This was understood to involve the dismantling of the Japanese empire and military that had enabled the war effort, but as well as significant changes to both the structure of the Japanese economy, and the constitution, as the legal framework for Japanese political life.[483] This part will explore how the history of the postwar occupation can be narrated as a move away from forms of economic democratisation and political self-determination. In their place came economic development, as part of a broader postwar order, and a managed constitutional 'revolution' that has come to be remembered as the significant legacy of the occupation.

A *Economy after Empire: Positioning the Zaibatsu in the Postwar Order*

The breakup of the large company combines, or 'zaibatsu', and the removal of their wartime leadership from economic positions of influence was initially a key aspect of the planned postwar pacification. The term zaibatsu means 'financial clique', or in today's terminology, perhaps 'business elite', but in Japan took the particular form of large corporate conglomerates, each often controlled by a single family.[484] The urgent promotion of the zaibatsu form, as a way of doing commerce, was a response to the need for Japan, after being forcibly 'opened up' to international trade in the 19th century, to present itself as a fully industrialised and civilised nation able to participate in international relations on an equal footing: as Bisson records, it was 'the price paid by Japan to catch up with the Western world'.[485] Since the 1920s these companies had steadily increased their connections to and influence over the government of Japan.

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[483] US Initial Post-Surrender Policy for Japan', SWNCC 150/4, Department of State Bulletin, September 23, 1945, especially under the heading 'Economic Demilitarization'. See also Takemae Eiji, *Inside GHQ: The Allied Occupation of Japan and its Legacy* (Continuum, 2002) 227.

[484] See Baars, above n 464, 207. Bisson estimates that by 1945 the number of employees of the Mitsubishi combine alone numbered some 2.8 million: T A Bisson, *Zaibatsu Dissolution in Japan* (University of California Press) 11.

[485] Bisson, above n 484, 34. See further R P Anand, *Studies in International Law and History: An Asian Perspective* (Martinus Nijhoff, 2004) 24–102.

During the war, permissive legislation had enhanced their 'dominant economic position', and 'hybrid agencies' with state capital and a measure of state control were created for international ventures, such as 'Manchuria Colonization' and 'Imperial Mining Development'.[486] Popular works in circulation in the US quoted zaibatsu leaders in Japan, who had came to take the view that

> [n]o matter how diligent the Japanese may be, no matter how superior their technical development or industrial administration may be, there will be no hope for Japanese trade expansion if there is no adequate force to back it. [487]

Such statements did not go unnoticed by US administrators. General MacArthur, the US military governor of Japan during the occupation, attributed significant responsibility for the conflict to the zaibatsu, stating that '[i]t is these very persons…who, working in closest affiliation with the military, geared the country with both the tools and the will to wage aggressive war'.[488]

This policy had two main parts: first, disaggregating the corporate combines and reestablishing their constituent parts as separately controlled companies; and second, a purge of all those who had formerly held 'wartime business posts of high responsibility' and 'all who failed to direct Japan's postwar economy toward peaceful ends'.[489] Each began in earnest during the first year of the occupation with the announcement of the liquidation of the holding companies of the big four zaibatsu, the sale of securities in their subsidiaries to the public, and the resignation of family members of these four companies.[490] This was followed by plans for a ban on securities trading and asset disposal, as well as reorganisation of subsidiaries, the abolition of restrictive contracts and the deconcentration of monopolies.[491] Next, the military government announced a

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[486] Bisson, above n 484, 13–14.

[487] Baars, above n 464, 208, citing Fujiwara, head of the Mitsui combine, in *Spirit of Japanese Industry*.

[488] Montgomery, *Forced to be Free: The Artificial Revolution in Germany and Japan* (University of Chicago Press, 1957) 99. See also Cohen, above n 32, 157–8. MacArthur has been called the 'last of the great colonial overlords': Eiji, above n 483, 5.

[489] Bisson, above n 484, 39. For a timeline of dissolution and deconcentration measures, see Yoshiro Miwa, 'Economic Effects of the Anti-Monopoly and Other Deconcentration Policies in Postwar Japan' in Juro Teranishi and Yutaka Kosai (eds), *The Japanese Experience of Economic Reforms* (St Martin's Press, 1993) 129, 139–40.

[490] SCAPIN [Supreme Commander of the Allied Forces Instructions] 244, 'Dissolution of Holding Companies' (6 November 1945); Bisson, above n 484, 73–4, 93, 96.

[491] SCAPIN 215, 'Sale or Transfer of Securities of Certain Business Firms' (31 October 1945), 403, 'Establishment of a Schedule of Restricted Concerns' (8 December 1945), 408, 'Regulations Affecting

purge of persons holding 'posts of major business responsibility' during the period of military aggression from the arena of corporate life.[492] The Attlee government of the United Kingdom had gone a step further, reportedly proposing in the Far Eastern Commission, which nominally oversaw occupation policy, that industries in certain key areas, including those critical to the war effort, such as coal, iron and steel, be nationalised.[493] Though similar options of nationalisation had been discussed internally within US government departments, this option was rejected by the US.[494] Instead, the aim of the military government became the creation of a 'competitive, private enterprise economy' in the occupied state.[495]

Plans to reduce the power of the company combines in the early phases of the occupation sat alongside a commitment to longer-term measures for the pacification of the Japanese economy. Such measures rested on an understanding that certain 'forms of economic activity, organization and leadership' would be 'likely to strengthen the peaceful disposition of the Japanese people, and to make it difficult to command or direct economic activity in support of military ends' and that it was the role of the occupying power to encourage such forms.[496] This process, termed 'economic democratization', entailed significant domestic reforms, including land reform and the distribution of ownership, and the promotion of 'organizations in labor, industry and agriculture organized on a democratic basis', or trade unions.[497] The effect of this was a postwar shift from a still partly 'feudal' system, despite reforms enacted as a result of the unequal treaty regime, to a liberalised economy with a nascent middle class — one that Baars notes bore a striking similarity to reforms enacted under European colonial rule elsewhere.[498]

Restricted Concerns' (8 August 1945) and 1079, 'Ordinances and Regulations Affecting the Holding Company Liquidation Commission' (23 July 1946): see Bisson, above n 484, 82–3, 123.

[492] Bisson, above n 484, 166; SCAPIN 550, 'Removal and Exclusion of Undesirable Personnel from Public Office' (4 January 1946). See further Cohen, above n 32, ch 9.

[493] Bisson, above n 484, 4.

[494] On internal US discussions, see Cohen, above n 32, 355; on rejection, see Bisson, above n 484, 47*ff*.

[495] Bisson, above n 484, 38.

[496] SWNCC 150/4.

[497] Eiji, above n 483, 276. See SWNCC 150/4 on trade unions and 'economic democratization'. On land reform, see further Ando, above n 237.

[498] Baars, above n 464, 232.

This reformist agenda at home dovetailed with measures designed to promote the eventual inclusion of Japan in the postwar international and liberalising economy. George Blakeslee, a senior State Department official, had formed the view in the early 1940s that the causes of Japanese militarism were economic, rather than cultural.[499] This view came to be reflected in early official occupation policy under which Japan would be 'permitted eventually to resume normal trade relations with the rest of the world', with secret directives to occupation officials fleshing out the way in which the Japanese economy would be reshaped for participation in global trade.[500] This included the abrogation of 'all legislative or administrative measures which limit free entry of firms into industries … where the purpose or effect of such measures is to foster and strengthen private monopoly' and the elimination of 'private international cartels or other restrictive private international contracts or arrangements'.[501] More broadly, the Allies had made attempts to mediate or neutralise the imperial imperatives that had led Japan as well as Germany to war through new international declarations and agreements geared towards a liberal postwar economy. As mentioned above, the wartime Atlantic Charter promised these post-empires continued access to the raw materials of the world on capitalist and liberal, rather than colonial, terms. This philosophy was also reflected in planning for postwar forms of regional organisation that might ensure a secure, economically integrated Asia.[502]

B *Constitutionalism after Aggression: Managing Self-Determination*

In contrast with plans for economic reforms by the occupiers, the Allied position on constitutional reform was initially somewhat less interventionist. At Potsdam, the Declaration had emphasised the importance of political reforms to the postwar process, stating that the 'authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest' should be 'eliminated for all

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[499] See Barnes, above n 436, 44.
[500] SWNCC 150/4.
[501] 'Basic Directive for Post-Surrender Military Government in Japan Proper', JCS 1380/15, reproduced in *Political Reorientation of Japan*, above n 36, vol II, 428.
[502] See Barnes, above n 436, 74.

time'.[503] Alongside economic reform, and consistently with the views put forward by Wright and Friedrich, this too was understood and presented as a means of pacification. Internal memoranda produced by the UK and US viewed the former Meiji constitution as 'defective' because it allowed Japanese aggression to 'flourish',[504] while US policy directives stated more broadly that the 'strengthening of democratic tendencies and processes in governmental, economic and social institutions' and the 'encouragement and support of liberal political tendencies in Japan' were 'essential' in order to 'foster conditions which will give the greatest possible assurance that Japan will not again become a menace to the peace and security of the world'.[505]

The position taken in the Potsdam Declaration was that it was the Japanese government, rather than the occupying forces, that should have responsibility for 'remov[ing] all obstacles to the revival and strengthening of democratic tendencies among the Japanese people'.[506] This position was, to some extent, in tension with an understanding of constitutionalism as essential to eradicating aggression. In an effort to resolve this apparent tension, General MacArthur met with the then-prime minister, Naruhiko Higashikuni, in September of 1945 to obtain his 'understanding of and acquiescence in the enlightened principles which of necessity would guide the revision to bring it within Allied general policy'.[507] The US official position at that time remained, however, that it was 'not the responsibility of the occupation forces to impose on Japan any form of government not supported by the freely expressed will of the people' and that 'direct action' in order to achieve constitutional change should be pursued 'only as a last resort'.[508] Instead, 'to the fullest possible extent the Japanese

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[503] 'Potsdam Declaration', above n 468.

[504] The National Archives (UK), DO 35/2026, WR 335/21, p. 36, Far Eastern (Ministerial) Committee, 'Future Constitutional Machinery for Japan' (13 October 1945) Appendix; 'Politico-Military Problems in the Far East: Reform of the Japanese Governmental System' (PR-32), Records of the State–War–Navy Coordinating Committee (October 8, 1945).

[505] Basic Initial Post-Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan, JCD 1380/15 (3 November 1945).

[506] 'Potsdam Declaration', above n 468.

[507] George Blakeslee, *The Far Eastern Commission: A Study in International Cooperation, 1945–52* (Department of State, 1953) 44.

[508] SWNCC 150/4; General Headquarters Supreme Commander for the Allied Powers, *History of the Non-Military Activities of the Occupation of Japan, 1945 through December 1951* (1951) vol 7, Constitutional Revision, 27. This does not seem to have been the consensus among the Allies. UK advice, strongly encouraged by Australia and New Zealand, was that 'only drastic change in the present Japanese political and social system will prevent the re-emergence of Japanese militarism': 'Future Constitutional Machinery for Japan', above n 504, 6.

people should be permitted and encouraged to do the work and undertake the reforms themselves, under the general guidance and supervision of the Occupation forces'.[509] As Alfred R Hussey was later to put it:[510]

> It would, indeed, have been strange if the principal proponents of democracy — inherent in which is the right of free choice of one's own form of government — had undertaken to impose their own system of government upon the conquered country.

It was in this sense that the postwar occupation, committed both to retaining the Japanese government and to reforming the Japanese political system, was presented as a 'new problem in international law'.[511]

Initially, the US sought to resolve this problem through a process of drafting nominally led by the Japanese government, though guided by the terms set out by the occupiers. The occupying forces presented the Japanese government in late September with several points which the US considered to fulfil Japan's obligations under the terms of surrender. These included the principle of parliamentary responsibility, the abolition of the imperial veto and imperial legislative authority, an 'effective' bill of rights, an independent judiciary, and the eradication of military representation in the government.[512] In October of 1945, the Japanese government appointed Dr Joji Matsumoto, a Japanese Minister of State, as head of a committee to draft the postwar constitution.[513] During this time, various drafts were also put forward by Japanese lawyers, intellectuals, and political parties. These ranged from the retention of the existing imperial structure of authority to proposals for a Japanese republic, with more socialist iterations including provisions for the nationalisation of industry and a comprehensive regime of rights modelled after the Soviet constitution.[514]

Soon after Matsumoto's appointment, the Moscow Conference of Foreign Ministers resolved to establish a Far Eastern Commission (the 'FEC'), a body composed

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[509] *Political Reorientation of Japan*, above n 36, vol I, 90–1.
[510] Ibid 89.
[511] Ibid 88.
[512] Ibid 91.
[513] Koseki suggests this was to prevent the more conservative Crown Prince Konoe from gaining control of revision: above n 33, 12.
[514] Ibid 19–42.

of eleven Allied states and dominions.[515] The FEC was charged with 'formulat[ing] the policies, principles and standards in conformity with which' Japan would fulfil its obligations under the terms of surrender, including the process of constitutional revision.[516] At the same time, however, the US government had begun to formulate its own official instructions for the reform of the Japanese Constitution. These measures for the elimination of aggression were to be directed 'not merely to the particular Japanese Government which the Allies recognize prior to withdrawal, but also to the nature of Japan's governmental institutions'.[517] Official US instructions emphasised that those institutions had proven themselves to be 'unsuited to the development of peaceful practices and policies' due to the lack of direct responsibility to the people, the lack of comprehensive oversight of the military, the excessive power of the Japanese elites in the Diet and advisory councils, and the lack of protection for civil rights.[518] Although the US still envisaged that constitutional reforms should be, if possible, implemented by the Japanese government itself, in the last instance the occupying forces should direct the government to necessary reforms.[519]

In February of 1946, the Matsumoto committee submitted a plan for 'Tentative Revision of the Constitution' to the Supreme Commander.[520] This plan was criticised by the SCAP for proposing to effect a moderate reform of Japan's existing Meiji constitution.[521] Their position was that the draft 'fell short of that broad and liberal reorganization of the Japanese governmental structure along democratic lines which the Allied Powers could regard as significant evidence that Japan had learned the lessons of war and defeat'.[522] Resolving to reject the draft, MacArthur instructed the Government

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[515] 'Communiqué of the Moscow Conference' (27 December 1945) in *Foreign Relations of the United States*, 1945, General: Political and Economic Matters, vol II, 815. Its member states were initially the Soviet Union, the UK, the US, China, France, the Netherlands, Canada, Australia, New Zealand, India and the Philippines, and later Burma and Pakistan.

[516] Blakeslee, *Far Eastern Commission*, above n 507, 44.

[517] State-War-Navy Coordinating Committee (SWNCC), 'Reform of the Japanese Government System' (7 January 1946) ('SWNCC 228').

[518] Ibid. In particular, the extension of civil rights to all persons in Japan, rather than only imperial subjects, would extension of civil rights guarantees to all persons in Japan 'will provide foreigners in Japan with a degree of protection which they have not heretofore enjoyed'.

[519] Ibid.

[520] The Matsumoto draft is discussed at length in *Political Reorientation of Japan*, above n 36, vol I, 98*ff*.

[521] Ibid 99. It would have retained the emperor's supremacy, made the war prerogative subject to Diet consent except in 'urgent circumstances', and limited the imperial right to dissolve the Diet.

[522] Ibid 105.

Section of SCAP to craft a response involving both the reasons for rejection and a draft constitution that conformed to the principles considered 'basic' by the United States.[523] This draft was to incorporate MacArthur's 'Three Points', which envisaged that the constitution would provide for: the retention of the emperor as a head of state responsible to the will of the people; the abolition of war 'as a sovereign right of the nation'; termination of the feudal system and rights of peerage.[524]

The hastily assembled draft represented an almost total break with the Meiji constitution.[525] Foremost among its changes was the principle of popular sovereignty as the source of state authority, representing a radical overhaul of the imperial order.[526] Executive power was vested in a Cabinet, with its exercise being 'collectively responsible to the Diet'.[527] It contained extensive provisions for the 'rights and duties of the people', such as equality before the law, freedom of thought, speech and association, and the right to property.[528] These also included significant economic and social rights — among them education, public health, welfare and collective bargaining.[529] Perhaps the most significant reform as a response to aggression was the so-called pacifist clause. The clause forswore the right to make war as an instrument of foreign policy and the use of force other than in self-defence.[530] It was the fruit of earlier statements by US officials that 'while no explicit mention need be made of the United Nations Charter, its principles should be borne clearly in mind in drafting the new Constitution'.[531] It would

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[523] Ibid 102.

[524] 'MacArthur's Three Basic Points' (3 February 1946). Despite its name, this document also included a fourth, somewhat terse instruction to '[p]attern budget after British system'.

[525] See Kostal, above n 34, 128–9.

[526] Draft Article I: The Emperor shall be the symbol of the State and of the Unity of the People, deriving his position from the sovereign will of the People, and from no other source. See 'Memorandum to Chief, Government Section' (12 February 1946) ('GHQ Draft') <https://www.ndl.go.jp/constitution/e/shiryo/03/076a_e/076a_etx.html>. This reflected the Government Section's decision that 'the pattern of that Constitution in defining with precision and particularity the powers, rights and authority of the Emperor should be completely reversed': *Political Reorientation of Japan*, above n 36, vol I, 103. It also provided for the cessation of the feudal system: see Draft Article XII.

[527] Draft Articles LX, LXI, LXII.. Article XC further provided that the constitution was the 'supreme law of the nation' and that contrary law should have no 'legal force or validity'.

[528] See Draft Articles XIII, XVII–XXI, XIV and XXVII.

[529] Draft Articles XXIV, XXVI, and XXIII. These drew on European and Soviet models: Eiji, above n 483, 279.

[530] Although the clause's origins are still disputed, Koseki notes that regardless of who proposed it, it was MacArthur who suggested that it be moved from the preamble to the main text: above n 33, 83.

[531] *Political Reorientation of Japan*, above n 36, vol I, 103 (General Whitney). See also Eiji, above n 483, 285*ff*.

later be hailed by MacArthur as an enlightened and progressive recognition of 'the futility of war as an arbiter of international issues'.[532]

The presentation of the draft was accompanied by an effort to avoid the appearance of constitutional imposition within Japan itself. Although the administration considered (as Friedrich had elsewhere suggested) that they had the legal authority to conduct such changes, the pragmatic problem of avoiding resistance from the Japanese people remained. The SCAP official history records that when presenting the draft and informing the government that the US had rejected the Matsumoto Committee's efforts, the US representative stated that the government was under 'no compulsion … to take further action'.[533] At the same time, they communicated MacArthur's determination 'that the constitutional issue should be brought before the people' and that 'they should have full opportunity to discuss freely and freely express their will on constitutional reform', even to the extent of sidelining the Japanese government and directly consulting the Japanese population.[534] This was an invocation of the ideals of self-determination and of popular sovereignty which had the potential both to circumvent possible reticence by the Japanese government and to render any legal strictures of the Potsdam declaration open to contestation and change.

The government's initial response to the draft was less than positive, characterising it as 'thoroughly alien'.[535] Matsumoto opposed the wholesale importation of Western philosophies of government, stating that 'a juridical system is very much like certain kinds of plants, which transplanted from their native soil, degenerate or even die'.[536] However, the US' appeal to the conservative government's sense of self-preservation appears to have been, in the last, successful.[537] On 6 March 1946, the Japanese government submitted a constitution to the SCAP for review that substantially

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[532] 'General MacArthur's Announcement of a New Constitution for Japan' (Speech delivered 6 March 1946). Though the inclusion of a similar clause in the Filipino constitution of 1935 shows continuity with American traditions of empire: see Kataoka, above n 462, 37.

[533] *Political Reorientation of Japan*, above n 36, vol I, 105. Eiji's retelling of the presentation, in which the General remarked on the 'warmth of Japan's atomic sunshine', leaves a thoroughly different impression: above n 483, 280.

[534] *Political Reorientation of Japan*, above n 36, vol I, 105.

[535] Eiji, above n 483, 280. Blakeslee records that the constitution contained a number of paraphrases from US political texts: *Far Eastern Commission*, above n 507, at 47.

[536] *Political Reorientation of Japan*, above n 36, vol I, 106.

[537] Eiji, above n 483, 280.

reproduced the key features of the MacArthur draft.[538] Despite the extended process of review by the Japanese parliament that followed, the final product was little changed from the GHQ draft, and the key features of popular sovereignty, rights, the abolition of the feudal system and the limitation of the powers of the executive were retained.

Whether or not the constitution conformed to the requirements of the Potsdam Declaration would remain the subject of contestation over the course of the next year of the occupation. The FEC emphasised its right to determine the final draft's consistency with the Potsdam Declaration. This, it felt, would give the Diet time 'to consider this very important question and bring to that consideration all available thought produced by the freely expressed will of the Japanese people', including the consideration of alternative drafts.[539] MacArthur's response was that the draft was already 'being well and freely discussed by the Japanese people, who show a healthy disposition to subject all provisions thereof to critical public examination'.[540] He contested the FEC's jurisdiction to review the draft constitution, stating that in the absence of formal policy decisions on its substance it had 'no executive powers, functions or responsibilities in the administration of Japan',[541] and condemning interference in the Diet process.[542] Acceding to MacArthur's interpretation of its jurisdiction, the FEC itself formulated a set of principles for the constitution.[543] These were kept secret from the international and Japanese press, out of concern that 'the voluntary character of the work now in process would instantly become clothed with the taint of Allied force', and a popular referendum on the constitution never eventuated.[544] By September of 1946, Blakeslee

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[538] See Blakeslee, *Far Eastern Commission*, above n 507, 46.

[539] Policy Decision No 1, 'Draft Constitution' (Far Eastern Commission, 20 March 1946). This was reiterated by the FEC in May: Policy Decision No 6, 'Principles Governing the Machinery for the Adoption of a New Japanese Constitution' (Far Eastern Commission, 13 May 1946).

[540] Though he also appeared to suggest that this would result only in 'changes in form and detail' rather than 'underlying principles': *Political Reorientation of Japan*, above n 36, vol 2, 747.

[541] 'General of the Army Douglas MacArthur to the Joint Chiefs of Staff' (4 May 1946) in *Foreign Relations of the United States*, 1946, The Far East, vol VIII, 220.

[542] *Political Reorientation of Japan*, above n 36, vol 2, 660.

[543] Policy Decision No 12, 'Basic Principles for a New Japanese Constitution' (Far Eastern Commission, 2 July 1946). See also the further decision in September: Policy Decision No 18, 'Further Policies Relating to a New Japanese Constitution' (Far Eastern Commission, 25 September 1946). In particular, the FEC insisted on the insertion of a provision ensuring the civilian character of the government, and separating it from the military: Koseki, above n 33, 207.

[544] See the FEC's October decision, 'Provisions for the Review of a New Japanese Constitution', especially the comments of Australia and New Zealand summarised at Blakeslee, *Far Eastern Commission*, above n 507, 58. On MacArthur's opposition, see at 64–5.

records that '[a]ll of the members with the exception of the Soviet representative expressed at least qualified approval of the draft Constitution'.[545]

The US occupiers presented the new constitution as a significant rupture with Japan's imperial and feudal history, and a means by which '[t]he Japanese people … turn their backs firmly upon the mysticism and unreality of the past and face instead a future of realism with a new faith and a new hope'.[546] In the eyes of the Government Section, what the occupiers had achieved was a kind of 'induced revolution': an artificial enabling of self-determination from without, rather than within.[547] The history of the struggles over who would make a new constitution for Japan, and with what authority, show the remarkable plasticity of concepts of democracy, representation, and 'local participation'. Over the course of the occupation, the nominal commitment to a more radical idea of popular self-determination gave way to technical arguments about constitutional design and procedures of popular consultation. The extent to which these concepts came to frame debates about administration and authority also reveals the significance of constitutionalism as a response to the problems of imperial aggression and economic ordering.

C *Embracing Industry in Constitutional Times*

Although the constitutional revolution had been, in the occupiers' eyes, a thorough success, the economic revolution was considerably less so. Despite official policy, more conservative figures within the US civil service had long believed that although the monopoly and special concessions granted to the zaibatsu was a concern, their sheer size and economic power was not of itself problematic.[548] Likewise, US administrators during the occupation were reluctant to extend measures for the purge of 'active exponents of militant nationalism and aggression' to figures that many perceived to be

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[545] Blakeslee, *Far Eastern Commission*, above n 507, 55–58. The Soviet rejection was on the grounds that the draft did not contain provisions giving power to the Diet to appoint ministers and judges, or grounding the institution of the emperor in popular sovereignty: Policy Decision no 18, 'Further Policies Relating to a New Japanese Constitution' (Far Eastern Commission, 25 September 1946).

[546] See above n 532. On arguments in the Japanese parliament as to whether the *kokutai*, or national polity, was preserved, and the document represented the 'will of the people', see Kataoka, above n 462, 39.

[547] *Political Reorientation of Japan*, above n 36, vol I, 186.

[548] They were also concerned about communist associations: Barnes, above n 436, 48.

merely ordinary commercial actors.[549] These conservative concerns, according to Cohen, were underscored by the views of business leaders within the US government, who considered that 'the world could only be brought back to order by a restoration of commerce, trade, and business and that would have to be done by businessmen'.[550]

The promulgation of the constitution in 1947 coincided with the beginnings of the 'reverse course' in occupation policy. With this shift from a strategy of military pacification to one of reindustrialising a new ally in the nascent Cold War, economic recovery became the 'prime objective' of the occupying force.[551] Along with a general winding back of measures of economic democratisation, such as the right to strike, the occupying force deemphasised programmes that aimed either to reduce the power of corporations within Japanese society or to redistribute industrial potential internationally through postwar reparations.[552] Business interests within both Japan and the US, too, had opposed these efforts to deconcentrate the sizeable zaibatsu subsidiaries on the grounds that they uncomfortably resembled 'socialization' of the economy.[553] The influence of business was not only rhetorical: two seats of the five-person Holding Company Liquidation Commission were allocated to businessmen, who along with the appointed chairman (a man of business himself) vetoed many of the deconcentration measures.[554] Opposition to measures of deconcentration within the Government Section of GCHQ was also aided by the recently introduced constitution, since the head of Section considered that domestic legislation to enforce the policy was very likely to fall foul of its provisions.[555] In the event, the planned deconcentration

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[549] Cohen, above n 32, 155–6.

[550] Ibid 166, quoting Navy Secretary Forrestal, *The Forrestal Diaries* (Walter Millis ed, Viking Press, 1951) 248.

[551] Michael Schaller, *Altered States: The United States and Japan since the Occupation* (Oxford University Press, 1997) 17. SCAP had initially been friendly with Socialist and Communist political elements in Japan but this, too, shifted in late 1948: Kataoka, above n 462, 47.

[552] Kataoka, above n 462, 53.

[553] Despite its earlier defence by MacArthur as a means of avoiding 'revolutionary violence' within Japan itself: Bisson, above n 484, 141. See also Blakeslee, *Far Eastern Commission*, above n 507, 199–200, on the reaction within the US to the release of a policy paper entitled 'Excessive Concentrations of Economic Power in Japan'. Konoe (the crown prince) too had warned the occupation that the breakup of the zaibatsu could lead to a communist Japan: Baars, above n 464, 223, n 567. See Cohen, above n 32, 369 for US conservatives' critiques of the occupation's 'New Deal radicalism'.

[554] Cohen, above n 32, 372–3.

[555] Ibid 364, referring to the views of Courtney Whitney. Although Cohen does not explain why, it can be recalled here that the Constitution included protection for property rights. See also the view of the Deconcentration Review Board, cited in Ando, above n 237, 26.

measures were either abandoned or were largely considered to have failed to achieve their aim.[556]

Likewise, far fewer were affected by the purge of senior wartime figures from the business world than was originally envisaged. Such measures also did not prevent their replacement by chosen or like-minded successors, and the occupiers did not pursue the imposition of sterner measures that would have impacted Japan's economic recovery (and hence that of its trading partners and investors).[557] The planned dissolution of the control associations, which coordinated and directed industrial production, was also abandoned out of this concern.[558] An ambitious programme of antitrust measures,[559] which sought to prevent 'unreasonable restraints of trade', was opposed by the American Chamber of Commerce, as well as Japanese business interests, on the grounds that it made 'the profitable conduct of free enterprise on any large scale impossible … almost completely ignor[ing] the principle of encouraging American business to participate in Japan's rehabilitation'.[560] Changes were subsequently made to facilitate foreign investment under the law.[561] By the middle of 1949, both the programme of reparations and the deconcentration efforts had been officially brought to a halt.[562]

Over the course of the occupation, then, there were two visions of democracy for postwar Japan. One vision had begun with a democratic capitalism that was nevertheless alert to, as Neumann had seen it, the need to disaggregate corporate wealth in order to counteract its militarising influence on the state. By 1949, however, the occupiers displayed a greater concern with Japan's capacity to rejoin the postwar

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[556] The end result of these programmes according to Bisson, though it varied across sectors, 'was drastic, by special action, for trading firms, hardly adequate for industrial concerns, and nil for banks': Bisson, above n 484, 156. See also Miwa, above n 489, 142–4 (noting the exception of shipbuilding). Many of the deconcentrated companies eventually recombined: Cohen, above n 32, 373.

[557] Bisson, above n 484, 177. Cohen estimates that 1555 persons, rather than the predicted 30 000, were impacted by the purge: above n 32, 169.

[558] SCAPIN 1108, 'Dissolution of Control Associations and Authorization to Establish Government Allocation Agency together with Necessary Control Organs within Specific Industries' (6 August 1946), cited in Bisson, above n 484, 195.

[559] This proposed prohibited owning stocks of competing companies in substantial restraint of competition, the establishment of a holding company, and the holding of executive positions in competing firms: ibid 182–4.

[560] Ibid 187.

[561] Ibid 187–90. See also Eleanor M Hadley, *Antitrust in Japan* (Princeton University Press, 1970).

[562] See Nester, above n 467, 238. Unlike in Germany, corporate figures were excluded from the scope of the Tokyo war crimes trials. Baars writes that they could find no explanation for this: above n 464, 221.

trading economy and to act as a market for global capital. This echoed Blakeslee's view that trade and commerce (not redistribution or economic democracy) was most conducive to international peace, a view buoyed by constitutional restrictions on redistributive techniques. The idea that democratic commitments might require a moderately revolutionary, or at least, self-directed process of reform gave way to a second vision, on the part of the occupiers, of directed constitutional change as essential to the building of the peace. In this vision, struggles over what political self-determination required, through what institutions it could be best realised, and how to ascertain the will of the people were conducted in largely procedural terms.

IV THE DEMANDS OF DEMILITARISATION: GERMAN CONSTITUTIONALISM AND THE EUROPEAN PEACE

For Germany, as for Japan, the initial position of the Allies after Potsdam was one of both political and economic transformation. The initial joint Allied policy was to extract reparations from the defeated nation, as well as relief and reconstruction aid, including forced labour assistance.[563] This was understood as a means of aiding the European nations devastated by Nazi aggression, but it was also a means of eliminating the 'economic base' of that aggression.[564] Changes in political leadership would be accompanied by the dismantling of military industry, the 'decentralization of the political and administrative structure', the democratisation of economic decision-making, and the 'development of local responsibility' through the separation of the centralised Nazi state into *Länder*, or regional governments.[565] The original occupation policy, however, which was one of social transformation, would come to be replaced with a programme of 'economic reconstruction along capitalist lines'.[566] At the same time, Allied governments would make key interventions into the process of constitution-making at both the *Land* and central levels.

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[563] Directive to the Commander in Chief of United States Forces of Occupation Regarding the Military Government of Germany' (JCS 1067, April 1945).

[564] John Willoughby, *Remaking the Conquering Heroes: The Social and Geopolitical Impact of the Post-War American Occupation of Germany* (Palgrave, 2001) 84, citing Henry Fowler, Director of the Enemy Branch of the Foreign Economic Administration.

[565] Ibid.

[566] Boehling, above n 24, 3.

A *Zonal Disagreements and the Decentralisation of the State*

The extent to which decentralisation, in the form of a federated Germany, was necessary would become a central point of disagreement between the Allied powers. Allied international legal decision-making on the international level displayed early moves toward decentralisation, and the establishment of a federal constitutional structure, as a method of establishing the peace. By 1947 *Länder* had been established and their constitutions adopted by representative governments in all zones except that of the British.[567] This decentralisation was to some degree a result of the partitioning of Germany at Potsdam into coordinated but separately-administered zones — to be occupied by France, the UK, the US and the Soviet Union — resulting from, unlike in Japan, the absence of a central German government.[568] The zonal form of administration, however, afforded the occupying powers significant latitude in terms of the method through which responsibility would be transferred back to the German people, and the pace at which this would be achieved.[569] The development of regional government by the zonal authorities thus offers insight into the different ways in which the zonal administrations comprehended and responded to German aggression.

By late 1946, a rough draft for a future German constitution was published in the Soviet Zone that emphasised centralised economic planning, public ownership of national resources, and nationalisation of private enterprises owned by National Socialists.[570] Although nominally a federal constitution, the powers reserved to the central government in the draft were broader than under the previous Weimar Constitution, and included industry, agriculture, economic planning, and education.[571] The draft, on paper, also eschewed the liberal principle of separation of powers in favour of popular sovereignty and the apparent concentration of decision-making in the national legislature.[572] As a matter of principle, the Soviets stated their opposition to the

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[567] Wolfgang Gaston Friedmann, *The Allied Military Government of Germany* (Stevens, 1947) 76.

[568] This drawing of *Länder* boundaries was done in part according to military necessity, rather than political or economic ties: Harold Zink, *American Military Government in Germany* (Macmillan, 1947) 175.

[569] Feis, above n 470, 243.

[570] Friedmann, above n 567, 78. On Soviet debates as to whether the constitution conformed to the commitments of Potsdam, see Norman M Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945–1949* (Belknap Press, 1995) 56–7.

[571] Friedmann, above n 567, 77–9.

[572] Ibid 78.

imposition of a federal structure, which should be left to a 'free vote of the German people'.[573] They proposed that the constitution's eventual drafting be left to a convention of 'democratic parties, free trade unions, and other anti-Nazi organizations and representatives of the *Länder*'.[574] This belied the extent to which Soviet administrators, too, made strategic interventions either within the German administrations that they had swiftly set up after the beginning of the occupation, or to settle disputes between local and central administrators.[575] The Soviet policy of continuing to extract reparations for the devastation wrought by German occupiers, coupled with eventual Western opposition to that policy, also meant that reparations were drawn heavily from the Soviet zone, dimming any prospect of economic and social transformation.[576]

The US occupiers, on the other hand, viewed decentralisation and federalism as a means of pacifying the centralised state with which Wright and Friedrich had so associated imperialism and aggression. The general favouring of decentralisation also squared with 'the declared American preference for unplanned economics and "free enterprise"', and their distaste for a central economic planning authority in the initial stages of the occupation.[577]. From an early stage, the US pursued a policy of effective decentralisation through the relatively rapid turning over of responsibility to German Länder in their zone, with constitutions adopted by representative bodies in order to represent the 'will' of the German people.[578] According to Friedmann, this initial policy favoured 'the utmost regional autonomy compatible with the survival of a loosely federated German state'.[579] A nominal commitment to self-determination, however, was accompanied by strategic interventions in order to 'elicit necessary changes' to the Länder constitutions.[580] One such area of change reflected the US position that 'no

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[573] Golay, above n 25, 5. See also Naimark, above n 570, 44–5.

[574] Golay, above n 25, 5.

[575] Naimark, above n 570, 44–7.

[576] See ibid 167, 178–82; Franz Neumann, 'Soviet Policy in Germany' (1949) 263 *Annals of the American Academy of Political and Social Science* 165, 166.

[577] Friedmann, above n 567, 81. The lack of such an authority in the initial period of the occupation caused significant friction with the Soviets.

[578] Spevack, above n 28, 91–2.

[579] Friedmann, above n 567, 80.

[580] The US policy, formulated by Clay, Friedrich and Parkman, was that 'objections should be made in the spirit of great caution and self-restraint' and attempts made 'to elicit necessary changes…and not to impose them': Spevack, above n 28, 95–6.

serious step will be taken to limit private capitalism' within Germany, despite the widespread popularity of socialist-oriented proposals at the time.[581] Accordingly, US occupiers opposed provisions to nationalise large-scale industries in Hesse and Bremen, and forced the postponement of a Bremen law implementing workers councils for all large businesses.[582] The US vision of constitutionalism was for decentralisation rather than planning, although both states had a less than congenial view of German self-direction.

B *Pacifying Aggression through Deconcentration or Demilitarisation?*

In line with an economic understanding of the causes of aggression, some progress had been made toward reducing the size and influence of industrial corporations in the early stages of the occupation. Within the Soviet zone of occupation, many such corporations had been nationalised by 1948, along with a comprehensive, though imperfectly implemented, programme of land redistribution.[583] To a lesser degree, however, this was also true of the US occupiers. US policymakers were enthusiastic about decartelisation, which they viewed as compatible with concepts of the free market and healthy competition, and the internationalisation of an 'open door' economy.[584] Deconcentration of the German industrial corporations, however, which were hardly larger than the US oligopolies of the period, was ultimately to prove contentious.[585]

As the occupation went on, US policy-makers argued more forcefully that there was a need to prioritise German economic recovery.[586] This was partly in response to British and American concerns about the comparatively higher costs of occupation within their zones and the needs of the German population.[587] It was in part also a

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[581] Ibid 86–8. See Friedrich, 'Military Government and Democratization', above n 396, on German support in the British and US zones for the absence of constitutional restraints on dealing with private enterprise: at 9.
[582] Spevack, above n 28, 86–8, n 133. See also the interventions in the Bavarian and Württemburg-Baden constitutions: at 86, and n 124.
[583] Naimark, above n 570, 151–2 (on land reform), 171–3 (on nationalisation).
[584] Volker R Berghahn, *The Americanisation of West German Industry 1945–1973* (Berg, 1986) 101.
[585] Ibid 89.
[586] See generally Boehling, above n 24.
[587] Berghahn, above n 584, 78.

response to the business critique of the continued observance of the Potsdam agreement. A report published by the International Chamber of Commerce urged that either a German government, or the Western occupiers, should take steps to rejuvenate the economy through currency and wage reform, 'the speedy reduction of government controls and the return to a system of free enterprise'.[588] This direction was adopted by the US, for whom the preservation of German industrial strength, along with the elimination of market control organisations, came to act as a 'lever' for economic influence over the rest of Western Europe.[589] Wishing to maintain Germany's industrial strength, and mistrustful of the Soviets, the US also ceased the making of reparations by mid-1946.[590] The British, while making no official announcements at that point, were apparently sympathetic to this position.[591] Although the UK had announced the nationalisation of German coal and steel companies in August of 1946, they also gave up these plans due to US influence over the Bizone.[592] In the event, although some deconcentration was achieved, it was far less than had originally been envisaged. Instead, the Western occupiers acceded to the view that what was ultimately needed was large and 'healthy' companies capable of promoting competition.[593]

Pursuing this type of economic recovery required minimising the inherent contradiction between liberal-capitalist rejuvenation and the initial Potsdam framework for preventing future German aggression. Accordingly, US Secretary of State James F Byrnes' plan for demilitarisation, presented to the other Allied Foreign Ministers in the Paris conferences of 1946, contained a relatively narrow concept of what was necessary to secure Europe.[594] Its conditions for the end of German occupation included the disbanding of armed forces, the reduction of war potential, and a ban on the utilisation of factories for military purposes. This can be compared with the broader concepts of social transformation and redistribution underlying the Colm-Dodge-Goldsmith plan of May 1946 for financial and currency reform, requested by Clay but ultimately

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[588] Discussed in Friedmann, above n 567, 216–17. See also the *Economist* article of 8 September 1945 cited in Feis, above n 470, 251.
[589] Berghahn, above n 584, 88.
[590] Ibid 76.
[591] Friedmann, above n 567, 188.
[592] Berghahn, above n 584, 96, 106.
[593] Ibid 94–110.
[594] Excerpted in Spevack, above n 28, 61.

abandoned in key respects.[595] The Soviets responded to Byrnes by counter-proposing what came to be known as the Molotov Plan for Germany. Vyacheslav Molotov, the Soviet Minister of Foreign Affairs, argued that disarmament had to be understood to include the elimination of German industries that contributed to the war, rather than simply a ban on their use for military purposes, and that 'only such a disarmament and demilitarization of Germany will respond to the interests of lasting peace and security of nations'.[596] Molotov also argued that the plans of the Western Allies for political reconstruction as a further bulwark against military aggression did not go far enough. For the Soviets, the eradication of fascism from German political life required the elimination of any concentration of power in the hands of large landowners and industrialists, not simply of military capacity. Responding to the proposal of federalism as a means of preventing the resurgence of German aggression, he stated that 'the Soviet people … hold that it is incorrect to impose upon the German people some one or other solution of this question'.[597] The proposals put forward by the Soviets suggested that the major part of the work to be done by the occupiers was in the economic sphere.

The response from the rest of the Allies was to reject the Soviet plan for German disarmament and reunification.[598] In September of 1946, Byrnes gave a speech at Stuttgart marking what would later be remembered as the definitive turning point in German occupation.[599] Rejecting a prolonged occupation, he stated instead that the US would be willing to grant the German people their self-determination, but only 'under proper safeguards'.[600] Such safeguards included controls on the constitutional form of the government of a future Germany, 'prevent[ing] the establishment of a strong central government dominating the German people instead of being responsible to their

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[595] Spevack, above n 28, 137. See Gerhard Colm, Joseph M Dodge and Raymond W Goldsmith,'A Plan for the Liquidation of War Finance and the Financial Rehabilitation of Germany' (1955) 111 *Zeitschrift für die gesamte Staatswissenschaft* 204, 207–8.

[596] 'United States Delegation Record, Council of Foreign Ministers, Second Session, Thirty-Eighth Meeting' (9 July 1946) in *Foreign Relations of the United States*, 1946, Council of Foreign Ministers, vol II, 844.

[597] Ibid 870.

[598] See Spevack, above n 28, 65.

[599] Baars, above n 464, 156. The text of the speech is reproduced in Armin Grunbacher, *The Making of German Democracy: West Germany during the Adenauer Era, 1945–65* (Manchester University Press, 2010).

[600] See also the letter written by Lucius Clay following the first rejection of Molotov Plan, displaying early thinking on mechanisms of German democratisation: letter of 19 July 1946, excerpted in Spevack, above n 28, 94.

democratic will'. At the same time, Byrnes committed to enabling the 'free exchange of commodities, persons and ideas throughout Germany' and to its economic unification, as a means of facilitating economic independence and prosperity. These measures would allow the German people to 'apply their great energies and abilities to the works of peace', and 'in time, to take an honorable place among members of the United Nations'.[601] Although enforcing German collective responsibility for the war meant that some degree of hardship during the period of occupation was inevitable, the United States would no longer support the 'needless aggravation of economic distress' that had resulted from government by the Allied Control Council.[602] To similar effect, UK Foreign Secretary Ernest Bevin gave a speech in October of 1946 outlining UK policy for a postwar Germany that relied on creating the political conditions to prevent a revival of aggressive policy.[603] Fostering a robust postwar economy would 'enable Germany to benefit in times of peace from German industry and resources'.[604] The merger of the UK and US zones on 1 January 1947, proposals for financial reform and trade liberalisation, and the revision of caps on industrial production, all reflected the view that '[a]n orderly, prosperous Europe requires the economic contributions of a stable and productive Germany'.[605]

C *From Economic to Constitutional Interventions*

Following the formation of a Soviet-supported Communist government in Czechoslovakia, France, the United Kingdom and the United States, together with Belgium, the Netherlands and Luxembourg, convened in London in early 1948 to decide on proposals for a West German state, as part of a unified European front in the broader Cold War. The French, who in any case opposed such a state, wished for the strongest possible form of federalism and a weak central government, combined with

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[601] Byrnes in Grunbacher, above n 599. See also 'United States Delegation Record, Council of Foreign Ministers, Second Session, Fortieth Meeting' in *Foreign Relations of the United States*, 196, Council of Foreign Ministers, vol II, 880.

[602] Byrnes in Grunbacher, above n 599.

[603] Excerpted in Spevack, above n 28, 333.

[604] Ibid.

[605] 'Directive of the United States Joint Chiefs of Staff to the Commander-in-Chief, United States Forces of Occupation, regarding the Military Government of Germany' (11 July 1947) ('JCS 1779').

prolonged occupation, and effective annexation of the Saar region, and control of German coal and steel industry.[606] The US and the British broadly considered, however, that a prosperous Germany offered the greatest chance of European stability and that 'only the most general restrictions required by the present and long-term security interests' of the Allies should be placed on the drafting of the West German constitution.[607] This, they suggested, would require a central government capable of raising revenue, but with effective guarantees against centralisation of power in the executive, and of the separation of powers and protection of civil rights and freedoms.[608]

After the withdrawal of the Soviets from the Allied Control Council on 20 March 1948, mid-way through the conference, the project of unifying the Western zones of Germany took on greater urgency.[609] The final documents of the conference agreed that the occupation would be ongoing, and that US occupation in particular was assured 'until the peace is secured in Europe';[610] proposed international control of the Ruhr in order to ensure that it be used in the 'interests of peace' rather than 'the purpose of aggression'; [611] and affirmed the principle of non-discrimination in relation to foreign property interests within Germany.[612] They also instructed the military governors to authorise a Constituent Assembly, with delegates to be chosen by the Länder parliaments, to draft a democratic constitution for popular ratification.[613] The constitution was to 'protect the rights of the participating states, provide adequate central authority, and contain guarantees of individual rights and freedom' and, as eventually drafted, included the right to property as one such guarantee.[614] A separate

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[606] Spevack, above n 28, 116.
[607] Golay, above n 25, 8–10.
[608] Ibid 9.
[609] Ibid 10, citing Clay: 'we were no longer willing to have a political and economic void in Central Europe'.
[610] 'Paper Agreed Upon by the London Conference on Germany: Report on Security' (26 May 1948) in *Foreign Relations of the United States*, 1948, Germany and Austria, vol II, 291, 292.
[611] 'Paper Agreed Upon by the London Conference on Germany: International Control of the Ruhr' (26 May 1948) in *Foreign Relations of the United States*, 1948, Germany and Austria, vol II, 285.
[612] 'Paper Agreed Upon by the London Conference on Germany: Protection of Foreign Interests' (26 May 1948) in *Foreign Relations of the United States*, 1948, Germany and Austria, vol II, 307.
[613] 'Paper Agreed Upon by the London Conference on Germany: Political Organisation' (26 May 1948) in *Foreign Relations of the United States*, 1948, Germany and Austria, vol II, 305.
[614] Ibid. During the Parliamentary Council debates on the basic law, the *Kommunistiche Partei Deutschlands* (KPD, or Communist Party) representative argued for conceptions of rights that included nationalisation of

letter of advice to the governors set out principles for a 'desirable governmental structure for Germany', including limiting emergency and executive powers, and specifically enumerating the powers of a central government.[615] These agreements formed the basis for the Frankfurt Documents, handed over to the minister-presidents of the western Länder in July of 1948, at the former IG Farben headquarters.[616] This was in line with Friedrich's insistence, in a memorandum to Clay, that, although where possible decisions should be left to German representatives, '[t]he basic pattern of a permanent German government is fixed by Allied policy declarations to be a decentralized and constitutionalized democratic Republic'.[617]

These documents would form the basis for the process of the German process of constitutional drafting. Following their handover, a conference of German constitutional experts convened in August of 1948 in order to provide recommendations for what would eventually be known as the Basic Law.[618] From September of that year, German representatives appointed by the *Land* governments would begin the process of drafting via the vehicle of a Parliamentary Council, which met in Bonn over a period of four months.[619] Despite Allied strictures, the German drafters refused to concede on a number of points, including insisting on the terminology of a 'Basic Law' rather than a constitution, avoidance of popular ratification, and refusing the redrawing of Länder boundaries.[620] Toward the end of constitutional negotiations the *Sozialdemokratische Partei Deutschlands*, or German democratic socialist party, also managed to achieve a degree of governmental centralisation that had not been envisaged in the London documents.[621] But although historians and lawyers disagree on the extent to which the Basic Law can be seen as a German creation, it is at least clear that Western European

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large private companies, while the SPD representative initially argued for social conceptions of rights, citing Laski: Spevack, above n 28, 227.

[615] 'Paper Agreed Upon by the London Conference on Germany: Letter of Advice to Military Governors Regarding German Constitution' (12 May 1948) in *Foreign Relations of the United States*, 1948, Germany and Austria, vol II, 240.

[616] Spevack, above n 28, 341–3.

[617] Ibid 212, reproducing Friedrich's essay 'Permanent Governmental Organization and Constitution'.

[618] Ibid 350.

[619] Ibid 357. On Allied interventions into the process of drafting, see at 384–93, 426–8.

[620] Ibid 346–8. See also Golay, above n 25, 13–17.

[621] Spevack, above n 28, 233.

states, as well as the US, viewed constitutionalism as a critical means of resolving the German question and of creating a peaceable postwar European order.

Over the course of the occupation, then, the principles of national political self-governance outlined in the Atlantic Charter, and tentatively reiterated at Potsdam, gave way in the German case to Allied security concerns and escalating Cold War tensions. To a very great extent, the eventual West German constitution was a product of international decision-making rather than an exercise of self-determination. At the same time, with the onset of the Korean War, and the beginning in earnest of the Marshall Plan for European economic reconstruction, a revitalised West German economy and industry became integrated into the postwar liberal international system of trade.[622] With the advent of that system, the Allied military government of Germany stood behind those parts of German society supporting a marketised economy and discouraged left-wing efforts on nationalisation, planning, economic denazification, and worker participation in corporate governance.[623]

In this environment, the economic forms of demilitarisation that had once been prioritised were seen to come at too high a cost. At the beginning of the occupation, there had been an observable contradiction in the US approach toward the industrialists 'as a social group on the one hand, and of the help they received as the economic agents of material reconstruction, on the other'.[624] By 1947, however, US Secretary of Defense Forrestal could confidently state that there was 'no historical validity for the Marxist theory according to which industrialists desired war for the sake of material gains…[and] no group anywhere that was more in favour of peace than the industrialists'.[625] Four months after the adoption of the Basic Law in May of 1949, John McCloy, previously the second president of the World Bank, was appointed US High Commissioner for Germany. As Baars recounts, McCloy would go on to grant clemency to many of the same German industrialists that had previously been thought to

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[622] Ibid 134.

[623] Boehling, above n 24, 259.

[624] Berghahn, above n 584, 72.

[625] Grietje Baars, 'Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII' in Kevin Jon Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013) 163, 189.

bear a share of responsibility for the war.[626] For the Western Allies, decision-making and intervention along juridical and constitutional — rather than economic — lines had come to represent the primary antidote to any future possibility of German aggression.

[626] Baars, above n 464, 196.

V CONCLUSION

This chapter has argued that constitutionalism came to be a dominant technique of administration of the occupied states of Germany and Japan. Tracing this administration offers a way of understanding the production of ideas of lawfulness over the course of the occupations. As I foreshadowed in Chapter 1, in telling these histories of occupation I have also resisted the separation of the 'economic' and the 'political' halves of their greater whole. By doing so I have illustrated how, if at the beginning economic and political-juridical theories of aggression had an uneasy coexistence in postwar policy, by the end of the occupations the balance, and the practices accompanying it, had for the majority of the occupiers shifted firmly in favour of the juridical side.

In Japan, the idea that the zaibatsu companies bore some responsibility for war and empire led to early policies of their disaggregation and political disenfranchisement. These were combined with attempts to promote forms of economic democratisation and labour organisation and create a wealthier middle class. The US occupation, however, rejected the nationalisation of industry in favour of private enterprise and competition, and the reshaping of the Japanese economy for participation in global trade. Eventually, more radical measures were abandoned in favour of economic recovery and Cold War reindustrialisation. Ideas of peace through trade underpinning that recovery sat alongside an understanding of liberal constitutionalism as essential to preventing aggression. The idea that the Japanese government should have responsibility for political reform, as an instantiation of self-determination, thus gave way to technical arguments about constitutional design, and procedural questions about how, and on whose terms, to best discern the will of the people.

In Germany, early moves toward decentralisation and *Land* constitutionalism can be understood as a manifestation of the view that federalism and decentralisation represented a way of pacifying the state. Here, a nominal commitment to self-determination was accompanied by strategic interventions to elicit changes to *Länder* constitutions, particularly those of a socialist orientation. Though the initial occupation policy was also to eliminate the industrial base of aggression, in the face of the costs of the occupation, the business critique and Cold War considerations, this gave way to the

prioritisation of economic recovery and the narrowing of concepts of demilitarisation. This was matched, at the international level, by limits placed on the constitutional process for Germany, which prescribed forms of constitutional design compatible with a decentralised and rights-protecting state.

In both cases, Western administrators came to consider that internationally-directed constitutional change, along with economic rejuvenation along capitalist lines, was a superior means of achieving a stable peace. This shift represented an abandonment of the practices of economic redistribution, self-determination and radical forms of democratic organisation that might have been thought necessary for a peaceful world. Despite challenges to the internationalised making of political choices, what was permitted was self-determination 'under proper safeguards': a technical idea of constitutionalism, designed and supervised by international actors. This idea stood in contrast to a socialist vision of reclaiming the state after war in which political authority carried the benefits of economic planning as well as the dangers of empire, and in which those dangers might be mitigated by economic rather than juridical structures.

Revisiting this history illustrates that other practices, which equally were seen as a means of building the peace, were left aside. It also shows that the availability of 'political' self-determination, seen here in the limited form of a people's capacity to make choices about the constitutional order of the state, cannot be separated in neat ways from 'economic' questions of the distribution of wealth and power. In this chapter, I have suggested that the constitutional techniques deployed by international actors, in the name of securing a more peaceful world, carried with them political preferences and theoretical concerns. These techniques, understood and justified in part through the prism of the postwar period, have come to be accepted and authorised by international law in the present.

CONCLUSION

In this thesis, I have inquired into the significance of the histories of constitution-making in Germany and Japan for international practices of constitution-making after conflict, and for the discipline of international law. I have argued that constitutionalism, as a set of practices and as a disciplinary orientation, today represents a particular version of the work that international law should do to address questions of civil war and conflict in the decolonised world. Scholarship on international law and constitution-making, I suggest, draws thereby on a tradition of constitutional thought and practice that was developed during the postwar era and in relation to the occupations of Germany and Japan. I argue that that tradition, as a vision of a post-imperial world, represents a rejection of material accounts of the causes of war and imperial aggression, and more radical visions of economic redistribution and political self-determination.

The consequences of this inheritance persist in the discipline of international law, through the reproduction of an account of a project of international peace and security in which constitution-making and constitutionalism, as a way of making choices about the legal structure of government and the allocation of authority, can play an important role. This account acts to effect a separation of constitutional questions from an explicit consideration of the economic choices that societies might make after conflict, or to endorse a model of constitutionalism that operates in tandem with a developmentalist vision of those choices. Constitutionalism, as a way of understanding law after war, has proved compatible with a liberal vision of economic ordering, of the distribution of wealth and power within society, and of development as a way of achieving social welfare and of organising international economic relations.

In Chapter 1, I offered a reading of the field of international law and constitution-making. I argued that international law depicts constitutionalism as a technique of international peace and security, and a way of responding to civil war and conflict in the decolonised world. I further argued that international lawyers offer different visions of how constitutionalism works through international law. For the pragmatist, international law might represent a means of transmission of constitutional standards, and constitutionalism might in turn require a transformation of international

law's precepts. For the cosmopolitan, international law represents a key mechanism for the gradual universalisation of constitutional standards, and constitutionalism provides a justification for the internationalised pursuit of those standards. For the technician, constitutionalism is understood through a transnational mode of legal ordering which emphasises the process of constitutional contestation and the professionalisation of constitutional advice. Common to the field, however, is an articulation of constitution-making as an aspect of the maintenance of international peace and security by international actors, within local contexts.

The histories of Germany and Japan support that articulation, through enabling international lawyers to respond to concerns of imposition, or imperialism, by pointing to the possibility, or effectivity, of internationalised practices of constitutionalism. These practices are narrated as part of the disciplinary project of international peace and security, the foundations of which were laid during the postwar period. The histories of constitution-making in Germany and Japan also offer a way of responding to critiques of international intervention and domination, through picturing international constitution-making as a post-imperial project, connected both to the rejection of empire and to the turn to international institutions. Constitution-making is envisaged as a reluctant but inevitable project, and a shared endeavour that supports, rather than denies, the political agency of 'the people'. In invoking these histories, international legal scholars reproduce an understanding of constitutional forms as an object of legal analysis and of technical reproduction, distinct from the broader economic choices that surround that object. Yet constitutionalism has a complex relationship with questions of the distribution of wealth, property and power, and of the relationship of the state to the market as a means of organising economic activity. The separation of these questions represents an aspect of the broader separation between the idealised work of international law in maintaining security and the material work of international law in ordering economy.

In Chapter 2, I argued that constitutionalism, as a way of understanding the work that international law might do after war, emerged during the middle part of the twentieth century. Constitutionalism represented an alternative to occupation, as the prevailing frame of law after war, and as a transformational, rather than conservationist, means of managing German and Japanese imperial violence. Through an exploration of

the thought of Quincy Wright, Ernst Fraenkel and Carl Friedrich, I set out three elements of constitutional thought in international law. First, Wright positioned postwar transformation, rather than a temporary or conservative occupation, as international law's response to the problem of the 'aggressive state'. Second, Fraenkel articulated imperial aggression as a problem of constitutionalism rather than a problem of capital, requiring juridical forms of intervention in struggles for power within the postwar state. Third, Friedrich justified dictatorship as a temporary, but permissible, means of constitutional transformation by liberal states in a post-imperial world.

Each of these authors understood constitutionalism to be a legal form of the state that was compatible with liberal ideas of commerce and the separation of the economic from the political. As I have shown, they each also articulated constitutionalist thought in reaction to socialist or anti-imperial thinkers that argued for a material understanding of aggression and empire and a radical reordering of economic wealth and power in its wake. In place of this understanding, these authors positioned internationalised forms of constitutional transformation — through juridical limits on prerogative power, the dispersal of centralised power through a federated state, or the protection of individual rights — as a solution to the problems of empire and as a program for a post-imperial world.

In Chapter 3, I showed how constitutional practices, as a means of conducting the postwar occupations of Germany and Japan, prevailed over alternative ways of understanding the causes of war and of imperial aggression. In Japan, concepts of corporate responsibility for war and empire gave way to the reshaping of the economy for participation in global trade, alongside forms of managed constitutionalism. In Germany, a commitment to deconcentrating the industrial bases of imperial aggression gave way to the prioritisation of economic recovery, alongside the use of constitutional techniques of decentralisation and judicialisation.

In tracing these practices, I sought to denaturalise international constitution-making as a technique for managing the postwar state. I also sought to show that its ascendance, as a way of understanding the demands of international peace and security, was linked to the promotion of economic development and commercially-oriented reconstruction. That ascendance came at the expense of practices of economic democratisation and redistribution, and ideas of radical forms of political self-

determination. Through this, the chapter offers an alternative reading of the significance of the history of constitution-making in Germany and Japan for international lawyers today: one that reinforces a move away from a material (and international) understanding of war and its causes toward a more juridicised framing that locates these causes, and proposes techniques for their resolution, within the constitutional structures of the postcolonial nation-state.

The field of international law and constitution-making frames constitutional choices as choices made by 'international' agents between one of many 'local' actors, each with their own political agenda. Reports of international institutions describe the environment in which these constitutions are made as one of division, corruption, greed, and failure. In such an environment, the idea that one might turn to international law for solutions has a seductive appeal. International law, as a body of rules and frameworks that presents itself as removed from the 'fray' of such politics offers not only doctrinal resources but a statement of how international lawyers and other actors might proceed in the face of uncertainty. Whether through the peacefully transformative work of the pragmatist, the universal and individualist vision of the cosmopolitan, or the capable and educative advice of the technician, this statement contains the possibility of a better way forward. The description, in this thesis, of a tradition of international constitution-making that emerged in response to the problem of empire, and that was adapted to the concerns of a liberal and aspirationally post-imperial economic order, but that represented a rejection of alternative material, political and social possibilities, thus offers a way of reconsidering the politics of international interventions in conflict and civil war.

In offering this history of international law and constitution-making, I have suggested that constitutionalism, as a way of responding to war and conflict in the decolonised world, is itself a deeply political choice. Understanding the nature of this choice also requires acknowledging that when we, as international lawyers, write about the world, we do so from a position of privilege and power. The proposal of constitution-making as a practical solution to the problems of war and violent conflict requires the acceptance of one way of understanding the world to the exclusion of another, and enables the reproduction of that understanding through sites of institutional power, authority, and knowledge. Through locating the solution to war in the juridical

structure of the state, and proposing international action to effect that solution, international lawyers risk absolving international actors and economic relations from complicity in these problems.

Through revisiting the postwar history of Germany and Japan, and rereading the economic and material dimensions of international constitutionalism, I have sought to expand the history of the discipline of international law, and to draw attention to the tradition on which it now rests. I have also sought to show that other theories of the proper relationship of the state to the economy, and of the causes of conflict and the conditions of peace, were open in the past. These theories were aligned with choices that carried with them a more radical vision of democratic representation and economic equality, from which we might wish to choose again. My hope is that this exploration will better enable scholars of international law to retheorise the work that international law does in the world. Rather than being a means of rationalising or systematising forms of international action, this history-as-retheorisation might require us, as international lawyers and as holders of material power and influence, to exist uncomfortably with both the past and present of international law.

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