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SUSPENDING SOVEREIGNTY: REASSESSING THE INTERLOCKING OF OCCUPATION, FAILED AND FRAGILE STATE, RESPONSIBILITY TO PROTECT, AND INTERNATIONAL TRUSTEESHIP (LESSONS FROM LEBANON)

*Noemi Gal-Or**

This Paper argues that the traditional international legal discourse on occupation fails to reflect the condition of international relations, and their governability by international law, at the turn of the 21st century. This Paper suggests re-conceptualizing the concept of occupation by linking it to the discourse of failed and fragile states and the responsibility to protect.

A contemporaneous understanding of occupation needs to reflect its transforming relationship to sovereignty. Occupation represents a state of interference with the external aspect of sovereignty, which ultimately infringes also on the state of internal sovereignty. In contemporary world politics, occupation arises also from a chain of successive situations interfering with sovereignty wherein internal sovereignty becomes "vitiating" ("failed and fragile state"), and creates a condition conducive to interference with external sovereignty. The outcome of this order of impingements on sovereignty represents a state wherein sovereignty was suspended.

The condition of suspended sovereignty triggers the new norm of the responsibility to protect. This Paper submits that re-vitalization of the concepts of leasehold and trusteeship offers an elegant, perhaps face-saving outlet, hence potentially constructive approach to empower the failed and fragile state in re-establishing its sovereign plenary control over its territory and ending an occupation-like situation.

The analysis of the Lebanese situation is an example of the arguments raised in this Paper and does not fit the traditional post World War II (WWII) occupation legal mould for neither belligerent nor non-belligerent occupation. The complex inter-state relationship linking Lebanon-Syria-Iran-Israel, and which is intricately interlaced in a state-to-non-state actor (NSA) web as played out in the relationship between Israel-South Lebanon Army on the one hand, and between Iran, Syria and Lebanon-Hezbollah on the other hand, serve to illustrate the new 21st century conditions. These conditions press for an updating of the traditional understanding of occupation.

* I would like to express my sincere appreciation and thanks to anonymous readers for their thoughtful and helpful comments.

I. Introduction

This Paper challenges the direction followed by the international legal discourse on occupation and asks whether it adequately reflects the condition of international relations and their governability by international law, at the turn of the 21st century. The Paper offers preliminary thoughts on the development and refinement of the concept of occupation and the surrounding legal applications and implications. It is couched within the recent discourses of “failed and fragile states” and the “responsibility to protect.”

I argue here that the reality of occupation has now surpassed the confines of the legal concept of occupation as developed in the post World War II (WWII) era. To understand occupation, the concept of sovereignty must be brought under close scrutiny. Sovereignty is a legal “fiction” comprising two aspects attributed to the state: External (relations between actors outside the state) and internal (domestic relations).¹ Sovereignty also denotes the convergence of three competences: Personal, governance (the ability to render public services), and territorial.² Sovereignty arises under certain conditions which require international recognition. In this framework, occupation represents a state of interference with the external aspect of sovereignty, which consequently infringes also on the state of internal sovereignty.

A contemporaneous and more accurate understanding of occupation requires refinement to reflect its evolving relationship to sovereignty. In this Paper, I suggest considering occupation also as arising from a *reverse* chain of successive situations interfering with sovereignty. In this display of occupation, at the outset, *internal* sovereignty becomes “vitiating,” which in turn creates a condition conducive to interference with *external* sovereignty. I further suggest conceptualizing the outcome of this reverse order of impingements on sovereignty as representing a state wherein *sovereignty was suspended*.³

¹ Nkambo Mugerwa, *Subjects of International Law*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 253 (Max Sørensen ed., 1968).

² *Id.*; David Ruzié, *DRÖIT INTERNATIONAL PUBLIC* (2ème Partie, 1975).

³ This approach requires identifying and classifying conditions interfering with internal sovereignty, and attracting the violation of external sovereignty, as well as identifying the succession and overlapping of stages in the process. This Paper represents the beginning of such an analytical enterprise. “Suspension,” rather than “transgression,” more accurately describes the situation of

A fresh look at history suggests that occupation is comprised of instances reflecting a plethora of modes of sovereignty suspension. These instances possess the following common denominators: post-colonial events that are a result of colonial mandates following World War I (WWI)—which were condoned by the League of Nations—to govern foreign territories; succeeded the mandate regime in form of trusteeship and peace-keeping operations after WWII and were administered by the United Nations; and incited contemporary humanitarian interventions and other (post) New World Order collective security operations.⁴ Recently, the concept of failed and fragile state (FFS)⁵ was coined to capture the essence of situations in which internal sovereignty is compromised and corresponding sovereign competences weakened. Concurrently, the impact of mitigated internal sovereignty, often entailing a corresponding weakening of external sovereignty, has propelled the birth of another new term—the responsibility to protect (R2P).⁶ R2P implies a new and supplementary understanding of limits on external sovereignty juxtaposing lessons learned from interferences with sovereignty with the “classical” concept of occupation (which focuses on inter-state relationships which compromise external sovereignty) and now warrants a review of the applicable law.

In the past several decades, a new form of *de facto* occupation has become most conspicuous. It is manifest in an amalgam of intra-and inter-state conditions under

an ongoing and *evolving* process whereby sovereign competences have ceased performing their functions effectively, regularly, and in an “orderly” fashion. Transgression suggests a causal relationship that emphasizes intervention and action; whereas suspension is neutral as to the cause and effect, more nuanced, and encompasses a wider spectrum, e.g., action, passivity, drastic alteration but also protracted process and adjustment. Perhaps the definition relating to music is the most accurate: “The action of deferring the progression of a part in harmony by prolonging a note of a chord into the following chord, usually *producing a temporary discord*; an insistence of this, a discord so produced ...” THE SHORTER OXFORD ENGLISH DICTIONARY 2094 (3d ed. 1968) (emphasis added N.G.-O.). I will not elaborate on the relevance of consent in municipal law due to lack of space.

⁴ These modes are extremely varied and include, for instance, the particular state of sovereignty of Hong Kong prior to and following the 1984 Sino-British Joint Declaration; Cyprus, especially since 1974; Haiti, Kosovo (Serbia), Somalia (beginning with the 1990s until the writing of this Paper); and Lebanon since the mid 1970s, to mention a few examples. More examples will be addressed herein.

⁵ See treatment of this concept in Canada Department of Foreign Affairs and International Trade at http://geo.international.gc.ca/cip-pic/current_discussions/fragile-resources-en.aspx (last visited Jan. 28, 2008).

⁶ First conceived in the International Commission on Intervention and State Sovereignty 2001, The Responsibility to Protect, International Commission on Intervention and State Sovereignty (Dec. 2001), available at <http://www.iciss.ca/report-en.asp>. See Section III B *infra* for a discussion on R2P.

which sovereignty is tempered. The situation of states characterized as “failed” or “fragile,” politically often resembles that of occupation. However, unlike the Hague Law of inter-state occupation,⁷ FFS situations involve non-state actors (NSAs), specifically individuals, and non-governmental organizations (NGOs), which are recognized subjects of international law only to a very limited extent and largely for the sake of their own protection. Also, FFS situations tend to conjure up images of civil war and asymmetrical war: Ethiopia and Eritrea mingling in Somalia’s affairs;⁸ no man’s land in the Kandahar Province exhibiting the Afghanistan government’s weakness and coupling it with Pakistan’s failings in Waziristan;⁹ Kosovo’s unsettled status and Serbia’s lack of effective control over the area;¹⁰ and Haiti’s precarious government situation.¹¹

Addressing the legal void pertaining to the newly identified FFS condition, the contemporary, ever-evolving concept of R2P¹² was coined. The brainchild of the Canadian Department of Foreign Affairs and International Trade (DFAIT) under the leadership of its Minister (then) Lloyd Axworthy,¹³ Canada sponsored the 2001

⁷ See also The Hague Convention No. II, Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 187 Consol. T.S. 429 (1900); The 1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907 and its annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2306, 205 Consol. T. S. 277 (1907) [hereinafter Hague Convention IV & Hague Regulations].

⁸ The Ethiopian and Eritrean mingling in Somalia’s affairs; *US Warns Eritrea, Ethiopia on Somalia*, ABC NEWS ONLINE, July 30 2006, available at <http://www.abc.net.au/news/newsitems/200607/s1700601.htm>.

⁹ INDEPENDENT PANEL ON CANADA’S FUTURE ROLE IN AFGHANISTAN, REPORT TO THE CANADA DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE (JAN. 2008), available at <http://www.canada-afghanistan.gc.ca/cip-pic/afghanistan/library/docs-en.asp>; Rahimullah Yusufzai, *Waziristan: Bin Laden’s Hiding Place?*, BBC NEWS, Mar. 4, 2004, available at <http://news.bbc.co.uk/2/hi/south-asia/3532841.stm>.

¹⁰ Kosovo’s unsettled status and Serbia’s lack of effective control over the area; Daniel McLaughlin, *A Declaration of Independence—or War?*, Dec. 7, 2007, THE INDEPENDENT, available at <http://www.independent.co.uk/news/europe/a-declaration-of-independence--or-war-763560.html>. This situation has changed since Kosovo’s declaration of independence of February 17, 2008, and the accumulating international recognition, e.g. by the Government of Canada on March 18, 2008, available at <http://news.gc.ca/web/view/en/index.jsp?articleid=386299>.

¹¹ Canada Department of Foreign Affairs and International Trade, *Reconstructing Haiti* at http://geo.international.gc.ca/cip-pic/current_discussions/reconstructinghaiti-en.aspx (last visited May 27, 2008).

¹² Conscious of the current debate (discussed later herein), I prefer to use “concept” rather than “norm” to the R2P.

¹³ Press Release, *Axworthy Launches International Commission on Intervention and State Sovereignty*, available at <http://www.iciss.ca/press1-en.asp> (last visited Jan. 28, 2008).

International Commission on Intervention and State Sovereignty, which produced the report “The Responsibility to Protect.”¹⁴ Mirroring the growing concern for security in a post-Cold War era, R2P was consequently endorsed in the U.N. Secretary General’s 2004 report “A More Secure World: Our Shared Responsibility.”¹⁵ Arguably, R2P has thus come to represent the activist aspect of the broader concept of human security:

The report endorses the emerging norm of a responsibility to protect civilians from large-scale violence—a responsibility that is held, first and foremost, by national authorities. When a *state fails to protect its civilians*, the international community then has a further responsibility to act, through humanitarian operations, monitoring missions and diplomatic pressure—and with force if necessary, though only as a last resort. And in the case of conflict or the use of force, this also implies a clear international commitment to rebuilding shattered societies.¹⁶

Although the term FFS is absent from the report,¹⁷ and R2P is not limited to FFS situations, it was undoubtedly designed to prevent conditions that can be characterized as FFS. Indeed, in spite of the identified need to “sav[e] lives within countries in situation of mass atrocity”¹⁸ the report lists, in addition to genocide, “mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease,”¹⁹ as giving rise to the R2P of “*every State* when it comes to

¹⁴ International Commission on Intervention and State Sovereignty, *supra* note 6.

¹⁵ The High-level Panel on Threats, Challenges and Change, Executive Summary, ¶ 203, U.N. Doc. A/59/565, (Dec. 2, 2004), available at www.un.org/secureworld [hereinafter A MORE SECURE WORLD]. The report specifies the following:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.

Id. at ¶ 203. Reaffirmed in S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) Arguably, “serious violations” of international humanitarian law is a very broad characterization.

¹⁶ *Id.* at 4.

¹⁷ But explicit nonetheless, *cf.* José E. Alvarez, *Notes from the President*, 23 ASIL NEWSLETTER 1 (Summer 2007).

¹⁸ A MORE SECURE WORLD, *supra* note 15, at ¶ 199.

¹⁹ *Id.* ¶ 201.

people suffering from avoidable catastrophe.”²⁰ Arguably little if anything then, prevents the international community from considering a condition of a state’s degeneration into political decay, or a situation where the FFS is incapacitated, i.e., suspended sovereignty, as harboring a threat to international peace and security. FFS externalization of the internal wrongs consequently falls within the ambit of the new duty to protect,²¹ while R2P is being turned into a tool to resurrect a state’s sovereign competences.²²

At this backdrop, I further suggest that the FFS suspended sovereignty condition and the triggering of the R2P beg the re-vitalization of the concepts of leasehold and trusteeship. These legal instruments are valuable in both assisting a FFS in re-establishing its sovereign plenary control²³ over its territory and ending an occupation-like situation. Specifically, where neither a belligerent nor non-belligerent occupation

²⁰ *Id.* While it does not yet elaborate on other possible instances of “avoidable catastrophe” in and from “shattered states,” it envisages such possibility by stating that “to redress catastrophic *internal* wrongs [the international community] is prepared to declare that the situation is a ‘threat to *international* peace and security’ [which] is not especially difficult when breaches of international law are involved.” *Id.* ¶ 202.

²¹ The report reflects the international community’s indecisiveness concerning the available and appropriate means to tackle such a situation:

There has been, as a result, a long-standing argument in the international community between those who insist on a “right to intervene” in man-made catastrophes and those who argue that the Security Council, for all its powers under Chapter VII to “maintain or restore international security,” is prohibited from authorizing any coercive action against sovereign States for whatever happens within their borders.

Id.

While some interpret this debate as driven by advocates of a revival of hegemonic/imperialist designs of international law on the one hand (for this comment I am indebted to an anonymous reviewer), it can also be read as leaving the door open for a wider interpretation of the means available to address the threat, namely within the “spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies,” on the other hand. *Id.* Certainly, the U.N. authorized foreign military intervention at the contemporary stage of legal development excludes pre-emptive action. Alvarez attributes precisely such intention to the U.S. protagonists of the R2P: “R2P treats sovereignty as more hindrance than protection and the U.N. Charter less as sovereignty’s guarantor than the guarantor of the rights of individuals.” Alvarez, *supra* note 17, at 12. Intervention is permissible only in situations of international armed conflict or *post bellum*, e.g., peacekeeping, peace-building but also in new post 9/11 borderline situations as the Afghanistan intervention mode suggests.

Not coincidentally, this matches well the general thrust of the report’s discussion of the R2P: It is open-ended, foreseeing—even endorsing—the development of international law. If this is so, then the concept of R2P, which is still in its infancy, may also benefit from other legal opportunities made available by the concept of *suspension of sovereignty*.

²² This should absolutely not be confused with what Alvarez refers to as imperial driven “conditional sovereignty” (Alvarez, *supra* note 17, at 11).

²³ Formerly referred to in the U.N. Charter as self-government and independence.

is being acknowledged, the institution of trusteeship, enabled or substituted by a leasehold agreement, offers an elegant and perhaps face-saving outlet.²⁴

In this paper, I focus on the example of Lebanon where (similar to some of the previously mentioned examples) sovereign competences have diminished significantly. Particularly, from 1970 onwards, different periods were extracted out of the purview and control of the Lebanese government. These territories did not remain vacant; rather they were placed under foreign state and/or local NSA domination. Such was the situation in South Lebanon during the control by the Israeli proxy South Lebanese Army (SLA); direct Israeli military occupation; the presence of Syrian forces throughout the rest of the country; and Hezbollah controlled “enclaves” within a Beirut neighborhood and widespread areas in South Lebanon. Precisely because these lands have *not* remained without governance, the possibility of occupation, albeit of a “non-classic” belligerent form²⁵ deserves consideration. Particularly interesting in the Lebanese situation²⁶ is the inter-state relationship, e.g., Lebanon-Syria-Iran-Israel, which has been intricately interlaced in a state-to-NSA web as played out in the relationship Israel-SLA on the one hand, and Iran, Syria, and Lebanon-Hezbollah, on the other hand. While politically representing a FFS situation, no equivalent encompassing *de jure* characterization of such situation exists as yet. A legal concept of *suspended sovereignty*, as a new recognized characteristic of occupation, may offer a peaceful alternative to military intervention.

II. Review of the Legal History of the Concept of “Occupation”

International legal concepts are born out of international political necessity. The evolution of the concept of occupation is no exception. Now is a suitable moment

²⁴ Lebanon’s seven-point plan’s suggestion to place the Shab’a Farms under United Nations jurisdiction pending a permanent delineation of the boundary more than hints at such possibility. S.C. Res. 392, ¶ 62, U.N. Doc. S/RES/392 (2007); Report of the Secretary-General on the Implementation of Security Council Resolution 1701 (2006), 10, S.C. Res. 147, U.N. Doc. S/2007/147 (Mar. 14, 2007) see chapter “G. Delineation of Borders”.

²⁵ Belligerent occupation is normally considered a situation where the direct occupant (of the occupied population’s territory) is a state, e.g., Germany following World War II, or Israel’s occupation of foreign territories following June 1967. Alternatively, a situation of non-international armed conflict, where land comes under the control of the warring parties, is not *de jure* qualified as occupation, even when effective control is established.

²⁶ Also characteristic of the Somalia case, *see supra* note 8.

to assess the correlation of law and politics regarding occupation for it increasingly appears that the political reality of occupation has been surpassing its legal confines of the post WWII era. Occupation arising in the context of military conquest, and leading to the seizure of control over a foreign territory, was conceptualized in the nineteenth century law of war as a matter of inter-governmental relations. It represented a legitimate means of achieving national goals and presumed a state of peaceful coexistence between occupant and local population.²⁷ Just prior to the turn of the 20th century, the principles underlying this doctrine were already under transformation. By the end of WWI, political developments related to the rising claims to, and struggles for, national self-determination; the expansion of the notion of sovereignty to include peoples and not solely governments; and the altering relationship between the public and the private spheres of society have all begun leaving their mark on international law.²⁸ The immediate lessons of the WWII experience prompted further important improvement of the law by focusing attention on the welfare of individuals—rather than collectivities—under occupation.²⁹ These specifications reflect a new theoretical approach transforming the law of occupation into a phenomenologically defined concept.³⁰ It has come to represent a state of “effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of

²⁷ Reflected in Article 43 of the 1907 Hague Regulations, *see* EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 27, 30 (2nd ed. 2004). *See also* Grant T. Harris, *The Era of Multilateral Occupation*, 24 *BERKELEY J. INT'L L.* 3 (2006).

²⁸ They crystallized, among others, in the Hague Convention (IV), *supra* note 7.

²⁹ The Lieber Code instructing the conduct of the U.S. forces in the American Civil War is considered a chief foundational source of this shift. *See* Harris, *supra* note 27, at 4. For post WWII developments *see*, ICRC. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. In an effort to further institutionalize the law of occupation beyond declaratory customary international law, the drafters of the Articles 47 and 64 *et seq.* of the Fourth Geneva Convention recognized the temporality of occupation in relation to sovereignty and the correlative limitations on the control by the occupant. This is complemented by other relevant provisions *see, e.g.*, Articles 9 and 11 and *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, art. 5, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol I].

Most recently, the US Army/Marine Corps Counterinsurgency Field Manual of 2007 has put security for civilians as a priority preceding the destruction of the enemy. UNITED STATES ARMY AND UNITED STATES MARINE CORPS, U.S. ARMY/MARINE COUNTERINSURGENCY FIELD MANUAL (2007) [hereinafter U.S. ARMY/MARINE COUNTERINSURGENCY FIELD MANUAL]. *See also* FUND FOR PEACE, *THE BOSPHORUS CONSENSUS DECLARATION* (2007).

³⁰ *See also* BENVENISTI, *supra* note 27, at 98-99.

that territory,”³¹ focusing on the *means* of occupation but not altering the *essence* of occupation.³² However, the disregard for these new rules exhibited in states’ practice as well as the legal discourse,³³ and displayed throughout the post-WWII period and well into the post-Cold War era, have now come to challenge the *status quo* of the law of occupation: “[A] double challenge: a challenge to the principles that underlie the laws of occupation, and a challenge to their enforceability.”³⁴

³¹ *Id.* at 5. For effective control see also Aeyal M. Gross, *The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation*, 19 *LIEDEN J. INT’L L.* 1-48 (2006); Yuval Shany, *Faraway, So Close: The Legal Status of Gaza after Israel’s Disengagement*, *Y.B. INT’L HUMAN. RTS. L.* (forthcoming 2008).

³² BENVENISTI, *supra* note 27, at 5.

³³ With the exception of the Israeli occupation after the 1967 war, all other occupants after World War II refrained from resorting to The Hague Regulations or the Fourth Geneva Convention as the source of their authority or as a guide to their actions. The propensity to avoid the regime of occupation is particularly noticeable in the various occupations of the 1970s and early 1980s. These occupations, the international reaction to them, and other international developments during this era, have greatly complicated the law of occupation.

Id. at 180.

Recent occupants did not view themselves as occupants and, for reasons discussed above, preferred to confer responsibility on local governments they established. As a result, occupants—except for Israel with regard to the territories occupied in 1967—did not have to struggle with the adaptation of the law of occupation to the contemporary challenges of administration. Thus, for example, aside from the interpretation of Article 43 of the Hague Regulations by Israeli institutions, no other state practice with regards to this basic article exists after World War II.

Id. at 182, *cf. also* 189-90.

This observation has been put to test following the recent 2003 invasion of Iraq by the U.S. led “Coalition of the Willing.” While the U.S. and British positions on Iraq’s post *bellum* situation and pre-establishment of the fledgling Iraqi government are framed within the formal law of occupation, the extent to which this stance is indeed reflected in deeds and compliance, is debatable. Harris refers to a political “New Model” of multilateral occupation which deviates from the former’s emphasis on basic humanitarian provisions, and favors nation-building, the latter not yet forming a part of the body of occupation law. Harris *supra* note 27, at 11. The U.S. ARMY/MARINE COUNTERINSURGENCY FIELD MANUAL 2007 (*supra* note 29) may signal a change of course.

³⁴ *Id.* at 107. Another recent example for the challenge in applying the law of occupation is the public opinion campaign just launched by the NATO forces in Afghanistan releasing videos of insurgents while in breach of international humanitarian legal obligations. Paul Kring, *Halt Detainee Transfers Now, Canada Urged*, *THE GLOBE & MAIL*, NOV. 13, 2007, A15; Alan Freeman, *Canada Violating Geneva Treaty, MPs Say*, *THE GLOBE & MAIL*, NOV. 17, 2007, A20; Daniel Leblanc, *Opposition Attacks Child-Detainee Transfers*, *THE GLOBE & MAIL*, NOV. 29, 2007, A, A6.

The overwhelming magnitude of the *problematique* concerning the discrepancy between factual situations similar to occupation, on the one hand, and the extant international law, on the other hand, resonates in the work of the International Institute of Humanitarian Law.³⁵ While non-international conflict (which often captures the condition of a FFS, or of foreign involvement in a third state amounting to “occupation like” conditions) is regulated by the Additional Protocol II to the Geneva Conventions,³⁶ which governs the duration of the armed conflict, the end of the non-international conflict remains a non-addressed issue. Consequently, a post *bellum like* situation remains excluded from the law of non-international conflict. Let us, however, assume for the sake of argument, that occupation is being recognized as a possibility in a non-international conflict. Then, will the application of Article 43 of the Hague Regulations on belligerent occupation and peace-building offer any guidance? Dinstein’s focus on the distinction between executive and legislative functions brings the legal challenge into the fore: The first obligation has to be implemented by the executive (and the judicial) branch of the Military Government of the Occupying Power, whereas the second obligation devolves on the legislative branch.

In the final analysis, the first obligation requires acts of commission: the Occupying Power must take the necessary and proper measures in order to restore and ensure public order and life. Conversely, the second duty postulates primarily acts of omission: avoiding the repeal or suspension of existing laws, except in cases of “*empêchement absolu*.”³⁷

Unlike during occupation (in an international conflict), the victorious party in a non-international conflict will most likely be already occupying not only the executive but also judiciary and legislative positions (e.g., it may be a coalition of previously rival parties, or a result of a *de facto* territorial cession). To be sure, it is precisely the purpose of the actor challenging the incumbent government in a non-international conflict to *change* the laws in force.³⁸ This clearly contradicts the

³⁵ YORAM DINSTEIN, MICHAEL N. SCHMITT, & CHARLES H.B. GARRAWAY, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY* (2006).

³⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

³⁷ Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, (Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series 3, Fall 2004).

³⁸ This, for instance, has been the argument of entitlement inherent in struggles for self-determination, which have come to be considered an inter-national type of conflict: “The claim of the lawful

objective of parties in an international armed conflict as envisaged by the Hague law of occupation.³⁹ Therefore, a party in a non-international conflict will be neither

struggle for self-determination ... coupled with the notion of illegal 'foreign occupation' could seem to import major qualifications, indeed, a revolution, in the law of occupation." BENVENISTI, *supra* note 27, at 187.

³⁹ For example:

In accordance with the second part of Article 43, the Occupying Power must respect "*les lois en vigueur*" (the laws in force) in the occupied territory, except in cases of "*empêchement absolu*." Respect means that—as spelled out in the Brussels Declaration—the Occupying Power has to maintain the laws in force and not modify, suspend or replace them with its own legislation. The term "*les lois*" appears to encompass only promulgated laws (whether basic or trivial; national or municipal; civil or criminal; substantive or procedural). Yet, there is no indication that the framers of the Hague regulations intended to exclude from the ambit of Article 43 "common law," tribal law (especially of indigenous and nomadic people) or other forms of domestic customary law.

Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, *supra* note 37, at 4.

Also, consider the following:

5. Protocol II includes language, political or other opinion, and national or social origin as prohibited bases of adverse distinction. These criteria are drawn from the law of human rights. Whereas it is clear that there is an increasing overlap of human rights law and the law of armed conflict, particularly in non-international armed conflict, the extent to which customary international law encompasses these expanded grounds is unclear in the latter context (bearing in mind that a non-international armed conflict usually involves a political dispute or clash between ethnic groups).

DINSTEIN, SCHMITT, & GARRAWAY, *supra* note 35, at 15.

Moreover, in reliance on the International Criminal Tribunal for Yugoslavia (ICTY), *Prosecutor v. Tadic*:

The extension of rules applicable in international armed conflict "has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the *general essence of those rules*, and not the detailed regulation they may contain, has become applicable to internal conflicts." Therefore, one should be cautious whenever applying provisions—or interpretations thereof—intended for application in international armed conflict to situations of noninternational armed conflict (see paragraph 7 of the commentary accompanying Rule 1.2.3).

Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, *supra* note 37, at 21.

And furthermore:

6. Since a non-international armed conflict may consist in part of riot situations, it is important to bear in mind that the use of riot control agents to control a riot is perfectly permissible. Admittedly, it is not always easy to determine when a riot has ended and "above the threshold" fighting has started (see discussion of the threshold issue in the commentary accompanying Rule 1.1).

Dinstein, *Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, *supra* note 37, at 34.

able nor willing to comply with these rules.⁴⁰

Certainly, a major factor contributing to the insufficiency of the legal concept of occupation consists in the evolution of the nature of armed conflict; the blurring of the boundary between international and non-international conflict; the emerging of the asymmetric war; and the ensuing challenge to the prevailing concepts of international legal personality.⁴¹ Lebanon serves as a quintessential example. An observation of the state of governance and exercise of sovereignty at the turn of this century, Lebanon,⁴² suggests a gap between the current doctrines of occupation and legal personality on the one hand, and political fact, on the other hand. The state of Lebanon has been troubled by internal rifts, carried on from pre-independence and lasting ever since, in spite of efforts to regulate the tense heterogeneous web of Lebanese political relationship by means of a political arrangement.⁴³ Lebanon's susceptibility to external influences

⁴⁰ This relates also to Harris' (*supra* note 27) concern with multilateral occupation and nation-building.

⁴¹ All reflected also in variations of the FFS. For international legal personality see Noemi Gal-Or, *A Reassessment of the International Wrong: Self-Help Remedies for International Wrongs & Countermeasures in Humanitarian Law*, (forthcoming) based on a lecture at the 35th Annual CCIL Conference Proceedings, 2006; *Zooming In and Out: The Tree and the Forest in the Justice Approach to Terrorism, Adapting North American Security Relations to Terrorist Threats*, J. CONFLICT STUD. (forthcoming 2008); Claudia Kissling, *The Evolution of CSOs' Legal Status in International Governance and Its Relevance for the Legitimacy of International Organizations*, in CIVIL SOCIETY PARTICIPATION AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT? ch. 2 (Jens Steffek et al. eds., 2007); Janne E. Nijman, *Paul Ricoeur and International Law: Beyond 'The End of the Subject'. Towards a Reconceptualization of International Legal Personality*, 20 LEIDEN J. INT'L L. 25-64 (2007). The evolving status of the individual, natural and legal, person, the NSA, and the international organization (IO) as subjects of international law is leaving no doubt that a reform of international law is practically under way. It is imperative that it includes also the law of occupation.

⁴² Post 9/11 Afghanistan and Iraq, among others, also serve as such examples. For lack of space, I will defer this discussion for another time.

⁴³ Elie Kedourie, *Ethnicity, Majority, and Minority in the Middle East*, in ETHNICITY, PLURALISM AND THE STATE IN THE MIDDLE EAST (Milton J. Esman & Itamar Rabinovich eds., 1988).

As it emerged into independence at the end of World War II, Lebanon included areas ... [with] large numbers of Sunni and Shi'ite Muslims who felt no particular attachment to the Lebanese state. To hold all these heterogeneous elements, the Lebanese constitution of 1926 included elaborate provisions ... the so-called confessional system. But after independence the system broke down quickly. In 1958, and more seriously after 1975, civil war dealt a powerful and perhaps mortal blow to the confessional system. And there can be no doubt that the mobilization of the Sunni and Shi'ite citizens of Lebanon by outside powers—the United Arab Republic, Syria, and latterly the Islamic Republic of

is evidenced in Syria's military presence and *de facto* direct rule in the country for nearly 29 years;⁴⁴ the establishment of the Palestinian Liberation Organization (PLO) headquarters and base of operations (including the so-called Fattah-land in Southern Lebanon after the PLO's forceful expulsion from Jordan in the early 1970s); Israeli incursions and occupations during varying periods of time since the late 1970s; and for a similar length of time—Iranian interference through proxies—most notably the Lebanese Hezbollah organization.⁴⁵ In today's vocabulary, Lebanon represents a very fragile state, unable to fully sustain its sovereign competences (at least, a condition of partial suspension of sovereignty) and thereby attracting and facilitating foreign intervention (often amounting to foreign occupation).⁴⁶ The recent 2006 Lebanon

Iran—was the main cause of the Lebanese Civil war ... [and] destroyed the balance of communities in Lebanon.

Thus ... in Lebanon the European vocabulary of politics and the modern European concepts of the state have visibly led not to greater welfare and security but to insecurity and destruction for the inhabitants ...

(*Id.* at 31.)

⁴⁴ Since 1990, when Syria sent forces to Lebanon to end the civil war there which broke out in 1975 and until the withdrawal of its armed forces from Lebanon in 2005, following the February 2005 assassination of Lebanese Prime Minister Hariri, *see Syria 'Starts Lebanon Pullback,'* BBC NEWS, (Mar. 8, 2005), available at http://news.bbc.co.uk/2/hi/middle_east/4331045.stm; *Biography: Mr. Rafic Hariri*, available at <http://www.rhariri.com/default.aspx> (The Official Website Former Prime Minister of Lebanon 1992-1998, 2000-2004).

⁴⁵ Which will discuss in *infra* Part III.

⁴⁶ To what extent Syria's occupation, or Iranian via Hezbollah's control, over parts of Lebanon amount to non-belligerent occupation or occupation, respectively, is of course the point that I am attempting to elucidate in this Paper. While attracted by the Lebanese civil war, foreign presence on Lebanese soil has not been related to a *Lebanese* war of national liberation. The control that the PLO exerted over areas in Lebanon during the 1970s and early 1980s, and up to the present—in the refugee camps, was related to the Palestinian struggle for statehood. Accounts of the challenges to the Lebanese state building endeavor are attributed to ethnic and religious tensions and strategic visions of its former mandatory “protector” France, rather than to a 19th century notion of nation-building or 20th century struggle of national liberation.

Greater Lebanon was created by France in 1920 The French decision to establish greater Lebanon was made in consequence of Maronite pressure and for want of a reliable alternative. Many Frenchmen favoured a united Syria with a small autonomous Lebanon on the Ottoman model The political system of Lebanon which developed between 1943 and 1958 depended upon three principles ... all [of which] were called into question and the consequence was the virtual destruction of the state.

M.E. YAPP, *THE NEAR EAST SINCE THE FIRST WORLD WAR*, 105, 265 (1991). Rabinovich observes that “[t]he idea of a Lebanese entity, rooted in a historic tradition and serving as bridge between East and West, though apparently secular, was perceived, certainly by its opponents, as Christian in orientation. Indeed, the Lebanonism of the Kata'ib, despite much elaboration and sophistication, was ultimately Maronite-Christian.” Itamar Rabinovich, *Arab Political Parties: Ideology and Ethnicity*, in Esman & Rabinovich, *supra* note 43, at 165.

War, the difficulties encountered by the U.N. International Investigation Commission investigating the murder of former Lebanese Prime Minister Rafiq Hariri as well as the current highly volatile political stalemate in the country clouded by a series of yet unexplained assassinations of eight anti-Syrian politicians since 2004⁴⁷—all represent a specific confluence of intra-and inter-state factors demonstrating the sovereign's incapacitation. This is a conspicuous example illustrating how FFS conditions operate as a magnet attracting foreign intervention and amounting to a not-yet-legally-identified form of occupation. In this fissure, where a state of suspension of sovereignty has been established, and where other actors actively and effectively rival the official and formal government over "*l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*,"⁴⁸ occupation appears to take on an additional and new form.

In the course of modern history, legal instruments were developed to address a "void" in sovereign competences. These arose in the context of colonialism in pre-Westphalian societies and included protectorates⁴⁹ such as the post WWI grant of the power of international legal mandates to governments to administer foreign territories on behalf of the League of Nations⁵⁰ and were consequently reformulated into trusteeships after WWII. These were no longer administered through the intermediate of a foreign government but rather by a "consortium" of governments, i.e., the

⁴⁷ Zeina Karam, *Lebanon Has Record of Assassinations*, WASHINGTONPOST.COM, Nov. 24, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/24/AR2006112400269.html>.

⁴⁸ Convention Concernant les Lois et Coutumes de la Guerre sur Terre, 1907, 205 Consol T.S. 277, 295 (C. Parry ed., 1980) cited in Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding*, *supra* note 37, at 2.

⁴⁹ The term "suspension" implies effective previous sovereign title. It remains open for debate whether the essence of sovereignty reflects pre-colonial legal situations in non-European polities. This is an issue too complex to address here for it requires the comparative study of, at least, the European, Communist, and Development doctrines of international law, and discussion of the concept of *terra nullius*. I am indebted to an anonymous reviewer for raising this issue.

⁵⁰ Suffice it here to mention that there are several international legal arrangements ranging on a continuum, and representing, albeit indecisively, situations wherein sovereign competences have been suspended, even relinquished. The protectorate and the vassal relationship tend to the latter engagements, which at face value, purport to be consensual (the protected state having requested the protection of the powerful state), see YORAM DINSTEIN, *THE NON-STATE INTERNATIONAL LAW*, *THE NON-STATE INTERNATIONAL LAW* 65-68 (1970) [in Hebrew] and Mugerwa, *supra* note 1, at 252, or a non-belligerent occupation. Yoram Dinstein, *The Beginning and the End of Belligerent Occupation*, Oral Presentation at Forty Years after 1967: Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context: An International Conference, Jerusalem & Tel Aviv (June 5-7, 2007) (personal notes, available with author).

United Nations. The protectorate, mandate, and trusteeship, respectively, represent successive stages in international law's development in addressing situations of "lack" or "partial" sovereignty and their relation to occupation (foreign rule). Thus, the mandate system was innovative in two main respects. First, it provided for the three categories of the mandates reflecting the three "degrees of preparedness" for independence.⁵¹ It is, however, clear that at least in one type of mandate (type A), foreign administration was established over territory conquered by a sovereign.⁵² The second innovation of the mandate doctrine compared it with the protectorate (and the colonial protectorates) which consisted as a trustee/agent. The mandate represented powers "on behalf" of the League of Nations (an international organization, not a sovereign) and under its authoritative supervision.⁵³ The fact that the successor of the

⁵¹ Article 22 of the Covenant of the League of Nations. For instance, Iraq and Jordan were considered to be at an advanced stage of independence for their internal and external relations proved to possess "a measure of international personality even before they attained full independence." Mugerwa, *supra* note 1, at 264. I will not elaborate on the three categories for lack of space. I will therefore forego the discussion of status of occupied territories that formed previously part of a sovereign state but were "torn" from it, only to be placed under mandate administration, and subsequently handed over to U.N. trusteeship management.

⁵² In the case of territories "lost" by Turkey and Germany, which were defeated in an armed conflict (WWI), the transfer of territorial powers was settled by means of a peace treaty—and assigned to several states, notably Britain, France, Belgium, and Japan. Abdullah El Erian, *The Legal Organization of International Society*, in Sørensen, *supra* note 1, at 61-62, and Dinstein, *The Beginning and the End of Belligerent Occupation*, *supra* note 50, at 70. Here the doctrine of the mandate system according to which the mandated territories were not yet fully (capable) of independence gets somewhat "fudged." Specifically, already prior to the end of WWI, Britain and France divided the formerly Ottoman territories in what became known as the controversial Sykes-Pico Note (1916), a secret agreement partitioning the Ottoman Empire between these two powers (and which contradicted some assurance given by T.E. Lawrence "of Arabia" to the Arabs when mobilizing them to the revolt against the Turks). The Sykes-Picot Agreement, May 15 & 16, 1916, Jerusalem Media and Communication Centre (JMCC), available at <http://www.jmcc.org/documents/sykespicot.htm> (last visited May 27, 2008). ALAN PALMER, *DICTIONARY OF MODERN HISTORY 1789-1945* (1983). For instance, the border between Syria and Lebanon was subsequently defined in yet another agreement between Britain and France in 1923, and *ratified* by the League of Nations in May 1935. HAIM SARBARO, *THE LEGITIMACY ISSUE OF THE LEBANESE CLAIM TO THE 'SHEBAA FARMS' IN RELATION TO THE INTERNATIONAL BORDER* (2006).

⁵³ El Erian, *supra* note 52, at 63. The mandatory state's administration of the mandated territory was regulated by resolutions of the League Council, agreed upon with each Mandatory, the latter required to report annually to the League Council. A Permanent Mandates Commission consisting of independent experts examined the reports and advised the Council respectively. Inhabitants of the mandated territories were legally entitled to petition the League, and disputes regarding the mandates were justiciable before the Permanent Court of International Justice. Consequently, "the mandatory or trust power exercised a *de facto* sovereign power over the territory. But the exact nature of the *de jure* position has never been clear and has given rise to a number of conflicting theories." Mugerwa, *supra* note 1, at 264.

mandates—the trust territories—were smaller in size and population in comparison with the mandated territories, and that the trusteeship system of the United Nations eventually “evaporated,” bespeaks the arrangement’s shortcomings.⁵⁴ All of this, however, does not invalidate the fundamental thrust of both mandate and trust doctrines, namely that the population (people) of territories under international tutelage deserves the protection and assistance of the international community, for a limited term, to support them in either establishing or recovering their sovereign competences.

In conclusion, where the new scope of actors exploits or enhances the debilitation of the sovereign’s competences, these competences become suspended and a new *de facto* form of occupation (neither explicitly belligerent, nor consensual) is established. This factual scenario calls for a *de jure* doctrine of occupation.⁵⁵ A new law will supplement the Hague and Geneva law of occupation by (a) identifying a new status of occupation, and (b) expanding the arsenal of regulative provisions to include limited term trusteeship as a means towards ending (reversing) the suspended condition of the sovereign’s competences.

III. *Suspending Sovereignty*⁵⁶ and *de facto* Occupation: Lessons from Lebanon

In this Paper, I argue that under a certain FFS situation, a legal condition of suspension of sovereignty ought to be identified. It arises where the sovereign (its government) is

⁵⁴ These shortcomings suffered also from lack of clarity in the transition of the mandate system from the extinct League of Nations to the trusteeship system of the United Nations. Dinstein, *The Beginning and the End of Belligerent Occupation*, *supra* note 50, at 74.

⁵⁵ See, e.g., rights and duties of occupant, of ousted government, transition into a state of occupation and from occupation to post occupation, consent of the population under occupation, etc.

⁵⁶ Michael Strauss, *Is Transdisciplinary Dialogue Possible? Translating International Relations and International Law to Each Other*, presented at International Political Science: New Theoretical & Regional Perspectives. IPSA International Conference. Concordia University, Montreal (Quebec), April 30-May 2, 2008

The notion of sovereignty has also defied a uniform definition. Its essential components parallel those of a state itself—territory, population and government—but as many as 12 distinct and overlapping meanings of sovereignty have been identified as the term applies to states, and Fowler and Bunck admit that the meaning “varies according to the issue that is being addressed or the question that is being asked.

For a thorough review of the gradual historical evolution of the concept of sovereignty see Hanna Danwall, *Guantanamo Bay, A Legal ‘Black Hole’?* (2004) (unpublished Master Thesis, Faculty of Law, University of Lund).

denied control over part of, or the entire, state territory due to (a) paramilitary control by a NSA, and where the situation cannot be characterized as a non-international *armed* conflict; (b) foreign military *indirect* control but no direct *armed* confrontation with the state's military or other armed forces; and (c) the sovereign did not formally and/or freely consent to the foreign intervention. Suspended sovereignty, therefore, combines elements similar to the current legal concept of non-belligerent occupation with a highly incapacitated FFS condition. It emerges from the triangular interface of inter-state, state-NSA, and state-international relations. With this background in mind, it logically follows that international law turn to address two issues relevant to suspended sovereignty: First, the specific essence of occupation in a FFS condition⁵⁷ and second, the restitution of sovereignty.

Lebanon is the quintessential proto-type of a FFS whose sovereignty has been suspended and matches the expanded concept of occupation proposed here. Lebanon's protracted submission to Syria, Israeli interference with Lebanese sovereignty, PLO's effective control over sections of its territory, and increasing Iranian mingling in Lebanese affairs represent a case in point. The 2006 Lebanon War exposed to the world that the Lebanese government's failure to exercise its powers over and control its own territory had reached a new climax. Here, a particular constellation of intra- and inter-state conditions converged into a grey zone falling neither within non-international, nor international, conflict and hence transcending mere occupation. The southern part of the country and a specific municipal neighborhood in the capital of Beirut

I will elaborate on the doctrine of sovereignty in a future broader version of this Paper. Meanwhile, see also Noemi Gal-Or, *Towards A Transdisciplinary Discourse on the Link of Trade and Investment, International Law, and Global Governance: Is a New Terminology Needed?* (Submitted for publication, 2006) (on file with author). Several other relevant publications (among a significantly more voluminous selection) addressing the dilemma of interpreting sovereignty, including the tension between the notion of sovereignty and its constituent competences are Peter Nyers, *The Accidental Citizen: Acts of Sovereignty and (un)Making Citizenship*, 35 *Eco. & Soc.* 22-41 (2006); Heinhard Steiger, *Remarks Concerning the Normative Structure of a Modern World Order in A Historical Perspective*, in *LEGAL SCHOLARSHIP IN INTERNATIONAL AND COMPARATIVE LAW* 75-101 (Thomas Gross ed., 2003); Véronique Voruz, *Sovereignty, Power and Resistance*, 15 *INT'L J. SEMIOTICS L.* 231 (2002); Jean-Jacques Morin, *Droit et souveraineté à l'aube du XXI siècle*, 25 *CAN. YB INT'L L.* 47 (1987); Benedict Kingsbury, *Sovereignty and Inequality*, 9 *EUR. J. INT'L L.* 599 (1998). Most recently, Carsten Stahn reviewed this conceptual dilemma in *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* 101 *AM. J. INT'L L.* 99 (2007).

⁵⁷ Where the "modern occupant" (BENVENISTI, *supra* note 27, at 147) runs to the assistance of a presumably aid requesting state; or, where the occupant exercises effective control in the foreign state but eschews admitting to it (most likely for political reasons), consequently avoiding (or preventing) the application of the rules of occupation. *Id.*

were removed from the purview of the Lebanese government and became effectively controlled by the Hezbollah.⁵⁸ This legally non-definable “hybrid” actor epitomizes a combination of a non-insurgent (until after the Lebanon War), yet paramilitary, organization partly representing a NSA—an Iranian surrogate supported by Syria—and partly a state actor—with elected representation in the Lebanese government both in the cabinet and in the opposition.⁵⁹ The ensuing situation of Lebanon defies legal characterization. It does not fit within the scope of Article 42 of the Hague Regulations; the claim that Hezbollah represents a *foreign* army establishing its control over foreign territory is unlikely. Equally, the Fourth Geneva Convention cannot be invoked because it does not involve the protection of individuals from foreign rule; on the contrary, the majority of the local population within the territory appears to be supportive of the “unofficial ruler” (the Hezbollah). Likewise, the two Additional Protocols are irrelevant to the situation for most of the length of its duration. In addition, currently⁶⁰ there is neither a legally recognized international nor non-international armed conflict in Lebanon.

This state of affairs gives rise to crucial questions. Does the situation reflect a *conscious* and *free* decision by the Lebanese government to abstain from governing the southern part of the country as well as to refrain from entering refugee camps, and therefore qualifies as an expression by the sovereign government regarding the exercise of its plenary sovereignty over all of Lebanon? If the answer is yes, and assuming for the sake of the argument that Hezbollah’s control is classified as occupation, any Lebanese government decision may be taken as implying consent, i.e., resemble the situation of non-belligerent occupation. Facts on the ground, however, refute this alternative. The Lebanese Prime Minister, Fouad Siniora, and members of his cabinet, have for several months spent most of their time in hiding, and have been running the state’s affairs out of a five-star hotel in Beirut rather than from the official government

⁵⁸ Not only continuous media reports (most recently, Marc MacKinnon, *In Lebanon, Something’s Got to Give*, THE GLOBE AND MAIL, NOV. 23, 2007, at A14) and scholarly writings (a detailed and encompassing book developed from his doctoral thesis, see AMAL SAAD-GHORAYEB, *HISBU’LLAH: POLITICS AND RELIGION* (2002)) identified the Hezbollah among the important and crucial actors, at least in Southern Lebanon. The U.N. as well has recently reached this conclusion in Report of the Secretary-General on the Implementation of S.C. Res. 1701, U.N. Doc. S/RES/730 (June 28, 2007).

⁵⁹ SAAD-GHORAYEB, *supra* note 58.

⁶⁰ With the exception of the recent events in the Nahr el-Bared camp north of Tripoli, and the apprehension surrounding the possibility of a renewed civil war. See *Lebanon Army Takes Control of Camp after Battle*, REUTERS, Sept. 2, 2007, available at <http://www.reuters.com/article/topNews/idUSL0261343920070902>.

premises. Moreover, their freedom of movement across the country they have been elected to politically govern is practically circumscribed.⁶¹ Foreign states (Syria, Iran, and Israel) continue to intervene in the country and although Syria withdrew from Lebanon, a threat of renewed use of military force is constantly looming in the background. There is currently no operative and representative government in Lebanon (whether democratically elected or not), that is capable of either consenting to, or withholding consent against, foreign intervention. Lebanon's sovereignty therefore, is suspended; it is in an expanded mode of occupation.⁶²

I now turn to a more detailed discussion of the relationship between the proposed legal concept of suspended sovereignty and FFS, on the one hand, and R2P, on the other hand.

A. *Fragile/Failed State*

There is no legal definition applicable to the condition of FFS. The term has been developed as part of an attempt to institutionalize the challenges facing the U.N. at the dawn of the 21st century.⁶³ Lebanon, which falls squarely within this political category,

⁶¹ MacKinnon, *supra* note 58.

⁶² Instinctively, the particular version of occupation suggested here represents essentially a special condition within the FFS situation. However, I am not excluding the possibility that further and comparative research will find otherwise. Arguably, the condition in the Waziristan region of Pakistan, Darfur in Sudan and the spillover into nearby Chad and Somalia are just a few examples which lend support to a thorough consideration of the proposition of a legal concept of suspended sovereignty. Although each of these examples represents a unique case, and neither is identical to the Lebanese scenario, all share a mix of situations falling into the legal void between an international *non-armed* conflict and non-international *non-armed* conflict.

⁶³ Mats Bredal, *Reconciling the Irreconcilable?*, in *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, BEHIND THE HEADLINES—REPORT OF THE UN SECRETARY-GENERAL'S HIGH-LEVEL ON THREATS, CHALLENGES AND CHANGE 7* (2005).

By what criteria does one identify a state "sliding towards collapse"? More difficult still, one imagines, will be to persuade a state thus identified to accept the 'invitation to attend' a meeting of the commission [proposed UN Peacebuilding Commission]. Even so, the rationale behind and the analysis that accompanies the proposal are convincing and well supported: "failed states" or "states in distress" clearly pose profound challenges to the UN membership as a whole.

"This loss of capacity of the traditional individual state of the 21st century to perform its functions for the people is not only a loss of factual power, might, strength and means. It is a *structural* loss and therefore it concerns all states, not only the 'failing state'..." Steiger, *supra* note 56, at 98

exemplifies the challenge. To arrive at a legal characterization, the status of a FFS must be determined in relation to the legal concept of sovereignty. Two instances of sovereignty are pertinent here: State sovereignty, which is critical for a diagnosis of a condition of FFS, and sovereignty of other political entities and international organizations, which becomes relevant in relation to the restitution to full sovereignty and hence applies to the R2P.

In the first instance, namely state sovereignty, two closely related concepts are of crucial importance: Territorial sovereignty and title to sovereignty. Territorial sovereignty may be original or derivative.⁶⁴ A state cannot exist without sovereignty and both are intrinsically connected. Being a state implies, by definition, sovereignty under international law.⁶⁵ Lebanon would not be a state without its territory, which it acquired in a derivative mode gaining independence in 1943 from its tutelage under the French Mandate for Syria. Title to sovereignty, which is closely connected to territorial sovereignty, emphasizes the notion of title. It thus concerns both the factual and legal terms under which territory is deemed to belong to one particular state only, and embodies the essence of territorial sovereignty in the sense that as a sovereign over territory, the state enjoys a certain type of competence—sovereign competence—which is a consequence of the title. It is used for comparative purposes in determining competing claims to territorial sovereignty.⁶⁶ It comprises an essential and necessary element, namely the power of disposition. While this power may be limited by treaty, the title however remains unaffected as long as the limitation on the power of disposition is not total.⁶⁷

(emphasis added). The challenges have been chronicled in the works of the U.N., beginning with the listing in the International Commission on Intervention and State Sovereignty, *supra* note 6, specifically the protection of citizens from man-made catastrophes such as mass murder, rape, starvation, i.e., humanitarian disasters and which are often related to other catastrophes (e.g., man-made environmental degradation, poverty, etc.) identified as necessary ingredients of human insecurity.

⁶⁴ Danwall, *supra* note 56, at 23.

Traditional international law provides five modes of acquisition of territorial sovereignty; [*sic*] occupation, prescription, accretion, cession and conquest. These are divided into original and derivative modes. An original acquisition is obtained through occupation or accretion and involves no transfer of sovereignty from a previous sovereign. The remaining modes are derivative and involve a transfer of sovereignty from a previous sovereign.

⁶⁵ *Id.*

⁶⁶ *Id.* at 24. See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928) cited in *Id.*

⁶⁷ *Id.*

The manifestation of title may take on different forms, depending on temporal and spatial conditions.⁶⁸ When a sovereign state distributes its sovereign competences to *other states*,⁶⁹ or disposes of its territory, it will nevertheless continue to possess titular, *residual* or nominal sovereignty (or engage in divided sovereignty in form of a condominium).⁷⁰ In contradistinction, the state exercising plenary power over the territory, but lacking the capacity of ultimate disposal, possesses only *effective* sovereignty. It is crucial to note that the doctrine envisages sovereignty only vertically and not horizontally, meaning that the sovereign state retains the highest authority. “[R]esidual and effective power, together make up the totality of sovereignty.”⁷¹

At the diagnostic stage of a FFS condition, the distinction between residual and effective sovereignty becomes instrumental. I argue that a FFS condition is established when the residual and effective sovereignties collide⁷² at the point where they, in fact, negate each other. In theory, this may be referred to as a suspension of sovereignty, in other words, a temporary freezing of the competences corollary to sovereignty. Legally, territorial sovereignty is not transferable to a NSA, either domestic or foreign (e.g., of the sort of the Hezbollah) or an international organization (e.g., the U.N., for that matter). Even if this was legally possible, such transfer would require to be made by explicit conventional or implicit customary legal avenues.⁷³ Lebanon did not recognize the Hezbollah as a government of any state. Even assuming that Syrian involvement in Lebanon were consensual and not under duress, while this might amount to derogation⁷⁴ from owning complete sovereignty, it could not qualify as transfer of sovereignty to Syria. Factually, however, Syria has been possessing effective control, and the Hezbollah continues to exert effective power in parts of Lebanon; both have been doing so to the detriment of Lebanon’s own *effective* sovereignty. Because Lebanon has long lacked conjoint effective and residual power over its territory—and the derogation from its sovereignty conflicts with the effective

⁶⁸ *Id.* at 25.

⁶⁹ Not to NSAs or other political entities and international organizations.

⁷⁰ Danwall, *supra* note 56, at 26.

⁷¹ Cited in *id.* at 27.

⁷² Rather than mutually complementing, e.g., in case of a treaty representing disposition of power over territory. For the various ways available to divide sovereign competences see Strauss, *Guantanamo Bay and the Evolution of International Leases and Servitudes*, *supra* note 56, at 6.

⁷³ Arguably, also general principles of international law. See G. James Apple, *What are General Principles of International Law?* 2 INT’L JUDICIAL MONITOR (July/Aug 2007), available at <http://www.judicialmonitor.org/current/generalprinciples.html>.

⁷⁴ For this point generally, and “derogation” of sovereignty specifically see IAN BROWNLIE, PRINCIPLE OF PUBLIC INTERNATIONAL LAW (6th ed. 2003) cited in Danwall, *supra* note 56.

powers exercised within its territory by Syria and Hezbollah (as well as Iran⁷⁵ and Israel)—it seems more accurate to define its situation as a FFS condition of suspended sovereignty.

B. R2P: Responsibility to Protect

Developing in tandem with the notion of FFS is the newly evolving norm R2P. Stahn describes the evolution of the concept as “almost like a fairy tale.”⁷⁶ First conceived in the International Commission on Intervention and State Sovereignty 2001 report on The Responsibility to Protect,⁷⁷ R2P then found its way into the U.N. High-Level Panel on Threats, Challenges and Change 2004 report entitled “A More Secure World: Our Shared Responsibility,”⁷⁸ only endorsed thereafter by the U.N. Secretary-General in his 2005 report “In Larger Freedom: Towards Development, Security and Human Rights for All,”⁷⁹ and later that year incorporated into the U.N. General Assembly’s

⁷⁵ In analyzing the Hezbollah, Saad-Ghorayeb says:

Another factor explaining the Shi’ites’ non-resistance and the non-materialisation of the Islamic Resistance during the 1978 invasion [by Israel] was that the Islamic Revolution in Iran had not yet taken place. Thus, the Shi’ites reacted militantly to the 1982 invasion, after the Revolution’s occurrence in 1979 But in the final analysis, there is much doubt as to whether Hizbu’lla, the political movement-cum-party, would have emerged had it not originated as a conglomeration of armed Islamic groups resisting Israel.

See SAAD-GHORAYEB, *supra* note 58, at 10. More specifically:

[i]nsofar as many of its cadres were drawn from Amal, the origins of the party do not actually lie in it. In point of fact, the fountainhead of Hizbu’llah was not located in Lebanon but in the religious academies of Najaf in Iraq where hundreds of young Lebanese Shi’ites studied in the early 1960s and 1970s [prior to the Iraq-Iran war and the Iranian revolution] under the tutelage of radical Shi’ite ideologues such as Kumayni and Muhammad Baqir as-Sadr.

Id. at 13. This influence was practically and physically reinforced with “Iran’s dispatch of 1,500 Revolutionary Guards (*Pasdaran*) to the Biqa’ in the wake of Israel’s 1982 invasion, which played a direct role in the genesis of Hizbu’llah.” *Id.* at 14. Saad-Ghorayeb chronicles the enhancement of the Hezbollah by Iran with the assistance of Syria throughout his work.

⁷⁶ Stahn, *supra* note 56, at 99.

⁷⁷ *Id.*

⁷⁸ A MORE SECURE WORLD, *supra* note 15.

⁷⁹ In Larger Freedom: Towards Development, Security and Human Rights for All, U.N. Doc. A/59/2005, ¶¶ 16-22 (2005), available at <http://www.un.org/largerfreedom/contents.htm>, (last visited Jan. 28, 2008).

“2005 World Summit Outcome”⁸⁰ resolution.⁸¹

R2P was conceived in a spirit similar to that of the Fourth Geneva Convention, namely focusing on the individual and informed by the law of human rights. Associated with concerns regarding, among other things, the loss of state capacity, characteristic

⁸⁰ G.A. Res. 60/1, ¶¶ 138-39, U.N. GAOR 60th Sess., U.N. Doc. A/RES/60/1 (Oct. 24, 2005) reprinted in Stahn, *supra* note 56, at 100.

⁸¹ Whether a normative transformation is, in fact, under way, is yet to be determined. “These findings suggest that something is wrong here. Either the concept of responsibility to protect is actually not so new and innovative as portrayed, or the qualification is wrong.” Stahn, *supra* note 56, at 102. I choose to refer to R2P as a norm in the making that may either crystallize, or dissipate. The I.C.J. interpretation in Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 91 (Feb. 26) addresses state responsibility in matters pertaining to the realm of the R2P. While the case marks the first time that a U.N. member *state* has been tried for genocide, the I.C.J. takes care to avoid and prevent misunderstandings that may arise in connection with the new concept of R2P. Judge Rosalyn Higgins, President of the I.C.J., emphasized: “We have been concerned *only* with genocide—and, I may add, genocide in the legal sense of that term, *not in the broad use of that term that is sometimes made.*” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Statement to the Press by H.E. Judge Rosalyn Higgins,” (Feb. 26, 2007), available at <http://www.icj-cij.org/presscom/index.php?pr=1898&p1=6&p2=1&search=%22SearchBosnia+and+Herzegovina+v.+Serbia+and+Montenegro%22> (emphasis added N.G-O). In *Serbia*, where a NSA was involved and acted outside the purview of the sovereign, the I.C.J. limited its interpretation of the scope of state responsibility in the case of genocide to the responsibility to prevent and the responsibility to punish, to the exclusion of the commission of the crime of genocide itself:

If the VRS [the army of the Republika Srpska] was an organ of Serbia and Montenegro (as that country was then called), then in law the Respondent would be responsible for the VRS’ actions. The Respondent would also be responsible in law if the VRS was acting on the instructions of, or under the direction or control of, the Respondent. In the light of the information available to it, the Court has found that it was not established that the massacres at Srebrenica were committed by organs of the Respondent. It has also not been established that those massacres were committed on the instructions, or under the direction of the Respondent, nor that the Respondent exercised effective control over the operations in the course of which those massacres were perpetrated. *This is the test in international law.* In fact, all indications are that *the decision to kill the adult male population of the Bosnian Muslim community in Srebrenica was taken by some members of the VRS Main Staff, without instructions from or effective control by the FRY....* The Court has found that the Respondent could, and should, have acted to prevent the genocide, but did not. The Respondent did nothing to prevent the Srebrenica massacres despite the political, military and financial links between its authorities and the Republika Srpska and the VRS. It therefore violated the obligation in the Genocide Convention to prevent genocide.

Id. These *Serbia* findings will have to be woven into the future debate on the R2P. They challenge the “legislators” of international law to explore approaches by which the legal lacuna in the gap separating the responsibility of the state from the responsibility of the NSA, must be filled. I am suggesting that the notion of suspended sovereignty might serve this purpose.

of the FFS,⁸² it pointedly penetrated the core of the legal construct of sovereignty. R2P “is testimony to a broader systemic shift in international law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of ‘human security.’”⁸³ This propelled a reconsideration of the concept of sovereignty for twenty first century purposes. The legal contours of the R2P have been discussed extensively in the larger contexts of state responsibility⁸⁴ and *humanitarian* intervention (including the tension existing between military and humanitarian intervention).⁸⁵ The doctrinal discourse of both state responsibility and humanitarian intervention wrestles with the question of establishing when a state’s abdication of responsibility justifies foreign intervention, and when foreign intervention transforms into foreign occupation.⁸⁶ It is precisely at this convergence—R2P “links” with FFS—to create the point where deterioration in the FFS (severe clash between residual and effective sovereignty) is recognized as an instance of suspended sovereignty.

Hypothetically, operationalizing an eventual legal R2P duty into actual policy would trigger both domestic and extra-territorial jurisdiction. Jurisdiction, which is commonly considered as a component of sovereignty, may be exercised also without owning title to territory.⁸⁷ Consequently, when territorial jurisdiction, which is “*prima facie* exclusive, over a territory and the permanent population living there,”⁸⁸ has been severely tampered with under the condition of a FFS, R2P—through invoking extra-territorial jurisdiction of foreign actors—may assist in resurrecting the suspended competences of the sovereign.⁸⁹

⁸² “[W]hile sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are *unable* or unwilling to do so ...” A MORE SECURE WORLD, *supra* note 15, at 56 (emphasis added N.G.-O.).

⁸³ Stahn, *supra* note 56, at 100-01.

⁸⁴ Little if any resolution has been achieved with regard to state responsibility in a situation involving a threat to peace. INTERNATIONAL LAW ASSOCIATION REPORT OF THE SEVENTY SECOND CONFERENCE, Toronto June 2006 (2006) (on file with author).

⁸⁵ See Jean-Baptiste Jeangène Vilmer, *Humanitarian Intervention and Disinterestedness*, 19 PEACE REV. J. SOC. JUST.

⁸⁶ Whether lead by a single foreign state, an alliance of states, or an international organization.

⁸⁷ Like sovereignty, the doctrine of jurisdiction is an indeterminate doctrine. Danwall, *supra* note 56, at 28.

⁸⁸ *Id.*

⁸⁹ See Stahn’s description of relevant propositions, *supra* note 56, at 118-120.

C. *International Trusteeship*

My argument in favor of enforcing extra-territorial jurisdiction where the sovereignty of a FFS has been suspended, builds on existing legal forms of interference with territorial integrity: Lease, servitude, trust, mandate, protectorate, colony, and occupation. Specifically, the lease and a re-vitalised concept of trusteeship as governing the lease are potentially instrumental both as a political means of rapprochement (confidence building) between conflicting parties (state and NSAs alike) as well as a legal means to settle disputes. They therefore offer a legal tool to “resuscitate” a state’s suspended sovereignty. To be sure, U.N. Charter Chapter VII, specifically Articles 40 and 41, and complementarity to Article 43, provide for the U.N. extra-territorial jurisdiction requisite for the application of an (eventually) rejuvenated Chapter XII on the International Trusteeship System.⁹⁰ To be effective, this U.N. extra-territorial jurisdiction, when applied to the FFS suspended sovereignty situation, must be centralized under the organization’s auspices and be unified and directly attributable to the U.N., not delegated to member states’ *individual* jurisdictional discretion.⁹¹ Such extra-territorial jurisdiction might be facilitated if established in either a lease agreement, where a recognizable government is still legally representative of the FFS (e.g., Lebanon prior to the current political stalemate⁹²), or in a trusteeship should a central government no longer exist (e.g., Somalia,⁹³ or during an interim period such as in Afghanistan after the ouster of the Taliban government and concomitantly to the arrangement following the Bonn Agreement 2001⁹⁴).

⁹⁰ I will elaborate on this, and specifically Articles 77(c) and 78, in a later broader version of this Paper. Suffice it here to point to the analysis by Stahn, who distinguishes—within R2P three relevant types of responsibility (in declining order of “firmness”) entrusted to the U.N. and transpiring from the four constitutive documents: The responsibility to prevent, to react, and to rebuild. *Id.* at 108-09.

⁹¹ Not excluding delegation of jurisdiction to regional organizations, e.g., NATO operations in Afghanistan, and on a case by case basis.

⁹² See, e.g., *Sixteenth Delay for Lebanon Poll*, ALJAZEERA.NET, Mar. 10, 2008, available at <http://english.aljazeera.net/NR/exeres/2E6F7902-5D35-47FB-9BA3-BA421D1DB50D.htm>.

⁹³ *Country Profile: Somalia*, BBC NEWS, Mar. 2, 2008, available at http://news.bbc.co.uk/2/hi/africa/country_profiles/1072592.stm.

⁹⁴ Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (2001) (the Bonn Agreement).

Territorial leases are recognized in international relations and law as an instrument enabling a state to exercise control over territory without owning sovereignty over it.⁹⁵ As Danwall writes:

[t]oday legal scholars define international territorial leases as legal rights exercisable by states over the territory of other states, which fall short of absolute sovereignty. These rights are attached to the territory and as such they may be enforced even though the ownership of the particular territory subject to the rights has passed to another sovereign, or in other words they are rights *in rem*.⁹⁶

International trusteeship represented a legal reform developed by the drafters of the U.N. Charter, adopted after the mandate system of the League of Nations started crumbling. The purpose was to oversee the transition of colonies to independence states; its “[m]ajor goals were to promote the advancement of people in the Territories and to promote their development toward self-government and independence.”⁹⁷ From a governance perspective, the FFS situation is comparable to that of a colony prior to self-determination. The opportunity of reviving⁹⁸ this means of international governance was not included in the work of the High Level Panel appointed by the U.N. Secretary-General and charged with proposing reforms, specifically regarding collective security.⁹⁹ It is, however, not too late to backtrack and amend this oversight.

⁹⁵ Michael Strauss, *The Viability of Territorial Leases in Resolving International Sovereignty Disputes*, address to the Annual Conference of the Association of Borderland Studies (Apr. 14, 2007) (on file with author) see especially 1.

⁹⁶ Danwall, *supra* note 56, at 40. Some examples are Cuba’s Guantanamo Bay lease to the United States; China’s 99-year lease of Hong Kong’s New Territories to Great Britain, which ended in 1997; lease arrangements in the Israeli-Jordanian Peace Treaty of 1994; France’s sovereign rights in the Pays Quint Septentrional (Quinto Real Norte), a small territory in Spain; and the United States Canal Zone lease from Panama, which ended in 1999. For more details see Noemi Gal-Or & Michael Strauss, *International Leases as a Legal Instrument of Conflict Resolution: The Shab’a Farms as a Proto-Type for the Resolution of Territorial Conflicts*, *TOURO INT’L L. REV.* (forthcoming 2008).

⁹⁷ Trusteeship Council, Sixty-Fourth Session, 1st Meeting, Oct. 20, 2004.

⁹⁸ Which has been considered in the context of international environmental governance. See *Eco-Logic: U.N. Reform—Restructuring for Global Governance*, July/August 1997, available at <http://www.iahf.com/world/un-refm.html>. The Trusteeship Council formally suspended operations on November 1, 1994, and is technically “non-existent.” Index to the Proceedings of the Trusteeship Council, United Nations Dag Hammarskjöld Library, UN-I-QUE (UN Info Quest), R00691.

⁹⁹ Mary Ellen O’Connell, *The Counter-Reformation of the Security Council*, 1 *J. INT’L L. & RELATIONS* 7 (2006), especially at 7.

Interstate leasing emulates the concept of lease in private law and includes three main elements: Rights of the lessee, duration of arrangement, and compensation to be paid to the lessor.¹⁰⁰ As the definition of international legal personality expands and with the inclusion therein of the international organization,¹⁰¹ and as new needs arise in regulating relationships among diverse international actors, there is no reason to foresee new circumstances for an international leasing where the lessee is an international organization and the lessor—a state.

The international community, as the trustee of the FFS, may assign a state or a group of states, or an international organization, the lease of territory from the FFS for the purpose of reconstituting authentic governance and returning the state into “active” sovereignty. A chief advantage of such an arrangement lies in the establishment of unequivocal jurisdiction.¹⁰² That such determinacy is desperately needed in a FFS has been demonstrated on several occasions in Lebanon, for instance, where UN military observer forces lacked the mandate to effectively fulfill the original purpose of their deployment.¹⁰³

Where sovereignty has been suspended, establishing a trusteeship is a first step toward the resurrection of sovereignty. However, trusteeship cannot be established in a legal vacuum. Arguably, the viability of a trusteeship depends on the effective control

¹⁰⁰ Strauss, *supra* note 95, at 1.

¹⁰¹ Albeit at a status, and with competences, different from that of the state.

¹⁰² At present, jurisdictional indeterminacy is plaguing both the institution of inter-state leasing and U.N. Charter, ch. VII, operations. On the one hand, the Guantanamo Bay experience is an example for jurisdictional indeterminacy where a bilateral lease and the leased territory are used to enable the lessee (U.S.) to by-pass application of its own domestic jurisdiction and international commitments. On the other hand, the NATO operation in Afghanistan serves to show that where the international community has established its extra-territorial jurisdiction (U.N. Charter, ch. VII) it has failed, in some respects, to measure up to the requisite standards of the rule of law. NATO forces' jurisdiction which must co-exist with the Afghan domestic jurisdiction, e.g. in the treatment of detainees handed over by NATO forces to the Afghan government, is a growing concern for it renders the extra-territorial jurisdiction ineffective. A specific example is the recent debate regarding Canada's role in the violations of rights of detainees transferred to the Afghan authorities, and the “dead end” situation Canada (as well as other NATO members operating in Afghanistan) faces in its actual ability to comply with both the Third and Fourth Geneva Conventions. See *Report Raises Red Flag for Governments Bound by Geneva Conventions*, THE GLOBE AND MAIL, Apr. 25, 2007, at A12.

¹⁰³ See letter of July 18, 2006 by the late Major Hess-von Kruedener, Infantry Officer with the Princess Patricia's Canadian Light Infantry, of the Canadian Forces on U.N. Mission Truce and Supervision Organization—UNTSO. *A Canadian Soldier's Report from South Lebanon*, CTV.CA NEWS, available at http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060718/mideast_lebanon_UN_060716/20060718/ (last visited Jan. 28, 2008).

by the trustee. Therefore, a situation such as Lebanon—where a sovereign FFSs was subjected, without its consent, to the control of, and was torn apart by, foreign states and a NSA¹⁰⁴—entails also a new approach to trusteeship. The trustee must be able to engage all actors upon which the restitution of the sovereign competences hinges. This, in turn, requires clarification of the status of the relevant actors in international law, i.e., their rights and obligations.¹⁰⁵

The second step following the establishment of a trusteeship regime consists of entering into a co-joint lease agreement with either a central government, if such authority exists, or lease-like agreements with actors controlling sections of the FFS territory.¹⁰⁶ The lease or lease-like arrangements will buttress the exercise of the trusteeship in an orderly legal fashion; they may encourage rivaling parties to negotiate a settlement and could potentially function as a trust building measure. They will add certainty and resolution to the application of U.N. Charter Chapter VII provisions, and consequently empower the FFS not only the NSA willing to reach an agreement. The FFS would be recognized as a party in a lease, not as a dependant in a trusteeship tutelage, and thus have secured itself an equal status in the triangular contractual relationship between co-lessors and lessee. In order to gain the FFS' consent to engage in a lease, on the one hand, and for the NSA to qualify for lessee status, on the other hand, both parties must commit to abide by the law governing occupation. Thus the lease is contingent upon fulfillment of the respective duties of the occupied and the occupier. The lease situation adds certainty to an unclear FFS situation¹⁰⁷ for “[i]nternational servitudes and territorial leases exploit the gaps in these notions [re. territorial issues] and add something new to their scope [W]hile they may be considered marginal aspects of international law and international relations, they in fact are pushing those margins outward and causing both to expand.”¹⁰⁸

¹⁰⁴ I.e., expanded occupation as argued earlier herein.

¹⁰⁵ The status of NSAs is no doubt intricately connected to this Paper's discussion of occupation and trusteeship. This is however beyond the scope of the present Paper which, at this stage, contends with exploring and proposing an innovative general framework to new challenges.

¹⁰⁶ “Lease-like” since the lessor (or guarantor of the lease) in such case is not the sovereign having legal title to the territory.

¹⁰⁷ The principal elements of the lease would be clearly defined when entering a lease agreement. For more detail *see* Michael Strauss, *The Viability of Territorial Leases in Resolving International Sovereignty Dispute. A Comparative Study* (unpublished Ph.D. dissertation, Centre d'Etudes Diplomatiques et Stratégiques, 2006), at 34. I will not elaborate here on the parallels between private and public international law due to lack of space.

¹⁰⁸ *Id.* at 3.

IV. Conclusion

Extant occupation law has been discarded for want of political appeal and the hurdles challenging enforcement. This Paper explores a new approach to addressing situations that “look like” occupation, but fall in between the international legal cracks separating international from non-international armed conflicts. In this paper, I propose to consider the formulation of a new legal term, namely suspended sovereignty. Suspended sovereignty arises where the sovereign is denied control over part of, or the entire, state territory due to (a) para-military control by a NSA therein, and where the situation cannot be characterized as a non-international *armed* conflict; (b) foreign military *indirect* control but no direct *armed* confrontation with the state’s military or other armed forces; and (c) the sovereign did not formally and/or freely consent to the foreign intervention. I also maintain that this term will lead to an expansion of the legal doctrine of occupation. The combination of recognizing the condition of suspended sovereignty as (a) a legal state of conflict and temporary void of government (fragile/failed state); (b) a legal order authorizing the peaceful intervention by a third party to re-establish sovereignty; and coupling it with twenty-first century adapted legal instruments of leasehold and trusteeship, proposes a reform to the current legal doctrine of occupation.

My argument takes advantage of two recent legal and political discourses: The FFS and the R2P. I propose focusing on the key concept of sovereignty, which underlies the debates surrounding FFS and R2P. Such reconsiderations must address two cardinal issues: Sovereignty as an operative condition and sovereignty as a status conferred also on NSA and the international organization. I advance the proposition that a FFS condition and the R2P duty represent both sides of the same coin labeled “sovereignty.” Therefore, their articulation is mandatory for ascertaining a state of suspended sovereignty as well as the contemplation of legal means to revive once suspended sovereignty. Such legal development will take advantage of the available legal instrument of international trusteeship and leasehold. These should be considered as a means to peacefully establish the rule of law in the FFS territory, and build the confidence necessary to arrive at a long lasting resolution of a conflict and restore the FFS plenary sovereignty.