# Asymmetries of Terror and Violence in the Space of Exception: The Colonised Other, the Two-Tiers of Sovereignty in International Law and the Emergence of Islamic State (IS)

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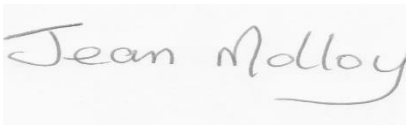
## General Statement

I, Jean Molloy, do hereby declare that this work that is submitted for assessment is my own and that due credit has been given to all sources of information contained herein, according to the rules that govern NUI Maynooth and the Faculty of Social Sciences. I acknowledge that I have read and understand the Code of Practice dealing with Plagiarism and the Code of Conduct of the National University of Ireland, Maynooth and that I am bound by them.



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# Abstract

This thesis aims to investigate the link between a plurality of factors and events that led to the establishment of the Caliphate by Islamic State (IS) in 2014, examining the link between the phenomenon of imperialism and the ultimate rise of Islamic State. Given the devastation that has caused by terrorist activities, the source of terrorism and their grievances should be an urgent and pressing debate for states. Rather, the discourse has focussed on the prevention of terrorist attacks and the introduction of legislation to deal with terrorists and terror suspects, sometimes in contravention of human rights laws, as demonstrated by the war on terror. It is significant to note that the legacy of colonisation on terrorism is not widely considered in the theories about the origins of terrorism. The aim of this thesis is to examine mechanisms of control and exclusion that deprived the non-European world of 'Western' sovereignty and which continue to persist and endure in the international legal system, to the benefit of Western economic interests. Quasi-sovereignty, i.e. a lack of full sovereign rights over a state's economic, political and cultural affairs, provides a very useful paradigm through which to develop a nuanced understanding of the ramifications of the violation of sovereignty in the Middle East. The assertion of the thesis is the system of law that emerged from the colonial experience has been instrumental in the formation of the international legal framework. The thesis begins with an examination of the rise of Islamic State by tracing the influence of Christianity and European culture on the evolution of international law, claiming that the modern international legal system is reflective of a framework that served to legitimise European colonial practices and interests, and while it operated universally, its meaning and application were dictated by those in power. Colonialism was therefore central to the formation of international law and the legacy of the governance of non-European people by European powers, that manifested in the League of Nations Mandate System and the ultimate creation of Iraq and Syria. The practices of "cultural subordination, and economic exploitation played an extraordinarily prominent role in shaping the relationship between international law and colonialism".[1] It is the argument of this thesis that these practices were not eradicated by decolonisation or the Mandate System, but continue to play an enduring and crucial role in international law, issues that are examined through the 1953 Iranian Coup, the 1991 Gulf War and the War on Terror. The Mandate

[1] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 245.

System devised a set of legal structures and technologies that cemented and normalised the two-tier system of full- and quasi-sovereignty, denying equilibrium to non-Western states, issues that this thesis argues include multiple cause factors and form part of a plurality of events and issues from which the rise of Islamic State and the establishment of the Caliphate in Iraq and Syria was the consequence. As observed by Seumas Milne "the roots of the global crisis which erupted on September 11 lie in precisely the colonial experiences and the quasi-imperial system that succeeded them".[2]

[2] Derek Gregory, *The Colonial Present*, London: Blackwell Publishing, 2004, 10.

# List of Abbreviations

| | |
|---|---|
| AUMF | Authorization for the Use of Military Force |
| AQI | Al-Qaeda in Iraq |
| CIA | Central Intelligence Agency |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Social, Economic and Cultural Rights |
| ICJ | International Court of Justice |
| IHT | Iraqi High Tribunal |
| ISGS | Islamic State of the Greater Sahara |
| ISI | Islamic State of Iraq |
| ISIL | Islamic State of Iraq and the Levant |
| ISIS | Islamic State of Iraq and Syria |
| ISIS-K | Islamic State Khorasan |
| IS | Islamic State |
| ISWAP | Islamic State of the West African Province |
| NATO | North Atlantic Treaty Organization |
| NSS | National Security Strategy of the United States of America |
| OAU | Organisation of African Unity |
| PNAC | The Project for the New American Century |
| RDI | Rendition, Detention and Interrogation Programme |
| SSCI | Senate Select Committee on Intelligence |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| US | United States |
| UNSC | United Nations Security Council |
| WMD | Weapons of Mass Destruction |

# Part I: The Theoretical Framework

# Chapter One: Aims and Structure of the Thesis

## 1.0 Introduction - Subject of Thesis

The aim of this thesis is to examine mechanisms of control and exclusion that deprived the non-European world of 'Western' sovereignty and which continue to persist and endure in the international legal system, to the benefit of Western economic interests. Quasi-sovereignty, i.e. a lack of full sovereign rights over a state's economic, political and cultural affairs, provides a very useful paradigm through which to develop a nuanced understanding of the ramifications of the violation of sovereignty in the Middle East. The assertion of the thesis is the system of law that emerged from the colonial experience has been instrumental in the formation of the international legal framework and that neo-colonial narratives continue to explicate the relationship between the origins of international law and its violation. Hence, international law can be problematic both because of its colonial origins and the neo-colonial narratives that provide the moral-juridical justifications for Western interventions, sometimes in violation of that very law. The research question investigates the plurality of factors and events that, it is argued, led to the establishment of the Caliphate by Islamic State (IS) in 2014.

An examination of multiple cause factors and influences that shaped the behaviours of states and non-state actors in the Middle East begins with the Sykes-Picot Agreement (1916) negotiated between the United Kingdom and France. The Agreement (discussed in detail in section 4.4.2) partitioned the Ottoman Empire granting spheres of control and influence to those states and created arbitrary groupings on people in the newly created states such as Iraq and Syria. The Agreement was described by the Egyptian revolutionary, Sayyid Qutb (whose crucial influence on the establishment of Islamic State and its Caliphate is analysed in section 8.1.1) and Osama bin Laden, as an act of imperialism and both men used it as a justification to engage in *jihad*.[1] bin Laden viewed that the breakup of the Ottoman Empire and the subsequent colonisation of the former Ottoman territories as the saddest point in regional history and stated a restored Caliphate would redress this wrong.[2] The multiple cause factors are also identified as the CIA

[1] Sumaia N. Masoom, 'A Colonial Catalyst: Reverberations of the Sykes-Picot Agreement in the Rise of ISIS' (2016) 8(11), *Inquiries Journal*, 1. Available at: http://www.inquiriesjournal.com/articles/1494/a-colonial-catalyst-reverberations-of-the-sykes-picot-agreement-in-the-rise-of-isis. Last accessed 12 January 2022.
[2] Lawrence Katzenstein, 'The Sykes-Picot Agreement and its Lasting Implications', *Global Risk Insights*, 2016. Available at: https://globalriskinsights.com/2016/05/sykes-picot/. Last accessed 12 January 2022.

(Central Intelligence Agency) coup against the democratically elected Prime Minister of Iran; the establishment of the Islamic Republic of Iran; the Iran-Iraq War (1980-1988), the Soviet-Afghan War (1980-89) (section 6.3 below) and the Gulf War (1991), discussed below in section 6.2. The US-led invasion of Iraq and the War on Terror, episodes that occurred in response to September 11 are also privileged events in the narrative of Islamic State. At the core of these events is Western imperialism and the resistance to that imperialism, the actions of which shaped the region, both at a state and non-state level. The revival of resistance to Western imperialism, the adaption of religious and political ideology as a form of resistance, the importance of radicalisation to the cause of resistance and the calls for *jihad* occupy pivotal roles in the establishment of the Caliphate in 2014, as Chapter Six in particular discusses.

It is important to acknowledge that the rise of Islamic State and the establishment of the Caliphate can be understood in a number of ways. The approach of this thesis is to examine it through the paradigms of Western imperialism and economic and political hegemony, sovereign inequality, resistance, religious ideology, radicalisation and *jihad.* However, other approaches could be taken, such as an examination of communism and the campaign to halt its spread throughout the Middle East and Afghanistan as a causal factor in the rise of Islamic State.

This research question is analysed using the framework of Carl Schmitt's state of exception and Giorgio Agamben's *homo sacer.* Agamben's thesis analyses the way in which modernity has resorted to the use of Schmitt's state of exception as a tool of totalitarianism.[3] The usefulness of the state of exception as a mode of governance is that it has enabled "the physical elimination not only of political adversaries but also of whole categories of citizens who for some reason cannot be integrated into the political system".[4] In this state of exception, the law is suspended, yet remains in force,[5] where "sovereign dictatorship … signifies the exercise of 'constituent power' … where no constitution or law applies other than the sovereign decision itself".[6] This, according to Parfitt, has created a situation "in which the state of exception is becoming the norm",[7]

[3] Giorgio Agamben, "The State of Exception" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer,* Durham and London: Duke University Press, 2005, 284-297.
[4] Ibid. at 297.
[5] Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception (2006)17(3) *The European Journal of International Law*, 677.
[6] Ibid. at 680.
[7] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41, 42.

where the operation of the law is suspended[8] and those who exist in a state of exception are reduced to what Agamben terms as "*homo sacer* (sacred man)",[9] a figure that personifies "bare life",[10] existing "apart from the law",[11] whose rights have been rescinded by the sovereign. The central concern of this thesis is that the process of the normalisation of states of exception in European colonies legitimised, authenticated and sustained practices of dominance between Western powers and their colonial subjects.[12] The emergency measures that evolved from the colonies and which were embodied in the emergency powers enacted in the war on terror speak to this normalisation process. Anghie cites the crucial role that colonies played in the development of international law.[13] The practices of economic exploitation and cultural subordination, which, according to Anghie, were essential aspects of colonialism, were not eradicated by decolonisation and the commissioning of sovereignty and self-determination to previously colonised peoples.[14] Rather, these very issues continue to play an enduring and crucial role in international law,[15] resulting in the emergence of a two-tier system of sovereignty (full-sovereignty and quasi-sovereignty), that was "repeated in the different phases of international law, including the Mandate period".[16] Anghie describes the Mandate System as devising a set of legal and economic structures, technologies and methods of control that emerged from the colonies and which cemented and normalised the inequitable system of sovereignty.[17] Particularly, the discipline of economics was omnipresent, ubiquitous, a means of control[18] that "represented a new and powerful way

[8] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41, 42.
[9] Peter Fitzpartick, "Bare Sovereignty: *Homo Sacer* and the Insistence of Law" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005,49-73, 49.
[10] Ibid.
[11] Peter Fitzpartick, "Bare Sovereignty: *Homo Sacer* and the Insistence of Law" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005,49-73, 49.
[12] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005 cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.
[13] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[14] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.
[15] Ibid.
[16] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 581.
[17] Ibid.
[18] Ibid.

of conceptualizing and managing the mandate territories and their peoples".[19] The type of sovereignty that was created within mandate territories was an embodiment of "the economization of sovereignty",[20] where sovereignty and economics were wholly intertwined, resulting in the undisputed understanding, (from a Western perspective), that colonised territories would continue to fulfil the economic and commercial demands of colonial powers.[21]

In order to address the research question, the study begins with an examination of the rise of Islamic State by tracing the influence of Christianity and European culture on the evolution of international law, claiming that the modern international legal system is reflective of a framework that served to legitimise European colonial practices and interests, and while it was applied universally, its meaning and application, including in the non-Western world, were dictated by those Western powers. Colonialism was therefore central to the formation of international law[22] and the legacy of the governance of non-European people by European powers, which manifested in the League of Nations Mandate System and the ultimate creation of Iraq and Syria. The role of economics itself became all-pervasive, as the narrative of international law moved its focus from race to economics.[23] The colonial civilising mission was justified as one of necessity in order to improve and transmute the welfare of colonial peoples who were deemed to be economically deprived.[24] However, this belied the fact that when sovereignty was eventually granted to mandate territories, it would be done so with the economic interests of former colonisers as the primary goal, rather than the welfare of the local population. The domination of economics resulted in what Anghie termed as the "economization of

[19] Antony Anghie, *Globalization and its Discontents: International Institutions and the Colonial Origins of Law and Development*, at 15. Available at: https://www.iilj.org/wp-content/uploads/2016/11/Anghie-International-Institutions-and-the-Conolial-Origins-of-Law-and-Development-2005.pdf. Last accessed 8 June 2021.
[20] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 281; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 581.
[21] Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship*, Melbourne: Oxford University Press, 1992 cited in Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[22] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[23] Ibid.
[24] Ibid.

sovereignty",[25] i.e. the Mandate System operated on the premise that colonial territories would continue to provide metropolitan powers with the resources to meet their economic needs.[26] The central theme of this thesis is that the international legal system has been utilised by Western nations to further their imperialistic economic and political agendas. International law therefore has been complicit in the transition from colonialism and imperialism to a state of neo-colonialism, where the practice of using economic and cultural imperialism violates the principles of the sovereign equality of states,[27] issues which form the basis of the discussion and analysis in Chapters Six, Seven and Eight.

The thesis examines the way in which the violation of sovereignty has undermined the principle of the equality of states. While in theory, all states are equal before the law,[28] in practice the violation of sovereignty has established that all states and their citizens do not, in fact, stand equally before the law. Rather, a two-tier system of sovereignty, full-sovereignty and quasi-sovereignty (the lack of full sovereign rights and autonomy over a state's internal political, economic and cultural affairs) exists in the international legal framework, a legacy of a legal system where the law was equated with the practice of 'civilised' sovereign states. The discussion in the thesis focusses on the violation of the rights of the Middle East by Western States (e.g. the US, Britain, Australia) as a continuance of this colonial mindset where a differentiation was created between sovereign and 'backward' states.[29]

The European system of law, which evolved from the colonial experience, was adopted as the right authority, whereas other systems, such as Islamic law, were not considered in the formation of the international legal framework. This system of law, based in the Judeo-Christian tradition, "devised a series of formal doctrines that used explicitly racial and cultural criteria to decree certain states 'civilised' and sovereign, and other states

[25] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 581; Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 281.

[26] Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship*, Melbourne: Oxford University Press, 1992 cited in Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[27] Charter of the United Nations, 1945, Art. 2(1). "The Organisation is based on the principle of the sovereign equality of all its Members."

[28] Ibid.

[29] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.

'uncivilised' and non-sovereign",[30] thereby exorcising non-European and non-Christian societies from the province of international law. Right authority, as it was applied in this system of law, distinguished between the sacredness and legitimacy of the European sectors of humanity, a discourse that at once subjugated and ostracised the non-European Other from that framework.[31] The League of Nations Mandate System applied the 'civilised'/'uncivilised' dichotomy through its management of mandated territories (discussed in Chapter Four). Even when these states gained independence, this implicit hierarchisation of humanity continued to permeate the international legal framework, which, as this thesis argues, was evident in the rhetoric and execution of the war on terror, issues discussed in Chapters Six and Seven.

The practices of "cultural subordination and economic exploitation",[32] which were essential aspects of colonialism, were not eradicated by decolonisation or the Mandate System, but continue to play an imperialistic, enduring and crucial role in international law, issues that are examined through the 1953 Iranian Coup, the 1991 Gulf War, the War on Terror and, ultimately, the rise of Islamic State. The doctrine of sovereignty, as it existed in the colonies, operated as a mechanism of exclusion which expelled the non-European society from the ambit of power and sovereignty.[33]

### 1.1 Purpose of Research

The declaration of the Caliphate by Islamic State in June 2014 provoked much consternation amongst Muslims, scholars and practitioners and dramatically altered the nature of Middle Eastern politics, illuminating the schism that exists between Shi'a and Sunni Muslims. The emergence of Islamic State in Syria and Iraq posed serious questions for regional and global security, fuelling sectarian tensions between Shi'as and Sunnis across the Muslim world. The rise of Islamic State and the establishment of the Caliphate also embroiled international actors (e.g. US, Britain, China, Russia, Turkey and the Gulf States) in a proxy war in the Middle East, and in some instances, in military action in the region. Given the devastation that has been caused by the terrorist activities of Islamic

[30] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 745.
[31] Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95.
[32] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.
[33] Ibid.

State, the source of their grievances should be an urgent and pressing debate for states. Rather, however, the discourse has focussed on the prevention, and not the cause, of terrorist attacks and the introduction of legislation to deal with terrorists and terror suspects, sometimes in contravention of human rights laws, as demonstrated by the War on Terror.[34] It is significant to note that the legacy of colonisation on terrorism is not widely considered in the theories about the origins of terrorism.[35] Despite increased academic attention garnered by terrorism in recent years, the link between colonialism, the lack of economic and political sovereignty and the rise of Islamic State remains an under-researched area of study. This compounds the need for research to be undertaken on these issues in order to understand the rise of Islamic State and the environment from which it emerged. The examination of the research question must include an analysis of colonial legacies of the universal, Western-centric system of international legal hierarcny and its continuing influence of international law on non-state actor terrorism. This thesis attempts to bridge that gap by investigating this link through the framework of the state of exception. However, the techniques of domination and exclusion which were employed in the colonies have re-emerged in the War on Terror, whereby international law has been violated and rewritten and used as a political instrument of control.

### 1.2 Hypothesis

It is the contention of this thesis that the principle of sovereignty in international law operates as a two-tier system, manifested as the enjoyment of full-sovereign rights by some states and the granting of quasi-sovereignty (the lack of full sovereign rights and autonomy over a state's internal political, economic and cultural affairs) to other States. It is argued that these two systems of sovereignty are maintained by the current international law regime, to the benefit of Western nations. The thesis will discuss and analyse the way in which the violation of sovereignty has undermined the principle of the equality of states. While in theory, all states are equal before the law,[36] in practice the violation of sovereignty has established that all states and their citizens do not, in fact, stand equally before the law. Rather, a two-tier system of sovereignty, full-sovereignty and quasi-sovereignty exists in the international legal framework, producing a third

[34] Fatemah Alzubairi, *Colonialism, Neo-Colonialism and Anti-terrorism Law in the Arab World*, Cambridge: Cambridge University Press, 2019; Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95.

[35] Bradley McAllister and Alex P. Schmid, *The Routledge Handbook of Terrorism Research*, Oxford: Routledge, 2011; Jeff Victoroff and Arie W. Kruglanski (eds.), *Psychology of Terrorism: Classic and Contemporary Insights*, New York: Psychology Press, 2009.

[36] Charter of the United Nations, 1945, Art. 2(1). "The Organisation is based on the principle of the sovereign equality of all its Members."

category through which to consider sovereignty, i.e. the semi-civilised space. The argument has three elements:

1. This configuration of the principle of sovereignty operates as a dualist two-tier system of inequality, where all state and their citizens are not treated as equals in international law.
2. The two-tier system of sovereignty, which has become part of the fabric of international law, operates in a zone of exception, where the transgression of the basic laws and norms erode the rights and autonomy of those subjected to it, creating a space where the "suspension of the legal order in its totality"[37] escapes "every legal consideration"[38] eliciting the semi-civilised space.
3. Through their violation of the sovereignty of Middle Eastern states, Western States have been responsible for the production of quasi-sovereignty in those States, creating chaotic spaces in which the violent extremism of Islamic State materialised and thrived. To further nuance this argument, the invasion of Iraq was possible, because since its creation in 1932, Iraq only existed as quasi-sovereign state, an issue that is engaged with in Chapter Six.

### 1.3 Methodology

This thesis explores the principle of sovereignty in international law, analysing its application through the lens of Carl Schmitt's state of exception and Giorgio Agamben's *homo sacer*. A central theme raised by the thesis is that the influence of colonialism is entrenched in the operations of the law, evident in the two-tier system of sovereignty that continues to permeate the process of international law. The thesis interrogates the influence of colonialism on international law through the work of Antony Anghie, who hypothesises that imperialism shaped the discipline of international law and that colonialism, rather than being a tangential undertaking of international law, is central to its very establishment and its founding principle of sovereignty and sovereign eqaulity.[39]

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[37] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 5 April 2020.

[38] Ibid.

[39] See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard Int'l Law J*ournal, 1; Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) *32 NYU Journal of Int'l Law & Politics*, 243; Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

My theoretical approach belongs to socio-legal theory, which analyses the principle of the law and its direct application on the society to which the law applies. The socio-legal theory approach emphasises the role that law and the legal system play in the creation, maintenance and/or change of social situations.[40] Socio-legal theory therefore supports a rigorous examination of the research question: The state of exception, the phenomenon of colonialism and the formation of the Euro-centric international legal framework are analysed as the social structures that supported the emergence of the inequitable application of sovereignty in international law. The central position that economics continues to play in international law has a direct and profound consequence on the societies to whom these policies are applied. International law, as it supports these economic agendas, facilitates an enquiry into the maintaining of the two-tier system of sovereignty and the effects of this on the societies who endure this system.

The research was conducted through an analysis of the relevant literature and legal instruments concerning the state of exception, the evolution of international law, and the phenomenon of colonialism and the continuance of the imperialistic in the international legal system. The case studies of the rise of Islamic State, the War on Terror and the Caliphate as a space of exception are examined through these frameworks.

### *1.3.1 Scope of the Thesis*

In order to set the scope of the thesis, I focus on the War on Terror during the time period September 11 2001 to 2021. At the time of writing, the US were one week from withdrawing from Aghanistan and after a twenty year presence in the country, the Taliban has taken control of the country. Although the Islamic State Caliphate has been defeated, Islamic State and their ideology remains an active force.

Saudi Arabia is not included in the analysis of the Islamic world whose sovereignty has been violated by Western intervention. Saudi Arabia can be considered to be an economic ally of the US. Since 2009, the US has sold $110 billion in arms to Saudi Arabia,[41] and in 2013 the National Security Agency (NSA) extended its relationship with the Saudi

[40] HW Jones, "Law and the Behavioural Sciences: The Case for Partnership," (1963) 47 *Journal of the American Judicature Society*, 109; David N. Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) *The Modern Law Review*, 39(3), 287.

[41] Mark Landler, 'US to Make Arms Deal 'Worth $110bn' with Saudi Arabia', *The Irish Times*, 20 May 2017.

Ministry of Interior with the purpose of ensuring the continuity of the Saudi regime and "to provide direct analytic and technical support … on internal security" matters.[42]

### 1.4 Method and Structure

This thesis is comprised of nine chapters, of which this is the first introductory chapter. The remainder of the chapters are divided between two parts. Part I sets out the framework revelant to the evolution and application of international law, namely the principle of sovereignty, the state of exception and the persistent influence of colonialism on the international legal framework. Part II examines the application and consequences of this framework applying it to the events that led to the rise of Islamic State and the War on Terror.

Chapter Two introduces Carl Schmit's state of exception and Giorgio Agamben's *homo sacer* as a theoretical framework through which to understand the interactions between sovereignty, law and exception. It analyses the way in which sovereignty emerged from the colonies to affect its application in the Western and non-Western worlds, producing a state of exception and a third category through which to consider sovereignty, i.e. the semi-civilised space. This is followed by an elaboration on the principle of sovereignty in international law, arguing that a disparity exists between the application of sovereignty between Western and non-Western states, producing a two-tier system of sovereignty – quasi-and full-sovereignty. An examination of the process of Othering, i.e. the attribution of negative characteristics by the dominant 'in group' to the dominated 'out group' is undertaken. The chapter concludes with an analysis of the influence of colonialism on the acquisition of sovereignty in the European and non-European worlds.

Chapter Three engages in a detailed discussion of the history of international law as it developed from its Judeo-Christian European[43] roots into a universally applied system governing the entire globe based upon Christian concepts and the Westphalian principles of sovereignty and authority of states, doctrines that became central to, and informed,

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[42] Glenn Greenwald and Murtaza Hussain, 'The NSA's New Partner in Spying: Saudi Arabia's Brutal State Police', *The Intercept*, July 25, 2004. Available at: https://theintercept.com/2014/07/25/nsas-new-partner-spying-saudi-arabias-brutal-state-police/. Last accessed 8 June 2021.

[43] "The term 'European' has no exclusively geographic connotation but encompasses the Americas too, countries that emerged from pre-imperial and pre-Westphalian European colonisation and settlement. With a few exceptions, (the USA (from 1898) and Japan (from 1895)), the 19th century colonisers were located on the European continent." See Paulina Starski and Jörn Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?' (2016) *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-12*, 1.

international law and the prevailing world order.[44] The Chapter considers the new mode of power of international law, in which colonialism, race and sovereignty were intertwined, leading to the dynamic of difference where international law created colonial peoples as Other, different, existing in a state of apartness. In turn, this otherness fostered and maintained a division between European and the non-European Other.[45] The chapter concludes with an examination of contemporary developments in international law and the continuance of imperialistic practices reflective of the 19th century's colonial era.

Chapter Four engages in an examination of the law that emerged from the colonial world, which operated as a zone of exception, where colonised peoples were othered in opposition to the 'civilised' European. The roots of this inequity reside in the system of colonialism where extraordinary governmental measures such as martial law,[46] emergency rule and legislation, and the 'civilised'/'uncivilised' distinction created between Europeans and non-Europeans were utilised to enable the cultural and economic exploitation of colonised peoples, where the emphasis was placed on economics, rather than welfare.[47] The international agreements that reformed the Arab World form part of the discussion and examination. The League of Nations Mandate System, which sought, in principle, to protect the people of the former territories of Germany and the Ottoman Empire and to integrate them into the international legal, economic and social system as sovereign states is also analysed. The Mandate System is an important issue to review, as the policies it implemented were interpreted principally in economic terms, which proved to be severely disadvantageous to mandated peoples and territories. The dual mandate of civilisation and economics was integrated into the policies of the Mandate System. Therefore, while the Mandate System was tasked with ensuring the political development of mandated territories, crucially, and to the detriment of these territories, it sought to accomplish this through economic development.[48] Hence, the governing and fundamental distinction which animated the civilising mission was situated, not in the 19th century distinctions between the civilised and the uncivilised, based upon culture and

[44] Henry Kissinger, *World Order*, *Reflections on the Character of Nations and the Course of History*, New York: Penguin Books, 2014.
[45] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[46] See John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017 for a detailed discussion of martial law.
[47] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard Int'l Law J*ournal, 1.
[48] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) *32 NYU Journal of Int'l Law & Politics,* 243.

politics, but in the economic province, which progressed the League's distinction between 'advanced' and 'backward' peoples.[49] This very distinction, identified with the concepts of backwardness, continued to permeate international relations, differentiating between developed and developing states, sovereign and quasi-sovereign states (discussed in section 4.5.9). The Mandate System created this new type of inferior sovereignty, a system that elevated Western economic power and policies above the welfare of mandated peoples in order to serve a particular set of interests, those of mandate powers. A review is undertaken of this system of international law that denied newly sovereign states control over their political economy, which addresses the contemporary issues that stem from the Mandate System.

Part II of the thesis begins with an introduction to the second part of the thesis (Chapter Five). This chapter contextualises the themes engaged with in Chapters Two, Three and Four, namely the two-tier system of sovereignty, the history of international law and the influence of colonialism on the international legal system and frames the discussion. These themes are applied to the analysis and discussion that forms the basis of Part II of the thesis, namely, the influence and interference by Western states in the affairs of the Middle East and the rise of Islamic State (Chapter Six), and the War on Terror (Chapter Seven). The actions of the Western world in terms of interventionist, political and economic policies that were applied to the Islamic world is crucial to the evolution of Islamic militancy and the establishment of Islamic State. The progress towards the establishment of the Islamic State Caliphate is narrated through the history of Western invention in Iran, Iraq and Syria, asserting that the intrusion in these countries is a continuance of Othering, a reproduction of the state of exception and sovereign exceptionalism. The chapter concludes with an examination of the Caliphate, a place of brutality and marginalisation, that although standing in opposition to Western practices of exceptionalism, also existed as a state of exception.

Chapter Six examines the emergence of Islamic State, examining the background and environment from which the group emerged.[50] The chapter analyses the effects of

[49] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 580.

[50] The forerunner to Islamic State was established under the name of *Jama'at al-Tawhid wal-Jihad.* See Aaron Y. Zelin, 'The War Between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement', (2014) No. 20, *Research Notes*, The Washington Institution for Near East Policy, Washington, D.C., 1, 1. In 2006, the Mujahideen Shura Council was established through the consolidation of *Jama'at al-Tawhid wal-Jihad* with other Sunni insurgent groups, giving birth to the Islamic State of Iraq (ISI) under the

Western intervention in the Islamic world and considers that such interventions have created the conditions and environments from which the Islamic State Caliphate was established. An examination of the violation and reinterpretation of sovereignty in the Islamic world by Western states, producing quasi- rather than full- sovereign rights is undertaken. The specific events that led to the production of quasi-sovereignty, namely the 1953 CIA-coup in Iran, the Iran-Iraq War (1980-88), the Gulf War (1990-91) and the UN sanctions imposed on Iraq are engaged with. The importance of Afghanistan to the formation of Islamic State and its interpretation of *jihad* is discussed, along with a review of the 2003 Iraqi invasion and its aftermath, including the Iraqi insurgency and the imposition of the de-Ba'athification laws. The chapter concludes with an analysis of the fragmentation of Iraq's and Syria's sovereignty as integral issues to understanding the rise of Islamic State: Iraq following the 2003 War, and Syria as a consequence of the Arab Uprisings in 2011 and the ensuing civil war.

Chapter Seven analyses the consequences of the reinterpretation of the principle of sovereignty, a move that has reinvigorated a different form of sovereignty with its colonial origins and text of exclusion, that of quasi-sovereignty. The reinterpretation is examined in the context of the War on Terror and its representation as a just and justifiable humanitarian war executed in the name of anticipatory self-defence. As the chapter discusses, the transformation of the non-European world enabled the continuance of the political and economic exploitation of the non-European world, signalling a return of Empire's Law, which distinguished between certain cultures, providing all the powers of sovereignty to European cultures, while simultaneously excluding others, denying them equality before the law[51] and the inability to exercise sovereign rights other their territory and economic and political resources. The justification for the War on Terror is analysed in this thesis as a form of political and economic imperialism and as a challenge to traditional understandings of sovereignty. The theory of the state of exception is reviewed through the practice of secret rendition as an exhibition of the 'civilised'/uncivilised' distinction. The chapter concludes with an analysis of the legal framework of the War on Terror, situating it in a continuum firstly of Empire crimes, defined as a crime committed by two or more states within the context of an imperialist alliance, and secondly, of

leadership of Abu Musab al-Zarqawi. See Robert G. Rabil, 'The ISIS Chronicles: A History', (2014) *The National Interest*, 1, 2.

[51] Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449.

imperialism, which continues as a living reality, operating as part of hegemonic international legal system.

Chapter Eight engages in an analysis of the challenge posed by Islamic State to the international system of sovereignty and statehood, epitomised in its contested vision of a society whereby the universalised Western system of statehood and the international legal framework that enabled the interference of Western states in the Islamic world is fully rejected. In its stead, Islamic State demanded the revivification of the Caliphate as the only legitimate mode of governance[52] and as the antithesis of this universalised system. Islamic State's understanding of sovereignty and statehood is examined through the works of Sayyid Qutb, who is considered to be the Father of *Salafi-Jihadism*,[53] the religio-political doctrine whose ideological roots have been adopted by al-Qaeda (the Base)[54] and Islamic State.[55] *Salafism-Jihadism* is defined as:

> The ideology of al-Qaeda and likeminded movements, mixing Wahhabi-inspired Sunni fundamentalism (Salafism) with a revolutionary programme of overthrowing unjust and un-Islamic regimes in the Muslim world, as well as irredentism aiming at expelling non-Muslim military presence and influences from Muslim lands.[56]

Salafism focuses "on purifying Islam from putative "bid" and returning to the model of the Prophet and the al-salaf al-ṣāliḥ (the righteous ancestors)".[57] Having rejected the Western system of law and governance, Islamic State also applied a two-tier system of sovereignty in the Caliphate however, producing a space of exception that presented as a mirror image of the colonies where the 'civilised'/'uncivilised' distinction was also applied and where atrocities were committed against the 'uncivilised' *homines sacri*.

The thesis concludes with a summary of the research and the framework through which that analysis was conducted, i.e. the state of exception, the principle of sovereignty, the history of international law and the phenomenon of colonialism. Recommendations are

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[52] See Peter Mandaville, *Islam and Politics*, 2nd ed, Oxford: Routledge, 2014; Gilles Kepel, *Jihad: The Trial of Political Islam*, MA: Harvard University Press, 2002; Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.

[53] Robert Manne, **'**Sayyid Qutb: Father of Salafi Jihadism, Forerunner of the Islamic State**',** *ABC Religion & Ethics*. Available at: https://www.abc.net.au/religion/sayyid-qutb-father-of-salafi-jihadism-forerunner-of-the-islamic-/10096380**.** Last accessed 12 August 2021.

[54] The simplified English translation of al-Qaeda is the Base.

[55] Sayed Khatab, *The Political Thought of Sayyid Qutb: The Theory of Jahiliyyah*, Oxon: Routledge, 2006.

[56] Petter Nesser, 'Abu Qatada and Palestine', (2013) 53 *Welt des Islams*, 416, 417.

[57] Ahmad Kindawi, 'A New Synthesis: Saudi Salafism and the Contested Ideologies of Muhammad Surur', *Theses and Dissertations*, Rowan University, 2020, 19.

offered regarding the equitable application of principle of sovereignty and sovereign equality, and the use of the UN veto system as a political tool by members of the organisation, including its (ab)use regarding the imposition of sanctions. The urgent need for the amendment of the current legal regime is also proffered in the Conclusion, along with proposals for future research relating to recognition of statehood and sovereignty under the Montevideo Convention 1933 and the issue of foreign fighters, their families and unaccompanied minors who remain in Detention Centres in Syria.

# Chapter Two: The State of Exception and the Re-Making of Sovereignty

## 2.0 Introduction

This chapter will introduce the concept of the Carl Schmitt's state of exception - the suspension, by the sovereign, of the basic laws and norms of a juridical order, as a framework for understanding the erosion of sovereign rights by Western hierarchies, for their economic gain. The analysis of the state of exception begins with the assertion that violent and discriminatory practices of the colonies influenced the emerging legal doctrine of international law and the principle of sovereignty. This conceptual mapping is instructive for our understanding of the interactions between sovereignty, law and exception. In discussing the space of exception, the chapter will also examine Giorgio Agamben's argument that this space has become a permanent form of government, most recognisably through the political transformations brought about by the War on Terror.

The chapter will discuss and analyse the way in which the violation of sovereignty has undermined the principle of the equality of states. While in theory, all states are equal before the law,[1] in practice the violation of sovereignty has established that all states and their citizens do not, in fact, stand equally before the law. Rather, a two-tier system of sovereignty, full-sovereignty and quasi-sovereignty (the lack of full sovereign rights and autonomy over a state's internal political, economic and cultural affairs) exists in the international legal framework. The doctrine of sovereignty, as it existed in the colonies, consisted "in part of mechanisms of exclusion which disqualified non-European society from the realm of sovereignty and power."[2] The argument of this thesis is that mechanisms of control and exclusion that deprived the non-European world of Western sovereignty[3] continue to persist and endure in the international legal system, to the benefit of Western economic interests, despite the official end of colonialism in the 1960s. Quasi-sovereignty therefore provides a very useful paradigm through which to engage with a nuanced understanding of the ramifications of the violation of sovereignty in the Middle East. Throughout the history of Iraq, from its foundation as a British Mandate to the US-led invasion of Iraq in 2003, the country has repeatedly been relegated to a position of

[1] Charter of the United Nations, 1945, Art. 2(1).
[2] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 742.
[3] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

subordination and inequality within the international state framework. Through the continuance of external interference in its affairs, from which Western states have benefitted economically, Iraq has been existing in a state of quasi-sovereignty. As the discussion in this chapter considers, quasi-sovereignty produces a political climate that facilitates the fragmenting of a state's sovereignty, resulting in the fertile conditions from which Islamic State grew and prospered in both Iraq and Syria. Section 2.1 analyses the way in which sovereignty emerged from the colonies to affect its application in the Western and non-Western worlds, producing a state of exception. Section 2.2 elaborates on the principle of sovereignty in international law, arguing that a disparity exists between the application of sovereignty between Western and non-Western states, producing a two-tier system of sovereignty – quasi- and full-sovereignty. Section 2.3 examines the process of Othering, i.e. the attribution of negative characteristics by the dominant 'in group' to the dominated 'out group'.[4] Section 2.4 introduces Giorgio Agamben's *homo sacer*, a person removed from the political community existing as bare life, in the state of exception. Finally, the influence of colonialism on the acquisition of sovereignty in the European and non-European worlds is the focus of section 2.5.

### 2.1 The Relevance of the State of Exception

Central to Giorgio Agamben's understanding of sovereignty and its function in establishing the state of exception is Foucault's concept of biopolitics,[5] through which human life becomes the focus of the administrative apparatus and power of the State,[6] a body whose "politics places his existence as a living being in question".[7] Agamben scrutinises the concept of sovereignty as "a biopolitical enterprise of disciplinary control in which sovereign power is able to enforce its dominance through the law".[8] The suspension of the law is achieved through the declaration of a state of exception, producing a paradoxical situation of suspended law that also remains "nominally in force".[9] For those who become the object and target of executive power to the point that

[4] S.H. Riggins, 'The Rhetoric of Othering' in S. H. Riggins (Ed.), *The Language and Politics of Exclusion – Others in Discourse*, Thousand Oaks: Sage, 1997.
[5] Giorgio Agamben, "The State of Exception as a Paradigm of Government" in *State of Exception,* (trans. Kevin Attell), 1st ed., Chicago: The University of Chicago Press, 2005, 1-31; Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41.
[6] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, London: Allen Lane, 1979.
[7] Ibid. at 143 cited by Thomas Carl Wall, 'Au Hasard' in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 31-48, 38.
[8] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41, 41.
[9] Ibid. at 41.

they endure the loss of their rights, and are no longer afforded the protection of the law and their lives can be ended without fear of punishment,[10] these people reside in a state of exception, reduced to Agamben's *homo sacer* or "bare life" (an obscure figure that existed in Roman law).[11] Agamben appropriated the term *homo sacer* (*homines sacri* - plural) from ancient Rome, to describe those people who were reduced to a state of bare life.[12] Parfitt describes how Romans "used the term *homo sacer* to refer to somebody who could be killed with impunity, but whose death could not constitute a sacrifice"[13] as their life had no meaning or value. In Agamben's analysis, *homines sacri* existed as outlaws, placed beyond the protections of the law, [14] where "they could be harmed and slaughtered without it constituting any breach of the law",[15] distinguished from citizens who enjoyed the full protections of the law. Agamben's contention that, in the contemporary world, sovereign power has increasingly resorted to the use of the state of exception,[16] is an important theme through which to analyse the central theme of the Thesis, i.e. the mechanisms of control and exclusion that deprived the non-European world of 'Western' sovereignty and which continue to persist and endure in the international legal system.[17] The consequences of this for modernity is that the state of exception has become the norm, manifested, for example, through the practices of the War on Terror, expanding the numbers of inhabitants banished to the state of exception, existing (not living) as *homo sacer*.

The importance of the theory of the state of exception to this thesis is that it provides a paradigm through which to examine the phenomenon of European colonialism and its profound implications for the evolution of international law; the imperialistic endeavours of Western states in the Middle East that maximised the economic goals of Western states,

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[10] Andrew Norris, 'The Exemplary Exception – Philosophical and Political Decisions in Giorgio Agamben's *Homo Sacer*, in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 262-283.

[11] Peter Fitzpatrick, "Bare Sovereignty: *Homo Sacer* and the Insistence of Law" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 49-73.

[12] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41.

[13] Ibid. at 41-42.

[14] Giorgio Agamben, "The State of Exception" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 284-297.

[15] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41, 42.

[16] Ibid.

[17] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

and, to examine the Islamic State Caliphate as its own state of exception. It is also pertinent to draw distinctions between the forms of power in the state of exception employed by historical forms of colonialism versus its more recent imperial, neo-liberal adaptation, including those of Islamic State. The connections between the state of exception, exceptional powers and neoliberalism is central to understanding the permanence of the state of exception in the international legal framework. Hence, it is prudent to provide an outline those ideologies, which inform the discussion and analysis throughout the thesis.

### *2.1.1 The Ideology of the European Colonial Era*

During the colonial era, as this thesis has comprehensively determined, colonial ideology was grounded in the civilising mission of "uncivilised" and "primitive" peoples. At the core of this ideology was the issue of race and racial discrimination that created a hierarchy between European and non-European peoples.[18] The colonial world, ruled by European powers, became a representation of "a twilight zone of multiple, indeterminate configurations of power and authority … of exception and lawlessness",[19] manifested through techniques of control and management that were exclusively used there. As colonial warfare was excluded from legal and institutional rules, sovereignty was exercised as power outside the (normal) law (*ab legibus solutus*),[20] whilst simultaneously remaining within it. In this state of exception, the rule of law could be legitimately suspended, allowing the state to assert its sovereignty without 'excessive' legal constraints.[21] The components of the state of exception, as identified by Agamben i.e. the blurring of executive, legislative and judicial powers, became integral features of colonial power.[22] Hence, the ideology of European colonialism was bound by religion, race and othering, which were central tenets on the colonial state of exception.

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[18] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

[19] J. Thomson, 'Sovereignty in Historical Perspective: the Evolution of State Control over Extraterritorial Violence', in (JA Caporaso, ed), *The Elusive State: International and Comparative Perspectives*, London: Sage, 1989, 227–55 cited in Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302.

[20] Achille Mbembe, 'Necropolitics' (trans. Libby Meintjes), (2003) 15 (1) *Public Culture*, 11, 23.

[21] Slavoj Žižek, *Welcome to the Desert of the Real*, London, New York:Verso, 2002.

[22] Mark Condos, The colonial origins of the 'permanent state of exception' (2021) International Affairs Blog. Available at: https://medium.com/international-affairs-blog/the-colonial-origins-of-the-permanent-state-of-exception-668e38c91a45. Last accessed 20 January 2022.

*2.1.2 The Ideology of US Imperialism*

US imperialism is based upon the ideology of US exceptionalism, denoting the special position that the US occupies in the world, framed in terms of spreading democracy and liberty to the world, as the arbiter of good and evil. However, US imperialism also consists of policies aimed at extending the political, economic, military and cultural influences internationally, which can take the form of economic or military action, forceful intervention, the imposition of sanctions or regime change.[23] At the core of US imperialism is an ideology of empire, which according to Ryn "includes perspectives on human nature, society, and politics, and it sets forth distinctive conceptions of its central ideas, notably what it calls ''democracy,'' ''freedom,'' ''equality,'' and ''capitalism.''"[24] The ideology of empire is omnipresent in the foreign policies employed by the US in the Middle East (discussed in Chapter Six) and in The Bush Doctrine (discussed in section 7.2.2), which strategised that the US would act decisively and unilaterally in the interest of US security without approval from the UN. US imperialism and ideology of empire continues to propagate the colonial distinctions between European and non-European peoples; the policies and actions that the US employed in the Middle East from the 1950s onwards (which form much of the discussion in Chapter Six) speak directly to this and again recall Agamben's understanding of the state of exception. the blurring of executive, legislative and judicial powers, [25] through the marriage of imperialism, racial superiority, unequal sovereignty and othering.

*2.1.3 The Ideology of Islamic State*

The philosophy of Islamic State, as a political identity, is ideologically driven and can be understood in terms of its adherence to *Jihadi-Salafism,*[26] a distinctive ideological movement in the Sunni Islam tradition and *Wahhabiyism*, which imposes *Shari'a* law and regards Shi'a Muslims and non-Muslims alike as heretic who should be persecuted.[27] The movement is founded on a radical understanding of Islamic scripture that is entrenched in a premodern doctrinal interpretation of Islam and derives from the

[23] Daniel Immerwahr, *How to Hide an Empire: A Short History of the Greater United States*, London: Vintage Publishing, 2019.
[24] Claes G. Ryn, 'The Ideology of American Empire' (2003) *Orbis*, 383, 384.
[25] Mark Condos, The colonial origins of the 'permanent state of exception' (2021) International Affairs Blog. Available at: https://medium.com/international-affairs-blog/the-colonial-origins-of-the-permanent-state-of-exception-668e38c91a45. Last accessed 20 January 2022.
[26] This is not to say that every Individual member of the Islamic State are driven solely by ideological factors. For some, money was the primary reason for joining the group.
[27] See Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) 16 *International Criminal Law Review*, 361.

venerable ancestors of the Prophet Mohammed.[28] *Salafism is* a primarily theological movement in Sunni Islam concerned with purifying the faith.[29] As an ideology, *Salafism* emphasises the elimination of veneration (*shirk*) and the affirmation of God's Oneness (*tawhid*). Followers of *Salafi* ideology view themselves as the only true Muslims and consider those who do not adhere to its practise as apostates and renouncers of true Islam.[30] The fundamental ideologies which are central to *Salafism* and which are the nucleus of Islamic State's ideology are:

> the call to return to the authentic practices and beliefs of the first generation of Muslims (*al-salaf al-sālih*); the need to diminish unbelief; the sole belief that the Qur'ān and Sunna are the only valid sources of religious authority; the imperative to rid Islam of heretical inventions (*bid'a*); and the belief that specific answers to all conceivable questions are found in the Qur'ān and Sunna.[31]

The ideology of Islamic State and the establishment of the Caliphate was the antithesis of Western imperialistic ideologies and exceptionalist policies that continued to dominate post-colonial policies through the lens of othering and race, producing and operating, as this thesis argues, in a state of exception. Islamic State's ideology contested imperialism by engaging in social imaginary and social memory to remake the pre-colonial era of Islam through the re-creation of the Caliphate. As the ideology reveals however, only those to strictly adhered to its core tenets were considered true believers and worthy citizens of the Caliphate. Hence, the ideology of Islamic State was bound by religion and othering, in its own state of exception.

The connections between the state of exception, exceptional powers and neoliberalism is central to understanding the use of state violence and interventionism in order to impose particular economic, political and legal agendas. This marriage of Empire's law and the state of exception exposes the very relationship between exception theory, emergency law and the political economy on one hand, and effect of this marriage on the socio-legal,

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[28] Cole Bunzel, 'From Paper State to Caliphate: The Ideology of the Islamic State', *Centre for Middle East Policy*, 2015. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf. Last accessed 15 January 2022.

[29] For a more detailed discussion of *Salafism*, see Bernard Haykel, "On the Nature of Salafi Thought and Action," in Roel Meijer (ed), *Global Salafism: Islam's New Religious Movement*, London: Hurst, 2009.

[30] Cole Bunzel, 'From Paper State to Caliphate: The Ideology of the Islamic State', *Centre for Middle East Policy*, 2015. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf. Last accessed 15 January 2022.

[31] Nael Shama, 'Al-Jama ' Al-Islamiya and the Al-Jihad Group in Egypt', in John L. Esposito and Emad El-Din Shahin (eds.), *The Oxford Handbook of Islam and Politics*, Oxford University Press, Oxford, 2013, 608 cited in Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) 16 *International Criminal Law Review*, 361, 388.

political and global economic. At the centre of the Empire's law and the state of exception is the concept of sovereignty and the relationship between law and sovereign power. Hardt and Negri view sovereignty, not only as a principle based on the nation-state polities, but as the attribute of the global order.[32] This is in line with Anghie's characterisation of sovereignty as that which is the exercising of legitimate power, discussed below. However, Anghie also characterises sovereignty as negating the power and the authority of colonial peoples, operating as a means to justify and legalise injustice and violence against them,[33] leading to Marks' pertinent question: "Who will decide on the definitions of justice and order across the expanse of this totality in the course of its process of constitution?[34] The thesis seeks to address this question through an examination of the relationship between law and sovereign power as it manifests in the international legal framework and in the Caliphate through the imposing of *Shari'a* law.

Anghie's thesis analyses how colonialism was central to the formation of an international legal system that "facilitated the racialisation of law by delimiting the notion of law to very specific European institutions".[35] The thesis traces the evolution of sovereignty as it emerged from the colonies, examining its application in the European and non-European worlds. The use of emergency powers that created states of exception formed part of the legal systems and governance policies in the colonies, which were absorbed into Western governmental practices through the League of Nations Mandate System. These practices, which generated a 'civilised'/'uncivilised' dichotomy and a system of Othering, and designated the local population as not fully politically qualified humans, influenced Western interventionist policy in the Middle East. It is the argument of this thesis that Western interventionist policies have adopted the process of Othering, which operate both inside outside of the legalities of international legal framework, in order to promote their own political and economic agendas. The strategies through which states have engaged with the phenomenon of othering and its relationship to (il)llegality is engaged with in Section 2.3.1. In Chapter Six, this argument is analysed through the interventions in Iran, Iraq and Syria. The thesis also discusses how these practices directly violated the principle of sovereignty – the supreme authority of the state – establishing an exceptional space of exception where legal norms were suspended and the

[32] Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449.
[33] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities (2006) 27 *Third World Quarterly*, 739.
[34] Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449, 465.
[35] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005, 55.

association between sovereign power and violence was legitimised in the name of economic security. Hence, the Western established system of international law and its institutions (discussed in Chapter Three), have been utilised to maintain Western hierarchies, as the legal justifications for the 2003 War on Iraq testify to, (i) anticipatory or pre-emptive self-defence, (ii) collective security under Chapter VII of the Charter of the United Nations,[36] and (iii) the doctrine of humanitarian intervention under the rubric of the Responsibility to Protect (R2P) doctrine.[37] Yet, as Simpson discusses, the argument of pre-emptive self-defence employed by the Bush administration stretched "international law beyond breaking point"[38] as the threat posed to the US by Iraq was not immediate and consequently a military assault on the Iraq was unjustified.[39] This configuration of the legal system propagated a structure of sovereignty that although was equitable in theory, where all states and their citizens stand equal before the law, in fact operated as a dualist two-tier system of inequality (sovereignty and quasi-sovereignty), where all states and their citizens do not, in fact, stand equally before the law. This leads into the central discussion of this chapter and to the predominant issue of this thesis – Schmitt's state of exception and Agamben's *homo sacer* are no longer the exception, but rather are essentials tool of contemporary states, "who have transformed it into an unrestrained feast in which pure violence is exhibited."[40]

In the following chapters, the discussion and analysis will explore the way in which the violation of sovereignty has undermined the principle of the sovereign equality of states. Chapter Three *The History of International Law: Asymmetries of Terror and Violence* analyses the modern international legal system as a reflection of a framework that served to legitimise European colonial practices and interests, a situation, it is argued, which still resonates presently, producing a two-tier system or quasi-system of sovereignty. Chapter Four *Colonialism and the Mandate System* examines the phenomenon of colonialism and

[36] Charter of the United Nations 1945, Chapter VII.
[37] The UN describes R2P as "The responsibility to protect embodies a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member States' pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity." Available at: https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml. Last accessed 8 June 2021. See Gerry Simpson, "War in Iraq and International Law" (2005) 6(1) *MJIL*, 167, 171-177 for a more detailed discussion of the three legal justifications for the War on Terror.
[38] Gerry Simpson, "War in Iraq and International Law" (2005) 6(1) *MJIL*, 167, 172.
[39] Ibid.
[40] Giorgio Agamben, "The State of Exception" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 284-297, 296.

the League of Nations Mandate System, a product of a discipline of international law[41] that emerged from the colonial confrontation and challenged the claim of sovereign equality amongst nations. The form of sovereignty granted to mandate territories acquired a different shape and character in the non-European world, imposing a European model of sovereignty on non-European states. This system of sovereignty, which did not recognise the validity of their culture or civilisation, transformed the internal operations and independence of those states. Chapter Six *Sovereignty, Quasi-Sovereignty and The Rise of Islamic State* examines the multiple cause factors that gave rise to the birth of the group, a story that pivots around the formation of the Middle East according to the dictates of European powers, the September 11 2001 attacks and the invasions of Afghanistan in 2001 and Iraq in 2003, all of which produced states of exception. Chapter Seven *Sovereignty, Quasi-Sovereignty and the War on Terror* engages in a discussion of the way in which biopower has been utilised to introduce the indefinite detention of terror suspects, to suspend the rule of law and to create a state of exception in which the state of *homo sacer* is realised.[42] As the chapter discusses, the space of Guantánamo Bay is also Agamben's space of exception, the biological space discussed in detail below. This process of dehumanisation, producing the figure of the biopolitical subject has been re-enacted and applied to the prisoners in the camp of Guantánamo Bay, in CIA blacksites and other places of detention through secret rendition and the legal framework of the War on Terror. Chapter Eight *Islamic (Exceptional) State: A New form of Sovereignty?* considers the Caliphate as its own state of exception, where the tiers of sovereignty (full-, quasi- and semi-civilised) that Islamic State so venomously rejected, was also produced the as a continuum of the civilised/uncivilised distinction.

### 2.2 The Principle of Sovereignty in International Law

The foundational principles of international law are sovereign equality – all states and their citizens stand equally before the law and must be treated equally under that system of law[43] and sovereign authority - all states possess legal authority over their own affairs.[44]

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[41] Peter Sluglett, 'An Improvement on Colonialism? The 'A' Mandates and their Legacy in the Middle East' (2014) 90(2) *International Affairs,* 414.

[42] Detainees at Guantánamo Bay are held in a 'legal black hole', according to Amnesty International. The '*Military Order on the Detention, Treatment and Trial of Non-Citizens in the War on Terrorism of 13 November 2001'* denied detainees of (i) the right to a trial by jury in the US courts, (ii) habeas corpus, and (iii) the protections of the *Geneva Conventions* and the *Convention Against Torture*.

[43] Charter of the United Nations, 1945, Art. 2(1).

[44] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, 9th ed, Oxford: Oxford University Press, 2008.

The principal of sovereign non-interference remains the cornerstone of international law[45] and is protected in Article 2(1) of the United Nations Charter. Article 2(1) stresses that "[t]he Organization is based on the principle of the sovereign equality of all its Members".[46] In 1825, in *The Antelope*, US Supreme Court Chief Justice Marshall asserted that "[n]o principle of general law is more universally acknowledged than the perfect equality of nations".[47] Under current international law, "sovereignty is the basic international legal status of a state that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign state or to foreign law other than public international law."[48] It is generally understood "as unlimited and indivisible rule by a state over a territory and the people in it"[49] where "governments generally claim legal sovereignty […] in the name of the state".[50] One of the outstanding characteristics of a state is its independence, or sovereignty,[51] as defined in the *Draft Declaration on the Rights and Duties of States by the International Law Commission* (1949) is "the capacity of a state to provide for its own well-being and development free from the domination of other states, providing it does not impair or violate their legitimate rights".[52] It is the enjoyment of full right and power of a governing body over itself, without any external interference,[53] within the limitations of international law. It is also defined as the "[u]ltimate authority, held by a person or institution, against which there is no appeal."[54] Robert Jackson defines the sovereign state as "an authority that is supreme in relation to all other authorities in the same territorial jurisdiction and that is independent of all foreign authorities… supremacy and independence are not two separate characteristics: they are two facets of one overall characteristic: sovereignty."[55] In contemporary international law, sovereignty is "the

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[45] Stephen Krasner, 'Compromising Westphalia' (1995-6) 20(3) *International Security*, 115; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *International History Review*, 569.
[46] Charter of the United Nations, 1945, Art. 2(1).
[47] *The Antelope*, [1825] USSC 20; 23 US 66, 122 (1825).
[48] Charter of the United Nations, Art. 2(1); J. Crawford, "Sovereignty as a Legal Value" in Crawford & Koskenniemi 2012, 123. See also H. Steinberger, 'Sovereignty' (1987) 10 *Encyclopedia for Public International Law*, 414.
[49] John Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics' (2005) 95(2), *Annals of the Association of American Geographers*, 437, 437.
[50] Christian Lund, "Fragmented Sovereignty: Land Reform and Dispossession in Laos" (2011) 38(4) *Journal of Peasant Studies*, 885, 887.
[51] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.
[52] *Yearbook of the ILC*, 1949, 286. Judge Huber noted in the *Island of Palmas* case that "independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state", *Island of Palmas Case* (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration [PCA].
[53] Charter of the United Nations, 1945, Art. 2(1).
[54] *World Encyclopedia*, Oxford: Oxford University Press, 2008.
[55] Robert Jackson, *Sovereignty*, Cambridge: Polity Press, 2007, 10-11.

political and legal basis of the international personality of the state. It belongs to all states, regardless of size, power, stage of development (…). The most important feature of state power is the sovereignty, which requires supremacy internally and in dependence externally".[56]

*2.2.1 Westphalian Understandings of Sovereignty*

The doctrine of sovereignty was first analysed by Jean Bodin in the *Six Livres de la République*,[57] in which he underscored the essential need for a sovereign power to implement the laws of the state. However, Western understandings of sovereignty are grounded in the *Peace of Westphalia* 1648,[58] which was based upon the principles of equality, autonomy, and the absolute sovereignty of states legitimately free from all interference.[59] The concept of sovereignty, which specifies that all sovereigns are equal in relation to each other[60] and that sovereign states have total control over their own states without the fear of external interference,[61] emerged from the Treaty of Westphalia of 1648.[62] According to Philpott, Westphalian sovereignty has "three faces".[63] Firstly, the sovereign state emerged as the legitimate political entity following the Peace of Westphalia. Secondly, Westphalian principles established that control over one's territory was essential as a criteria for statehood. And thirdly, Westphalia eliminated legitimate restrictions that had previously curtailed a state's activities within its territory.[64] According to Bielat, the three aspects of sovereignty cited above, capture the very essence of the "most traditional definition of sovereignty, that a sovereign,

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[56] D. Mazilu, 2001 in Jana Maftei 'Sovereignty in International Law' (2015) 11(1) *Acta Universitatis Danubius Journal* 54, 60.

[57] *The Six Books of the Republic of Jean Bodin Angevin. To Monsignor du Faur, Lord of Pibrac, Adviser of the Roy in his Privy Council*, Paris, Jacques du Puis, 1576, book I, chapter VIII,p. 11[7]-118.

[58] The Peace of Westphalia comprised two peace treaties, signed at Munster, between the Holy Roman Empire and France, and at Osnabruck, between the Holy Roman Empire and Sweden. "The treaties confirmed the supplanting of centralized imperial power by a juridical arrangement of autonomous sovereigns. Medieval theocracy gave way to early modern-legal rationalism (for some time after, the Vatican continued to think of international law as a Protestant conspiracy)". See Gerry Simpson, "International law in diplomatic history", in Crawford & Koskenniemi 2012, 25-46, 31.

[59] Daniel Philpott, 'Religious Freedom and the Undoing of the Westphalian State' (2004) 25(4) *Michigan Journal of International Law*, 981.

[60] Charter of the United Nations, 1945, Art. 2(1).

[61] Charter of the United Nations, 1945, Art. 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[62] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities (2006) 27 *Third World Quarterly*, 739, 740.

[63] Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, Princeton, NJ: Princeton University Press, 2001, 7, cited in Hope Lozano Bielat, *Islamic State and the Hypocrisy of Sovereignty*, 2015. Available at: https://www.e-ir.info/2015/03/20/islamic-state-and-the-hypocrisy-of-sovereignty/. Last accessed 8 June 2021.

[64] Ibid.

territorially defined state had supreme authority within its borders and was part of a world order in which states were the dominant actors".[65] Although the concept of sovereignty was not a novel one in the 1640s,[66] having already been enjoyed by the Emperor and Pope, the post-Westphalian landscape witnessed the decline of the monopoly on sovereignty that the Church, Emperor and kings had possessed[67] in favour of parliamentary forms of government. Thus, the principle of state sovereignty was enshrined at Westphalia, but only as a right of Western nations, which as the discussion below considers, has had lasting a profoundly negative consequences for non-Western states such as Iraq and Syria.

*2.2.2 The-Tiers of Sovereignty: The Production of Quasi-Sovereignty*

As this chapter discusses, states have supreme authority within their territory, immune from the jurisdiction of other states.[68] International relations scholars refer to a Westphalian states system "as a system of political authority based on territory and autonomy".[69] For Krasner, understandings of Westphalian sovereignty include "an institutional arrangement for organising political life that is based on territoriality and autonomy. States exist in specific territories. Within these territories domestic political authorities are the only arbiters of legitimate behaviour".[70] However, the argument put forth in this thesis challenges the principles of non-interference, equality and political authority. As the thesis discusses, the sovereignty of Middle-Eastern countries has been repeatedly violated by Western nations in order to protect their economic interests in the region. Stephen Krasner provides an insight into the concept of sovereignty, identifying three aspects, namely (i) international legal sovereignty, (ii) Westphalian sovereignty and (iii) domestic sovereignty.[71] Certainly, Westphalian sovereignty (the exclusion of external influences from another's territory) and domestic sovereignty (the capacity to exercise political authority in a given territory)[72] are particularly relevant to the

[65] Hope Lozano Bielat, *Islamic State and the Hypocrisy of Sovereignty*, 2015. Available at: https://www.e-ir.info/2015/03/20/islamic-state-and-the-hypocrisy-of-sovereignty/. Last accessed 8 June 2021.
[66] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *The International History Review*, 569.
[67] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *The International History Review*, 569.
[68] Charter of the United Nations 1945, Art. 2(4). **"**All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[69] Stephen Krasner, 'Compromising Westphalia' (1995-6) 20(3) *International Security*, 115, 115.
[70] Stephen Krasner, 'Compromising Westphalia' (1995-6) 20(3) *International Security*, 115, 119.
[71] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[72] Stephen Krasner, *Power, the State, and Sovereignty: Essays on International Relations*, Oxon: Routledge, 2009.

examination of sovereignty in this thesis, as the nature of internal and external understandings of sovereignty help to determine how a state can operate. The establishment of the Islamic State Caliphate in 2014 calls into question these understandings of sovereignty, both as a rejection, by Islamic State, of Western notions of sovereignty and of its own understanding of sovereignty, i.e. a divine principle granted by Allah.[73] This discussion is engaged with in Chapter Eight.

Although not referring specifically to the violation of sovereignty in the Middle East, Krasner cites the process of violated sovereignty as "organised hypocrisy".[74] Such hypocrisy, whereby states are equal in law, yet the domestic autonomy of states such as Iraq and Syria has been infringed upon, has created an international legal system, historically created to reflect the will of Western sovereign states, that operates a two-tier system of sovereignty – full- and quasi-sovereignty and international law. An exploration of the genealogy of sovereignty uncovers the emergence of quasi-sovereignty from the non-European world, where it was used as a mechanism of exclusion and control. The evolution of the concept of sovereignty from the colonies through the 20th and 21st centuries reveals that sovereignty functions at different levels in the international arena. The recognition of the role of quasi-sovereignty as a functional and structural element of public international law is therefore of paramount importance to understanding the way in which the civilised/uncivilised distinction continues to permeate international relations, producing a third tier of the 'semi-civilised' person. Such an understanding is useful in order to analyse how Iraq and Syria became "sites of contestation"[75] where competing sources of authority denied these states their autonomy, independence and economic autonomy, leading to the fragmentation of their sovereignty and ultimately their states. The two-tier system of sovereignty operates in a zone of exception, where the suspension of the basic laws and norms erode the rights and autonomy of those subjected to it, creating a space where the "suspension of the legal order in its totality"[76] escaped "every legal consideration".[77] It is the argument of this thesis that the colonial form of law informed the production of a two-tier system of sovereignty, that although in violation of legal norms, became part of the fabric of international law. The actions of Western

[73] Raluca Codruta, 'The Islamic State – Aspects of Sovereignty' (2015) 2 *International Journal on Humanistic Ideology*, 143.
[74] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017, 17.
[75] Bob Jessop, *State Power: A Strategic-Relational Approach*, Cambridge; Malden, MA: Polity, 2007, 37.
[76] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 5 April 2020.
[77] Ibid.

nations, discussed in Chapters Six and Seven, operated in the zone of exception where the fragmentation of Iraq's and Syria's sovereignty created the chaotic spaces that emerged under the system quasi-sovereignty. In was in these spaces that the violent extremism of Islamic State materialised and thrived.

*2.2.3 Quasi-Sovereignty*

Quasi-sovereignty signifies a situation whereby a state exercises only partial control over its own political organisation, authority, territoriality and economic and cultural affairs, the concepts that constitute sovereignty. While all states are recognised as equal actors in law,[78] the interference in the affairs of one state by one or more other states who assert their sovereign authority beyond their borders, renders the former as a quasi-state, denied its full sovereign rights and the ability to govern effectively. Such a state is not a fully autonomous and not fully recognised as a legal personality. It represents a legal façade of sovereignty and formal independence. Gerry Simpson questions the existence of sovereign equality in international law.[79] Rather, he argues that the international legal order accommodates the great powers through legalised hierarchy and hegemony. The interventions in Iraq and Afghanistan demonstrate, for Simpson, that liberal anti-pluralism, rather than equality between states, is the dominating force in international law.[80] Simpson notes that international law supports the practice of 'anti-pluralism', which "denies certain states the right to participate fully in international legal life because of some moral or political incapacity, such as lack of civilisation, absence of democracy or aggressive tendencies."[81] Hegemonic ambitions, according to Simpson, reveal the façade of sovereign equality and destroy claims of equality in international law.[82] As Chapter Four discusses, this system of inequality and hegemonic superiority emerged from the colonial experience, where the techniques and doctrines that international law used to advance its civilising mission included racial superiority, "cultural subordination and economic exploitation".[83] It is argued in this thesis that the civilising mission has endured over time through the violation of the principle of non-interference. It is further

[78] Charter of the United Nations, 1945, Art. 2(1).
[79] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal*, Cambridge: Cambridge University Press, 2009.
[80] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal*, Cambridge: Cambridge University Press, 2009.
[81] Ibid., 232.
[82] Ibid.
[83] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.

argued that this represents a new form of Empire, reflecting previous incarnations of colonialism where colonised peoples were Othered, not considered to be fully political qualified humans since they did not exist in the European world, and colonised territories did not have their own legal personality. Quasi-sovereignty is a form of sovereign exceptionalism, where foreign actors assert their claim of sovereign authority in the State of another. The discussion in Chapter Six applies these arguments to the situations of Iran, Iraq and Syria, asserting that the interference in these countries is a continuance of Othering, a reproduction of Empire and sovereign exceptionalism, where a violent contest for sovereign authority produced a state of exception in which law and violence combined to configure exceptional spaces where the political order of quasi-sovereignty was reinforced.

*2.2.3.1 Interpretations of Quasi-Sovereignty*

The legal scholarship of quasi-sovereignty is discussed throughout the thesis. Siba N'Zatioula Grovogui (1996) and Lauren Benton (2008) are both cited (Grovogui in chapters three and five and Benton in chapters two and seven). While the scholarship of both scholars was very illuminating, their interpretation of quasi-sovereignty and its application are different. Grovogui, for example, maintains that the reduction of states to a quasi-sovereign status is the result of the machinations and manipulations of a Western-centric, colonialist system of international law, that permitted former colonial states to experience rudimentary political powers, whilst simultaneously maintaining without the colonial structures of domination. Hence, for Grovogui, there is no distinction drawn between international law and international power politics, meaning that international law operates neither as politically neutral or equal. Consequently, international law continues to be used as a strategy to perpetuate Western hegemony and the marginalisation of non-Western states.[84] While Benton acknowledged "the constitutive effect of colonialism on sovereignty",[85] she also stated that it was important to observe trends beyond those generated by the European international legal system. A failure to do so consigned colonial legal conflicts to the background "as elements of influence of European thought rather than phenomena with their own trajectories and institutional repercussions". [86] Benton's position can also be applied to the emergence of fragmented sovereignty

[84] Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans*, Minneapolis, University of Minnesota Press, 1996.
[85] Lauren Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900' (2008) 26(3) *Law and History Review*, 595, 618.
[86] Ibid., 596.

(discussed in the next section), as a phenomenon that is actively produced within the state in which it is experienced, rather than externally by peripheral actors.

This thesis argues that quasi-sovereignty continues to exist and function in international law and that the legal framework of decolonisaton did not eliminate this form of sovereign exceptionalism. Its role and mode of operations *has* evolved however, following a trajectory from the formal doctrine that permeated the colonial confrontation, to the functional and structural elements of public international law.

The establishment of the United Nations and the adoption by the General Assembly of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*[87] and the *Declaration on Principles of International law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*[88] signalled the formal end of colonisation, establishing instead an international legal system where each state would enjoy sovereign equality where these states would "no longer merely objects of international law; [but that they] are subjects of international law".[89] However, there are also counter-arguments to the notion of sovereign equality between Western and non-Western states and the claim that "international law is universal in its geographic scope and application".[90] Authors such as Anghie, argues that the modern international law continues to emulate the international framework of the 19th century through the "dynamic of difference"[91] and "the civilising mission"[92] that continues to inform the discipline. According to Oldemeinen, there are questions about the neutrality and objectivity of the international institutions that were established to administer Europe's

[87] UNGA Resolution 1514 (XV). *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960. "By this resolution, the General Assembly, considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories, solemnly proclaimed the necessity of bringing colonialism in all its forms and manifestations to a speedy and unconditional end, and in this context, declared, inter alia, that all people had a right to self-determination.". Available at: https://www.un.org/dppa/decolonization/en/about. Last accessed 12 January 2022.

[88] UNGA Resolution 2625 (XXV). *Declaration on Principles of International law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970.* "The General Assembly solemnly proclaimed the principles of international law concerning friendly relations and cooperation among States, including the principle of "equal rights and self-determination of peoples". In that principle, it is stated that the "establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people".

[89] Russel Lawrence Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" (1994) 7, *Harvard Human Rights Journal*, 33, 66.

[90] Makau Mutua, "Critical Race Theory and International Law: The View of an Insider Outsider" (2000) 45, *Villanova Law Review*, 841, 844.

[91] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 742.

[92] Ibid. at 742.

colonies and accommodate former colonies into the system of European international law, questioning whether "they are … still the Western-dominated organisations that are there to protect and further the interests of the West",[93] echoing Gerry Simpson's concerns about the international legal order's accommodation of the great powers through legalised hierarchy and hegemony.[94] The standard of civilisation was the metric by which states would either be included in the family of civilised nations, or excluded if they did not meet that standard. Those who were included were deemed to be in possession of an international legal personality and legitimate sovereign powers.[95] The binary classification of civilised/uncivilised did not accommodate parts of the world such as the Ottoman Empire, Japan, China and Russia, who were not recognised as belonging to the family of nations, but who were also distinguished from 'savage' (or uncivilised) peoples and spaces deemed to be terrae nullius.[96] To overcome this complication and accommodate this grey area, a third classification was added to the international legal discourse, that of the semi-civilised state (or 'barbarous'),[97] an categorisation of people who were not the 'savage' of the colonies, but not civilised enough to enjoy full sovereign rights. This is very instructive for the discussion in Chapter Six, offering a nuanced reflection of the production of quasi-sovereignty as a structural and functional element of public international law.

The international legal hierarchy continues to be informed by various critical accounts of the international legal hierarchy, such as Ali Hammoudi's semi-peripheral sovereignty,[98] Prabhakar Singh's semi-colonialism,[99] Umut Özsu's semi-civilised-state[100] and Arnulf

[93] Mareike Oldemeinen, 'Is International Law Colonial?' (2010) *E-International Relations*. Available at: https://www.e-ir.info/pdf/3958. Last accessed 12 January 2022.
[94] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal*, Cambridge: Cambridge University Press, 2009.
[95] Umut Özsu, 'Agency, Universality, and the Politics of International Legal History' (2012) 52 Harv. Int'l L.J., 58, 60.
[96] Ibid. at 60. John Stuart Mill wrote that "[t]o suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into." See John Stuart Mill, 'A Few Words on Non-Intervention', in John M. Robson (ed.,) *Collected Works of John Stuart Mill* 111, 118 (1984) (1859) cited in Umut Özsu, 'Agency, Universality, and the Politics of International Legal History' (2012) 52 Harv. Int'l L.J., 58, 60.
[97] Umut Özsu, 'Agency, Universality, and the Politics of International Legal History' (2012) 52 Harv. Int'l L.J., 58, 60.
[98] See Ali Hammoudi, *The Pomegranate Tree Has Smothered Me: International Law, Imperialism & Labour Struggle in Iraq, 1917-1960*, PhD Dissertation, Osgoode Hall Law School, York Universite, 2018.
[99] Prabhakar Singh, 'Of International Law, Semi-colonial Thailand, and Imperial Ghosts' (2019) 9(1) *Asian Journal of International Law,* 46.
[100] Umut Özsu, 'Agency, Universality, and the Politics of International Legal History' (2012) 52 Harv. Int'l L.J., 58, 60.

Becker Lorca's mestizo international law.[101] Each of these critiques of the hierarchical framework add substance to the contextualisation and analyses of sovereignty and its relationship to the central argument of this thesis.

Hammoudi analyses the way in which the doctrine of semi-peripheral sovereignty was developed by the Permanent Mandates Commission of the League of Nations to ensure that the imperial, geopolitical and economic interests of Western nations were protected upon Mandate territories gaining their independence. When Iraq gained its independence in 1932, in theory it was no longer a colonial territory, but rather existed in a state of semi-periphery sovereignty,[102] subjected to a new form of imperialism that of neo-colonialism. Hammoudi's scholarship is significant and pertinent to the thesis as it advances a paradigm through which to understand the functional and structural elements of public international law that sustains a two-tier system of sovereignty, where the imperial, geopolitical and economic interests of Western nations continue to affect the international legal system, with implications for the continued existence of quasi-sovereignty. These issues are discussed in Chapter Four and the ramifications of semi-periphery sovereignty are laid bare in Chapters Six and Seven.

For Prabhakar Singh "[A] metropolitan country in a state of semi-colonialism exerts power and influence within an asymmetrical relationship without assuming "outright domination and formal sovereignty over the peripheral country", as in colonialism." [103] Singh's theory of semi-colonialism offers a nuanced lens through which to analyse US imperialism and its relationship to the state of exception, analysed through the plurality of factors and events that gave cause to the rise of Islamic State in Chapter Six and to the state of exception in which the War on Terror was fought.

Arnulf Becker Lorca uses a tripartite system to distinguish between core (European), semi-periphery (Ottoman Empire, Japan, China and Russia) and periphery (the rest of the world) to organise the complex division of the world that emerged in the 19th century.[104] However, Becker Lorna reconstructs 19th and early 20th century international law not as

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[101] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933*, New York: Cambridge University Press, 2015.
[102] See Ali Hammoudi, *The Pomegranate Tree Has Smothered Me: International Law, Imperialism & Labour Struggle in Iraq, 1917-1960*, PhD Dissertation, Osgoode Hall Law School, York Universite, 2018.
[103] Prabhakar Singh, 'Of International Law, Semi-Colonial Thailand, and Imperial Ghosts' (2019) 9(1) *Asian Journal of International Law*, 46, 49.
[104] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933,* New York: Cambridge University Press, 2015.

a system of one-way European imposition on Asian, Eastern European and Latin American nations, but as one of appropriation by non-European actors who sought to resist the status quo of international law and to reform international legal rules in favour of their own foreign policy agendas. Becker Lorca presents non-European actors as active participants in a counter-hegemonic strategy, rather than passive receivers of imperialistic structures and policies.[105] Becker Lorca's scholarship on the non-European appropriation of international law illuminates the discussion in Chapter Eight about the establishment of the Islamic State Caliphate as a site of resistance to Western approaches of statehood and international affairs.

### *2.2.4 Fragmented Sovereignty*

In a quasi-sovereign state, formal power structures become less influential as state power wanes and the recognisable attributes of sovereignty, i.e. legitimacy and effective institutions, become weak or non-existent.[106] In these circumstances, power becomes increasingly decentralised as political authority fragments and the government apparatus of control loses its formal power. In this space, the influence of informal power structures gains traction, enabling the penetration of the state by a range of different actors with differing motivations, producing multiple, localised, and autonomous nucleuses of power[107] These "mutually exclusive claims of the right to rule create conditions of 'multiple sovereignty' and the formation of 'states within states'",[108] where a broad range of competing and overlapping communities are contested between conflicting groups and allegiances, all of which cause the fragmentation of sovereignty.[109] In this environment, when facing existential threats, people typically turn to an identity group, such as tribes, to ensure their survival.[110] This was precisely the situation in Iraq post-2003 invasion, where the Sunni minority existed in a precarious and dangerous situation as they were subjected to increasing violence from the Shi'a majority, which was conducted with apparent impunity. This raises interesting issues about the relationship between notions

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[105] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933*, New York: Cambridge University Press, 2015.

[106] Louise Fawcett, 'States and Sovereignty in the Middle East: Myths and Realities' (2017) 93 *International Affairs*, 937.

[107] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

[108] Nicholas Barker, 'Who Will Rule in Syria? Fragmented Sovereignty and the Problems of Transition', *Strife*, 21 March 2014. Available at: https://www.strifeblog.org/2014/03/21/who-will-rule-in-syria-fragmented-sovereignty-and-the-problems-of-transition/. Last accessed 3 March 2021.

[109] B. Kraxberger, 'Strangers, indigenes, and settlers: contested geographies of citizenship in Nigeria' (2005) 9(1), *Space and Polity*, 9; R.A. Litzinger, 'Contested Sovereignties and the Critical Ecosystem Partnership Fund' (2006) 29(1) *PoLAR: Political and Legal Anthropology Review*, 66.

[110] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

of citizenship, inclusion, marginalisation and contested loyalties – state actions that restrict people's rights to legal protection relegate them to an existence of bare life beyond the margins of the law, where they are no longer recognised or protected by law, excluded from the protections of their own citizenship, existing as the Other, (discussed in detail in section 2.3).

*2.2.5 'Civilised'/'Uncivilised' and the Sovereignty Dichotomy*

As the thesis discusses, the international legal system has not adhered to the principle of equality, instead continuing to draw upon the colonial practices of discrimination cited by Anghie, namely the creation of cultural and ideological distinctions between groups of people.[111] In the late 19th century, "international lawyers used the term quasi-"sovereignty" to refer to the status of sub-polities within empire-states that were said to retain some measure of authority over their internal legal affairs while holding only limited capacity to form international relations".[112] Their understanding of sovereignty was influenced by the recognition of an international legal community composed of 'civilised' polities who were respectable members of the international community, standing in direct opposition to those deemed to be 'uncivilised', placed at the peripheries of the law and beyond the traditional understandings of sovereignty. In discussing the 'civilised'/'uncivilised' distinction, Simpson quotes John Westlake who justified it as those "interested in maintaining the rules of good breeding and those that were not".[113] The trends that emerged within European international law in the late 19th century from which new legal practices were generated[114] were directly influenced by this discrimination. These practices, such as those employed by the League of Nations Mandate System, were not consigned to the early twentieth century however. The 'civilised'/'uncivilised' dichotomy was visible as a practice during the War on Terror, materialising, as Simpson argues, in the denial of the basic protection of the law to citizens of outlaw states.[115] For Simpson, words such as 'uncivilised' or 'terrorist' create a sphere where, according to Peter Rowe, "there is an unwillingness among combatants to accord

[111] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities (2006) 27 *Third World Quarterly* 739; Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[112] Lauren Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900' (2008) 26(3) *Law and History Review*, 595, 596.
[113] John Westlake, *The Collected Papers of John Westlake on Public International Law* (1914) 6; Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.
[114] Lauren Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900' (2008) 26(3) *Law and History Review*, 595.
[115] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167.

the "protection" of the law to their adversaries, who are seen in this light".[116] In the words of Carl Schmitt:

> To confiscate the word humanity, to invoke and monopolize such a term … has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.[117]

The denial of humanity and sovereignty is a theme engaged with in Chapter Six. In orchestrating the September 11 2001 attacks, Osama Bin Laden specifically referenced the mistreatment of the Iraqi people and their resulting deaths as a justification for those attacks:

> We have been fighting you because we are free men who do not remain silent in the face of injustice. We want to restore our [Islamic] nation's freedom. Just as you violate our security, we violate yours.[118]

Following the invasions of Afghanistan and Iraq the conditions of quasi-sovereignty were as states were dispossessed of their sovereignty in the name of security: a state possessing sovereignty by virtue of being a state, yet paradoxically, stripped of it, through the process of Othering. It was in these very conditions that a fragmented society emerged (discussed in Chapter Seven), in which formal power structures lost their authority. It was through these very conditions of violated and fragmented sovereignties, that Islamic State emerged.

### 2.3 The Phenomenon of Othering in the State of Exception

Staszak describes Otherness as the process by which a dominant in-group (us/the Self) creates and stigmatises another group (them/Other) through the construction of difference between the groups. This difference, real or imagined, is utilised to undermine the identity of Other and as a motivation to engage in discriminatory practices against Other.[119] Schwalbe conceptualises Othering as "…the defining into existence of a group of people who are identifiable, from the standpoint of a group with the capacity to dominate, as inferior",[120] or as "…the process whereby a dominant group defines into

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[116] Peter Rowe, 'War Crimes' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford: Hart Publishing, 2004, 203, 204 cited in Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.

[117] Carl Schmitt, *The Concept of the Political*, (George Schwab trans.), Chicago: University of Chicago Press, 1996 [1976], 5.

[118] Osama bin Laden, *Address to the American People*, November 1, 2004. Available at: https://www.aljazeera.com/news/2004/11/1/full-transcript-of-bin-ladins-speech. Last accessed 2 November 2020.4.

[119] Jean-François Staszak, 'Other/otherness', in Kitchin & Thrift (eds), *International Encyclopedia of Human Geography: A 12-Volume Set*, Oxford: Elsevier Science, 2009.

[120] M. Schwalbe, 'The Elements of Inequality' (2000) 29(6), *Contemporary Sociology*, 775, 777.

existence an inferior group."[121] The process of Othering reduces the targeted group to stereotypical characteristics that are dehumanising, and which illuminate perceived differences as negative, such as religion, gender, skin colour, ethnicity, or sexual orientation.[122] These categorisations are then used to justify the supremacy of one group, "who may or may not make up a numerical majority",[123] and legitimises its propensity to dominate the Other. Having studies various forms of societies, Lévi-Strauss observed the use of Othering to be widespread, "Passage from the state of Nature to the state of Culture is marked by man's ability to view biological relations as a series of contrasts; duality, alternation, opposition, and symmetry, whether under definite or vague forms".[124] From this viewpoint, the Othered person becomes a screen upon which the subject projects his or her stereotypes, using an "us vs. them" mentality to alienate the group.[125] Othering therefore facilitates the division of humanity into two groups: one that exemplifies the norm, whose identity is to be valued, standing in opposition to the Other who is devalued, inferior and defined by perceived faults.[126] Jensen describes othering as a

> discursive processes by which powerful groups, who may or may not make up a numerical majority, define subordinate groups into existence in a reductionist way which ascribe problematic and/or inferior characteristics to these subordinate groups. Such discursive processes affirm the legitimacy and superiority of the powerful and condition identity formation among the subordinate.[127]

Essentially, the process of otherness permits and sanctions the classification of individuals into two groups that denote a hierarchy: us and them,[128] existing in opposition to each other.

### *2.3.1 Othering and (Il)legality*

The thesis proffers the argument that Western interventionist policies have adopted the process of Othering, which operates both inside and outside the legalities of the international legal framework. Some interventions are legal under international law e.g.

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[121] M. Schwalbe *et al*, 'Generic Processes in Reproduction of Inequality: An interactionist Analysis' (2000) 79(2), *Social Forces*, 419, 422.
[122] S.H. Riggins, 'The Rhetoric of Othering' in S. H. Riggins (Ed.), *The Language and Politics of Exclusion – Others in Discourse*, Thousand Oaks: Sage, 1997; R. Lister, *Poverty*, Cambridge: Polity Press, 2004.
[123] SQ Jensen, 'Othering, Identity Formation and Agency' (2011) 2(2), *Qualitative Studies*, 63, 65.
[124] Simone de Beauvoir, "Introduction", *The Second Sex* (H.M. Parshley, trans.), London: Vintage, 1997, 13-29, 17.
[125] John Cash, *Identity, Ideology & Conflict*, Cambridge: Cambridge University Press, 1996.
[126] Jean-François Staszak, 'Other/otherness', in Kitchin & Thrift (eds), *International Encyclopedia of Human Geography: A 12-Volume Set*, Oxford: Elsevier Science, 2009.
[127] SQ Jensen, 'Othering, Identity Formation and Agency' (2011) 2(2), *Qualitative Studies*, 63, 65.
[128] Ibid. at 65.

The Gulf War 1991, Libya 2011, the 2003 Iraqi War was an illegal intervention,[129] while the Syrian and Afghanistan interventions operated both within and outside the legalities of international law. What each of these interventions have in common however, is the process of Othering that states engage in using strategies that circumnavigate international law.

*2.3.1.1 Othering and (Il)legality: The Use of Special Forces*

For example, the use of specialised forces in warfare has promoted the abuse of the citizens the invaded country, as witnessed in Iraq and Afghanistan. Gurr has argued that "the biggest predictor for state terror is the existence of units or institutions which specialize in combating insurgency or terrorism".[130] The conflict in Northern Ireland provides a fertile example of the relationship between Othering and (il)legality. While the presence of the British was legal, the activities of the specialist anti-terrorist forces, such as the SAS, the 14th Intelligence Company and the Force Research Unit (FRU), speak to the process of othering. Specifically, these activities included the 'shoot to kill' policy of eliminating terrorist suspects,[131] in a display of eliminationist Othering, the torture of Republicans and Catholics and collusion between specialist forces and Loyalist paramilitaries in the murder of Republicans and Catholics.[132]

So too do the wars in Iraq and Afghanistan speak to the relationship between Othering and (il)legalit as special forces were used in these circumstances, where they conducted covert operations with minimal political oversight.[133] These operations included colluding with third force actors such the Northern Alliance in Afghanistan[134] and Kurdish forces in Northern Iraq, the interrogation and abuse of terrorist suspects, which

[129] For a detailed discussion of the illegality of the Iraqi War, see Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.
[130] T.R. Gurr, 'The Political Origins of State Violence and Terror', in M. Stohl and G. Lopez, eds, *The State as Terrorist: The Dynamics of Governmental Violence and Repression*, Wesport: Green Wood Pres, 2006 cited in Ruth Jamieson and Kieran McEvoy, 'State Crime by Proxy and Juridical Othering' (2005) 45(4) *The British Journal of Criminology*, 504, 507.
[131] John Stalker, *The Stalker Affair,* London: Viking, 1988.
[132] Martin Dillon, *The Dirty War*, London: Hutchinson, 1990; Paul Larkin, *A Very British Jihad: Collusion, Conspiracy and Cover-Up in Northern Ireland*, Belfast: Beyond the Pale, 2003 cited in Ruth Jamieson and Kieran McEvoy, 'State Crime by Proxy and Juridical Othering' (2005) 45(4) *The British Journal of Criminology*, 504.
[133] J. Kibbe, 'The Rise of the Shadow Warriors' (2004) 83(2) *Foreign Affairs,* 102.
[134] The capture and subsequent sale of the Australian David Hicks by the Northern Alliance to the US is discussed in section *7.3.4.3 Secret Rendition: The Case of David Hicks.*

is discussed in section *7.4.2.5 Spaces of Exception in the War on Terror* and the operation of 'hunter killer' teams that targeted high value targets.[135]

*2.3.1.2 Othering and (Il)legality: Collusion with Paramilitaries*

The process of Othering and (il)legality was laid bare during the Libyan intervention where there is evidence of collusion between NATO forces and rebel groups as third force actors, with the purpose of removing Gadaffi from power, rather than engaging with the Responsibility to Protect doctrine.

A key indicator which suggests that NATO was exercised with the expelling Gaddafi from power, was the arming and training of the rebel groups who were fighting Gaddafi's regime. Indeed, following its intervention, NATO stated that the "combination of coalition airpower with the supply of arms, intelligence and personnel to the rebels guaranteed the military defeat of the Gaddafi regime".[136] Green reports that Britain admitted to "NATO … providing intelligence and reconnaissance information to the rebels".[137] A recurring issue during the intervention was the refusal of NATO and the rebel groups to negotiate a ceasefire with Gaddafi, prompting commentators to state that NATO was interested only in regime change and not in executing the Responsibility to Protect doctrine. Commenting on this, one senior Brazilian diplomat "recalled that the suggestion to interrupt the military operation and to pursue political negotiations was opposed by the countries leading the NATO intervention, with the argument that the military operation should not be micromanaged—not an argument that truly addressed the proposed termination of the operation".[138]

Green argues that NATO's focus on regime change in Libya was a demonstration of US-backed imperialism.[139] The establishment of the Africa Oil Policy Initiative Group (AOPIG) in 2002 and its submission of a white paper to Congress entitled *African Oil: A*

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[135] See J. Kibbe, 'The Rise of the Shadow Warriors' (2004) 83(2) *Foreign Affairs*, 102; M. Fitzimmons, (2003) 19(3) 'The Importance of Being Special: Planning for the Future of US Special Operations Forces' (2003) Defence and Security Analysis, 203 cited in Ruth Jamieson and Kieran McEvoy, 'State Crime by Proxy and Juridical Othering' (2005) 45(4) *The British Journal of Criminology*, 504.

[136] House of Commons Foreign Affairs Committee 'Libya: Examination of intervention and collapse and the UK's future policy options' 3rd report 2016-17, HC119,10.

[137] Matthew Green, "To What Extent Was the NATO Intervention in Libya a Humanitarian Intervention?" (2019), *E-International Relations*, 1, 3. Available at: https://www.e-ir.info/2019/02/06/to-what-extent-was-the-nato-intervention-in-libya-a-humanitarian-intervention/. Last accessed 7 January 2022.

[138] S. Brockmeier, O. Stuenkel, and M. Tourinho (2016) 30(1) "The impact of the Libya intervention debates on norms of protection", *Global Society*, 113, 129 cited in Matthew Green, "To What Extent Was the NATO Intervention in Libya a Humanitarian Intervention?" (2019), *E-International Relations*, 1, 3.

[139] Ibid. Green.

*Priority for U.S National Security and African Development*[140] supports this argument and situates the imperialistic endeavours of the US as a means to promote and further its economic agenda, a recurring theme in the thesis. The subsequent establishment of the US military's Africa Command (AFRICOM) allowed for "a more comprehensive U.S. approach in Africa, and establishment of U.S. Army Africa enables USAFRICOM to more effectively advance American objectives for self-sustaining African security and stability",[141] focusing on the "absolute imperative to secure African sources for U.S.'s own needs".[142]

The discussion above has outlined some of the practices that states employ producing a state of 'Othering'. What each of the practices reveal is the relationship between Othering and (il)legality, where legal interventions can still employ illegal practices, placing the 'Other' person beyond the protections of the law. However, the fact that these practices can be conducted, not by regular state armies, but by specialised forces or rebel groups, allows states can distance themselves from Othering strategies, all the while maintaining the façade of the legality of their interventions.

### *2.3.2 Othering in Literature*

Das credits the origin of the term 'Other' to the writings of Derrida, Sartre and Lacan: "One finds the extensive use of Other in existential philosophy, particularly in Satre's *Being and Nothingness* to explain the relation between Self and Other in creating an awareness of Self and identity."[143] Two important points about Othering can be attributed to Lacan. Firstly, Lacan pointed to the central importance of language in constituting one's and another's identity.[144] This understanding of identity was adopted by Althusser who coined the concept of interpellation, the process by which a person encounters the value of a culture or ideology and internalise them, occupying specific subject positions.[145] Secondly, Lacan stressed that identity is essentially formed and fashioned

[140] Maximilian Forte, *Slouching Towards Sirte*, Chicago: Baraka Books, 2013, 190.
[141] W.B. Garrett, S.J. Mariano and A. Sanderson, (2010), 90(1) 'Forward in Africa: USAFRICOM and the US Army in Africa', *Military Review*, 16, 25 cited in Matthew Green, "To What Extent Was the NATO Intervention in Libya a Humanitarian Intervention?" (2019), *E-International Relations*, 1, 4.
[142] Maximilian Forte, *Slouching Towards Sirte*, Chicago: Baraka Books, 2013, 194.
[143] Bijay Kumar Das, *Twentieth Century Literary Criticism*, 5th ed, New Delhi: Atlantic P & Distributers, 2005, 62.
[144] Jacques Lacan, 'The Mirror Stage as Formative of the Function of the I as Revealed in Psychocanalytic Experience' in *Ecrits: The First Complete Edition in English* (Bruce Fink trans.), NY: Norton & Company, 2006.
[145] Louis Althusser, 'Ideology and Ideological State Apparatuses' in *Lenin and Philosophy* (Ben Brewster, trans.), New York and London: Monthly Review Press, 1971, 144-153.

in the gaze of the dominant group.[146] In Simone de Beauvoir's *The Second Sex,* understandings of Self and Other are analysed through the paradigm of men who are regarded as the norm and women as Other.[147] de Beauvoir asserted that women are constructed as Other by men in order to serve their (men's) interests. De Beauvior's theory of Self and Other encapsulates the differences that are fabricated based on gender and other hierarchical social differences.[148] Engaging Hegel's understanding of Othering, de Beauvoir drew upon Hegel's master-slave dialectic,[149] two juxtaposed figures whose essential Self is construction in opposition to the inessential Other, a theme he developed in *Phänomenologie des Geistes.*[150] Through a reading of Hegel, de Beauvior stated that

> the category of the Other is as primordial as consciousness itself…. Otherness is a fundamental category of human thought. Thus is that no group ever sets itself up as the One without at once setting up the other over against itself. If three travellers chance to occupy the same compartment, that is enough to make vaguely hostile "others" out of all the rest of the passengers of the train. In small-town eyes all persons not belonging to the village are "strangers" and suspect.[151]

The asymmetry in dynamics of power is therefore crucial to the production of otherness. Dominated out-groups existing on the peripheries are Others precisely because they are unable to prescribe their own norms.

*2.3.2.1 Edward Said and Orientalism*

In his book *Orientalism,*[152] Edward Said described the Oriental person as characterised by his barbarity, his savageness and his race, existing in an Oriental place so constructed that it was imagined with pathos and its inhabitants were reduced to negative stereotypes.:[153] "there is no doubt that imaginative geography and history help the mind to intensify its own sense of itself by dramatizing the distance and difference between what is close to it and what is far away".[154] Arias & Bryla describe how "Said revealed the Orient to be a collection of mental maps and socio-cultural attributes constructed, represented and consolidated through the discourse of orientalism, which, ultimately,

[146] A. Gingrich, 'Conceptualizing Identities' in G. Bauman and A. Gingrich (eds.), *Grammars of Identity/Alterity –A Structural Approach*, Oxford: BergHahn, 2004.
[147] Simone de Beauvoir, *The Second Sex* (trans. H.M. Parshley), London: Vintage, 1997.
[148] A. Hughes and A. Witz, 'Feminism and the Matter of Bodies: From de Beauvoir to Butler' (1997) 3(1), *Body & Society*, 47.
[149] Simone de Beauvoir, *The Second Sex* (trans. H.M. Parshley), London: Vintage, 1997.
[150] GWF Hegel, *Phenomenology of Spirit* (trans. AV Miller), NY: Oxford University Press, 1979.
[151] Simone de Beauvoir, *The Second Sex* (trans. H.M. Parshley), London: Vintage, 1997, 16-17.
[152] Edward Said, *Orientalism*, London: Penguin Books, 1995 [first published in 1978].
[153] Ibid.
[154] Ibid. at 55.

served to define and consolidate Western identity",[155] since "European culture gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self".[156] As European states engaged in colonialist practices, the concept of the West was not fixed in one space as a geographic location, as the Orient was, but was instead presented as an intellectual tradition[157] as an exclusive club from which the non-European world was excluded. The Other was constructed in opposition to this notion of Western superiority, a position which justified the colonialism of Africa, Asia and the Middle East.[158] Islam, as Other, was viewed as dangerous and anti-rational, populated with 'uncivilised' people who had to be controlled and dominated[159] and whose economic and political agendas had to align with Western interests. It was through this paradigm of Othering that Western interventionist policies in the Middle East were conducted (discussed in Chapter Six), the attribution of full-sovereign rights was denied, and through which the human rights abuses of the War on Terror were justified (analysed in Chapter Seven).

### *2.3.3 Otherness and Power Relations: The Colonies*

In the colonial experience, Othering refers to a "process by which imperial discourse creates its Others … whereas the Other corresponds to the focus of power [....] construction of the Other is fundamental to the construction of the Self".[160] The colonisers considered themselves to be the centre, and the colonised population were deemed to be the marginalised Other.[161] The stigmatisation of other groups as savages or barbarians relegated the stigmatised group to the margins of humanity. The creation of Other and the process of othering became essential practices through which imperial and colonising powers asserted their own power and agendas. Postcolonial theory traces the deployment of binary logic to the process of colonialism, where the binary dichotomy of us and them, 'civilised' and 'uncivilised', superior and inferior was utilised.[162] According

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[155] Rosario Arias & Martyna Bryla, 'Orientation Towards Otherness in the Social and Literary Spaces of Today's Europe' (2018) 4(18) *Palgrave Communications*, 1. Available at: https://www.nature.com/articles/s41599-018-0070-3.pdf. Last accessed 8 June 2021.
[156] Edward Said, *Orientalism*, (25th Anniversary Ed.), New York: Vintage Book, 2003, 3.
[157] Alan Knight, 'Jihad and cross-cultural media: Osama bin Laden as reported in the Asian press' (2007) 13(2) *Pacific Journalism Review*, 155.
[158] Edward Said, *Orientalism*, 25th Anniversary Edition, New York: Vintage Book, 2003.
[159] Alan Knight, 'Jihad and cross-cultural media: Osama bin Laden as reported in the Asian press' (2007) 13(2) *Pacific Journalism Review*, 155.
[160] Bill Aschroft, Gareth Griffins and Helen Tiffins (eds), *Key Concepts in Postcolonial Studies*, London/New York: Routledge, 1998.
[161] Bijay Kumar Das, *Twentieth Century Literary Criticism*, 5th ed, New Delhi: Atlantic P & Distributers, 2005.
[162] Alison Jones and Domoka Lucinda Manda, 'Violence and 'Othering' in Colonial and Postcolonial Africa. Case Study: Banda's Malawi' (2006) 18(2) *Journal of African Cultural Studies*, 197.

to Mercer & Julien, "Imperialism justified itself by claiming that it had a civilising mission – to lead the base and ignoble savages and 'inferior races' into culture and godliness."[163] The process through which Western nations engaged in this civilising mission was through the forcible transmission of religion and culture onto colonised peoples, enabling the West to universally disseminate its values[164] as a means of domination of Other.

The Othering and dehumanising of the inhabitants of the colonies were important tools for colonial powers as its enabled them to posit European states in contradistinction to the colonies which, they testified, were inhabited by savages. The casting of the inhabitants of the colonies as Other, savages and barbarians, enabled European colonisers to justify their claim of supremacy over colonised peoples and to engage in violent dehumanising practices. Colonial peoples were denied access to any form of sovereignty, existing, as they did beyond the margins of humanity. As Chapter Four analyses, the Othering of colonised peoples informed the practices of the Mandate System, which, as identified by Anghie, devised a set of legal structures, technologies and methods of control through which the dehumanisation practices that emerged from the colonies were cemented and normalised in the two-tier system of full- and quasi-sovereignty, denying equilibrium and equality to non-Western states.[165]

*2.3.4 Spatial Organisation*

One of the most powerful means of the construction of otherness is to separate the Self from the Other, both mentally and physically. Segregation has proven to be a very effective measure of elevation on the one hand, and subordination on the other. Massey cites how patterns of ethnic and racial segregation "reveal a close connection between a group's spatial position in society and its socioeconomic well-being."[166] Confining the Other to ghettos and segregated spaces prevents the contamination of the One by the

[163] K. Mercer, and I. Julien, 'Race, Sexual Politics and Black Masculinity: A Dossier', in R. Chapman and J. Rutherford (eds), *Male Order: Unwrapping Masculinity*, London: Lawrence & Wishart, 1988, 106-7 cited in Hammad Mushtaq, 'Othering, Stereotyping and Hybridity in Fiction: A Postcolonial Analysis of Conrad's Heart of Darkness (1899) and Coetzee's Waiting for the Barbarians (1980)' (2010) 3 *Journal of Language and Literature*, 25.

[164] Jean-François Staszak, 'Other/otherness', in Kitchin & Thrift (eds), *International Encyclopaedia of Human Geography: A 12-Volume Set*, Oxford: Elsevier Science, 2009.

[165] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities (2006) 27 *Third World Quarterly*, 739.

[166] Douglas S. Massey, 'Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas', in Neil J. Smelser, William Julius Wilson and Faith Mitchell (eds.), *America Becoming: Racial Trends and their Consequences, Volume 1*, Washington DC: The National Academic Press, 2001.

Other. The practice of segregation is a powerful one both for the optics and the physicality of the process. The colonies and the Concentration Camps, for example, became spaces where the stigmatisation and desolation that the inhabitants suffered was justified by the dominant group through the performance of Othering. In the camp, the inhabitants were completely dehumanised by their captors, set apart from the general population, as inferior beings, considered to be deserving of their punishment due to their inferiority.[167] The Othering of the inhabitants of these spaces demonstrates the way in which sovereign power is, according to Foucault, produced through the management and control of populations, making human life the target of political power.[168] The sovereign enacts decisions regarding who is deserving of political and legal protections or who should be excluded from these protections, living in an existence beyond the law, in the state of exception as Agamben's bare life.[169] The inhabitants of the colonies, the prisoners of the camp, and the detainees of Guantánamo Bay were all denied the protection of the law and recognition as legal persons before that law, instead living between life and death, as the devalued and subordinated Other, standing in opposition to the dominant one in a 'civilised'/'uncivilised' dichotomy. This raises the spectre of Mbembe's necropolitics,[170] i.e. the "subjugation of life to the power of death."[171] According to Mbembe in "our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of *death-worlds*, new and unique forms of social existence in which … populations are subjugated to conditions of life conferring upon them the status of *livi*ng-*dead".*[172] Mbembe's theory of necropolitics invokes Agamben's state of exception as the space where the subjugated populations of the colonies, the camp and Guantánamo Bay reside as *homini sacri*.

### *2.3.5 The Camp*

The argument of the thesis is that the international legal framework emerged from discriminatory colonial practices, informally adopting a two-tier system of sovereignty into the legal landscape. This dualist system was absorbed by Western governmental practices, which in turn influenced Western interventionist policy in the Middle East. As

[167] Achille Mbembe, "Necropolitics" (trans. Libby Meintjes), (2003) 15(1) *Public Culture* 11.
[168] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, London: Allen Lane, 1979.
[169] Andrew Norris, 'The Exemplary Exception – Philosophical and Political Decisions in Giorgio Agamben's *Homo Sacer*, in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 262-283.
[170] Necropolitics is the use of social and political power to dictate how some people may live and how some must die.
[171] Mbembe, 'Necropolitics' (2003) 15(1) (trans. Libby Meintjes), *Public Culture*, 11, 39.
[172] Ibid. at 40.

this thesis discusses, these practices directly violated the principle of sovereignty – the supreme authority and equality of the state – establishing an exceptional space where legal norms were suspended and the association between sovereign power and violence was legitimised in order to ensure the economic security of Western interests. The camp links the violence of several spaces of exception, all of which are extreme expressions of the destructiveness of sovereign power and the violation of sovereignty: the colonies, the Concentration Camps of World War II and Guantánamo Bay. All are camps in their own right, places beyond the margins, removed from the political community.[173] The establishment of this link is significant as it situates the violence, and absence of the rule of law in Guantánamo Bay as a continuance of methods of savagery and cruelty across time, connecting the historical inhabitants of the colonies to the present-day prisoners of Guantánamo Bay.

### 2.4 Sovereign Power and the State of Exception

"Sovereign is he who decides on the exception" - this is how Carl Schmitt's *Political Theology* famously begins.[174] Schmitt is credited with attempting to construct the most thorough theory of the state of emergency, the essentials of which are found in Dictatorship[175] and Political Theory.[176] The origin of sovereign power is, according to Schmitt, "the state of exception, the suspension of rules and conventions creating a conceptual and ethical zero-point from where the law, the norms, and the political order can be constituted"[177] ruled over by a sovereign "the one who can proclaim a state of emergency"[178] or in Foucault's analysis, "… one of the characteristic privileges of sovereign power is the right to decide life and death".[179] It defines a judicial order within which the law of normal times remains valid but does not have force, and acts that would otherwise be unacceptable (e.g the suspension of human rights and the marriage of law and violence) now acquire the force of law.[180] The definition of the state of exception is

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[173] M. Fiskesjö, *The Thanksgiving Turkey Pardon, the Death of Teddy's Bear, and the Sovereign Exception of Guantánamo*, Chicago: Prickly Paradigm, 2003.
[174] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: Chicago University Press, 2005, 1.
[175] Carl Schmitt, *Dictatorship, From the Origin of the Modern Concept of Sovereignty to the Proletarian Class Struggle*, (trans. by Michael Hoelzl and Graham Ward), Cambridge: Policy Press, 2014.
[176] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: Chicago University Press, 2005.
[177] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 301.
[178] Mbembe, 'Necropolitics' (2003) 15(1) (trans. Libby Meintjes), *Public Culture*, 11.
[179] Michel Foucault, *The History of Sexuality Volume 1: An Introduction*. London: Allen Lane, 1979, 119.
[180] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 5 April 2020.

one of complexity,[181] situated as an "ambiguous and uncertain fringe at the intersection of the legal and the political".[182] In *Political Theory*, Schmitt "established the essential proximity between the state of exception and sovereignty".[183] The sovereign, according to Schmitt's definition, is the one whose authority enables the suspension of the entire existing juridical order, the polity capable of instituting a total suspension of the law, replacing it with extra-legal force.[184] Schmitt concluded that any legal order was based on the decisions of the sovereign, and not on a legal norm.[185] Schmitt discounted the notion that the exception has no juridical standing however:

> The state of exception is always something different from anarchy and chaos, in a juridical sense, an order still exists in it, even if it is not a juridical order … Just as in the normal situation the autonomous moment of decision is reduced to a minimum, so in the exceptional situation the norm in annulled. And yet even the exceptional situation remains accessible to juridical knowledge, because both elements, the norm as well as the decision, remain within the framework of the juridical.[186]

Sovereign power, Agamben argues, is established "through the production of a political order based on the exclusion of bare, human life".[187] This is achieved this through the establishment of the state of exception, where the law is suspended, and where its inhabitants exist as beings who are stripped of their legal status and their protection under the law, reduced to *homo sacer*.[188] Agamben's views of sovereign power analysed:

> How this power functions differentially, to target and manage certain populations, to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognised laws; … how sovereignty, understood as state sovereignty in this instance, works by differentiating populations on the basis of ethnicity and race, how the systematic management and derealisation of populations function to support and extend the claims of a sovereignty accountable to no law; how sovereignty extends to its own power precisely through the tactical and permanent deferral of the law itself.[189]

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[181] Giorgio Agamben, "The State of Exception" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 284-297.
[182] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: Chicago University Press, 2005.
[183] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 5 April 2020.
[184] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: Chicago University Press, 2005.
[185] Ibid.
[186] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago: Chicago University Press, 2005, 12.
[187] Amy O'Donoghue, *Sovereign Exception: Notes on the Thought of Giorgio Agamben.* Available at: https://criticallegalthinking.com/2015/07/02/sovereign-exception-notes-on-the-thought-of-giorgio-agamben/. Last accessed 8 June 2021.
[188] Ibid.
[189] Judith Butler, *Precarious Life*, London: Verso, 2004, 68.

Commenting on Schmitt's argument, Agamben noted that though external to the law, the exception presented a paradox where the law remained in force, appealing to Hobbes's dictum "that it is authority and not truth which makes the law".[190] The state of exception is a paradox *par excellence* – the enactment of legal measures that contravene the legal norms, yet those very same contraventions are given legal form, as the basic laws and norms are arrested by the state.[191] Schmitt articulates this oxymoron as thus: that which should be protected by the legal order remains external to it[192] and that which is the normative order no longer applies. The quandary of this paradox is visible in the legal framework that was enacted during the War on Terror (discussed in Chapter Seven), an example of authority making the law, whilst paradoxically transgressing it. Blom Hansen and Stepputat describe sovereign power as existing "in modern states alongside, and intertwined with, bio-political rationalities aiming at reproducing lives and societies as an ever-present possibility of becoming reduced to a purely biological form."[193] Modern sovereign power has, according to Agamben, both "profane and sublime dimensions":[194] a 'civilised' fully human person who is included in cultural and political life and offered the protections of the law, and the 'uncivilised' body, excluded from society, stripped of rights and dignity, and symbolised as "bare life.[195] Gregory charges the US government with using the 'civilised'/'uncivilised' distinction in order to justify the War on Terror. In *The Colonial Present,* Gregory states that the ideological position adopted by the Bush administration regarding the reasons for the September 11 attacks revealed imperialistic proclitivies and reinforced the negative representations of the Middle-Eastern Other,[196] evident in Bush's rhetorical question: "Why do they hate us?" as political prelude to the War on Terror.[197] The perception of the Other was reinforced in the process. As Said argues "To build a conceptual framework around a notion of us-versus-them is, in effect, to pretend that the principal consideration is epistemological and natural - our civilization

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[190] George Duke, 'Hobbes on Political Authority, Practical reason and Truth' (2014) 33(5) *Law and Philosophy,* 605, 618.
[191] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 5 April 2020.
[192] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty,* Chicago: Chicago University Press, 2005.
[193] Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology,* 295, 304.
[194] Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology,* 295, 301.
[195] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford, CA: Stanford University Press, 1998 cited in Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology,* 295, 301.
[196] Derek Gregory, *The Colonial Present,* Oxford: Blackwell Publishing, 2004.
[197] Ibid. at 21.

is known and accepted, theirs is different and strange - whereas, in fact, the framework separating us from them is belligerent, constructed, and situational".[198] This 'civilised'/'uncivilised' narrative, as a construction of colonial rule, continued to be visible as a practice during the War on Terror, materialising, as Simpson argues, in the denial of the basic protection of the law to "citizens of outlaw states".[199] For Simpson the use of words 'uncivilised' and 'terrorist' facilitated an environment which, produced for Peter Rowe, an "unwillingness among combatants to accord the "protection" of the law to their adversaries, who are seen in this light".[200] However, as Chapter Eight analyses, the creation of the state of exception and the Other were not just the preserve of the West; Islamic State also created a biological body, which stripped the inhabitants of the Caliphate of their sovereignty and human rights, existing as *homines sacri.*

### *2.4.1 Agamben's Reading of Sovereignty*

Through a reading of Carl Schmitt, Michel Foucault and Hannah Arendt, Agamben established a link between sovereignty and the rise of a form of life "whose politics can place his existence as a living being in question".[201] This form of life invokes Agamben's *homo sacer*, "an obscure figure of archaic Roman law" that emerges at the point where the law suspends itself,[202] initiating Schmitt's zone of exclusion and abandonment - the state of exception. Agamben's theory of sovereign power is based on the sovereign's power to exclude, to deny the enjoyment of rights, producing a state of exception in which bare, human life exists beyond the margins of the political community.[203] In the continuous progression of this "global civil war",[204] the state of exception has presented as the archetype of government, evident for example in the anti-terrorism laws enacted in various countries around the world.[205] Yet, once the state of exception has become the

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[198] Edward Said, "The Clash of Definitions" in his Reflections on Exile and Other Essays, Cambridge, MA: Harvard University Press, 2000, 569-90, 577; Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, 24.

[199] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.

[200] Peter Rowe, 'War Crimes' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford: Hart Publishing, 2004, 203-204 cited in Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.

[201] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (trans. Robert Hurley), London: Penguin, 1990, 143.

[202] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (trans. Daniel Heller-Roazen), Stanford: Stanford University Press, 1998, 8.

[203] Andrew Norris, 'The Exemplary Exception – Philosophical and Political Decisions in Giorgio Agamben's *Homo Sacer*, in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005.

[204] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 5 April 2020.

[205] See for example, Ireland: *Criminal Justice (Terrorist Offences) Act 2005* and *Criminal Justice (Terrorist Offences) (Amendment) Act 2015*. UK: *Counter Terrorism and Border Security Act 2019* (2019 Act).

rule, the conversion of a temporary and extraordinary measure into a technique of government that enacts a "suspension of the legal order in its totality … that escapes every legal consideration"[206] necessarily entails the loss of human rights and liberties.

Foucault's theory of biopolitics argues that human life beaome the target of mechanisms of state power, an insidious system that controls both individuals and whole populations.[207] In responding to Foucault's assertion, Agamben argues that sovereign power and biopolitics operate in tandem with the other, intertwined in the state of exception and in the operation of sovereign power in that space,[208] functioning as an exclusionary political framework, producing *homo sacer*. Agamben's view of sovereign power analyses:

> How this power functions differentially, to target and manage certain populations, to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognised laws; … how sovereignty, understood as state sovereignty in this instance, works by differentiating populations on the basis of ethnicity and race, how the systematic management and derealisation of populations function to support and extend the claims of a sovereignty accountable to no law; how sovereignty extends to its own power precisely through the tactical and permanent deferral of the law itself.[209]

This is achieved this through the suspension of the law and the denial of its protections to those beings whom the sovereign has designated as bare life, existing in Agamben's state of exception.[210]

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France: *Penal Code* (as amended 2016); *Law on the Fight Against Terrorism* (1986, as of 2018); *Law Relating to Security and Fight Against Terrorism* (2012); *Criminal Procedure Code* (as amended 2010). Council of Europe: *Council of Europe Convention on the Prevention of Terrorism* (ETS 196), Ratified 9/04/2008; Council of Europe Convention on the Prevention of Terrorism (ETS 196) 22/05/06 29/04/2008; *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (ETS 198), Signed 23/03/2011. European Union: The EU has adopted two framework decisions on terrorism: - Council Framework Decision 2002/475/JHA on combatting terrorism, 13 June 2002; - Council Framework Decision 2008/919/JHA on combatting terrorism, 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.

[206] Giorgio Agamben, 'The State of Emergency' (Lecture). Available at: http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 20 February 2021. Last accessed 5 April 2020.

[207] Katia Genel, 'The Question of Biopower: Foucault and Agamben' (2006) 18(1) *Rethinking Marxism*, 43.

[208] Amy O'Donoghue, *Sovereign Exception: Notes on the Thought of Giorgio Agamben.* Available at: https://criticallegalthinking.com/2015/07/02/sovereign-exception-notes-on-the-thought-of-giorgio-agamben/. Last accessed 8 June 2021.

[209] Judith Butler, *Precarious Life*, London: Verso, 2004, 68.

[210] Agamben, "The State of Exception as a Paradigm of Government" in *State of Exception*, (trans. Kevin Attell), 1st ed., Chicago: The University of Chicago Press, 2005, 1-31.

The relevance of biopolitics to Agamben's *homo sacer* is significant. According to Agamben, *homo sacer* encompasses the living dead, a figure who "emerged at the point where the law suspended itself, its absence falling over a zone not merely of exclusion but a zone of abandonment"[211] in Agamben's state of exception, *ex-capere*.[212] As summarised by Vaughan-Williams, "bare life is a form of life that is amenable to the sway of the sovereign power because it is banned from the realm of law and politics […] whenever and wherever the law is suspended".[213] Agamben's interrogation of the state of exception led to his claim that it has become the foremost architype of government in contemporary politics,[214] recalling Foucault's assertion about the widespread use of the biopolitical technologies of government, which are used to dominate and discipline particular populations.[215] "Man", according to Foucault, would not be "what he was for Aristotle, a living animal with the additional capacity for a political existence whose politics places his existence as a living being in question".[216] It is these very technologies of exclusion that produced Agamben's *homo sacer*. A representation *par excellence* of these technologies is the camp, "the most extreme manifestation of such a space of the exception",[217] the location where people are stripped to *homini sacri*,[218] and whose inhabitants are denied not only legal and political rights, but also the very conditions of humanity.[219] As previously stated, the concept of the camp is important in addressing the research question of this thesis, namely that the Western states have used the law as a political instrument of control for economic gains, embodying the very essence of the state of exception "an absence of law prescribed by law under the concept of necessity – a legal black hole, but one created, perhaps even in some sense bounded, by law".[220]

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[211] Derek Gregory, 'The Angel of Iraq' (2004) 22 *Environment and Planning: Society and Space*, 317, 319.
[212] Ibid.
[213] Vaughan-Williams, "Borders, Territory, Law" (2008) 2(4) *International Political Sociology*, 322, 333.
[214] Agamben, "The State of Exception as a Paradigm of Government" in *State of Exception*, (trans. Kevin Attell), 1st ed., Chicago: The University of Chicago Press, 2005, 1-31.
[215] Michel Foucault, *The History of Sexuality Vol. 1, An Introduction*. London: Allen Lane, 1979.
[216] Michel Foucault, *The History of Sexuality Vol. 1, An Introduction*. London: Allen Lane, 1979, 140 cited in Thomas Carl Wall, "Au Hasard" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 31-48, 38.
[217] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 41.
[218] Ibid. at 41.
[219] Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (trans., Daniel Heller-Roazen), Stanford, CA: Stanford University Press, 1998 cited in Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 41.
[220] David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59 *University of Toronto Law Journal*, 1, 2 cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 46.

*2.4.2 Foucault's Reading of Sovereignty*

Foucault described the modern techniques of power as "an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations",[221] as the means through which the nation-state can defend, purify, and protect the "locus of sovereignty";[222] that is the nation and society.[223] The modern techniques of sovereign power and governance have thus empowered the sovereign to include a person in the community as a political body[224] or to cast them aside as Foucault's biological life, existing at the mercy of the sovereign. These techniques of power have meaning for the local populations in the colonies who existed as brutalised and dispensable biological life, for the detainees in Guantánamo Bay who are exposed to the vagaries of the sovereign, and for the hundreds of thousands of people who have been killed by Western powers in pursuit of their economic and political agendas, an issue that forms the basis of the discussion in Chapter Six. Blom Hansen and Stepputat describe how "the body is always the site of performance of sovereign power, which becomes most visible in states of war, extreme conditions, fragmentation, and marginality".[225] The body is inscribed with sovereign power both through the giving and withholding of rights and through inclusion or exclusion from the judicial order as a function of the asymmetrical application of terror and violence. Chapters Six, Seven and Eight chronicle the negative effects of this asymmetry on the Middle East, notably the mode of sovereignty that the region acquired. Chapter Eight is also concerned with asymmetries of terror and violence but from the perspective of Islamic State, whose actions reflect a rejection of the sovereignty of Western states and the elevation of their mode of sovereignty, which also marks the body through the performance of inclusion and exclusion.

## 2.5 The Making of Sovereignty in the non-European World

Antony Anghie, a leading scholar on Third World approaches to international law, analyses that the history of non-European sovereignty is explicitly intertwined with the

[221] Michel Foucault, *The History of Sexuality Vol. 1, An Introduction*. London: Allen Lane, 1979, 140.
[222] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302.
[223] Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295.
[224] E. Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*. Princeton, NJ: Princeton Univ. Press, 2002.
[225] Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 297.

broader history of sovereignty and international law.[226] Traditionally, international law "asserts that there is one juridical version of sovereignty, implicitly European sovereignty, which applies to all states. This understanding is crucial to the maintenance of the fundamental premise of international law: that all states formally are sovereign and equal."[227] However, this interpretation of sovereignty ignores the fact that international law, as it applies universally, reflects a particular Western-centric viewpoint,[228] with no consideration given to other non-Western understandings of sovereignty. It is this crucial factor that, according to Anghie, created two separate systems and versions of sovereignty: "European sovereignty and non-European sovereignty".[229] From the mid-19th century, scholars observed a "sliding scale of sovereign equality among states"[230] linking "the degree of sovereignty a state has to the degree of equality it enjoys on the international stage."[231] The model of sovereignty that was forced upon the non-European world profoundly and negatively affected the economic, social and cultural structures of those societies.[232]

### *2.5.1 Fabricating the State of Exception*

One of the enduring characteristics of a declaration of a state of exception is thus: the state of exception does not have to be based in fact, but its existence can result from a fabrication or a gross misrepresentation of a situation, by the sovereign. The declaration by the US government that Saddam Hussein possessed weapons of mass destruction, as justification for the 2003 Iraqi invasion is a case in point.[233] In Schmitt's estimation, "[I]t

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[226] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[227] Ibid. at 520. See also the Charter of the United Nations, 1945, Art.2(1); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970*, A/Res/25/2625 (XXV); *Helsinki Accords*, 1975, also known as the *Helsinki Act*, *Helsinki Final Declaration* and "Declaration on Principles Guiding Relations between Participating States" ("The Decalogue").

[228] Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) *The European Journal of International Law*, 379.

[229] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 520.

[230] Michael J. Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"? Revolutionary International Legal Theory or Return to Rule by the Great Powers?,' (2005) 10 *UCLA Journal of Int'L. & Foreign Affairs*, 361, 387-88.

[231] Michael J. Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"? Revolutionary International Legal Theory or Return to Rule by the Great Powers?,' (2005) 10 *UCLA Journal of Int'L. & Foreign Affairs*, 361, 387-88.

[232] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[233] On 5 February 2003, US Secretary of State Colin Powell delivered a speech to the United Nations in which he outlined the United States' position on Iraq. Iraq, he stated, possessed

is not the case that the sovereign realizes that there is an objective state of need and thereupon he acts decisively. Instead, the sovereign chooses which state is to be raised to the level of the exception, or simply fabricates it."[234] The use of the state of exception for this purpose raises an urgent issue that speaks to the association between sovereign power and legitimised violence in the name of security: "… the voluntary creation of a permanent state of emergency … has become one of the essential practices of contemporary states, including so-called democratic ones.".[235] Schmitt's claim of fabrication by the sovereign and the establishment of a state of exception is directly relevant to assertions by the Bush administration, now discredited, that Saddam Hussein possessed weapons of mass destructions. This claim was used as a justification for the 2003 invasion of Iraq, the disastrous aftermath of which, as is argued in this thesis, fragmented Iraq's sovereignty, and as was discussed above, directly led to the establishment of the Islamic State Caliphate in 2014 (discussed in Chapters Six and Eight).

The attacks of September 11 2001 are central to addressing the research question, i.e. namely, that a two-tier system of sovereignty continues to operate in international law (full- and quasi), informed by the colonial experience that excluded non-Europeans, furthering the economic gains and agenda of Western nations. September 11 has a multifaceted lineage that reaches back into the colonial past,[236] a genealogy that is analysed in Chapter Seven, and is an event that has been used by the US to advance a colonial present, through their invasion of Iraq in 2003 and the subsequent war on terror. These events (Iraq 2003 and the War on Terror), as this thesis asserts, were an attempt to establish a global narrative of US hegemony, vested in a particular constellation of power that installed Western-friendly governments in Iraq and Afghanistan and reconfigured the principles of international humanitarian law, allowing terror suspects to be regarded as *homines sacri.*

weapons of mass destruction (WMD), which provided just cause for the US invasion of Iraq in 2003 under the rubric of pre-emptive self-defence. No WMD were ever discovered in Iraq.
[234] Giorgio Agamben, "The State of Exception as a Paradigm of Government" in *State of Exception,* (trans. Kevin Attell), 1st ed., Chicago: The University of Chicago Press, 2005, 1-31.
[235] Ibid. at 2 cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 41.
[236] Derek Gregory, *The Colonial Present*, London: Blackwell Publishing, 2004.

*2.5.2 The Articulation of the Colonial Present: The War on Terror*

The War on Terror occupied such a space of exception in which historical patterns of economic and political subordination continued to be used as an expression of sovereign power and legitimate violence, recalling Reynolds' discussion of the normalisation of the mechanisms of control that emerged from the colonies.[237] Benjamin called this a pure or divine form of violence, that which transgresses the law yet is beyond its reach, removed from the political and juridical order by the sovereign.[238] The law that emerged from the colonies absorbed these practices of violence, "cultural subordination and economic exploitation"[239] into the fabric of the international legal framework, as expressed through the governance practises of League of Nations Mandate System and the distinction created between 'civilised' and 'uncivilised' peoples. The Mandate System devised a set of legal structures and technologies and methods of control that cemented and normalised the two-tier system of full- and quasi-sovereignty, denying equilibrium and equality to non-Western states.

*2.5.3 The Unruly Rule of Law*

The concept of the state of exception, as a juridical-political form, has a long history, from Roman law doctrine, to its use in the French Revolution;[240] from a colonial legal technique to the Weimar Constitution in inter-war Germany,[241] culminating in its absorption into the narrative of international law. Walter Benjamin's description of the state of exception as the rule rather than an anomaly,[242] is very relevant to the War on Terror, as the legislation invoked by the US government, as part of the War on Terror, demonstrates. Frank Kafka's articulation of terrorists as existing outside of the law, [243] in a state of exception, speaks to the plight of prisoners of the War on Terror, a conflict

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[237] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

[238] Walter Benjamin, "Critique of Violence", in Walter Benjamin*: Selected Writings Volume One 1913-1926*, (Marcus Bullock and Michael Jennings, eds.), Cambridge: MA and London: Belknap Press, 2004.

[239] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.

[240] Giorgio Agamben, *State of Exception*: *Homo Sacer II*, Chicago: University of Chicago Press, 2005, 2.

[241] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

[242] Walter Benjamin, "Critique of Violence", in Walter Benjamin*: Selected Writings Volume One 1913-1926*, (Marcus Bullock and Michael Jennings, eds.), Cambridge: MA and London: Belknap Press, 2004 cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

[243] Frantz Kafka, *Before the Law/Vor dem Gesetz*, Selbswehr, Kurt Wolff, 1919 cited in Petter Danckwardt, 'Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority', *Thesis in International Law*, Faculty of Law, Stockholm University, 2016, 7.

fought not within the parameters of domestic or international law,[244] but by transgressing that very law. The ‘‘Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001’’,[245] was enacted in November 2001, granting much expanded powers to the Federal Government relating to surveillance, finances and the deportation of aliens form the US.[246]

*2.5.3.1 The US Patriot Act*

The Patriot Act, adopted on 26 October 2001, dramatically increased the US government’s executive and surveillance powers, authorising it to engage in the following activity. (1) Records searches. The Act expanded the government's ability to access an individual's records held by a third parties. Section 215 empowered the FBI to instruct doctors, bookstores, universities, libraries and internet service providers to turn over records on their clients or customers (Section 215). (2) Secret searches. The Act also expanded the government's ability to search private property without providing notice to the owner and without their consent (Section 213). (3) Intelligence searches. The Act violated the rights provided for in the Fourth Amendment relating to intelligence searches[247] (Section 218). (4) "Trap and trace" searches. The Act further violated Fourth Amendment protections in relation to the origin and destination of communications (Section 214).[248] Upon its enactment, several hundred immigrants were detained, pending deportation, without charge, and in many cases, indefinitely, without meeting the strict threshold that is required for detention established by the US Supreme Court.[249] The Patriot Act was one of several legal instruments imposed by the Bush administration following the September 11 attacks. Another of those instruments was the *Presidential Military Order*, discussed below.

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[244] Petter Danckwardt, ‘Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority’, *Thesis in International Law*, Faculty of Law, Stockholm University, 2016.

[245] *Patriot Act 2001* (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001)(*Patriot Act 2001*).

[246] Shirin Sinnar, ‘Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act’ (2003) 55 *Stanford Law Review*, 1419.

[247] The Fourth Amendment of the US Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized. See https://constitution.congress.gov/constitution/amendment-4/.

[248] For a detailed discussion on the *Patriot Act*, see https://www.aclu.org/other/surveillance-under-usapatriot-act. Full text of the USA Patriot Act available at: https://www.govinfo.gov/content/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf. Last accessed 18 June 2021.

[249] See *Zadvydas v.Davis*, 533 U.S. 678 (2001). See also Shirin Sinnar, ‘Patriotic or Unconstitutional? The Mandatory Detention of Aliens Under the USA Patriot Act’ (2003) 55 *Stanford Law Review*, 1419.

2.5.3.2 *The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001*

*The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001*[250] which designated terror suspects as enemy combatants, removed from the protections of the law, a being who "shall not be privileged to seek any remedy or maintain any proceedings … in any court of the United States".[251] The prisoner was not designated as a lawful combatant, but merely a "detainee", erasing their identity as an individual. The Military Order rendered the body of the detainee as both the site and object of sovereign power. The detainee became the quintessential representation of *homo sacer,* denied the basic protections and equality before the law, as evident in the treatment of the detainees at Guantánamo Bay and CIA-blacksites. Interestingly, US citizens who were deemed to be terror suspects (e.g. John Walker Lindh) were not transferred to Guantánamo Bay but served sentences in US prisons. This speaks to the Othering of people from outlaw states and a denial of their sovereign rights, addressing the prevalent theme in this thesis that the 'civilised'/'uncivilised' distinction continues to influence the relationships between states, where a hierarchy still exists and which Islamic State sought to eradicate.

## 2.6 Chapter Conclusions

The preceding discussion on the state of exception and sovereignty illustrates that the principle of sovereign equality has been repeatedly violated by Western states in order to further their own economic agendas and impose their own ideologies during the period of colonialism that included racial inequality and the entrenching of divisions between European and non-European peoples. This practice, whilst it contravenes international law, can trace its origins to the colonies, where a distinction was created between the 'civilised' peoples of Europe and the 'uncivilised' populaces of the colonies, creating an Other. Colonial spaces were a representation of the state of exception *par excellence*, where the juridical order was suspended and where the violence of this exceptional space was justified as a necessary service to civilisation. Economic and ideological differences continued beyond formal colonialism, incorporated into the Mandate System of tutledge,

[250] *The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001, 66 Fed. Reg. 57831-57836 (The President Nov. 16, 2001).* "By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code".

[251] *Patriot Act 2001*, 7(a)(3)(b)(1).

that, it is argued greatly affected the type of sovereignty granted to Mandate territories. The space of exception raises important issues such as international law's capacity to include and exclude, to humanise and dehumanise, and to protect or abandon. Foundational issues such as these inform the discussion in the thesis, debated in the context of colonial law and the 'civilised'/'uncivilised' dichotomy omnipresent in international law; the Othering that maintains the state of exception; the League of Nations Mandate System the War on Terror, and the rise of Islamic State.

The practices of "cultural subordination and economic exploitation",[252] which, according to Anghie, were fundamental to the process of colonialism,[253] were not eradicated by decolonisation or the Mandate System, but continue to play an enduring and crucial role in international law, issues that are examined in the thesis through the 1953 Iranian Coup, the 1991 Gulf War and the War on Terror. The Mandate System devised a set of legal structures and technologies that cemented and normalised the two-tier system of full- and quasi-sovereignty, denying equilibrium to non-Western states, issues that this thesis argues, were instrumental in fragmenting the sovereignty of these states, the direct consequence of which was the rise of Islamic State and the establishment of the Caliphate. Rather than being the exception in international law, the disequilibrium between peoples, as a legacy of colonialism and the disparity between 'sovereign' nations became the norm. One of the central issues of this thesis is that the principle of the sovereign equality of states and citizens is being eroded as distinctions are made between people based "cultural attributes or ideological proclivities and tendencies – a world in which not everyone is entitled to the full protection of the law".[254] As Simpson attests, this performs at both the individual and state level. At the individual level, this is notable in the way citizens of states designated as 'outlaw' have been denied the basic protection of the law, as evidenced by the treatment of the detainees at Guantánamo Bay and CIA-blacksites.[255] At the state level, there is a return to the 19th century assessment of 'civilised' and 'uncivilised' states, demonstrated by states deemed to be Western-unfriendly being labelled as rogue states and as part of the Axis of Evil.[256] This points to the continued

[252] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.
[253] Ibid.
[254] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.
[255] Ibid.
[256] Ibid. George Bush's "Axis of Evil" comprised of Iran, Iraq, and North Korea. "Beyond the Axis of Evil" comprised Cuba, Libya, and Syria.

existence of Othering and a new form of Empire in international law that influenced formation of the international legal framework, issues which continue to inform the discipline of law.

# Chapter Three: The History of International Law: Asymmetries of Terror and Violence

## 3.0 Introduction

It is the aim of chapter to examine the history of international law as it developed from its Judeo-Christian European roots into a universally applied system based upon Christian concepts and the Westphalian principles of sovereignty and authority of states, doctrines that became central to and informed international law and the prevailing world order.[1] The European system of law was adopted as the 'right authority', whereas other systems, such as Islamic law, discussed in section 3.2.5-3.2.11, were not considered. The international legal system instituted formal doctrines that overtly designated states as either 'civilised' and by virtue of this, sovereign, or 'uncivilised' and therefore non-sovereign, according to their cultural and racial composition.[2] 'Uncivilised' states, which were non-European and non-Christian societies were expelled and ostracised from the realm of international law.[3] Hence, Islamic law, tribal legal systems, minority and Indigenous rights and the legal systems of Africa, China and India, for example, were not reflected in the universally applied legal framework. As Chapter Two discussed, this process of Othering and exclusion from the family of nations excluded the non-Western world from being granted sovereign rights and recognition. It is the assertion of this thesis that sovereignty inequality has persisted in international law. Orakhelashvili, for example, argues that "European international law is an ideology based … on prejudice and chauvinism generated from a sense of racial, cultural and religious superiority over those who are different".[4] European law was grounded in the Westphalian Judeo-Christian tradition and it was this version of the that law prevailed and was applied universally, demonstrating a complete disregard for other systems of law. The evolution of international law from the Peace of Westphalia (1648) reveals that law and injustice have collaborated through the centuries to posit Western societies in dominant positions of power, whilst simultaneously denying full sovereign rights to their non-Western counterparts. As the discussion in this chapter addresses, the international legal system emerged from the law of Christian nations, which 'barbaric' and 'uncivilised' nations

[1] Henry Kissinger, *World Order*: *Reflections on the Character of Nations and the Course of History*, New York: Penguin Books, 2014.
[2] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 745.
[3] Ibid.
[4] Alexander Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law*, 315, 347.

were prevented from joining. It was a legal system that served to legitimise European colonialism and discriminatory practices where the distinction between the 'civilised' European and the 'uncivilised' Indigenous community was entrenched. The law evolved from its Western Judeo-Christian, natural law ethos into a system of law that became universally applied based upon Christian concepts and the Westphalian principles of sovereignty and authority of states, doctrines that became central to international law and the prevailing world order.[5] It was out of this system of discrimination that the modern legal framework developed into a political instrument of control, where its meaning and application were dictated by those in positions of power. This discussion is very pertinent to the wider thesis, i.e. Chapter Six examines the consequences that the inequitable system of law has had on the states of Middle East, countries which have been denied full sovereign rights by Western interventionism, instead existing in a quasi-sovereign state of injury in Schmitt's state of exception. Section 3.1 of this chapter focuses on the foundations of international law, from its early genesis, based upon Christianity, to the universalisation of European law. Section 3.2 focuses on the new mode of power of international law, in which colonialism, race and sovereignty were intertwined, leading to the 'dynamic of difference'[6] where international law posited "a difference between European and non-European cultures and peoples".[7] Section 3.3 examines contemporary developments in international law and the continuance of imperialistic practices reflective of previous centuries.

### 3.1 The Foundations of International Law

Neff describes how the history of international law can be presented as a story of progress toward a humane and rational global order.[8] It reflects the establishment and evolution of a system that was founded on the notion of the 'civilised' independent sovereignty of states, who continue to be the only sovereign actors in the international system.[9] This is an issue that will be returned to in Chapter Eight, in relation to Islamic State's claim to sovereignty. The following discussion of the history of international law narrates some of the crucial developments in the discipline, from its early genesis to the universalisation of the international legal system and the establishment of the principle of sovereignty,

[5] Henry Kissinger, *World Order*: *Reflections on the Character of Nations and the Course of History*, New York: Penguin Books, 2014.
[6] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 742.
[7] Ibid.
[8] Stephen C. Neff, *A Short History of International Law* in Malcolm D. Evans (ed) *International Law (4th ed)*, Oxford: Oxford University Press, 2014.
[9] Ibid.

which as Chapter Two discussed, evolved into a system where sovereignty was both formed and influenced by international institutions such as the League of Nations, which exclusively served the interests of Western states and interests to the detriment of the non-European world.

### *3.1.1 The Early Genesis of International Law*

The modern international system of law is a direct reflection of, and is derived from previous occurrences in the European world.[10] It was a system founded on the principle that it is only sovereign states who are the relevant entities in international law.[11] Legal systems that existed beyond the European world, such as Chinese and Islamic legal systems were disregarded and hence, had no influence on the evolution of international law.[12] Perhaps the finest example of an emerging system of international law can be found in three areas of ancient Eurasia: Mesopotamia (by the fourth or third centuries BC), northern India in the Vedic period (around 1600 BC), and China (prior to its unification as a single state). By (fifth and fourth centuries BC), classical Greece provided an important example of the emerging system of international law in a city-state cosmos.[13] Each of these areas were characterised by two key features: political fragmentation and a high level of cultural unity or homogeneity.[14] This enabled a number of standard practices to emerge, which stabilised the, to date, unpredictable nature of inter-state relations. Three particular practices provide evidence of this development: diplomatic relations, the conduct of war and treaty-making.[15] Diplomatic relations accorded certain privileges and immunities to envoys dispatched on official missions from foreign powers. A theme common to a number of civilisations was the "Just War" theory, which can be traced back to antiquity.[16] An examination of a range of religions and societies suggests that wars should be undertaken only if there was a just cause for

[10] C. F. Amerasinghe, 'The Historical Development of International Law - Universal Aspects' (2001) 39(4) *Archiv des Völkerrechts*, 367.
[11] Stephen C. Neff, *A Short History of International Law* in Malcolm D. Evans (ed) *International Law (4th ed)*, Oxford: Oxford University Press, 2014.
[12] C. F. Amerasinghe, 'The Historical Development of International Law - Universal Aspects' (2001) 39(4) *Archiv des Völkerrechts*, 367.
[13] Stephen C. Neff, *Justice Among Nations: A History of International Law*, Cambridge, MA: Harvard University Press, 2014.
[14] Ibid.
[15] Ibid. For a detailed account of practices in Greece and the Middle East see David J. Bederman, *International Law in Antiquity*, Cambridge: Cambridge Univ. Press, 2001. See also Bhatia for an account of the development of such practices in India; Bhatia (ed), *International Law and Practice in Ancient India*, New Delhi: Deep and Deep,1977.
[16] Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regine: A Study of the South Moluccas and Aceh*, Leiden, Boston: Martinus Nijhoff Publishers, 2010.

them and certain restraints on violence would be observed. [17] Despite the cultural traditions of the Islamic world, the Indian subcontinent and China, these were excluded from the development of international law in favour of the Europeanisation of the international legal framework.

Naturalism propagated the view that all states are bound by a higher universal law and therefore are not the exclusive architect of the law.[18] Positivism directly contradicts this stance, asserting that the state is exclusively responsible for the creation of law, and cannot be constrained by laws to which it has not consented.[19] The positivist tradition was discriminatory in practise; only 'civilised' (i.e. European) states were deemed to be sovereign. By this logic. non-European states were uncivilised and therefore did not quality as sovereign.[20] Consequently, non-European societies were excluded from the international community, lacked legal personality, and were unable to play any part in the evolution of international law. The consequences of this have been tragic for the non-European world, leading to conquest, colonialism, economic exploitation and the dispossession of land and resources.[21] Even when former colonialist societies did eventually gain independence, they continued to be subjected to a system of quasi-sovereignty, as this thesis explores.

### *3.1.2. Natural Law*

Historically, natural law undertook a study of human nature in order to understand the rules of moral behaviour which derive from both nature's and God's creation of reality.[22] Natural law articulates a set of universal moral norms, which are intrinsic to human nature and which give causation to legal and ethical norms. These norms are conferred by God and not by rules created by humans.[23] Anghie describes natural law as that "naturalism, which prevailed from the beginnings of the modern discipline in the 16th century to roughly the end of the 18th century, stipulated that international law was to be found in 'nature'; it could be ascertained through the employment of reason, and this transcendent

[17] Stephen C. Neff, *A Short History of International Law* in Malcolm D. Evans (ed) *International Law (4th ed)*, Oxford: Oxford University Press, 2014.
[18] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Reshaping Justice: International Law and the Third World, 739, 740-741.
[19] Ibid. at 745.
[20] Ibid.
[21] Ibid.
[22] Leo Strauss, *'Natural Law' in David L Sills (ed) International Encyclopedia of the Social Sciences* (Vol. 2), New York: Macmillan and Free Press, 1968.
[23] For a detailed discussion on the theory of natural law, see Mark Murphy, *Natural Law and Practical Rationality*, New York: Cambridge University Press, 2001.

'natural' law-which had religious origins-was binding on all states".[24] For natural law theories, law's validity is tied to morality, and morality is understood as relating to the nature of being (including the prime being, God), or human being. In the Middle Ages, the writings of the Jewish philosopher Moses Maimonides infused natural law with religious principles.[25] In particular, it flourished under the influence of the thesis of St. Thomas Aquinas (1224/25–1274), and the Catholic Church. In *Summa Theologiae*, Aquinas described natural law as "the participation of the rational creature in the eternal law of God."[26] One of the fundamental tenants of Aquinas' philosophy was that God created natural law so that humans could be guided by and share in God's eternal law. He argued that, as rational beings, humans could determine what is good and moral, rejecting that which is evil.[27] French theologian Jean Gerson developed the contemporary idea of natural rights in his 1402 treatise *De Vita Spirituali Animae,* which is considered one of the first endeavours to expand modern natural rights theory.[28] The belief in natural law was broadened and extended by the Stoics,[29] who depicted the world as a single 'world-city State' (*kosmopolis*) governed by the law of nature,[30] and a body of rules of universal importance and relevance. Of fundamental importance to Stoics was the development of natural rights and the dignity of human equality.[31] St. Thomas Aquinas and the Stoics had complete conviction in the universal application of natural law, as it was bestowed by God. This belief in its universality was crucial to the development of European thought and the international law of nations. These disciplines were ultimately

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[24] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) Reshaping Justice: International Law and the Third World, 739, 740-41.

[25] Kathleen Kuiper (ed.), *The Britannica Guide to Theories and Ideas that Changed the Modern World*, New York: Britannica Educational Publishing, 2010.

[26] Thomas Aquinas, Summa Theologiae, I, II, 91, 2. Available at: http://www.newadvent.org/summa/2091.htm. Last accessed 7 July 2021. Summa Theologica is the best-known work of St Thomas Aquinas. It has been described as "one of the classics of the history of philosophy and one of the most influential works of Western literature." See James F Ross., 'Thomas Aquinas, *Summa Theologiae* (ca. 1273), Christian Wisdom Explained Philosophically', in *The Classics of Western Philosophy: A Reader's Guide*, (eds.) Jorge J. E. Gracia, Gregory M. Reichberg, Bernard N. Schumacher, Oxford: Blackwell Publishing, 2003.

[27] Taylor Marshall, *Thomas Aquinas on Natural Law in 5 Points*. Available at: https://taylormarshall.com/2014/06/thomas-aquinas-natural-law-5-points.html. Last accessed 9 September 2019.

[28] Richard Tuck, *Philosophy and Government 1572–1651*, Cambridge: Cambridge University Press, 1993.

[29] Stoicism is a school of Hellenistic philosophy founded by Zeno of Citium in Athens in the early 3rd century BC. The philosophy of stoicism was informed by a system of logic and its views on the natural world. It became the foremost philosophy among the educated elite in the Hellenistic world and the Roman Empire. According to Gilbert Murray, "nearly all the successors of Alexander [...] professed themselves Stoics", Bertrand Russell, *History of Western Philosophy: And Its Connection with Political & Social Circumstances from the Earliest Times to the Present Day*, UK: George Allen & Unwin Ltd, 1946, 25. See also H. Amos, *These Were the Greeks*, Chester Springs: Dufour Editions, 1982.

[30] R.W. Carlyle and A.J. Carlyle, *A History of Medieval Political Theory in the West*, New York: Barnes & Noble Inc., 1921, 8, 9.

[31] Evadné Grant, 'Dignity and Equality' (2007) 7(2) *Human Rights Law Review*, 299.

applied throughout much of the world, meaning that the emerging international legal system was based solely on Christian values, without regard being given to other non-Christian systems of law.

Prior to the Peace of Westphalia, the systems of law were an assemblage of different legal systems including Islamic law, Chinese and Indian law and tribal legal systems,[32] but there did not exist an expression of any set of deep-seated general principles.[33] However, the advent of the great universal religions introduced more extensive and formal systems of regulation and societal order.[34] Of fundamental importance to these religious practices were the principles of morality and ethics, grounded in nature or reason; [35] inherent rights that were conferred God, nature, and reason and not by governments.[36] Natural law has had a lasting and profound effect on the evolution and trajectory of international law and on the very essence of the modern international legal system. Crucially, its enduring influence ensured that international law was a product of Europe and not of the non-Western, non-Christian world. The Christianisation of international law (discussed below) based on the concept of natural law would have far-reaching implications for the development and application of international law and the contemporary attentiveness to human rights issues.

Indeed, the influence of natural law is evident in the adoption of the ethos by the United Nations. Carlos P. Romulo, President of the United Nations General Assembly (1949-50) compared natural law to just law: "By just law I mean law based on reason, consonant with the essential requirements of man's nature and deriving ultimate sanction from the source of all authority, God Himself."[37] He stated that the United Nations Charter was based on the concept of natural or just law, stating "[w]e discern in the Charter's avowal of faith in human rights and in the dignity of the human person the Christian belief in a brotherhood of men equally precious in the eyes of God, each deserving of His justice and worthy of His love, a belief which lies at the root of all our traditions of equality among men and nations."[38] The Universal Declaration of Human Rights (UDHR)(1948)

[32] Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law*, Oxford: Oxford University Press, 2012.
[33] Stephen C. Neff, *A Short History of International Law* in Malcolm D. Evans (ed) *International Law (4th ed)*, Oxford: Oxford University Press, 2014.
[34] Ibid. There are the five major world religions -Christianity, Judaism, Buddhism, Hinduism and Islam.
[35] Simone Zurbuchen, *The Law of Nations and Natural Law, 1625-1800*, Leiden Boston: BRILL, 2019.
[36] Hans Kelsen, *General Theory of Law and State*, NJ: The Lawbook Exchange, 2007.
[37] Carlos P. Romulo, 'Natural Law and International Law' (1949) 35(8) *Virginia Law Review*, 1052, 1052.
[38] Ibid. at 1053.

demonstrates the continued influence of natural law on the system of international law. Romulo asserted that "[i]t is true that the Universal Declaration of Human Rights as it now stands does not have the force of law. It is … an affirmation of the essential rights with which man has been endowed by his Creator."[39] Values such as these were imbued with the equality of people and dignity of human beings. However, colonial peoples continued to be othered, existing in the state of exception that was the colonial experience, outside of the protections of the law. The application of the UDHR was therefore reserved for 'civilised' societies, a situation that remained *in situ* until the 1960s, when the calls for equality and colonial nationalism finally delivered self-determination to colonial peoples, bringing to an end the colonial empires that had dominated since the 19th - century. However, as this thesis discusses, the phenomenon of imperialism did not end in the 1960s but rather continues in the international system through the War on Terror, discussed in Chapter Seven, that resembles a much earlier imperial venture.

### *3.1.3 The Universalisation of the Judeo-Christianity Ethos*

The foundations of international law lie in the Judeo-Christian tradition development and dominance of Western culture and political organisation.[40] It was a system built on and distinguished by the perceived differences between Europeans and Others. As the discussion in Chapter Two articulated, Europeans embodied the norm, whose identity was valued and celebrated, as opposed to the 'uncivilised' Other who was devalued, inferior, defined by perceived faults[41] and constructed in direct opposition to the 'civilised' European. The non-Western world was specifically constructed as a space dominated by European law and culture. This historical narrative of distinction between the European and non-European worlds is relevant to the discussion in this thesis, as it speaks to a desire to universalise and legitimise the particular Western standpoint. The evolution of an "international community of equal sovereign entities",[42] marked the beginning of an international legal system, based not on religion but on the supremacy of the state,[43] a principle that was defined at the Peace of Westphalia (1648).[44] The

[39] Carlos P. Romulo, 'Natural Law and International Law' (1949) 35(8) *Virginia Law Review*, 1052, 1053.
[40] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.
[41] Jean-François Staszak, 'Other/otherness', in Kitchin & Thrift (eds), *International Encyclopaedia of Human Geography: A 12-Volume Set*, Oxford: Elsevier Science, 2009.
[42] Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22(2) *The European Journal of International Law*, 373, 380.
[43] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.
[44] "The treaties confirmed the supplanting of centralized imperial powers by a juridical arrangement of autonomous sovereigns. Medieval theocracy gave way to early modern-legal rationalism (for some time after, the Vatican continued to think of international law as a Protestant conspiracy)", Gerry Simpson, "International law in diplomatic history", in Crawford & Koskenniemi *The Cambridge Companion to*

emergence of the modern nation-state system coincided with Hobbes' theories of sovereignty and the Leviathan (1651)[45] which emphasised the supreme power of the sovereign and the sovereignty of states[46] but which remained grounded in the Judeo-Christian tradition.

*3.1.4 The International Law of Christianity*

The Middle Ages were epitomised by the supreme authority of the Roman Catholic Church founded upon the values of Judeo-Christian tradition.[47] All of Europe was under its authority and bound by ecclesiastical law based in natural law, reflecting the widespread influence of the Church's dominant power, and the supranational application of canon law. [48] The Church was one of several authors of law during this period (influencing the law of warfare and agreements); [49] commercial and maritime law was rapidly developing and English law established the Law Merchant, a universally applied code of rules governing foreign traders.[50] While these rules and codes contributed to the development of the international legal system, it was the rise of the nation-states of England, France and Spain and the interaction between sovereign entities that significantly advanced the evolution of an international community of sovereign and

*International Law, Cambridge: Cambridge University Press*, 2012, 31. For a detailed discussion of the ramifications of the Peace of Westphalia, see Henry Kissinger, *World Order: Reflections on the Character of Nations and the Course of History*, London: Penguin, 2014: "The Peace of Westphalia became a turning point in the history of nations because the elements it set in place were as uncomplicated as they were sweeping. The state, not the empire, dynasty, or religious confession, was affirmed as the building block of European order. The concept of state sovereignty was established. The right of each signatory to choose its own domestic structure and religious orientation free from intervention was affirmed, while novel clauses ensured that minority sects could practice their faith in peace and be free from the prospect of forced conversion. Beyond the immediate demands of the moment, the principles of a system of "international relations" were taking shape, motivated by the common desire to avoid a recurrence of total war on the Continent. Diplomatic exchanges, including the stationing of resident representatives in the capitals of fellow states (a practice followed before then generally only by Venetians), were designed to regulate relations and promote the arts of peace. The parties envisioned future conferences and consultations on the Westphalian model as forums for settling disputes before they led to conflict. International law, developed by traveling scholar-advisors such as Hugo de Groot (Grotius) during the war, was treated as an expandable body of agreed doctrine aimed at the cultivation of harmony, with the Westphalian treaties themselves at its heart.", at 25.

[45] Hobbes thesis, that everywhere there is the foe and the competitor of everyone else – *bellum omnium contra omnes,* lends understanding to how the Leviathan emerged as the supreme protector. Hobbs asserted that the State positioned itself as the Leviathan or Sovereign in response to people's fear of nature and mistrust of each other. See Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, London: Greenwood Press, 1996.

[46] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.

[47] The central understanding of the human being within the Judeo-Christian tradition starts is that the person created man in God's own image, reflecting its divinity. This accords absolute worth to all human beings, giving them a special status, a unique value and dignity.

[48] Arthur Nussbaum, *A Concise History of the Law of Nations,* New York: The Macmillan Company, 1948; See also Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.

[49] Ibid. Nussbaum. See also M.H. Keen, *The Laws of War in the Middle Ages*, London: Routledge, 2015.

[50] William Holdsworth, *A History of English Law*, Vol. 5, London: Methuen & Co. Ltd., 1924.

separate states in the 16th century.[51] Grewe acknowledges that there was interaction between European and non-European entities in the pre-colonial era in the form of agreements and legal contracts. However, non-Europeans continued to be excluded from the international legal order,[52] entrenching the 'Eurogenetic' character of international law, which continues to inform the discipline of international law. The Reformation and the subsequent European religious wars illuminated the secular approach that had emerged in the political landscape during the Renaissance period.[53] marking the decline of a system of governance founded exclusively on Christianity, in favour of a more secularised system established on the supremacy of the state.[54] Two of the proponents of this approach were Hugo Grotius and Alberto Gentili.

### *3.1.5. Hugo Grotius*

Perhaps the most famous scholars and publicist (or classical writers) in this period was Hugo Grotius,[55] a jurist from the natural law school, who was highly influential in the "metamorphosis in just war thought that led it away from a system of rules importantly connected to the value system of Christian religion and toward the secularized system of values and rules that is modern international law."[56] His major work, *De Jure Belli ac Pacis*[57] (*On the Law of War and Peace*), was published in Paris in 1625. One of Grotius' fundamental principles was that a sovereign's concern for his subjects must be supreme, "[T]he first and particularly necessary concern, is for subjects, either those who are subject to authority in a family, or those who are subject to a political authority."[58] influenced the development of international law. The principle philosophy of this work was the application of the principles of natural law to international affairs, whilst also stressing the many applications of the law of nations as an expression of human will. Grotius also presented his considerations on Just War in *De Jure Belli ac Pacis*[59] where

[51] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.
[52] Wilhelm G. Grewe, 'Vom europtiischen zum universellen Volkerrecht, ZabRV 42 (1982), 449-479; Lassa Oppenheim, International Law, Vol. I, 2nd edn, London: Longmans Green Co. 1912, 46. Critically Orakhelashvili, 'Idea' 2oo6 (n. 14), 338.
[53] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.
[54] Ibid.
[55] Hugo Grotius, *On the Law of War and Peace* (trans. A.C. Campbell), Kitchener, Ontario: Batoche Books, 2001.
[56] Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime. A Study of the South Moluccas and Aceh*, Leiden, Boston: Martinus Nijhoff Publishers, 2010, 14.
[57] Hugo Grotius, *On the Law of War and Peace* (trans. A.C. Campbell), Kitchener, Ontario: Batoche Books, 2001.
[58] Hugo Grotius, (J.B. Scott (ed.)( F. Kelsey trans), *De Juri Belli ac Pacis*, Oxford: Clarendon Press, 1925, 578, cited in Richard B. Lillich, Thomas C. Wingfield and James E. Meyen, (eds), *Lillich on the Forcible Protection of Nationals Abroad*, Newport RI: Naval War College Press, 2002, 1.
[59] Hugo Grotius, *On the Law of War and Peace* (trans. A.C. Campbell), Kitchener, Ontario: Batoche Books, 2001.

he stated that the just causes for war were self-defence and as a means by which to punish states who were guilty of causing grievances or injury.[60] Grotius believed that the law should not be influenced by any aspect of religious 'dogma' and should not serve a person's self-interest,[61] but rather he countenanced collective responsibility.[62] Grotius advocated an international order comprised of a society of states governed by laws, mutual agreements and customs, rather than by force or warfare.[63] Crucially, during this period, the nation-state was increasingly viewed as a permanent corporate entity, with political agendas and long-term interests, and separate from the affairs of the Church. According to Bull, Roberts and Kingsbury "[t]he idea of international society which Grotius propounded was given concrete expression in the Peace of Westphalia and Grotius may be considered the intellectual father of this first general peace settlement of modern times."[64] Grotius did not speak from a Christian/religious viewpoint but from a legal one, developing a theory of legal obligation that was independent of religious assumptions, emphasising the inconsequence and irrelevance of divine law.[65] Thus, crucially for the development of international, he expunged theology from the discipline,[66] although the Judeo-Christian tradition continued to inform and influence international law.

### *3.1.6 Alberico Gentili*

Grotius was not the first writer to separate the legal from the religious; Italian jurist Alberico Gentili, whose works Grotius extensively drew upon, is credited with being the initiator of the secular school of through in international law. Gentili was an advocate of a system of international law that minimised previously significant theological issues,[67] and encompassed the practices of 'civilised' nations, moderated by moral but not specifically religious considerations.[68] In 1598 he published *De jure belli libri tres* (*Three*

[60] Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime. A Study of the South Moluccas and Aceh*, Leiden, Boston: Martinus Nijhoff Publishers, 2010.
[61] Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian 'Tradition'' (2019) 30(1) *European Journal of International Law*, 17.
[62] Richard B. Lillich, Thomas C. Wingfield and James E. Meyen, (eds), *Lillich on the Forcible Protection of Nationals Abroad*, Newport RI: Naval War College Press, 2002.
[63] Hedley Bull; Adam Roberts, Benedict Kingsbury (eds.), *Hugo Grotius and International Relations*, Oxford: Oxford University Press, 1992.
[64] Ibid. at 51.
[65] Martti Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian 'Tradition' (2019) 30(1) *European Journal of International Law*, 17.
[66] Malcolm N. Shaw, *International Law* (6th ed), Cambridge: Cambridge University Press, 2008.
[67] Ibid.
[68] Andreas Wagner, 'Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law' (2012) 23(3) *The European Journal of International Law*, 873.

*Books on the Law of War*),[69] in which he presented a comprehensive thesis of the laws of war. Gentili's work transformed the law of nature from a theological belief founded on religious dogma to a secular philosophy based in reason.[70] This was a pivotal period in the evolution of international law. The law was no longer viewed as religious doctrine and the principles that emerged from Westphalia were now appreciated as a legal framework. Notwithstanding the claim that Christian tenets were posited as neutral legal doctrines, Westphalian principles were firmly based on a Christian ethos. As the discussion in Chapter Three reveals, the non-Christian world was bound by its principles through the law of nations and process of imperialism. Religious dogma remained at the core of the legal system through the Christianisation of the law. That international law was incontrovertibly of European origin has been vigorously articulated by historians such as JHW Verzijl:

> Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin.[71]

As the discussion below considers, the centuries following Grotius and Gentili escalated the Europeanisation of international law, which was hugely significant during the period of colonialism and the distinction created between the European and non-European worlds. European Christianity continued to greatly influence the discipline, as the discussion below considers, as Europeans established standards of admittance based on 'civilised' societies. As such, "half-civilized peoples, 'semi-barbarous' states and native tribes had no right to participate" [72] in the universalised European international law, existing as Agamben's *homines sacri* in a state of otherness, beyond the margins of the law.

### *3.1.7 The Universalisation of European Law*

During the 17th and 18th centuries, the European states-system emerged, initiating a view that suggested this was one of the great accomplishments and triumphs of modern

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[69] Alberico Gentili, *Three Books on the Law of War*, NY: William S. Hein & Company, 1995.
[70] *International Law: Historical Developments.* Available at: https://www.britannica.com/topic/international-law/Historical-development. Last accessed 8 July 2021.
[71] JHW Verzijl, *International Law in Historical Perspective* (Vol. 1), 10 vols, Leiden: AW Sijthoff, 1968, 435-436 cited in Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 25(5) *Third World Quarterly*, 739, 739-740.
[72] Paulian Starski, Paulina and Jörn Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?' (2016) *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-12*, 11.

European civilisation.[73] The argument that became dominant in the 18th and 19th centuries was that Europeans alone had developed a corpus of legal doctrine that regulated relations between states, the roots of which were Natural Law and Christian dogma. Proponents of the European doctrine supported its imposition on the entire globe,[74] despite the existence of other vibrant legal systems, such as those in Islamic, Asian, Indian and Indigenous societies.

### *3.1.8 The Nineteenth Century and Beyond*

In the 19th century, international law was viewed as the "gentle civilizer of nations"[75] as European public law transformed into "the international law of 'civilised' nations",[76] diametrically opposed to the despotic empires of other civilisations.[77] Indeed, the founding fathers of the *Institut de droit International* (*Institute of International Law* (IIL))[78] saw themselves as the legal conscience of the 'civilised' world[79] in organising a permanent scientific institution to promote the study and progress of international law. Of the eleven international lawyers who founded the Institute, ten were European with the eleventh, David Dudley Field, from New York,[80] very much reflecting the European nature, meaning and application of international law. The *ius publicum europaeum*[81] exhibited an international law of European origin that evolved into an international law of Europeans,[82] albeit with universal application. For Heffter, international law "developed only within the circle of certain states and was rooted in the conscience of

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[73] Richard Devetak, 'Historiographical Foundations of Modern International Thought: Histories of the European States-System from Florence to Göttingen, (2015) 41(1) *History of European Ideas*, 62.

[74] Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282.

[75] Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press, 2001.

[76] Raymond Kubben, 'International Law and the Structure of International Order: *Von der Staatengesellschaft zur Weltrepublik?'* (2013) 15 *Journal of the History of International Law* 117, 121

[77] Montesquieu, *L'esprit des lois* in *Oeuvres Complètes*, Roger Caillois (ed), Vol. 2, Paris: Gallimard, 1951, trans. Anne Cohler, Basia Miller and Harold Stone (eds), *The Spirit of the Laws*, Cambridge: Cambridge University Press, 1989; Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282, 285

[78] The *Institut de Droit International* was founded on 8 September 1873 at the Ghent Town Hall in Belgium. "Eleven international lawyers of renown had decided to join together to create an institution independent of any governmental influence which would be able both to contribute to the development of international law and act so that it might be implemented." See https://www.idi-iil.org/en/a-propos/. Last accessed 14 February 2021.

[79] Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press, 2001.

[80] Institut de Droit International. Available at: *https://www.idi-iil.org/en/a-propos/*. Last accessed 14 February 2021.

[81] *Ius publicum Europaeum* ("European public law") denotes the legal order of the states of Europe from the Peace of Westphalia (1648) until well into the 19th century.

[82] Paulina Starski and Jörn Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?' (2016) *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-12*, 1.

Christian Europe and European-originated states. Hence it is qualified with the adjective 'European'."[83] The notion that a European system of international law could be paralleled by other non-European legal systems remained an alien and unexplored concept in the European legal framework, as international law was essentially a European order.

### *3.1.9 The International Law of Nations*

The International Law of Nations became one of the most important discourses through which Europe asserted itself as the unique bearer of universal values.[84] Emmerich de Vattel, an international lawyer and 18th-century legal scholar, is considered to be a pivotal figure in the development of modern international thought. His seminal work, *The Law of Nations*,[85] depicted states or nations as moral persons, as legal equals despite their international standing or level of power they possessed.[86] Vattel's viewpoint of universalism was one of an egalitarian international community of sovereign nations, asserting "A sovereign prince, however low he may rank in the scale of power, is as completely sovereign and independent as the greatest monarch".[87] This, however, obscured the reality of a system that facilitated and empowered a discriminatory, hierarchical structure of Western domination, in which sovereignty and the right to self-governance was denied to parts of the world. The duplicity of the concept of universalism was exposed through the brutal colonial expansion in which European powers were engaged. With the imperialist expansion that began in the 1870s, almost the entire continents of Asia and Africa were controlled by European powers. The Congress of Berlin in 1884 divided Africa among fifteen European powers, so that by 1914, the continent was almost fully colonised by Europeans.[88] Professor Enrico Catellani, a member of the *Institut de droit International* lamented the fact that advancing civilisations

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[83] Alexander Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law*, 315, 323.

[84] Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282.

[85] Emer de Vattel, *The Law of Nations, or the Principles of Law of Nature Applied to the Conduct and the Affairs of Nations and Sovereigns,* (6th ed), Philadelphia: T. & J. W. Johnson, 1883 cited in Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282, 286.

[86] Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282.

[87] Emer de Vattel, *The Law of Nations, or the Principles of Law of Nature Applied to the Conduct and the Affairs of Nations and Sovereigns,* (6th ed), Philadelphia: T. & J. W. Johnson, 1883, 694 cited in Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282, 286.

[88] *Expansion was Everything: Holocaust and Human Behaviour*. Available at: https://www.facinghistory.org/holocaust-and-human-behavior/chapter-2/expansion-was-everything. Last accessed 8 July 2021.

oppressed and impoverished Indigenous peoples to the point of extinction, a phenomenon that imperial powers acknowledged as a natural consequence of modernity.[89]

The development of international law in the latter part of the 19th century and into the 20th century attests to a European attitude of superiority towards the non-European world. Vattel's treatise illuminates the paradox that exists in an international legal system: it is decreed as universal, yet discrimination persists between states, reflecting the non-universality of the law. Henry Wheaton's *Elements of International* Law illustrates this point very succinctly, "international law has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin".[90] This was very evident in the structure and mandate of the League of Nations, an intergovernmental organisation founded on 10 January 1920.[91] As the discussion in Chapter Four assesses, the League of Nations Mandate System legitimated the imperialistic endeavours of the juridical model of the early 20th century, to the detriment of 'non-civilised' nations and other system of law. The international legal system, as it had developed by the period of the League of Nations, served as an instrument through which the modern state was formed. The territorial and colonial domination of the League imposed systems of organisation and governance that redrew the borders of the Middle East, altering the political and economic future of the regions. When sovereignty was eventually granted to mandate territories, it was done so with the economic interests of former colonisers as the primary goal, rather than the welfare of the local population. As this thesis assets, Western economic interests continue to inform the discipline of international law.

### 3.2 The Exclusion of the Non-European World from International Law

As the preceding discussion has established, the modern international legal system is reflective of a framework that served to legitimise European colonial practices and interests. The exclusively European view of sovereignty that was embraced by the legal system consisted "in part of mechanisms of exclusion, which expelled the non-European society from the realm of sovereignty and power."[92] The universality of international

[89] Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press, 2001.
[90] Henry Wheaton, *Elements of International Law*, (6th ed), Boston, MA: Little Brown, 1855, 21 cited in Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282, 288.
[91] Christian Tomuschat, *The United Nations at Age Fifty: A Legal Perspective*, Leiden: Martinus Nijhoff Publishers, 1995.
[92] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 741.

law became a new mode of power, in which colonialism, race and sovereignty were intertwined, leading to the "dynamic of difference"[93] where international law manufactured "a difference between European and non-European cultures and peoples, the former being characterised as 'civilised' and the latter as 'uncivilised'".[94] Contact between European and non-European people had occurred for many centuries. Commencing in the 15th century, legal doctrines, created or adapted by Europeans, were established to manage the complex interactions between European and non-European states.[95] Natural law informed the discipline of international law until the end of the 18th century. By the 19th century, positivism had prevailed, and still remains the relevant jurisprudence. It dictated that states could only be constrained by the rules to which they have consented. As international law developed, the principles established at Westphalia were afforded to the Western world only, while the non-European world remained on the peripheries of international law. The internal politics and systems of non-European states had to comply with standards that not only accommodated, but conformed to European norms and values.[96] Non-European societies that did not facilitate an environment in which Europeans could trade and live were vanquished, only to be replaced by a European system of authority.[97] While this system proclaimed to provide stability and imbue civility to the local population,[98] in fact, it prejudiced and subordinated them. Such governance was justified however, as inevitable: "The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied".[99] The discussion in Chapter Four engages with this theme, as the development of colonial resources became a prominent issue for colonial powers. There were some cautious overtures made about the need to balance the well-being of the local populations with the desire for economic gain. However, the suffering endured by the local populations was swept aside as European economic endeavours took precedence.[100] The welfare of the non-European world was therefore peripheral to the imperialistic process. The issues this raised, such as how to govern

[93] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 742.
[94] Ibid. at 742.
[95] Ibid. at 742.
[96] Ibid.
[97] Ibid. at 746.
[98] Ibid. at 746.
[99] John Westlake, *Chapters on the Principles of International Law*, Cambridge: Cambridge University Press, 1894, 142.
[100] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

colonised peoples and the legal basis upon which their lands could be dominated, remained secondary concerns, about which the discipline of international law was not overly occupied.[101] As a result, the diagnostic structure governing the discipline prohibited any authentic investigation of non-European viewpoints, cementing the apparatuses of exclusion which disqualified the non-European world from being granted sovereign equality.[102] By the end of the 19th century, the breadth of European expansion meant that the European structure of law was now globally established into one single system of international law. [103] European international law was now *the* universal system of law. This prompted John Westlake, the Whewell Professor of International Law at Cambridge, to declare:

> When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have become accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well-being at least not less than they had enjoyed before the arrival of the strangers. Can the natives furnish such a government, or can or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it.[104]

Hence, Western standards were declared universal. Non-Western states that failed to adhere to these European standards were labelled as lacking in civilisation and in need of European governance, a view that justified Western intervention and the conquest of the non-Western world.[105] Western nations progressively applied the law of nations or European law to non-Western states, in the process drawing a distinction between European and non-European cultures and peoples. Legal doctrines were again formulated that proved to be enormously beneficial to European imperialistic endeavours. The distinction so created by European powers was effectively used to advance their imperialistic desires, which were presented, not as conquest for commercial exploitation, but as a desire "to bring the 'uncivilised'/aberrant

[101] Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.
[102] Ibid.
[103] Ibid.
[104] John Westlake, *Chapters on the Principles of International Law*, Cambridge: Cambridge University Press, 1894, 141 cited in Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 745.
[105] Antony Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.

violent/backward/oppressed into the realm of civilization".[106] Presented in this manner, the issue of sovereignty became an expression of superiority and of exclusion. European cultures were deemed to be entitled to full-sovereignty, without question, while 'uncivilised' cultures were excluded from and denied the right to self-governance. This position was adopted by the League of Nations Mandate System, which characterised the differences between the 'civilised' (advanced) and 'uncivilised' (backward), a position that secured Western economic and political interests and, as this thesis argues, continued the economic subordination of the non-Western world, the ramifications of which are discussed in Section Two of this thesis, in Chapters Six to Eight.

### *3.2.1 International Law and European Legal Culture*

International law was the product of European legal culture, comprising of standards that were applicable to all states, which ignored the legal norms and cultures of other societies.[107] From the end of the 18th-century, natural law, based in Christianity, was succeeded by the law of nations and the international law of mankind, discussed in the following section, which was of specifically European origin and grounded in European legal culture. For Starski and Kämmerer, international law remains imprinted with these European origins,[108] labelling it as "eurogenetic":[109]

> Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin."[110]

As previously discussed, international law was used to justify the imperialistic endeavours of European states during the 19th and 20th centuries.[111]

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[106] Antony Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739,742.
[107] Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) *The European Journal of International Law*, 379.
[108] Paulina Starski and Jörn Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?' (2016) *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-12.*
[109] Ibid. at 1.
[110] JHW Verzijl, *International Law in Historical Perspective, Vol. I*, Leyden: Sijthoff, 1968, 435 cited in Paulina Starski and Jörn Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?' (2016) *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-12,* 1-2.
[111] Onuma, 'When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective', (2001) 2 *Journal of the History of International Law,* 1 cited in Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) *The European Journal of International Law,* 379.

*3.2.2 The International Law of Mankind*

Steiger labelled the period during World War I and its aftermath as "the international law of mankind".[112] He cites the potential universality of membership of the League of Nations as a positive development in international law. However, membership was certainly not universal; the Mandate System was Eurocentric and based on a Western paradigm of international law that sought to civilise the underdeveloped, backward, violent, oppressed and colonised people of the former territories of Germany and the Ottoman Empire. According to the Mandate System, the people of these territories were "incapable of or deficient in power of self-government", "destitute", and "requiring nursing towards political and economic independence".[113] Hall correctly assessed the origins of the international law, stating

> It is scarcely necessary to point out that as international law is a product of a special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently 'civilised', such states can only be presumed to be subject to it as inheritors of that civilisation. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints.[114]

The people of the former territories of Germany and the Ottoman Empire were subjugated to a form of law derived from European culture and values, which did not recognise the validity of their culture or civilisation, based as they were on non-European values. In the process of 'civilising' the non-Western world, non-Western values, cultures, identities and legal personalities were excluded in favour of imposing a Western-centric model of governance to the colonial world. Other non-Western systems of law, such as China and Islamic law, discussed below, were ignored. Sundhya Pahuja describes these repercussions as "the ever-expanding reach of an international law positioned as superior to national law, intervening, often violently, to maintain an unfavourable and asymmetric *status quo* in the name of idealized economic, political, and social models that cast themselves as universal".[115] Metropolitan cultures constructed other cultures *as* Other, as the following discussion of China and Islam examines. Both are included as examples of

[112] Kubben, 'International Law and the Structure of International Order: *Von der Staatengesellschaft zur Weltrepublik?'* (2013) 15 *Journal of the History of International Law* 117, 121.
[113] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005, 140.
[114] W.E. Hall, *A Treatise on International Law* (2nd ed), Oxford: Clarendon Press, 1884, 40. Available at: https://archive.org/stream/treatiseonintern00hallrich#page/n3/mode/2up. Last accessed 23 April 2018
[115] Sundhya Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality*, Cambridge: Cambridge University Press, 2011.

rich cultures with sophisticated legal systems that were nonetheless excluded from the international legal framework.

### *3.2.3 China and International Law*

Montesquieu represented a viewpoint that prevailed in the 19th century amongst European powers; they were bastions of freedom forming a unique community of states governed by the law of nations and diplomacy.[116] Despotic, non-European states, conversely, were deemed to be ill-suited to co-exist as equal and independent states in the European family of nations, lacking as they were in "relations of mutual accommodation, constraint, resistance, and negotiation".[117] China provides a good example of such a state excluded from a legal framework reserved for 'civilised' societies, being described instead as a state who treated foreigners as barbaric and inferior.[118] Former US President John Quincy Adams (1825-1829) reiterated Montesquieu's viewpoint of Asian states, contrasting the European principle of equality and fairness with the despotic empires of the East.[119] Adams argued that China followed a "churlish and unsocial system" contravening the principle of equality among nations.[120] China, he stated:

> admits no obligation to hold commercial intercourse with anyone. It utterly denied the equality of other nations with itself, and even their independence. It holds … all other nations with who it has any relations, political or commercial, as outside tributary barbarians reverently submissive to the will of its despotic chief.[121]

Adams' views of China as a state that denied the equality and independence of nations, acutely and ironically represents the European position and attitude towards those of non-

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[116] Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations,* 282.
[117] Ibid.
[118] Ibid. Foucault's theory of biopower is very instructive as a means of understanding the techniques of control and the technologies of power that European states employed for managing humans in large groups, literally having control over bodies through "an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations". In his lecture series on biopower entitled *Security, Territory, Population* delivered at the Collège de France between January and April 1978, Foucault provided further elaboration on the concept of biopower: "By this I mean a number of phenomena that seem to be to be quite significant, namely, the set of mechanisms through which the basic biological features of the human species because the object of a political strategy, of a general strategy of power, or, in other words, how, starting from the 18th century, modern Western societies took on board the fundamental biological fact that human beings are a species. This what I have called biopower." See Michel Foucault, *Security, Territory, Population: Lectures at the College de France, 1977-78* (Michel Senellart, ed), Graham Burchell (trans.), London: Palgrave Macmillan, 2007.
[119] John Quincy Adams, 'Lecture on the War with China, delivered before the Massachusetts Historical Society, December 1841 (1842) 11 *Chinese Repository*, 274, 281.
[120] Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations*, 282.
[121] Ibid. at 288.

European descent.[122] The development and application of international law initiated and sustained the very distinctions that Adams accused the Chinese and other non-Western cultures, of fostering (universal values versus despotic regimes). The Western/non-Western dichotomy denied the humanity of non-Europeans. These prejudices can be traced to European thought and history, views that "laid the justification for the enslavement and consequent colonization of non-European societies, thereby providing a role for international law, in part, to purvey this Eurocentric justificatory regime."[123] Eurocentricism was defined by Larrain as the

> belief that the progress brought about... in capitalist Europe is inherently superior and has a historical mission which must finally prevail in the world... backward countries or nations have the prospect of development and progress, but only through the agency of, following the path of, and in so far as they do not interfere with the main European historical agents and their needs.[124]

Non-European peoples were thought of as in need of European 'guidance', Christian enlightenment and salvation in order[125] "to bring civilisation and light to a continent... characterized as dark",[126] arguments that justified the colonial conquest. Although the belief in an international system of law that had universal application and inclusivity was an appealing narrative, in reality, by the turn of the 19th century, the law of nations was based on European public law.[127] Henceforth, European public law would be held up as the 'civilised' standard for the international legal system, the universal character of which was not was applied equally and fairly to all states and cultures, thereby entrenching discriminatory practices between states. According to Anghie, the universal application of international law to the non-European world recast vast amounts of territory into the mould of European states, legitimising the imperialistic ambitions of Europeans, resulting in the appropriation and administration of extensive areas of land.[128] Western states also imposed the European concept of sovereignty as an absolutist principle onto colonised

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[122] Although Adams' statement hails from 1842, it has parallels to the 21st century War on Terror, which will be discussed in Chapter Seven.
[123] James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law*, 184, 199.
[124] J. Larrain. 'Classical Political Economy and Marx on Colonialism and "Backward Nations"', (1991) 19 *World Development,* 240, 24 cited in James Thuo Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law*, 184, 200.
[125] Sibd N'Tatioula Grovogui, *Sovereigns, Quasi-Sovereigns and Africans*: *Race and Self-Determination in International Law,* Minnesota: University of Minnesota Press, 1996.
[126] Ibid. at 68.
[127] Jennifer Pitts, 'International Relations and the Critical History of International Law', (2017) 31(3) *International Relations,* 282
[128] Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies,* 321 and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law,* 2005.

territories.[129] According to the jurist J. de Hornburg, "the civilised must set the example of a superior justice . . . the civilised nations must help the " inferior races " to enter into the political system of states".[130] Natural law was again used to differentiated between 'civilised' and 'barbaric' people, with J. Lorimer stating:

> As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilised humanity, that of barbarous humanity, and that of savage humanity. To these . . .belong, of right, at the hands of civilised nations, three stages of recognition – plenary political recognition, partial political recognition, and natural or mere human recognition . . . . '.[131]

This differentiation denigrated other systems of law, such as that which existed in the Islamic world (discussed in the section below) and subjected these jurisdictions to a Judeo-Christian system of law and governance with far-reaching effects. It is the argument of this thesis that these effects continue to reverberate in the contemporary world, an issue that forms of the basis of the discussion and analysis in Section II of the thesis.

### *3.2.4 The Islamic World and International Law*

The overarching argument of this thesis is that the establishment of the Caliphate by Islamic State is a consequence of the long history of Western intervention in the Middle Eastern world, largely to protect Western economic interests. These interventionist policies were facilitated by a Euro-centric international legal system, traditionally based on the notion of 'civilised' states to the exclusion the 'uncivilised' non-European Other who were denied their full sovereign rights. In rejecting this worldview, al-Qaeda and Islamic State have engaged in a conflict that extends back to the Crusades, resorting to catastrophic violence on behalf of the *umma*, or community of all Muslims.[132] In particular, Islamic State advanced the Caliphate as an alternative to a world shaped through a European paradigm, a space where devout Sunni Muslims could live a truly austere and courageous Islamic life modelled on that of the Prophet Mohammad, fighting against Islam's enemies – principally the United States and its allies.

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[129] Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies,* 321 and Antony Anghie, *Imperialism, Sovereignty and the Making of International Law,* 2005.

[130] Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) *The European Journal of International Law* 379, 383.

[131] Philip C.C. Huang and Kathryn Bernhardt (eds.), *History and Theory of Legal Practice in China: Towards a Historical-Social Jurisprudence*, Leiden/Boston: Brill, 2014, 353.

[132] Malise Ruthven, *Islam*, Oxford: Oxford University Press, 2012.

*3.2.5 The Development of Islamic Law*

The advent of the great universal religions allowed for differing systems of world order to materialise.[133] One example of this was the founding of the Islamic empire in the seventh century, which its monotheistic religious tradition.[134] Central to the tenets of Islam is the *Qur'an*, the sacred text, which contains the teachings of the Prophet Mohammed as disclosed to him by Allah. While the *Qur'an* alone is considered the sacred scripture, the Sunna (the body of traditional social and legal custom and practice of the Islamic Sunni community), also forms part of Islamic Canon.[135] According to the Islamic *shadada* (statement of witness) "There is no God but Allah".[136] There are two divisions within Islam, Sunni and Shi'a. The schism in Islam occurred following the death of the Prophet Mohammed on 632, when a debate over who should succeed him ensued. One group favoured Abu Bakr,[137] a companion of the Prophet, as the new leader. The other group supported Mohammed's cousin and son-in-law, Ali ibn Abi Talib.[138] The two opposing groups evolved into what are now Islam's two sects, Sunni (who supported Abu Bakr[139] as the new caliph) and Shia (who favour succession based on bloodline). Ali was eventually pronounced as the new caliph in 656.[140]

As the Islamic faith progressed, a body of law was developed specifically to negotiate relations within the Muslim world. The *Dar al-Islam*, or 'House of Islam' was a much richer and more developed system of law than that which existed between the Islamic and outside world (*Dar al-Harb* or 'House of War).[141] Between these two worlds, a pragmatic system of temporary truces evolved, which enabled relations between these domains to

[133] Stephen C. Neff, *A Short History of International Law* in Malcolm D. Evans (ed) *International Law (4th ed)*, Oxford: Oxford University Press, 2014.
[134] Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies* 48.
[135] Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015.
[136] Christopher van der Krogt,'Who is Allah? Understanding God in Islam', *The Conversation.* Available at: https://theconversation.com/who-is-allah-understanding-god-in-islam-39558**.** Last accessed 8 July 2021.
[137] Abu Bakr al-Baghdadi, the self-proclaimed caliph of the Islamic State (2014) adopted his name from the companion of Mohammed.
[138] 'The Sunni-Shia Divide', *Council on Foreign Relations*. Available at: https://www.cfr.org/sunni-shia-divide/#!/. Last accessed: 8 July 2021.
[139] The declaration of the new Caliphate in 2014 was announced by Abu Bakr al-Baghdadi, who took his name from Mohammed's companion and cousin-in-law.
[140] 'The Sunni-Shia Divide', *Council on Foreign Relations*. Available at: https://www.cfr.org/sunni-shia-divide/#!/. Last accessed: 8 July 2021.
[141] Stephen C. Neff, *A Short History of International Law* in Malcolm D. Evans (ed) *International Law (4th ed)*, Oxford: Oxford University Press, 2014.

transpire.[142] Several centuries before the Renaissance occurred in Europe, an unprecedented degree of knowledge, sophistication and excellence was achieved in *Dar al-Islam*. Indeed, much of the groundwork for scientific and philosophical comprehension emerged from the Islamic world.[143] Yet, these achievements were disregarded by the European system of law that emerged centuries later, which branded Islamic states as 'uncivilised' and as in need of minding under the tutelage of League of Nations Mandate System.

### *3.2.6. Defining Islam: Religion and Political Ideology*

Defining Islam is not a simple matter. It is both a religion and a political ideology and for some, it is a mark of personal and group identity. For an organisation like Islamic State, its interpretation of the religion's ideology emphasises the righteousness and purity of the practices, ideologies and beliefs of *al-salaf al-salih, (*pious ancestors). According to the group, this is the only authentic interpretation of Islam,[144] i.e. Sunni Islam and *Wahabbism.*

### *3.2.7 Islam as Identity*

Muslim, in its primary meaning, as employed in the *Qur'an*, the unmediated Word of God, and other Islamic foundational texts, refers to one who surrenders him or herself to their faith. It also has a secondary meaning that can indicate ethnicity or group allegiance, but not necessarily adherence to the Islamic faith.[145] Those who identify as non-observant Muslims can be labelled as "infidels" by observant Muslims.[146]

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[142] J. Allain, 'Acculturation Through the Middle Ages: The Islamic Law of Nations and Its Place in the History of International Law' in Orakhelashvili, A. (ed) *Research Handbook on the Theory and History of International Law*, Cheltenham: Edward Elgar, 20011, 394-407.

[143] The achievements of Muslims and the areas in which the excelled are impressive: poetry, philosophy, mathematics, optics, medicine, astronomy, architecture and design, metalwork and ceramics. There is some debate about how far such achievements are Islamic, i.e. in the sense that they can be attributed to Islam, and how far they are the result of the achievements of preceding Greek and Persian civilisations. See Ruthven, *Islam*, Oxford: Oxford University Press, 2012.

[144] Abdul Basit Kassim, 'Defining and Understanding the Religious Philosophy of *Jihadi-Salafism* and the Ideology of Boko Haram', (2015) 16 *Politics, Religion & Ideology*, 173, 176 cited in Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) 16 *International Criminal Law Review*, 361, 387.

[145] Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies* 48. By contrast, the term 'Christian' implies a strictly religious affiliation.

[146] For example, members of the Islamic State designated all Sunni who did not adhere to their strict interpretation of Islam as infidels. They all applied the label to all Shi'as.

*3.2.8 Islam as a Political Ideology*

The word fundamentalist[147] is sometimes used to describe Muslims, such as members of al-Qaeda and Islamic State, who seek to establish or indeed, restore the Caliphate and coerce obedience to *Shari'a* law, the body of Islamic rules and teachings that govern relationships with families, society, and the nation.[148] *Shari'a*, or "the right path" refers to traditional Sunni Islamic law and originated from the Prophet Muhammad's teachings and interpretations by Muslim legal scholars.[149] While the term may suggest that fundamentalist Muslims adhere to a strict interpretation of *Shari'a* law, some writers and ideologists described as fundamentalists have adopted modernistic understandings of the *Qur'an*.[150] Despite their opposition to Western intellectual and political cultures, Abul Ala Maududi (1903-79), Sayyid Qutb (1906-66) and the Ayatollah Khomeini (1902-89) (the authors of modern political Islam), were each influenced by these traditions.[151] The Constitution of the Shi'a Islamic Republic of Iran, introduced by Ayatollah Khomeini in 1979, represents a mixture of Islamic and Western dictates.[152] The Ayatollah established that the Iranian Islamic state, a successor to the Prophet Mohammad, has the authority to override *Shari'a* law in matters of fasting, prayer and pilgrimage.[153] It is these hybrid mixes of Islam that Islamic State rejected and condemned. Instead, it sought to establish a Caliphate where daily life was portrayed as a eutrophic society where people could live happily and freely[154] according to the pure Islamic principles of *Salafism*[155] and the fundamentalist religious doctrine of *Wahhabiyyism*[156] under the slogan of *baqiya wa*

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[147] The term fundamentalist has Christian origins, originally being a movement directed against the modernist or liberal theology of American Protestant seminaries whose teachings, for example, questioned the creation of the earth in six days and the resurrection and return of Christ. See Ruthven, *Islam*, Oxford: Oxford University Press, 2012.

[148] Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies* 48; Wael Hallaq, *The Formation of Islamic Law*, London and New York: Taylor and Francis Group, 2004.

[149] Yasin Dutton, *The Origins of Islamic Law: The Qur'an, the Muwatta' and Madinan Amal (Culture and Civilization in the Middle East)*, Oxon: Routledge Curzon, 2002.

[150] Wael Hallaq, *The Formation of Islamic Law*, London and New York: Taylor and Francis Group, 2004, Ruthven, *Islam*, Oxford: Oxford University Press, 2012.

[151] Ruthven, *Islam*, Oxford: Oxford University Press, 2012.

[152] Firoozeh Papan-Matin (trans.) 'The Constitution of the Islamic Republic of Iran' (2014) 47:1, *Iranian Studies*, 159.

[153] Ramin Moschtaghi, 'The Relationship between International Law and the Islamic Republic of Iran – A Multilayer System of Conflict?' (2009) 13, *Max Planck Yearbook of United Nations Law*, 375.

[154] Lauren Williams, *Islamic State Propaganda and the Mainstream Media*, Sydney: Lowy Institute for International Policy, 2016, 2.

[155] *Salafism* originates from *al-salaf-al-sālih* (the pious ancestors), adheres to absolute monotheism and is believed by its followers to be more rigorous and pure than other forms of Islam. See Petter Nesser, 'Abu Qatada and Palestine', (2013) 53 *Welt des Islams*, 416, 417.

[156] *Wahhabiyya* was founded by Muhammad Ibn 'Abl al-Wahhab. It imposes *Shari'a* law and regards Shi'a Muslims and non-Muslims alike as heretic who should be persecuted. See Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) 16 *International Criminal Law Review*, 361.

*tatamaddad* (remaining and expanding).[157] The discussion about Islamic State and its bloody campaign to reignite the ideology of the *al-salaf al-salih* is considered in more detail in Chapter Eight.

### *3.2.9 Islam as Law*

The relationship between the religion of Islam and Islamic law can be a complex, disputed debate, one that gained prominence with the collapse of the Ottoman Empire and the emergence of the concept of the nation-state.[158] The outbreak of the Arab uprisings across the Middle East in 2011 coincided with the substantial increase of Islamic political movements in the Arab world. Supporters of these movements shared a belief that *Shari'a* law or God's will for humankind, had been marginalised and vilified since the early 20th century.[159] One such movement, Islamic State, sought to reinstate *Shari'a* law as the only doctrine by which people live through the establishment of the Caliphate.

Many Islamic scholars believe Islam to be both a state and a religion, "meaning that Islam should regulate government and public life, while also serving as a religion".[160] Through this understanding, Islamic law requires that the legal system of a state with a Muslim population must be consistent with its religious laws to be valid.[161] Moschtaghi explains that supporters (both Shi'ite and Sunni) of an Islamic state[162] and Islamic system of government are in agreement that the establishment of the *Shari'a* as the dominant law is essential for a state to be considered Islamic.[163] However, others such as Ali Abdel Razek, a *Shari'a* law judge, argued that Islam was a religion only and should not be involved in governance.[164] In his book *Islam and Fundamentals of Political Power* Razek argues that "the Caliphate is not a fundamental of Islam and is, instead, a mundane and

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[157] Daveed Gartenstein-Ross, 'Radicalisation: Social Media and the Rise of Terrorism', *House Testimony, Hearing before the US House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security*, 28 October 2015, 3. Available at: http://oversight.house.gov/wp-content/uploads/2015/10/10-28-2015-Natl-Security-Subcommittee-Hearing-on-Radicalization-Gartenstein-Ross-FDD-Testimony.pdf. Last accessed 24 February 2021.
[158] Yussef Auf, 'Islam and Sharia Law: Historical, Constitutional, and Political Context in Egypt' (2016) *Atlantic Council*, 1.
[159] Ibid.
[160] Ibid. at 2.
[161] Ramin Moschtaghi, 'The Relationship between International Law and the Islamic Republic of Iran – A Multilayer System of Conflict?' (2009) 13, *Max Planck Yearbook of United Nations Law*, 375.
[162] Islamic state refers to the countries in which Islam is the religion of the state.
[163] S. Ruhollah, *Khomeini, Islam and Revolution I – Writings and Declaration of Imam Khomeini (1941-1980)* (trans. Hamid Algar), Mizan Press, 1981; Ramin Moschtaghi, 'The Relationship between International Law and the Islamic Republic of Iran – A Multilayer System of Conflict?' (2009) 13, *Max Planck Yearbook of United Nations Law*, 375.
[164] Yussef Auf, 'Islam and Sharia Law: Historical, Constitutional, and Political Context in Egypt' (2016) *Atlantic Council*, 1.

political issue,"[165] a view that supported the separation of state and religion. Islamic State however, fundamentally rejected this view, forcibly imposing its strict interpretation of Islam and the *Qur'an*, which ruled all aspects of life in the Caliphate to brutal affect.

Islamic law originated as an important part of the Islamic religion. As Islamic civilisation developed, laws were required to establish law and order in society. Accordingly,

> there came into being Islamic Laws or codes of conduct that govern not only inter-personal relations, but also communal and inter-civilizational relations. Muslim powers dealt with their neighbors in a way that served their interests and represented their system of values and what they deemed to be acceptable behavior.[166]

The Islamic legal systems relied on divine sources as a foundation of legal norms, to introduce "many humanistic aspects domestically as well as internationally"[167] to the first millennium.

### *3.2.10 Islamic Law in the Caliphate*

In the early Caliphate, Bennoune argues that Islamic law institutionalised humanitarian limitations on the conduct war.[168] Bennoune further asserts that there are parallels between just war theory and the Islamic rules governing war, which include acceptable military conduct, the cessation of hostilities, care of the sick and wounded, limits on the severity of war and the distinction between civilians and combatants.[169] Islamic Law sources comprise of primary and secondary sources:

> Primary sources (also known as "agreed-upon" sources) include the *Qur'an*, the Sunnah (tradition) of the Prophet, *ijmā'* (legal literature representing consensus of opinion) and *qiyās* (rules of analogy developed via deductive reasoning). Secondary sources (also known as "disputed" sources) are a number of jurisprudential methods for developing Islamic laws which come in varying order of authority, including *istiḥsān* (juristic/public preference), *maslaḥ. ah mursalah* (public interest), *'urf* (custom), *shar' man qablanā* (sharı¯ahs of religions before Islam), *madhhab al-saḥ abī* (the opinions of the Companions of the Prophet), *sadd al-dharā'i'* ("blocking the means" – i.e., preventing the occurrence of something evil, though it also extends to include facilitating the occurrence of something

[165] Ali Abdel Razek, *Islam and The Foundations of Political Power*, (Abdou Filali-Ansary ed.), (trans. Maryam Loutfi), Edinburgh: Edinburgh University Press, 2013 (1925)) cited in Yussef Auf, 'Islam and Sharia Law: Historical, Constitutional, and Political Context in Egypt' (2016) *Atlantic Council*, 1, 2.
[166] Labeeb Ahmed Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies* 48, 49.
[167] Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Cheltenham: Edward Elgar Publishing, 2018, 15.
[168] Abdullah Saeed, *Human Rights and Islam: An Introduction to Key Debates between Islamic Law and International Human Rights Law*, Cheltenham: Edward Elgar Publishing, 2018.
[169] Ibid.

good) and *istisḥ āb* (the continuation of the applicability of a rule that was accepted in the past, unless new evidence supports a change in its applicability).[170]

Islamic law delineates from other legal systems by embracing all aspects of people's lives; it claims to be authoritative for all Muslims.[171] The legal system includes rules on beliefs, worship and morality, and provides rules on family law, criminal law, financial transactions and governance in war and peacetimes.[172]

### *3.2.11 Islamic Law and International Law*

International law operates as a relationship between independent and sovereign states. Each nation establishes its own system of law and exercises its authority without interference from outside forces, except those imposed by international law.[173] Islamic international law, or *Siyar*, originates from "infallible religious sources"[174] and was "observed by Muslim rulers as a branch of divine law". [175] *Siyar* was therefore a compulsory framework, and not a convention that gained its validity by the consent of the state. As it was part of a faith based on divine law, the violation of *Siyar* educed punishment, and thus, by necessity, honouring the principles of *Siyar* was a religious duty.[176] The universality of *Siyar* has been disputed by some scholars however, because it rests upon divine sources;[177] this despite the fact that international law is predicated upon the divine sources of Christianity.

Despite the rich jurisprudence that exists in Islamic law, Badar considers Western international law to be "nakedly self-serving for certain Western powers both structurally as well as in practice and that is the main reason for the failure of many nations to develop".[178] Following this theme, Gazi argues that Western international law banished

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[170] Ahmed Al-Dalwoody, 'Islamic Law and International Humanitarian Law: An Introduction to the Main Principles' (2018) 99(3) *International Review of the Red Cross*, 995, 998.
[171] Ramin Moschtaghi, 'The Relationship between International Law and the Islamic Republic of Iran – A Multilayer System of Conflict?' (2009) 13, *Max Planck Yearbook of United Nations Law*, 375.
[172] Ahmed Al-Dawoody, 'Islamic Law and International Humanitarian Law: An Introduction to the Main Principles' (2018) 99(3) *International Review of the Red Cross*, 995,
[173] Labeeb Ahmed Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies*, 48.
[174] Ibid. at 61.
[175] Hosny M. Gaber, "The Early Islamic State, with Special Reference to the Evolution of the Principles of Islamic International Law, 632-750", Ph.D. Dissertation, American University of Washington, 1962. 24 cited in Labeeb Ahmed Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies*, 48, 50.
[176] Labeeb Ahmed Bsoul, 'Historical Evolution of Islamic Law of Nations/*Siyar*: Between Memory and Desire' (2008) 17 *Digest of Middle East Studies*, 48.
[177] Mohamed Badar, Masaki Nagata and Tiphanie Tueni, 'The Radical Application of the Islamist Concept of Takfir', (2017) 31 Arab Law Quarterly, 132.
[178] Ibid. at 133.

the 'un-civilised' non-European world beyond the perimeters and protections of the law.[179] According to Gazi, "[t]he Western international law, as conceded by several Christian and Jewish writers, is an offshoot of the Christian civilization prevalent in Christendom."[180] Further stressing the Christina origins of Western international law, Gazi states

> [t]he Christian component of Western international law becomes more striking in areas where a rule of international law is disputed by one of the parties. In such a situation, according to a recent but highly respectable authority, Oppenheim, it lays down that the principles of Christian morality should be applied. On the other hand, in a similar situation Muslim international law does not invoke any principle of Muslim morality. It invokes the principles of natural justice, particularly the principle of *tamathul*, *mujazah* or reciprocity ensuring an equal footing to both the parties.[181]

Rejecting the premise that the international legal framework based on Christian principles applies to Muslims, Islamic scholars argue that *Siyar* is the one true system international law as it applies to Muslims. Khadduri describes how Islam has been an expansionist religion from its inception. According to Khadduri, Islamic is in a permanent state of war with the non-Islamic world.[182] Following the foundation of the first Islamic Caliphate (the Rāshidun Caliphate, established after Mohammed's death in 632) other forms of relationships with non-Muslim world were established in recognition that constant hostilities could not be sustained.[183] To this end, Islamic scholars developed elaborate legal doctrines hundreds of years before international law was codified in Europe.[184] Khadduri credits the eminent jurist of the Hanafite school (the leading school of Sunni Islam), Muhammad ibn al-Hasan al-Shaybani, with writing the first major Islamic treatise on the law of nations.[185] Al-Shaybani's contribution to *Siyar* is, for Bashir, foundational to Islamic understandings of international law.[186] Al-Shaybani's text, *Kitab al-Siyar al-Kabir* describes, amongst other things, the conditions for *jihad* and for peace, the principles governing the conduct of diplomacy and of military action, and rules for the

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[179] Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Cheltenham: Edward Elgar Publishing, 2018.
[180] Muḥammad al-Ḥasan, (Mahmood Ghazi, ed.) *The Shorter Book on Muslim International Law*), New Delhi: Adam Publishers & Distributors, 2007, 21. See also Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Cheltenham: Edward Elgar Publishing, 2018.
[181] Ibid. al-Hasan at 21.
[182] Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, Baltimore: John Hopkins University Press, 2002.
[183] Ibid.
[184] Ibid.
[185] Ibid.
[186] Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Cheltenham: Edward Elgar Publishing, 2018.

treatment of prisoners.[187] However, the importance of Al-Shaybani's writings were rejected by some scholars in favour of Grotius and Gentili and their advocacy of discriminatory treatment against non-Christians.[188] Nonetheless, Al-Shaybani's body of work continues to provide relevant insights into relations between the Islamic and the non-Islamic worlds. Recognising the Islamic perspective on international law and its contribution to the development of international law is vital in order to understand contemporary developments that are discussed in Chapters Six to Eight.

### 3.3 Contemporary Developments and the New Imperialism

The philosopher M. Xifaras emphaised, "the justification of international law must take responsibility for the historical meaning of international law for non-Western peoples, and not simply content itself with affirming its own legitimacy in terms of its conformity with principles that have their origins in Western thought".[189] The Westernisation of the non-Western world, ensured that "international law remains, simultaneously and indissociably, the legal form in which both the promise of the political unification of humanity and that of the most infinite and violent conquest are contained".[190] The discussion and critique in the following chapters focusses on the centrality of Western legal thought in the non-Western world, using Iran, Afghanistan, Iraq and Syria as examples of states whose violated sovereignty was enabled by a legal framework that was a product of European legal culture. Section Two of the thesis asserts that the civilising mission, which occupied a central place in the colonial experience, continues in the contemporary world, as international law engages in the transformative activity of reassembling the internal political and economic characteristics of certain, non-Western societies (e.g. Iraq and Syria) through a disassembling of the norms of international law.

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[187] Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Cheltenham: Edward Elgar Publishing, 2018; Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, Baltimore: John Hopkins University Press, 2002.

[188] Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Cheltenham: Edward Elgar Publishing, 2018.

[189] Xifaras, 'Commentaire' , in E. Jouannet and H. Ruiz-Fabri (eds.), *Le droit international et l'impérialisme en Europe et en Amérique* (2006) [ *la justifi cation du droit international doit prendre en charge la signifi cation historique du droit international pour les peuples non occidentaux et ne saurait se contenter d'affi rmer sa légitimité par le constat de sa conformité à des principes qui trouvent leur origine dans la pensée occidentale* ] cited in Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18(3) *The European Journal of International Law* 379, 406.

[190] Ibid.

*3.3.1 The New Norms in International Law*

The September 11 attacks and the subsequent War on Terror articulated a willingness, by the US and coalition forces, to use pre-emptive force against rogue states and the so-called Axis of Evil.[191] The War on Terror also revealed an ambition to transform the countries of the Middle East into Western-friendly democracies, an issue that will be examined in-depth in Chapter Six in relation to Iraq. In Anghie's assessment, the actions and transformative ambitions of the US and coalition forces echo former transformative determinations and imperialistic ventures from previous centuries.[192] Bush viewed rogue states as the chief threat to global order; his foreign policies reflected this position, aimed at altering the behaviour of these states, or eliminating those regimes that refused to acquiesce to the demands of the US.[193] As explained by Merry, the Bush Doctrine advanced three core propositions - pre-emption, democratisation and dominance.[194] Certainly, democratisation and dominance disconcertingly resemble the rhetoric used by the Spanish colonisers of Americas in the 16th century and the European colonisers of the 19th century, namely the civilisation of the barbaric and the 'uncivilised'.[195] In the process of the civilising mission, the US sought to reconstruct international law through the engagement of pre-emptive self-defence and, as will be discussed in Chapter Seven, a disregard for the rules of international humanitarian law and the protections afforded by the Geneva Conventions.[196]

## 3.4 Chapter Conclusions

The preceding discussion on the history and evolution of international law illustrates the Western-centric nature of the legal framework. The law evolved from its Western Judeo-Christian, natural law ethos into a system of law that became universally applied, based as it was upon Christian concepts and the Westphalian principles of sovereignty and authority of states. As previously cited in Chapter Two, "understandings of Westphalian sovereignty include an institutional arrangement for organising political life that is based

[191] The phrase Axis of Evil was first used by President Bush in his State of Union on January 29, 2002. He recited it repeatedly throughout his presidency to describe foreign governments that allegedly sponsored terrorism and sought weapons of mass destruction. The Axis of Evil comprised of Iran, Iraq and North Korea. In response, Iran formed a political alliance that it called the "Axis of Resistance" comprising of Iran, Syria and Hezbollah.

[192] Antony Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.

[193] Robert W. Merry, *Sands of Empire: Missionary Zeal, American Foreign Policy, and the Hazards of Global Ambition*, Simon & Schuster, 2005.

[194] Robert W. Merry, *Sands of Empire: Missionary Zeal, American Foreign Policy, and the Hazards of Global Ambition*, Simon & Schuster, 2005.

[195] Antony Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.

[196] *Geneva Conventions 1949*.

on territoriality and autonomy where domestic political authorities are the only arbiters of legitimate behaviour"[197] However, an important point that has emerged from the study of international law is that sovereignty was granted only to European nations, with a few exceptions, enabling the practice of colonialism to flourish, and for international law to hone its discriminatory and disciplining practices.

The chapter also considered the way in which natural law, based upon Christian traditions and Western rationalism and which derived from a European view of the world, played a significant role in the development of European thought and international law. The chapter followed the evolution of law from the Westphalian system to its application in the colonies arguing that the denial of sovereign rights paved the way for the imperial expansion of European powers to the non-Western world. Such is the anomaly of the state of the exception. The removal of legal protections for the local populations created the Other through the process of dehumanisation, so that when the technologies of power were imposed, which dominated, subjugated and terrorised the Other, it was done so without the transgressing the law. The colony as a formation of terror therefore became the space of exception where international law and institutions were used by the West to maintain its modes of domination and systems of hierarchy, a practice that is asserted in the chapter, was continued by the League of Nations and indeed even when countries, such as Iraq, acquired independence. Although the League was devised as a measure to move away from the era of imperialism and colonialism towards one of independence, sovereignty and self-determination, in reality it supported and gave affect to the basic feature of 19th century international law - the law of conquest that colonised non-European peoples and sought to extinguish their culture and legal systems, replacing them with the colonisers' systems of law. As international law evolved, it continued to embrace the political theory of particularism,[198] a structure that served the interests of powerful nations, at the expense of the interests and sovereignty of the less powerful. Thus, one of the assertions of the chapter is that the colonialism is still a living entity and has not been assigned to history.

[197] Stephen Krasner, 'Compromising Westphalia' (1995-6) 20(3) *International Security*, 115, 119.
[198] "Particularism refers to an exclusive or special devotion to a particular interest; a theory that each political group has a right to promote its own interests and especially independence without regard to the interests of larger groups". Definition available at Merriam Webster: https://merriam-webster.com/dictionary/particularism. Last accessed 10 July 2021.

The chapter draws a link between the contemporary development in international law and its colonial history, considering that the colonial past continued to articulate events into the 20th and 21st centuries as a new form of imperialism, i.e. the 1953 coup in Iran and the Gulf War (1990-91), the consequences of which remain a living reality, i.e. the War on Terror and the rise of Islamic State, issues that are examined in the following chapters. Yet, as the War on Terror has highlighted, sovereignty is regularly violated, by compromising domestic authority, in a process that Krasner refers to "organised hypocrisy",[199] reinforcing the issue that imperialism remains a central part of the international legal framework. This reaches back into the imperialistic past, where colonialism spread a European international system, based on Christian values, to the non-European world. The imperial policies of international law are both past and present, as the War on Terror has testified to. Following on from Chapter Two, it was through this prism of the colonial state of exception that the international law of the 20th century was applied universally. Although *jus natural* was included in the international legal framework through the UDHR and therefore applied universally, as this thesis argues, those individual rights were denied to the peoples of Iraq and Syria who were located outside the normal legal system in the space of quasi-sovereignty. They became the voiceless possessors of Agamben's bare life, the objects of sovereign power rather than its subjects, excluded from politically qualified life as outcasts "placed beyond the pale and beyond the privileges and protections"[200] of international law. The discussion in Chapter Four focusses on the way in which colonialism moulded the very essence of international law and the principle of sovereignty. The type of sovereignty acquired by the non-European world operated through the prism of otherness, which as Chapters Six and Seven discuss, created a new category of Other, i.e. the terror suspect, who like his predecessors in the colonies, was subjected to technologies that dominated, subjugated and terrorised.

[199] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017, 17.
[200] Derek Gregory, *The Colonial Present*, Malden, MA: Blackwell Publishing, 2004, 249.

# Chapter Four: Colonialism and the Political Economy of the Mandate System

## 4.0 Introduction

By the end of the 19th century, Anghie asserts that European expansion into Africa "ensured that European international law had been established globally as the one single system",[1] applicable to all societies as a universal system of law.[2] The end of the First World War radically altered the landscape of colonialism however, as the victors of the war determined the fate of the former colonial territories of Germany and the Ottoman Empire. The Treaty of Versailles 1919,[3] whose principal architects were British Prime Minister David Lloyd George, President Woodrow Wilson of the United States, French Premier Georges Clemenceau and Premier Vittorio Orlando of Italy,[4] determined that Germany would be stripped of her colonies in China and Africa through Article 119[5] and the Arabic-speaking territories over which Turkey had control.[6] (The Ottoman Empire is the terminology used throughout this thesis, rather than 'Turkey'). The League of Nations Mandate System was devised as a measure to move away from this era of imperialism and colonialism towards one of independence, sovereignty and self-determination. The stated aim of the Mandate System was to create sovereign independent states as equal members of the family of nations, states which had previously been excluded from the realm of an international legal system that distinguished between the 'civilised' European and the 'uncivilised' non-European. As Chapter Three discussed, the emerging system of international law was informed by the colonial experience that excluded non-Europeans, where a fundamental difference was assumed between the 'civilised' European and 'uncivilised' non-European worlds. The distinction between the 'civilised' and the 'uncivilised', a crucial factor in the development of the doctrine of sovereignty, can be understood as Empire's law. This colonial system of exclusion was adopted by the League of Nations Mandate System, whose stated purpose it was to protect the interests of "backward" people (as the inhabitants of mandated territories were identified

[1] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 746.
[2] Ibid.
[3] "The Peace Treaty of Versailles was signed five years after the assassination (28 June 1914) of Austria's Archduke Franz Ferdinand, the event that instigated World War I. 27 Allied countries signed the Treaty with Germany. See Bharat H. Desai and Jay B. Desai, 'On the Century of Peacemaking at the 1919 Treaty of Versailles: Looking Back to Look Ahead' (2020) 57(3) *International Studies,* 201, 202.
[4] Bharat H. Desai and Jay B. Desai, 'On the Century of Peacemaking at the 1919 Treaty of Versailles: Looking Back to Look Ahead' (2020) 57(3) *International Studies,* 201.
[5] Ibid.
[6] Pittman B. Potter, 'Origin of the System of Mandates under the League of Nations' (1923) 16(4) *The American Political Science Review*, 563.

by the League of Nations),[7] the promotion of their welfare and development, and the provision of guidance toward self-government and independence, in certain cases.[8] Mackey challenges these claims however, contending that the League's mandate represented "the shell of respectability under which the victors of the war attempted to hide their avarice".[9] This avarice, as the chapter discusses, was the protection of Western economic interests, where the pre-occupation with the economic development of the colonies governed all areas of colonial policy, rather than the well-being of mandate peoples.[10]

The central theme of this thesis is that Western nations have used international law to further their economic agendas and gains, instituting a two-tier system of sovereignty, i.e. full-sovereignty and quasi-sovereignty, discussed in detail in Chapter Two. As this chapter explores, the roots of this inequity reside in the system of colonialism where extraordinary governmental measures such as martial law,[11] emergency rule and legislation, and the 'civilised'/'uncivilised' distinction created between Europeans and non-Europeans were utilised to enable the cultural and economic exploitation of colonised peoples.[12] It is these very methods of control and domination that influenced the universal system of international law, and which were adopted by the Mandate System. The legacy of these practices form the basis of the discussion in Section Two of the thesis. Section 4.1 considers the colonial world as the zone of exception, where colonised peoples were othered in opposition to the 'civilised' European. Section 4.2 analyses colonial influences on the evolution of international law. Section 4.3 reflects on the effects of colonialism on the Middle East, the ramifications of which still reverberate presently. The international agreements that reformed the Arab World form the discussion in Section 4.4. Section 4.5 discusses the creation of the League of Nations Mandate System, which sought, in principle, to protect the people of the former territories

[7] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[8] Ibid.
[9] Sandra Mackey, *The Reckoning: Iraq and the Legacy of Saddam Hussein*, New York: Norton, 2002, 107.
[10] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[11] Martial law was used by colonial powers as a way of preserving imperial control. Examples of its use can be found in Kenya, India and Ireland by the British and in Algeria by the French. See John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.
[12] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

of Germany and the Ottoman Empire and to integrate them into the international legal, economic and social system as sovereign states. Section 4.6 reviews the system of international law that denied newly sovereign states control over their political economy. Section 4.7 addresses the contemporary issues that stem from the Mandate System, notably the lack of sovereignty granted to Iraq upon independence.

### 4.1 The Colonial World: A Zone of Exception

"The colony became the site where European powers tested and developed their techniques of government".[13] It was in this colonial space that 'natural sovereignty'[14] developed i.e., "the right to rule of the "civilized" Christian white nations emerged over several centuries".[15] The creation of the European judicial order (*jus publicum Europaeum*) imposed a new global order, which had, as its basis, the territorialisation of the sovereign state.[16] *Jus publicum Europaeum* distinguished between different parts of the globe, dividing it between the 'civilised' world and those territories which could be colonised.[17] *Jus publicum Europaeum* thus constructed non-European cultures as Other with a binary split of "us" and "them", "civilised" and "barbarian", a space inhabited by "savage".[18] According to Mbembe

> colonies are zones in which war and disorder, internal and external figures of the political, stand side by side or alternate to each other. As such, the colonies are the location *par excellence* where the controls and guarantees of juridical order can be suspended – the zone where the violence of the state of exception is deemed to operate in the service of "civilisation".[19]

The casting of the inhabitants of the colonies as Other - savages and barbarians, enabled European colonisers to impose Empire's law, justify their claim of supremacy over colonised peoples and to engage in violent dehumanising practices. The European colonial conquest imposed terrible physical and mental violence on the subjugated inhabitants of colonised spaces, denying peoples the right to "make their own history".[20] Hansen and Stepputat describe the colonies as constituting "a zone of exception , a place

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[13] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302.
[14] Ibid.
[15] A. Pagden, *Lords of All the World. Ideologies of Empire in Spain, Britain and France c. 1500–1800*, New Haven, CT: Yale Univ. Press, 1995 cited in Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302.
[16] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295.
[17] Ibid.
[18] Hannah Arendt, *Origins of Totalitarianism,* New York: Meridian, 1958.
[19] Achille Mbembe, 'Necropolitics' (trans.Libby Meintjes), (2003) 15 (1) *Public Culture*, 11, 24.
[20] Derek Gregory, *The Colonial Present,* Malden, MA: Blackwell Publishing, 2004, 10.

beyond the pale, an alien world whose populations were not accorded full humanity or membership of a community of civilized men entitled to *habeas corpus* and other rights of the subjects of European powers".[21] As a consequence, sovereignty in the colonial world took on a different form to that which was experienced in the European world, "marked by an excess of violence and much harsher forms of punishment than were administered in the European world at the time".[22] Arendt cites the colonial world as the first testing ground for the subjugation and destruction of certain races of people, by synthesising violence and death with Western rationality and bureaucracy, unleashing a level of violence previously unknown.[23] In Arendt's assessment, the denial of any bond or commonality between the coloniser and the colonised empowered and authorised the violence against "savage life". [24] The conqueror viewed such savage life "just as another form of animal life, a horrifying experience, something alien beyond imagination or comprehension".[25] According to Arendt, the 'savages' (as colonial peoples were referred to), were observed and categorised as beings who lacked specifically human characteristics "so that when European men massacred them they somehow were not aware that they had committed murder".[26] The sovereign right to use extreme violence and to kill the inhabitants of the colonies was sanctioned through the use of emergency powers. For example, the use of violence in Algeria by France during the Algerian War[27] was systematic and part of the structure of French rule in its Algerian colony. Franz Fanon describes the violence and dehumanising practices which the French Armed Forces engaged in during the Algerian War:

> I remember … that from time to time, when the travelling cinema of the battalion came and showed us a film, and it didn't go over, soldiers and officers would get up and tranquilly spend the rest of the evening in the company of the prisoners ... The screams were partly drowned by the music of the film.[28]

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[21] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 303.
[22] Ibid. at 303.
[23] Hannah Arendt, *Origins of Totalitarianism*, New York: Meridian, 1958.
[24] Ibid. at 192; Achille Mbembe, 2003, 'Necropolitics' (trans. Libby Meintjes), *Public Culture*, Vol 15(1), 11, 24.
[25] Hannah Arendt, *Origins of Totaliarianism*, New York: Meridian, 1958, 192; Achille Mbembe, 2003, 'Necropolitics' (trans. Libby Meintjes), *Public Culture*, Vol 15(1), 11, 24.
[26] Hannah Arendt, *Origins of Totaliarianism*, New York: Meridian, 1958, 192; Achille Mbembe, 2003, 'Necropolitics' (trans. Libby Meintjes), *Public Culture*, Vol 15(1), 11, 24.
[27] The Algerian War (1954 to 1962), also known as the Algerian War of Independence or the Algerian Revolution was fought between France and the Algerian National Liberation Front (*Front de Libération Nationale*-FLN). France used emergency powers extensively during the war, which was characterised by the use of torture. See John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, for a more detailed discussion of the emergency legal framework employed in Algeria, at 8, 9, 69.
[28] Frantz Fanon, 'Algeria Face to Face with the French Torturers' in Frantz Fanon, *Toward the African Revolution: Political Essays*, Haakon Chevalier trans., New York: Grove Press, 1970, 70 (originally published in French in *El Moudjahid*, No 10, September 1957).

The practices were not the exclusive domain of the French in Algeria however, but rather were a systemic practice of colonialism. In discussing the normalisation of the use of emergency powers, Reynolds cites Fanon who describes these powers "as part of a pattern of police domination, of systematic racism, of dehumanization rationally pursued; … monstrous practices implemented under the state of emergency",[29] "such as torture", [30] are "inherent in the whole colonialist configuration".[31] Reynolds further elaborates on the dehumanising treatment endured by the inhabitants of the colonies,[32] which according to Hansen and Stepputat, was based on the exploitation of resources such as timber and minerals.[33] For Mbembe, the prominence of race or racism in the calculus of biopower is absolutely justifiable. He states that the issue of race has been omnipresent in Western political thought and practice, especially in the inhumanity demonstrated towards the colonial peoples over whom Western powers ruled.[34] For Arendt, the politics of race is a "shattering experience of otherness".[35] In a Foucaultian analysis, racism is quintessentially a technology intended to permit "the exercise of biopower … that old sovereign right of death"",[36] enabling the state execute its murderous functions as "the condition for the acceptability of putting to death".[37]

### 4.2 Colonial Influences on the Evolution of International Law

The discussion in Chapter Three examined the development of international law as a reflection of a particular Western culture that internationalised and universalised the values of its system, based in the Judeo-Christian ethos.[38] By the end of the 19th century, the European system of international law had expanded to such an extent that it now had

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[29] Frantz Fanon, 'Algeria Face to Face with the French Torturers' in Frantz Fanon, *Toward the African Revolution: Political Essays*, Haakon Chevalier trans., New York: Grove Press, 1970, 64 (originally published in French in *El Moudjahid*, No 10, September 1957) cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 18.

[30] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 18.

[31] Frantz Fanon, 'Algeria Face to Face with the French Torturers' in Frantz Fanon, *Toward the African Revolution: Political Essays*, Haakon Chevalier trans., New York: Grove Press, 1970, 64 (originally published in French in *El Moudjahid*, No. 10, September 1957) cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 18.

[32] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

[33] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295.

[34] Achille Mbembe, 2003, 'Necropolitics' (trans. Libby Meintjes), *Public Culture*, Vol 15(1), 11, 17.

[35] Ibid. at 17.

[36] Michel Foucault, "*Society Must be Defended", Lectures at the College de France*, (trans. David Macey), New York: Picador, 2003, 214 cited in Achille Mbembe, 2003, 'Necropolitics' (trans. Libby Meintjes), *Public Culture*, Vol 15(1), 11, 17.

[37] Ibid. at 17.

[38] Henry Kissinger, *World Order: Reflections on the Character of Nations and the Course of History*, York: Penguin Books, 2014.

universal application and authority,[39] applicable to cultures and societies to which this European system was alien. The universality of international law became Empire's law, a new mode of power, in which colonialism, race and sovereignty became intertwined.[40]

### *4.2.1 Cultural Differences and the Making of International Law*

The practices of economic exploitation and cultural subordination, which were essential aspects of colonialism,[41] were not eradicated by decolonisation and the commissioning of sovereignty and self-determination to previously colonised peoples. Rather, contends Anghie, these very issues continue to play an enduring and crucial role in international law.[42] International law in 19th century endorsed a system that sanctioned the conquest and henceforth the exploitation of the non-European world through the practise of colonialism.[43] Jurists of the 19th and early 20th centuries such as Lawrence, Westlake, and Oppenheim were supporters of this system of international law that legitimised the exploitation and subjugation of colonial peoples.[44] Although the inter-war jurists sought to distance themselves from the views held by their predecessors, the work they turned to was that of Francisco de Vitoria, a 16th century Spanish jurist who had produced a notable work on American Indigenous peoples,[45] to endorse and substantiate the League's Mandate System of tutelage.

### *4.2.2 Vitoria and the New World*

In attempting to formulate a legal basis for the Spanish rule over the Indigenous peoples of the Americas, Vitoria declared that their systems of governance and government were inadequate, as the Indigenous populations had "no proper laws nor magistrates, and [were] not even capable of controlling their family affairs."[46] Vitoria characterized the

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[39] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005.
[40] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.
[41] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[42] Ibid.
[43] Ibid.
[44] Quincy Wright, *Mandates Under the League of Nations*, New York: Praeger, 1969.
[45] Francisci de Victoria, *De Indis Et Ivre Belli Relectiones* (Ernest Nys (ed.) and John Pawley Bate (trans.)), Washington: Carnegie Institute of Washington, 1917. For a detailed discussion of the significance of Victoria's work on the discipline of international law see Arthur Nussbaum, *A Concise History of the Law of Nations*, New York: Macmillan Co, 1947; David Kennedy, 'Primitive Legal Scholarship' (1986) 27 Harvard International Law Journal, 1.
[46] Francisci de Victoria, *De Indis Et Ivre Belli Relectiones* (Ernest Nys (ed.) and John Pawley Bate (trans.)), Washington: Carnegie Institute of Washington, 1917, 161.

local population as "infants"[47] "hardly better than wild beasts",[48] "with defective intelligence",[49] reinforcing the notion that the Indigenous population required guardianship. According to Anghie,

> This … justified and lent even further reinforcement to the continuing presence of the colonial powers-now mandatory powers-in these territories, as the task of these powers was not to exploit, but rather to civilize, the natives. This revival of Vitoria's rhetoric was combined through the Mandate System with a formidable array of legal and administrative techniques directed toward transforming the native and her society.[50]

The League's adoption of wardship of Indigenous peoples had a number of determinantal consequences. It solidified the 'civilised'/'uncivilised' distinction made between Europeans and non-Europeans and reinforced the idea that non-European societies should be reproduced by European countries,[51] by duplicating and conforming with Western notions of civilisation and sovereignty. The 'civilised'/'uncivilised' dichotomy also dictated that Indigenous people existed beyond the rule of law as Agamben's *homini sacri*[52] in an exceptional space; bound by the law, yet remaining outside its protections, "as the object of the most extreme aspects of sovereignty".[53] The League of Nations supported and gave affect to the most basic features of 19th century international law; the law of conquest, that sanctioned and legalised the colonisation of non-European peoples, and the state of exception, where colonised peopled lived beyond the margins and protections of the law, subjected to the extinction of their economic, cultural and legal systems. An exploration of the genealogy of sovereignty in Chapter Two revealed the emergence of quasi-sovereignty from the non-European world. The Mandate System devised a set of legal structures, technologies and methods of control that emerged from the colonies and which cemented and normalised the two-tier system of full- and quasi-sovereignty, denying equilibrium and equality to non-Western states.

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[47] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 564.
[48] Ibid. at 564.
[49] Ibid. at 564.
[50] Ibid. at 565.
[51] Ibid.
[52] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (trans. Daniel Heller-Roazen), Stanford: Stanford University Press, 1998.
[53] Antony Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 744.

*4.2.3 International Law as the Exclusive Province of the 'Civilised'*

As has been previously discussed, jurists of the mid-19th century rejected the notion that all nations belonged to the Family of Nations. Instead, 19th century jurists such as Wheaton championed international law as the "exclusive province of civilized societies".[54] As Anghie states, Vitoria dismissed colonial peoples as "children in need of a guardian"[55] whom Vitoria identified as "agents of natural law",[56] firmly situating colonial peoples in the sovereign / non-sovereign paradigm.[57] Positivists such as Westlake argued that only those who had achieved a pre-determined degree of civilisation could be decreed as sovereign.[58] Hence, African tribes could not be deemed as sovereign because "they were incapable of understanding the concept".[59] Sovereignty therefore could only be acquired by civilised European states, to the exclusion of the (very sizeable) non-European world. This viewpoint disavowed the fact these mandated societies had instituted different forms of economic and political organisation. The purpose of the traditional doctrine of sovereignty, according to Glanville, is the "'unfettered' rights to self-government, non-intervention and freedom from interference in internal affairs",[60] indicating that the principle of sovereignty is a neutral one, applied without prejudice. In the case of the non-European world however, the acquisition of sovereignty as ascribed by the Mandate System did not respect these unfettered rights; rather, the Mandate System imposed a European model of sovereignty on non-European states that required extreme alterations to the internal operations of those states[61] and denied them the right to self-governance and determination. The model of sovereignty advanced by the Mandate System offered the same representation of self-government to states in Africa as it did to Iraq, for example, without considering the cultural, political and economic uniqueness of each state. In doing so, mandated peoples were subjected to forms of control that prohibited the expression or elevation of systems of societal organisation or political

[54] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard Int'l Law Journal*, 1, 20.
[55] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities (2006) 27 *Third World Quarterly*, 739, 743.
[56] Ibid. at 743.
[57] Ibid.
[58] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard Int'l Law Journal,* 1.
[59] Ibid. at 40.
[60] L. Glanville, (2011). The Antecedents of 'Sovereignty as Responsibility' (2001) *European Journal of International Relations*, 17(2), 233, 234 cited in Michael Bolt (2013) 'The Changing Nature of Sovereignty' *E-International Relations*, 1, 2. Available at: https://www.e-ir.info/pdf/43622. Last accessed 16 August 2021.
[61] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

economies that did not conform to the Mandate's European model.[62] When sovereignty was transferred to mandate peoples, the powers of government and the exercise of governmental functions associated with control over the cultural and political economy was denied to newly sovereign states, exacerbating the structural economic inequalities experienced by non-Western states.[63] It served the interests of Western states to institute systems of control and management over their former colonies in order to maintain their economic interests in those territories and legitimised their continued presence both economically and socially.[64] Sovereignty was therefore conceived of in a new way by League of Nations' lawyers, enabling the development of new techniques of control involving law, economics and administration, that facilitated the continued domination of former colonies. While newly sovereign nations were, theoretically, equal in law, in reality a gap remained between the former colonisers and mandated peoples that reflected the distinction between 'civilised' and 'uncivilised' nations and which hence, solidified the notion of the advanced and the backward,[65] identified as a lack of Europeanisation and of progress.[66] The stark contrast between the mode of sovereignty that was experienced by Western states and mandated territories is laid bare in the economic and political differences between those States. As Bedjaoui describes:

> only the form of a legal concept is considered, while its content – the social reality it is supposed to express – is lost sight of. In this view of an international law detached from reality, concepts are not just abstractions but mere artifices and fictions. As a result, no attention at all is paid to the economic and political context, which differs from one State to another according to their degree of development and which governs the application of a concept such as State sovereignty. Yet it is this context which is decisive in giving a concrete meaning to sovereignty – or in denying it any such meaning.[67]

Wright's argument that mandated territories were the object and not the subject of sovereignty[68] supports this thesis, laying bare the inequities that were established by the League of Nations and sustained by an international legal system that recreated colonial

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[62] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[63] Ibid.
[64] Ibid.
[65] For example, the Mandate System sought to eradicate certain customs of mandated peoples, including those they considered to be barbaric practices and therefore, not fitting for countries that would eventually become members of the family of nations. See M. Yanaghita, 'The Welfare and Development of the Natives in Mandated Territories' (1923) *Permanent Mandates Commission, Annexes to the Minutes of the Third Session*, League of Nations Doc. A.19 (Annexes) 1923 VI, at 282.
[66] Quincy Wright, *Mandates Under the League of Nations*, New York: Praeger, 1969.
[67] Mohammed Bedjaoui, *Towards a New International Economic Order*, New York: Holmes & Meier, 1979, 5.
[68] Quincy Wright, *Mandates Under the League of Nations*, New York: Praeger, 1969.

relations. Hence, the pursuit of economic policies by Western states rendered former colonies subservient to unequal economic development and created a new form of imperialism, that of neo-colonialism,[69] which imposed a different form of sovereignty upon the non-European world to that which was enjoyed by European nations. Hence, "all states are *not* equally sovereign and that this is *because* of international law and institutions rather than *despite* international law and institutions".[70] According to Campbell, "Neo-colonialism refers to the involvement of more powerful states in the domestic affairs of less powerful ones",[71] while Abbott argues that neo-colonialism is in itself another form of colonisation,[72] echoing Campbell's sentiments. Kwame Nkrumah, the leader of independent Ghana, used the term "neo-colonialism" in his book *Neo-Colonialism, the Last Stage of Imperialism*[73] to refer to the second phase of imperialism, i.e. "the continued exploitation of newly independent countries by foreign capital in the postcolonial period".[74] The imposition of quasi-sovereignty and economic subordination that is the result of neo-colonialism exist in tandem to render states vulnerable to the influence and interference of foreign actors. Although the countries of the Middle East are sovereign independent countries, they remain profoundly affected by Western economic interests and neo-colonialism. The following section (4.3) examines the conditions that have rendered the Middle East vulnerable to these manipulations, identifying that they are legacies of the League of Nations Mandate System, which prioritised the economic interests of former colonial powers above the welfare and economic wellbeing of mandated peoples.

### 4.3 The Ottoman Empire

The relationship between the Western world and the East extends back two thousand years, encompassing the conflict between Christianity and Islam, which manifested in the Crusades and the Ottoman assault on Europe.[75] The Islamic world was far superior in

[69] Neo-colonialism is the practice of using economics, globalisation, cultural imperialism and conditional aid to influence a country.
[70] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 520.
[71] P.J. Campbell, A. MacKinnon & C.R. Stevens, *An Introduction to Global Studies*, Oxford: Wiley-Blackwell, 2010, 38.
[72] Jeff Abbott, 'The Neo-Colonization of Central America' (2016), Vol. XVI(1), *New Politics*, 41, 41.
[73] Kwame Nkrumah, *Neo-Colonialism, the Last Stage of Imperialism*, Bedford: Panaf Ltd., 1974.
[74] BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14(17) *Oregon Review of International Law*, 17, 27.
[75] The Ottoman wars were waged in Europe in the Late Middle Ages between the Ottoman Empire and European states. The earliest conflicts began during the Byzantine-Ottoman wars in the late 13th century, followed by the Bulgarian-Ottoman wars and the Serbian-Ottoman wars in the mid-14th century and the expansion by the Ottomans into the Balkans. See Alexander Lyon Macfie, *The Eastern Question 1774-*

terms of power, wealth, glory and stability to its Western counterpart for the majority of the past 1,400 years.[76] After the death of the Prophet Muhammad in 632 in Medina, Islam spread rapidly; the military supremacy of the Arab Muslims armies over Byzantine and Sasanian Empires is considered by some historians to be the prime reason for this.[77] The flags of these forces have been reinvoked and reimagined by contemporary extremists such as Islamic State, who adopted the imagined black flags of these historic armies as the symbol under which they fought.[78] When the Islamic State spokesperson, Abu Muhammad al-Adnani announced the establishment of a Caliphate on June 29, 2014, the proclamation hailed the military victories of the early period of Islam that "filled the earth with justice … and ruled the world for centuries".[79] Chapter Six examines the background to the emergence of Islamic State, analysing its interpretation of sovereignty as it was expressed in the Caliphate.

### *4.3.1 The Rise of Islam*

The rise of Islam coincided with an unprecedented social, political, social, economic and military weakness in Persia following decades of war between the Persian and Byzantine Empires, (also referred to as the Eastern Roman Empire).[80] In approximately 639 – 642 AD, the Islamic armies moved out of the Arabian peninsula to conquer Egypt, the territory that is now Iran and the Levant.[81] Three major caliphates existed during the medieval period: the Rashidun Caliphate (632-661); the Umayyad Caliphate (661-750) and the Abbasid Caliphate (750-1258).[82] The fourth major caliphate was the Ottoman Empire, which was established in 1517 and ruled for the next 400 hundred years until the Empire's defeat by the Allied powers during World War One.[83]

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*1923*, (2nd ed), London: Taylor & Francis Ltd., 1996; L.S. Stavrianos, *The Balkans Since 1453* (2nd ed), London: C Hurst & Co Publishers Ltd., 2000.

[76] Jason Burke, *The New Threat from Islamic Militancy*, London: Vintage, 2015.

[77] Ibid.

[78] Tamim Ansary, *Destiny Disputed: A History of the World Through Islamic Eyes*, New York: Public Affairs, 2009.

[79] James Renton, 'The Post-Colonial Caliphate: Islamic State and the Memory of Sykes-Picot', *The Conversation*, 2016. Available at : https://theconversation.com/the-post-colonial-caliphate-islamic-state-and-the-memory-of-sykes-picot-52655. Last accessed 23 June 2020.

[80] Both "Byzantine Empire" and "Eastern Roman Empire" are historiographical terms created after the end of the realm; its citizens continued to refer to their empire as the *Roman Empire* and to themselves as Romans.

[81] John Haldon, Warfare, State and Society in The Byzantine World 560-1204, London: Oxford, 2002.

[82] Clifford Edmund *Bosworth, The New Islamic Dynasties: A Chronological and Genealogical Manual. New Edinburgh Islamic Surveys (2nd ed.), Edinburg: Edinburgh University Press, 2004.*

[83] Douglas A. Howard, *A History of the Ottoman Empire*, Cambridge: Cambridge University Press, 2016.

*4.3.2 The Redrawing of the Maps of the Middle East*

Despite the size and influence of the Ottoman Empire, it disintegrated completely after its defeat in World War I, having supported the Central Powers of Germany and Austria-Hungary during the War.[84] Britain and France divided up the captured Ottoman territories into British and French protectorates according to the terms of the Sykes-Picot Agreement of 1916.[85] The Agreement, which has huge significance for Islamic State, carved up the Ottoman Empire into artificial states, creating borders which paid no consideration to the culture, political and economic organisation, and religion of those who were affected by these borders. The creation of these artificial states, such as Syria, Lebanon and Iraq, enabled "Western powers to manipulate a constant state of turmoil and conflict that has effectively undermined both nationalism and regional pan-nationalism".[86] Prior to the fall of the Ottoman Empire, Arab people did not have a nationalistic identity, as such, but rather lived in the pluralistic society of the Ottoman Empire.[87] However, with the breakup of the Ottoman Empire, the redrawing of the maps of the Middle East and governance of the newly formed states of Iraq, Syria and Transjordan under the League of Nations Mandate System, Arab people were subjugated and colonised by foreign powers under British and French tutelage.[88] They were expected to assume a nationalistic identify, but as a colonised people without the right to exercise sovereignty over their territories, economy or political decisions. This was very problematic given that nationalistic identity did not exist as these were newly formed states without a history. The Mandate's position also invalidated the actual cultures and histories of former mandated peoples. Secondly, sovereignty was denied to a people whose ancestry was embedded in the Ottoman Empire. It was vast in its landmass, multi-ethnic in its composition and once greatly superior to Europe.[89] Now, these peoples were under the rule of a foreign power, where "their well-being and development was interpreted principally in economic

[84] The Empire though had been in decline for centuries, losing key regions of land. In 1878, the Congress of Berlin declared the independence of Romania, Serbia and Bulgaria. During the Balkan Wars (1912-1913) the Ottoman Empire lost nearly all their territories in Europe.

[85] The Sykes-Picot Agreement of 1916 divided the Middle East into separate states, under the control of British and French powers. See Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017. The agreement was negotiated by the French diplomat Francois Georges-Picot and Britain's Sir Mark Sykes. See James Barr, *A Line in the Sand: Britain, France and the Struggle that Shaped the Middle East*, London: Simon & Schuster, 2011.

[86] Emmit B. Evans,' Iraq and the New American Colonialism' (2003) 1(2) Article 10 *Moebius*, 46, 47. Available at: https://digitalcommons.calpoly.edu/moebius/vol1/iss2/10.

[87] Caroline Finkel, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923*, New York: Basic Books, 2007.

[88] Peter Sluglett, 'An Improvement on Colonialism? The 'A' Mandates and their Legacy in the Middle East' (2014) 90(2) *International Affairs*, 414.

[89] Jason Burke, *The New Threat from Islamic Militancy*, London: Vintage, 2015.

terms"[90] which were enormously disadvantageous to mandate peoples.[91] This relationship resulted in the humiliating and disempowering experience of colonialism for the Islamic world, producing an experience which has had a profound and destructive effect on the Middle East, lasting to the present day.[92] Central to the humiliation was the decline of the Ottoman Empire compared to the European countries to which it was once superior. In 2014, the Islamic State spokesperson, Abu Muhammad al-Adnani, referenced the fall of the Ottoman Empire, signalling its enduring legacy, when announcing the establishment of the Caliphate in Iraq and Syria. The condition of statelessness that followed the disintegration of the Ottoman "allowed "the disbelievers" to occupy Muslim lands, install their agents as authoritarian rulers and spread false Western doctrines".[93] According to Islamic State leaders, colonialism left the *ummah* without influence or authority as it (colonialism) denied the very principle by which states gained the mandate for self-governance, sovereignty.[94] Instead, the peoples of the former Ottoman Empire were denied sovereign equality and the ability to exercise sovereign rights within their territories and over their economic and political resources, existing in a state of quasi-sovereignty, which left them on the peripheries of the international legal order and vulnerable to a reconfiguration of the Middle East and a redrawing of the maps of the region, as the discussion below examines.

### 4.4 International Agreements on the Re-Formation of the Arab World

The agreements and declarations discussed below narrate the endeavours of colonial powers to reorganise the Arab world for their (Western) benefit, but in the process, creating many of contemporary problems that can be traced to the violation of the sovereignty of Iraq and Syria, reducing Iraq in particular to a state of quasi-sovereignty from its establishment in 1932, a situation that did not alter throughout the 20th and early 21st centuries, making possible the 2003 US-led 2003 intervention.

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[90] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 581.
[91] Ibid.
[92] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[93] James Renton, 'The Post-Colonial Caliphate: Islamic State and the Memory of Sykes-Picot', *The Conversation*, 2016. Available at : https://theconversation.com/the-post-colonial-caliphate-islamic-state-and-the-memory-of-sykes-picot-52655. Last accessed 23 June 2020.
[94] Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution*, London, New York: Verso, 2015.

*4.4.1 The McMahon Agreement 1915*

The partitioning of the Ottoman Empire was sanctioned by the Treaty of London 1915, a secret pact between Britain, France, Russia and Italy.[95] A number of bilateral agreements were signed by the Allies, [96] one such agreement being the McMahon Agreement, which comprised of the exchange of ten letters, between the British High Commissioner in Egypt, Sir Henry McMahon and the Sherif of Mecca, later King Hussein of the Hejaz.[97] The result of these negotiations was an agreement to establish of an independent Arab state in the Middle East.[98] This area was defined as being "in the limits and boundaries proposed by the Sherif of Mecca",[99] with the exception of "portions of Syria" lying to the west of "the districts of Damascus, Homs, Hama and Aleppo".[100]

> The districts of Mersina and Alexandretta, and portions of Syria lying to the west of the districts of Damascus, Homs, Hama and Aleppo, cannot be said to be purely Arab, and must on that account be excepted from the proposed limits and boundaries. With the above modification and without prejudice to our existing treaties concluded with Arab Chiefs, we accept these limits and boundaries, and in regard to the territories therein in which Great Britain is free to act without detriment to interests of her ally France, I am empowered in the name of the Government of Great Britain to give the following assurance and make the following reply to your letter: Subject to the above modifications, Great Britain is prepared to recognise and support the independence of the Arabs within the territories in the limits and boundaries proposed by the Sherif of Mecca.[101]

On 16 June 1918, Sir Henry McMahon released *The Declaration to the Seven*,[102] which stated that any British policy implemented in the regions of the former Ottoman Empire

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[95] Ray Stannard Baker, *Woodrow Wilson and World Settlement, Vol. I*, NY: Doubleday, Page, and Company, 1923.

[96] Ibid.

[97] 'Palestine: Legal arguments likely to be advanced by Arab representatives', Memorandum by the Secretary of State for Foreign Affairs, Jan. 1939, National Archives, CAB 24/282, CP 19 (39), 149. Available at: http://filestore.nationalarchives.gov.uk/pdfs/large/cab-24-282.pdf. Last accessed 13 July 2021.

[98] Peter Sluglett, 'An Improvement on Colonialism? The 'A' Mandates and their Legacy in the Middle East' (2014) 90(2) *International Affairs*, 414.

[99] 'Palestine: Legal arguments likely to be advanced by Arab representatives', Memorandum by the Secretary of State for Foreign Affairs, Jan. 1939, National Archives, CAB 24/282, CP 19 (39), 149. Available at: http://filestore.nationalarchives.gov.uk/pdfs/large/cab-24-282.pdf. Last accessed 13 July 2021.

[100] Elie Kedouri, *In the Anglo-Arab Labyrinth: The McMahon-Husayn Correspondence and Its Interpretations 1914-1939*, Oxford: Routledge, 2014. See also 'Palestine: Legal arguments likely to be advanced by Arab representatives', Memorandum by the Secretary of State for Foreign Affairs, Jan. 1939, National Archives, CAB 24/282, CP 19 (39), 149. Available at: http://filestore.nationalarchives.gov.uk/pdfs/large/cab-24-282.pdf. Last accessed 13 July 2021.

[101] 'Palestine: Legal arguments likely to be advanced by Arab representatives', Memorandum by the Secretary of State for Foreign Affairs, Jan. 1939, National Archives, CAB 24/282, CP 19 (39), 149. Available at: http://filestore.nationalarchives.gov.uk/pdfs/large/cab-24-282.pdf. Last accessed 13 July 2021.

[102] "Report of a Committee set up to Consider Certain Correspondence between Sir Henry McMahon (his Majesty's high commissioner in Egypt) and the Sharif of Mecca in 1915 and 1916". His Majesty's Stationery Office. Available at :

"should be based upon the principle of the consent of the governed".[103] Annex G of the *Report of a Committee set up to Consider Certain Correspondence between Sir Henry McMahon (his Majesty's high commissioner in Egypt) and the Sharif of Mecca in 1915 and 1916* outlined Britain's position:

> His Majesty's Government have considered the memorial of the seven with the greatest care. His Majesty's Government fully appreciate the reasons why the memorialists desire to retain their anonymity, and the fact that the memorial is anonymous has not in any way detracted from the importance which His Majesty's Government attribute to the document.
>
> The areas mentioned in the memorandum fall into four categories : —
>
> 1. Areas in Arabia which were free and independent before the outbreak of war;
>
> 2. Areas emancipated from Turkish control by the action of the Arabs themselves during the present war;
>
> 3. Areas formerly under Ottoman dominion, occupied by the Allied forces during the present war;
>
> 4. Areas still under Turkish control.
>
> In regard to the first two categories, His Majesty's Government recognise the complete and sovereign independence of the Arab inhabiting these areas and support them in their struggle for freedom.
>
> In regard to the areas occupied by Allied forces, His Majesty's Government draw the attention of the memorialists to the texts of the proclamations issued respectively by the General Officers Commanding in Chief on the taking of Baghdad and Jerusalem. These proclamations embody the policy of His Majesty's Government towards the inhabitants of those regions. It is the wish and desire of His Majesty's Government that the future government of these regions should be based upon the principle of the consent of the governed and this policy has and will continue to have the support of His Majesty's Government.
>
> In regard to the areas mentioned in the fourth category, it is the wish and desire of His Majesty's Government that the oppressed peoples of these areas should obtain their freedom and independence and towards the achievement of this object His Majesty's Government continue to labour.
>
> His Majesty's Government are fully aware of, and take into consideration, the difficulties and dangers which beset those who work for the regeneration of the populations of the areas specified.
>
> In spite, however, of these obstacles His Majesty's Government trust and believe that they can and will be overcome, and wish to give all support to those who

https://web.archive.org/web/20080618062554/http://domino.un.org/unispal.nsf/3d14c9e5cdaa296d85256cbf005aa3eb/4c4f7515dc39195185256cf7006f878c%21OpenDocument . Last accessed13 July 2021.

[103] Isaiah Friedman, *Palestine: A Twice-Promised Land? Vol. 1: The British, the Arabs, and Zionism, 1915-1920*, New Brunswick, N.J.: Transaction Publishers, 2000.

> desire to overcome them. They are prepared to consider any scheme of cooperation which is compatible with existing military operations and consistent with the political principles of His Majesty's Government and the Allies.[104]

Although the Declaration to the Seven advanced the principle of national self-determination for Arab people, [105] in reality, it did not come to fruition. The failure to establish an independent Arab state and the subsequent colonisation of the Middle East under the League of Nations Mandate System is signified as an example of British duplicity and of the "betrayal of the Arabs".[106] One hundred years later, this remained an issue of real contention for the leaders of Islamic State, who asserted that colonial powers had betrayed the *ummah* through the Sykes-Picot Agreement, discussed below, and by the failure to create a sovereign independent Arab state.[107] According to Abu Bakr al-Baghdadi, it was to rectify this exact wrong committed by Western colonial powers that the Caliphate was established in 2014.[108]

### *4.4.2 The Sykes-Picot Agreement*

The Sykes–Picot Agreement of 1916, officially known as the Asia Minor Agreement, was an Agreement signed by Mark Sykes and François Georges-Picot.[109] Its purpose was to secure "an orderly partition (of the Ottoman Empire) to keep wartime allies from plunging into a new conflict after victory".[110] The Agreement "divided the Arab provinces of the Empire by an east-west "line in the sand" across the Syrian desert".[111] The French exclusively controlled the blue zone north of that line, (which included Beirut and Tripoli). Also in the blue zone was an Arab state under French protection (Damascus,

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[104] "Report of a Committee set up to Consider Certain Correspondence between Sir Henry McMahon (his Majesty's high commissioner in Egypt) and the Sharif of Mecca in 1915 and 1916". His Majesty's Stationery Office, *Annex G, The Declaration of the Seven*. Available at: https://web.archive.org/web/20080618062554/http:/domino.un.org/unispal.nsf/3d14c9e5cdaa296d85256cbf005aa3eb/4c4f7515dc39195185256cf7006f878c%21OpenDocument. Last accessed 13 July 2021.

[105] Timothy J. Paris, *Britain, The Hashemites, and Arab Rule, 1920-1925: the Sherifian Solution*, London: Frank Cass, 2003.

[106] Peter Sluglett, 'An Improvement on Colonialism? The 'A' Mandates and their Legacy in the Middle East' (2014) 90(2) *International Affairs*, 414, 416.

[107] Laura Hood, 'The Post-Colonial **C**aliphate: Islamic State and the Memory of Sykes-Picot', *The Conversation*, 23 February 2016. Available at: https://theconversation.com/the-post-colonial-caliphate-islamic-state-and-the-memory-of-sykes-picot-52655. Last accessed 13 July 2021.

[108] Laura Hood, 'The Post-Colonial **C**aliphate: Islamic State and the Memory of Sykes-Picot', *The Conversation*, 23 February 2016. Available at: https://theconversation.com/the-post-colonial-caliphate-islamic-state-and-the-memory-of-sykes-picot-52655. Last accessed 13 July 2021.

[109] David Fromkin, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East*, New York: Owl, 1989.

[110] Martin Kramer, 'Sykes-Picot and the Zionists', *The American Interest, 19 May* 2016. Available at: https://scholar.harvard.edu/files/martinkramer/files/sykes-picot_and_the_zionists.pdf. Last accessed 13 July 2021.

[111] Ibid.

Homs, Hama, Aleppo, and Mosul), which became Syria, minus Mosul. South of the line in the sand, was a red zone under direct British control (included Basra and Baghdad), which became Mandatory Iraq, including Mosul (under British rule from 1920 to 1932). Britain also had control Mandatory Palestine, a British protectorate, which it ruled from 1923 to 1948.[112] Commenting on the Sykes-Picot Agreement, the Arab activist George Antonius wrote that it was "the product of greed at its worst",[113] and according to Islamic State, a symbol of Western colonialism in the Levant, which had to be eradicated.[114]

The Sykes-Picot Agreement stated:

> It is accordingly understood between the French and British Governments---
>
> 1. That France and Great Britain are prepared to recognize and protect an independent Arab State or a Confederation of Arab States in the areas (A) and (B) marked on the annexed map, under the suzerainty of an Arab chief. That in area (A) France in area (B) Great Britain, shall have priority of right of enterprise and local loans. That in area (A) France, and in area (B) Great Britain, shall alone supply advisers or foreign functionaries at the request of the Arab State or Confederation of Arab States.
>
> 2. That in the blue area France, and in the red area Great Britain, shall be allowed to establish such direct or indirect administration or control as they desire and as they may think fit to arrange with the Arab State or Confederation of Arab States.
>
> 3. That in the brown area there shall be established an international administration, the form of which is to be decided upon after consultation with Russia, and subsequently in consultation with the other Allies, and the representatives of the Shereef of Mecca.[115]

The Sykes-Picot Agreement effectively negated British assurances to Arabs about the establishment of an Arab state in the Middle East, in exchange for supporting the British against the Ottoman Empire.[116] The Agreement is of considerable importance to understanding the physical landscape of the modern Middle East, and as a representation of its colonial past. Indeed, Islamic State placed a great deal of importance on the Agreement.[117] Such is its legacy that a propagandist English-language video, *Breaking*

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[112] Martin Kramer, 'Sykes-Picot and the Zionists', *The American Interest, 19 May* 2016. Available at: https://scholar.harvard.edu/files/martinkramer/files/sykes-picot_and_the_zionists.pdf. Last accessed 13 July 2021.
[113] Ibid.
[114] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[115] Sykes-Picot Agreement 1916. Available at: https://wwi.lib.byu.edu/index.php/Sykes-Picot_Agreement. Last accessed 21 March 2018.
[116] For a comprehensive summary of the Sykes-Picot Agreement see *Partition of the Ottoman Empire.* Available at: https://courses.lumenlearning.com/suny-hccc-worldhistory2/chapter/partition-of-the-ottoman-empire/. Last accessed 14 July 2021.
[117] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

*the Border*, showed a bulldozer breaching the sand barrier demarcating the colonial borders that were imposed by the Sykes-Picot agreement in 1916-1917.[118] In June 2014, a Chilean-Norwegian man, Bastián Vásquez and a member of Islamic State, uploaded a video to internet, titled 'The End of Sykes-Picot', in which he stated:[119]

> As you can see right now, I'm on the border of Iraq and al Sham. … As you can see this is the so-called border of Sykes-Picot. Alhamdulillah, we don't recognise it and we will never recognise it. Inshallah this is not the first border that we will break and inshallah, we shall break all the borders, but we shall start with this, inshallah. … As Abu Bakr Al Baghdadi used to say "He is the breaker of barriers". Inshallah we will break the barriers of Iraq, Jordan, Lebano, all the country [sic] inshallah. … This is the first of many barriers we shall break inshallah.[120]

The purpose of the video was to demonstrate that the dominance of the West had been broken and that Islamic State was not an aberration, as its motto *baqiyah wa-tatam-madad* (remain and expand) indicated. The video advocated for jihadists to destroy all colonial borders in the Levant and to destabilise the governments of the Middle East through brutal violence.[121]

## 4.5 The League of Nations Mandate System

### *4.5.1 The Foundation of the League of Nations*

The Paris Peace Conference (also known as Versailles Peace Conference) was held on 10 January 1920, at which the victorious Allied Powers from World War I established the intergovernmental organisation of the League of Nations.[122] The peace terms for the defeated Central Powers were established at the Conference. The Conference was attended by delegates from the Allied and associate powers,[123] including the Prime Minister of France, Georges Clemenceau, the Prime Minister of Britain, David Lloyd George and the President of the United States, Woodrow Wilson. Apart from the creation of League of Nations, the other major decision agreed upon were: (i) the Ottoman Empire would be dismembered in its entirety, with former Ottoman territories awarded chiefly to Britain and France; (ii) economic constraints, disarmament provisions and territorial

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[118] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[119] Ibid.
[120] 'The End of Sykes-Picot' (28 June 2014) (the video is no longer available for viewing on the internet). For a transcript of the video, see Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017, 28.
[121] Ibid.
[122] John Norton Moore, 'Development of the International Law of Conflict Management', in John Norton Moore, Frederick S. Tipson and Robert F. Turner, (eds.), *National Security Law*, US: Carolina Academic Press, 1989.
[123] Marcus M. Payk, 'What We Seek Is the Reign of Law': The Legalism of the Paris Peace Settlement after the Great War' (2018) *The European Journal of International Law*, 29(3), 809.

concessions would be imposed on Germany and its former colonies would also be awarded to European powers[124] (iii) the creation of new borders and the redrawing of the map of the Middle East.[125] Article 231 of the Versailles Peace Treaty (also referred to as the War-Guilt clause, or the War-Guilt Lie in Germany[126]) established a legal form of state responsibility and placed the guilt for the war firmly on Germany and her allies.[127] Specifically, Art. 231 stated:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her Allies for causing all the loss and damage to which the Allied and Associated Governments have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her Allies.[128]

It is the assertion of this thesis that the decision taken at the Paris Peace Conference to redraw of the maps of the Middle East has had profound and far-reaching consequences, which it is argued, resulted in the rise of Islamic State almost 100 years later.

### *4.5.2 The Creation of the Mandate System*

Prior to the 20th century, states alone were recognised as sovereign entities and as having rights and obligations under international law.[129] However, with the creation of the League of Nations, a new actor emerged in the international system, one that provided international law with a new range of technologies for the control and administration of the international landscape.[130] Through the expansion of the European Empires, particularly those of Britain and France, the European system of international law was developed beyond the boundaries of the Western world. As Chapter Three discussed however, international law was a reflection of a Euro-centric form of sovereignty, a system that ignored the will of colonial states (and indeed post-colonial states in the latter part of the 20th century).

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[124] Germany lost 13% of its land, which comprised 48% of its iron production and a large portion of its coal production. See 'The Aftermath of the First World War', *The Weiner Holocaust Library*. Available at: https://www.theholocaustexplained.org/the-nazi-rise-to-power/the-effects-of-the-first-world-war-on-germany/the-treaty-of-versailles/. Last accessed 15 July 2021.

[125] Marcus M. Payk, 'What We Seek Is the Reign of Law': The Legalism of the Paris Peace Settlement after the Great War' (2018) *The European Journal of International Law*, 29(3), 809.

[126] Harold Temperley, '"War Guilt" in the Peace Treaty' (1932) 17(67), *History*, 231, 231.

[127]. Marcus M. Payk, 'What We Seek Is the Reign of Law': The Legalism of the Paris Peace Settlement after the Great War' (2018) *The European Journal of International Law*, 29(3), 809.

[128] Art. 231 of the Versailles Treaty, 1919.

[129] 'International Legal Personality', *Icelandic Human Rights Centre*. Available at: https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-actors/international-legal-personality. Last accessed 17 August 2021.

[130] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

*4.5.3 The Governing Principles of the Mandate System*

A League of Nations mandate was "one of the first international concepts of political trusteeship modeled on a common law trust",[131] and was a system through which mandated territories were administered by the League of Nations (a system that was emulated the UN Trusteeship System).[132] The Mandate System was established under Article 22 of the Covenant of the League of Nations.[133] The Mandate System was administered by two governing principles i.e. the non-annexation of the territory[134] and "its administration as a "sacred trust of civilisation" to develop the territory for the benefit of its native peoples".[135] As Matz states, "The principle of administration as a "sacred trust of civilisation" was designed to prevent a practice of imperial exploitation of the mandated territory in contrast to former colonial habits. Instead, the Mandatory's administration should assist in developing the territory for the well-being of its native people."[136] The League of Nations was dissolved following World War II. It was agreed at the Yalta Conference, held in 1945,[137] to establish a system of trusteeship for mandate territories under the rubric of the United Nations:

> The UN Charter established the Trusteeship Council as one of the main organs of the United Nations, and assigned to it the task of supervising the administration of Trust Territories placed under the International Trusteeship System. The main goals of the International Trusteeship System were to promote the advancement of the inhabitants of Trust Territories and their progressive development towards self-government or independence. The Trusteeship Council is made up of the five permanent members of the Security Council -- China, France, the Russian Federation, the United Kingdom and the United States.[138]

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[131] Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 9, 2005, 47-95, 50.

[132] Ibid.

[133] Covenant of the League of Nations, entered into force on 28 June 1919. Full text (including amendments adopted to December 1924) available at: https://avalon.law.yale.edu/20th_century/leagcov.asp. Last accessed 14 July 2021.

[134] Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 9, 2005, 47-95, 70.

[135] Ibid. at 70.

[136] Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 9, 2005, 47-95, 71.

[137] The Yalta Conference, also known as the Crimes Conference was held from 4-11 February 1945. It was a meeting of the three World War II Allies: Winston Churchill, Franklin D. Roosevelt and Joseph Stalin. They discussed the fate of Poland, Germany, the re-organisation of post-war Europe, the Far-East and the United Nations. See Melvyn P. Leffler, 'Adherence to Agreements: Yalta and the Experiences of the Early Cold War' (1986) 11(1) *International Security*, 86, 94.

[138] United Nations 'Trusteeship Council'. Available at: https://www.un.org/en/about-us/trusteeship-council. Last accessed 14 July 2021.

Yet, as the discussion in this chapter considers, the Mandate System, rather than preventing the imperial exploitation of mandate territories, was directly responsible for their economic manipulation and misuse, a tragic situation the continued under the UN Trusteeship Council.

*4.5.4 The Aims of the Mandate System*

The creation of the Mandate System was a reflection of a wider set of developments in international law, namely (i) the creation of a new international system "based on respect for the international rule of law",[139] (ii) the creation of the Permanent Court of International Justice (PCIJ), (1922-1946), an international court attached to the League of Nations,[140] and (iii) a call by lawyers at that time for the codification of international law.[141] The Mandate System sought, in principle, to protect the people of the former territories of Germany and the Ottoman Empire and to integrate them into the international legal, economic and social system as sovereign states. The people of these territories were considered to be "backward",[142] "incapable of or deficient in power of self-government",[143] "destitute",[144] and "requiring nursing towards political and economic independence".[145] According to Hall, however,

> It is scarcely necessary to point out that as international law is a product of a special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently 'civilised', such states can only be presumed to be subject to it as inheritors of that civilisation. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints.[146]

The Mandate System was undoubtably a mechanism of control and a means through which imperial power policies could be implemented through the "continued … practice of foreign rule over the former colonies based upon an assessment of capability and civilization according to the leading states' perspectives on African and Asian

[139] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 528.
[140] Ibid. at 529.
[141] Ibid. at 529.
[142] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 523.
[143] Ibid. at 523.
[144] Ibid. at 523.
[145] Ibid. at 523.
[146] W.E. Hall, *A Treatise on International Law* (2nd ed), Oxford: Clarendon Press, 1895, 40. Available at: https://archive.org/stream/treatiseonintern00hallrich#page/n3/mode/2up. Last accessed 14 July 2021.

peoples".[147] The majority of the non-European world was colonised under an international legal principle of the Doctrine of Discovery that allowed European states to claim superior rights over Indigenous lands.[148] The Doctrine therefore sanctioned the exploration and conquer, by European Christian states, of non-European territories, declaring ownership and dominion over the people and resources they had "discovered".[149] One of the elements that constituted the Doctrine was that non-Christians had no rights to sovereignty, self-determination or their land.[150] European powers framed their colonial endeavours in terms of a civilising mission that was justified on the basis of necessity in order to transform and improve the well-being and lives of deprived peoples, despite the damage caused to the local population. The distinction created between the 'civilised' European and non-'civilised' non-Europeans allowed a form of law to be enforced in the colonies that erased the rights of local peoples and which would not have legal or tolerated in European nations.[151]

The Mandate System purported to correct this by achieving equality between nations. In reality, the people of the former territories of Germany and the Ottoman Empire were subjected to a form of law derived from European culture and values, which did not recognise the validity of their culture or civilisation, based as they were on non-European values, as discussed in Chapter Four. Although the Mandate System claimed to have the best interests of the people of the Levant and Mesopotamia at the core of its policies, the

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[147] Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' in A. von Bogdandy and R. Wolfrum, (eds.), *Max Planck Yearbook of United Nations Law*, Volume 9, 2005, 47-95, 56.

[148] Doctrine of Discovery was well defined in the 1823 United States Supreme Court decision of *Johnson v. M'Intosh (*Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-97 (1823)) in which the Supreme Court held that the Doctrine of Discovery was an established legal principle of European and American colonial law. See Robert J. Miller, 'The International Law of Colonialism: A Comparative Analysis' (2011) 23, *Lewis & Clark Law School Legal Research Paper Series*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920009; Robert J. Miller, Lisa Lesage & Sebatian Lopez Escarcena, 'The International Law of Discovery, Indigenous Peoples, and Chile' (2010) 89(4) *Nebraska Law Review*, 819; Robert J. Miller & Micheline D'Angelis, 'Brazil, Indigenous Peoples, and the International Law of Discovery*'* (2011) 37 *Brooklyn Journal of Int'l Law*, 1; Robert J. Miller, 'Christianity, American Indians, and the Doctrine of Discovery' in *Remembering Jamestown: Hard Questions about Christian Mission*, Amos Yong & Barbara Brown Zikmund (eds.), Eugene, OR: Pickwick Publications, 2010.

[149] Robert J. Miller, 'The International Law of Colonialism: A Comparative Analysis', (2012) 15(4), *Lewis & Clark Law Review*, 847, 847.

[150] Robert J. Miller, 'The International Law of Colonialism: A Comparative Analysis' (2011) 23, *Lewis & Clark Law School Legal Research Paper Series*, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920009. Miller's other elements or factors that constitute the Doctrine of Discovery are first discovery, actual occupancy and current possession, pre-emption/European title, Native title, Indigenous limited sovereign and commercial rights, contiguity, *terra nullius*, civilization and conquest. See Miller, 'The International Law of Colonialism: A Comparative Analysis', (2012) 15(4), *Lewis & Clark Law Review*, 847, 852-854.

[151] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.

system of law applied to mandate territories was based in the positivist international law of the 19th century, a structure that had endorsed the conquest and exploitation of non-European peoples and had operated to exclude non-European societies from the international community.[152] The Mandate System, a product of a discipline of international law[153] that emerged from the colonial confrontation therefore challenges the claim of sovereign equality amongst nations. The form of sovereignty granted to mandate territories acquired a different shape and character in the non-European world, imposing a European model of sovereignty on non-European states that profoundly transformed the internal operations and independence of those states. Essentially, non-European States became Europeanised entities. Through this process a two-tier system of sovereignty (full-sovereignty and quasi-sovereignty), discussed in detail in Chapter Two, emerged that was repeated through different periods in the international law, including the Mandate period, [154] and as this thesis will examine, continues to operate and affect the international legal landscape. Reflecting Angie's central thesis that the colonies played a crucial role in the development of international law, the two-tier system of sovereignty validated the system's civilising mission, thus reproducing the 'civilised'/'uncivilised' dichotomy.

### *4.5.5 The Creation of Mandate Territories*

Seven mandatory powers gained control of fourteen mandate territories. The controlling powers were: the United Kingdom, the Union of South Africa, France, Belgium, New Zealand, Australia and Japan.[155] Following the demise of the League, territories that remained under mandates became United Nations Trust Territories, under Chapter XI (Articles 73 and 74), of the Charter of the United Nations 1945.[156] The process of decolonisation gained traction in the 1960s, continuing until the 1990s.

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[152] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[153] Peter Sluglett, 'An Improvement on Colonialism? The 'A' Mandates and their Legacy in the Middle East' (2014) 90(2) *International Affairs*, 414.

[154] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005.

[155] F.S. Northedge, *The League of Nations: Its life and times, 1920–1946*, Leicester: Leicester University Press, 1986.

[156] *Chapter XI (Articles 73 and 74), of* the Charter of the United Nations 1945.

*4.5.6 Article 22 of the Covenant of the League of Nations*

The primary obligation of mandatory powers to territories under their control is stated in Article 22 of the League Covenant, which enunciated the concept of a "sacred trust of civilization", the "just treatment of native inhabitants" and "protection of minorities in Europe":[157]

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied, the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutledge of such peoples should, be entrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.[158]

The A mandates, which applied to parts of the old Ottoman Empire, were:

> certain communities that have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.[159]

The B mandates were applied to the former German colonies:

> ...at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.[160]

[157] Covenant of the League of Nations, Art. 22.
[158] Covenant of the League of Nations, Art. 22, paras. 1-4.
[159] Ibid.
[160] Ibid.

South West Africa and certain South Pacific Islands were administered by League members under C mandates. These were classified as "territories":

> ...which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.[161]

The wording and ideology of Article 22 embodied the Euro-centric nature of the Mandate System and the League of Nations. The views espoused about the people of former Ottoman territories such as "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world", "the tutelage of such peoples should be entrusted to advanced nations who ... can best undertake this responsibility" expressed an imperialistic, paternalistic and condescending viewpoint that remained firmly entrenched in a colonialist ideology. The balance between the sovereignty of states and the competence of the organisation achieved in the Covenant of 1919 seemed to be firmly in favour of sovereign states.

In reality, the people of the former territories of Germany and the Ottoman Empire were subjected to a form of law derived from European culture and values, which did not recognise the validity of their culture or civilisation, based as they were on non-European values. Although the Mandate System claimed to have the best interests of the people of the Levant and Mesopotamia at the core of its policies, the system of law applied to mandate territories was based in the positivist international law of the 19th century, a structure that had endorsed the conquest and exploitation of non-European peoples.[162] Hence, in the process of 'civilising' the non-Western world, non-Western values, cultures, identities and legal personalities were excluded in favour of imposing a Western-centric model of governance to the colonial world, based on a European model of law and values that gave no consideration to non-European systems of law and culture.

### *4.5.7 Mandate Peoples and the Political Economy*

Anghie cites the development of the resources of the territories, which were rich in natural resources,[163] as the unquestionable aim of, and crucial aspect to, the Mandate System's

[161] Covenant of the League of Nations, Art. 22.
[162] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[163] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects,* Cambridge: Cambridge University Press, 2008.

agenda. All the social institutions of mandate territories were subordinated to this primary aim.[164] By way of example, the Secretary of the War Cabinet in Britain identified control of the oil regions in Mosul as a primary objective of Britain's Trusteeship of Iraq: "[W]e should obtain possession of all oil-bearing regions in Mesopotamia and Southern Pesia".[165] The intentions of Britain to recreate Iraq into a state where Britain could protect its economic expansion and financial interests is explicitly evident in its acquisition of the oil rich Mosul. The incorporation of Mosul into the Kingdom of Iraq, for example, points to a disregard for the social, economic and political interests of the Mosuli people which were secondary to the economic value that Mosul provided for Britain.

*4.5.7.1 Technologies of Control and Management and the Quasi-fication of Sovereignty*

The stated purpose of the Mandate System was to ensure the "well-being and development" of the mandate territories,[166] which they attempted to do by "creating a set of techniques that were uniquely devised for the specific purpose of transforming backward, non-European societies into modern societies through the promotion of sovereignty and self-government".[167] One of the tasks of the League was promoting sovereignty and self-governance in the mandate territories under its control.[168] Yet, in doing so, "it devised legal, administrative and institutional mechanisms"[169] that entrenched "technologies of management and control".[170] These technologies subjugated and marginalised mandated peoples, rather than promoting their independence, and profoundly affected the type sovereignty that was granted to them.[171] At the core of the type of sovereignty that was accorded to non-European mandated peoples was the protection of Western economic interests, rather than their well-being and development, a position that completely contradicted the League's stated purpose of care. Commenting on the nature of the sovereignty that Iraq should acquire upon independence from British mandatory power, Sir Arthur Hirtzel of the Indian Foreign Office recommended "What we want to have in existence, what we ought to have been creating in this time, is some administration with Arab institutions which we can safely leave while pulling the strings

[164] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[165] Helmut Mejcher, *Imperial Quest for Oil: Iraq 1910-1928*, London: Ithaca Press, 1976, 35.
[166] Covenant of the League of Nations, Art. 22.
[167] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 747.
[168] Ibid.
[169] Ibid. at 747.
[170] Ibid. at 747.
[171] Ibid. at 739.

ourselves; something that won't cost very much, which Labor can swallow consistent with its principles, but under which our economic and political interests will be secure".[172]

These technologies were not consigned to history when mandated territories gained their independence however, but continued to dictate the relationship between developed and developing nations, managed through such institutions as the International Monetary Fund (IMF) and the World Bank. For example, the World Bank's desire to promote "good governance"[173] resembles the Mandate's aim to promote "self-governance".[174] The interest that is common to both institutions is the promotion and securing of Western economic interests, rather than promoting the interests and welfare of the developing country.[175] In summary, the Mandate System was tasked with the creation of sovereign states on equal footing with the Western world. In reality however, the form of sovereignty that was granted to these non-European societies was created with the abject purpose of furthering Western interests, a position that has been emulated by the World Bank and the IMF. Hence, when sovereignty was granted to the non-European world, it was as quasi- rather than full-sovereignty as a means of ensuring the continued economic subordination of these states, even after the official end of colonialism.

*4.5.7.2 Technologies of Control and Management and the Economisation of Sovereignty*

The lack of care afforded to the local population was highlighted by Van Rees, who stated to the Permanent Mandate Commission that "[i]t was clear that, in general, European civilisation was based on principles diametrically opposed to those of the natives, and it resulted from this that a European administration had not and could not have the welfare of the natives, as conceived by the natives themselves, for its sole object".[176] Despite these grievances being highlighted to the Permanent Mandate Commission (PMC), the exploitation of the resources remained the paramount principle of the Mandate System.[177]

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[172] Peter Sluglett, *Britain in Iraq, 1914 – 32*, London: Ithaca Press, 1976, 37.

[173] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 626.

[174] Ibid. at 626.

[175] Ibid. at 626-7.

[176] *Permanent Mandate Commission, Minutes of the Sixth Session*, League of Nations Doc. C.386M.132 1925 VI at 49.

[177] The crucial link between labour and development is again emphasised in the list of questions: "Does the local supply of labour, in quantity, physical powers of resistance and aptitude for industrial and agricultural work conductedl on modern lines appear to indicate that it is adequate, as far as can be foreseen, for the economic development of the territory?" See *List of Questions Which the Permanent Mandates Commission Desires Should Be Dealt with in the Annual Reports of the Mandatory Powers*, League of Nations O.J. 1322-28 (1926) cited in Antony Anghie, 'Colonialism and the Birth of International

The resources of non-European territories were characterised by the European countries and colonial administrators alike as "belonging, not only to the peoples of those territories, but also to the larger international community",[178] as articulated by Joseph Chamberlain's assertion that new territories were developed for the Commerce of the World.[179] Indeed, it was unexceptional for colonial powers to characterise the resources of mandated territories as belonging to the international community, prompting the Portuguese representative to argue that "[s]ome people, having nothing at heart but the interests of mankind as a whole, consider that it is the duty of colonising countries to exploit the economic wealth of their colonies and that, unless they do so, they have no right to retain those possessions".[180] The continued and pervasive dominance of economics informed and influenced all of the Mandate's policies, resulting in what Anghie has termed the "economization of sovereignty."[181] When sovereignty was eventually granted to mandate territories, it was done so with the economic interests of former colonial powers as the primary goal, rather than the welfare of the local population. As a consequence of this, social and cultural practices were reframed in terms solely of economics.[182] For the Indigenous population, this transformed them into an economic resource and possession, viewed primarily through the paradigm of their labour and production capacity.[183] Commenting on these mandate labour policies, Wright asserts that "it began to be seen that the native was an important economic asset. Without his labor the territory could not produce."[184] This was one aspect of an all-consuming pervasive project whose aim it was to transform Indigenous "political institutions and practices based on social relations into institutions and practices based on economic

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Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 610.

[178] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 586.

[179] Harry Browne, *Joseph Chamberlain, Radical and Imperialist*, London: Longman, 1974.

[180] *Draft Convention of Slavery*, 11 *League of Nations Official Journal* 1541 (1926). See also Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 586.

[181] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 281; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 581.

[182] J.S. Furnivall, *Colonial Practice and Policy: A Comparative Study of Burma and Netherlands India*, Cambridge: Cambridge University Press, 2015 cited in Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[183] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', (2000) 32 *NYU Journal of Int'l L & Pol*, 243.

[184] Quincy Wright, *Mandates Under the League of Nations*, Westport, CT: Praeger, 1969, 10.

considerations", [185] to the detriment of its stated aims, i.e. "the well-being and development of the people of mandate territories".[186]

The end of formal colonialism did not however, result in the end of colonial and imperialistic practices. Rather, as countries such as Iraq demonstrate, colonialism was replaced by neo-colonialism where economic interests were placed at the forefront of international law to the detriment of human rights and equality between peoples. The ramifications of this for Iraq was its relegation to a subordinate role in the international system, compounding its quasi-sovereignty status, allowing Western states such as the US and Britain the continuance of their interference into the affairs of Iraq for their own economic benefits. Essentially, Iraq existed in a state of exception, subjected to techniques of control and subordination, that enabled the dehumanisation of the Iraqi people. For Iraq, and indeed the non-European world, this has had profoundly damaging and long-lasting ramifications. As the discussion in Chapter Six reveals, the focus of which is Iran and Iraq, these inequitable systems of sovereignty, based in economics, continued to dictate Western foreign policy towards the Middle East, greatly affecting their ability to govern and function as independent states.

*4.5.8 The Injustice of the Political Economy*

The economic development of resources in the colonies had long-term and profoundly damaging effects on mandated peoples, as their interests and welfare were undermined. It led to continued injustices being experienced by the local populations, as large infrastructure projects became central to economic development in the colonies.[187] The protection of the economic interests of colonial nations became all-encompassing and insidious, dominating all of the policies that were enacted in the mandate territories. The form of sovereignty that was granted to the inhabitants of these territories denied them control over their land and resources. Rodney describes how the infrastructure projects that were developed to manage these resources were designed, not to meet the needs of

[185] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 281.

[186] Covenant of the League of Nations, Art. 22, para. 1. Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 572.

[187] European mining, agricultural and trading companies expanded their businesses expedentially in the colonies, due in no small part to the development of the railway system. This however, had an extremely detrimental effect on the local populations who were tasked with supplying the labour for these companies. See M. Freire d'Andrade, 'The Interpretation of that Part of Article 22 of the Covenant Which Relates to the Well-Being and Development of the Peoples of Mandated Territories', *Permanent Mandates Commission, Minutes of the Seventh Session*, League of Nations Doc. C.648 M.237 1925 VI, at 197 (1925).

local populations, but rather "[t]o extract gold or manganese or coffee or cotton. They were built to make business possible for the timber companies, trading companies, and agricultural concession firms …".[188] In order to maximise the wealth that these resources generated for colonial powers, the market became the central, dominant institution within mandated territories, to the detriment of all other social institutions.[189] Furnival, a colonial expert, furnished the view that the impact of capitalist development and the emphasis on economics, rather than welfare, had an expediently greater effect on mandated territories, where capitalism was imposed from above, than it did on Western societies:

> [t]here is materialism, rationalism, individualism, and a concentration on economic ends far more complete and absolute than in homogeneous Western lands; a total absorption in the exchange and market; a capitalist structure, with the business concern as subject, far more typical of capitalism than one can imagine in the so-called capitalist countries …".[190]

This was achieved by the creation of sophisticated, international networks of economic affiliations that connected the labour of the person in a mandate territory to a much more comprehensive economic network that began at a local level and extended beyond the metropolis, to the international economy.[191] Furnivall describes how the inhabitants of mandated territories were integrated into an impenetrable and comprehensive network of economic power, which subjected them to systems of governance that radically transformed their societies; social relations were transmuted into purely economic associations, deeply affecting the affiliation that people had to the state;[192] and political power was utilised to advance and strengthen the market in favour of Western interests.[193]

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[188] Walter Rodney, *How Europe Underdeveloped Africa*, London: Bogle-L'Ouverture Publications, 1972.
[189] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[190] J.S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India*, Cambridge: Cambridge University Press, 1948.
[191] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 281; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[192] This is an issue which will be explored in this thesis in relation to the formation and rise of Islamic State. As people's affiliations to the state was damaged, their loyalty to their communities, groups and tribes was strengthened. Loyalty was therefore generated from bottom up rather than from the top-down (loyalty to the state).
[193] J.S. Furnivall, *Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India*, Cambridge: Cambridge University Press, 1948.

*4.5.9 The Mandate System and Sovereignty*

The Mandate System's desire to control and develop the resources of mandated territories was fundamental in shaping the form of sovereignty granted to mandated peoples and to the type of society that developed in those territories. The acquisition of sovereignty therefore "acquired a different form and character as it was transferred from the European to the non-European world",[194] where mandated peoples did not have sovereignty over their resources and the inhabitants of former mandated territories obtained quasi- rather than full-sovereign rights, the negative and far-reaching ramifications of which are analysed in Chapter Six.

As has been previously discussed in Chapter Three, jurists of the mid-19th century rejected the notion that "a single, universally applicable law governed a naturally constituted society of nations".[195] Instead, 19th century jurist, Wheaton claimed that international law was exclusively the domain of civilized societies.[196] The purpose of the traditional doctrine of sovereignty is the protection of the cultural, political and social institutions of a state. Viewpoints, such as Wheatons, excluded the non-European world from being able to exercise any form of sovereignty over their own territories however, a position that the Mandate system readily adopted and imposed. The acquisition of sovereignty as ascribed by the Mandate System had the effect of instituting a European model of sovereignty on non-European states, requiring profound transformations to their internal operations.[197] The model of sovereignty advanced by the Mandate System offered the same representation of self-government to states in Africa as it did to Iraq, without considering the cultural, political and economic uniqueness of each state. In doing so, mandated peoples were trapped in a system that denied them any meaningful control over their own societies and lives. When sovereignty was transferred to mandate peoples, the powers of government and the exercise of governmental functions associated with control over the cultural and political economy was denied to newly sovereign states, exacerbating the structural economic inequalities experienced by non-Western states.[198]

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[194] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 281; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 520.

[195] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40(1) *Harvard Int'l Law Journal*., 1, 20.

[196] Ibid.

[197] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[198] Ibid.

Very significantly, the conferring of quasi-sovereignty on the former mandate territories served the interests of Western states very well, as it allowed them to institute systems of control and management over their former colonies in order to maintain their economic interests in those territories. Sovereignty was therefore conceived of in a new way by League of Nations lawyers, enabling the development of new techniques of control involving law, economics and administration, that facilitated the continued domination of the former colonies of Germany and the Ottoman Empire.[199] While newly sovereign nations were, theoretically, equal in law, in reality a gap remained between the former colonisers and mandated peoples that reflected the distinction between 'civilised' and 'uncivilised' nations and which hence, solidified the notion of the advanced and the backward,[200] identified as a lack of Europeanisation and of progress.[201] As Bedjaoui describes:

> only the form of a legal concept is considered, while its content – the social reality it is supposed to express – is lost sight of. In this view of an international law detached from reality, concepts are not just abstractions but mere artifices and fictions. As a result, no attention at all is paid to the economic and political context, which differs from one State to another according to their degree of development and which governs the application of a concept such as State sovereignty. Yet it is this context which is decisive in giving a concrete meaning to sovereignty – or in denying it any such meaning.[202]

The stark contrast between the mode of sovereignty that was experienced by Western states and mandated territories is laid bare in the economic and political differences between those states, one who enjoyed full economic and sovereign rights and the other whose rights were subordinated and transgressed in order to protect the interests of the former.

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[199] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[200] For example, the Mandate System sought to eradicate certain customs of mandated peoples, including those they considered to be barbaric practices and therefore, not fitting for countries that would eventually become members of the family of nations. See M. Yanaghita, 'The Welfare and Development of the Natives in Mandated Territories' (1923) *Permanent Mandates Commission, Annexes to the Minutes of the Third Session*, League of Nations Doc. A.19 (Annexes) 1923 VI, at 282.

[201] Quincy Wright, *Mandates Under the League of Nations*, New York: Praeger, 1969.

[202] Mohammed Bedjaoui, *Towards a New International Economic Order*, New York: Holmes & Meier, 1979, 5.

*4.5.10 Former Mandates: A Different Form of Sovereignty*

Due to the subjugable and discriminatory characteristics of the type of sovereignty that was imposed on mandate territories,[203] they continued to experience economic and political inequality even after they had achieved independence. Wright's argument that mandated territories were "the object and not the subject of sovereignty"[204] supports the thesis of sovereign inequity, laying bare the inequities that were established by the League of Nations and sustained by an international legal system that recreated colonial relations. Hence, the pursuit of economic policies by Western states rendered former colonies subservient to unequal economic development and created a new form of colonialism, neo-colonialism, where Western powers continued to exert economic dominance, political influence and cultural engineering. The imposition of this inequity, as Chapter Six analyses, was applied in Iraq, with devastating consequences that included the imposition of sanctions, causing the death of half a million Iraqi children[205] and the 2003 invasion of Iraq, where it is estimated that 308,000 deaths are directly attributable to the war.[206]

Viewed through the lens of economic exploitation, the elucidated goal of the Mandate System, that being to promote the "well-being and development"[207] of mandate peoples, and the establishment of self-governing sovereign states was exposed as a fallacy. Rather, the Mandate System devised a set of legal structures and technologies[208] that cemented and normalised the two-tier system of full- and quasi-sovereignty. These structures and technologies further created the fertile conditions for advancement of neo-colonialism,

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[203] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[204] Quincy Wright, *Mandates Under the League of Nations*, New York: Praeger: 1969, 295 cited in Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 623.

[205] In 1999, Richard Garfield, a professor of clinical international nursing at Columbia University, approximated the mortality figure for children under five at 227,000 for the period August 1991 to 1998. He attributed these deaths directly and indirectly to the sanctions. He posed the following question: "Do U.S. officials really wish to assert their moral authority by claiming that "only" 227,000–350,000 children died rather than 500,000?" See Sheldon Richmond, 'Iraqi Sanctions: Were They Worth It?", *Global Policy Forum*, January 2004. Available at: https://archive.globalpolicy.org/component/content/article/170-sanctions/41952.html. Last accessed 28 August 2021.

[206] Neta C. Crawford and Catherine Lutz, 'Human Cost of Post-9/11 Wars', Watson Institute, Brown University, 2019.

[207] Covenant of the League of Nations, Art. 22.

[208] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

thus denying equilibrium to non-Western states whilst also ensuring that Western economic interests continued to be served.

### 4.6 The Legacy of the Mandate System

Chapter Three discussed the way international law played a crucial role in disenfranchising local populations and in establishing the system of economic exploitation, as the rule of law became the means by which the system of economic development was sustained. The Mandate System's comprehensive economic network reduced local populations to a subordinate role within that network and rendered them vulnerable to the economic demands of the international economy, [209] which, as previously discussed, supported the agendas of powerful Western nations. While economic progress itself was not an intolerable development, the newly expanded international legal system, comprising of "norms, policies, standards, regulations, and treaty provisions",[210] resulted in gross economic inequality and subordination in a system that undermined the interests of mandated peoples, and ultimately, their sovereignty.

#### *4.6.1 The Legacy of the Mandate System in the Middle East*

The Mandate System did have some positive aspects, namely the introduction or continuance of public service traditions in the areas of public health and medicine, education, public works and agriculture.[211] However, there are many negative and disastrous aspects to mandatory rule, with consequences that still reverberate in the modern Middle East. The Mandate System was another form of imperialism, carried out by the traditional colonial empires of Britain and France. Rather than liberating the people of the former Ottoman Empire from colonial rule, the Mandate System subjugated the people of the Middle East to Euro-centric colonial powers of Britain and France. The political structures and other societal establishments that were that were put in place by colonial powers were neither robust nor vested in the fabric of society. In post-colonial Iraq and Syria, for example, this would lead to the establishment of state institutions that were not deeply rooted or vested in the society and to which people felt no affiliation. Politics therefore did not represent the interest of a large part of the population of these newly formed countries. The post-colonial narratives of Iraq and Syria have been

[209] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[210] Ibid. at 610.
[211] Peter Sluglett, 'An Improvement on Colonialism? The 'A' Mandates and their Legacy in the Middle East' (2014) 90(2) *International Affairs*, 414.

blighted by instability, the ineffective functioning of institutions of civil society, nepotism and of sectarian violence and terrorism. In relation to Iraq, it was an artificial state with shaky shallow roots that were not vested in society. Britain tried to impose a sense of nationalism and statehood onto the population of the newly formed Kingdom of Iraq, but the people lacked anything resembling a national identity and did not identify with the new state. The plural notions that existed were inconsistent and at odds with the nation-state model of sovereignty and a dominant culture that people could identify with,[212] exhibited through the huge disparities between the Shi'a and Sunni areas and urban and rural societies.[213] However, the nation-state model was doomed to failure given the lack of a homogenous identity. Instead, people turned towards kinship ties, community, religious and tribal roots.[214] These affiliations would remain strong and binding, even when Iraq received its independence in 1932 and decades later, would paly a crucial role in the fragmentation of Iraq's sovereignty (discussed in Chapter Six), an issue that was integral to the rise of Islamic State.

Yet, despite these utterances, the well-being and development of the people of the Middle East and the just treatment of local populations were a secondary concern to the economic benefits that European powers derived from the lands of Mesopotamia and Syria.[215] The civilising process that European powers sought to impose on the people of the Middle East was part of a strategy to incorporate non-European people into the universal but Western-centric system of international law. Hence, the universalising mission of international law was embraced by the League of Nations Mandate System and by Western powers who imposed a model of law, behaviour and political structures based on Western values and culture. It is true to say that the Mandate System and international law sought to create sovereign nations from mandated territories by establishing economic, social and political structure. However, these structures were based on the structure of the European nation-state and renounced the concept and validity, in international law, of non-Western values, and social and political governance. The Mandate System therefore sought to eradicate certain native customs which were not compatible with European civilisation.[216] The imposition of Western values, social

[212] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Yanaghita, 'The Welfare and Development of the Natives in Mandated Territories', *Permanent Mandates Commission, Annexes to the Minutes of the Third Session,* League of Nations Doc. A.19 (Annexes) 1923 VI at 283 (1923).

structures and other institutions of civil society that were put in place by colonial powers were neither robust nor vested in the fabric of society. In post-colonial Iraq and Syria, for example, this would lead to the establishment of state institutions that were not deeply rooted in society and to which people felt no affiliation. Politics therefore did not represent the interest of much of the population of these newly formed countries. It is argued in this thesis that these instabilities are a product of a system of international law that emerged from the colonial experience, and was developed through the Mandate System to produce a new set of technologies and modes of governance[217] that continue to affect the contemporary economic, cultural and societal affairs of Iraq and Syria.

### 4.7 The Mandate System and Contemporary Developments

As previously discussed, when sovereignty was transferred to mandate peoples, the powers of governance and the exercise of governmental functions associated with control over the cultural and political economy was denied to newly sovereign states, exacerbating the structural economic inequalities experienced by non-Western states.[218] The significance and far-reaching consequences of the Mandate System and the type of sovereignty it granted to Iraq can be analysed through the genesis and expression of Iraqi sovereignty and its implications for the modern Iraqi nation-state. The sovereignty granted to Iraq was constructed in order to ensure that Western interests were well served and that Britain would continue to have access to its military and economic interests in Iraq after independence was granted in 1932.[219] As Iraq demonstrate, colonialism was replaced by neo-colonialism where economic interests were placed at the forefront of international law to the detriment of human rights and equality between peoples. The ramifications of this for Iraq was its relegation to a subordinate role in the international system, compounding its quasi-sovereignty status, allowing Western states such as the US and Britain the continuance of their interference into the affairs of Iraq for their own economic benefits. Essentially, Iraq existed in a quasi-sovereign state of exception, subjected to techniques of control and subordination that enabled the dehumanisation of the Iraqi people. For Iraq, and indeed the non-European world, this has had profoundly damaging and long-lasting ramifications.

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[217] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[218] Ibid.
[219] Rashid Khalidi, *Resurrecting Empire: Western Footprints and America's Perilous Path in the Middle East*, Boston, MA: Beacon Press, 2004.

### 4.8 Chapter Conclusions

The significance and consequences of the Mandate System can be understood in a number of ways. The League of Nations and the Mandate System were ground-breaking innovations in the arena on international law and justice. They played a vital role in the creation and administration of the newly formed countries of former Ottoman and German territories. Equally important is the issue of sovereignty, which the countries of Iraq and Syria did achieve, albeit in a different form to that which is enjoyed by Western states. As has been argued in this chapter, the phenomenon of colonialism has provided a vital and enduring legacy that is evident in the formation of international law, which drew a sharp distinguished between Europeans and non-Europeans, enabling the governance of those non-European people through racial discrimination, violence, cultural and religious subordination and economic exploitation. The enduring legacy, which is central to the argument in this thesis, is one of imperial sovereignty that formed the core of the Bush Doctrine (discussed in Chapter Seven) Western interventions (even those deemed to be legal, such as Iraq in 1991 and Libya in 2011). The Mandate System operated with a set of contradictions between promoting self-government and maintaining vested economic interests in mandated territories. Even when former mandate territories were granted independence, they remained under the influence of their former colonisers, as the province of Mosul demonstrates. Britain's strategy in gaining control over Mosul was enabled by the rule of law, which operated to further Britain's economic interests. The period of colonialism by European nations subjected the Middle East to extended periods of subjugation and submission to European powers.[220] The colonisation of the Middle East created a profound and lasting crisis of collective self-esteem, from which, it is arguable, the region has not yet recovered.

The Mandate and State Systems that emerged after World War I were undoubtably a projection of the economic and geopolitical interests of Britain and France, severely disadvantaging the Arab world. As this thesis argues, the consequences of this system of neo-colonialism still reverberate. Although formal colonialism is a thing of the past, it is not true to say that colonialism no longer exists. This is evident in the West's continued influence in the political, economic and military affairs of Iraq and Syria and in the 2003 War on Terror and its disastrous aftermath.[221] Robert Baer provides an interesting

[220] The League of Nations Mandate System awarded Britain with the mandate for Palestine and Iraq; France was given the mandate for Algeria.
[221] Derrek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.

analysis of the continued influence of the creation of the modern states of the Middle East. He argues that the carving out of nation of Iraq, and the forcible division of Syria have been a part of the larger strategy of continued destabilisation of the Middle East, thus necessitating the role of Western powers as peace brokers and indeed, arms suppliers.[222] Such a strategy points to a continuum of the colonisation of the Middle East under the guise of neo-colonialism, where non-European states continue to be economically, socially and culturally subordinated in the international system, positioning them at the margins of international law, existing in a exceptional quasi-sovereign state. This speaks to the metaphysics of power and the reduction of a nation of people to *homines sacri*, placed outside of the law "whose lives were perpetually *au hazard*, at large and at risk, utterly politicized"[223] where they could be harmed and killed without these actions being in breach of the law. The newly formed state of Iraq was granted quasi-, rather than full-sovereignty rights, the purpose of which, as Chapter Six explores, was to ensure the continued exploitation of Iraq's resources and to protect Western economic interests. The practice of using international law to promote a Western agenda during the era of the Mandate System was therefore given new life through another incarnation of colonialism, that of a neo-colonialist influence which was imposed during the first Gulf War (1990-91), the brutal regime of UN sanctions imposed upon Iraq[224] and the 2003 Iraqi invasion.

The narrative of the War on Terror has a complex lineage that harks back into the colonial past of the League of Nations Mandate System and the formation of Iraq. At a time when the people of the Middle East were striving for independence, the economic value of the mandated territories became increasingly important for Western powers, hugely influencing their policies, without any regard for the people living in this region, denying them their full sovereign rights with consequences that reached into the twenty-first century. As this chapter discusses, the state of exception as a space of control and domination continues to influence the mechanisms of international law. This point is engaged with in Chapters Six and Seven in relation to the hundreds of thousands of deaths

[222] During the Iran-Iraq War (1980-1988), the US supplied arms to both Iran and Iraq, although publicly, it supported Saddam Hussein's regime. For a further discussion of this issue see Robins, *The Middle East*, London: Oneworld Publications, 2016. For Robert Baer's analysis see Baer, *See No Evil: The True Story of a Ground Soldier in the CIA's War Against Terrorism*, New York: Three Rivers Press, 2003.
[223] Thomas Carl Wall, 'Au Hazard' in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 31-48.
[224] Derek Gregory, *The Colonial Present*, 2004; Petter Danckwardt, *Conceptualizig ISIS in International Legal Terms – Implications, Crises and Failure of Westphalian Notions of Authority*, Thesis in International Law, Faculty of Law, Stockholm University, 2016.

that were the result of the imposition of UN sanctions on Iraq, and the legal framework of the War on Terror where terror suspects could be subjected to draconian measures, including torture, secret rendition and removal from legal protections, reducing such to Agamben's bare life. Chapter Six also analyses these effects of Western intervention in the Islamic world, i.e. loss of sovereignty and subordination, effects the chapter argues, directly led to the conditions that facilitated and made possible the establishment of the Caliphate of Islamic State in 2014. As this thesis argues, these draconian practices did not cease when former mandated territories were granted independence, but rather continued throughout the 20th and 21st centuries, as Chapter Six details. Although it is now a sovereign country, the War on Terror was utilised by the US to violate Iraq's sovereignty, giving rise to a new type of colonialism – neo-colonialism as a means of protecting economic and political interests. As this chapter surmises, the end of formal colonialism did not result in end of colonial and imperialistic practices, as Section Two of this thesis discusses.

# Part II: Sovereignty and Quasi-Sovereignty:

## The Rise of Islamic State

## The War on Terror

## The Caliphate as a State of Exception

# Chapter Five: Introduction to Part II of the Thesis

## 5. Introduction to Part II

It is the aim of Part II of this thesis to apply the framework that was analysed in Part I to the topics that form the basis of Part II, i.e. the imposition of quasi-sovereignty on Iran, Iraq and Syria, the War on Terror and the rise of Islamic State. The framework includes the Europeanisation of international law, and the political economy of the mandate system that was informed by colonialism and the violation, by the West, of the sovereignty of the non-Western world. As the thesis argues, these issues produced Carl Schmitt's state of exception and Giorgio Agamben's *homo sacer*, highlighting the continued existence of Empire's law. Specifically, the analysis focusses on Iran, Iraq and Syria, as states whose violated sovereignty are central to the rise of Islamic State. The purpose of this chapter is to contextualise the discussion and analysis.

### 5.1 A Contextualisation of Part I

As Part I of this thesis discusses, sovereignty is the right to exercise authority and the assertion of legitimate power. Sovereignty designates that states and peoples stand equal before the law. The principle of non-interference also remains the cornerstone of international law.[1] However, the argument of this thesis is that the doctrine of sovereignty was influenced by the colonial encounter, which established that Western powers had the sole right to decide to whom sovereign status would apply. This determination was inevitably applied in a way which excluded non-European peoples.[2] One such model was that of "legal personality"[3] and its attribution to a potentially sovereign state. European powers decided that non-European peoples could be granted sovereign rights and legal personality, but *only* if they belonged to the Family of Nations.[4] Membership however, was granted according to a set of European norms that created the distinction between

[1] Stephen Krasner, 'Compromising Westphalia' (1995-6) 20(3) *International Security*, 115; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *International History Review*, 569.

[2] James Tully, *Strange Multiplitics: Constitutionalism in the Age of Diversity*, Cambridge: Cambridge University Press, 1995.

[3] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) *32 NYU Journal of Int'l Law & Politics,* 243; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard Int'l Law Journal*, 1; Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies,* 321. See also Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449.

[4] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) *32 NYU Journal of Int'l Law & Politics,* 243.

'civilised' and 'uncivilised' societies. The application of this distinction meant that only European forms of political organisations, and social and cultural norms and practices were deemed to be civilised and hence sovereign,[5] excluding non-European societal structures and configurations from the 'civilised' sovereign community. Their understanding of sovereignty was influenced by the recognition of an international legal community composed of civilised polities who were respectable members of the international community, as opposed to those deemed to be 'uncivilised', placed at the peripheries of the law and beyond the traditional understandings of sovereignty. The international legal system emerged from the law of Christian nations, which barbaric and 'uncivilised' nations, as they were categorised, were prevented from joining. It was a legal system that served to legitimise European colonialism and discriminatory practices where the perceived differences between the 'civilised' European and the 'uncivilised' Indigenous population were entrenched. The law evolved from its Western Judeo-Christian ethos into a system of law that became universally applied. Hence, Christian philosophy occupied a central position in the prevailing world order and the evolution of international law,[6] ignoring other system of law such as Islamic law. The consequence of this was devastating for the non-European world, as the "Christian and enlightenment mission of salvation was … transformed into one of colonial conquest".[7] Essentially, Western nations developed a monopoly on the establishment of the international legal order, denying membership of that legal order to the non-European world, reducing much of the globe to the status of "objects"[8] rather than subjects of international law.

For colonial peoples, sovereignty did not provide a means through which to exercise their authority and power. Rather, it was used by European powers as a means of negating these very rights[9] and as a tool by which to exclude the non-European world from the Family of Nations. "Thus, the family of nations functioned to enshrine a cultural criterion of participation in the making, interpretation, and enforcement of international law".[10] The non-European world was therefore used as a testing facility for European prejudice

[5] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) *32 NYU Journal of Int'l Law & Politics,* 243.
[6] Henry Kissinger, *World Order*: *Reflections on the Character of Nations and the Course of History*, York: Penguin Books, 2014.
[7] Sibd N'Tatioula Grovogui, *Sovereigns, Quasi-Sovereigns and Africans: Race and Self-Determination in International Law*, Minnesota: University of Minnesota Press, 1996, 68.
[8] Starski and Kämmerer, 'Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?' (2016) *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-12,* 2.
[9] Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449.
[10] Ibid. at 459.

and,[11] creating the Other through which European identities, technologies of power and systems of law, including international law, were defined and realised. It is the assertion of the thesis that international law and its institutions were created by European nations and were used to maintain Western hierarchies and to protect Western economic interests. One such institution was the Mandate System, which in theory, worked towards the creation of sovereign states, but in reality, created a form of government and sovereignty in non-European society with the sole purpose of furthering Western interests.[12] Hence, the reduction of mandate territories and peoples into purely economic entities was the crucial and motivating factor that determined full sovereign rights would be denied to colonial peoples. When sovereignty was granted to the non-European world, it was as quasi- rather than full-sovereignty as a means of ensuring the continued economic subordination of these states, even after the official end of colonialism. Hence, the European system of international law and colonialism continued to inform and influence international relations.

The exercise of sovereign power is, according to Schmitt, the state of exception, the "suspension of the entire existing juridical order",[13] "the suspension of rules and conventions creating a conceptual and ethical zero-point from where the law, the norms, and the political order can be constituted".[14] The space in which the law is suspended invokes the *iustitium*, whose literal interpretation means "to bring to a stop, to suspend the *ius*, the juridical order", a judicial vacuum.[15] As Agamben explains, the *iustitium* was not a temporary suspension in the administration of justice, but was rather an abandonment of the law itself.[16] The colonies were a true representation of the *iustitium* a space of exception devoid of the law, as were Concentration camps, where people lived on the peripheries without legal protection. As a theory, the state of exception is informative as a paradigm through with to examine the effects and consequences of violated sovereignty, as Part II of the thesis examines.

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[11] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[12] Ibid.
[13] Giorgio Agamben, "The State of Exception" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 284-297, 289.
[14] Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 301.
[15] Giorgio Agamben, "The State of Exception" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 284-297, 286.
[16] Ibid. See also Giorgio Agamben, "The State of Emergency" (Lecture), available at http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 20 February 2021.

### 5.2 Overview of Part II

The state of exception is the principal theme by which Parts I and II of the thesis are connected. The exclusionary nature of international law and the continued influence of the colonial practices of "cultural subordination and economic exploitation",[17] analysed by Anghie have normalised the marginalisation of non-European world. The discussion in the following three chapters offers an examination of the sustained Western influence and interference in the affairs of the Middle East, in which the normal rule of law has been repeatedly suspended and the principle of sovereign equality has been persistently violated. The actions of the Western world in terms of policy and intervention in the Islamic world is crucial to the evolution of Islamic militancy and the establishment of Islamic State. In Part II, the progress towards the creation of the Islamic State Caliphate is narrated through the history of Western invention in Iran, Iraq and Syria, asserting that the intrusion in these countries is a continuance of Othering, and a reproduction of the state of exception and sovereign exceptionalism. At the core of these intrusions is the promotion of Western economic and political agendas, which continues the production of different forms of sovereignty between the Western and non-Western worlds, full- and quasi-sovereignty. Economic subordination and quasi-sovereignty have therefore operated in tandem to render formal power structures impotent, producing the conditions for the further disintegration of sovereignty, manifesting in the form of fragmented sovereignty, discussed in Chapter Two. Particularly, the 2003 invasion of Iraq and legislative resolutions of the UN Security Council have given way to Empire's law, where international law has been utilised as an instrument of subjugation and as a means of further protecting Western interests. Zones of exception have served Western interests well, from the colonies to the War on Terror. Since the start of the War on Terror much attention has been paid to the exceptional nature of Guantánamo Bay, the extra-judicial prison camp located in Cuba.[18] Guantánamo Bay was specifically established in order to detain terror suspects "in circumstances where law would impose no constraints on the disciplinary regime to which they were subjected".[19] In their book *The Torture Papers:*

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[17] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.

[18] The US naval base at Guantánamo Bay in Cuba has been continuously leased under duress since 1903 from its near neighbour after its inter-colonialist seizure by the US from Spain in 1898. It has proved to be an ideal such space of exception, insofar as it provides absolute US control, with exclusive access controlled by the US military. US law can be enforced there and until 2005, the territory was formally beyond US jurisdiction and recourse to the rule of (US) law.

[19] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41, 42.

*The Road to Abu Ghraib*, Greenberg and Dratel document the abuse of detainees in Guantánamo Bay, Baghram Airbase, Afghanistan and Abu Ghraib, Iraq. The torture memos and reports, which comprise of over 1000 pages, catalogue the ill-treatment and torture of detainees during the War on Terror[20] and chronicle the abandonment of the principles of international and human rights law. The establishment of these spaces of exception had three objectives:

(i) the desire to place the detainees beyond the reach of any court or protections afforded under international law;

(ii) the desire to abrogate the Geneva Convention with respect to the treatment of prisoners; and

(iii) the desire to absolve those implementing the policies of any liability for war crimes under US and international law.[21]

Similarly, the practice of exceptional rendition, which saw the US administration transport terror suspects "to countries whose laws are more permissive than those of the United States concerning the use of torture"[22] demonstrated a willingness by the Bush administration to transgress the law. The transgressions were not confined to the treatment of detainees however. The use of pre-emptive force against 'rogue states' and the objective of the US to metamorphose Middle Eastern countries into democracies with Western friendly governments speak to the continuance of Empire's Law. These practices resemble the 19th century imperial venture, the primary concern of which was economic and political gain and which, as the War on Terror demonstrates, has not been consigned to the history books. Rather, economic and political imperialism remains part of hegemonic international legal system.[23] What is missing from the academic debate on the issues stated above is an examination of the consequences of these actions, namely, as identified in this thesis, the rise of Islamic State and the establishment of the Caliphate in 2014.

[20] Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib*, Cambridge: Cambridge University Press, 2005.
[21] Joshua Dratel, "The Legal Narrative" in Karen Greenberg and Joshua Dratel (eds), *The Torture Papers: The Road to Abu Ghraib*, Cambridge: Cambridge University Press, xxi-xxiii, xxi.
[22] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41, 42.
[23] Detlev Vagts, 'Hegemonic International Law', (2001) 95 *AJIL*, 843

### 5.3 The Islamic State as a State of Exception

The discussion in this thesis has thus far asserted that sovereignty functions at different levels in international law driven by economic and political agendas, i.e. full-sovereignty and quasi-sovereignty. It has also been argued that the Middle East acquired a different form of sovereignty than that which applies in the Western world, gaining instead a type of sovereignty that was influenced by the colonial experience and the 'civilised'/'uncivilised' distinction that existed between people. In establishing a Caliphate in 2014,[24] where it enforced its own interpretation of *Shari'a* law,[25] Islamic State rejected the universal application of a Western-centric system of law and the states of exception that were created through its (mis)use. Yet, ironically the Caliphate also existed outside of the normal state of international law, where coercive force and brutality were used to control territory and populations, and where Islamic State exercised its own version of sovereignty, to establish its own state of exception. Yet, is true to consider the Islamic State Caliphate as a representation of the *iustitium*, as an abeyance of the *ius*, the judicial order, comparable with prior instances of the state of exception and h*omo sacer*? This question is considered in Chapter Six. The establishment of the Caliphate as an alternative to Westphalian notions of sovereign states is a very useful case study, as its founding challenged conventional understandings of sovereignty and statehood. For example, did the Caliphate qualify as a sovereign state according to the Montevideo Convention?[26] This raises very interesting and lingering questions about the application of sovereignty in international law, namely, who qualifies as a sovereign state and to whom does sovereignty belong?

[24] At the height of its powers in 2015, Islamic State had control of a third of Syria and 40 percent of Iraq, encompassing an area that extended from western Iraq to eastern Syria. See 'Timeline: The Rise, Spread and Fall of Islamic State', *Wilson Center*, 28 October 2019. Available at: https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state. Last accessed 28 April 2021.

[25] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

[26] The *Montevideo Convention on the Rights and Duties of States***,** signed at Montevideo, Uruguay, on December 26, 1933 (and entering into force the following year), that established the standard definition of a state under international law. The Convention stipulates that all states are equal sovereign units consisting of a permanent population, defined territorial boundaries, a government, and an ability to enter into agreements with other states. Among the Convention's provisions were that signatories would not intervene in the domestic or foreign affairs of another state, that they would not recognize territorial gains made by force, and that all disputes should be settled peacefully.

# Chapter Six: Sovereignty, Quasi-Sovereignty and the Rise of Islamic State

## 6.0 Introduction

On the first day of Ramadan 1435 – 28 June 2014 in the Gregorian calendar - Abu Bakr al-Baghdadi, the self-proclaimed Caliph, announced the newly formed Caliphate of the Islamic State.[1] The group identified itself as the Sunni protector of Islam and as a defence against colonialism. A propagandist English-language video titled *Breaking the Border* showed a bulldozer breaching the sand barrier demarcating the colonial borders that were imposed by the Sykes-Picot Agreement in 1916-1917, discussed in detail in Chapter Four. The purpose of the video was to demonstrate that the dominance of the West had been broken and that Islamic State was not an aberration, as its motto *baqiyah wa-tatam-madad* (remain and expand) indicated. The video advocated for jihadists to destroy all colonial borders in the Levant and to destabilise the governments of the Middle East through brutal violence.[2] The spokesperson also declared the aspiration of Islamic State to expand its influence across Iraq, Syria, Jordan and Lebanon until they reached "al-Quds, inshallah' (Jerusalem, God willing)".[3]

The emergence of the Islamic State came at a time when the Middle East was embroiled in political turmoil and the Arab Spring that began in Tunisia in December 2010 and spread across the Middle East.[4] Iraq and Syria experienced political, social and economic

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[1] Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015. Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution*, London, New York: Verso, 2015; Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017. For a discussion of Islamic State's relationship with al-Qaeda, see Oliver Holmes, 'al-Qaeda Breaks Links with Syrian Militant Group ISIL', *Reuters*, 3 February 2013. Available at: http://www.reuters.com/article/us-syria-crisis-qaeda-idUSBREA120NS20140203. Last accessed 16 July 2021.

[2] Abu Bakr Naji, *The Management of Savagery: The Most Critical Stage Through Which the Umma Will Pass* (William McCants, trans.), Cambridge, MA: John M. Olin Institute for Strategic Studies at Harvard University, 2006.

[3] *ISIS – The End of Sykes-Picot', presented by the spokesperson Abu Saffiya from Chile* (29 June 2014). Available at: https://www.youtube.com/watch?v=TxX_THjtXOw. Last accessed 14 January 2021.

[4] "The Arab Spring was a movement of protests and civil wars started from Tunis on December 18, 2010 and extended all over the Arab world. It was against the long-term despotic rules of the authoritarian rulers, continuous state of emergency in which Police and the Interior Ministry had excessive powers to crush the people, unemployment, poverty, inflation, etc. Social media was used in all countries where there these protests took place to get the attention of world community. All the regimes which were affected by the Arab Spring used their powers vehemently to crush the demonstrators and consequently the peaceful protesters also became violent."[4] See Qadir Mushtaq and Muhammad Afza, 'Arab Spring: Its Causes and Consequences' (2017) 30(1) *JPUHS*, 1, 1. The common slogan of the protesters throughout Arab Spring was "the people want to bring down the regime". See Aissa, *The Arab Spring: Causes, Consequences, and Implications*, Pennsylvania: U.S. Army War College, 2012 cited in Abdul Qadir Mushtaq and Muhammad Afza, 'Arab Spring: Its Causes and Consequences' (2017) 30(1) *Journal of the Punjab University Historical Society*, 1, 1.

fragmentation, the consequence of which was the disintegration of society and the fragmenting of sovereignty. Amid the increasing chaos and poverty, where people's basic needs of food, shelter and security were not met, Islamic State emerged and thrived to advance its interpretation of *jihad*,[5] through which a war would be waged against heretics and infidels in accordance with the principles of *Salafism* and *Wahhabiyysm.* A decade before the Islamic State declared it had established a Caliphate, jihadist strategist Abu Bakr Naji published a document detailing a comprehensive approach to the pursuit of *jihad* and the foundation of an Islamic Caliphate, entitled *Management of Savagery.*[6] Naji urged persistent violent action directed towards the instigation of instability so as to create a zone of conflict which states, both Western and non-Western, would prove incapable of

[5] "*Jihad,* meaning "to struggle" is rooted in the *Qur'an*'s command "to struggle or exert" oneself in the path of God. It primarily means the obligation of all Muslims, individuals and the community, to do God's will: to lead a virtuous life, struggle against the evil in oneself, make a serious effort to do good works and help to reform society. Depending on the circumstance in which one lives, *jihad* can also mean fighting injustice and oppression, creating a just society through preaching and teaching and, if necessary, engaging in armed struggle to defend one's community and religion. These multiple meanings continue to exist across the Muslim world". See John L. Esposito, and Dalia Mogahed, 'Battle for Muslims' Hearts and Minds: The Road Not (Yet) Taken' (2007) 14 *Middle East Policy*, 27, 33. There are multiple meanings of *jihad* across the Muslim world, as a worldwide Gallup Poll reveals: "Please tell me in one word (or a very few words) what *'jihad'* means to you." Personal definitions of *jihad* included (in decreasing order of frequency) references to: "a commitment to hard work" and "achieving one's goals in life"; "struggling to achieve a noble cause"; "promoting peace, harmony or cooperation, and assisting others"; and "living the principles of Islam." In four Arab nations (Lebanon, Kuwait, Jordan, and Morocco), the most frequent response was: "duty toward God", a "divine duty", or a "worship of God". In four non-Arab countries (Pakistan, Iran, Turkey, and Indonesia), a significant minority reported - "sacrificing one's life for the sake of Islam/God/a just cause", or "fighting against the opponents of Islam" and in Indonesia, it was expressed by a majority. See John L. Esposito, and Dalia Mogahed, 'Battle for Muslims' Hearts and Minds: The Road Not (Yet) Taken' (2007) 14 *Middle East Policy*, 27, 33. The *Qur'an* offers contradictory guidance on when *jihad* is justified in the sense of holy war. Early *Qur'an*ic verses delivered while the prophet Mohammed was still in Mecca, conveyed a personal struggle to overcome instincts and passions and urged the spreading of Islam through non-violent means only. See Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004. "There is no compulsion in religion, for the right way is clear from the wrong way" (2:256). See Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin, 2015, 37. However, the later chapters, promulgated in Medina when Mohammed had become a head of state, speak to a fight against the unbelievers to defend the lands of Islam: "Fight and slay the pagans wherever ye find them and seize them, beleaguer them and lie in wait for them" (9:5). See Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin, 2015, 37. These later verses were collectively known as the 'Sword verses' and were considered by Muslim clerics to abrogate the earlier less violent verses. See Tom Holland, *In the Shadow of the Sword: The Battle for Global Empire and the End of the Ancient World*, Boston: Little, Brown, 2014. This understanding of Islam was adopted by the Muslim Brotherhood in the 1920s. Their slogan stated: "Allah is our way; the Prophet is our leader; the Koran is our law; *jihad* is our way; dying in the way of Allah is our highest hope". See Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin, 2015, 38. It was also through this understanding of Islam that the young fighters in Afghanistan referred to themselves as *mujaheddin* or "holy warriors". Many of the *mujaheddin* grew up in the refugee camps on the border with Peshawar in north-west Pakistan. They were affected by the occupation and militarisation of Afghanistan during the Soviet-Afghan war. Although they were from different groups and factions in Afghanistan, their shared faith and experiences in the refugee camps instilled in them a resolve to end the occupation of Afghanistan by infidels. See Roxanne Euben, "Killing (for) politics: *jihad*, martyrdom and political action" (2002) 30 *Political Theory*, 4; John Esposito, *Unholy War: Terror in the Name of Islam*, Oxford: Oxford University Press, 2002. Valentine Moghadam, "Patriarchy, the Taliban and the politics of public space in Afghanistan" (2002) 25 *Women's Studies International Forum*, 19; Derek Gregory, *The Colonial Present*, London: Blackwell Publishing, 2004.

[6] Abu Bakr Naji, *The Management of Savagery: The Most Critical Stage Through Which the Umma Will Pass,* (William McCants, trans.), Cambridge, MA: John M. Olin Institute for Strategic Studies, 2006.

managing. Naji considered that the ensuing chaos would polarise different communities, pushing large segments of the population towards the jihadists for protection. Islamic State drew on Naji's jihadist strategy, employing this strategy in Syria and Iraq to provoke a bloody conflict between the Shi'ites and Sunnis[7] and in Europe, to encourage social fragmentation.

The story of Islamic State did not begin in June 2014 however, with the declaration of the new Caliphate, stretching across Eastern Syria and north-western Iraq. Rather, this thesis argues, its narrative reaches back to the fall of the Ottoman Empire and the end of the reign of the last caliph, Abdullmejid II, following World War I. For the supporters of the new Caliphate, its establishment across a significant swathe of the Middle East restored Muslims to the position of dominance and power of former Islamic Empires. By establishing the Caliphate, Islamic State rejected the Western-centric hegemonic system of international law and the consequences this system of law has had for the Middle East.

In order to understand the emergence of Islamic State it is necessary to examine the context and environment from which the group emerged. This speaks to the sustained subordination of the Islamic world by Western nations who sought to impose their own political and economic agendas, and to a rejection of such interventionalist policies that engaged in the process of Othering, which was discussed in detail in Chapter Two. It is the aim of this chapter to consider the effects of Western intervention in the Islamic world, considering the establishment of the Islamic State Caliphate as part of a complex plurality of events. Section 6.1 analyses the violation and reinterpretation of sovereignty in the Islamic world by Western nations, producing quasi- rather than full- sovereign rights. Section 6.2 examines the specific events that led to the production of quasi-sovereignty, namely the 1953 CIA-coup in Iran, the Iran-Iraq War (1980-88), the Gulf War (1990-91) and the UN sanctions imposed on Iraq. Section 6.3 examines the importance of Afghanistan to the formation of Islamic State and its interpretation of *jihad*. Section 6.4 engages in a review of the 2003 Iraqi invasion and its aftermath, including the Iraqi insurgency and the imposition of the de-Ba'athification laws. Section 6.5 examines how the fragmentation of Iraq's and Syria's sovereignty and their redefined political organisation is integral to understanding the rise of Islamic State: Iraq following the 2003 War, and Syria as a consequence of the Arab Uprisings in 2011 and the ensuing civil war.

[7] John Turner, 'Manufacturing the *Jihad* in Europe: The Islamic State's Strategy' (2020) 55(1) *The International Spectator*, 112.

In order for Islamic State to emerge, domestic conditions, such as the disintegration of society and fragmented sovereignty, must already have been present. The discussion in this chapter examines the events that led to such fragmentation and disintegration, arguing that each event is marked by the 'civilised'/'uncivilised' distinction that continues to inform international law, the use of which remains a persistent feature of the discipline in order to further imperialistic policies.

### 6.1 The Complex Narrative of Islamic State

The abject failure of the Iraqi and Syrian states assists in understanding the extraordinary rise of Islamic State, growing into a multi-national force of militants that defeated the armies of those states, allowing the group to occupy and control vast territories in Iraq and Syria.[8] It was in these chaotic spaces that Islamic State was able to impose their autonomy and to develop a ferociously loyal support base.[9] However, this did not occur in a vacuum. Domestic conditions, such as the disintegration of society and the fragmenting of that society's sovereignty must already have been in place for these groups to emerge (fragmented sovereignty is discussed in detail in section 6.4). Both situations are representations of Western hegemony and violated sovereignties, where spaces of exception are produced through the operation of sovereign power, at the point where the law suspends itself. In this space, state authority is replaced by quasi- and fragmented sovereignties (analysed in section 6.4.2), enabling groups like Islamic State to emerge from the ensuing chaos. While much of the blame for the rise of the militant group is focussed on Sykes-Picot agreement (discussed in Chapter Four) this narrative obscures a far more complex story, one that is woven throughout the 20th and 21st centuries. The rise of Islamic State pivots around the September 11 2001 attacks, an event that is central to its establishment and one whose origins can be traced to the colonial past of the 'civilised'/'uncivilised' distinction that emerged from the colonial experience. As Chapters Two, Three and Four discussed, this distinction has been sustained by the international legal framework. The genealogy of the attacks includes the evolution of an international legal regime that emerged out of the confrontation between European and non-European worlds (Chapter Three) where the universalisation of international law was based upon Western norms and values which ignored other systems of law, including Islamic law. The role of the *mujahideen* in Afghanistan (section 6.3) also form an

[8] Kashif Mumtaz, 'ISIS: Assessment of Threat for Afghanistan' (2016) 36(1) *Pakistan Strategic Studies*, 1.
[9] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

important part of the narrative of September 11. Without question, the attacks of September 11 provided the springboard from which Islamic State evolved into a vast Caliphate. That episode is part of a lineage of events – the CIA (Central Intelligence Agency) coup against the democratically elected Prime Minister of Iran; the establishment of the Islamic Republic of Iran; the Iran-Iraq War (1980-1988) and the Gulf War (1991), discussed below in section 6.2. The US-led invasion of Iraq and the War on Terror, episodes that occurred in response to September 11 are also privileged events in the narrative of Islamic State. The common and binding theme relevant to each and every country and episode discussed in this chapter, is the violation and abuse of their sovereignty by Western powers as a display of Western imperialism. What each event has in common with the other is that they are representations of violated sovereignty and of an evolution from direct colonial rule of the Middle East to the continued indirect control that the West continues to exert over the region, through neo-colonialism, discussed in detail in Chapter Four.

### 6.2 The Violation of Sovereignty and the Production of Quasi-Sovereignty

From the British governance of Iraq from 1920 to its participation in the 2003 invasion, the continued presence of colonialism in Iraq has been articulated, not least by the arbitrary 'line in the sand' drawn through the Middle East by Britain and France following World War I.[10] The 2003 Iraqi invasion was possible because Iraq already existed as a quasi-sovereign state, due to the machinations of League of Nations Mandate System, which dictated the form of sovereignty that Iraq was granted upon its independence in 1932. This section begins with an examination of the CIA-coup against the democratically elected Prime Minister of Iran, Mohammed Mossadegh.[11] Each of the events listed above,[12] without which the subsequent events would not have occurred, are essential to the narrative of Islamic State's formation and speak to the Western-centric nature of international law that was used as a political instrument of control. The two-tiered system of sovereignty that emerged out of the League of Nation's Mandate System, reflecting the economic and geostrategic interests of Britain and France,[13] continued

[10] Caroline Finkel, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923*, New York: Basic Books, 2007.

[11] Since 2001, the United States has intervened militarily in seven predominately Muslim countries: Afghanistan, Iraq, Somalia, Yemen, Pakistan, Libya and Syria. See Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd, 2017.

[12] The CIA Iranian coup; the Iran-Iraq War (1980-1988); the Gulf War (1991); the US-led invasion of Iraq and the rise of Islamic State.

[13] Caroline Finkel, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923*, New York: Basic Books, 2007.

throughout the twentieth and into the twenty-first centuries, severely disadvantaging the Arab world. At the core of these violations and abuse of sovereignty is the issue of economics and oil – specifically, the securing of Middle Eastern oil supplies by the US. The practices of "cultural subordination and economic exploitation",[14] (discussed in Chapter Four) which were essential aspects of colonialism,[15] have continued to resonate producing "the ever-expanding reach of an international law positioned as superior to national law, intervening, often violently, to maintain an unfavourable and asymmetric *status quo* in the name of idealised economic, political, and social models that cast themselves as universal".[16] The discussion below explores the expanding reach of international law through the production of neo-colonialism in the Middle East.

Each of the events listed above articulate a penetration of border and a violation of sovereignty against the wishes of the rulers. These are Agamben's spaces of exception where the loss of sovereignty lead to the exclusion of individuals from political and social life and where individuals could be killed with impunity, producing *homines sacri*. The irony of this is thus; Islamic State emerged from a chaotic space of exception where sovereignty was eroded due to actions of the West. The establishment of the Caliphate was a rejection of Western colonialism and colonial borders, yet its version of sovereignty also produced a space of exception where individuals were excluded from political and social life, were killed with impunity and were physically and sexually abused, producing yet more *homines sacri*. This forms the basis of the discussion in Chapter Eight.

The following discussion focusses on the influence of and interference by the West in the affairs of the Middle East. The actions of the Western world in terms of its intervention in the Islamic world and the policies that were enforced there is crucial to the evolution of Islamic militancy and the establishment of Islamic State. The interference and influence of the West in the aftermath of World War I exploited the principle of sovereignty which enabled Western nations to further their own political and economic agendas, that, according to NATO Secretary-General Javier Solana "produced the basis

[14] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.
[15] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[16] Sundhya Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality*, Cambridge: Cambridge University Press, 2011.

for rivalry, not community of states; exclusion, not integration."[17] This reinterpretation of the principle of sovereignty resulted in its fragmentation in Islamic countries leading to the wider fragmentation of these societies, the consequences of which are examined below. How did the production of quasi-sovereignty lead to the rise of Islamic State however? This question is examined in relation to the production of Empire's law, introduced in Chapter Four. Empire's law, grounded in the colonial experience, continues to serve Western interests and is representative of a reinterpreted form of sovereignty, in which Empire is the political mechanism that controls the international economic and political agenda and sovereign power is that which governs international relations.[18] The following discussion appraises this complex issue, as a representation of Empire's law and the far-reaching consequences of its abuse, beginning with an examination of CIA-coup in Iran when the United States actively interfered in Middle Eastern politics.

At first glance, it might appear that Iran could not possibly have anything to do with the rise Islamic State and the Caliphate. Iran is a predominately Shi'a country, whereas members of Islamic State are devout Sunni Muslims, who consider Shi'a Muslims as infidels. Yet, as the following discussion reveals, the Iranian coup was the springboard from which a litany of events unfolded, culminating, it is argued, in the establishment of the Islamic State Caliphate. Central to this argument is the revival of Islamic resistance movements that the Iranian Coup inspired, which coincided with and strengthened a resurgence of resistance in the wider Islamic world, notably the 1952 coup in Egypt,[19] against European imperialism.[20] One of the most notable and influential Islamist ideologues to emerge during this time was Sayyid Qutb (who is discussed in detail in Chapter Eight),[21] who compared European imperialism to the Crusades against Islam and who wrote of the resurrection of the Caliphate as a theocracy where *Shari'a* law was strictly enforced and through which the Islamic world could be rescued from European imperialism. Qutb's political views inspired Osama bin Laden and were adopted by and

[17] Javier Solana, *Symposium on the Continuing Political Relevance of the Peace of Westphalia: Securing Peace in Europe*, North Atlantic Treaty Organisation, Munster, November 12, 1998. Available at: https://www.nato.int/docu/speech/1998/s981112a.htm. Last accessed 19 February 2021.
[18] Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449.
[19] Paul Berman, 'The Philosopher of Islamic Terror', *The New York Times Magazine*, 23 March 2003. Available at: https://www.nytimes.com/2003/03/23/magazine/the-philosopher-of-islamic-terror.html. Last accessed 11 January 2022.
[20] Ibid.
[21] Robert Manne, 'Sayyid Qutb: Father of Salafi Jihadism, Forerunner of the Islamic State', *ABC Religious and Ethics*, 7 November 2016. Available at: https://www.abc.net.au/religion/sayyid-qutb-father-of-salafi-jihadism-forerunner-of-the-islamic-/10096380. Last accessed 11 January 2022.

adhered to by Islamic State.[22] Islamic State's adoption of Qutb's theocracy emphasised the integral position of religious ideology, radicalisation and crucially, *jihad* to the cause of resistance and to the overthrow of Western imperialism. Resistance movements, which gained momentum following the Iranian Coup, and the emergence of leaders such as Sayyid Qutb therefore occupies a pivitol role in the establishment of the Caliphate in 2014. It is therefore pertinent to examine the circumstances of the Coup and its wide-ranging and long-lasting ramifications.

### *6.2.1 Iran as a State of Exception*

Iran is an important part of the narrative of the rise of Islamic State. Its violated sovereignty, through the 1953 CIA-coup (discussed in section 6.2.2) played a very significant role in this narrative. Without it, the 1979 Islamic Revolution, which propelled the Ayatollah Khomeini to power, would not have happened, an assertion that is discussed below. The purpose of the CIA-coup, codenamed TPAJAX, against Iran's Prime Minister, Mohammed Mossadegh, Iran's 35th Prime Minister, who held office from 1951 until 1953, was firmly to preserve the Shah's power and to protect Western control of the highly profitable Iranian oil industry.[23]

### *6.2.2 The CIA-Coup Against Prime Minister Mohammed Mossadeq*

The following is a transcript of a CIA document from 1953:

*Campaign to Install Pro-Western Government in Iran Authority*

**Target**

Prime Minister Mossadeq and his government

**Objectives**

Through legal, or quasi-legal, methods, to affect the fall of the Mossadeq government; and

To replace it with a pro-western government under the Shah's leadership, with Zahedi as its Prime Minister.

[22] Sumaia N. Masoom, 'A Colonial Catalyst: Reverberations of the Sykes-Picot Agreement in the Rise of ISIS' (2016) 8(11), *Inquiries Journal*, 1. Available at: http://www.inquiriesjournal.com/articles/1494/a-colonial-catalyst-reverberations-of-the-sykes-picot-agreement-in-the-rise-of-isis. Last accessed 12 January 2022.

[23] Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror*, New York: John Wiley and Sons, 2003.

**CIA Action**

Plan of action was implemented in four phases:

1. [Censored] (…) to strengthen the Shah's will to exercise his constitutional power and to sign those decrees necessary to affect the legal removal of Mossadeq as Prime Minister;
2. Welded together and co-ordinated the efforts of those political factions in Iran who were antagonistic towards Mossadeq, including the powerfully influential clergy, to gain the support and backing of any legal action taken by the Shah to accomplish Mossadeq's removal;
3. [Censored] (…) disenchant the Iranian population with the myth of Mossadeq's patriotism, by exposing his collaboration with Communists and his manipulation of constitutional authority to serve his own personal ambitions for power;

[Censored] (…) Simultaneously, conducted a 'war of nerves' against Mossadeq designed to reveal to Mossadeq and to the general populace that increased economic aid would not be forthcoming and that the U.S. viewed with alarm Mossadeq's policies:

a. A series of public statements by high U.S. officials, implying that there was little hope that Mossadeq could expect increased U.S. aid;
b. U.S.press and magazine articles which were critical of him and his methods; and
c. [Censored] (…) absence of the American ambassador, lending credence to the impression that the U.S. had lost confidence in Mossadeq and his government (…).[24]

The CIA-coup is important to examine, as it demonstrates the often ruinous influence that the West has exerted on the Islamic world. The coup was in direct violation of Iran's sovereignty and of Article 2(1) of the UN Charter.[25] The two-tiered system of sovereignty or quasi-sovereignty that was fostered and promoted by the Mandate System was extraordinarily articulated through the 1953 Iranian *coup d'état*. The role of the US in the coup was confirmed by President Obama in 2009 in a speech delivered in Cairo. Here he admitted that "in the middle of the Cold War, the United States played a role in the overthrow of a democratically elected Iranian government".[26] Mossadegh's government espoused populist ideology and nationalist views, particularly regarding the nationalisation of Iranian oil, posing a threat to Western economic and geopolitical

[24] National Security Archive, George Washington University, Electronic Briefing Book. No. 435, 19 August 2013. Document 2: CIA, Summary 'Campaign to install pro-western government in Tehran', draft of internal history of the coup, undated cited in Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017, 5-6.
[25] Charter of the United Nations, 1945, Art. 2(1).
[26] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017, 7.

interests. The potential loss of the monopoly over Iranian oil occurred at the time when Britain had lost control of India, and the US President Eisenhower, who had branded Mossadegh as a communist, was determined to stop the spread of communism and to defend democratic governments threatened by Moscow.[27]

*6.2.3 Britain's Iranian Oil Interests*

Although Iran was not officially a colony or a protectorate of Britain, it was heavily controlled by Britain who severely undermined its sovereignty, essentially operating as a *de-facto* British colony. Stephen Krasner provides an insight into the concept of sovereignty, identifying four key aspects of it i.e. international legal sovereignty, Westphalian sovereignty, domestic and interdependence sovereignty.[28] Certainly, Westphalian sovereignty (the exclusion of external influences from another's territory)[29] and domestic sovereignty (the capacity to exercise political authority in a given territory)[30] are particularly relevant to Iran. Through its monopoly over the Iranian oil industry, Britain violated Westphalian notions of sovereignty relating to the exclusion of external influences from another's territory and the authority and equal sovereignty of States,[31] quashing any ambitions by Iran to exercise its political authority in order to secure a more equitable distribution of the profits from the Iranian oil industry.

The Anglo-Persian Oil Company (APOC), a British company, was founded in 1908 in Iran.[32] The British government enjoyed a monopoly on the Iranian oil industry, having been granted an exclusive licence by the Anglo-Persian Oil Company (APOC) to extract petroleum.[33] Oil production in Iran under the control of Britain was its largest investment abroad and crucial to its foreign trade.[34] In 1935, the APOC was renamed the Anglo-

[27] Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror*, New York: John Wiley and Sons, 2003.
[28] Stephen D. Krasner, *Power, the State, and Sovereignty: Essays on International Relations*, Oxon: Routledge, 2009.
[29] Charter of the United Nations, 1945, Art. 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
[30] Charter of the United Nations, 1945, Art. 2(1).
[31] Charter of the United Nations, 1945, Art. 2(1).
[32] See *BP and Iran: The Forgotten History*. Available at: https://www.cbsnews.com/news/bp-and-iran-the-forgotten-history/. Last accessed 19 July 2021.
[33] Jonathan Kuiken, 'Caught in Transition: Britain's Oil Policy in the Face of Impending Crisis, 1967–1973' (2014) 39(4) *Historical Social Research / Historische Sozialforschung*, 272.
[34] Rüdiger Graf (trans. Alex Skinner), *Oil and Sovereignty: Petro-Knowledge and Energy Policy in the United States and Western Europe in the 1970s*, New York and Oxford: Berghahn, 2018.

Iranian Oil Company (AIOC)[35] when the Shah of Iran, Reza Shah Pahlavi, formally requested that foreign powers refer to Persia by its internal name, Iran.[36] In the years between its foundation and the beginning of World War Two, Britain benefitted from around £800 million of oil profits, while Iran, the owner of the oil, received just $105 million.[37] It prompted Winston Churchill to describe the AIOC as "a prize from fairyland beyond our wildest dreams".[38] Churchill's comment speaks directly to argument of the thesis, that the violation of sovereignty in the Middle East is directly attributable to the desire of Western states to protect their very lucrative economic interests. The following year, in March 1951, Mossadegh became Prime Minister. The British government was alarmed by the threat that Mossadegh and his government now posed to the lucrative Iranian oil revenue from which they had benefited for decades. Mossadegh's nationalisation of the AIOC and it renaming to the National Iranian Oil Company marked the decline of Britain's colonisation of Iranian oil.

In a speech delivered on 21 June 1951, Mosaddegh justified his policy to nationalise Iran's oil industry by claiming the state was "the rightful owner..." of all the oil in Iran,[39] a declaration that alarmed Britain:

> Our long years of negotiations with foreign countries… have yielded no results this far. With the oil revenues we could meet our entire budget and combat poverty, disease, and backwardness among our people. Another important consideration is that by the elimination of the power of the British company, we would also eliminate corruption and intrigue, by means of which the internal affairs of our country have been influenced. Once this tutelage has ceased, Iran will have achieved its economic and political independence.[40]

In a spectacular display of the complete disregard for Iranian sovereignty, Mossadegh was removed by the CIA-coup, imprisoned for three years and then placed under house arrest until his death in March 1967. His supporters were arrested, imprisoned and tortured. Britain accused Mossadegh of contravening the AIOC's legal rights and, in response, organised a world-wide boycott of Iran's oil, thrusting the country into a

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[35] The AIOC was the forerunner to British Petroleum (BP), which was formed in 1953 and is still a massive global oil company.
[36] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea),* Devon: Old Street Publishing Ltd., 2017.
[37] Ibid.
[38] Ibid. at 8.
[39] Stuart Littlewood, 'No Apology for Iran, Just Demonization', *The Palestine Chronicle*, November 17, 2011. Available at: https://www.palestinechronicle.com/no-apology-for-iran-just-demonization/. Last accessed16 July 2021.
[40] Stuart Littlewood, 'No Apology for Iran, Just Demonization', *The Palestine Chronicle*, November 17, 2011. Available at: https://www.palestinechronicle.com/no-apology-for-iran-just-demonization/. Last accessed16 July 2021.

financial crisis.[41] The Iranian economy was in ruins. Commenting on his fate, Mossadegh said:

> My greatest sin is that I nationalized Iran's oil industry and discarded the system of political and economic exploitation by the world's greatest empire… With God's blessing and the will of the people, I fought this savage and dreadful system of international espionage and colonialism. I am well aware that my fate must serve as an example in the future throughout the Middle East in breaking the chains of slavery and servitude to colonial interests.[42]

Why is the Iranian oil industry, the coup against Mohammed Mossadegh and the ruination of the Iranian economy important to the narrative of the rise of Islamic State? Iran is a Shi'a country, whereas members of Islamic State are devout Sunni Muslims, who consider Shi'a Muslims as infidels. Therefore, at first glance, it would appear that Iran could not possibly have anything to do with the rise Islamic State and the Caliphate. Yet, as the following discussion reveals, the Iranian coup was the catalyst from which a litany of significant events in the narrative of Islamic State unfolded that culminated in the establishment of the Caliphate.

### *6.2.4 The Shah of Iran*

Following the coup against Mossadegh, Mohammad Reza Pahlavi was reinstated as the Shah of Iran. For the next twenty-six years, until the establishment of the Islamic Republic of Iran following the Islamic Revolution of 1979, the Shah ruled Iran as a friend of the Western world,[43] and very much under the control of the US.[44] Iran became an important ally to Israel and allowed the US to use its territory as a military support base. The Shah used the SAVAK,[45] the Iranian secret police force, domestic security and intelligence service, to quash nationalist, leftist movements throughout Iran and the Islamic world.[46] The SAVAK was funded by the US and trained by both the US and Israel.[47] The main beneficiaries of the Shah's rule were the tiny upper-class elite, foreign corporations and Western nations, whose political and economic agendas were met by

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[41] Dan De Luce, 'The Spectre of Operation Ajax, *The Guardian*, 20 August 2003. Available at: https://www.theguardian.com/politics/2003/aug/20/foreignpolicy.iran. Last accessed 19 July 2021.
[42] Mossadegh in military court after the coup as quoted in M. Movahed, *The Uneasy Dream of Oil: Dr. Mossadegh and the National Iranian Movement*, Tehran: Karhameh, 2008, 119.
[43] Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror*, New York: John Wiley and Sons, 2003.
[44] Emmit B. Evans,' Iraq and the New American Colonialism' (2003) 1(2) Article 10 *Moebius*, 46.
[45] SAVAK was Iran's most feared institution during the reign of the Shah, engaging in the systematic torture and execution of opponents of the Shah and his regime.
[46] Stephen Kinzer, *All the Shah's Men: An American Coup and the Roots of Middle East Terror*, New York: John Wiley and Sons, 2003.
[47] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017.

the Shas's pro-Western policies. Against this backdrop, the mosques grew into strongholds of opposition to the Shah, under the leadership of Ayatollah Khomeini, who directed the resistance movement from exile in Iraq and then Paris. Commenting on the rise of support for the Ayatollah, Evans stated, "Rebelling against the corruption and abuses of the Shah's American-backed regime, the popular Iranian revolution of 1979 brought the fundamentalist Ayatollah Khomeini to power, and placed the military and police hardware supplied to the Shah in the hands of fiercely anti-American forces".[48] The Islamic Republic of Iran was established following the revolution of 1979 (the same year as the Soviet Union invaded Afghanistan), as an Islamic Shi'a theocracy headed by the Supreme Leader, the Ayatollah.[49] The United States pursued a policy to eliminate Iran's military strength, forming a partnership with Saddam Hussein in neighbouring Iraq,[50] a policy that had a direct bearing on the Iran-Iraq War 1980-88. The massive amount of aid that the US gave to Iraq directly create a new military power in the Middle East,[51] the consequences of which resulted in the invasion of Iraq in 2003 and the broader War on Terror (discussed in detail in this chapter).

### *6.2.5 The Far-Reaching Consequences of the CIA-Coup*

The coup brutally eliminated a parliamentary democracy because Prime Minister Mossadeq was considered to be a threat to Western interests and oil revenues. Yet the coup has had devastating and far-reaching consequences. According to Michael Luders, without the 1953 coup, there would be no Islamic Revolution. [52] Luders' assertion is instructive for the argument of this thesis and can be analysed as part of a plurality of events and factors that led to the rise of Islamic State, extending the line from *Operation Ajax* beyond the 9/11 attacks, to include the rise of Islamic State and the establishment of its Caliphate as a rejection of the universally applied Western hegemonic legal framework that facilitated the CIA-coup.

### *6.2.6 The Iran-Iraq War 1980-1988*

From the 1953 coup, the Afghan War and the rise of the *mujahedeen*, to the 2003 invasion of Iraq, the same pattern is discernible: successive US governments from Eisenhower to Carter and from George H. Bush to George W. Bush have embedded themselves in the

[48] Emmit B. Evans,' Iraq and the New American Colonialism' (2003) 1(2) Article 10 *Moebius*, 46, 48.
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017.

affairs of Middle Eastern countries, each with the same guiding principle, i.e. tolerate no power in the region that is not a champion of Western interests. The following examination of the Iran-Iraq War is important, as it places the war in a continuum of events that include the Gulf War 1991 and the 2003 Iraqi War in addressing the production of the two-tier system of sovereignty that, it is argued, directly contributed to the rise of Islamic State.

Saddam Hussein invaded Iran in September 1980, beginning the Iran-Iraq War, which ended in a stalemate in 1988, having claimed at least one million lives;[53] three-quarters of them were Iranian.[54] The roots of the eight-year war lie in a territorial dispute over the Shatt al-Arab, the major waterway that connects the Persian Gulf with the Iranian ports of Khorramshahr and Abadan and the Iraqi port of Basra.[55] It also forms a boundary between Iran and Iraq. [56] Religious rivalry, brought to the fore by the Islamic Revolution of 1979, also played a crucial part in fuelling the war. Both nations are Muslim, however Saddam Hussein and members of the Ba'ath party were Sunni, while the Iranians are Shia. Prior to the Iranian revolution in 1979, the dissimilarities between the states were more ideological than religious. The ruling Ba'ath Party (Sunni) in Iraq was a supporter of socialism and the Soviet Union; Iran under the Shah was anti-socialist and pro-Western.[57] The Islamic revolution, which brought Ayatollah Khomeini (Shi'a) to power in Iran, was perceived by Saddam Hussein as a direct threaten to Iraq. The Ayatollah did, in fact, want to remove Hussein from power, as he viewed Hussein as a Sunni tyrant who oppressed Iraq's Shi'a majority.[58] When Saddam Hussein launched his attacks on Iran in September 1980, leading to the war that lasted for eight years, he justified the attack as an act of pre-emptive self-defence[59] (a justification that was also used by the US for its invasion of Iraq in 2003). Hussein viewed post-revolutionary Iran as on the brink of collapse economic collapse.[60] Saddam described the war as a conflict to reclaim "the

[53] Efraim Karsh, *The Iran-Iraq War, 1980-1988*, Oxford: Osprey Pub., 2002.
[54] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea*), Devon: Old Street Publishing Ltd., 2017.
[55] Alexander Melamid, 'The Shatt al-'Arab Boundary Dispute' (1968) 22(3) *Middle East Journal*, 350.
[56] Ibid.
[57] For a detailed discussion of this issue, see Dina Rizk Khoury, *Iraq in Wartime: Soldiering, Martyrdom, and Remembrance*, Cambridge: Cambridge University Press, 2013; Efraim Karsh, *The Iran-Iraq War, 1980-1988*, Oxford: Osprey Pub., 2002; Nigel John Ashton and Bryan R. Gibson, *The Iran-Iraq War: New International Perspectives*, Milton Park, Abingdon, Oxon, New York: Routledge, 2013.
[58] Roger Hardy, *The Iran-Iraq War: 25 Years On*, BBC News, 22 September 2005. Available at: http://news.bbc.co.uk/2/hi/middle_east/4260420.stm#:~:text=Iraq%20invaded%20Iran%20on%2022,boundary%20between%20the%20two%20countries. Available at: http://news.bbc.co.uk/2/hi/middle_east/4260420.stm. Last accessed 19 July 2021.
[59] Ibid.
[60] Ibid.

civilization of Mesopotamia that had illuminated the world when the rest of mankind was living in darkness"[61] and as a crusade to regain "sole Arab sovereignty over the Shatt a-Arab waterway that controlled access to the Gulf".[62] Western and Arab powers, such as Saudi Arabia, were alarmed by the rise of a Shi'a Islamic Republic in the heart of the Middle East. The US was also very focussed upon containing Soviet expansionism in the region.[63] Faced with these propositions, these nations supported Saddam Hussein and his Sunni Ba'athist government in order to provide a counterweight to the Ayatollah and the spread of communism. However, the war proved to be a monumental mistake.

In the first few months, the Iraqi army advanced deep into Iranian territory. However, by mid-1982, Iran began using 'human waves' of thousands of religiously-inspired children and teenagers, who walked across the mine fields as flesh and blood minesweepers, each with a plastic key around his neck to open the gates of Heaven, clearing the way for Iranian soldiers to advance on Iraq.[64] The early success experienced by Iraq waned, prompting the US to intervene on the side of Iraq, a move that prolonged hostilities for a further six years.[65] On 20 December 1983, President Ronald Regan's special envoy, Donald Rumsfeld, was photographed shaking hands with Saddam Hussein, guaranteeing US support for Iraq in the form of weapons and money and symbolising the desire of the US to secure an Iranian defeat.[66] The actions of the US debunk any self-proclaimed statements of its neutrality. The agenda pursued by the US amplified the continued existence and implementation of quasi-sovereignty. In direct violation of Article 2(4) of the UN Charter,[67] the Reagan administration supported anti-Khomeini forces in Iran, which including the giving of millions of dollars' worth of arms to two Iranian paramilitary groups in Eastern Turkey. The administration also tried to unify anti-Khomeini forces in France and Egypt in order to secure the overthrow of Khomeini.[68] Successive US governments actively supported Iraq during the War in abject violation of

[61] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, 153.
[62] See Lawrence Freedman and Efraim Karsh, *The Gulf Conflict 1990-1991: Diplomacy and War in the New World Order*, Princeton, NJ: Princeton University Press, 19-21 cited in Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, 153.
[63] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[64] Efraim Karsh, *The Iran-Iraq War, 1980-1988*, Oxford: Osprey Pub., 2002; Nigel John Ashton and Bryan R. Gibson, *The Iran-Iraq War: New International Perspectives*, Milton Park, Abingdon, Oxon ; New York: Routledge, 2013; Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[65] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea*), Devon: Old Street Publishing Ltd., 2017.
[66] Twenty years later, that photo would be an embarrassment to Rumsfeld and the Bush administration and would serve as a reminder of the malevolence of US foreign policy.
[67] Charter of the UN, 1945, Art. 2(4).
[68] Jon Frappier, 'Above the Law: Violations of International Law by the U.S. Government from Truman to Reagan' (1984) 21(22), *Crime and Social Justice*, 1.

Iranian sovereignty, in order to ensure an Iranian defeat and the weakening of the Iranian state. During the presidency of Jimmy Carter, the White House sided with the "moderate" and "pragmatic" Saddam.[69] This continued during the presidency of Ronald Regan, with his administration supplying Baghdad with weaponry and satellite intelligence on Iranian military dispositions. In January 1995, former US National Security Council Director Howard Teicher made the following affidavit before a Florida court:

> In June 1982 … President Regan decided that the United States would do whatever was necessary and legal to prevent Iraq from losing the war with Iran. President Regan formalized this policy by issuing a National Security Decision Directive ('NSDD') to this effect … CIA Director Casey personally spearheaded the effort to ensure that Iraq had sufficient military weapons, ammunition and vehicles to avoid losing the Iran-Iraq war … The United States actively supported that Iraqi war effort by supplying the Iraqis with billions of dollars of credit, by providing US military intelligence and advice to the Iraqis, and by closely monitoring third-country arms sales to Iraq to make sure that Iraq had the military weaponry required.[70]

Regan's policies demonstrate an agenda to actively interfere in the sovereignty of two countries, Iran and Iraq, in order to achieve the geopolitical aims of the US, producing in both states, violated sovereignty and states of exception.

### *6.2.7 The Use of Chemical Weapons*

When Iraq began using chemical weapons, including mustard gas, sarin and the nerve gas tabun against Iranian troops and civilians, in violation of the Geneva Protocol,[71] Washington blocked any condemnation by the UN Security Council of Iraq's actions.[72] Estimates of the number of military and civilian Iranians killed by Iraqi chemical weapons

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[69] Dilip Hiro, *The Longest War: the Iran-Iraq* Conflict, London: Routledge, 1991, 71; John Bulloch and Harvey Morris, *Saddam's War: The Origins of the Kuwait Conflict and the International Response,* London: Faber & Faber, 1991, 6 cited in Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, 154. President Carter's administration had been very alarmed by the replacement of the Western-friendly Shah with the pro-Islamic Ayatollah who referred to the US as 'the Great Satan'. Saddam's regime, by contrast, was secular and increasingly vocal in its opposition to communism. Roland Regan's administration removed Iraq from the State Department's list of states supporting terrorism, allowing it to purchase "dual-use" technology for military and civilian use.

[70] Sworn Court Declaration of Howard Teicher, United States District Court, Southern District of Florida, 31 January 1995. Available at: http://www.realhistoryarchives.com/collections/hidden/teicher.htm. Last accessed 22 September 2020. Teicher also testified, in the same affidavit, that the CIA did sell weaponry to Iran via third parties that included Israel, the proceeds of which were used to finance right-wing Contra rebels in Nicaragua. During the congressional hearings in 1987, President Regan was unable to recall anything about the Iran-Contra affair.

[71] The *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare 1925* (Geneva Protocol), entered into force on 8 February 1928. It prohibits the use of chemical and biological weapons in international armed conflicts.

[72] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.

are 100,000.[73] More than 80,000 survivors of exposure to chemical gases suffered long-term debilitating after-affects.[74] Iran made repeated appeals to the United Nations to outlaw the use of chemical weapons, which the US attempted to block. UN specialist teams were dispatched to Iran in March 1984, April 1985, February–March 1986, April 1987, and in March, July and August 1988.[75] Clinical examinations confirmed the use of nerve agents and mustard gas against Iranians, for which they were widely condemned. The findings of these examinations were reported in UN Security Council Reports S/16433,[76] S/17127,[77] S/17911,[78] S/18852,[79] S/19823,[80] S/20060,[81] S/20134.[82] The Iraqi regime continued launching chemical attacks with mustard gas and sarin poison,[83] including those against the Kurdish civilisation population in Halabja in March 1988, who had joined with Iran in fighting Saddam. 5,000 people were killed and thousands

[73] Omid Payrow Shabani, 'The Green's Non-Violent Ethos: The Roots of Non-Violence I n the Iranian Democratic Movement (2013) 20(2) *Constellations*, 347.
[74] Ibid.
[75] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[76] SC Report S/16433. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 26 March 1984. This report determined that chemical agents had been used in the Iran-Iraq War, including aerial bombs in contradiction of international law. Available at: https://www.securitycouncilreport.org/un-documents/document/disarm-s16433.php. Last accessed 21 July 2021.
[77] SC Report S/17127. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 24 April 1985. This contained a report by a medical specialist who examined the Iranian victims of chemical weapons attacks. Available at: https://www.securitycouncilreport.org/un-documents/document/disarm-s17127.php. Last accessed 21 July 2021.
[78] SC Report S/17911. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 12 March 1986. This report determined whether chemical agents had been used in the Iran-Iraq War. Available at: https://www.securitycouncilreport.org/un-documents/document/disarm-s17911.php. Last accessed 21 July 2021.
[79] SC Report S/18852. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 8 June 1987. This report determined whether chemical agents had been used in the Iran-Iraq conflict. Available at: https://www.securitycouncilreport.org/un-documents/document/disarm-s18852.php. Last accessed 21 July 2021.
[80] SC Report S/19823. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 25 April 1988. This report confirmed that there had been an increase in the intensity of chemical attacks in terms of both the number of victims and the severity of injuries and that there was an increase in the number of civilian victims. Available at: https://www.securitycouncilreport.org/un-documents/document/disarm-s19823.php. Last accessed 21 July 2021.
[81] SC Report S/20060. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 20 July 1988. Available at: https://digitallibrary.un.org/record/48547?ln=en. Last accessed 21 July 2021.
[82] SC Report S/20134. UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 19 August 1988. Available at: https://digitallibrary.un.org/. Last accessed 21 July 2021.
[83] Ali Karami, 'Medical Aspects of Chemical Weapons Victims of Iran', CBRNe Convergence 2012,30 Oct – 2 Nov, VA, USA. Available at: https://www.academia.edu/12119117/Medical_Aspects_of_Chemical_Weapons_Victims_of_Iran. Last accessed 21 July 2021.

more were subjected to long-term health problems due to chemical exposure.[84] As further evidence of the willingness of the United States to support an Iraqi despotic regime because of its Western-friendliness, the US claimed that Iran was partly responsible for the atrocities against the Kurds. Notably, there was no outrage from the US and its allies about the widespread use of chemical weapons in Iran. Disturbingly, the US also exerted its influence in the UN Security Council, blocking any condemnation of Iraq, despite evidence presented by weapons inspectors of the use of chemical weapons.[85] The Regan regime again resisted attempts by the US Congress to impose sanctions on the Hussein regime,[86] a move that could have shortened the length of the war. The war finally ended after eight years with a truce and borders unchanged. The Iranian government sets the number of deaths at 1,000,000.[87] Other estimates state that up to 500,000 Iranians were killed.[88] By the time the ceasefire had been signed in August 1988, Iraq was on the verge of bankruptcy and heavily indebted to Kuwait and Saudi Arabia. In 1979 Iraq had had over $35 billion of gold reserves; after eight years of war the country was in debt to the tune of $80 billion.[89]

In 2003, John King summed up America's involvement in the Iran-Iraq War:

> The United States used methods both legal and illegal to help build Saddam's army into the most powerful army in the Mideast outside of Israel. The US supplied chemical and biological agents and technology to Iraq when it knew Iraq was using chemical weapons against the Iranians. The US supplied the materials and technology for these weapons of mass destruction to Iraq at a time when it was know that Saddam was using this technology to kill his Kurdish citizens. The United States supplied intelligence and battle planning information to Iraq when those battle plans included the use of cyanide, mustard gas and nerve agents. The United States blocked UN censure of Iraq's use of chemical weapons. The United States did not act alone in this effort. The Soviet Union was the largest weapons supplier, but England, France and Germany were also involved in the shipment of arms and technology.[90]

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[84] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.

[85] UNSC *Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq*, 12 March 1986. Available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20S17911.pdf. Last accessed 31 March 2021. See also Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.

[86] For a detailed discussion of these issues, see Charles Tripp, *History of Iraq*, Cambridge: Cambridge University Press, 2007; Dilip Hiro, *The Longest War: the Iran-Iraq* Conflict, London: Routledge, 1991; David Campbell, *Politics Without Principle: Sovereignty, Ethics and the Narratives of the Gulf War*, Boulder, CO and London: Lynne Rienner Publishers, 1993.

[87] Omid Payrow Shabani, 'The Green's Non-Violent Ethos: The Roots of Non-Violence I n the Iranian Democratic Movement (2013) 20(2) *Constellations*, 347.

[88] Ibid.

[89] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea*), Devon: Old Street Publishing Ltd., 2017.

[90] John King, *Arming Iraq and the Path to War*, 2003. Available at: https://ratical.org/ratville/CAH/armIraqP2W.html. Last accessed 31 March 2021.

Regan's policies reflect a return to 'civilised'/'uncivilised' dichotomy of the colonial mission where the inhabitants of the colonies were treated as *homines sacri*. Central to Regan's policies were the protection of US interests in the region, even if that meant ignoring the UN's denunciation of their criminal actions. International law then conspired with the US and other countries to transgress a system of law that, in theory treats all people equally, but in practice engages in Othering, serving the interests of some, whilst banishing others to the margins beyond the law's protection in the state of exception.

### *6.2.8 The Effects of the Iran-Iraq War: Prelude to the Rise of Islamic State*

The legacies of the Iran-Iraq War are many. These include the mobilisation of the Shi'ite communities across the region, "penetrating previously impervious political and ideological spaces in Iraq … Syria, Lebanon, and Yemen".[91] The War also shaped the geopolitical hostilities between Iran and the Gulf Arab States, that continues to persist in the region.[92] The Ba'ath regime records, obtained by the US after the 2003 invasion, reveal that Saddam Hussein's ambition for Iraq was to transform its regional standing into a powerful pan Arab power, and he saw the invasion of Iran as providing that very opportunity.[93] Yet, for Iraq, the war and its effects had devastating consequences. In the decades since the Iran-Iraq War, Iraq has experienced bankruptcy, destitution, conflict[94] and the establishment of Islamic State on its territory. The 2003 invasion of Iraq exposed the sectarian divisions in Iraq as Shi'ite Muslims (supported by Iran during the Iraqi War) were pitted against Sunni Muslims (supported by the Arab Gulf states).[95] These divisions also revealed the broader geopolitical complexities and conflicts of the region, as alliances were formed by Shi'ite nations on the one side and Sunnis on the other. Additionally, the war revealed the persistence of a colonial civilising mission, operating at both a national and international level. Internally, international law sought to transform the internal policies of Iraq into a Western-friendly nation, by dispossessing the country of its sovereignty. Transnationally, international law was utilised by geopolitical rivalries (US, Turkey and Gulf States *v* Russia, China and Iran) to impose their respective political and economic agendas on the region, bringing to fruition their imperialist ambitions.

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[91] Ranj Alaaldin, *How the Iran-Iraq war will shape the region for decades to come*. Available at: https://www.brookings.edu/blog/order-from-chaos/2020/10/09/how-the-iran-iraq-war-will-shape-the-region-for-decades-to-come/. Last accessed 27 July 2021.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] Ibid.

These rivalries have, to date, destroyed any efforts to secure durable regional peace and have, it is argued, greatly attributable to the fragmentation of Iraqi and Syrian sovereignty, which have proved to be one of the major contributing factors to the rise of Islamic State.

The eight-year war between Iran and Iraq greatly affected the dynamics of the region, the consequences of which were far-reaching and lasting. According to Emmet, "Massive Western aid to Iraq throughout its bloody 1980-1988 war with Iran, continuing to the eve of the 1991 Gulf War, created a new military power in the region".[96] Saddam Hussein, as leader of the Ba'ath (Rebirth or Renaissance) Party, came power on 16 July 1979 and served as its 5th Prime Minister until 9th April 2003, installing a Sunni Prime Minister and government in power. In the earlier part of his reign, he was viewed as a friend of the West and received much support from them, particularly during the Iran-Iraq War. The Ba'ath Party[97] was founded by two Syrian intellectuals during World War Two. Its driving ideology was one of pan-Arab unity and the establishment of a single Arab state that would be freed from the legacy and continued influences of colonialism.[98] When Ba`athists came to power in Iraq following a coup in 1963, the ferocious violence that followed fatally damaged any hope of Iraqi achieving democracy, described by Peter and Marion Sluglett as "some of the most terrible violence hitherto experienced in the postwar Middle East."[99] In their book *Iraq Since 1958*, Peter and Marion Sluglett outline the CIA involvement in Iraq:

> Although individual leftists had been murdered intermittently over the previous years, the scale on which the killings and arrests took place in the spring and summer of 1963 indicates a closely coordinated campaign, and it is almost certain that those who carried out the raid on suspects' homes were working from lists supplied to them. Precisely how these lists had been compiled is a matter or conjecture, but it is certain that some of the Ba`athist leaders were in touch with American intelligence networks, and it is also undeniable that a variety of different groups in Iraq and elsewhere in the Middle East had a strong vested interest in breaking what was probably the strongest and most popular Communist Party in the region.[100]

While it has never been conclusively established that the lists were compiled by the CIA, King Husain of Jordan was convinced of the CIA involvement. In a conversation with

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[96] Emmit B. Evans,' Iraq and the New American Colonialism' (2003) 1(2) Article 10 *Moebius*, 46, 48.
[97] Fred Halliday emphasises Ba'athism's "cult of war as the purgative fire, its obsession with the strong man, the knight or *faris* on horseback, who will deliver the Arab nation, and its explicit valorization of *al-qiswa* (harshness) as a tool of government control". See Fred Halliday, *Islam and the Myth of Confrontation*, London: I.B. Tauris, 2003, 84.
[98] Derek Gregory, *The Colonial Present*, Blackwell Publishing, 2004.
[99] Peter and Marion Sluglett, *Iraq Since 1958,* London, I.B. Taurus, 1990, 86.
[100] Ibid. at 86.

Muhammad Hasanein Haikal, chief editor of Al-Ahram, on 27 September 1963 at the Hotel Crillon in Paris, he stated:

> You tell me that American Intelligence was behind the 1957 events in Jordan. Permit me to tell you that I know for a certainty that what happened in Iraq on 8 February had the support of American Intelligence. Some of those who now rule in Baghdad do not know of this thing but I am aware of the truth. Numerous meetings were held between the Ba`ath party and American Intelligence, the more important in Kuwait. Do you know that . . . on 8 February a secret radio beamed to Iraq was supplying the men who pulled the coup with the names and addresses of the Communists there so that they could be arrested an executed.[101]

It was through this system of patronage, repression, violence and CIA intrusion in the internal affairs of Iraq that Saddam Hussein rose to power.[102] The involvement of the CIA and the US government in the politics and governance of Iraq and in the repeated violation of its sovereignty since Saddam Hussein fell out of favour with the US and the Western world has had catastrophic consequence., which will be discussed in detail in this chapter. The eight-year Iran-Iraq War, which without the involvement of Washington would have been shortened by several years, laid the groundwork for the first Gulf War, which, in turn, was hugely instrumental in the bringing about the 2003 Iraqi War and ultimately, the rise of Islamic State.

The Iran-Iraq War illustrates the malign cause and effect of the war, through which a "colonial present"[103] was narrated, articulated by the interference of the US in the affairs of both countries and by the US agenda to weaken Iran at any cost during the Iran-Iraq conflict. Their means of trying to achieve that, through its support for Iraq, resulted in the prolonging of the war by several years. America's desire to weaken Iran cost Iraq dearly: it materialised in the form of a bankrupt Iraq, which directly lead to Iraq's invasion of Kuwait in 1990 and the subsequent ostracisation of Saddam Hussein by Western powers following his attacks on US gas stations in Kuwait. These events reinforced fears of a new age of Western expansionism and military intervention in the Islamic world and articulate a continuance of colonialism, through the imperialistic endeavours of such expansionism. Hammoudi's thesis of semi-peripheral sovereignty and Singh's scholarship on semi-colonialism are instructive in seeking to understand the plurality of issues that lead to the rebirth of the Caliphate: the Iran-Iraq War 1980-88, the

[101] Hanna Batatu,*The Old Social Classes and the Revolutionary Movements of Iraq,* Princeton: Princeton University Press, 1978, 985.
[102] Derek Gregory, *The Colonial Present*, Blackwell Publishing, 2004; Dina Rizk Khoury, Iraq in Wartime: Soldiering, Martyrdom, and Remembrance, Cambridge: Cambridge University Press, 2013.
[103] Ibid. Gregory.

imposition of sanctions on Iraq by the UN, the Gulf War 1990-91, the 2003 Iraqi War and ultimately, the rise of Islamic State over thirty years after Iraq invaded Iran. Hammoudi's thesis of semi-peripheral sovereignty and Singh's scholarship on semi-colonialism are instructive in seeking to understand the plurality of issues that lead to the rebirth of the Caliphate: Specifically, Hammoudi's focus on the functional and structural elements of public international law that sustains a two-tier system of sovereignty, acknowledges the imperial, geopolitical and economic interests of Western nations that continue to affect the international legal system, with implications for the continued existence of quasi-sovereignty. Singh's theory of semi-colonialism offers a nuanced lens through which to analyse Western imperialism and its relationship to the state of exception and is important for the analysis of the plurality of factors and events that gave cause to the rise of Islamic State and to the state of exception in which the War on Terror was fought, discussed in the following sections. What underpins both Hammoudi's and Singh's theories is a disparity in the power structures of the actors involved, which as identified by Reynolds, underpins the states of exception.[104]

### *6.2.9 What Price Oil? Prelude to the Gulf War*

Iraq had financed the eight-year war through loans, and at the conclusion of the war, owed some $37 billion to Gulf creditors,[105] including to the United Arab Emirates and Kuwait, who refused to cancel Iraq's debt.[106] It was made all the more vulnerable by the fall in the price of a barrel of oil to just ten dollars, due to overproduction by Kuwait and the United Arab Emirates (UAE), in defiance of OPEC quotas.[107] Kuwait's excess production was carried out at the Rumaila oil field, which shared a border with Iraq. The collapse in oil prices had catastrophic consequences for the Iraqi economy and its people. Saddam claimed this was a form of economic warfare and now turned his attention to Kuwait, whom he claimed was slant-drilling across the border into the Iraqi Rumaila oil fields.[108] This situation, combined with the fact that Kuwait would not cancel Iraq's debt incurred from the Iran-Iraq War, led to Saddam Hussein's ill-fated invasion of Kuwait on 2 August 1990 and the Gulf War (1990-91).[109]

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[104] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017.
[105] Ibid.
[106] Office of the Historian, Foreign Service Institute, 'The Gulf War, 1991'. Available at: https://history.state.gov/milestones/1989-1992/gulf-war. Last accessed 22 July 2021.
[107] Derek Gregory, *The Colonial Present*, Blackwell Publishing, 2004.
[108] Derek Gregory, *The Colonial Present*, Blackwell Publishing, 2004.
[109] Ibid. Gregory; Office of the Historian, Foreign Service Institute, 'The Gulf War, 1991'. Available at: https://history.state.gov/milestones/1989-1992/gulf-war. Last accessed 22 July 2021.

*6.2.10 The Gulf War: The Invasion of Kuwait*

American policy vis-à-vis the oil producing Gulf States was dictated by the Carter Doctrine of 1980, a policy proclaimed by President Jimmy Carter in his State of Union Address on January 23, 1980, during which he stated that:

> the United States will use military force, if necessary, to defend its national interests in the Persian Gulf. Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.[110]

The Gulf War illuminates the central position that oil played in drafting US foreign policy. Just prior to Operation Desert Storm, President George H Bush invoked the Carter Doctrine of 1980 when he stated:

> Access to Persian Gulf oil and the security of key friendly states in the area are vital to U.S. national security. Consistent with NSD 26 of October 2, 1989, and NSD 45 of August 20, 1990, and as a matter of long-standing policy, the United States remains committed to defending its vital interests in the region, if necessary through the use of military force, against any power with interests inimical to our own. Iraq, by virtue of its unprovoked invasion of Kuwait on August 2, 1990, and its subsequent brutal occupation, is clearly a power with interests inimical to our own.[111]

On August 2, 1990, with a force of one hundred thousand troops, Saddam Hussein invaded Kuwait using four elite Iraqi Republican Guard divisions (1st Hammurabi Armoured Division, 2nd al-Medinah al-Munawera Armoured Division, 3rd Tawakalna ala-Allah Mechanized Infantry Division and 4th Nebuchadnezzar Motorized Infantry Division), as well as Iraq's special forces units.[112] The invasion was carried out on the basis that Iraq had pre-colonial title to the disputed territory in Kuwait.[113] Tripp suggests that Saddam used Kuwait as a bargaining tool, endeavouring to reduce the colossal debt amassed from the Iran-Iraq War.[114] However, he seriously miscalculated the response of his onetime allies, the United States and other Arab states. The Gulf War had several consequences for Iraq. The country was completely bankrupt and in severe debt. Saddam Hussein was now viewed as an enemy of the West, when he had once been considered to

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[110] President Jimmy Carter State of Union Address, 23 January 1980. Full transcript is available at: https://www.jimmycarterlibrary.gov/assets/documents/speeches/su80jec.phtml. Last accessed 25 September 2020.

[111] National Security Directive 54, 15 January 1991. The full text is available at: https://fas.org/irp/offdocs/nsd/nsd_54.htm. Last accessed 30 September 2020.

[112] David Campbell, *Politics Without Principle: Sovereignty, Ethics and the Narratives of the Gulf War*, Boulder, CO and London: Lynne Rienner Publishers, 1993.

[113] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D. Evans, *International Law*, (4th ed.), Oxford: Oxford University Press, 2014.

[114] Charles Tripp, *History of Iraq*, Cambridge: Cambridge University Press, 2007.

be a friend. Iraq suffered massive casualties and was subjected to a comprehensive and stringent regime of UN sanctions that had dire consequences for the country.

The Gulf War can be situated within the spectrum of the civilising mission and the imperialistic endeavours of the US. One of the aims of the war was to greatly reduce the military capabilities of the Iraqi army by destroying the arms that the US had supplied to Iraq during the Iran-Iraq War. Secondly, while the US did not wish to directly remove Saddam from power, it supported the Shi'a and Kurdish revolts that sought to overthrow Hussein's regime.[115] The US saw this as an opportunity to install a Western-friendly regime in Iraq in a move that would allow it to impose its neo-colonialist ambitions to control the flow of Middle Eastern oil.

*6.2.10.1 Casualties of the Gulf War*

In an investigation undertaken by Greenpeace, the organisation estimated that 100,000-120,000 Iraqi troops and between 72,500 to 93,000 Iraqi civilians died during the war; additionally 2,000 to 5,000 Kuwaitis died during the Iraqi occupation of Kuwait.[116] In contrast, 343 allied troops died in combat and accidents; among them were 266 Americans, of whom 147 were killed in action; of them, 35 were killed accidently by friendly fire.[117] Although the coalition forces kept meticulous records of their own casualties, they claimed they had no records of Iraqi casualties.[118] The Geneva Conventions require belligerents "to search for the dead to prevent their being despoiled", to record any relevant information that might assist with their identification and to bury the dead individually in marked graves, as far as circumstances allow.[119] Despite the protections afforded by the Geneva Conventions, the Pentagon refused to engage with this protocol. As stated by General Norman Schwarzkopf, "I have absolutely no idea what the Iraqi casualties are and I tell you, if I have anything to say about it, we're never going to get into the body-count bubiness".[120] The dead Iraqi soldiers were subjugated to the position of *homines sacri* as first discussed in Chapter Two, as those who, literally, just didn't count. The casting of dead Iraqi soldiers as *homines sacri* was further

[115] Emmit B. Evans,' Iraq and the New American Colonialism' (2003) 1(2) Article 10 *Moebius*, 46.
[116] 'Gulf War Led To 150,000 Deaths, Greenpeace Reports', *Seattle Times*, 29 May 1991.
[117] Michael O'Hanlon, 'Estimating Casualties in a War to Overthrow Saddam' (2003) *Orbis*, 21.
[118] Ibid.
[119] *Geneva Convention for the Amelioration of the Coalition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Arts. 15-17.
[120] Margot Norris, 'Military Censorship and the Body Count in the Persian Gulf War' (1991) 19 *Cultural Critique*, 223, 224.

compounded by Colin Powell who asserted that he had "no idea how many Iraqis had been killed, and I really don't plan to undertake any real effort to find out",[121] demonstrating a blatant disregard for the Geneva Conventions and rules governing war.

*6.2.11 UN Sanctions*

The Executive Summary of a report produced by Caritas Europa describes the sanctions imposed on Iraq as thus: "The sanctions against Iraq are widely accepted as being the most comprehensive and stringent sanctions ever imposed by the United Nations and this has prompted a current debate about both the principle of sanctions (their effectiveness, their morality, whether or not they are counterproductive, and the humanitarian cost)".[122] The Gulf War and the sanctions that followed, had a devastating effect on the Iraqi people. As Ramsay Clark states:

> Without setting foot on Iraqi soil, or engaging Iraqi troops, U.S. aircraft and missiles systematically destroyed life and life-support systems in Iraq over a period of six weeks. There were two thousand air strikes in the first twenty-four hours. More than 90 per cent of Iraq's electrical capacity was bombed out of service in the first few hours. Within several days, "not an electron was flowing." Multimillion-dollar missiles targeted power plants up to the last days of the war, to leave the country without power as economic sanctions sapped life from the survivors. In less than three weeks the U.S. press reported military calculations that the tonnage of high-explosive bombs already released had exceeded the combined allied air offensive of World War II. By the end of the assault, 110,000 aircraft sorties had dropped 88,500 tons of bombs on Iraq, the equivalent of seven and a half atomic bombs of the size that incinerated Hiroshima.[123]

Clark catalogued the damage as:

> no running water, no communications links, the destruction of transportation links (including 139 bridges over Iraq's two great rivers, the Tigris and the Euphrates), the heavy damage to Iraq's eight multi-purpose dams (with the concomitant wreckage of flood control, municipal and industrial water supplies, irrigation and hydro-electric power). Targeting water and sewage facilities led to sewage spilling into the Tigris and out into the streets of Baghdad. Grain silos, factories, hospitals (28), community health centres (52), schools (676) and government office buildings were all targeted and severely damaged or destroyed. Iraq's oil industry was a priority target. US planes hit 11 oil refineries, 5 oil pipeline and production facilities, export pipeline facilities, and many oil storage tanks. Three oil tankers were sunk and three others set on fire.[124]

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[121] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, 168.
[122] Caritas Europa, 'A People Sacrificed: Sanctions against Iraq', 28 February 2001. Available at: https://reliefweb.int/report/iraq/people-sacrificed-sanctions-against-iraq-report-caritas-europa. Last accessed 22 July 2021.
[123] Ramsey Clark, *Challenge to Genocide: Let Iraq Live*, NY: International Action Center, 1998, 57.
[124] Ramsey Clark, *Challenge to Genocide: Let Iraq Live*, NY: International Action Center, 1998, 62.

Within hours of Iraq's invasion of Kuwait, the United Nations Security Council passed Resolution 660[125] "demanding Iraq's immediate and unconditional withdrawal", followed by Resolution 661[126] "imposing comprehensive economic sanctions" and Resolution 662[127] "declaring the annexation of Kuwait null and void". Additionally, the

[125] United Nations Security Council Resolution 660 (1990) of 2 August 1990. "The Security Council, alarmed by the invasion of Kuwait on 2 August 1990 by the military forces of Iraq. Determining that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait. Acting under Articles 39 and 40 of the Charter of the United Nations, 1. Condemns the Iraqi invasion of Kuwait; 2. Demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 August 1990; 3. Calls upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the League of Arab States; 4. Decides to meet again as necessary to consider further steps to ensure compliance with the present resolution. Adopted at the 2932nd meeting by 14 votes to none. One member (Yemen) did not participate in the vote." Available at: http://unscr.com/en/resolutions/doc/660. Last accessed 22 July 2021.

[126] United Nations Security Council Resolution 661, adopted on 6 August 1990, reaffirming Resolution 660 (1990), "condemns the Iraqi invasion of Kuwait; demands that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on 1 Aug. 1990; calls upon Iraq and Kuwait to begin immediately intensive negotiations for the resolution of their differences and supports all efforts in this regard, and especially those of the League of Arab States; decides to meet again as necessary to consider further steps to ensure compliance with the resolution." Available at: https://digitallibrary.un.org/record/94220?ln=en. Last accessed 22 July 2021.

[127] United Nations Security Council Resolution 662, adopted unanimously on 9 August 1990, recalling resolutions 660 (1990) and 661 (1990), "decides that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void; calls upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation; further demands that Iraq rescind its actions purporting to annex Kuwait; decides to keep this item on its agenda and to continue its efforts to put an early end to the occupation." Available at: https://digitallibrary.un.org/record/94573?ln=en. Last accessed 22 July 2021.

following UN Resolutions sanctions were imposed on Iraq: 664,[128] 665,[129] 666,[130] 667,[131] 669,[132] 670,[133] 674,[134] 677,[135] 678,[136] 686[137] and 687.[138] Resolution 687 allowed the

[128] United Nations Security Council Resolution 664, adopted unanimously on 18 August 1990, reaffirming resolutions 660 (1990), 661 (1990) and 662 (1990), "demands that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials to such nationals; further demands that Iraq take no action to jeopardize the safety, security or health of such nationals; reaffirms its decision in resolution 662 (1990) that annexation of Kuwait by Iraq is null and void, and therefore demands that the Government of Iraq rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel, and refrain from any such actions in the future." Available at: https://digitallibrary.un.org/record/95133?ln=en. Last accessed 22 July 2021.

[129] United Nations Security Council Resolution 665, adopted on 25 August 1990, after demanding the full and immediate implementation of resolutions 660, 661, 662 and 664, "calls upon those Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990); invites Member States to cooperate to ensure compliance with the provisions of resolution 661 (1990) with maximum use of political and diplomatic measures; requests all States to provide such assistance as may be required by the States referred to in paragraph 1 of this resolution; requests the States concerned to coordinate their actions using as appropriate mechanisms of the Military Staff Committee and after consultation with the Secretary-General to submit reports to the Security Council and its Committee established under resolution 661 (1990)." Available at: https://digitallibrary.un.org/record/95664?ln=en. Last accessed 22 July 2021.

[130] United Nations Security Council Resolution 666, adopted on September 13, 1990, after recalling resolutions 661 (1990) and 664 (1990) "decides that in order to make the necessary determination whether or not for the purposes of paragraph 3 (c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding foodstuffs in Iraq and Kuwait under constant review; requests, for the purposes of paragraphs 1 and 2 of this resolution, that the Secretary-General seek urgently, and on a continuing basis, information from relevant UN and other appropriate humanitarian agencies and all other sources on the availability of food in Iraq and Kuwait, such information to be communicated by the Secretary-General to the Committee regularly; requests further that in seeking and supplying such information particular attention will be paid to such categories of persons who might suffer specially, such as children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly; decides that if the Committee, after receiving the reports from the Secretary-General, determines that circumstances have arisen in which there is an urgent humanitarian need to supply foodstuffs to Iraq or Kuwait in order to relieve human suffering, it will report promptly to the Council its decision as to how such need should be met; directs the Committee that in formulating its decisions it should bear in mind that foodstuffs should be provided through the UN in cooperation with the International Committee of the Red Cross or other appropriate humanitarian agencies and distributed by them or under their supervision in order to ensure that they reach the intended beneficiaries." Available at: https://digitallibrary.un.org/record/96569?ln=en. Last accessed 22 July 2021.

[131] United Nations Security Council resolution 667, adopted unanimously on 16 September 1990, after recalling resolutions 660 (1990), 661 (1990), 664 (1990), 665 (1990) and 666 (1990), "strongly condemns aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait, including the abduction of foreign nationals who were present in those premises; demands the immediate release of those foreign nationals as well as all nationals mentioned in resolution 664 (1990); further demands that Iraq immediately and fully comply with its international obligations under resolutions 660 (1990) and 664 (1990) of the Security Council, the Vienna Conventions on diplomatic and consular relations and international law; further demands that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and in Iraq and take no action to hinder the diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests." Available at: https://digitallibrary.un.org/record/96599?ln=en. Last accessed 22 July 2021.

[132] United Nations Security Council resolution 669, adopted unanimously on 24 September 1990. "Conscious of the fact that an increasing number of requests for assistance have been received under the provisions of Article 50 of the Charter of the UN, entrusts the Committee established under resolution 661 (1990) concerning the situation between Iraq and Kuwait with the task of examining requests for assistance under the provisions of Art. 50 of the Charter of the UN and making recommendations to the President of

the Security Council for appropriate action." Available at: https://digitallibrary.un.org/record/97342?ln=en. Last accessed: 22 July 2021.

[133] United Nations Security Council resolution 670, adopted on 25 September 1990, after recalling resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990) and 667 (1990). "confirms that resolution 661 (1990) applies to all means of transport, including aircraft; decides further that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory unless: (a) the aircraft lands at an airfield designated by that State outside Iraq or Kuwait in order to permit its inspection to ensure that there is no cargo on board in violation of resolution 661 (1990) or the present resolution, and for this purpose the aircraft may be detained for as long as necessary; or (b) the particular flight has been approved by the Committee established by resolution 661 (1990); or (c) the flight is certified by the UN as solely for the purposes of UNIIMOG; decides that each State shall take all necessary measures to ensure that any aircraft registered in its territory or operated by an operator who has his principal place of business or permanent residence in its territory complies with the provisions of resolution 661 (1990) and the present resolution; decides further that all States shall notify in a timely fashion the Committee established by resolution 661 (1990) of any flight between its territory and Iraq or Kuwait to which the requirement to land in paragraph 4 above does not apply, and the purpose for such a flight." Available at: https://digitallibrary.un.org/record/97522?ln=en. Last accessed 22 July 2021.

[134] United Nations Security Council resolution 674, adopted on 29 October 1990, after recalling resolutions 660 (1990), 661(1990), 662(1990), 664 (1990), 665 (1990), 666(1990), 667(1990) and 670 (1990) "demands that the Iraqi authorities and occupying forces immediately cease and desist from taking third State nationals hostage, and mistreating and oppressing Kuwaiti and third-State nationals; invites States to collate substantiated information in their possession or submitted to them on the grave breaches by Iraq and to make this information available to the Security Council; reaffirms its demand that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of those third-State nations, including diplomatic and consular personnel, who wish to leave; demands that Iraq ensure the immediate access to food, water and basic services necessary to the protection and well-being of Kuwaiti nationals and of nationals of third States in Kuwait and Iraq, including the personnel of diplomatic and consular missions in Kuwait; reaffirms its demand that Iraq takes no action to hinder diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests and rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel; invites States to collect relevant information regarding their claims, and those of their nationals and corporations, for restitution or financial compensation by Iraq; requires that Iraq comply with the provisions of the resolution and its previous resolutions, failing which the Security Council will need to take further measures under the Charter; decides to remain actively and permanently seized of the matter until Kuwait has regained its independence and peace has been restored; reposes its trust in the Security Council to make available his good offices, to pursue them and to undertake diplomatic efforts in order to reach a peaceful solution to the crisis caused by the Iraqi invasion and occupation of Kuwait." Available at: https://digitallibrary.un.org/record/100468?ln=en. Last accessed 23 July 2021.

[135] United Nations Security Council resolution 677, adopted unanimously on 28 November 1990, after recalling resolutions 660 (1990), 662 (1990) and 674 (1990), "condemns the attempts by Iraq to alter the demographic composition of the population of Kuwait and to destroy the civil records maintained by the legitimate Government of Kuwait; mandates the Secretary-General to take custody of a copy of the population register of Kuwait, the authenticity of which has been certified by the legitimate Government of Kuwait and which covers the registration of the population up to 1 Aug. 1990; requests the Secretary-General to establish, in cooperation with the legitimate Government of Kuwait, an Order of Rules and Regulations governing access to and use of the said copy of the population register." Available at: https://digitallibrary.un.org/record/102244?ln=en. Last accessed 23 July 2021.

[136] United Nations Security Council Resolution 678, adopted on 29 November 1990, after reaffirming resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674 and 677 (all 1990), "demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so; authorizes Member States cooperating with the Government of Kuwait, unless Iraq on or before 15 Jan. 1991 fully implements the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area; requests all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of the resolution; requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of the resolution; decides to remain seized of the matter." Available at: https://digitallibrary.un.org/record/102245?ln=en. Last accessed 23 July 2021.

Security Council "to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area."[139] The United States stated that it would use military force as a last resort in order to force Iraq to comply with the UN inspection regime and began moving air and sea artillery to the Persian Gulf.[140] Pursuant to Resolution 678 (1990), the United States was legally entitled to use force to ensure Iraq's compliance with the conditions of Resolution 687 (1991).[141] Iraq was also charged with being in material breach of a number of UN Resolutions,[142] a reason that was used as justification by the US, for its 2003 invasion in order "to secure peace and security in the area."[143]

*6.2.11.1 UN Security Council Resolution 661*

The passing of UNSC Resolution 661, adopted on 6 August 1990, which was an initiative of the US, had a devastating effect on Iraq and its people. On 2 September 1990, the UNSC passed further sanctions on Iraq. A summary of the Resolution reads:

> UNSC Resolution 661 decides that all States shall prevent: (a) the import into their territories of all commodities and products originating in Iraq or Kuwait

[137] United Nations Security Council Resolution 686, adopted on 2 March 1991, after reaffirming resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674 and 677and 678 (all 1990), "affirms that all 12 resolutions continue to have full force and effect; demands that Iraq implement its acceptance of all 12 resolutions and in particular that Iraq: (a) rescind immediately its actions purporting to annex Kuwait: (b) accept in principle its liability under international law for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait; (c) immediately release under the auspices of the International Committee of the Red Cross, all Kuwaiti and 3rd-country nationals detained by Iraq and return the remains of any deceased detainees; (d) immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period; further demands that Iraq: (a) cease hostile or provocative actions by its forces against all Member States, including missile attacks and flights of combat aircraft; (b) designate military commanders to meet with counterparts from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities; (c) arrange for immediate access to and release of all prisoners of war (d) provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in the adjacent waters." Available at: https://digitallibrary.un.org/record/108110?ln=en. Last accessed 23 July 2021.

[138] United Nations Security Council Resolution 687, adopted on 3 April 1991, after reaffirming resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674 and 677and 678 (all 1990) and 686 (1991), "calls for a permanent ceasefire agreement. It requires Iraq to destroy all of its chemical, biological and nuclear weapons capability as well as missiles with a range of more than 150 kilometers and to allow verification by inspectors from the UN Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA)." Available at: https://peacemaker.un.org/iraqkoweit-resolution687. Last accessed 23 July 2021.

[139] United Nations Security Council Resolution 687, para. 34.

[140] Ruth Wedgwood 'The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction' (1998) 92(4) *The American Journal of International Law,* 724.

[141] The Resolution was, in fact, used as justification for the use of force against Iraq by both the US and Britain in response to Iraq's breach of Resolution 687 in 1993 and 1998. See John Yoo, International Law and the War in Iraq (2003) 97(3) *The American Journal of International Law,* 563.

[142] John Yoo, 'International Law and the War in Iraq' (2003) 97(3) The *American Journal of International Law*, 563.

[143] United Nations Security Council Resolution 687, para. 34.

> exported therefrom after the date of the present resolution; (b) any activities by their nationals or in their territories which would promote the export or trans-shipment of any commodities or products from Iraq or Kuwait; (c) the sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products but not including supplies intended strictly for medical purposes, and in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait; decides that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources; decides to establish a Committee of the Security Council consisting of all the members of the Council: (a) to examine the reports on the progress of the implementation of the present resolution; (b) to seek from all States information regarding the action taken by them concerning the implementation of the present resolution; calls upon all States: (a) to take appropriate measures to protect assets of the legitimate Government of Kuwait and its agencies; (b) not to recognize any régime set up by the occupying Power; requests the Secretary-General to report to the Council on the resolution, the 1st report to be submitted within 30 days.[144]

Michael Ludders asserts that the US and Britain utilised Resolution 661 to instigate a popular revolt against Saddam Hussein with the purpose of overthrowing him.[145] The consequences of this however, caused the deaths of more than a million Iraqis, including the deaths of half a million Iraqi children between 1992 to 2000.[146] Resolution 661 imposed a comprehensive and devastating embargo on Iraq; only "supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs"[147] were excluded. However, these essential supplies were subject to approval by the Sanctions Committee and the approval proved very hard to obtain. The committed allowed very few medicines, medical equipment or chemicals into Iraq, even outlawing the importation of chlorine for the purification of drinking water.[148] In 1999, the British government blocked the export of vaccinations against diphtheria and yellow fever for Iraqi children. The vaccines, paid for by Iraqi people in Britain, were sent to Iraq on a mercy flight.[149] The British government argued that the vaccinations "could be used in weapons of mass destruction".[150] Malcolm Dando, a biological warfare

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[144] United Nations Security Council Resolution 661, adopted on 6th August 1990, after affirming resolution 660. Available at: https://digitallibrary.un.org/record/94221?ln=en. Last accessed 23 July 2021.
[145] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017.
[146] John Pilger, "Squeezed to Death," *The Guardian*, March 3, 2000.
[147] United Nations Security Council Resolution 661, adopted on 6 August 1990, reaffirming Resolution 660 (1990) and noting Iraq's refusal to comply with it and Kuwait's right of self-defence, the Council took steps to implement international sanctions on Iraq under Chapter VII of the United Nations Charter.
[148] Pencils were also subject to the sanctions, the reason cited being their potential for use by the army.
[149] Seumas Milne, 'Ministers Ban Vaccine for Iraq', *The Guardian*, 9 December 1999. Available at: https://www.theguardian.com/uk/1999/dec/09/1. Last accessed 29 October 2020.
[150] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017, 36.

specialist refuted this however, "Although there is a serious problem about Iraq's biological weapons potential, none of these vaccines lines up with classical biological weapons agents."[151]

Prior to the imposition of the sanctions, the Iraqi healthcare system had experienced dramatic growth.[152] It was a system described by Sarah Graham-Brown as "centralized in organization, highly medicalized, with a heavy dependence on prescribing drugs".[153] Yet, ten years of sanctions reduced the Iraqi health system to ruins. Scarcely a single piece of medical equipment was functional, aspirin was available only on the black market at hugely inflated prices, a diagnosis of diseases such as cancer, diabetes or heart disease were tantamount to a death sentence. Dr. 'Abd-al Salam Muhammad Sa'id, the Health Minister of Iraq, "pleaded with the United Nations Development Program to allow Iraq to purchase medicine, equipment and other necessary medical requirements to lessen the evil of these sanctions upon his own people."[154]

An NGO, Education Development, Inc., was working in Iraq during the period of sanctions. They urged the United Nations to remove all sanctions against Iraq, citing the gross human rights violations.[155] The letter stated, "the Commission should request the Security Council to end all sanctions relating to food, medicine and other items needed for the survival of the Iraqi people, its livestock and its agriculture."[156] The Sanctions Committee continued to hinder the delivery of vital equipment and medication, including chemotherapy drugs, all the while British and American planes were engaged in almost daily attacks on Iraq, killing thousands of civilians. In 1998, the Assistant Secretary-General at the UN, Denis Halliday, resigned his office in protest, stating: "The policy of economic sanctions is totally corrupt. We are in the process of destroying an entire society. It is as simple and terrifying as that […] Five or six thousand children are dying

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[151] Seumas Milne, 'Ministers Ban Vaccine for Iraq', *The Guardian*, 9 December 1999. Available at: https://www.theguardian.com/uk/1999/dec/09/1. Last accessed 29 October 2020.
[152] Regional Health Systems Observatory - World Health Organization, *Health System Profile: Iraq*, 2006, 5.
[153] Sarah Graham-Brown, *Sanctioning Saddam: The Politics of Intervention in Iraq*, New York: NY, St. Martin Press, 1999, 181.
[154] Mattie Bieberly, *United Nations Resolution 661: Intervention, Devastation and the Internal Collapse of 1990s Iraq*, Honours Dissertation, University of Kansas, 2018, 31.
[155] Ibid.
[156] United Nations Economic and Social Council Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, Written statement submitted by the NGO, International Education Development, Inc., E/CN.4/1999/NGO/119 (1999). For a more detailed discussion, see Mattie Bieberly, *United Nations Resolution 661: Intervention, Devastation and the Internal Collapse of 1990s Iraq*, Honours Dissertation, University of Kansas, 2018, 31.

every month".[157] In March 2000, Dr Jawad Al-Ali, a cancer specialist and member of Britain's Royal College of Physicians was interviewed by John Pilger. Commenting on the dust contaminating the air in and around Basra, Dr. Al-Ali stated:

> It carried death. Our own studies indicate that more than 40 per cent of the population in this area will get cancer: in five years' time to begin with, then long afterwards. Most of my own family now have cancer, and we have no history of the disease. It has spread to the medical staff of this hospital. We don't know the precise source of that contamination, because we are not allowed to get the equipment to conduct a proper scientific survey, or even to test the excess level of radiation in our bodies. We suspect depleted uranium, which was used by the American and British in the Gulf War right across the southern battlefields.[158]

The Iraqi people, subjected to these horrors, were abandoned by the universal legal framework of human rights that was established to protect every person as an equal. Iraqi people were not viewed as equal though. Through the process of Othering, their rights were rendered null and void as they existed in a state of exception, not fully politically qualified humans, as Agamben's *homines sacri*. The response by Madeline Albright to the death of half a million Iraqi children, discussed below, recalls the practice of Othering in the colonies, where colonisers considered themselves to be the centre, in opposition to the savage and barbaric colonised population who were deemed to be the marginalized Other,[159] relegating them to the margins of humanity.

*6.2.11.2 Children Dying: 'A Price Worth Paying'.*

The suffering of Iraqi children during a decade of sanctions is elucidated in a poem by the Iraqi poet Sinan Antoon:

> Do you know that your tomorrow has no tomorrow? That your blood is the ink of new maps? Do you know that your mother is weaving the slowness of her moments into an elegy? And she is already mourning you? don't be shy! Your funeral is over the tears are dry everyone's gone come forward![160]

On 12 May 1996, the then US ambassador to the UN, Madeline Albright, was asked the following question on *60 Minutes*, in reference to the economic sanctions imposed on Iraq: "We have heard that about half a million children have died.[161] I mean that's more

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[157] Patrick Cockburn, 'UN Aid Chief Resigns Over Iraq Sanctions', *Independent*, 30 September 1998.
[158] John Pilger, 'Squeezed to Death', *Guardian*, 4 March 2000. Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017.
[159] Bijay Kumar Das, *Twentieth Century Literary Criticism*, 5th ed, New Delhi: Atlantic P & Distributers, 2005.
[160] Sinan Antoon, *Baghdad Blues*, Vermont: Harbour Mountain Press, 2007, 10-11.
[161] In 1999 Richard Garfield, a professor of clinical international nursing at Columbia University, estimated that the mortality figure was 227,000 for children under 5 years of age, from August 1991 to 1998, most of them directly or indirectly attributable to the sanctions. He posed the following question in response to discrepancies in the estimates: "Do U.S. officials really wish to assert their moral authority by claiming that

children than died in Hiroshima. Is the price worth it?" Albright's response was, "I think that is a very hard choice, but the price, we think, the price is worth it".[162] This response elicited no great public outcry or backlash. In January 1997, Albright was appointed as the US Secretary of State in President Bill Clinton's administration. In her opening statement to the Senate Foreign Relations Committee, she said: "We will insist on maintaining tough UN sanctions against Iraq unless and until that regime complies with relevant Security Council resolutions."[163] Madeline Albright's reaction to the death of hundreds of thousands of Iraqi children treated them and the broader Iraqi society as irrelevancies, collateral damage, as people who simply didn't matter. They were excluded from the protections and human rights standards of international law. The scores of dead Iraqis were disavowed,[164] reduced to yet more of Agamben's *homini sacri.* The discussion in the following paragraph attests to the *homini sacri* status of Iraqis, existing in an utterly devastated country largely due to the UN sanctions imposed upon the state.

The shattering effect of the continued imposition of sanctions was evident in the infant mortality rate in Iraq that was amongst the highest in the world and the chronic malnutrition that affected a quarter of all Iraqi children under the age of five.[165] "The human and economic cost of sanctions has, indeed, been enormous, and it has largely been borne by the civilian population of Iraq. There can be no question of seeking justification for policy-induced human suffering of this magnitude."[166] John Pilger sums up the suffering of the Iraqi people very succinctly,

> Denial is easy, for Iraqis are a nation of unpeople in the West, their panoramic suffering of minimal media interest; and when they are news, care is always taken to minimise Western culpability. I can think of no other human rights issue about which the governments have been allowed to sustain such deception and tell so many bare-faced lies. Western governments have had a gift in the "butcher of Baghdad", who can be safely blamed for everything. Unlike the be-headers of Saudi Arabia, the torturers of Turkey and the prince of mass murderers, Suharto,

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"only" 227,000–350,000 children died rather than 500,000?" See Sheldon Richmond, 'Iraqi Sanctions: Were They Worth It?", *Global Policy Forum*, January 2004. Available at: https://archive.globalpolicy.org/component/content/article/170-sanctions/41952.html. Last accessed 23 July 2021.

[162] Sheldon Richman, 'Iraqi Sanctions: Were They Worth It?', *Global Policy Forum*, January 2004. Available at: https://archive.globalpolicy.org/component/content/article/170-sanctions/41952.html. Last accessed 23 July 2021.

[163] Ibid.

[164] For a more detailed account of the killing of Iraqi civilians, see Ed Vulliamy, "Iraq: The Human Toll", *Observer*, July 6 2003.

[165] Mattie Bieberly, *United Nations Resolution 661: Intervention, Devastation and the Internal Collapse of 1990s Iraq*, Honours Dissertation, University of Kansas, 2018.

[166] Peter Boone, Haris Gazdar and Athar Hussain, 'Sanctions Against Iraq: Costs of Failure', Center for Economic and Social Right, November 1997, 3-4.

> only Saddam Hussein is so loathsome that his captive population can be punished for his crimes.[167]

Prior to UN sanctions in 1990, Iraq's economy, healthcare system, and infrastructure was positioned favourable within the Middle East yet, by the end of the century, the sanctions had annihilated the previously robust middle classes, they created sky-rocketing inflation and drove 90-95% of the population into abject poverty.[168] In 1989, the literacy rate of Iraq had been the highest in the Arab world, standing at 95%; by 2000 it had fallen below 50%.[169] Luders cites the systematic impoverishment of the Iraqi people, directly instigated by the US and Great Britain, as one of the least-known and least-acknowledged crimes committed by the West since World War II.[170] A number of years later, with the 2003 invasion of Iraq, the actions of the US, Great Britain and the Coalition of the Willing, comprising of 49 nations,[171] would orchestrate the fall of the Iraqi government, the collapse of Iraqi civil society and pave the way for a new reign of terror under the Islamic State.

*6.2.11.3 The Gas Station has been Liberated … But at What Cost to Iraq?*

Addressing a joint session of Congress on 11 September 1990, George Bush Snr. described Iraq's invasion of Kuwait as "the first assault" on the emergent world order. "Out of these troubled times, a new world order can emerge," in which "the rule of law supplants the law of the jungle".[172] Gearóid ÓTuathail describes Bush speech as reinscribing a colonial discourse of "wild, untamed spaces" in which "civilization" was terrorised by a degeneration to "barbarism".[173] The imagery of a raw aggressive Iraq as a "throwback" and "a dark relic from a dark time … in which the law of the jungle

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[167] John Pilger, 'Squeezed to Death', *Guardian*, 4 March 2000.

[168] Simon Wessely, '*The Gulf War and its Aftermath'* in Johan M. Havenaar, Julie G. Cwikel, and Evelyn J. Bromet (eds.), *Psychological and Societal Consequences of Ecological Disasters,* New York, Kluwer Academic/Plenum Publishers, 2002.

[169] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea),* Devon: Old Street Publishing Ltd., 2017.

[170] Ibid.

[171] Matthew A. Baum, 'The Iraq Coalition of the Willing and (Politically) Able: Party Systems, the Press, and Public Influence on Foreign Policy' (2012) 57(2) *American Journal of Political Science*, 442.

[172] President H.W. Bush, *Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit*. Available at: https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-persian-gulf-crisis-and-the-federal-budget. Last accessed 11 October 2020.

[173] Gearóid Ó'Tuathail, 'The Effacement of Place: US Foreign Policy and the Spatiality of the Gulf Crisis' (1993) 25(1) *Antipode*, 4 cited in Derek Gregory, *The Colonial Present*, Blackwell Publishing, 2004, 159. David Campbell also describes Bush's imagery as reactivating "the myth of the frontier, in which territorial space becomes intertwined with ethical identity such that the fluid boundary and persistent struggles between "civilization" and "barbarism" is rendered in terms of geopolitical conflict". See Campbell, *Politics Without Principles*: *Sovereignty, Ethics and the Narrative of the Gulf War*, Boulder, CO: Lynne Reinner, 1993, 22.

supplants the law of nations"[174] positioned Saddam Hussein, not as a moderate or pragmatic friend of the West, a Cold War ally with whom Dick Cheney shook hands, but as the very personification of irrationality, fanaticism and cruelty, responsible for the "ruthless, systematic rape of a peaceful neighbour".[175] He was publicly rebuked for the 1988 poison gas attack on the Kurdish town of Halabja, in which up to 5,000 people died[176] (the Western businesses who supplied the weapons were neither criticised or denounced). The casting of Saddam Hussein as evil incarnate allowed the UN, urged on by the US to impose sanctions on Iraq. The discussion of sanctions is pertinent for several reasons. Firstly, the imposing of the sanctions shines a spotlight on the political chasm that exists between the sovereign powers of the US and its allies who are deemed to be deserving of full sovereign rights and those, such as Iraq, who were excluded from politically qualified life,[177] existing in a state of quasi-sovereignty. Secondly, in assessing UN strategies during the 1990s, Cortright and Lopez describe the 1990s as the sanctions decade,[178] with Iraq and Libya being the targets of these sanctions in response to Western political will,[179] highlighting the power and influence that Western nations hold in the UN. The imposing of sanctions on Iraq caused tremendous hunger, poverty, hardship and widespread death, yet these devastations were ignored, signals a return to colonial practices, where the well-being of the people of the Middle East was a secondary concern to the economic benefits that European powers enjoyed. Luders describes how the US and Britain pushed the UN to deploy sanctions against Iraq in order to trigger a revolt against Hussein[180] resulting in his removal. Thirdly, the human cost and human rights violations that the sanctions introduced and sustained are tragically incompatible with the ethos of the United Nations Charter,[181] the UN Convention on Human Rights,[182] and the

[174] President H.W. Bush, *Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit*. Available at: https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-persian-gulf-crisis-and-the-federal-budget. Last accessed 11 October 2020.
[175] Derek Gregory, *The Colonial Present*, Blackwell Publishing, 2004, 162.
[176] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea*), Devon: Old Street Publishing Ltd., 2017.
[177] Paul William Roberts, *The Demonic Comedy*, Edinburgh: Mainstream Publishing, 2010; Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[178] David Cortright and George Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Boulder, CO: Lynne Rienner, 2000.
[179] Alex Vines, 'The Effectiveness of UN and EU sanctions: lessons for the twenty-first century' (2012) 88(4), *Royal Institute of International Affairs*, 867.
[180] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd, 2017.
[181] The Charter of the United Nations, 1945.
[182] *Universal Declaration of Human Rights*, UNGA Res. 217A (III), at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810, Dec. 12, 1948.

UN Convention on the Rights of the Child,[183] severely undermining its credibility and acceptability. Lastly, the US system of sanctions reveals just how politicised and divided the UN veto system is, with China and Russia standing in opposition to the US and Britain on the issue of Iraqi sanctions. It is a system through which the geopolitical rivalries of the Permanent Five can be played out as they strive for global influence, and which can escalate into a proxy war between the two global camps. This is precisely the situation that occurred in Syria, an issue that is returned to when analysing the fragmentation of Syria's sovereignty, the consequences of which are explored in relation to the rise of Islamic State.

### *6.2.12 Osama bin Laden and the al-Qaeda Attacks*

The devastation and death caused to Iraq was not the only far-reaching consequence of the UN sanctions. On 29 October 2004, Osama bin Laden released a speech that was broadcast by Al-Sahab Institute for Media Production,[184] during which he stated his reasons for planning and executing the September 11 2001 attacks. Bin Laden specifically referenced the sanctions on the Iraqi people and the resulting deaths as one of the reasons:

> We have been fighting you because we are free men who do not remain silent in the face of injustice. We want to restore our [Islamic] nation's freedom. Just as you violate our security, we violate yours.
>
> The events that had a direct influence on me occurred in 1982, and the subsequent events, when the U.S. permitted the Israelis to invade Lebanon with the aid of the American sixth fleet. … I still remember those moving scenes – blood, torn limbs, and dead women and children; ruined homes everywhere, … bombs raining down mercilessly on our homes. It was as though a crocodile swallowed a child, and he could do nothing by cry. But does a crocodile understand any language other than arms? The entire world saw and heard, but did not respond.
>
> … I became convinced that iniquity and the premeditated murder of innocent children and women is an established American principle, and that terror is [the real meaning of] 'freedom' and 'democracy', while they call the resistance 'terrorism' and 'reaction'. America stands for iniquity and for imposing sanctions on millions of people, resulting in the death of many, as Bush Sr. did, causing the mass slaughter of children in Iraq, [the worst] that humanity has ever known. It stands for dropping millions of pounds of bombs and explosives on millions of children in Iraq again, as Bush Jr. did, in order to depose an old agent and to appoint a new agent to help him steal Iraq's oil, and other sorts of horrible things.

[183] Convention on the Rights of the Child 1990. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

[184] Al-Sahab Institute for Media Production also produced Al-Qaeda's video messages.

> … You have starved the Muslims of Iraq, where children die every day. It is a wonder that more than 1.5 million Iraqi children have died as a result of your sanctions, and you did not show concern. Yet when 3000 of your people died, the entire world rises and has not yet sat down. Bush's hands are sullied with the blood of all of these casualties on both sides, for the sake of oil and to give business to his private companies.[185]

bin Laden also repeatedly referred to the presence of US military bases in Saudi Arabia as a key reason for attacks of September 11 2001.[186] He was aghast that "infidels"[187] as he called American troops, were based in the land that is home to Islam's two holiest sites, Mecca and Medina, and offered to raise an army of *mujaheddin*[188] to rid Saudi Arabia of them. "Since God laid down the Arabian peninsula, created its desert, and surrounded it with its seas, no calamity has ever befallen it like these Crusader hosts that have spread in it like locusts, crowding its soil, eating its fruits, and destroying its verdure; and this at a time when the nations contend against the Muslims like diners jostling around a bowl of food".[189] When this offer was refused, it was cited by bin Laden as one of the reasons for the al-Qaeda attacks of September 11 2001.[190]

### *6.2.13 What Price Oil? Prelude to the 2003 Iraqi War*

Over twenty years after the imposition of the devastating sanctions, with the 2003 invasion of Iraq, the national interests of the US would again play a tragic and pivotal role in a war in the Middle East. In his book, *Fuel on the Fire,* Greg Muttitt states that the real goal of the 2003 Iraqi war was not the destruction of weapons of mass destruction (WMD) but rather the stabilisation of global energy supplies,[191] in a bid to ensure the continued and uninterrupted flow of Iraq's oil to world markets.[192] "The most important

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[185] Osama bin Laden, *Address to the American People*, November 1, 2004. Available at: https://www.aljazeera.com/news/2004/11/1/full-transcript-of-bin-ladins-speech. Last accessed 2 November 2020.

[186] Steve Yetiv, *Explaining Foreign Policy: U.S. Decision-Making and the Persian Gulf War,* (2nd ed.) Baltimore, MD: Johns Hopkins University Press, 2011.

[187] Ahmed S. Hashim, 'The World According to Usama bin Laden' (2001) 54(4) *Naval War College Review*, 11, 22.

[188] *Mujaheddin* is the plural form of mujahid, the Arabic term for one engaged in *jihad*. The term refers to Islamist Afghan fighters in the Soviet-Afghan War, and now extends to other jihadist outfits in various countries including Iran, Myanmar, the Philippines and the former Yugoslavia.

[189] Ahmed S. Hashim, 'The World According to Usama bin Laden' (2001) 54(4) *Naval War College Review*, 11, 22-23.

[190] Steve Yetiv, *Explaining Foreign Policy: U.S. Decision-Making and the Persian Gulf War,* (2nd ed.) Baltimore, MD: Johns Hopkins University Press, 2011; Osama bin Laden, *Address to the American People*, November 1, 2004. Available at: https://www.aljazeera.com/news/2004/11/1/full-transcript-of-bin-ladins-speech. Last accessed 2 November 2020.

[191] Greg Muttitt, *Fuel on the Fire: Oil and Politics in Occupied Iraq*, New York: Vintage, 2012.

[192] Nareez Ahmed, 'Iraqi Invasion Was About Oil', *The Guardian.* Available at: https://www.theguardian.com/environment/earth-insight/2014/mar/20/iraq-war-oil-resources-energy-peak-scarcity-economy. Last accessed 26 July 2021.

strategic interest lay in expanding global energy supplies, through foreign investment, in some of the world's largest oil reserves – in particular Iraq. This meshed neatly with the secondary aim of securing contracts for their companies."[193] Opponents of the 2003 Iraqi War claimed the reason for the War reaches back to the British interests in Iraqi oil in the regions of Basra, Baghdad and Mosul, in the First World War (hence Britain's insistence on Mosul being part of the British Mandate for Iraq). Iraqi's crude oil reserves are estimated to be 145,019 billion barrels and the country ranks fifth in the world's oil producers.[194] Oil prices fell in 1998-9. During this time Saudi Arabia developed closer ties with Iran and both countries drove the price of oil above a price that was acceptable to the US.[195] Saudi Arabia also indicated that it would no longer submit to American economic interests,[196] which caused concern in Washington. It was in this environment that Iraqi oil was viewed as a strategic asset to displace an increasingly volatile Saudi Arabia.[197] Saddam Hussein remained a problem however, as Iraq had "effectively become a swing producer of oil turning its taps on and off when it felt such action was in its strategic interest to do so".[198] Muttitt's claims that the real goal of the 2003 Iraqi War was the stabilisation of global energy supplies certainly has merit. The overthrow of the Saddam Hussein regime was mooted and advocated in the 1990s by The Project for the New American Century (PNAC) and in the 2001 Report - *Strategic Energy Policy: Challenges for the 21st Century*.[199] The Report recommended the implementation of "highly focused and enforced sanctions that target the regime's ability to maintain and

[193] Greg Muttitt, *Fuel on the Fire: Oil and Politics in Occupied Iraq*, New York: Vintage, 2012, 76.
[194] 2019 data. See Organization of the Petroleum Exporting Countries (OPEC). Available at: https://www.opec.org/opec_web/en/about_us/164.htm. Last accessed 18 December 2020.
[195] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[196] The US had also become increasingly worried about the reliability of Saudi Arabia's oil supply following the September 11 attacks. Fifteen of the hijackers were Saudi citizens. A Pentagon briefing paper claimed that "Saudis are active at every level of the terror chain, from planners to financiers, from cadre to foot-soldier, from ideologist to cheer-leader". See Thomas Rocks, "Briefing Depicted Saudis as Enemies", *Washington Post*, August 6, 2002 cited in Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, 190.
[197] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[198] Edward L. Morse and Amy Myers Jaffe, *Strategic Energy Policy Challenges for the 21st Century*, Report of an Independent Task Force co-sponsored by the James A. Baker III Institute for Public Policy of Rice University and the Council on Foreign Relations, 2001, 43. Available at: https://cdn.cfr.org/sites/default/files/pdf/2001/04/Energy%20TaskForce.pdf. Last accessed 7 October 2020; Nareez Ahmed, 'Iraqi Invasion Was About Oil', *The Guardian.* Available at: https://www.theguardian.com/environment/earth-insight/2014/mar/20/iraq-war-oil-resources-energy-peak-scarcity-economy. Last accessed 26 July 2021. For a more general discussion about the Iraqi oil industry and its relationship with the US, see Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004, Ch. 8, 180-247.
[199] Edward L. Morse and Amy Myers Jaffe, *Strategic Energy Policy: Challenges for the 21st Century*, Report of an Independent Task Force co-sponsored by the James A. Baker III Institute for Public Policy of Rice University and the Council on Foreign Relations, 2001. Available at: https://cdn.cfr.org/sites/default/files/pdf/2001/04/Energy%20TaskForce.pdf. Last accessed 26 July 2021.

acquire weapons of mass destruction",[200] "enhance the well-being of the Iraqi people",[201] and most importantly of all, to remove the major obstacle to the stability of oil prices – Saddam Hussein himself.[202] The removal of Hussein traces an arc from the repeated US intervention in the political economy of Iraq following the Second World War (with increasing force and British complicity) to the aftermath of the first Gulf War, when it was decided that Saddam Hussein must be deposed. One of the overarching arguments of this thesis is that colonialism is a living reality, continually informing and influencing international relations. The deposing of Saddam Hussein is one such example, inscribing the colonial present on Hussein's deposed body and on the fabric of Iraq.

*6.2.14 The Trial and Death of Saddam Hussein: A Case of Hegemonic Power*

Following the capture of Saddam Hussein by US forces on 13 December 2003, the Coalition Provisional Authority created the Iraqi High Tribunal (IHT) under Article 19 of the Iraqi High Tribunal (IHT) statute.[203] The IHT authority to try Saddam Hussein and Iraqi citizens for war crimes, crimes against humanity, and genocide[204] was granted under the IHT Statute, Iraq's domestic law on *Criminal Proceedings with Amendments – Law No. 23 of 1971*,[205] and the *Iraqi Penal Code – Law No. 111 of 1969*.[206] The indictment of the former Iraqi President highlights issues of fairness of the Tribunal. It was established by both a foreign government – the US and the new Iraqi government, raising questions as to its legitimacy and its ability to deliver justice in a fair manner, given the aim of the US to remove Saddam from power. The Tribunal has been described by Sissons and Bassinn as "a political spectacle, a new attempt at Iraqi justice, and, after the implementation of sentencing, an ill-fated symbol of sectarian revenge".[207] It has also

[200] Edward L. Morse and Amy Myers Jaffe, *Strategic Energy Policy: Challenges for the 21st Century,* Report of an Independent Task Force co-sponsored by the James A. Baker III Institute for Public Policy of Rice University and the Council on Foreign Relations, 2001. Available at: https://cdn.cfr.org/sites/default/files/pdf/2001/04/Energy%20TaskForce.pdf. Last accessed 26 July 2021

[201] Ibid.

[202] Ibid.

[203] IHT Statute, Arts 11-13. Miranda Sissons and Ari S. Bassin, 'Was the Dujail Trial Fair?' (2007) 5, *Journal of International Criminal Justice*, 272.

[204] Miranda Sissons and Ari S. Bassin, 'Was the Dujail Trial Fair?' (2007) 5, *Journal of International Criminal Justice*, 272.

[205] Law on Criminal Proceedings With Amendments, No. 23, (1971) cited in Eric H. Blinderman, 'The Execution of Saddam Hussein – A Legal Analysis' (2006) 9 *Yearbook of International Humanitarian Law*, 153, 158.

[206] Penal Code, No. 111, (1969) cited in Eric H. Blinderman, 'The Execution of Saddam Hussein – A Legal Analysis' (2006) 9 *Yearbook of International Humanitarian Law*, 153, 158.

[207] Miranda Sissons and Ari S. Bassin, 'Was the Dujail Trial Fair?' (2007) 5, *Journal of International Criminal Justice*, 272, 272.

been criticised as being a display of US hegemonic power and as a failure of international law to ensure that due process was followed.[208]

Saddam Hussein was convicted of crimes against humanity on 5 November 2006 and sentenced to death by hanging. He was executed on 30 December 2006.[209] Two other defendants, Barzan Ibrahim al-Tikriti, Hussein's half-brother and Awad al Bandar, the former chief judge of Hussein's revolutionary court, were also found guilty of crimes against humanity against the civilian population of Al-Dujail[210] and were executed by hanging on 15 January 2007.[211] From the outset, Saddam Hussein's trial were beset with problems, flagrantly disregarding "constitutional and legal proscriptions in its haste to execute … Hussein",[212] placing "an indelible stain"[213] on the trial. The interim Iraqi Prime Minister, Iyad Allawi, was accused of orchestrating a show trial by Salem Chalabi, the former head of the Iraq Special Tribunal: "Show trials followed by speedy executions may help the interim government politically in the short term but will be counterproductive for the development of democracy and the rule of law in Iraq in the long term."[214] In contravention of international law, the Tribunal's statute prohibited the commuting a death sentence.[215] Human Rights Watch stated that the execution "of Saddam Hussein follows a flawed trial and marks a significant step away from the rule of law in Iraq."[216] Human Rights Watch also identified numerous difficulties with Hussein's trial, detailing these in a 97-page report, 'Judging Dujail: The First Trial Before the Iraqi High Tribunal'. The Report found that the actions of the interim Iraqi government obstructed the independence of the trial. The Report also chronicled serious procedural flaws in the trial, including concerns about the independence and impartiality of the IHT

[208] Philip Manyok, *Saddam Hussein's Trial, Execution: A Case for Forced Justice*, 2010. Available at: https://www.researchgate.net/publication/272507673_Saddam_Hussein's_Trial_Execution_A_case_for_forced_justice. Last accessed 31 March 2021.
[209] Eric H. Blinderman, 'The Execution of Saddam Hussein – A Legal Analysis' (2006) 9 *Yearbook of International Humanitarian Law*, 153.
[210] Ibid.
[211] John F. Burns, 'Second Iraqi Hanging also Went Awry', *The New York Times*, 16 January 2007. Available at: https://www.nytimes.com/2007/01/16/world/middleeast/16hang.html. Last accessed 29 August 2021.
[212] Eric H. Blinderman, 'The Execution of Saddam Hussein – A Legal Analysis' (2006) 9 *Yearbook of International Humanitarian Law*, 153, 179.
[213] Ibid. at 179.
[214] 'Iraq PM Seeks Saddam Show Trial', *BBC News*, 23 September 2004. Available at: http://news.bbc.co.uk/2/hi/middle_east/3684052.stm. Last accessed 31 March 2021.
[215] Miranda Sissons and Ari S. Bassin, 'Was the Dujail Trial Fair?' (2007) 5, *Journal of International Criminal Justice*, 272.
[216] Iraq: Saddam Hussein Put to Death – Hanging After Flawed Trial Undermines Rule of Law, *Human Rights Watch*, 29 December 2006.

and the presumption of innocence,[217] violations of defendants' rights to question prosecution witnesses[218] and lapses in judicial demeanour by the presiding judge.[219]

*6.2.14.1 The Trial and Death of Saddam Hussein: The International Criminal Court (ICC)*

One of the significant questions that remains about Saddam Hussein's trial concerns the decision to try him by the IHT in Iraq, rather than taking the case to the ICC, with its jurisdiction to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes and the crime of aggression.[220] Saddam Hussein's trial did not did not meet the basic standards set by the ICC, namely: "i) the presumption of innocence until proven guilty by the court of justice, ii) informing the accused of the alleged charges promptly, iii) allowing adequate time for the defendant, and iv) due process".[221] Questions as to whether Saddam Hussein received a fair trial remain.[222] His trial and execution also deepened sectarian divisions in Iraq, according to journalist Mohamad Bazzi:

> The vengeful and sectarian way in which Hussein was killed deepened the civil war that had been raging inside Iraq since early 2006—Sunni violence against Shiites, followed by Shiite reprisals. And if there wasn't a deep-rooted Sunni-Shiite rift in the region before Hussein's hanging, there certainly was one after. In the days following his execution, Hussein emerged as a Sunni Arab hero who stood calm and defiant as his Shiite executioners tormented him. No one will ever forget the way in which Saddam was executed", then–Egyptian President Hosni Mubarak told the Israeli newspaper Yediot Aharonot. "They turned him into a martyr".[223]

Bazi stated that Sunnis interpreted Hussein's execution as an act of sectarian vengeance, blaming the US and the Shi'ite-dominated Iraqi government for crushing Arab nationalism,[224] thus maintaining the imperialistic endeavours of Western States.

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[217] *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, *Human Rights Watch*, 37. Available at: https://www.hrw.org/reports/2006/iraq1106/. Last accessed 26 July 2021.
[218] Ibid.
[219] Ibid.
[220] *Rome Statute of the International Criminal Court (ICC) 1998.*
[221] Philip Manyok, *Saddam Hussein's Trial, Execution: A Case for Forced Justice*, 2010. Available at: https://www.researchgate.net/publication/272507673_Saddam_Hussein's_Trial_Execution_A_case_for_forced_justice. Last accessed 26 July 2021.
[222] For a detailed discussion of this, see Philip Manyok, *Saddam Hussein's Trial, Execution: A Case for Forced Justice*, 2010. Available at: https://www.researchgate.net/publication/272507673_Saddam_Hussein's_Trial_Execution_A_case_for_forced_justice. Last accessed 26 July 2021.
[223] Mohamad Bazzi, 'How Saddam Hussein's Execution Contributed to the Rise of Sectarianism in the Middle East', *The Nation*, 15 January 2016.
[224] Ibid.

The discussion in this chapter has thus far focussed on the continuance of international law's civilising mission, a practice that, as this thesis argues, has not been confined to the colonial era of the 19th century, but rather has been maintained through the imperialistic endeavours of Western states. The CIA-coup in Iran and the Iran-Iraq War attest to these imperialistic enterprises subjecting Iranian and Iraqi people to the most extreme aspects of sovereignty,[225] as objects of sovereign power. President Carter's State of Union Address on January 23, 1980 and President G.H. Bush's invoking of that Address further attest to the imperialistic ambitions of the US, overtly stating the intention of the US to interfere in the economic and political sovereignty of another state in order to protect its national interests and to enforce its military power to the Gulf region in order to maintain it hegemony. Saddam Hussein's decision to invade Kuwait and to threaten oil reserves led to him falling very much out of favour with Western nations following the Gulf War and it sowed the seeds for his downfall, which was achieved through the 2003 Iraqi War.

### 6.3 Afghanistan and the Globalisation of *Jihad*

Afghanistan forms an integral part of the narration of the formation of Islamic State. Afghanistan had been central to global ambitions of several jihadi organisations; Khurasan, a province in present-day Afghanistan, is the birthplace of an Islamic army that helped Abu Abdullah Muhammad ibn Abdallah al-Mansur (al-Mahdi) establish the Abbasid Caliphate at Mecca in 775.[226] The ragged formation of modern Afghanistan narrates a story of American involvement in its internal affairs that extends from the Second World War through to the Soviet occupation (1979-89) and the rise of the Taliban[227] in 1994. As a country, Afghanistan has endured a long history of domestic unrest and friction, as well as foreign intervention that has had a devastating and lasting effect. One of the most influential of those interventions in terms of the lasting impact it had on Afghanistan was the Soviet invasion in 1980, which led to the eight-year long war between the Soviet Union and Afghanistan.

The Soviet-Afghan War would profoundly affect the trajectory and fortunes of the country in the coming decades. The bloodied conflict pitted Muslim fighters against an

[225] Antony Anghie, 'The Evolution of international law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.
[226] Kashif Mumtaz, 'ISIS: Assessment of Threat for Afghanistan' (2016) 36(1) *Pakistan Strategic Studies*, 1.
[227] The Taliban are ultraconservative students who emerged from and were inspired by the *mujahideen*. Only three states officially recognised the legitimacy of the Taliban in 1997: Saudi Arabia, the United Arab Emirates and Pakistan.

avowedly atheist state, which drew many foreign fighters to Afghanistan to engage in *jihad.* The Afghan war proved to be vital to the jihadist movement as it bred a new generation of trans-nationalist *jihadis*, whom upon their return to their home countries, enthusiastically endorsed a brand of *jihad* based on fundamentalist *Wahhabist* Sunni Islam.[228]

### *6.3.1 The Soviet-Afghan War: 1979–1989*

The 1979–1989 Soviet-Afghan War was instrumental in the evolution of *jihad*, when it emerged onto the global stage to a degree not previously witnessed. The conflict in Afghanistan proved to be a compelling arena for the incubation of a particular brand of *jihad – Salafism-Jihad.* The USSR invaded Afghanistan in December 1979 at a time when armed resistance in Afghanistan against the Marxist Khalg government threatened to spill across the borders of the USSR.[229] Moscow was troubled by the rise of Islamicism[230] throughout central Asia following the Iranian revolution (1978-9) that had toppled the Shah in February 1979.[231] Its invasion of Afghanistan in 1979 was an attempt to stop the spread of Islamicism into USSR. The act of invasion led to a decade long war between the *mujaheddin* in Afghanistan and the Soviet Union (1979-89). This war proved to be vital to the *jihadist* movement, as it bred a new generation of trans-nationalist *jihadis* and becoming a recruiting ground for many religiously inclined Muslims, invigorating *jihadist* ambitions.[232] Following the defeat of the USSR in Afghanistan, many of the Afghan Arabs[233] as they became known, felt empowered to globalise the Islamist revolution.

### *6.3.2 The Afghan Arabs*

Muslims from many countries who spoke different languages travelled to Afghanistan to collectively fight against the Soviet occupation. They came from Algeria, Egypt, India, Indonesia, Iraqi Kurds, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Pakistan, Palestine, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, Yemen, amongst others.[234]

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[228] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[229] Ibid.
[230] The term Islamicism, also referred to as Islamic fundamentalism, can refer to political and social activism which advocates that public and political life should be guided by Islamic principles. Specifically, the term can refer to the full implementation of Sharia law.
[231] Derek Gregory, *The Colonial Present*, Oxford: Blackwell Publishing, 2004.
[232] Ibid.
[233] Afghan Arabs refers to Arab and other Muslim Islamists who fought in Afghanistan during and the Soviet-Afghan War to help fellow Muslims fight against the invasion by the secular Soviets.
[234] Frawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, Cambridge: Cambridge University Press, 2005.

Although they numbered in the tens of thousands, which was infinitesimal in comparison with the number of Afghani fighters, Gerges describes how "the presence of such a broadly representative segment of the Muslim population transformed the Afghan war into a religious struggle between the *ummah* (the Muslim community worldwide) and the communist Soviets."[235] In 1980s Afghanistan there existed a community of Muslims who dreamed of the past glories and victories of previous Caliphates. To illustrate this point, a Yemeni Afghan volunteer stated, "Afghanistan reminded Muslims of all colours and races that what unites us [the Islamic faith] is much more important than the superficial differences wrought by colonialism and secular nationalism. We felt we were on the verge of re-enacting and reliving the Golden Age of our blessed ancestors."[236] The ideology of the Afghan Arabs was more "scripturalist"[237] and fundamentalist than the doctrine of their native Afghan counterparts.[238] Many of the Afghan Arabs adhered to the pure Islamic principles of *Salafism* and the fundamentalist religious doctrine of *Wahhabiyya*, in contrast to the Afghanis who adhered mostly to the less conservative Deobandi sub-school of the Hanafi school of thought.[239] The Afghan Arabs returned to their home countries, enthusiastically seeking to spread their fundamentalist ideology. One such person was Abu Musab al-Zargawi, the future founder of the Islamic State of Iraq (ISI), the precursor to Islamic State.[240]

This is not to suggest however, that ideology was the only contributing factor to the ultimate rise of Islamic State. While *Wahhabism* and *Salafism* were the fundamental ideologies adopted by Islamic State, the threat of the eradication of tribal and Islamic law and the brutal crushing of conservatism by the ruling government in Afghanistan and the Soviets[241] were the initial driving forces for the resistance against the government and the invading Soviets. The framework in Part I of the thesis allows a nuanced reflection of the role the state of exception, *homo sacer* and biopower in Afghanistan as contributing factors on the rise of Islamic State and the establishment of the Caliphate.

[235] Frawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, Cambridge: Cambridge University Press, 2005, 82.
[236] Ibid.
[237] Ibid. at 82.
[238] Ibid.
[239] Ibid.
[240] Toby Warrick, *Black Flags: The Rise of ISIS*, London: Transworld Publishers, 2015.
[241] Massouda Jalal & Mario Silva, Hanging by a Thread: Afghan Women Rights and Security Threats, New Delhi: Gyan Publishing, 2016.

*6.3.2.1 The Mujahideen and Resistance to the State of Exception*

The *mujaheddin* framed themselves as defenders of Afghanistan against a foreign invader, as engaged in a nationalistic struggle, fighting against an imperialist power[242] and as defenders of the tribal laws that they recognised over constitutional laws.[243] The resistance to the technologies of governance engaged in by the *mujahideen* can be positioned and contextualised through Levi's[244] argument that the state's coercion of its citizens gives rise to social opposition and resistance against that state, and through Foucault reading of the co-existence of power and resistance.[245] Foucault's theorisation of power reveals domination as the effect of hegemony and as he states, "there is always a point of resistance to domination".[246] Foucault's framing of resistance can be linked to the notion of agency and the rejection of the subject as a passive recipient of power. The humanity of Agamben's *Muselmann*, who is the victim of absolute power, has no such agency, however, having been compromised by "the moving threshold in which man passed into non-man".[247] The *Muselmann* is Agamben's metamorphosised *homo sacer*, he who exists in the state of exception where sovereign exceptionalism produces the docile bare life. The resistance engaged in by the *mujahideen* rejected the technologies of control and regulation that would have reduced them to Agamben's *Muselmann*, as passive recipients of hegemonic (non-Islamic) power, as docile objects of that power existing in a state of 'hegemonic' exception void of tribal and Islamic law.

*6.3.3 Developments from the Soviet-Afghan War*

It is questionable whether transnational *jihad* would have flourished without the Soviet-Afghan war and the influence of the *mujahideen*. One of the legacies of the prolonged Afghan war was the mobilisation, radicalisation and transformative impact it had on foreign combatants. Four of these combatants were Osama bin Laden, Abdullah Azzam,

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[242] Marnix Middelburg, 'Understanding Power in Counterinsurgency: A Case Study of the Soviet-Afghanistan War' (2021) *E-International Relations*, 1. Available at: https://www.e-ir.info/pdf/90011. Last accessed 18 January 2022.

[243] Tasleem Malik & Faizullah Jan, 'Foucauldian Biopower, Homo Sacer, and Resistance Under the Taliban Rule in Afghanistan' (2021) 5(1) *Liberal Arts & Social Sciences International Journal (LASSIJ)*, 582.

[244] Margaret Levi, *Of Rule and Revenue*, Berkeley and Los Angeles, CA: University of California Press, 1988.

[245] Foucault, *The History of Sexuality, Volume 1: An Introduction* (trans. Robert Hurley), London: Penguin, 1990.

[246] Tasleem Malik & Faizullah Jan, 'Foucauldian Biopower, Homo Sacer, and Resistance Under the Taliban Rule in Afghanistan' (2021) 5(1) *Liberal Arts & Social Sciences International Journal (LASSIJ)*, 582, 591.

[247] Peter Fitzpatrick, "Bare Sovereignty: *Homo Sacer* and the Insistence of Law" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 49-73, 66.

Ayman al-Zawahiri, and Abu Musab al-Zarqawi.[248] In particular, in the years following the Afghan war, al-Qaeda under the leadership of bin Laden, al-Zawahiri and al-Zarqawi instigated transnational *jihad*, furthering the cause of global *jihad* against the "far enemy".[249] al-Zawahiri was al-Qaeda's second in command to Osama bin Laden and became the leader of al-Qaeda following the death of bin Laden on 2nd May 2011. In his 2001 memoir, *Knights Under the Prophet's Banner*, al-Zawahiri wrote about the importance of the Afghan war to the *jihadist* movement:

> the *jihad* battles in Afghanistan destroyed the myth of a (superpower) in the minds of young Muslim *mujahedeen.* The Soviet Union, a superpower with the largest land army in the world, was destroyed, and the remnants of its troops fled Afghanistan before the eyes of the Muslim youths and with their participation.[250]

Zawahiri stated the Afghan war "provided the *jihadist* movement with an arena that served as an incubator for its seeds to grow and where it acquired practical experiences in combat, politics, and organization."[251] Equally important to Zawahiri was the "*esprit de corps*"[252] that existed between the Afghan war veterans, which he stated, fuelled the Afghan *jihad* long after the war ended.[253] Zawahiri credited this loyalty with helping the veterans survive the US invasion in October 2001 and the subsequent US military campaign against al Qaeda and the Taliban.[254] Afghanistan, he wrote, "gave young Muslim *mujahedeen* – Arabs, Pakistanis, Turks, and Muslims from Central and East Asia - a great opportunity to get acquainted with each other on the land of Afghan *jihad* through comradeship-at-arms against the enemies of Islam."[255] Thus, "the Afghan war experience infused the *jihadist* movement with new global sensibilities and ambitions and a small but cohesive army of converts to transnational jihadism with a strong *asabiya* (group or tribal loyalty)".[256]

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[248] Martha Crenshaw, 'Transnational Jihadism & Civil Wars' (2017) 146(4) *Dædalus, the Journal of the American Academy of Arts & Sciences*, 59.
[249] Martha Crenshaw, 'Transnational Jihadism & Civil Wars' (2017) 146(4) *Dædalus, the Journal of the American Academy of Arts & Sciences*, 59. The Far Enemy refers to American, European and other Western targets. The Near Enemy refers to national targets. Al-Qaeda targeted the Far Enemy in contrast to Islamic State who targeted the Near Enemy.
[250] John Calvert, *Islamism: A Documentary and Reference Guide*, California: Greenwood Publishing Group, 2008, 230. A. Zawahiri, 'Knights Under the Prophet's Banner', in Mr. Perry and H.E. Negrin H.E. (eds) *The Theory and Practice of Islamic Terrorism*, Palgrave Macmillan, New York, 2008.
[251] John Calvert, *Islamism: A Documentary and Reference Guide*, California: Greenwood Publishing Group, 2008, 230.
[252] Frawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, Cambridge: Cambridge University Press, 2005, 86.
[253] Ibid.
[254] Ibid.
[255] John Calvert, *Islamism: A Documentary and Reference Guide*, California: Greenwood Publishing Group, 2008, 231.
[256] Frawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, Cambridge: Cambridge University Press, 2005, 86.

The Afghan war and the *mujahedeen* play a pivotal role in the rise of Islamic State. Following the lead of the Afghan Arabs, Islamic State also adopted and practised *Salafism-Wahhabism* and enforced adherence to these doctrines in the Caliphate, with much brutality. The Afghan *jihad*, whose roots lie in the war against the Soviet Union, transformed the very concept of *jihad* that ultimately materialised in the al-Qaeda terrorist attacks in New York (2001), Washington (2001), Madrid (2004) and London (2005), in the War on Terror, in the collapse of Afghanistan and Iraq and in the triumph of Islamic State.

## 6.4 Islamic State and Fragmented Sovereignty

### *6.4.1 Background to the Rise of Islamic State*

The Sunni militant group has had a number of incarnations: its forerunner was the Islamic State of Iraq (ISI). It was established under the name of *Jama'at al-Tawhid wal-Jihad*,[257] a predecessor of *Tanzim Al Qadea fi Bilad al-Rafidayn* or al-Qadea.[258] The group has also used the names of the Islamic State of Iraq and the Levant (ISIL); the Islamic State of Iraq and Syria (ISIS), the Islamic State of Iraq and al-Sham (ISIS); DAESH (an abbreviation of the Arabic name for ISIL), and in 2014, the group adopted the name, Islamic State. Other splinter groups have emerged, including Islamic State of the West African Province (ISWAP), Islamic State of the Greater Sahara (ISGS) and Islamic State Khorasan (ISIS-K).

As has been discussed in this chapter, the origins of Islamic State can be traced to the US-led invasion of Iraq and its chaotic aftermath. In addition to this, the civil war in Syria presented ISI with a prime opportunity to seize territory in the country. Following Syria's descent into civil war in 2011, ISI seized the opportunity to expand into Syria, which it did in 2013. Establishing itself in Iraq and Syria, ISI changed its name to the Islamic State of Iraq and al-Sham (ISIS).[259] Upon its arrival in Syria, the group gained control of Syrian oil wells and refineries, which provided ISIS with access to vast financial resources.[260] On 29 June 2014, the first day of Ramadan, the Caliphate was declared by

[257] Aaron Y. Zelin, 'The War Between ISIS and al-Qaeda for Supremacy of the Global Jihadist Movement', (2014) No. 20, *Research Notes*, The Washington Institution for Near East Policy, Washington, D.C., 1, 1. Available at: http://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote_20_Zelin.pdf. Last accessed 23 March 2021.
[258] Robert G. Rabil, 'The ISIS Chronicles: A History', (2014) *The National Interest*, 1, 2. Available at: http://nationalinterest.org/feature/the-isis-chronicles-history-10895
[259] C.R. Lister, *The Syrian Jihad: Al-Qaeda, Islamic State and the Evolution of an Insurgency*, Oxford: Oxford University Press, 2015. In 2014, al-Qaeda renounced its former affiliate.
[260] Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution*, London, New York: Verso, 2015.

the new Caliph, Abu Bakr al Baghdadi – Caliph Ibrahim. Its slogan, *baqiya wa tatamaddad* (remaining and expanding) – urged followers to defend the Caliphate. [261] The Caliphate drew thousands of fighters from North Africa, Europe, the Caucasus, the Far East and all over the Middle East to Iraq and Syria,[262] where its inhabitants could live in accordance with the pure Islamic principles of *Salafism* and the fundamentalist religious doctrine of *Wahhabiyya.*

*6.4.2 Fragmented Sovereignty in Iraq and Syria*

The discussion in Chapter Two examined sovereignty as a widely accepted norm of the international framework, grounded in Western philosophical tradition. The analysis also focussed on quasi-and fragmented sovereignty and environments in which they are produced.[263] The Westphalian system, based on the autonomy, authority of the state and territorial integrity has proved to be problematic when applied to non-Western domestic affairs however,[264] as the following discussion of Iraqi and Syrian sovereignty will examine. The issue of Iraq's and Syria's fragmented sovereignty is integral to understanding the rise of Islamic State in Iraq and Syria (and indeed, the wider Middle East). Both states experienced the fragmentation of their sovereignty in years leading up to the establishment of Islamic State. When the sovereignty of the state is eroded, unpredictable and chaotic spaces emerge, which was exactly the situation in Iraq and Syria: Iraq following the 2003 War, and Syria as a consequence of the Arab Uprisings in 2011 and the ensuing civil war. As stated in section 6.1, the abject failure of the Iraqi and

[261] Daveed Gartenstein-Ross, 'Radicalisation: Social Media and the Rise of Terrorism', *House Testimony, Hearing before the US House of Representatives Committee on Oversight and Government Reform, Subcommittee on National Security*, 28 October 2015, 3. Available at: http://oversight.house.gov/wp-content/uploads/2015/10/10-28-2015-Natl-Security-Subcommittee-Hearing-on-Radicalization-Gartenstein-Ross-FDD-Testimony.pdf. Last accessed 23 March 2021.

[262] Lauren Williams, *Islamic State Propaganda and the Mainstream Media*, Sydney: Lowy Institute for International Policy, 2016, 2.

[263] Quasi-sovereignty was described as the lack of full sovereign rights and autonomy over a state's internal political, economic and cultural affairs) operating within the two-tier system of full- and quasi-sovereignty. Fragmented sovereignty exists in a quasi-sovereign state, where formal power structures have become less influential as state power wanes and the recognisable attributes of sovereignty, i.e. legitimacy and effective institutions, become weak or non-existent. In these circumstances, power becomes increasingly decentralised as political authority fragments. In this space, the influence of informal power structures gains traction, enabling the penetration of the state by a range of different actors with differing motivations, producing multiple, localised, and relatively autonomous cores of power, rather than an all-compassing structural and centralised modality of control. Conflicting claims of the right to rule generate multiple and competing sovereignties, leading to the formation of states within states, where a wide range of competing and overlapping communities are contested between conflicting groups and allegiances, all of which cause the fragmentation of sovereignty. Islamic State is an excellent example of this. For a more detailed discussion of the fragmentation of sovereignty, see Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

[264] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

Syrian states assists in understanding the extraordinary rise of Islamic State.[265] However, in order to accomplish this, domestic conditions, such as the disintegration of society and fragmented sovereignty, must already have been in place for such a group to emerge. Through a discussion of the fragmentation of sovereignty in Iraq and Syria, it is revealed that imperialism has not been consigned to the past, but rather continues to operate as a central part of the international political landscape. The processes through which the fragmentation of sovereignty occurred in both countries highlights the continued dominance of international actors in these conflicts and their imposition of quasi-sovereignty, exposing how imperialism has always been, and remains part of the international legal framework.

*6.4.3 The Fragmentation of Iraqi Sovereignty*

The dismantling of a nationalist-based structure, achieved through the demobilisation of the military and the process of de-Baathification, fragmented and eroded Iraq's sovereignty through the violation of its autonomy and authority over its internal affairs and its much-cherished autonomy over its oil industry. Paul Bremer, the Chief Executive of the Coalition Provisional Authority, pursued a neo-liberalism agenda of privatisation in Iraq until, according to Luders "the last functioning remnants of the state had been all but extinguished".[266] Returning to Greg Muttitt's argument, discussed above, that the real goal of the 2003 Iraqi War was to stabilise global energy supplies, Bremer's decision to reverse the 1972 nationalisation of Iraq's oil industry, in favour of Western interests, endorses the assertion that the Bush administration demonstrated a complete lack of knowledge and understanding of the composition and fragility of Iraqi sovereignty.[267] Bremer granted the new exploration rights to US and British companies: Exxon, Chevron, Halliburton, BP and Shell [268] ending the three and a half decades of state ownership of Iraq's oil and gas.[269] "Arab oil for the Arabs" was one of the most popular slogans of the Ba'athist era (1968-2003), culminating in the nationalisation of Iraqi oil, which brought to fruition a policy that had first been demanded in the 1950s.[270] The fact

[265] Kashif Mumtaz, 'ISIS: Assessment of Threat for Afghanistan' (2016) 36(1) *Pakistan Strategic Studies*, 1.
[266] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd, 2017, 44.
[267] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[268] Tariq Shafiq, *Iraq's Oil History: Prospects & Limitations*, IEA Workshop, Iraq Energy Outlook, 4 May 2012, Istanbul.
[269] Ibid.
[270] Valdrin Xhemaj**, '**Iraq: What Happened to the Oil after the War?' *The Conversation*, July 8 2016. Available at: Iraq: what happened to the oil after the war? (theconversation.com). Last accessed 11 January 2021.

that the Iraqi oil was privatised by Bremer and by extension, the Bush administration, was an afront to Iraqis and their culture and demonstrated a distinctive lack of knowledge, by the Bush government, of the importance of a nationalised Iraqi oil industry.

*6.4.3.1 The Fragmentation of Iraqi Sovereignty and the Role of Sectarianism*

The mis-governance and sectarian rule that resulted largely from Bremer's de-Ba'athification laws alienated Iraqi Sunnis, providing impetus and momentum sectarian violence. The disassembling of the Iraq state eviscerated its autonomy and territorial sovereignty, enabling tribal structures to augment their legitimacy, while the authority of the state (a central attribute of sovereignty) waned. One of the major calamities of the Bush administration was its failure to anticipate the actions of disaffected Ba'athist army personnel, who formed the core of al-Qaeda in Iraq (AQI) under the leadership of the former Afghan Arab, Abu Musab al-Zarqawi.[271] Dispossessed and marginalised by the US occupation and the installation, by the US, of a Shia-dominated Iraqi government, Sunni resistance to the occupation and to the ruling majority Shiites was born, laying the foundations for the terrorism and violence of the Islamic State. Many of Saddam Hussein's former generals and officers, and thousands of ex-soldiers, secret service agents and party officials joined forces with the insurgents of AQI, engaging in a campaign of violence against US forces and Arab Shiites.[272] In the aftermath of the 2003 War, Iraqi politics was increasingly shaped and amplified by vitriolic sectarian tensions and by the escalation of fractious competition between the Shi'a and Sunni.[273]

On 30 June 2004, the Iraqi Interim Government was installed by the Bush administration. The key facts of the Iraqi Interim Government were:

- The Iraqi Interim Government will operate under the legal framework established by the Transitional Administrative Law, including the TAL Annex.
- The Iraqi Interim Government will take power on 30 June and will dissolve when the Iraqi Transitional Government is formed. The Transitional Government will be chosen through a process of democratic elections to be held no later than 31 January 2005.
- The Iraqi Interim Government will consist of a President, two Deputy Presidents and a Prime Minister leading a Council of Ministers. The new government will also include an Interim National Council composed of Iraqis who reflect Iraq's diversity, and a Judicial Authority.[274]

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[271] Toby Warrick, *Black Flags: The Rise of ISIS*, London: Transworld Publishers, 2015.
[272] Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution*, London, New York: Verso, 2015; Toby Warrick, *Black Flags: The Rise of ISIS*, London: Transworld Publishers, 2015.
[273] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[274] See *Iraqi Interim Government: Announcement Ceremony Press Packet*, June 2004. Available at: https://govinfo.library.unt.edu/cpa-iraq/government/press_packet.pdf. Last accessed 27 July 2021.

What was not stated in the Report was the fact that the Interim Government was dominated by Shi'a Iraqis, while the Sunni population was locked out of government and other public service positions. Paul Bremer's farewell speech was broadcast on Iraqi television: "I leave Iraq gladdened by what has been accomplished and confident that your future is full of hope."[275] Iraq's future was not full of hope however. The Chilcot Report identified the lack of planning for Iraq's future as one of the contributory factors to the destruction, carnage and chaos that followed the deposing of Saddam Hussein and the evisceration of the Ba'ath Party.[276] De-Ba'athification was a disaster for Iraq and had long-term dramatic consequences. According to Alaaldin, the likelihood of the existence of Islamic State is very questionable had disaffected former Ba'ath members not been able to acquire resources and arms in the chaotic aftermath of the 2003 invasion.[277] Giving credibility to this assertion is that many of the former members of the Iraqi Army, all Ba'ath members, joined the Islamic State of Iraq (ISI) to fight against the US occupation and the Shi'a domination of Iraqi government and society.

At the time of Saddam Hussein's removal from power, Iraq was poverty stricken, in the grips of increasing sectarianism, under the control of criminal networks, powerful tribal and religious factions.[278] In this unstable, chaotic and violent environment, ISIS and subsequently Islamic State were in a prime position to assert their authority, to become the most determined and brutal of *jihadist* militant group. The following section addresses how Islamic State gained such a foothold in Iraq and Syria, capitalising on the fragmentation of Iraqi and Syrian sovereignty and their societies, in order to achieve its aims. Hence, the issue of fragmented sovereignty is very important, forming an integral part of the narrative of the rise of Islamic State.

*6.4.3.2 The Fragmentation of Iraqi Sovereignty and the Role of Tribes*

The prevailing importance of tribes is evident in Saddam Hussein's use of tribes to assert control over peripheral areas of Iraq and in the impact of Iraq's Arab tribes on the origins and rise of Islamic State.[279] Islamic State posed a challenge to the international legal

[275] Robert Leeson, *Hayek: A Collaborative Biography – Part VIII: The Constitution of Liberty: 'Shooting in Cold Blood', Hayek's Plan for the Future of Democracy*, Cham: Palgrave Macmillan, 2019, 358.
[276] John Chilcot, *The Report of the Iraq Enquiry*, 6 July 2016. Available at: https://webarchive.nationalarchives.gov.uk/20160708115158/http://www.iraqinquiry.org.uk/media/246416/the-report-of-the-iraq-inquiry_executive-summary.pdf. Last accessed 27 July 2021.
[277] Ranj Alaaldin, 'ISIS Rose from the Ruins of Iraq. But Postwar Chaos Was Not the Sole Factor', *The Guardian*, 7 July 2016. Available at: https://www.theguardian.com/commentisfree/2016/jul/07/isis-iraq-war-postwar-chaos-jihadism-saddam. Last accessed 27 July 2021.
[278] Ibid.
[279] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

order by rejecting the foundational doctrines upon which (post-)Westphalianism principles are based. Instead, the group sought to assert its own model of statehood in opposition to the Westphalian state system[280] (the details of which are discussed in Chapter Eight). An analysis of the rise of Islamic State is very illuminating in understanding the way in which the fragmentation of sovereignty and the marginalisation of societal groups can lead to the rise of political violence and the emergence of militant organisations such as Islamic State who seek to establish a new systems of statehood as an alternative mode of governance and as a way to reconfigure geo- and world politics.

Traditional tribal affiliations and loyalties, which have provided structure and order from pre-Ottoman times, continued to endure through the Saddam Hussein era and post-2003, as informal power structures.[281] The concept of *asabiyya*, which expresses social solidarity, unity, and a sense of shared purpose and social cohesion,[282] highlights the prevailing and ensuing importance of tribes in Iraq. As explained by John McCary, a former intelligence collector for the Iraq army in Anbar during 2003 and 2004, tribal allegiances became of paramount importance to Sunni Arabs as a means for survival, post the 2003 invasion, a situation that was exploited by AQI who drew upon "individuals within the general populace to support their causes".[283] Indeed, the first edition of *Dabiq*[284] in 2014 spoke about the importance of tribes to the furthering of their cause:

> extensive history of building relations with the tribes within its borders in an effort to strengthen the ranks of the Muslims, unite them under one imam, and work together towards the establishment of the prophetic Khalifa. Its practice of attending tribal forums, addressing the concerns of the tribal leaders and accepting their bay'ah is regularly met with success.[285]

The unwilling violation of Iraqi sovereignty (against the wishes of the Saddam Hussein regime) and the increase in tribal dynamics and loyalties exacerbated and magnified the conditions where AQI and then ISI were able to thrive and exercise their own autonomy. The failure of the successive Iraqi governments post-2003 to reinstate the key components of a sovereign state, territoriality, governance, autonomy and citizenship, exposed Iraq to

[280] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[281] Ibid.
[282] Ibid.
[283] Ibid. at 86.
[284] *Dabiq* was an online magazine used by the ISIS as radicalisation and recruitment tool. *Dabiq* itself stated that its purpose was truth-seeking, migration, holy war and community. It was first published in July 2014 in a number of different languages, including Arabic, English and French. See Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) 16 *International Criminal Law Review*, 361.
[285] *Dabiq*, 1; Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017, 152.

the ideology of AQI, ISI and ISIS. The penetration of the Iraqi state by external actors following the overthrow of Saddam Hussein fundamentally changed the nature of Iraqi politics. In the face of existential threats from Shi'a militias, Sunnis retreated to the identity group of their tribes for survival and protection,[286] deepening sectarian divisions in Iraq.

*6.4.4 The Fragmentation of Syrian Sovereignty*

Syria has a population of approximately 20 million. The ethnic makeup of the country is Arab (50%), Alawite (15%), Kurd (10%), Levantine (10%) and other (15%) (includes Druze, Ismaili, Imami, Nusairi, Assyrian, Turkoman, Armenian).[287] Religious denominations are categorised as follows: Muslim 87% (includes Sunni (74%) and Alawi, Ismaili, and Shia (13%)), Christian 10%[288] (includes Orthodox, Uniate, and Nestorian), and Druze 3%.[289] Despite its religious diversity, Syria had been a mainstay of stability until the 2011 uprisings, under the leadership of President Bashar al-Assad and his father before him, Hafez al-Assad (until his death in 2000). Assad is an Alawaite, an offshoot of Shiite Islam.

The uprisings in Syria began as part of the Arab Spring, a series of pro-democracy protests across the Arab World.[290] While the uprisings themselves have non-superpower origins, the Arab Spring protests play an integral role in the narrative of Islamic State's rise. The metastasising of the uprisings from an internal conflict to a proxy war between global superpowers, that exacerbated and extended the war and speaks to the uncomfortable association between imperialism, law, politics and economics as powerful states sought to impose their own agendas on the global landscape. The consequences of such actions for Syria were devastating; the violation and fragmentation of Syrian sovereignty ushered in a new epoch of a weakened nation-state and powerful non-state actors such as Islamic State who challenged to the conventional notions of statehood and the *status quo* of the international law.

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[286] Warren Bassem, 'When Conflict Arises, these Iraqis go to the Madeff', *Al-Monitor*, 30 October 2015. Available at: https://www.al-monitor.com/pulse/originals/2015/10/iraq-madeef-tribes-host-disputes-politicans.html. Last accessed 27 January 2021.

[287] Central Intelligence Agency (CIA) *World Fact Book: Iraq.* Available at: https://www.cia.gov/the-world-factbook/countries/syria/. Last accessed 26 January 2021.

[288] The Christian population may actually be considerably smaller as a result of Christians fleeing the country during the civil war.

[289] Central Intelligence Agency (CIA) *World Fact Book: Iraq.* Available at: https://www.cia.gov/the-world-factbook/countries/syria/. Last accessed 26 January 2021.

[290] Hamid Dabashi, *The Arab Spring: The End of Postcolonialism*, London: Zed Book Ltd., 2012.

The protests began in Syria in January 2011, as a means of airing long-standing grievances against the Assad regime and the securitised structure of Syrian society. While the protests were initially non-sectarian and focussed on corruption and general social problems, the situation escalated.[291] Assad engaged in violent repression of protests in Derra, Homs and Banias,[292] prompting a full-scale rebellion against the Assad regime and its close associates.[293] "A domestically weak state is one where the central government exercises little effective control over its society".[294] The conflict also took on sectarian overtones. For example, from mid-2011, Alawite-dominated militias, loyal to Assad, attacked Sunni villages and districts, besieging and starving the inhabitants, and laying waste to whole areas.[295] Since 2012, Assad had been receiving support from Iraqi and Lebanese Shi'ite fighters, which signalled to the majority Sunni population that they were the target of a religiously-motivated state oppression.[296] The demise of the Syrian state was accompanied by brutal violence exercised by the Bashir regime. Faced with these circumstances, Syrians retreated to their sectarian groups to seek protection from the state. As Syrians aligned with their identity groups, rather than with the state, identities were reinforced from the bottom-up, furthering weakening the Bashir administration. The loss of control from the top down therefore created the very circumstances that led to the fragmentation of Syrian sovereignty and identities.[297] In the environment of chaos, endemic violence, sectarianism, a battle between Shi'as and Sunnis, and state collapse, an estimated 300,000 deaths, four million refugees and a further seven million internally displaced peoples,[298] Islamists and Islamic militants stepped into the frame, readily seizing the opportunity to fulfil their aim of establishing an Islamic State Caliphate.

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[291] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017; Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

[292] Deborah Amos, 'In Syria, Opposition Stages Massive Protests', *NPR*, 15 July 2011. Available at: https://www.npr.org/2011/07/15/138168604/in-syria-opposition-stages-massive-protests?t=1611782677553. Last accessed 27 January 2021.

[293] Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015.

[294] F. Gregory Gause III, "Beyond Sectarianism: The New Middle East Cold War", Washington, D.C.: Brookings Institution, July 22, 2014, 10. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/English-PDF-1.pdf. Last accessed 19 August 2021.

[295] Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017.

[296] Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015.

[297] F. Gregory Gause III, "Beyond Sectarianism: The New Middle East Cold War", Washington, D.C.: Brookings Institution, July 22, 2014, 10. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/English-PDF-1.pdf. Last accessed 19 August 2021.

[298] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

The Syrian conflict became increasingly internationalised, as the civil war transformed into a proxy war between Iran, Hezballah (both Shi'a) and Russia who supported Assad and whose aim was to undermine and sabotage the power and influence of Western allies;[299] and the US, UK, France, Germany, Turkey and Saudi Arabia were determined to remove Assad from power, putting in place a Western friendly regime under Western control. The Syria crisis transformed from a public uprising, to a civil war, then into proxy war between competing powers, becoming a geopolitical rivalry between the US, Turkey and the Arab States on one side and Russia, Hezbollah and Iran on the other, all competing for global influence.[300] In an ongoing cycle of interference in the Middle East by state actors, the sovereignty of Syria was violated by external actors who championed their own political agendas instead of protecting the sovereignty and rights of the Syrian people. Particularly, the US and Russia, on opposing sides, sought to assert their influence in the Middle East. The Syria crisis therefore served as testing ground for external actors to expand their global authority and strength. When the US and its allies tried to push through measures against Assad's regime, or Resolutions seeking to establish no-fly zones or safe areas for refugees, Russia and China consistently vetoed these.[301]

The war in Syria metastasised from an internal conflict to an international one that unfolded at a crossroads of global, power-political interests, with two diametrically opposing views: "Assad must go" and "Assad must stay".[302] The conflicts between the opposing sides played out on the landscape of Syria, fragmenting its sovereignty, prolonging a humanitarian tragedy and undisturbed by these warring sides, enabled IS to grow into a formidable regional power.[303] As the agendas of the national and international players in the Syrian conflict projected their neo-imperialistic visions for the country and

[299] Simon Mabon, *Saudi Arabia and Iran: Soft Power Rivalry in the Middle East*, London: I.B. Tauris, 2013.
[300] Muharrem Eksi, 'The Syrian Crisis as a Proxy War and the Return of the Realist Great Power Politics' (2017) 1(2) *Hybrid Warfare Special Issue*, 106. See also Michael Luders, *Blowback: How the West F*cked Up the Middle East (and why it was a bad idea)*, Devon: Old Street Publishing Ltd., 2017. Those opposed to Assad calculated that a Sunni regime would ascend to power in Syria in his stead, driving a wedge between the Syria, Iran and Hezbollah.
[301] Markos Kounalakis argues that by vetoing these measures and Resolutions, Russia and China were defending the Westphalian principles of sovereignty against Western unilateral interventions. See Kounalakis, "China's position on international intervention: A media and journalism critical discourse analysis of its case for "Sovereignty" versus "Responsibility to Protect" principles in Syria" (2016) 1(3) *Global Media and China*, 149.
[302] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[303] Ibid.

the region, the tragedies of imperialism were inscribed onto the Syrian landscape, just as they had been inscribed on Iraq's.

### *6.4.5 The Success of Islamic State*

Syria became the platform from which Islamic State launched its campaign for the establishment of its Caliphate, sweeping through towns and villages across northern Syria. By the summer of 2013, IS was attracting many fighters, both local and foreign, into its organisation. Like the Taliban before it in 1990's Afghanistan, Islamic State made rapid territorial gains in Syria. Just as they had done in Iraq, Islamic State employed the same strategy in Syria, that of exploiting tribal links to gain local allies.[304] Invigorated by the resources at its disposal, which now included oilfields in eastern Syria and lucrative smuggling networks, Islamic State strategically advanced into north and west Syria, acquiring more oilfields and supply routes. Al-Baghdadi, assisted greatly by former Ba'athist members of Saddam Hussein's army, pulled off an extraordinary feat, one that was a century in the making and would not have been conceivable without the violated and fragmented sovereignty of the Middle East and the neo-imperialistic ambitions of international actors. On the first day of Ramadan 1435 – 28 June 2014 in the Gregorian calendar, Abu Bakr al-Baghdadi, the self-proclaimed Caliph announced the newly formed Caliphate of the Islamic State.[305]

## 6.5 Chapter Conclusions

This chapter identified and discussed the events that led to the rise of Islamic State and the declaration of the Caliphate in 2014. The narrative is a complex one that pivots around the September 11 2001 attacks and the 2003 Iraqi War, from which AQI, the forerunner to the Islamic State emerged. However, the rise of Islamic State reaches further back to the 1953 US-backed coup in Iran, which was the catalyst for a chain of events that culminated in the establishment of the Caliphate: the 1979 formation of the Islamic Republic of Iran, the Iran-Iraq War (1980-81), the 1991 Gulf War and the 2003 Iraqi War. What these multiple cause factors and plurality of events have in common is a violated sovereignty effected by Western interventionist policies that have denied these states their sovereign rights, reducing them to a state of quasi-sovereignty. This raises the issue of

[304] Michael Weiss and Hassan Hassan, *ISIS: Inside the Army of Terror*, London and NY: Regan Arts, 2015; Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015.
[305] Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015. Patrick Cockburn, *The Rise of Islamic State: ISIS and the New Sunni Revolution*, London, New York: Verso, 2015; Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

whether Westphalian principles continue to be relevant or are they anachronistic, as the former British Prime Minister, Tony Blair, suggested in 1998.[306] In 1998, at a NATO *Symposium on the Continuing Political Relevance of the Peace of Westphalia*, its Secretary-General Javier Solana said "humanity and democracy [were] two principles essentially irrelevant to the original Westphalian order" and proffered that "the Westphalian system had its limits. For one, the principle of sovereignty it relied on also produced the basis for rivalry, not community of states; exclusion, not integration."[307] This goes to the heart of the issue of the Westphalian principles of sovereign rights. Their application reveals a disparity between their application in the Western and non-Western worlds. As the discussion on Iraqi and Syrian sovereignty examined, the principle of sovereign has been utilised not to include but as a means of exclusion to further the economic and political agendas of Western nations. The result of these polices, as the chapter considers, is a fragmented sovereignty where Sunnis retreated to the safety and security of historic tribal allegiances, dynamics and loyalties, which are integral components to understanding the rise of Islamic State in Iraq and Syria (and indeed, the wider Middle East).

The roots of Islamic State can be found in the Ba'athist/Sunni-dominated Iraqi army, one of the largest in the world before 2003,[308] and in the 2003 US-led invasion of Iraq, which caused a political turmoil that revealed and deepened the country's long-standing grievances. The most austere of these occurred along sectarian lines, with political and religious differences becoming increasingly violent and acute.[309] Iraq's sectarian and tribal divisions were exposed and exacerbated by the policies implemented by the US government in aftermath of the war, with far-reaching disastrous consequences, and by the abuse of Iraqi's economic sovereignty for Western economic gain.

[306] Alex Bellamy and Paul Williams, *Understanding Peacekeeping*, Cambridge: Polity Press 2010, 37.
[307] Javier Solana, *Symposium on the Continuing Political Relevance of the Peace of Westphalia: Securing Peace in Europe*, North Atlantic Treaty Organisation, Munster, November 12, 1998. Available at: https://www.nato.int/docu/speech/1998/s981112a.htm. Last accessed 19 February 2021.
[308] Petter Danckwardt, *Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority*, Faculty of Law, Stockholm University, 2016.
[309] Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.

# Chapter Seven: Sovereignty, Quasi-Sovereignty and the War on Terror

## 7.0 Introduction

The previous chapter examined the context from which the Islamic State emerged, arguing that its founding was as a direct consequence of and in direct response to the violated sovereignty of the Islamic world by Western interventionist endeavours in that region. As Chapter Six argued such interventionism imposed a system of quasi-sovereignty that reinterpreted the very definition of sovereignty, redefining the political organisation of the region, specifically Iraq and Syria, which was the focus of the discussion.

Anghie describes the War on Terror as "the return of a much older form of imperialism. Equally, however, there is a certain novelty about the present that requires closer analysis, as the USA's policy appears to be premised on the belief that only the use of force and the transformation of alien and threatening societies into 'democratic' states will ensure security".[1] The transformation of the non-European world has therefore been justified in terms of providing physical security but this obscures the fact that it primarily enables the continuance of the political and economic exploitation of the non-European world, signalling a return of Empire's Law.

It is the aim of this chapter to analyse the consequences of the reinterpretation of the principle of sovereign integrity, a move that has reinvigorated a different form of sovereignty with its colonial origins and text of exclusion, that of quasi-sovereignty. The reinterpretation will be examined in the context of the War on Terror and its representation as a just and justifiable humanitarian war executed in the name of self-defence, anticipatory self-defence and preventative war. Yet, as the chapter will examine, the discourse of human rights and a war of necessity has entrenched the sovereignty of Western imperialism while eroding the sovereignty and human rights of those states designated as rogue or 'uncivilised'. The War on Terror invoked humanitarian intervention as a justification for engaging in exceptions to the international prohibitions on armed attacks, which violated the sovereignty of those states, resulting in a catalogue

[1] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly,* 739, 751.

of human rights abuses.[2] The violation of sovereignty has instituted a quasi-sovereignty in these states, a form of sovereignty that reduced their political and economic authority, and transgressed their territorial integrity. Yet, as the chapter considers, the human rights abuses that the US and other states engaged in were part of Empire crimes,[3] insidious practices that extended from colonialism to the War on Terror. In this model of Empire, the chapter asserts, the War on Terror represented the quintessential expression of imperialism, as the US shaped and reinterpreted the rules for themselves in order to impose its regime of neo-liberal capitalism. The issue of legitimising such interventions on humanitarian grounds concealed the true, neo-imperialistic intentions of the interventions. Section 7.1 examines the justification for the War on Terror, situating it as economic imperialism, considering the issues this poses to traditional understandings of sovereignty. Section 7.2 analyses the rhetoric of the War on Terror, including the reinterpretation of the principle of self-defence and the use of force in the name of humanitarianism. Section 7.3 engages the theory of the state of exception to review the US government's willingness to transgress the law through its use of such practices as secret rendition, as an exhibition of the 'civilised'/'uncivilised' distinction. Section 7.4 analyses the legal framework of the War on Terror, situating it in a continuum of Empire crimes and imperialism, which continues as part of hegemonic international legal system.[4]

### *7.1 A New Sovereignty? – The War on Terror: Economic Imperialism*

The principle of sovereignty, as discussed in Chapter Two, denotes that all states possess sovereign equality and supreme legal authority within their own territory [5] and are bound and protected by the principle of territorial sovereignty and non-interference.[6] Entwined

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[2] President Bill Clinton signed the *Iraqi Liberation Act of 1998* on 31 October 1998. Upon signing the Act, he stated: "Today I am signing into law H.R. 4655, the ''Iraq Liberation Act of 1998.'' This Act makes clear that it is the sense of the Congress that the United States should support those elements of the Iraqi opposition that advocate a very different future for Iraq than the bitter reality of internal repression and external aggression that the current regime in Baghdad now offers. Let me be clear on what the U.S. objectives are: The United States wants Iraq to rejoin the family of nations as a freedom-loving and law-abiding member. This is in our interest and that of our allies within the region. The United States favors an Iraq that offers its people freedom at home. I categorically reject arguments that this is unattainable due to Iraq's history or its ethnic or sectarian make-up. Iraqis deserve and desire freedom like everyone else. The United States looks forward to a democratically supported regime that would permit us to enter into a dialogue leading to the reintegration of Iraq into normal international life." See https://www.govinfo.gov/content/pkg/WCPD-1998-11-09/pdf/WCPD-1998-11-09-Pg2210.pdf, 2210. Last accessed 30 June 2021.

[3] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16, 17.

[4] Detlev Vagts, 'Hegemonic International Law', (2001) 95 *AJIL*, 843.

[5] Charter of the United Nations, 1945, Art. 2(1).

[6] Ibid., Art. 2(4).

with the principle of sovereignty is the potential of human rights to hold states accountable for their violations of those rights so that "states can no longer shelter behind the fig leaf of sovereignty for violations committed against individuals".[7] As Carlson asserts, "the triumph of human rights means that the fortress wall of sovereignty, long enjoyed by states, are crumbling",[8] to be replaced by a "new sovereignty" as Kofi Anna described it,[9] whose form embodies an individual sovereignty that contests the responsible and responsive sovereignty of the state.[10] The victory of human rights is its displacement of oppressive rogue states and leaders, replacing them with legitimate states and moral leaders.[11] However, as this chapter discusses, the September 11 attacks determined that the international community was confronted with a new and unique threat, where the established practices of international law were "inadequate for the challenges it presented."[12] The response to the challenges and threats presented by al-Qaeda, which this chapter discusses in detail, resulted in a catalogue of human rights abuses and a reinterpretation of the principle of self-defence.

### *7.1.1 Background to the War on Terror*

The War on Terror, also known as the Global War on Terrorism and US War on Terror, was an international military campaign that was launched in response to the September 11 attacks. It was spearheaded by the US government and comprised of the Coalition of the Willing.[13] On Tuesday 11th September 2001, the nineteen hijackers associated with the Wahhabist[14] terrorist group al-Qaeda[15] unleashed four coordinated terrorist attacks on US soil in New York and Washington. The attacks resulted in 2,974 fatalities (2,750 in

[7] Ratna Kupur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28, *Sydney Law Review*, 665, 669; Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95, 100.
[8] John D. Carlson, 'Trials, Tribunals, and Tribulations of Sovereignty: Crimes Against Humanity and the Imago Dei', in John D. Carlson and Erik C. Owens (eds) *The Sacred and the Sovereign*, Washington, D.C..: Georgetown University Press, 2003, 196.
[9] Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95, 100.
[10] Christine Chinkin, Shelley Wright and Hilary Charlesworth, 'Feminist approaches to international law: Reflections from another century in Buss and Manji (eds), *International Law: Modern Feminist Approaches*, Oxford: Hart Publishing, 2005.
[11] Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95.
[12] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 750.
[13] Eric Schmitt and Thom Shanker, ', US Officials Retool Slogan for Terror War', *The New York Times*, 26 July 2005.
[14] David Commins, *The Wahhabi Mission and Saudi Arabia*, London: I.B.Tauris, 2009.
[15] Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11*, New York: Knopf, 2006.

New York, 184 at the Pentagon and 40 in Pennsylvania), with over 25,000 injuries.[16] According to *The 9/11 Commission Report*,[17] the chief architect of the attacks was Khalid Sheik Mohammed.[18] The US response to the attack, which started the War on Terror, was specifically targeted towards Sunni Islamic fundamentalists groups. Although the primary targets were initially al-Qaeda and the Taliban, as the War on Terror progressed, the targets have been extended to the Islamic State of Iraq and the Levant (ISIL), ISIS and Islamic State.[19] US President George W. Bush first used the term "war on terrorism" on 16 September 2001. Four days later, in a formal speech before Congress, he spoke of the "war on terror".[20] In that speech, he stated, "Our enemy is a radical network of terrorists and every government that supports them."[21] As this chapter examines, the response of the US to the September 11 attacks resulted in a litany of human rights abuses that included the practise of secret rendition, the use of torture on detainees at Guantánamo Bay, Baghram Airbase (Afghanistan) and other places of detention. Specifically, *The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001*[22] authorised the detention of terror suspects at Guantánamo Bay. The inhumanity displayed in these spaces were part of a contagion of inhumanity, the trajectory of which, as this thesis argues, began in the colonies and over a hundred years later, were laid bare in the horrific images of abuse at Abu Ghraib prison.

The War on Terror has been very controversial; critics cite that it has been an exploitative campaign, used by powerful states to pursue and impose their own global policies or

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[16] Matthew J. Morgan, *The Impact of 9/11 on Politics and War: The Day that Changed Everything?* New York: Palgrave Macmillan, 2009.

[17] 'The 9/11 Commission Report', *National Commission on Terrorist Attacks Upon the United States Public Law 107-306*, November 27, 2002. Available at: https://www.9-11commission.gov/report/911Report.pdf. Last accessed 30 June 2021.

[18] Mohammed was captured by US and Pakistani officers in Rawalpindi, Pakistan on 1 March 2003. He spent two years in CIA Blacksites in central Europe from 2004-2006, when he was then transferred to Guantánamo Bay. CIA documents confirm he has been waterboarded 183 times. Mohammed remains at Guantánamo Bay, currently awaiting trial for offences related to the September 11 attacks. See 'Khalid Sheikh Mohammad: Trial date set for 'architect of 9/11', BBC News, 31 August 2019. Available at: https://www.bbc.com/news/world-us-canada-49532731. Last accessed 30 June 2021.

[19] Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015.

[20] Kenneth R. Bazinet, 'A Fight vs Evil, Bush and Cabinet Tell US', *Daily News*, New York, 17 September 2001. Available at: https://web.archive.org/web/20100505200651/http://www.nydailynews.com/archives/news/2001/09/17/2001-09-17_a_fight_vs__evil__bush_and_c.html. Last accessed 19 February 2021.

[21] Transcript of President Bush's address to a joint session of Congress on Thursday night, September 20, 2001. Available at: https://edition.cnn.com/2001/US/09/20/gen.bush.transcript/. Last accessed 19 February 2021.

[22] *The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001, 66 Fed. Reg. 57831-57836 (The President Nov. 16, 2001).*

military objectives,[23] namely, to secure economic and political interests in Islamic countries and to reduce civil liberties[24] thereby infringing upon human rights as a means of controlling these populations. Critics also assert that the term "war" should not be applicable in this context: "There are no front lines in the "war on terror" … there is no single war against it because there are few common causes, no common enemy and no common strategy for fighting one. … The so-called war is really a series of mostly unconnected clashes over political, social and religious matters that military might has failed to resolve." [25] Political theorist Richard Jackson has also argued that "the 'war on terrorism,' … is simultaneously a set of actual practices - wars, covert operations, agencies, and institutions - and an accompanying series of assumptions, beliefs, justifications, and narratives - it is an entire language or discourse."[26] Much of the narrative surrounding the war on terrorism engaged in the civilised/uncivilised distinction and the process of othering, as John Ashcroft's statement reveals, "the attacks of September 11 drew a bright line of demarcation between the civil and the savage",[27] reigniting long-standing colonial distinctions between 'civilised' and the non-'civilised' Other. The attacks also altered the operation of international law relating to self-defence and humanitarian intervention, which the following section considers.

The following discussion in Section 7.2 examining the US justification for the war on terror is a representation of that war as a form of the state of exception in international law and international affairs, as, it is argued, the discussion in Chapter Seven attests to. Singh's thesis of semi-colonialism is instructive here and allows the war on terror to be analysed as one of imperialism, operating in a paradigm of asymmetrical power dynamics between powerful states engaged in imperialistic actions and less powerful peripheral states. These conflicts are fought in the international arena, yet, in contrast, the docile *homo sacer* bodies existing in spaces such as CIA-blacksites, Guantánamo Bay and Baghram Airbase were rendered to and bound by a domestic political authority in the US.

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[23] Ryan Singel, "FBI Tried to Cover Patriot Act Abuses with Flawed, Retroactive Subpoenas, Audit Finds", 13 March 2008. Available at: https://www.wired.com/2008/03/fbi-tried-to-co/. Last accessed 19 February 2021.

[24] Ryan Singel, "FBI Tried to Cover Patriot Act Abuses with Flawed, Retroactive Subpoenas, Audit Finds", 13 March 2008. Available at: https://www.wired.com/2008/03/fbi-tried-to-co/. Last accessed 19 February 2021.

[25] Todd Richissin, 'War on Terror Difficult to Define', *Baltimore Sun*, 2 September 2004. Available at: https://web.archive.org/web/20090114085106/http://seattletimes.nwsource.com/html/nationworld/2002023596_russanal02.html. Last accessed 20 February 2021.

[26] Lawrence Wright, *The Looming Tower: Al-Qaeda and the Road to 9/11*, New York: Knopf, 2006, 302.

[27] Devin Jessee, 'Tactical Means, Strategic Ends: Al-Qaeda's Use of Denial and Deception' (2006) 18(3), *International Journal of Intelligence and Counter-Intelligence*, 367, 371.

Citizens of states who were involved in the Multi-National-Force were not returned to their countries of citizenship, but were kept in spaces where they were subjected to a system of justice whose threshold was both inside and outside the judicial order (discussed in section 7.4). For Agamben, this form of judicial order is "pure violence",[28] derived from Benjamin's "divine violence",[29] a violence which "may be called sovereign violence"[30] integrally bound to the law.

## 7.2 Challenging the International Legal Framework

### *7.2.1 Self-Defence: Operation Enduring Freedom*

The September 11 attacks presented a radical challenge to the doctrine of self-defence.[31] Gerry Simpson explains that the use of force in response to terrorist attacks was a very controversial issue prior to the 9/11 attacks; only the US and Israel had asserted such a right, and it was only employed in response to attacks on nationals abroad.[32] However, there was no general support for the use of force as a response to terrorist attacks, according to Simpson.[33] This position drastically changed following the September 11 attacks; the US launched *Operation Enduring Freedom* (OEF)[34] in October 2001 with the aim of preventing Afghanistan from being used as a base for terrorism.[35] The US invoked the principle of self-defence as the basis for its invasion of Afghanistan in October 2001 under Article 51 of the UN Charter.[36] NATO also invoked Article 5 of the NATO Treaty for the first time, providing that "an attack on one member State is an attack on all."[37] The military response by the US received widespread support from the EU, Russia, China, Pakistan and Japan. Unsurprisingly, Iraq and Iran challenged the legitimacy of *Operation*

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[28] Peter Fitzpatrick, "Bare Sovereignty: *Homo Sacer* and the Insistence of Law" in A. Norris (ed.), *Politics, Metaphysics, and Death – Essays on Giorgio Agamben's Homo Sacer*, Durham and London: Duke University Press, 2005, 49-73, 63.
[29] Ibid. at 63.
[30] Ibid. at 63.
[31] Sean D. Murphy, 'Terrorist Attacks on the World Trade Center and the Pentagon' (2002) 96(1) *American Journal of Int'l Law*, 237; W. Michael Reisman, 'In Defence of World Public Order' (2001) 95(4) *American Journal of Int'l Law*, 833.
[32] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167.
[33] Ibid. at 182.
[34] For a detailed discussion of *Operation Enduring Freedom* see Richard E. Killblane, "Operation Enduring Freedom – Afghanistan", in *Delivering Victory*, Bingley: Emerald Publishing Limited, 2019, 217-246.
[35] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D. Evans, *International Law*, (4th ed.), Oxford: Oxford University Press, 2014.
[36] Charter of the United Nations, 1945, Art. 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."
[37] North Atlantic Treaty Organization (NATO), Article 5. The key section of the Washington Treaty is Article 5. Its commitment clause defines the *casus foederis.* It commits "each member state to consider an armed attack against one-member state, in Europe or North America, to be an armed attack against them all."

*Enduring Freedom*.[38] UNSC Resolution 1368 condemned the September 11 attacks[39] while UNSC Resolution 1373 recognised the right of self-defence.[40] This was the first time that the UNSC had recognised the right to use force in self-defence. However, uncertainty existed as to whether force could be used in self-defence against a state which was not complicit in a terrorist attack[41] e.g. Afghanistan. Simpson discussed how the argument of pre-emptive self-defence has stretched "international law beyond breaking point"[42] and urges that it is a doctrine which should be disavowed.[43] There is certainly merit in Simpson's viewpoint, given the potential for the doctrine to be abused; rather than the doctrine being invoked for the sole purpose of self-defence it could instead be (ab)used as an act of aggression.

### *7.2.2 The Bush Doctrine*

The Bush Doctrine is the common description applied to parts of American foreign policy (post 9/11) which specifically employs pre-emptive attacks as a means for self-defence.[44] This strategy was finalised in the *National Security Strategy* (NSS) (2002), which advocated the use of pre-emptive self-defence "against an immediate or perceived future

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[38] Christine Gray, 'The Use of Force and the International Legal Order' in Malcolm D. Evans, *International Law*, (4th ed.), Oxford: Oxford University Press, 2014.

[39] UNSC Resolution 1368, adopted unanimously by the Security Council at its 4370th meeting on 12 September 2001. "Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 Sept. 2001 in New York, Washington, D.C. and Pennsylvania and regards such acts, like any act of international terrorism, as a threat to international peace and security; expresses its deepest sympathy and condolences to the victims and their families and to the people and Government of the United States; calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attack and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable; calls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions; expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 Sept. 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the UN." Available at: https://digitallibrary.un.org/record/448051?ln=es. Last accessed 28 July 2021.

[40] UNSC Resolution 1373, adopted unanimously by the Security Council at its 4385th meeting on 28 September 2001. Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, "decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities". Available at: https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf. Last accessed 28 July 2021.

[41] T. Becker, *Terrorism and the State*, Oxford: Hart Publishing, 2006.

[42] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 172.

[43] Ibid.

[44] Stephen McGlinchy, *International Law and the Bush Doctrine*, (2009) *E-International Relations*, 1. Available at: https://www.e-ir.info/2009/09/09/international-law-and-the-bush-doctrine/. Last accessed 1 March 2021.

threat to the security of the U.S.".[45] This raised a very important question about the principle of sovereign integrity. The issue and sovereignty, sovereign integrity and sovereign equality was severely undermined by the Bush doctrine's challenge to the existing international legal order.[46] McGlinchy argues that The Doctrine disregarded the right to sovereignty of those nations whom it judged to be providing actual or potential shelter and protection to terrorists.[47] The NSS stated that these States would be treated as hostile countries, with no distinction drawn between them and the terrorists they allegedly protected. This position, the US argued, gave them the right to invade these countries,[48] in order to protect their own sovereignty.[49] The Bush Doctrine therefore redefined the traditional understanding of sovereignty and sovereign equality by claiming to right to invade the sovereign territory of another State based on their potential harbouring of terrorists. McGlinchey argues that "this is an important shift in the logic of the international system as international law prohibits the use of military force "to punish", … the concept of military punishment is conspicuously absent from the entire canon of international law".[50] Crawford cautions against this particular logic however, urging that the redefining of sovereignty "must be rejected as it eliminates all limits to war, allowing for a definition of national interests to be so wide that the self is potentially under threat everywhere".[51] The removal of the limits on warfare raises important issues about the fundamental character of international law and the potential to change its nature in order to accommodate great power hegemony and a new international order. In such a scenario, a distinction is created between those States who are entitled to sovereign equality and the full protection of the law and those who are not. This engages the process of Othering and is reminiscent of the inclusion/exclusion dichotomy of family of nations, signalling a return to the 19th century perception of 'civilised' and 'uncivilised' States.

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[45] *The National Security Strategy of the United States of America* [NSS] 2002, 5.
[46] Stephen McGlinchy, *International Law and the Bush Doctrine*, (2009) *E-International Relations*, 1. Available at: https://www.e-ir.info/2009/09/09/international-law-and-the-bush-doctrine/. Last accessed 1 March 2021.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Stephen McGlinchy, *International Law and the Bush Doctrine*, (2009) *E-International Relations*, 1. Available at: https://www.e-ir.info/2009/09/09/international-law-and-the-bush-doctrine/. Last accessed 1 March 2021.
[51] Neta C. Crawford, 'The Justice of Pre-emption and Preventive War Doctrines', in Malcolm Evans, (ed.), *Just War Theory: A Reappraisal*, Edinburgh: Edinburgh University Press, 2005, 41.

*7.2.3 The Use of Force and Humanitarianism*

The War on Terror has challenged the narrative that human rights hold authoritarian leaders and states to account. Traditional understandings of Westphalian sovereignty include "an institutional arrangement for organising political life that is based on territoriality and autonomy. States exist in specific territories. Within these territories domestic political authorities are the only arbiters of legitimate behaviour".[52] Beginning with the invasion of Afghanistan in October 2001, followed by the invasion of Iraq in 2003, the traditional doctrine of territorial sovereignty has been violated through the rhetoric of the legitimisation of the use of force on humanitarian grounds and the necessity of pre-emptive self-defence. Despite the widespread support that the invasion of Afghanistan received from UN members, it can be argued that it was a display of Western imperialism, executed by sovereign states, in the name of human rights and humanitarianism. The narrative surrounding the US-led invasion of Afghanistan was justified "in part as a liberation of women from the structures of the Taliban".[53] Likewise, the deposing of the despotic Saddam Hussein regime and the intervention on behalf of the Afghani and Iraqi people were rationalised on humanitarian grounds. The use of human rights and humanitarianism has delineated between "us" (sovereign, protectionist states) and "them" (rogue, despotic, illegitimate states), placing the War on Terror on the side of legitimate sovereignty. Anne Orford positions human-rights victims, "the bodies of massacred women, children and men" as central to the narratives of international law.[54] Narratives such as these produce a number of actors - "hapless victims in distress",[55] the tyrant (non-Western) and the saviour (Western) operating on a humanitarian mandate.[56] The ordering effect that is structured from the victim, villain, saviour narratives situates interventions in Afghanistan and Iraq as "just war"[57] in order to eradicate their

[52] Stephen Krasner, 'Compromising Westphalia' (1995-6) xx/3 *International Security*, 115, 119.

[53] Christine Chinkin, Shelley Wright and Hilary Charlesworth, 'Feminist approaches to international law: Reflections from another century in Buss and Manji (eds), *International Law: Modern Feminist Approaches*, Oxford: Hart Publishing, 2005, 19. In 1997, the then Secretary of State Madeleine Albright stated "… it is very clear we are opposed to the Taliban because of their despicable treatment of women and children, and their general lack of respect for human dignity". See Peter Bergen, *Holy War, Inc.*, New York: Free Press, 2001, 144; Jean Bethke Elshtain, *Just War Against Terror: The Burned of American Power in a Violent World*, New York: Perseus, 2003, 40; Christine Chinkin, Shelley Wright and Hilary Charlesworth, 'Feminist approaches to international law: Reflections from another century in Buss and Manji (eds), *International Law: Modern Feminist Approaches*, Oxford: Hart Publishing, 2005, 101.

[54] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge: Cambridge University Press, 2003, 218.

[55] David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention*, Sterling, Va.: Pluto Press, 2002, 36;

[56] Ibid., Chandler; Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95, 102.

[57] Just War theory is concerned with the legality of a war. The war must be morally justifiable, established through a series of criteria that must be met. The criteria are split into two groups, *jus ad bellum* (right to go to war) and *jus in bello* (right conduct in war). See Charles Guthrie and Michael Quinlan, *Just War:*

'barbarism' and to restore human rights. In 2003, whilst standing on the desk of the USS Abraham Lincoln, President Bush declared an end to the major combat in Iraq, structuring the victory of the "just war" around the victim, villain and saviour narrative:

> our coalition is engaged in securing and reconstructing that country […] Men and women in every culture need liberty like they need food, and water, and air. Everywhere that freedom arrives, humanity rejoices. And everywhere that freedom stirs, let tyrants fear […] We are helping to rebuild Iraq, where the dictator built palaces for himself, instead of hospitals and schools. And we will stand with the new leaders of Iraq to establish a government of, by, and for the Iraqi people. The transition from dictatorship to democracy will take time, but it is worth every effort. Our coalition will stay until our work is done. And then we will leave – and we will leave behind a free Iraq.[58]

These 'justified' interventions form part of an international political order that, for Denike, utilise long-standing colonial distinctions between 'civilised' and the non-'civilised' Other.[59] As Chapter Two discusses Western interventionist policies have adopted the process of Othering, which operate both inside and outside of the legalities of international legal framework, in order to promote their own political and economic agendas. The discourse of legitimacy surrounding invasions, violence and humanitarian interventions, has, for Orford, erased the very violence that is conducted in the name of preserving and restoring human rights,[60] thus silencing the denunciations from invaded states of the devastation of war and the human rights abuses suffered by invaded peoples in the name of human rights. As Orford has noted, this "new humanitarianism"[61] denotes a considerable conversion "from a discourse of rebellion and dissent into that of state legitimacy",[62] where the devastation of war and the deaths of hundreds of thousands of people, as was the situation in Iraq, are accepted as normal, reinvigorating the colonial state of exception, where its inhabitants were subjected to techniques of control and subordination, that enabled their dehumanisation.

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*The Just War Tradition: Ethics in Modern Warfare*, London: Bloomsbury, 2007. Under the traditional Just War theory, the proper authority to wage war lay with a feudal lord, a prince, an emperor or a Pope. The creation of the nation-state changed this, with the authority to wage war now residing with the state only. See Charles Guthrie and Michael Quinlan, *Just War: The Just War Tradition: Ethics in Modern Warfare*, London: Bloomsbury, 2007.

[58] Jarrett Murphy, 'Text of Bush Speech', CBS News, 1 May 2003. Available at: www.cbsnews.com/news/text-of-bush-speech-01-05-2003/. Last accessed 14 December 2020.

[59] Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95, 102.

[60] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, Cambridge: Cambridge University Press, 2003.

[61] Ibid. at 202.

[62] Ibid. at 202.

*7.2.4 The Rhetoric of the War on Terror*

Anghie describes how the narrative that President Bush engaged in to justify the invasion of Iraq has very disturbing similarities to the rhetoric employed by Francisco de Vitoria to justify the Spanish conquest of Indigenous peoples.[63] Although Vitoria acknowledged the humanity of the Indigenous peoples of the Americas, it was evaluated against an idealised European standard, which Vitoria claimed they did not attain:

> Although the aborigines in question are … not wholly unintelligent, yet they are a little short of that condition, and so are unfit to found or administer a lawful State upto the standard required by human and civil claims. Accordingly, they have no proper laws nor magistrates, and are not even capable of controlling their family affairs.[64]

The idealised European standard by which humanity may be evaluated was very evident in the War on Terror. As Chapter Six discussed, the deaths of up to half-a-million Iraqi children attributable to the UN sanctions was described as "a price worth paying" by Madeline Albright,[65] as if the humanity of those children was less valuable than their Western counterparts. Indigenous peoples were also viewed as Saracen and pagan:

> so when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought.[66]

The incarceration of Indigenous peoples, regardless of their guilt or innocence, placed them beyond the protections of the law as the objects of the power of the sovereign, existing in Agamben's state of exception. The plight of terror suspects, also incarcerated beyond the protections of the law, draws disturbing parallels to the plight of the Indigenous peoples of the Americas, both cast as 'barbaric' and the 'uncivilised'. This reconstruction of international law is a reflection of Empire's law and not the viewpoint of the non-European world. These endeavours have sought to create a new international law involving "a return to a primordial and formative structure of international law, the civilising mission",[67] that has formulated "a new form of imperialism that asserts itself in

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[63] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739.
[64] Ibid. at 743.
[65] Sheldon Richman, 'Iraqi Sanctions: Were They Worth It?', *Global Policy Forum*, January 2004. Available at: https://archive.globalpolicy.org/component/content/article/170-sanctions/41952.html. Last accessed 16 March 2021.
[66] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly*, 739, 744.
[67] Ibid. at 750.

the name of 'national security' and as self-defence".[68] This assertion ignores the fact that such a new form of imperialism has also asserted itself in the name of securing Western economic interests, as the discussion in Chapter Six analysed. The imperial dimensions are obvious unmistakable, linking the colonial world with the international legal framework.

The framing of the Iraqi invasion as one humanitarian intervention belies the fact that, since World War II, the United States has intervened repeatedly in the economic and political affairs of Iraq (with British complicity), as demonstrated by the Iran-Iraq War (1980-1988), the first Gulf War (1991) and the 2003 invasion. This legacy has been disregarded however, deemed irrelevant. "Led by the United States of Amnesia" wrote Gary Yonge, "it became a commonplace to dismiss *the* past as an inconvenience".[69] The following section challenges this narrative however, firmly placing the War on Terror in the realm of economics, rather than as a humanitarian intervention, drawing a clear link between the economisation of 19th century colonialism and the 21st century war on terror.

The discussion thus far has stated that the War on Terror and the Iraqi War are explicit examples of Western imperialism. Pashukanis, writing in 1924, describes how imperialism has remained an inherent part of international landscape, citing the way in which international law has been moulded by and developed through a capitalist and economic paradigm.[70] As the discussion in Chapter Six considered, is because of the political and economic agendas of Western states, that imperialism remains a living reality, with the violence, death and destruction that has followed in its wake.

### *7.2.5 The Economisation of the War on Terror*

As was discussed in Chapter Four, the practices of economic exploitation and cultural subordination, which were essential to the phenomenon of colonialism,[71] have not been eradicated. Rather, as Anghie contends, these very issues continue to play an enduring

[68] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly,* 739, 744.
[69] Gary Yonge, "The Limits of Generosity", *Guardian*, April 7, 2003; Derek Gregory, *The Colonial Present,* Oxford: Blackwell Publishing, 2004, 145.
[70] Evgeny Pashukanis, *The General Theory of Law and |Marxism*, London: Routledge, 2001.
[71] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *NYU Journal of Int'l L & Pol*, 243; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

and crucial role in international law,[72] indicating that imperialism has played an integral role in the international system since its inception. The US justified the interventionists policies it employed during the War on Terror as essential in order to ensure the security of the US. This security, it argued, could only be achieved by using force to convert rogue and hostile states into 'democratic' ones, championing the war not only as a necessary response to evil, but as a humanitarian, just war. This however, sought to conceal the economic benefits of the war in terms of imposing Western-friendly governments in power who would adhere to Western economic and political agendas.[73] For Naomi Klein "the human rights discourse and its narratives of progress has been harnessed in the service "disaster capitalism"",[74] whereby devastation "is created and exacerbated by the very individuals who stand to personally profit from the new imperial order they impose in its place, all the while engaging in the rhetoric of the humanitarianism of "Operation Infinite Justice" or "Iraqi freedom."[75] As previously stated, international law (from its Vitorian beginnings) transformed the peoples of the non-European world into an othered, economically exploited group.[76] Emulating the essential aspects of colonialism – "cultural subordination and economic exploitation"[77] - practices that were adopted by the Mandate System and continued through the 20th century during the Iran-Iraq War and the Gulf War, the War on Terror supported a prolongation of this lineage of capitalist endeavour. Capitalism, therefore, was stained with the colonialist crimes of slavery, genocide and the theft of land and resources. However, as Lasslett reminds us, these constituent crimes of capital continue today in ever more devastating and insidious globalised forms of imperialism,[78] extended primarily through economic penetration, though always reinforced by military might.[79]

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[72] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

[73] The other benefits of the war have also been the awarding of lucrative contracts to Western firms for the building schools and the supply of medical facilities and water supplies. See Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95.

[74] Naomi Klein, *The Shock Doctrine*, New York: Metropolitan Books, 2007 cited in Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95, 103.

[75] Ibid. at 103.

[76] Antony Anghie (2006) 'The Evolution of International Law: Colonial and Postcolonial Realities,' (2006) 27(5), *Third World Quarterly*, 739.

[77] Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 NYU J Int'l L & Pol, 243, 245; Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513, 518.

[78] K. Lasslett, *State Crime on the Margins of Empire: Rio Tinto, the War on Bougainville and Resistance to Mining*, London: Pluto Press, 2014; Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16.

[79] Meiksins Wood, *The Origin of Capitalism: A Longer View*, NY: Verso Books, 2017.

As this thesis argues, the War on Terror is a quintessential expression of imperialism, as the US moved to intervene militarily in Iraq in order to impose its regime of neo-liberal capitalism and to protect its economic agendas. The issue of legitimising such interventions on humanitarian grounds is to conceal the true, imperialistic intentions of the interventions.

The discussion in Chapter Six has explored how the US deliberately violated the sovereignty of Iraq in order to protect its economic interests. Those transgressions resulted in the production of quasi-sovereignty at a state level. However, the US hegemony also violated the sovereignty of individuals by denying their right to due process and subjecting them to a brutal regime of abuse. At the individual level, this was seen in the way the "citizens of outlaw states"[80] were denied the basic protection of the law,[81] as the discussion in section 7.3 examines. and "an unwillingness among combatants to accord the "protection" of the law to their adversaries".[82] The discussion of the legal framework of the War on Terror is therefore important to the overall research question, i.e. that colonialism and the two-tiers of sovereignty (full- and quasi-) are intertwined in a lineage of capitalist endeavour, producing a third tier, that of the semi-civilised person, who is not the 'savage' of the colonies but is nonetheless a barbaric killer. Included in that lineage is the violated sovereignty of the Middle East, without which, this thesis asserts, the War on Terror and the rise of Islamic State would not have occurred.

### 7.3 The State of Exception and Counter-Terrorism: An 'Exceptional' Rendition

Chapter Two discussed and analysed Carl Schmitt's state of exception as the space where the suspension, by the sovereign, of the basic laws and norms of a juridical order occurs. Chapter Two also examined Giorgio Agamben's argument that this space has become a permanent form of government, most recognisably through the political transformations brought about by the War on Terror, describing it as an "ambiguous and uncertain fringe at the intersection of the legal and the political".[83] He identified modern totalitarianism as tools of governments, which permitted the state to eliminate political adversaries and

[80] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.
[81] Ibid. at 182.
[82] Peter Rowe, 'War Crimes' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues*, Oxford: Hart Publishing, 2004, 203, 204 cited in Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.
[83] Giorgio Agamben, "The State of Emergency" (Lecture), available at http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 18 August 2021.

those categories of people deemed to be enemies of the state. The creation of a state of exception is thus of paramount importance and usefulness to the contemporary state in dealing with emergencies. Once it has become the norm or rule, there is a danger that exceptional and provisional measures imposed during a state of emergency will occasion "the loss of the traditional distinction between different forms of constitution".[84] In the global war on terrorism, such a declaration has invested the state with enormous power – the power to torture and indefinitely detain in the name of preventing terrorism.

Poynting describes how state terror typically invokes a form of exception, or a state of exception. The logic of emergency, of extraordinary dangerous and high-risk circumstances call for exceptional measures for the duration of the emergency. Exceptionalist war on terror arguments assert that contemporary global terrorists could deploy new weapons of exponentially greater destructive capacity, aided by powerful new technologies, attacking suddenly and from afar.[85] This unacceptable level of supposed new risk accordingly necessitates a partial suspension and reinterpretation of the rule of law.[86] As Tony Blair famously stated, "The rules of the game have changed".[87] But, as Poynting asserts, the victors write and shape the rules favourably for themselves,[88] but in doing so, they violate the rights and sovereignty of Other.

### *7.3.1 The 'Civilised'/'Uncivilised' Distinction*

The September 11 attacks and the 2003 War in Iraq conducted by the United States and a multi-national-force (MNF-1)[89] have been pivotal moments in reframing and redefining international relations, whose very structure has vastly changed since the United Nations was establishment at the end of World War II. International relations are now depicted as a "new constitutional moment",[90] and as occupying a "difficult and precarious

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[84] *Giorgio Agamben, "The State of Emergency" (Lecture), available at http://www.generation-online.org/p/fpagambenschmitt.htm. The text is an extract from a lecture given at the Centre Roland-Barthes (Universite Paris VII, Denis-Diderot) in 2002. Last accessed 18 August 2021.*

[85] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal,* 16.

[86] J. Burnett and D. Whyte, "Embedded Expertise and the New Terrorism Thesis" (2005) 1(4) *Journal for Crime, Conflict and the Media,* 1.

[87] P. Wintour, "Blair Vows to Root Out Extremism", The Guardian, 6 August 2005. Available at https://www.theguardian.com/politics/2005/aug/06/terrorism.july7. Last accessed 20 February 2021.

[88] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal,* 16.

[89] The Multi-National Force - Iraq (MNF-I), also called the coalition forces, was commanded by the US (Operation Iraqi Freedom) during the 2003 invasion of Iraq and during the Iraq War. The coalition included the United Kingdom (Operation TELIC) and Australia. There were 40 contributing members.

[90] Anne-Marie Slaughter and William Burke-White, 2002, 'An International Constitutional Moment', *Harvard International Law Journal,* Vol. 43(1), 2; Tom Farer, 2003, 'The Prospect of International Law and Order in the Wake of Iraq', *American Journal of International Law,* Vol. 97, 621, 627.

transitional moment in the international legal system governing the use of force".[91] Through the realisation of the Multi-National-Force and the co-operation between nation states in fighting the War on Terror, international relations have invoked Klein's paranoid-schizoid position,[92] where a binary split of 'us' and 'them', 'civilised' and 'barbarian' invited a return to the colonial past.[93] Indeed, President Bush's declaration "You are either with us, or you are with the terrorists", [94] created a binary of 'us' and 'them'. The War on Terror has been repeatedly cast as a just, justifiable and necessary war, framed by the Bush administration as a confrontation with "evil"[95] and a battle for "civilisation".[96] The War was construed "literally and metaphorically as a crusade against a 'barbaric' and 'savage' Other (typically Islamic fundamentalists)".[97] The Bush administration was cast as the legitimate benevolent protectionist sovereign, while the evil of the Other rendered their destruction intrinsically just. The perception of the Other was reinforced through the use of law. By reinventing the myth of US innocence into America as an innocent target of aggressive terrorism,[98] the Bush administration invoked a politics of fear that engaged the philosophy of Hobbes – *homo homini lupus* - man is a wolf to man. According to Hobbes, man is a creature with unbridled passion, which, if left unchecked, could lead to monstrous, uncontrollable terror. For Hobbes, the only remedy for the state of terror therefore, was the terror of the state,[99] which as Chapter

[91] Jane Stromseth, 2003, 'Law and Force after Iraq: A Transitional Moment', *American Journal of International Law*, Vol. 97.
[92] John Cash, 'Negotiating Insecurity' (2009) 30(1) *Australian Feminist Law Journal*, 95.
[93] Derek Gregory, *The Colonial Present*, Malden, MA: Blackwell Publishing, 2004
[94] Speech by President Bush to the US Congress on 21 September 2001. See David Hastings Dunn, 'Bush, 11 September and the Conflicting Strategies of the 'War on Terrorism'' (2005) 16 *Irish Studies in International Affairs*, 11, 15.
[95] In his State of the Union address of January 29, 2002, President Bush claimed: "States like these [Iraq, Iran, and North Korea] constitute an Axis of Evil arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide the arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States."
[96] George W. Bush, *The National Security Strategy of the United States of America*, September 17, 2002. Available at: https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/. Last accessed 9 December 2020. For a general discussion see Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95; Catherine Powell, 'Lifting Our Veil of Ignorance: Culture constitutionalism and women's human rights in post-September 11 America' (2005) 57 *Hastings Law Journal*, 331; Christine Chinkin, Shelley Wright and Hilary Charlesworth, 'Feminist approaches to international law: Reflections from another century in Buss and Manji (eds), *International Law: Modern Feminist Approaches*, Oxford: Hart Publishing, 2002; David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention*, Sterling, Va.: Pluto Press, 2005; Costas Douziznas, Postmodern Just Wars: Kosovo, Afghanistan, and the New World Order in (John Strawson, ed.) *Law After Ground Zero*, Portland, Ore.: Glasshouse Press, 2003.
[97] Margaret Denike, 'The Human Rights of Others: Sovereignty, Legitimacy, and "Just Causes" for the "War on Terror' (2008) 23(2), *Hypatia*, 95, 102.
[98] Debra B. Bergoffen, 'Between the Ethics and Politics of Innocence' (2006) 18 *Australian Feminist Law Journal*, 49.
[99] Thomas Hobbes, *Leviathan*, CB Macpherson (ed), Harmondsworth: Penguin, 1968, 227.

Two discussed, placed the Other at the peripheries of the law and beyond the traditional understandings of sovereignty.

### *7.3.2 The Interpretation of Law and Quasi-Sovereignty*

The discourse of terrorism is occupied with a narrative that it poses such a serious threat to state security, neither domestic or international law is sufficiently robust or adequate to address it. This narrative of terrorism has been mobilised to enable the introduction of sweeping law that have severely curtailed or negated the rights of those subjected to them. As Anghie has remarked, the terrorist has been constructed in terms of race and war.[100] His actions are acts of war, requiring not only a response of self-defence but a pre-emptive strike against him (Iraq) and those who harbour him (Afghanistan). His construction in this manner has allowed for a reinterpretation of international law and the legal framework governing human rights.[101] A vital and far-reaching impact of the re-articulation of international law and the language of "war as self-defence"[102] has been the reinterpretation of the principle of sovereign integrity, legitimising the violation of the sovereignty of states classified as "rogue". The reinterpretation of the law allowed for the implementation of draconian and far-reaching policies that excluded, detained and abused those subjected to them, placing them beyond the reaches of the law, a situation that the following section examines.

### *7.3.3 The Violation of Human Rights in the Name of Protecting Rights*

In an interview conducted shortly after the attacks on the Twin Towers, Jacques Derrida insisted on the essential need for preserving human rights and their associated discourses:

> We must (*il faut*) more than ever stand on the side of human rights. We need (*il faut*) human rights. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient. Which alone suffices to remind us that they are not natural. They have a history – one that is recent, complex, and unfinished … To take this historicity and this perfectibility into account in an affirmative way we must never prohibit the most radical questioning possible of all the concepts at work here: the

[100] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005.

[101] For example, in the United Kingdom, the *Anti-Terrorism, Crime and Security Act of 2001*, allowed authorities to detain non-British nationals without trial, and to present a different standard of proof than that which is required by domestic criminal law. There was almost no opposition to the *Act* after a debate of sixteen hours without a single amendment. See Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 56(4) *McGill Law* Journal, 863. The United Kingdom was the only country in Europe to derogate from Article 5 of the European Convention on Human Rights "(provisions for the right to life, liberty, and security of person; and fair and transparent public procedures for arrest, trial, and detention."

[102] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005, 278.

> humanity of man … as well as the question of the history of recent judicial concepts or performatives such as a "crime against humanity", and then the very concept of rights or of law (*droit*).[103]

Yet, human rights are sometimes the very instrument through which governments administer their biopolitical agendas.[104] Noam Chomsky used the term "new military humanism" to describe the practice, by governments, of initiating wars and engaging in human rights abuses in the name of defending human rights.[105] A prime example of this was the US administration's assertion that the war on terrorism was conducted in the name of protecting human rights,[106] invoking humanitarian intervention as a justification for the violations of prohibitions on armed attacks. By engaging in this narrative, the US Administration invoked its own campaign of violence and terror, which it has sought to legitimise through international law. This suggests that human rights are not as important as political ones; rather, political agendas determine and define human rights.[107] Arendt has suggested that even the most basic of human rights - inclusion in humanity and survival, are governed by politics and power, the abuse of which, she argues, led to the Nazi and Soviet totalitarian regimes.[108] Arendt cites these abuses as a warning from history about the fragility of freedom, exploring how propaganda, terror and political isolation all aided the slide towards the total domination these regimes exerted.[109] Islamic State as both an ideology and organisation that the War on Terror sought to eradicate, ironically has its genesis in the 2003 Iraqi invasion as part of the War on Terror. It too engaged in the totalitarian practices of propaganda, terror and political isolation to great effect. The Bush administration, as the instigator of the War on Terror, also continued those practices of the abuse of politics and power, laying witness to the most heinous of

[103] Giovanna Borradori (ed), "Autoimmunity": Real and Symbolic Suicides: A Dialogue with Jacques Derrida", trans. Pascale-Anmne Brault and Michael Naas, in *Philosophy in a Time of Terror: Dialogues with Jűrgen Habermas and Jacques Derrida,* 2003, 132-33.
[104] The power of the state to decides who lives and who dies.
[105] Ian Balfour and Eduardo Cadava (2004) 103(2-3) "The Claims of Human Rights: An Introduction", *South Atlantic Quarterly*, 277.
[106] Ibid.
[107] Ibid.
[108] Hannah Arendt, *The Origins of Totalitarianism,* New York, Meridian, 1958.
[109] Ibid.

human rights abuses in spaces such as Guantánamo Bay and CIA Blacksites.[110] Guantánamo Bay, discussed in detail in 7.3.4.1, was specifically created in order to detain terror suspects beyond the rule of law, where the legal restrictions on the interrogation methods to which detainees could be subjected were repeatedly violated.[111] The practice of exceptional rendition saw the US administration render terror suspects to CIA Blacksites where legal norms were discarded, as terror suspects were subjected to torture, indefinite detention and violations of human rights norms.

### *7.3.4 The Monstrous Other in the State of Exception*

The creation of the monstrous Other, whose purpose, according to Dick Cheney, was to kills millions of Americans,[112] heralded in a new global order in which administrative measures replaced the rule of law, evidenced in the US, for example, by the establishment of the Detainee Treatment Programme, discussed in section 7.4.2.[113] Hence, John Ashcroft's claim that "terrorists use America's freedom as a weapon against us".[114] In

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[110] A blacksite is a location where an unacknowledged covert operation is conducted. In the context of the War on Terror, it refers to the facilities that were controlled by the CIA and used by the Bush Administration to illegally detain and torture men classified as unlawful enemy combatants, under the extraordinary rendition programme. The treatment of prisoners in CIA Blacksites, Guantánamo Bay and other spaces of detention contravened both international and domestic US law, including The Geneva Conventions, the UN Convention Against Torture and the International Covenant on Civil and Political Rights. Despite the contraventions of domestic and international law, the existence of Guantánamo Bay and CIA Blacksites were framed in the narrative of emergency and security, a situation that necessitated exceptional measures for the duration of the emergency. See *Geneva Conventions 1949*; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1); *The International Covenant on Civil and Political Rights (ICCPR)*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49, defines detention as arbitrary if it is not in accordance with due process of law or is manifestly disproportional, unjust or unpredictable. It stipulates that detention should be consistent with the normal procedures used to prosecute individuals implicated in criminal offences, and terrorism cases are no exception. Detainees should be charged with recognized criminal offences and speedily brought to a fair trial. Detainees at Guantánamo Bay waited for up to five years for their case to be heard before a military tribunal. The offence of "Material support for terrorism", which some detainees were charged with, was not a recognized criminal offence until the Guantánamo tribunals. The ICCPR, moreover, accords the right to choose one's own legal counsel, in addition to the right to legal counsel provided for by the *1949 Geneva Convention Relative to the Treatment of Prisoners of War*. See Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) State Crime Journal, 16.

[111] Trevor Parfitt, "Are the Third World Poor *Homines Sacri*? Biopolitics, Sovereignty, and Development" (2009) 34(1) *Alternatives: Global, Local, Political*, 41.

[112] Slavoj Zizek, 'Are We in a War? Do We Have an Enemy? Love Thy Neighbour', (2002) 24(10) *London Review of Books*, 3.

[113] The *Patriot Act 2001* (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001) was also introduced by the US government. It authorised "the indefinite detentions of immigrants; the searching of a person's home or business without the owner's or the occupant's consent or knowledge; and the expanded use of National Security Letters, which allows the Federal Bureau of Investigation (FBI) to search telephone, e-mail, and financial records without a court order; and the expanded access of law enforcement agencies to business records, including library and financial records."

[114] Slavoj Žižek, *Welcome to the Desert of the Real*, London, New York: Verso, 2002, 103.

the aftermath of those attacks, the fight against terrorism was presented as a global emergency, where the suspension of human and legal rights was legitimised.[115] The logic of emergency called for exceptional measures that facilitated a reinterpretation of what used to be regarded as the rule of law.[116] The matrix of reinterpreted rules included the operation of Guantánamo Bay as a (indefinite) detention facility, the practice of secret rendition and the creation of the Detainee Treatment Programme.

*7.3.4.1 Guantánamo Bay*

Guantánamo Bay was established as the detention centre for terror suspects in January 2002 by the US Government.[117] The site in Cuba had been deliberately chosen as the space to imprison detainees to place them beyond the reach and jurisdiction of the courts. Since its opening, approximately 900 detainees have been held there, including 15-year old children.[118] Detainees were held in 8ft by 8ft cells. Interrogation methods, which were approved by Donald Rumsfeld, the US Secretary of State, included:

> the use of stress positions (like standing) for up to four hours; isolation up to 30 days; sensory deprivation; removal of comfort items; forced grooming; use of individual phobias (for example, fear of dogs) to induce stress. Other policies include: degrading treatment (such as the removal of clothing - sometimes in the

[115]Ian Balfour and Eduardo Cadava, (2004) 103(2-3) "The Claims of Human Rights: An Introduction", *South Atlantic Quarterly*, 281.

[116] J. Burnett and D. Whyte, "Embedded Expertise and the New Terrorism Thesis" (2005) 1(4) *Journal for Crime, Conflict and the Media*, 1.

[117] The prison camp of Guantánamo Bay has received much criticism from lawyers, international legal experts, journalists, human right activists, medical doctors and former prisoners. The published documentation details the daily life, diaries, assessments of the legal status of prisoners and accounts of interrogation techniques. Three British citizens of Pakistani background, known as the Tipton Three, Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed, documented their brutal treatment. "This statement [115 pages] jointly made by them constitutes an attempt to set out details of their treatment at the hands of U.K. and U.S. military personnel and civilian authorities during the time of their detention in Kandahar in Afghanistan in late December 2001 and throughout their time in American custody in Guantánamo Bay, Cuba. This statement comprises the experiences of all three." Shafiq Rasul, Asif Iqbal, and Rhuhel Ahmed, Composite Statement: Detention in Afghanistan and Guantánamo Bay, 2004, Available at: https://ccrjustice.org/files/report_tiptonThree.pdf. Last accessed 9 May 2020. See Joseph Marguilles, *Guantánamo and the Abuse of Presidential Power*, New York: Simon and Schuster, 2006; James Silkenat and Mark Shulman, *The Imperial Presidency and the Consequences of 9/11: Lawyers React to the Global War on Terrorism* , Vol. 2 , Westport, CT: Praeger/Security International, 2007; Fleur Johns, "Guantánamo Bay and the Annihilation of the Exception," (2005) 16 *The European Journal of International Law*, 613; David Rose, *Guantánamo: America's War on Human Rights*, London: Faber and Faber, 2004; David Rose, *Guantánamo: America's War on Human Rights*, London: Faber and Faber, 2004; Michael Ratner and Ellen Ray, *Guantánamo: What the World Should Know*, White River Junction, VT: Chelsea Green Publishing, 2004; Steven Miles, *Oath Betrayed: Torture, Medical Complicity, and the War on Terror*, New York: Random House, 2006; Chris Mackey & Greg Miller, *The Interrogators: Task Force 500 And America's Secret War Against Al Qaeda*, NY: Bay Back Books, 2005; James Yee, *For God and Country: Faith and Patriotism Under Fire*, New York: Public Affairs, 2005.

[118] "Response of the United States of America, dated 21 October 2005, to the inquiry of the Special Rapporteurs of the UN dated 8 August 2005 pertaining to detainees at Guantánamo Bay", cited in Nick Vaughan-Williams, 'The Generalised Bio-Political Border? Re-conceptualising the Limits of Sovereign Power' (2009) 35 *Review of International Studies*, 738.

> presence of women); cultural and religious harassment (such as using female interrogators to perform 'lap dances' and kicking the Holy Koran); and beating detainees who resist.[119]

According to a report by UN Economic and Social Council Commission on Human Rights, the act of indefinite detention caused very serious and prolonged mental health issues among detainees. [120] The three attempted suicides that occurred at Guantánamo Bay were labelled as "acts of aggression against the US".[121] George Bush described the prisoners as "madmen who are willing to kill themselves and other populations."[122] One of the iconic images of Guantánamo Bay is that of shackled prisoners in orange jumpsuits. Halit Mustafa Tagma argues that these images "show how the prisoners have been deprived of their senses that make them human. The pictures showed muffs strapped to the prisoners' ears, goggles blocking their sights and masks that cover their mouths, stripping subjects of their human senses",[123] in an expression of spectacular torture, where sovereign power is spectacularly displayed. Guantánamo Bay can be described as a contradictory jurisdictional location, a "non-place", representative of a legacy of colonialist spaces of exception.[124] Although located in Cuba, Guantánamo Bay is under absolute US control, operating beyond US jurisdiction and recourse to the rule of (US) law, forming part of the network of secret rendition and the broader Detainee Treatment Programme.

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[119] Response of the United States of America, dated 21 October 2005, to the inquiry of the Special Rapporteurs of the UN dated 8 August 2005 pertaining to detainees at Guantánamo Bay, 52 cited in Nick Vaughan-Williams, 'The Generalised Bio-Political Border? Re-conceptualising the Limits of Sovereign Power' (2009) 35 *Review of International Studies*, 729, 738.

[120] United Nations Economic and Social Council Commission on Human Rights, 'Situation of Detainees in Guantánamo Bay', 15 February 2006, E/CN.4/2006/120, 24 cited in Nick Vaughan-Williams, 'The Generalised Bio-Political Border? Re-conceptualising the Limits of Sovereign Power' (2009) 35 *Review of International Studies*, 729.

[121] Allison Howell, "Victims or Madmen? The Diagnostic Competition Over 'Terrorist' Detainees at Guantánamo Bay," (2007) 1 *International Political Sociology*, 29, 47.

[122] Ibid. at 47.

[123] Halit Mustafa Tagma '*Homo Sacer* vs. Homo Soccer Mom: Reading Agamben and Foucault in the War on Terror' (2009) 34 *Alternatives*, 407, 419.

[124] Diego Garcia in the Indian Ocean can also be described as a space of exception. It had been used as a refuelling base for rendition flights and US warships anchored there served as floating "black prisons". See J. Ball, "US Rendition: Every Suspected Flight Mapped", *The Guardian*, 22 May 2013. Available at https://www.google.com/search?sa=X&source=univ&tbm=isch&q=See+J.+Ball,+%E2%80%9CUS+Rendition:+Every+Suspected+Flight+Mapped%E2%80%9D,+The+Guardian,+22+May+2013.&hl=en&client=avast&ved=2ahUKEwjDsJP2javvAhVsQRUIHQckA9oQjJkEegQIAhAB&biw=1242&bih=568. Last accessed 10 March 2021; Ross W. Bellaby, 'Extraordinary rendition: expanding the circle of blame in international politics' 2018 22(4) *International Journal of Human Rights*, 574; Adam Zagorin, "Source: US Used UK Isle for Interrogations", *Time*, 31 July 2008. Available at http://content.time.com/time/world/article/0,8599,1828469,00.html. Last accessed 12 March 2021.

*7.3.4.2 Secret Rendition*

The following section engages in a discussion of the practice of secret rendition as the ultimate expression of the state of exception, where the transgression of the law was also given force by the law, discussed in section 7.3 and where the figure of *homo sacer* was produced. Although there is no one official definition of secret rendition, it is defined in *Globalizing Torture: CIA Secret Detention and Extraordinary* as "the transfer—without legal process—of a detainee to the custody of a foreign government for purposes of detention and interrogation".[125] The practice of rendition, an anathema to the rule of law, exposes the continuance of Empire's law, which in the colonies, endorsed the human rights abuses and barbaric mistreatment of its inhabitants. The treatment of terror suspects raises in these spaces such questions as "how can these violations be reconciled with international law on the treatment of prisoners of war?" The US had no time for such questions however, instead framing the existence of Guantánamo Bay and CIA Blacksites in the narrative of emergency and security, as a situation that necessitated exceptional measures.[126] The Bush administration reshaped and reinterpreted the rules of international law to enable to them to run the extraordinary rendition programme and to detain terror suspects, without due process at CIA Blacksites, This position is succinctly laid bare in the 'Torture Memos' and in the reclassification of detainees at Guantánamo Bay, as unlawful enemy combatants denied the protections of the Geneva Conventions, discussed in section 7.3.4.1. Commenting on the use of rendition and torture in the War on Terror, Dick Marty, Rapporteur to the Committee on Legal Affairs and Human Rights Parliamentary Assembly of the Council of Europe summarised "With regard to the question of fitting into legal frameworks ... the United States does not see itself bound to satisfy anyone's interpretation of international law but its own."[127] That interpretation excluded the enemy from the political arena, beyond the scope of international law, but bound by Empire's law, as the case of David Hicks, outlined in section 7.3.4.3 reveals.

The CIA commenced a secret detention program which enabled them to transport terror suspects to CIA prisons, also known as Black Sites, which were located in Eastern Europe, Thailand, Morocco and other locations outside the United States. At these

[125] Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary*, Open Society Justice Initiative, New York: Open Society Foundations, 2013, 13.

[126] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16.

[127] Dick Marty, 'Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States', Committee on Legal Affairs and Human Rights, Parliamentary Assembly Council of Europe, 7 June restricted (provisional version) mAS/Jur (2006) 16 Part II. Available at https://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf. Last accessed 21 February 2021. *See also* Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16, 24.

facilities, detainees were subjected to a range of enhanced interrogation techniques that amounted to torture.[128] The CIA "gained expansive authority to engage in extraordinary rendition".[129] Commenting on the justification for rendering terror suspects, Dick Cheney, former Vice-President of the US stated:

> We also have to work through sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective.[130]

A study by the Senate Select Committee on Intelligence (SSCI) documents the extent of the torture that was endured by the terror suspects (approximately 119 in number)[131] who were renditioned under the *CIA's Rendition, Detention and Interrogation Programme* (RDI) from 2001-2006.[132] Similar to Guantánamo Bay, those men detained under the CIA programme were placed beyond the beyond the reach and margins of the law.[133] The

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[128] Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary*, Open Society Justice Initiative, New York: Open Society Foundations, 2013.
[129] Ibid. at 5.
[130] Vice President Dick Cheney, Interview by Tim Russert, "Meet the Press," NBC News, Sep. 16, 2001 cited in Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary*, Open Society Justice Initiative, New York: Open Society Foundations, 2013, 5.
[131] Ruth Blakeley and Sam Raphael, 'The Prohibition Against Torture: Why the British Government is Falling Short and the Risks that Remain' (2019) 90(3) *The Political Quarterly*, 408, 409.
[132] Senate Select Committee on Intelligence (SSCI), *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, declassified Executive Summary, 3 December 2014, 14. Available at http://www.therenditionproject.org.uk/documents/RDI/141209-SSCI-Torture_Report_Executive_Summary.pdf. Last accessed 30 March 2020 cited in Ruth Blakeley and Sam Raphael, 'The Prohibition Against Torture: Why the British Government is Falling Short and the Risks that Remain' (2019) 90(3) *The Political Quarterly*, 408.
[133] Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary*, Open Society Justice Initiative, New York: Open Society Foundations, 2013. The European Court of Human Rights has observed that "extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the [European] Convention. It would be incompatible with a Contracting State's obligations under the Convention if it were to extradite or otherwise remove an individual from its territory in circumstances where that individual was at real risk of extraordinary rendition. To do so would be to collude in the violation of the most basic rights guaranteed by the Convention." See *Babar Ahmad and Others v. United Kingdom*, Eur. Ct. H.R., Decision on admissibility (July 8, 2010). The Venice Commission, the Council of Europe's advisory body on constitutional matters, has observed that "[f]or a State knowingly to provide transit facilities to another State may amount to providing assistance to the latter in committing a wrongful act, if the former State is aware of the wrongful character of the act concerned." See European Commission for Democracy through Law (Venice Commission), Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of Prisoners, Opinion no. 363/2005, CDL-AD(2006)009, Mar. 17, 2006, para. 45, available at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp. Art. 2 of *The Convention against Torture* (CAT), Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1), expressly requires states to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction", while Art. 16 also "prevent…other acts of cruel, inhuman or degrading treatment or punishment… committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The ICCPR also entails a positive obligation to prevent torture and cruel, inhuman, and degrading treatment. See U.N. Human Rights Committee, General Comment No. 20, U.N.

CIA conspired with a number of governments such as Afghanistan, Egypt, Morocco and Poland and Yemen,[134] to establish its secret extraordinary rendition and detention program. The programme, as described by the Open Society Justice Initiative, "stripped people of their most basic rights, facilitated gruesome forms of torture, at times captured the wrong people, and debased the United States' human rights reputation world-wide".[135] Torture was prolific in these facilities- prisoners were subjected to arbitrary and secret detention and enforced disappearance, "were held incommunicado, for months or years on end and subjected to torture and cruel, inhuman and degrading treatment".[136] Details of the treatment of these prisoners, which details a brutal regime of torture and interrogation, are contained within a 499-page executive summary of a study by the Senate Select Committee on Intelligence into the CIA's programme (SSCI report).[137] Abuses within these CIA prisons included:

> including drowning to the point of unconsciousness, repeated beatings, the use of ice baths and hoses to induce hypothermia, sleep deprivation for more than a week at a time, painful stress positions for months at a time, prolonged confinement in extremely small boxes, and sexual assault by forced feeding through the rectum. Prisoners were threatened with power drills and subjected to mock executions, and were often beaten so severely that they passed out. Those detained in the CIA programme were subjected to a regime designed, as one interrogator stated, to take them "to the verge of death and back again".[138]

Doc. A/47/40 (Oct. 9, 1992). "Accordingly, states that knew or should have known of human rights violations associated with the CIA's secret detention and extraordinary rendition operations bear responsibility under international human rights law for assisting in operations that entailed such violations."

[134] In total, 54 governments were identified as being involved in the secret rendition programme: Africa, Asia, Australia, Europe, and North America, and include: "Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Yemen, and Zimbabwe." See Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary*, Open Society Justice Initiative, New York: Open Society Foundations, 2013, 6.

[135] Jonathan Horowitz and Stacy Cammarano, '20 Extraordinary Facts About CIA Extraordinary Rendition and Secret Detention' Open Society Justice Initiative, 2013. Available at: https://www.justiceinitiative.org/voices/20-extraordinary-facts-about-cia-extraordinary-rendition-and-secret-detention. Last accessed 6 July 2021.

[136] Ruth Blakeley and Sam Raphael, 'The Prohibition Against Torture: Why the British Government is Falling Short and the Risks that Remain' (2019) 90(3) *The Political Quarterly*, 408, 409.

[137] Senate Select Committee on Intelligence (SSCI), *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, declassified Executive Summary, 3 December 2014. Available at: https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf. Last accessed 6 July 2021.

[138] Ruth Blakeley and Sam Raphael, 'British War in the 'War on Terror' (2017) 23(2) *European Journal of International Relations*, 243, 246.

Despite the abuse of detainees, Condoleezza Rice, former US Secretary of State, defended rendition "as a vital tool in combating terrorism."[139] She stated that "where appropriate, the United States seeks assurances that transferred persons will not be tortured."[140] Testifying in a Congressional hearing, the then CIA Director Porter Goss admitted that such assurances were meaningless, declaring that "[w]e have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course, once they're out of our control, there's only so much we can do."[141] Such reassurances were of little use in the face of such transgressions of international law that contravened both international and domestic US law: in international law alone, the Geneva Conventions,[142] the UN Convention Against Torture[143] and the International Covenant on Civil and Political Rights[144] were among those breached. The case of David Hicks, an Australian who was subjected to secret rendition, catalogues the litany of abuse the terror suspects were subjected to and their total removal from the legal protections of the law.

*7.3.4.3 Secret Rendition: The Case of David Hicks*

The USS Peleliu was where "Detainee No. 001", John Walker Lindh, had been mistreated, denied a lawyer, interrogated under duress, and had confessed to terrorist activities.[145] Aboard the Peleliu, another prisoner, Australian David Hicks witnessed the beatings and torture of two fellow captives – an Afghan and an Arab – and was threatened with a mock shooting. He was hooded and taken to be interviewed on board the Peleliu by Australian security and federal police officers.[146] On 3 January, Hicks was taken by helicopter to be held captive on another assault vessel, the USS Bataan.[147] Between interrogations on board that vessel, Hicks was taken blindfolded to another facility on

[139] Condoleezza Rice, U.S. Secretary of State, "Remarks Upon Her Departure for Europe," Dec. 5, 2005; Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary*, Open Society Justice Initiative, New York: Open Society Foundations, 2013, 17.
[140] Douglas Jehl and David Johnston, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," New York Times, Mar. 6, 2005.
[141] Senate Select Committee on Intelligence, Testimony of the Director of Central Intelligence Porter J. Goss, "Global Intelligence Challenges 2005: Meeting Long-Term Challenges with a Long-Term Strategy," Feb. 16, 2005. Available at https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf. Last accessed 6 July 2021.
[142] *Geneva Conventions 1949.*
[143] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.*
[144] *ICCPR 1966.*
[145] Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16.
[146] David Hicks, *Guantánamo: My Journey*, Melbourne: Random House Australia, 2010.
[147] Nigel Brew, Jan Miller, Roy Jordan and Sue Harris Rimmer, (2007) 'Australians in Guantánamo Bay: A Chronology of the Detention of Mamdouh Habib and David Hicks', *Parliament of Australia*. Available at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/online/AustralianBay. Last accessed 20 February 2021.

land, where he was subjected to prolonged beatings, kicked whilst blindfolded, threatened with rape, hit with rifle butts, spat upon, trophy-photographed and humiliated.[148] As Clive Stafford Smith, a director of the non-governmental organisation (NGO) Reprieve, and lawyer for another Guantánamo detainee, Moazzam Begg, commented, "Being taken off a warship is ... a rendition, period. There were all sorts of renditions. There were American renditions to themselves from Pakistan to Afghanistan to torture people, from American ships to Afghanistan to torture people".[149] In January 2020, Hicks was rendered to the US military base in Guantánamo Bay in Cuba. He was one of the first to be detained there as "Prisoner 002". No. 001, John Walker Lindh, was not incarcerated at Guantánamo Bay due to his US citizenship.[150] Hicks was detained without trial as a so-called "alien unlawful enemy combatant"[151] and was the first prisoner there to face a military commission. Following six years of detention and torture in Guantánamo Bay, Hicks entered a formal guilty plea of providing material support for terrorism as part of a plea bargain. However, he continued to protest his innocence under an "Alford plea".[152] Hicks was repatriated to Australia in 2007, where he served out the remaining seven months of his sentence in an Adelaide prison.[153] His is an interesting case. Hicks' torture; his sale for a military bounty by the Afghan Northern Alliance to the US; his extraordinary rendition to and from warships for the purpose of interrogation under torture; his extraordinary rendition to Guantánamo Bay; and his subsequent incarceration in Australia, all amount to US-led Empire crimes in the War on Terror, of which David Hicks was just one story.[154] These crimes were supported by a wide network of complicit states and sub-state agents like the Northern Alliance, performed in indeterminate legal spaces of exception inherited from colonialism.

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[148] David Hicks, "Affidavit Sworn before Major M.D. Mori, Judge Advocate, US Marine Corps", 5 August 2004. (Published by *Sydney Morning Herald* as "The Hicks Affidavit", December 10 2004). Available online at http://www.smh.com.au/news/World/David-Hicks-affidavit/2004/12/10/1102625527396. html. Last accessed 20 February 2021 cited in Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16.

[149] Four Corners. (2005) "The Case against David Hicks", Reporter Debbie Whitmont, Australian Broadcasting Commission, 31 October. Available at https://www.abc.net.au/4corners/david-hicks-story/8953376. Last accessed 20 February 2021.

[150] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16. Walker Lindh served his sentence at the US Penitentiary, Victorville, northwest of Los Angeles. He was released from custody in 2019, under strict probation requirements.

[151] Ibid. at 21.

[152] Ibid. An A*lford plea* in United States law, is a guilty *plea* in criminal court, whereby a defendant in a criminal case does not admit to the criminal act and asserts innocence.

[153] David Hicks, *Guantánamo: My Journey*, Melbourne: Random House Australia, 2010.

[154] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16.

*7.3.4.4 Beyond the Reach of the Law*

The secret rendition and torture of prisoners in CIA Blacksites attest to the determination of the US administration to place detainees outside of the justice system and to deny them the protections afforded in human rights treaties, producing Agamben's *homo sacer*. Extraordinary rendition exposed the contradictions of the legal process in times of emergency; the fight against terrorism legitimised the suspension of legal and human rights, a position that has been stipulated and sanctioned by law. David Dyzenhaus describes such a scenario as "an absence of law prescribed by law under the concept of necessity – a legal black hole, but one created, perhaps even in a sense bounded, by law".[155] Reynolds discusses Dyzenhaus' application of the "'conceptual puzzle' of martial law,"[156] i.e. "the use of law to dissolve law so as to preserve legal order",[157] in order to question whether this can "really be understood as law?"[158] Through Agamben's "double-structure"[159] of the presence of law and conversely, its absence, Reynolds cites Raulff to describe "how a maximum of anomy and disorder can perfectly coexist with a maximum of legislation".[160] Such was the case with the extraordinary rendition programme, the law was utilised to enable and justify a programme that formed part of a wider governmental apparatus of security and domination. Foucault described these modern techniques of power, as "an explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations",[161] as the means through which the nation-state can defend, purify, and protect the "locus of sovereignty";[162] "the nation, the people, and/or the community, often defined in ethnic and racial terms".[163]

[155] David Dyzenhaus, 'The Puzzle of Martial Law' (2009) 59 *University of Toronto Law Journal* 1, 2 cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 46.
[156] Ibid. at 46.
[157] Ibid. at 46.
[158] John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 46.
[159] Ibid. at 47.
[160] Ulrich Raulff, 'An Interview with Giorgio Agamben' (2004) 5(5) *German Law Journal* 609, 611-12 cited in John Reynolds, *Empire, Emergency and International Law*, Cambridge: Cambridge University Press, 2017, 47.
[161] Michel Foucault, *The History of Sexuality Vol. 1, An Introduction*. London: Allen Lane, 1979, 140.
[162] Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302, 309.
[163] Michel Foucault, "*Society Must be Defended"*, *Lectures at the College de France*, (Trans. David Macey), New York: Picador, 2003 cited in Thomas Blom Hansen and Finn Stepputat, 'Sovereignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302.

### 7.4 The Legal Framework of The War on Terror

The following discussion engages in an analysis of legal framework that the US government employed during the War on Terror, representing a space where the rule of law was redefined, and laws were written by and interpreted to accede to the will of the US government. Hence, the legal framework is an important point of discussion for this thesis as it speaks to the disregard of the rule of law by the US, placing it in a continuum of such abuse by states that Poynting calls Empire Crimes,[164] which extend from the colonial practices to the War on Terror.

The US government offered various justifications for the abuses they engaged in during the War on Terror, i.e. extraordinary rendition, indefinite detention and interrogation of suspected terrorists. These measures were criticised by some however, as

> a cruel irony, an Orwellian bit of business, … the formal abandonment of America's commitment to key provisions of the Geneva Convention. This was the day, a milestone on the road to Abu Ghraib, that marked our descent into torture. … Depriving prisoners seized in wartime of the protections of the Geneva Conventions was a huge and unprecedented step, and thoroughly alarming. And yet, despite criticism from Secretary of State Colin Powell, the administration pushed forward remorselessly towards the creation of an America that practiced arbitrary detention and torture.[165]

By way of vindicating and rationalising a strategy of detention and torture, President Bush described the detainees of Guantánamo Bay as terrorists before these claims had been established by a court of law or the military tribunals at Guantánamo Bay. He also demanded the complicity of other nations in this strategy of abuse by declaring "Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists." The casting of the prisoners of the war on terror as those "who hate our way of life"'[166] normalised the rhetoric of the suspension of legal and other rights and invigorated a debate about placing restrictions on the basic elements of freedom and human dignity. Jonathan Alter's *Newsweek* article 'Time to Think about Torture' is an exemplary example. Debating the merits of torture in the War on Terror, Alter wrote:

> We can't legalise torture; it's contrary to American values. But even as we continue to speak out against human-rights abuses around the world, we need to

[164] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16, 17.

[165] Andy Worthington, 'Exactly 16 Years Ago, George W. Bush Opened the Floodgates to Torture at Guantánamo', *Common Dreams*, 7 February 2018. Available at: https://www.commondreams.org/views/2018/02/07/exactly-16-years-ago-george-w-bush-opened-floodgates-torture-guantanamo. Last accessed 8 April 2020.

[166] Jonathan Alter, 'Time to Think about Torture: It's a New World and Survival May Well Require Old Techniques that Seemed out of the Question', *Newsweek*, 5 November 2001.

> keep an open mind about certain measures to fight terrorism, like court-sanctioned psychological interrogation. And we'll have to think about transferring some suspects to out less squeamish allies, even if that's hypocritical. Nobody said this was going to be pretty'. We'll have to think about transferring some suspects to our less squeamish allies, even if that's hypocritical. Nobody said this was going to be pretty.[167]

The public narrative of torture continued in April 2002, when the question of "Should he be Tortured?"[168] referring to Abu Zubaydah, presumed to be the second-in-command of al-Qaeda, was readily discussed in the media. In a live broadcast by NBC on 5 April 2002, Secretary of Defense Donald Rumsfeld claimed that American lives were his first priority,[169] and "not the human rights of a high-ranking terrorist", [170] Abu Zubaydah. Rumsfeld also admonished journalists for expressing concern over the mistreatment of Abu Zubaydah.[171]

The narratives of Bush and Rumsfeld invoke the arguments of Anthony Anghie, "the very invocation of 'the terrorist' suggests a threatening entity beyond the realm of the law that must be dealt with by extraordinary emergency powers, or even extra-legal methods".[172] As Chapter Two discussed, Frank Kafka described terrorists as existing outside of the law, [173] in a state of exception, speaking to the plight of prisoners of the War on Terror, a conflict waged not by means of normal domestic or international law,[174] but by transgressing that very law. Jacques Derrida's elucidation also highlights the plight of the detainees as he who stood outside the law both a subject of the law and as an outlaw.[175]

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[167] Jonathan Alter, 'Time to Think about Torture: It's a New World and Survival May Well Require Old Techniques that Seemed out of the Question', *Newsweek,* 5 November 2001. See also Slavoj Zizek, 'Are We in a War? Do We Have an Enemy? Love Thy Neighbour', (2002) 24(10) *London Review of Books*, 3, 4.

[168] Slavoj Zizek, 'Are We in a War? Do We Have an Enemy? Love Thy Neighbour', (2002) 24(10) *London Review of Books*, 3.

[169] Slavoj Zizek, *Welcome to the Desert of the Real: Five Essays on September 11 and Related Dates*, London, New York: Verso, 2002.

[170] Ibid. at 105.

[171] Ibid. at 105.

[172] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law,* Cambridge University Press, 2005, 299.

[173] Frantz Kafka, *Before the Law/Vor dem Gesetz,* Selbswehr, Kurt Wolff, 1919 cited in Petter Danckwardt, 'Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority', *Thesis in International Law,* Faculty of Law, Stockholm University, 2016.

[174] Petter Danckwardt, 'Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority', *Thesis in International Law,* Faculty of Law, Stockholm University, 2016.

[175] Jacques Derrida, *The Beast and the Sovereign Vol. 1*, Chicago: Chicago University Press, 2009.

*7.4.1 Abu Ghraib*

Abu Ghraib prison was built by British contractors in the 1960s and is situated some twenty miles from Baghdad. During the Saddam Hussein era, it was the scene of some of the worst atrocities of that reign. Prisoners were subjected to beatings, electrocution and stripped naked in order to humiliate and degrade them.[176] Thousands of prisoners were killed in the facility and buried in unmarked graves[177] in violation of Article 22 of the *Iraqi Interim Constitution* (freedom from torture)[178] and the *Iraqi Penal Code*, which criminalises the use of torture by public servants.[179] Abu Ghraib existed as a space operating outside of the law, yet simultaneously operating within it; while torture was criminalised by the Constitution, it was also authorised and sanctioned by Saddam Hussein's regime. Following the fall of the Saddam Hussein in 2003, Iraqis likely thought that the horrors of Abu Ghraib were consigned to the past. However, four months after the US-led coalition forces gained control of Iraq, Abu Ghraib was reopened as a place of detention, housing thousands of Iraqi men, women and teenagers.[180] Many of the prisoners were captured in random military sweeps and were categorised as "common criminals; security detainees suspected of "crimes against the coalition"; and a small number of suspected "high-value" leaders of the insurgency against the coalition forces".[181] By the autumn of 2003, very concerning reports about the endemic abuse of prisoners began to emerge. A confidential US military investigation into Abu Ghraib was published in April 2004, which included disturbing images of the abuse and torture of prisoners at the facility.[182] The abuse of detainees by US guards included:

> Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell; sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.[183]

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[176] Derek Gregory, Editorial 'The Angel of Iraq', (2004), *Environment and Planning D: Society and Space,* Vol 22, 317.
[177] Ibid.
[178] Iraqi Interim Constitution, Art. 22. Adopted on 16 July 1970. See http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=42152.
[179] Iraqi Penal Code (Law No. 111 of 1969). Available at: https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=57206&p_lang=en. See also Derek Gregory, Editorial 'The Angel of Iraq', (2004), *Environment and Planning D: Society and Space*, Vol 22, 317, 317.
[180] Derek Gregory, Editorial 'The Angel of Iraq', (2004), *Environment and Planning D: Society and Space,* Vol 22, 317; Seymour M. Hersh, 'Torture at Abu Ghraib', *New Yorker*, 10 May 2004. Available at: https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib. Last accessed 28 July 2021.
[181] Ibid.
[182] Seymour M. Hersh, 'Torture at Abu Ghraib', *New Yorker*, 10 May 2004. Available at: https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib. Last accessed 28 July 2021.
[183] Ibid.

The response from the US government cited the abuse as "unacceptable but un-American; appalling but an aberration; inexcusable but an exception".[184] This wholly inappropriate and dismissive response by the US government recalls Frank Kafka's poignant statement on torture:

> torture mocks the law, using punishment to gather evidence to justify the punishment already inflicted, rather than using evidence already gathered to justify punishment. When torture becomes an official policy, the victim's suffering and pain lose legal relevance, and they become further isolated just when they most need the law's protection.[185]

The prisoners at Abu Ghraib were not "common criminals; security detainees suspected of "crimes against the coalition"; and "high-value" leaders of the insurgency against the coalition forces".[186] Rather, the 2004 ICRC *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other [Persons Protected] by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation* stated that 70-90% of all prisoners "had been arrested by mistake".[187] During the Hussein era, Abu Ghraib emerged as a space where Agamben's *homo sacer* dwelt and continued as such during the occupation of Iraq, a space devoid of the rule of international law and human rights.

The policy employed the Bush administration illuminates the injustice of the Bush administration's policies and to the reduction of detainees to Agamben's *homo sacer*, placing these prisoners beyond the rule of law. When Donald Rumsfeld declared the detainees at Guantánamo Bay to be 'unlawful combatants'[188] as opposed to lawful

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[184] Derek Gregory, Editorial 'The Angel of Iraq', (2004), *Environment and Planning D: Society and Space,* Vol 22, 317, 318.

[185] Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances*, Cambridge: Cambridge University Press, 2013, 212; John T. Parry, 'Escalation and Necessity: Defining Torture at Home and Abroad', in Sanford Levinson (ed.), *Torture: A Collection*, Oxford: Oxford University Press, 2004, 153.

[186] Seymour M. Hersh, 'Torture at Abu Ghraib', *New Yorker*, 10 May 2004. Available at: https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib. Last accessed 28 July 2021.

[187] ICRC, 'Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other [Persons Protected] by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation', *International Committee of the Red Cross*, 2004. Available at http://www.informationclearinghouse.info/article6170.htm. Last accessed 28 March 2021.

[188] "Any alien unlawful enemy combatant is subject to trial by military commission under chapter 47A — Military Commissions (of the Military Commissions Act of 2006 (10 U.S.C. 948a (Section 1, Subchapter 1)). The definition of unlawful and lawful enemy combatant is given in Chapter 47A—Military Commission: Subchapter I--General provisions: Sec. 948a. Definitions. The definition of unlawful combatants was defined in the Military Commissions Act 2006 as (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaida, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

combatants[189] or prisoners of war, the way was paved for the development and enactment of the Detainee Treatment Programme. It was an expression of imperialism through the imposing of exceptions not in the sense of colonising territories, but of imposing sovereign's will. Other people commit crimes and still remain 'lawful criminals' with rights and the protections of law. However, by designating the detainees as 'unlawful combatants', they became a political enemy, removed from the political space, a biopolitical tool whose status was reduced to bare life.

### *7.4.2 The Development of the Detainee Treatment Policy*

The response of the Bush administration to the attacks of September 11 2001 introduced an assault on the principles of international law that had been held as sacrosanct since the Nuremberg Charter 1945,[190] the Universal Declaration of Human Rights 1948 (UDHR) [191] and the Geneva Conventions 1949.[192] Mutua, for example, cites the UDHR as an instrument that

> sought to give universal legitimacy to a doctrine that is fundamentally Eurocentric in its construction. Sanctimonious to a fault, the Universal Declaration underscored its arrogance by proclaiming itself the 'common standard of achievement for all peoples and nations'. The fact that half a century later human rights have become a central norm of global civilization does not vindicate their universality. It is rather a telling testament to the conceptual, cultural, economic, military and philosophical domination of the European West over non-European peoples and traditions.[193]

Although the thesis argues that the foundations of international law reside in the colonial confrontation, it was a Eurocentric model of law that was applied universally, drawing upon its colonial origins to perpetuate sharp distinctions between European and non-European peoples. While critical and redemptive accounts of international law may not necessarily be reconciled, they are useful for understanding the asymmetries that exist between the colonial confrontation, imperialism and the existence of the permanent state of exception. The invention of new categories of people is a case in point. The

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[189] The term 'lawful enemy combatant' means a person who is — (A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States."

[190] *Charter of the International Military Tribunal 1945*.

[191] *Universal Declaration of Human Rights*, UNGA Res. 217A(III)., *GAOR, 3rd Session, Part 1, Resolutions, 71*, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810, Dec. 12, 1948.

[192] *Geneva Conventions 1949.*

[193] M. Mutua, *Human Rights: A Political and Cultural Critique*, University of Pennsylvania Press, 2008, 157 cited in Ben Golder, 'Beyond redemption? Problematising the critique of human rights in contemporary international legal thought' (2014) 2(1) *London Review of International Law*, 77, 100-101.

categorisation of groups of people, such as unlawful enemy combatants, has denied the protections of human rights and international humanitarian law to these people so deemed, prompting Hannah Arendt to question whether there is a right to have rights.[194] For Angie, the emergence of new categories of people invoked a return to the imperialistic endeavours of the 19th century evident in the remaking of sovereignty "where the division between civilized and uncivilized states was the foundation of a differentiated system of international law in which the uncivilized state was denied the rights of sovereignty and could, thus, within the law, be conquered and transformed."[195] The assault on the principles of international law, through which a critical analysis of international law is revealing, is further evident in the vocabulary that is omnipresent in international law – liberal and non-liberal states, democratic and rogue, civilised and uncivilised, that justifies and normalises a different set of rules and standards for states cast as "inferior".

The discussion below in sections 7.4.2.1 – 7.4.2.5 elaborates upon the argument of a a deviation from international law by powerful states. President Bush's declaration of a war on al-Qaeda and the Taliban introduced a policy of extrajudicial detention that held prisoners outside of the United States legal process, denied prisoner-of-war status to enemy combatants, including those captured in non-combat locations, deprived these prisoners of the protection of the Geneva Conventions.[196] and recourse to *habeus corpus*. The US understanding of sovereignty was influenced by the recognition of an international society composed of 'civilised' polities who were respectable members of the international community, as opposed to those deemed to be 'uncivilised', placed at the peripheries of the law and beyond the traditional understandings of sovereignty. The trends that emerged within European international law in the late 19th century from which new legal practices were generated, [197] were directly influenced by this discrimination. These practices, such as those employed by the League of Nations Mandate System, were not consigned to the early 20th century however. The 'civilised'/'uncivilised' dichotomy was visible as practice during the War on Terror, materialising in the denial of the basic protection of the law to "citizens of outlaw states",[198] which the following section details.

[194] Hannah Arendt, 'The Right to Have Rights' in *The Rights of Others: Aliens, Residents, and Citizens,* Cambridge University Press, 2012, 49-70. See also Antony Anghie, 'Rethinking Sovereignty in International Law' (2009) 5, *Annual Review Law Social Science,* 291.
[195] Antony Anghie, 'Rethinking Sovereignty in International Law' (2009) 5, *Annual Review Law Social Science,* 291, 307.
[196] *Geneva Conventions 1949.*
[197] Lauren Benton, 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900' (2008) 26(3) *Law and History Review,* 595.
[198] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL,* 167, 182.

*7.4.2.1 Authorization for the Use of Military Force (AUMF)*

One week after the attacks of September 11, 2001, the US Congress passed the *Authorization for Use of Military Force (AUMF)* authorising the president to use all "necessary and appropriate" military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . .".[199] Using this logic, the Administration argued that this included the indefinite detention of suspected enemy combatants and terrorists, a position that they avowed in *Rasul, Hamdi and Hamdan* (discussed below).

*7.4.2.2 The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001*

*The Authorization for Use of Military Force (AUMF)* was used as the basis for the enactment, by President Bush on 13 November 2001, of *The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001*.[200] The Order sanctioned by the Secretary of Defense, Donald Rumsfeld to detain any alien deemed to be a member of al-Qaeda, "or anyone suspected of engaging in, aiding or abetting, or conspiring to commit international terrorism", or anyone who had harboured a person or persons suspected of any of the above acts.[201] The specifics of the Order were:

(i) the place and duration of the detention of terror suspects would be at the sole discretion of the Secretary of Defence;

(ii) (ii) the principles of rules and laws of evidence accepted in criminal case trials in the US would not be recognised, including the right of due process and trial by jury,

(iii) (iii) terror suspect trials would be conducted before Military Commissions, not the courts,

(iv) (iv) detained individuals would not be able to seek recourse in any US court, the courts of other nations, or any international tribunal, pursuant to the Presidential Order, and

[199] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 2001 (codified at 50 U.S.C. § 1541).

[200] *The Presidential Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism 2001, 66 Fed. Reg. 57831-57836 (The President Nov. 16, 2001).*

[201] Military Order of 13 November 2001, 66 Fed. Reg. 57,833 (Nov. 13, 2001). See 32 C.F.R. §§ 9.1-18.6. for the specific regulations.

(v) (v) detainees would not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (a) any court of the United States, or any State thereof, (b) any court of any foreign nation, or (c) any international tribunal.[202]

The Order identified the AUMF as the basis for authorising the detentions of detainees and for the use of military tribunals as a means of trying those detainees at Guantánamo Bay. While the AUMF did not address the authority to detain prisoners, the Bush administration relied upon it to detain individuals without charge.[203] The administration also used its own interpretation of *Article II Commander in Chief Powers*[204] to detain individuals indefinitely and without charge.[205]

*7.4.2.3 Unlawful Combatants and the Geneva Conventions*

The Bush administration declared that the Geneva Conventions,[206] including Common Article 3, which prohibits "outrages upon personal dignity, in particular humiliating and

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[202] Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 CFR 918 (Nov. 16, 2001).

[203] Wallace Tashima, 'The War on Terror and the Rule of Law', *Jefferson Memorial Lecture*, University of California, Berkeley, September 17, 2007.

[204] "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." See Michel R. Ramsey and Stephen I. Vladeck, *Commander in Chief Clause.* Available at: https://constitutioncenter.org/interactive-constitution/interpretation/article-ii/clauses/345. Last accessed 6 July 2021.

[205] Wallace Tashima, 'The War on Terror and the Rule of Law', *Jefferson Memorial Lecture*, University of California, Berkeley, September 17, 2007. President Bush's executive order drew heavily from Proclamation 2561 issued by President Franklin D. Roosevelt in 1942 following the capture of eight German soldiers, in what was known as *Quirin*. See *Quirin 317 U.S. at 1, (1942).* That Proclamation *had* denied enemy soldiers and spies any access to US courts and had appointed a military commission to try the eight captives. *See* 7 Fed. Reg. 5103 (July 7, 1942) (establishing a military commission). *Ex Parte Quirin* was frequently cited by the Bush administration as the legal basis for the detention and trial of al-Qaeda suspects under the AUMF. However, the validity of *Quirin* as a basis for the use of military tribunals in the War on Terror has been disputed.[205] A report by the American Bar Association commenting, states:

> "The *Quirin* case … does not stand for the proposition that detainees may be held incommunicado and denied access to counsel; the defendants in *Quirin* were able to seek review and they were represented by counsel." In *Quirin*, "The question for decision is whether the detention of petitioners for trial by Military Commission ... is in conformity with the laws and Constitution of the United States. Since the Supreme Court has decided that even enemy aliens not lawfully within the United States are entitled to review under the circumstances of *Quirin*, that right could hardly be denied to U.S. citizens and other persons lawfully present in the United States, especially when held without any charges at all." See Daniel Kanstroom, *"Unlawful Combatants" in the United States: Drawing the Fine Line Between Law and War*, 1 January 2003. Available at: https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol30_2003/winter2003/irr_hr_winter03_unlawful/. Last accessed 29 February 2020.

[206] *Geneva Conventions 1949.*

degrading treatment"[207] did not apply to the detainees of Guantánamo Bay, in violation of international law. The Geneva Conventions apply in times of war in order to protect both prisoners and civilians. Article 5 of the Third Geneva Convention, *Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949*,[208] applies to prisoners whose status has not yet been determined:

> The present Convention shall apply to the persons referred to in Article 4 (*Prisoners of War*) from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. [209]

Therefore, according to Art. 5, a prisoner must be treated as a prisoner of war and accorded the rights and protections of the Geneva Conventions until his or her status can be determined. Those who are not deemed to be a lawful combatant still retain their rights under the Fourth Geneva Convention[210] so that he (the prisoner) must be "treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial". However, as stated above, the protections of the Geneva Conventions were denied to the prisoners of Guantánamo Bay, leading to a litany of abuses committed against them, including torture and indefinite detention.

The following section outlines the caselaw that challenged the status and detention of prisoners in Guantánamo Bay.

*7.4.2.4 Relevant Caselaw*

On 28 June 2004, in *Rasul v Bush*, the Supreme Court of the United States considered the issue of alien detainees at Guantánamo Bay. Two aliens detained of Guantánamo filed federal *habeas corpus* petitions under 28 U.S.C. §§ 2241 (the federal *habeas corpus* statute), 1331 and 1350 challenging the legality of their detention at the Guantánamo Bay Naval Base. The US Supreme Court reversed the ruling of District of Columbia District Court[211] and the D.C. Circuit Court of Appeals both of which had dismissed the petition.

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[207] *Geneva Conventions*, Art. 3.
[208] *Geneva Conventions Relative to the Treatment of Prisoners of War 1949, 1949*, Art. 5. For the full text, see https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf. Last accessed 5 June 2021.
[209] Ibid. Art. 5
[210] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*. For the full text, see https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf. Last accessed 4 August 2021.
[211] Rasul v Bush, 215 F. Supp. 2d 55 (D.D.C. 2002).

*Rasul* exposed the Administration's desire to place the detainees of Guantánamo Bay in a legal black hole, outside of the protection of the Geneva Conventions, where the writ of *habeas corpus* did not apply.

*Hamdi v Rumsfeld,* heard in the US Supreme Court, considered the habeas petition by a detained enemy combatant, who was a US citizen. The Court decided that an enemy combatant "unquestionably has the right to access to counsel." Specifically, the Court ruled that "the Bush administration's use of military commissions to try terrorist suspects violated the U.S. Code of Military Justice and Geneva Conventions, and were not specifically authorized by any act of Congress." [212]

*7.4.2.5 Spaces of Exception in the War on Terror*

Prior to *Rasul*, detainees were held in Guantánamo Bay based purely on the Executive's order, without any formal procedures in place to establish beyond mere suspicion, whether a detainee was an enemy or member of al Qaeda. Previous to their transfer to Guantánamo Bay, the majority of detainees were held at Bagram Airbase and Kandahar, Afghanistan, before being flown to Guantánamo for further interrogation. Gregory describes how prisoners who remained at Bagram Airbase fared worse than those sent to Guantánamo however. He reports that prisoners were "chained to the ceiling, shackled so tightly that the blood flow stops, kept naked and hooded …, and kicked to keep them awake for days on end". [213] A report by Mark Denbeaux states that approximately 86 percent of alleged combatants who were sent to Guantánamo captured by the Northern Alliance or Pakistani military[214] for bounties of up to US $15,000,[215] and not by US forces during combat. According to Mackey and Miller, reports suggest that all of the Arabs who were detained in the detention camps in Afghanistan and elsewhere, were sent to Guantánamo Bay, based on a presumption that foreign Arabs nationals would not be present in Pakistan or Afghanistan, without culpable cause.[216]

[212] *Hamdi v. Rumsfeld 542 US 507 (2004).*
[213] Derek Gregory, *The Colonial Present*, Malden, MA: Blackwell Publishing, 2004, 67.
[214] Mark Denbeaux *et al*., *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, Seton Hall University School of Law (2006). Available at: https://law.shu.edu/faculty/full-time/mark-denbeaux.cfm. Last accessed 2 March 2020.
[215] For example, the Australian detainee, David Hicks, was sold to American forces by the Northern Alliance for US$15,000.
[216] Chris Mackey & Greg Miller, The Interrogators: *Task Force 500 And America's Secret War Against Al Qaeda*, NY: Bay Back Books, 2005.

In November 2001 thousands of Taliban troops were captured near Kunduz in an operation controlled by the Fifth US Special Forces troops but carried out by Northern Alliance fighters.[217] Four hundred captives were taken to Qala-i-Jhangi on the outskirts of Mazar-i-Sharif. A battle ensued between the Taliban fighters on the one side and British SAS, US Special Forces and Northern Alliance fighters on the other.[218] When the fighting ceased, reporter Luke Harding witnessed "a death scene that Dante or Bosch might have conjured up… There was an avalanche of death from the sky",[219] suggesting that this was not a proportionate military response to the incident. Thousands of other Taliban fighters were transported to a prison compound at Shiberghan, where they were loaded in sealed freight containers that remained exposed to the Afghan sun for several days. "The prisoners, many of whom were dying of thirst and asphyxiation, started banging on the side of the trucks. … Dostum's men stopped the convoy and machine-gunned the containers".[220] Up to 3,000 prisoners died, some for their gunshot wounds, others from lack of water and air. They were buried in unmarked graves, an operation that was supervised by US troops.[221] The deaths of these men clearly violate the principle of proportionate military response in conflict situations, as well as the Geneva Conventions 1949. Article 13 of the Third Geneva Convention, *Relative to the Treatment of Prisoners of War* [222] states:

> Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity. Measures of reprisal against prisoners of war are prohibited.

Despite the clear committal of war crimes, the English military historian, Sir John Keegan defended the deaths of the Afghanis:

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[217] Derek Gregory, *The Colonial Present,* Malden, MA: Blackwell Publishing, 2004.
[218] Ibid.
[219] Luke Harding, "Allied Direct the Death Rites of Trapped Taliban Fighters" Guardian, November 27, 2001; Harding, "Dead Lie Crushed or Shot, in the Dust, in Ditches, Amid the Willows", Guardian, November 29, 2001; Nicholas Watt, Richard Norton-Taylor, and Luke Harding, "Allies Justify Mass Killings", *Guardian,* November 29, 2001 cited in Derek Gregory, *The Colonial Present,* Malden, MA: Blackwell Publishing, 2004, 64.
[220] Derek Gregory, *The Colonial Present,* Malden, MA: Blackwell Publishing, 2004, 64.
[221] Ibid.
[222] *Geneva Conventions 1949*, Art. 13.

> Mr Rumsfeld, in his recent statements, has made it clear that swift, local brutality may cause a problem to disappear. Better not to speculate about the detail. We are dealing with the modern equivalent of pirates and bandits, whose fate was sealed historically by peremptory measures. That may be the best way out.[223]

This is a space of Agamben's *homo sacer,* where the law suspended itself, a space of exception where *homines sacri* became the objects of sovereign power.

The previous discussion on the legal framework of the War on Terror situates it in the realm of Empire's law, as a continuance of the distinction created between the 'civilised' and 'uncivilised'. So too did the War on Terror allow a form of law to be enforced that erased the rights of those subjected to it through the abandonment of the rule of law.

### 7.5 Chapter Conclusions

This chapter considers the human rights abuses that the US engaged in were part of Empire crimes,[224] insidious practices that extended from colonialism to the War on Terror. In this model of empire, the chapter asserts, the War on Terror represented the quintessential expression of imperialism, as the US shaped and reinterpreted the rules for themselves in order to impose its regime of neo-liberal capitalism. The issue of legitimising such interventions on humanitarian grounds concealed the true, neo-colonialist intentions of the interventions. Sovereignty, in this guise, is interpreted and executed in a manner that allows the sovereign to decide what counts as justice and the right to determine who should be stripped of their sovereign and human rights, languishing in the state of exception. The War on Terror involved the return to a form of imperialism which promulgated that view only the use of force and the conversion of rogue inalienable states into 'democratic' societies would ensure the security of the Western world. The transformation obscured the fact that this position is representative of the continuance of the imperialistic political economic exploitation of the non-European world, signalling a return of Empire's Law.

The narrative of the US response to the events of September 11 2001 reveals several concerns. Firstly, the administration showed complete disregard for international law and for the conventions and protocols governing human rights. The AUMF authorised the

[223] John Keegan, "Death may be the only way out for 'Arabs'', *Daily Telegraph*, November 23, 2001 cited in Gregory, *The Colonial Present,* Malden, MA: Blackwell Publishing, 2004, 64-65.
[224] Scott Poynting, 'Empire Crime, Rendition and Guantánamo Bay: The Case of David Hicks' (2015) 4(1) *State Crime Journal*, 16, 17.

president to use all "necessary and appropriate" military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons. . . .".[225] The legal justifications for the introduction of new interrogation techniques were initiated by the US Department of Justice lawyers.[226] They determined that the protections enacted in Common Article 3 of the *Geneva Conventions* were null and void in the space of Guantánamo Bay. William Haynes admitted as much in a press conference held on 22 June 2004, "Military necessity can sometimes allow warfare to be conducted in ways which might otherwise infringe on the applicable articles of the *Convention*".[227] Commenting on the Iraqi War, Zbigniew Brzezinski, the national security advisor to President Jimmy Carter, countered this by stating "The Iraq War was unnecessary, self-damaging, demoralizing, delegitimizing, and governed primarily by simplistic military assumptions that didn't take into account the regional mosaic in which Iraq operates and the internal mosaic inside Iraq."[228]

The treatment of detainees at these facilities and in CIA Blacksites represents a complete disregard for due process and the rule of law, and demonstrates the sustained unleashing of the terror of the US state. The eminent Australian philosopher, Raimond Gaita noted in 2004 "not too long ago, no one would have dreamt of publicly defending torture. It is now up for discussion".[229] What was once considered to be morally repugnant and obscene would now be represented as necessary for 'our' protection. For Gaita, this has constructed a space in which people will "abandon their belief that torture is an evil that no circumstances could justify".[230] Instead, he notes that society "may choose to replace one of its deepest moral commitments with a belief that when it is rational, morality is an adaptable set of rules or principles that serve a purpose".[231] When this happens, there is a danger that democratic discourse will accept state terror and the abuse of power as

[225] Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 2001 (codified at 50 U.S.C. § 1541).
[226] Philippe Sands, 2008, 'Torture Team: The Responsibility of Lawyers for Abusive Interrogation' (2008) 9(2) *Melbourne Journal of International Law*, 29.
[227] Ibid.
[228] Dominic Tierney, 'The Twenty Years' War', *The Atlantic*, August 23, 2016. Available at: https://www.theatlantic.com/international/archive/2016/08/twenty-years-war/496736/. Last accessed 6 July 2021.
[229] Raimond Gaita, 'Done in Our Name', *The Age* (Melbourne, Australia), 18 December 2004; cited in Jessica Howard, Book Review: *The Torture Papers: The Road to Abu Ghraib* by Karen Greenberg and Joshua Dratel (eds), 2005, 202.
[230] Ibid.
[231] Raimond Gaita, 'Done in Our Name', *The Age* (Melbourne, Australia), 18 December 2004; cited in Jessica Howard, Book Review: *The Torture Papers: The Road to Abu Ghraib* by Karen Greenberg and Joshua Dratel (eds), 2005, 202.

necessities in the quest for freedom and protection. Despite the protections available in international law, the Bush administration systematically violated and transgressed these rules in pursuit of their programme of detention of al-Qaeda suspects in the spaces of Guantánamo Bay, Bagram Airbase, Afghanistan and in CIA Blacksites. The techniques of governance and power employed by Western powers exposed the fragility and vulnerability of the international legal system, demonstrated through the legal framework of the war on terror, which were justified as a necessary response to the serious terrorist threat to the Western world. The discussion of the legal framework of the War on Terror is important to the overall research question, i.e. that colonialism and the two-tiers of sovereignty (full- and quasi-) are intertwined in a lineage of capitalist endeavour. Included in that lineage is the violated sovereignty of the Middle East, without which, this thesis asserts, the War on Terror and the rise of Islamic State would not have occurred.

# Chapter Eight – Islamic (Exceptional) State: A New form of Sovereignty?

## 8.0 Introduction

The discussion in this thesis has thus far asserted that sovereignty functions at different levels in international law, i.e. full-sovereignty and quasi-sovereignty. Fragmented sovereignty has also been considered, operating in a space of informal power structures, which create the conditions for the functioning of multiple sovereignties and the formation of states within states, where a wide range of competing and overlapping communities are contested between conflicting groups and allegiances.[1] It has also been argued that the Middle East acquired a different form of sovereignty than that which applies in the Western world, emerging as it did from the colonial experience and the 'civilised'/'uncivilised' distinction that was created between Western and non-Western peoples. The formation of the state system, which was imposed by the victors of World War One, paid no attention to existing sub- and supra-state identities, instead carving through established communities, resulting in a total disparity and incongruence between the state and the nation[2] that, this thesis argues, has resulted in a deficit of legitimacy and full sovereign rights in the Middle East. The type of sovereignty that was granted to Middle Eastern countries, i.e. quasi-sovereignty, facilitated and legitimised the continued influence by Western states in the affairs of Middle Eastern states, making them vulnerable to interference by foreign actors, the discussion of which formed the basis of Chapter Six. These states therefore lacked legitimate governance, leading to "a crisis of state of failed political and economic governance decades in the making".[3] This crisis, as Gerges argues, is linked to the spectacular rise of Islamic State in 2014 who sought to impose their own form of sovereignty in the Caliphate, a system that rejected the Western structure of international law and the secular state system, enforcing instead an interpretation of sovereignty solely invested in and granted by Allah.[4]

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[1] B. Kraxberger, 'Strangers, indigenes, and settlers: contested geographies of citizenship in Nigeria' (2005) 9(1), *Space and Polity*, 9; R.A. Litzinger, 'Contested Sovereignties and the Critical Ecosystem Partnership Fund' (2006) 29(1) *PoLAR: Political and Legal Anthropology Review*, 66.

[2] Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.

[3] Fawaz Gerges, *IS: A History*, NJ: Princeton University Press, 2014, 223.

[4] See M. Muslehuddin, *Philosophy of Islamic Law and the Orientalists: a Comparative Study of Islamic Legal System*, Lohore: Islamic Publications Ltd., 1977; Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.

Islamic State's challenge to the international system of sovereignty and statehood is epitomised in its competing vision and interpretation of sovereignty and the international society. Their stance on these issues rejected the universalised Western system of statehood and the international legal framework that enabled the interference of Western states in the Islamic world. In its stead, Islamic State demanded the renaissance of the Caliphate as the only authentic form of government[5] as an antithesis of this universalised system. The Caliphate represented the onset of a new era of "might and dignity" for Muslims.[6] While the leaders of Islamic State established the Caliphate as a a form of government legitimised by Allah, it was also established in order to achieve post-colonial emancipation and to rid the Muslim world of all vestiges of the Western rule of law, the Western manifestation of sovereignty and of Western economic domination. Section 8.1 engages in an analysis of Islamic State's understanding of sovereignty and statehood through an examination of the works of Sayyid Qutb. Having rejected the Western system of governance however, Islamic State also applied a two-tier system of sovereignty, which Section 8.2 considers. The Caliphate as a state of exception presented as a mirror image of the colonies, where the 'civilised'/'uncivilised' distinction was applied to the inhabitants of the Caliphate. This space therefore became its own state of exception where infidels and heretics were banished to the margins, subjected to the cruelty, barbarity and Othering of the colonial era.

### 8.1 Islamic State and Sovereignty

As Chapter Two discussed, the foundational principles of the international legal system are sovereign authority and sovereign equality - all States possess supreme legal authority within their own territory and all States and their citizens have equal status within the international legal system, equal before the law.[7] In 2014, Islamic State issued this declaration on statehood:

> Here the flag of the Islamic State, the flag of tawhīd (monotheism), rises and flutters. [...] The frontlines are defended. [...] The people in the lands of the State move about for their livelihood and journeys, feeling safe regarding their lives and wealth. Wulāt (plural of wālī or "governors") and judges have been appointed. Jizyah (a tax imposed on kuffār) has been enforced. Fay' (money taken from the kuffār without battle) and zakat (obligatory alms) have been collected. Courts

[5] Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.
[6] "Khilafah Declared," *Dabiq*, Issue No.1 (Ramadan 1435/Summer 2014), 6-9.
[7] Charter of the United Nations, 1945, Art. 2(1). See also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, 9th ed, Oxford: Oxford University Press, 2008.

> have been established to resolve disputes and complaints. Evil has been removed [...].[8]

This quote speaks to the emergence of the challenge posed by Islamic State to the international system of statehood through its rejection of the universalised Western system of statehood and the Western-centric international legal framework. Murat Yesiltas and Tuncay Kardas argue that the nature of state sovereignty has also been altered with the rise of Islamic State, claiming that the emergence of the group "helped to transform a homogenous and absolute understanding of sovereignty into multiple sovereignties"[9] through the rejection of the secular state and the traditional form of the nation-state based upon Western understandings of the principle of sovereignty and the definition of statehood as stated in the Montevideo Convention.[10]

The emergence of Islamic State and the declaration of a Caliphate in June 2014 (discussed in section 4.5.1) was unparalleled in the Arab state system that was constructed after the Treaty of Versailles Peace Conference. [11] The previous Caliphate of the Ottoman Empire, was defeated by the Allied powers during World War One,[12] followed by its breakup, which as Chapter Four discussed, was divided up into British and French protectorates

[8] M. Kaldor, *New and Old Wars: Organized Violence in a Global Era*, 3rd ed., CA: Stanford University Press, 2012.

[9] Murat Yesiltas and Tuncay Kardas, 'The New Middle East, ISIL and the 6th Revolt Against the West' in Yesiltas and Kardas (eds.), *Armed Non-State Actors in the Middle East: Geopolitics, Ideology and Strategy*, Palgrave Macmillan, London: Palgrave Macmillan, 2018, 147-68; Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.

[10] See *Montevideo Convention on the Rights and Duties of States***,** agreement signed at Montevideo, Uruguay, on December 26, 1933 (and entering into force the following year), that established the standard definition of a state under international law. The Convention has 16 Articles: "The state as a person of international law should possess the following qualifications: a ) a permanent population; b ) a defined territory; c ) government; and d) capacity to enter into relations with the other states (Art. 1); The federal state shall constitute a sole person in the eyes of international law (Art. 2); The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law (Art. 3); States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law (Art. 4). Available at: https://www.colombohurdlaw.com/montevideo-convention-on-the-rights-and-duties-of-states/. Last accessed 18 August 2021. See also https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166aef. Last accessed 18 August 2021.

[11] John Norton Moore, 'Development of the International Law of Conflict Management', in John Norton Moore, Frederick S. Tipson and Robert F. Turner, (eds.), *National Security Law*, US: Carolina Academic Press, 1989.

[12] Douglas A. Howard, *A History of the Ottoman Empire*, Cambridge: Cambridge University Press, 2016.

according to the terms of the Sykes-Picot Agreement of 1916.[13] Islamic State was both a national and transnational entity. Through the establishment of the Caliphate, it sought to create a new State in the Middle East,[14] under the leadership of Abu Bakr al-Baghdadi, the self-proclaimed Caliph. The aim of Islamic State was to eradicate the imposed post-colonial state system, invalidating the legitimacy of the Western system of states and notions of sovereignty, whilst also imposing its own understanding of sovereignty. This can be viewed as a symptom of the imposition of quasi-sovereignty in the Middle East since the fall of the Ottoman Empire, including the violation of Iraq's and Syria's sovereignty in the twenty-first century. Secondly, the global movement of *Jihadi-Salafism* (discussed in section 8.1.1) rejected the secular state in the Middle East as a product of a Western-centric system of international law,[15] recalling the philosophy of the Afghan Arabs of the 1980s and their influence on the rise of Islamic State (discussed in Chapter Six).

Among Muslim scholars, there are different understandings of sovereignty. The first interpretation is that it derives its authority from the law, which would align with Western notions of sovereignty, while the second interpretation places the emphasises on a divine-democracy state.[16] Muhammed Muslehuddin adheres to the latter understanding, suggesting that sovereignty belongs to God, stating "a nation ruled by divine laws which precede it and to whose dictates it has ideally to confirm".[17] This was very much Islamic State's interpretation, which inspired its vision of a restored Caliphate built and ruled by the law of Allah, where God's law was actualised.

### *8.1.1 Sayyid Qutb and Sovereignty*

One of the most influential theorists of global *jihad* was the Egyptian Sayyid Qutb, considered to be the father of *Salafi Jihadism*.[18] Two of his most works are *Milestones*[19]

[13] Caroline Finkel, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923*, New York: Basic Books, 2007.
[14] The border of this region last changed in 1948, with the formation of the State of Israel.
[15] Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.
[16] Ridwan and Muhammad Fuad Zain, 'God and Human Sovereignty in Islamic Political Tradition' (2020) 5(1) *Journal of Muslim Society Research*, 10.
[17] M. Muslehuddin, *Philosophy of Islamic Law and the Orientalists: A Comparative Study of Islamic Legal System*, Lohore: Islamic Publications Ltd., 1977, 57.
[18] Robert Manne, 'Sayyid Qutb: Father of Salafi Jihadism, Forerunner of the Islamic State', *ABC Religion & Ethics*. Available at: https://www.abc.net.au/religion/sayyid-qutb-father-of-salafi-jihadism-forerunner-of-the-islamic-/10096380. Last accessed 12 August 2021.
[19] Sayed Qutb, *Milestones*, NY: Islamic Book Service, 2006.

and *In the Shade of the Qur'an*[20] where he proclaimed that Muslim society had become *jahiliyya* (no longer Islamic) and that Islam must be restored by an Islamic vanguard, in order to revitalise the ideal of Islamic universalism.[21] According to Qutb's teachings, sovereignty is solely vested in Allah who is the superior legislator and source of all political authority.[22] Qutb further stated that while "human beings are required to enact God's will, they themselves are not the source of authority or legitimacy, nor are they to be venerated".[23] Islamic State adopted Qutb's teachings and understandings of sovereignty, renouncing secular sovereignty and nationalism in all forms (people, territory, flag, army and other symbols), deeming them be to analogous to the worship of false idols in Islam.[24] The organisation adhered to and supported Qutb's interpretation of sovereignty, with Allah as the supreme legislator. Islamic State's conception of sovereignty, grounded in the teachings of Qutb therefore utterly rejected Westphalian understandings of sovereignty and the legitimacy of the sovereign, secular nation-state.[25] Their belief of sovereignty resided in *Wahhabism* and *Jihādi-Salafism*, religious terms that informed every aspect of life in the Caliphate.

Islamic State leaders and its followers embraced the ideas grounded in these Wahhabist teachings that rejected innovations in religion. They also forbade the acceptance of dangerous non-Islamic cultural influences.[26] In its propagandist messages, the group stressed the importance of principle of *tauheed*[27] and *jihad*, or holy war, which was portrayed as a heroic act.[28] According to Islamic State, the principle of *tauheed* is fundamental to the Islamic faith and must be applied in every domain – spiritual, temporal, personal, public, political, social and cultural. The concept of *tauheed* is

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[20] Sayed Qutb, *In The Shade of the Qur'an*, Vols. 1 to 18, Leicestershire: Islamic Publishing, 2009.
[21] Andrea Mura, (2014) 'The Inclusive Dynamics of Islamic Univeralism: From the Vantage Point of Sayyid Qutb's Critical Philosophy' (2014) 5(1), *Comparative Philosophy*, 29.
[22] Andrea Mura, (2014) 'The Inclusive Dynamics of Islamic Univeralism: From the Vantage Point of Sayyid Qutb's Critical Philosophy' (2014) 5(1), *Comparative Philosophy*, 29; Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the Islamic State, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.
[23] Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.
[24] Ibid.
[25] Michael Weiss and Hassan Hassan, *IS: Inside the Army of Terror*, London and NY: Regan Arts, 2015.
[26] W. McCants, *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State*, New York: Macmillan, 2015.
[27] Tauheed is the indivisible oneness concept of monotheism in Islam. It is the religion's central and single most important concept, upon which a Muslim's entire religious adherence rests. It unequivocally holds that God as per Islam is One and Single. See W. McCants, *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State*, New York: Macmillan, 2015.
[28] Gilles Kepel, *Jihad: The Trial thatf Political Islam*, MA: Harvard University Press, 2002.

espoused in the first line of the call to prayer: "There is no God but Allah, and Mohammed is His prophet".[29] According to *tauheed*, diversity and polytheism were apostasy and were a deliberate rejection of the teachings of God.[30] As Chapter Six discussed, Islamic State employed an understanding of *jihad* through which a war would be waged against heretics and infidels in accordance with the pure Islamic principles of *Salafism* and the fundamentalist religious doctrine of *Wahhabiysm.*

*8.1.2 The Caliphate as a Sovereign Space*

If "the colony became the site where European powers tested and developed their techniques of government",[31] the Caliphate mirrored this as a space of exception and lawlessness[32] where multiple atrocities were committed, with authority granted from God. As was discussed in Chapter Three, the development of international law is the reflection of a particular Western culture that internationalised and universalised the values of its system, based in the Judeo-Christian ethos.[33] By the end of the 19th century, the expansion of European Empires tethered the entire world to the European system of international law.[34] Abdullah Azzam,[35] a Palestinian who had fought in the 1967 war against Israel, published a book *Al-Defaa aan Ardhee al-Muslimeen aham furood al-ayaan, Defending Muslim Lands is Among the Most Important Collective Obligations* in 1985 in which he offered an augmented defence of *jihadism*, urging his fellow Muslims to engage in *jihad* in order to expel unbelievers from Muslim lands.[36] Azzam argued that the petty borders of nations states must be ignored and every Muslim should be ready for the struggle. [37] This philosophy was adopted by al-Baghdadi and Islamic State, who rejected the contrived borders between Iraq, Transjordan, Syria and Lebanon, which he viewed as a symbol of the violated sovereignty of the Middle East and a demonstration of the

[29] Jason Burke, *The New Threat from Islamic Militancy*, London: Penguin Random House, 2015, 44.
[30] Ibid.
[31] Thomas Blom Hansen and Finn Stepputat, 'Sovererignty Revisited' (2006) 35 *Annual Review of Anthropology*, 295, 302.
[32] J. Thomson, 'Sovereignty in Historical Perspective: The Evolution of State Control over Extraterritorial Violence', in JA Caporaso, (ed), *The Elusive State: International and Comparative Perspectives*, London: Sage, 1989, 227–55.
[33] Henry Kissinger, *World Order, : Reflections on the Character of Nations and the Course of History*, York: Penguin Books, 2014.
[34] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005.
[35] Azzam is credited with discovering Osama Bin Laden, while teaching an elective in Jeddah. Azzam created the concept of Al-Qaeda al-Sulba (Firm Base), which established supports and services in Afghanistan in order to wage global *jihad*. He was also a supporter of the recruitment and fundraising techniques employed by Hezbollah and encouraged Sunni Islamist militant groups to adopt these.
[36] Youssef Aboul–Enein, 'The Late Sheikh Abdullah Azzam's Books: Part III: Radical Theories on Defending Muslim Land through *Jihad*,' (2008) *Combatting Terrorism Center at West Point*, 1.
[37] Ibid.

illegitimate authority of Western powers who established these borders during and post-World War I. For Islamic State, the dismantling of the Ottoman Empire in the early 20th century at the hands of Western states, was the decisive reason for the subordination and marginalisation of Islamic countries and for the continued weakness and fragmentation of Islamic countries in the 21st century.[38] Islamic State challenged the established nature of international law, the declarative theory of statehood as an accepted part of customary international law and the achievement of legal personality of a nation-state by presenting a competing vision of the international landscape, instead resurrecting the Caliphate as the only legitimate mode of governance.

Islamic State offered a new conception of sovereignty, claiming the authority and equality granted by their version of sovereignty for the Caliphate, whilst simultaneously rejecting the Treaty of Westphalia's principle and understanding of sovereignty.[39] The Islamic State Caliphate therefore challenged traditional Westphalian conceptions of sovereignty, invoking instead a pre-Westphalian vision of dominion and authority that was based on religious authority granted by Allah, rather than on state identity.[40] Hope describes how Islamic State presented a binary view of the world order, positing it as a war between the Islamic world and the secular state, particularly the US.[41] Islamic State and the Caliphate provided an opportunity for Sunni Muslims to live by the principles espoused by the group (*tauheed, jihad, Salafism and Wahhabiysm*) and according to Hope to be "bound by religious values that exist beyond the territorial boundaries of states".[42] Although Islamic State made remarkable gains to establish the Caliphate, it also violated the sovereignty of other states in the process. In seeking to re-establish a Caliphate and an alternative to the modern nation-state, Islamic State disregarded the territorial integrity and right to sovereignty of Iraq and Syria.

### *8.1.3 Islamic State as an Alternative to the Modern State*

Under Islam doctrine, authority belongs only to the deity or God who is the supreme sovereign, the only source of authority, that creates *shari'a* law. According to this

[38] Anne Allmeling, 'IS Threatening to Redraw Mideast Borders: The Relentless March of the 'IS'', (2014) *Deutsche Welle*, 1, 1 Available at: http://www.dw.com/en/IS-threatening-to-redraw-mideast-borders/a-17811889. Last accessed 24 February 2021.
[39] Hope Lozano Bielat, 'Islamic State and the Hypocrisy of Sovereignty' (2015) *E-International Relations*, 1. Available at: https://www.e-ir.info/2015/03/20/islamic-state-and-the-hypocrisy-of-sovereignty/. Last accessed 30 May 2021.
[40] Ibid. See also Simon Mabon and Stephen Royle, *The Origins of ISIS*, London and New York: I.B. Tauris, 2017.
[41] Ibid. Bielat.
[42] Ibid. Bielat.

doctrine, only Allah can confer sovereignty. Islamic State, as a military group, a political group, using terrorism to achieve political goals and as a doctrinal group, inspired by radical interpretation of the Qura'n based on the teachings of Sayyid Qutb (discussed in section 8.1.1), established the Caliphate, where religious and political power could be exercised. Accordingly, Islamic State sought to provide an alternative to the modern state and system of international law. Convinced that one of the main attributes of a sovereign state is its population, al-Baghdadi called on all believers to join the newly established state: "Rush of Muslim to *your State*. Yes it is your State! Rush, because Syria is not for Syrians and Iraq is not for Iraqis (…) The State is a state for all Muslims".[43] Islamic State beneficiated enormously from the state failures, weak economic, political and societal structures and fragmented sovereignty in Syria and Iraq, creating instead a political authority that sought to legitimise the Caliphate through the imposition of its own interpretation of sovereignty, based on the legal foundation of *Shari'a* law[44] and not on the rules of public international law that were established by Western nations. Although the Caliphate was not recognised internationally by other actors, it could be argued that it met the criteria of statehood according to the Montevideo Convention and the declarative theory of statehood (statehood is independent of its recognition by other states); (i) the acquisition of territory; (ii) a permanent population; (iii) government and (iv) the capacity to enter into relations with other states. One of Islamic State's goals was the erasure of all colonial borders whilst simultaneously establishing a state that provided an alternative to the modern state. It asserted historical continuity with previous Caliphates, claiming territorial sovereignty over a huge territory based on the ancient of Caliphates[45] and proclaiming an end of the territorial delineation and colonial borders of the Middle East.

### *8.1.4 The Mirror Image*

As this chapter has discussed, Islamic State established the Caliphate as an alternative to Western notions of statehood, and as a rejection of Western interference in the Islamic world.[46] The group also sought to establish a state where Sunni Muslims could live a pure and strict Islamic life. Islamic State opposed the Western system of international law that emerged from the colonies, where a distinction was created between different

[43] *Dabiq*, Issue 1, 1435, 6.
[44] Peter Danckwardt, *Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority*, Faculty of Law, Stockholm University, 2016.
[45] Ibid.
[46] Peter Mandaville, *Islam and Politics*, 2nd ed, Oxford: Routledge, 2014.

groups of people.[47] Interestingly though, in instigating its own interpretation of sovereignty and statehood, the Islamic State Caliphate became a mirror image of the colonies, where the 'civilised'/'uncivilised' distinction, that had been applied so prolifically in the colonies, was now also applied to the inhabitants of the Caliphate. As this chapter has discussed, Islamic State established the Caliphate as an alternative to Western notions of statehood, and as a rejection of Western interference in the Islamic world.[48] The group also sought to establish a state where Sunni Muslims could live a pure and strict Islamic life. Islamic State opposed the Western system of international law that emerged from the colonies, where a distinction was created between different groups of people.[49] Interestingly though, in instigating its own interpretation of sovereignty and statehood, the Islamic State Caliphate became a mirror image of the colonies, where the 'civilised'/'uncivilised' distinction, that had been applied so prolifically in the colonies, was now also applied to the inhabitants of the Caliphate. The thesis argues that the colonies and the Caliphate are mirror images of the other through the inclusion/exclusion paradigm employed in both spaces and through the production of *homo sacer*, bare life subjected to discriminatory punishment and acts of violence that grossly violated the human rights of those subjected to these regimes. The belief in the superiority of one's own ideology also links the two spaces. This is as true in the period of formal colonialism as it is in the Caliphate where their respective ideologies, which dictated the cultures of these spaces, were considered to be vastly superior, elevated above the 'Other' and non-adherence to them was severely punished.

Where the two spaces primarily differ is in the areas of culture, economics and the application/suspension of the judicial order. European culture was derived from Western notions of the nation-state,[50] which were formed after the Peace of Westphalia. Islamic State sought to re-establish a culture that pre-dated Westphalia, rejecting the cultural, legal, political and religious aspects of the Western nation-state,[51] reverting instead to a

[47] J. Thomson, 'Sovereignty in Historical Perspective: The Evolution of State Control over Extraterritorial Violence', in J.A. Caporaso, (ed), *The Elusive State: International and Comparative Perspectives*, London: Sage, 1989, 227–55.
[48] Peter Mandaville, *Islam and Politics*, 2nd ed, Oxford: Routledge, 2014.
[49] J. Thomson, 'Sovereignty in Historical Perspective: The Evolution of State Control over Extraterritorial Violence', in J.A. Caporaso, (ed), *The Elusive State: International and Comparative Perspectives*, London: Sage, 1989, 227–55.
[50] Michael Milshtein, 'A Middle Eastern "Apocalypse Now": The Islamic State (IS) as a Social and Cultural Phenomenon' (2019) 13(3) *Tel-Aviv Notes*, 1. Available at: https://dayan.org/content/middle-eastern-apocalypse-now-islamic-state-social-and-cultural-phenomenon. Last accessed 10 January 2022.
[51] Ibid.

cultural, legal, political and religious system based on a strict *Wahhabist* interpretation of the *Qura'n* that radically deviated from acceptable (Western-derived) norms.

At the heart of European colonisation was the economic development of the colonies, which dominated all aspects of governance, economic, social and cultural policies. Colonial territories that did not share any common traits were nonetheless homogenised through the prism of economics. These systems were then transferred to the management of mandate territories, where economics also became all pervasive.[52] While economic survival was relevant to the Caliphate as it sought to function as a legitimate state, it was through the *Salafi-Wahhabist* ideology that every aspect life was conceptualised and managed and hence, religious ideology, as opposed to the discipline of economics, was the all-pervasive motivating factor.

The Caliphate became its own state of exception, discussed in the following section, where infidels and heretics were banished to the margins, subjected to the cruelty, barbarity and the insidious Othering of the colonial era. However, a return to the question that was raised in Chapter Five is timely. Is it true to consider the Islamic State Caliphate was a representation of the *iustitium*, as an abeyance of the *ius*, the judicial order? Is it comparable with prior instances of the state of exception and h*omo sacer*? While Islamic State rejected the Western-derived international judicial order, the Caliphate was not devoid of a recognised system of law. A version of *Shari'a* law, derived from a subjective reading of the *Qur'an* was implemented, through which Islamic State justified its barbarity towards infidels and the Yazidi (discussed in sections 8.2.2-8.2.4). Hence, the Islamic State Caliphate committed its atrocities *because* of the law rather than because of an abrogation of the law. The way in which a reading of law by Islamic State was manifested in discussed in the following section.

### 8.2 Islamic State as a State of Exception

Islamic State leaders and its followers embraced the ideals of *Wahhabi* teachings, which included the rejection of the influence of non-Sunni culture and innovations in religious teachings. The group also claimed that only a small number of declared Muslims were

[52] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

capable of effecting true Islamic law.[53] Islamic State's interpretation of *iihad,* discussed in Chapter Six, was portrayed as a heroic value.[54] Islamic State was an advocate of a nationalist ideology based upon an absolutist Islamist identity and the fostering of unity among the Muslim community in the Caliphate.[55] However, insufficiently observant Sunnis posed a threat to the Caliphate and its nationalist ideology and therefore must be eliminated.[56] "Syria is not for the Syrians, and Iraq is not for the Iraqis," Baghdadi stated when he announced the formation of the Caliphate in June 2014.[57] The other stated aims of the Caliphate were: "(i) to recruit individuals who might travel to Iraq and Syria to fight for Islamic State, as well as those who remain in their home countries and support the movement by raising funds or carrying out acts of terrorism; (ii) to generate fear among its opponents; (iii) to assert its legitimacy and gain acceptance of its status as a state";[58] (iv) to eradicate those groups considered to be infidels, e.g. Christians and Shi'a Muslims,[59] (v) "to bring Muslim-inhabited states, including Iraq, Syria, Lebanon, Palestine and Southern Turkey under its political control",[60] and (vi) to eradicate the threat posed by foreign governments,[61] the consequences of which have resulted in multiple global attacks carried out by Islamic State and its sympathisers.

As has been contended, Islamic State's challenge to the international legal order displayed a commitment to establishing an alternative to that system, which subjugated the Islam world and violated its sovereignty for decades through violence and death. As the discussion of Islamic State has previously revealed, the group's stated aim was to

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[53] Will McCants, 'How the IS's Favorite Strategy Book Explains Recent Terrorist Attacks,' *War on the Rocks blog*, November 24, 2015. Available at: http://warontherocks.com/2015/11/ how-the-islamic-states-favorite-strategy-book-explains-recent-terrorist-attacks/. Last accessed 26 February 2021.

[54] Emman El-Badawy, Milo Comerford, and Peter Welby, *Inside the Jihadi Mind*, London: Centre on Religion and Geopolitics, Tony Blair Faith Foundation, October 2015, 4.

[55] "The Return of the Khilafah," *Dabiq* I, 2014. Available at http:// www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq.

[56] F. Gregory Gause III, "Beyond Sectarianism: The New Middle East Cold War", Washington, D.C.: Brookings Institution, July 22, 2014. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/English-PDF-1.pdf. Last accessed 19 August 2021.

[57] "The Return of the Khilafah," *Dabiq* I, 2014, 11. Available at http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq.

[58] Lauren Williams, *IS Propaganda and the Mainstream Media*, Sydney: Lowy Institute for International Policy, 2016, 2.

[59] For a detailed discussion of the fate of Christians under Islamic State, see Mindy Belz, *They Say We Are Infidels: On the Run from ISIS with Persecuted Christians in the Middle East,* Illinois: Tyndale Momentum, 2017.

[60] Anne Allmeling, 'IS Threatening to Redraw Mideast Borders: The Relentless March of the 'IS'', (2014) *Deutsche Welle*, 1, 1 Available at: http://www.dw.com/en/IS-threatening-to-redraw-mideast-borders/a-17811889 . Last accessed 24 February 2021.

[61] F. Gregory Gause III, "Beyond Sectarianism: The New Middle East Cold War", Washington, D.C.: Brookings Institution, July 22, 2014. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/English-PDF-1.pdf. Last accessed 19 August 2021.

establish an Islamic Caliphate across the Levant, destroying all colonial borders as well as destabilising the Middle East through brutality and violence.[62] It embarked on a campaign of violence and aggression in order to establish the Caliphate against the infidels, who were identified by Islamic State as Shi'a Muslims, foreign governments and unobservant Sunnis.[63] The Caliphate existed outside of the norms of international law, as a critical alternative to globalisation. This alternative state became a space of exception, introduced in Chapter Two, where human rights treaties, conventions and instruments were violated.[64] Coercive force and brutality were used to control territory and populations and to exercise its own version of sovereignty, based upon a divine-democracy state.[65] The group also claimed to have thousands of supporters in the West, foreign fighters,[66] who travelled to the Caliphate and who greatly bolstered the number of fighters (see section 8.2.1).[67] When male fighters travelled to join Islamic State, many

[62] A.B. Naji, 'The Management of Slavery: The Most Critical Stage Through Which the *Umma* Will Pass', *John M. Olin Institute for Strategic Studies Harvard University*, 2006.
[63] Ridwan and Muhammad Fuad Zain, 'God and Human Sovereignty in Islamic Political Tradition' (2020) 5(1) *Journal of Muslim Society Research*, 10.
[64] For example, Islamic State violated all nine core human rights treaties; International Covenant on Civil and Political Rights 1966 (ICCPR); International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); Convention on the Elimination of All Forms of Racial Discrimination 1969 (CERD); Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment 1984 (UNCAT/ CAT); Convention on the Rights of the Child 1989 (CRC); Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families1990 (CMW); Convention on the Rights of Persons with Disabilities 2006 (CRPD) and Convention for the Protection of All Persons from Enforced Disappearance 2006 (CED).
[65] Ridwan and Muhammad Fuad Zain, 'God and Human Sovereignty in Islamic Political Tradition' (2020) 5(1) *Journal of Muslim Society Research*, 10.
[66] 'Foreign fighters' have been defined as "individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict". See Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, The Hague: T.M.C. Asser Press, 2016. The UN refers to foreign fighters as "foreign terrorist fighters", which has been defined in UN Security Council Resolution 2178 (2014) as "…individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict". See Amina Adanan and Jean Molloy, *The Use of Extraterritorial Jurisdiction to Prosecute Returning Foreign Fighters*, 16 October 2019. Available at: https://criminaljusticeinireland.wordpress.com/2019/10/16/the-use-of-extraterritorial-jurisdiction-to-prosecute-returning-foreign-fighters/. Last accessed 18 March 2021.
[67] A July 2018 study by the International Centre for the Study of Radicalisation in King's College London concluded that 42210 people (or 32809 men, 4761 women, and 4640 children) from 80 countries were affiliated with IS specifically. According to the study, 19572 came from the Middle East and North Africa, 7252 from Eastern Europe, 5965 from Central Asia, 5904 from Western Europe, 1010 from Eastern Asia, 1063 from South-East Asia, 753 from the Americas, Australia, New Zealand, 447 from Southern Asia, and 244 from Sub-Saharan Africa. Estimated figures show that 900 UK citizens travelled to Syria to join IS, including 145 women and 50 children. Of the 900, 180 are confirmed dead, 420 returned to the UK, and 300 have yet to return. Irish Department of Justice officials estimate that about 25 people have travelled from Ireland to fight with the group and that of these 25, five were killed in action. See Joana Cook and Gina Vale, 'From Daesh to 'Diaspora': Tracing the Women and Minors of Islamic State', *International Centre for the Study of Radicalisation,* July 2018; Amina Adanan and Jean Molloy, *The Use of Extraterritorial Jurisdiction to Prosecute Returning Foreign Fighters*, 16 October 2019. Available at:

expected a utopian of riches, which included numerous wives and slaves. The barbaric use of violence was justified through a subjective reading of the *Qur'an*, and likewise to celebrate each sexual assault as a spiritual virtue.[68] Its brutal brand encouraged young men to join the Caliphate and also helped Islamic State to attract fighters from around the world (see footnote 61, Chapter 8). Most of those who joined Islamic State witnessed floggings, amputations, beheadings and other punishments.[69] As reported by Kevin Sullivan in the *Washington Post*, "By publicly beheading and crucifying people even suspected of disloyalty, the militants have created a culture of horror and fear that has made it virtually impossible for people to rise up against them."[70] Islamic State operated the Caliphate as a state of emergency in which the group decided, in Carl Schmitt's words, who should be included as protected citizens and who should be subjected to the crucifixions, beheadings, beatings and violence under, discussed in detail in section 8.2.2.

### *8.2.1 Foreign Fighters*

The issue of how to deal with foreign fighters who return to their country of residence is a pressing issue that many countries are faced with. It is estimated that there 2,000 foreign Islamic State fighters currently in custody in Iraq and Syria.[71] The home countries of many of the fighters have refused to repatriate them on concerns about the ability to secure

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https://criminaljusticeinireland.wordpress.com/2019/10/16/the-use-of-extraterritorial-jurisdiction-to-prosecute-returning-foreign-fighters/. Last accessed 18 March 2021.

[68] Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared IS (IS)" *(*2016) 16 *International Criminal Law Review*, 1, 4. In 2000, the United Nations Security Council adopted Resolution 1325 on women and peace and security on 31 October 2000. "The resolution reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security. Resolution 1325 urges all actors to increase the participation of women and incorporate gender perspectives in all United Nations peace and security efforts. It also calls on all parties to conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict. The resolution provides a number of important operational mandates, with implications for Member States and the entities of the United Nations system". Available at: https://www.un.org/womenwatch/osagi/wps/. Last accessed 6 August 2021. In 2008, the UN Security Council adopted Resolution 1820: "Reaffirming its commitment to the continuing and full implementation of resolution 1325 (2000), 1612 (2005) and 1674 (2006). Guided by the purposes and principles of the Charter of the United Nations. Reaffirming also the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity and by ensuring the protection of civilians, in particular women and girls, during and after armed conflicts, in accordance with the obligations States have undertaken under international humanitarian law and international human rights law". Available at: https://www.peacewomen.org/SCR-1820. Last accessed 6 August 2021.

[69] Kevin Sullivan, 'Spoils for the Rulers, Terror for the Ruled,' *Washington Post*, October 1, 2015.

[70] Kevin Sullivan, 'A Climate of Fear and Violence,' *Washington Post*, October 1, 2015.

[71] Isabel Coles, 'Iraq Sentences Seven ISIS Fighters from France to Death; Trials have shown the difficulties in dealing with fighters captured after the fall of Islamic State's modern-day Caliphate', *Wall Street Journal*, 30 May 2019; Trudy Govier & David Boutland, 'Dilemmas regarding returning ISIS fighters' (2020) 13(2) Ethics & Global Politics, 93.

convictions. Trying them in Syria is legally problematic because they are being held by a US-backed militia rather than a sovereign state.[72] In Iraq, Islamic State foreign fighters face the death penalty. In May 2019, seven French citizens accused of being Islamic State foreign fighters were sentenced to death by an Iraqi court.[73] These trials, which have drawn sharp criticism from human rights groups who object to the passing of death sentences, highlight the myriad of challenges that are arise when dealing with foreign fighters captured in Iraq and Syria.[74] Of particular challenge for home states is the passing of death sentences on those who hail from countries where the death penalty is illegal and where it is in violation of human rights conventions.[75] Another issue of concern is the fate of the orphaned children of foreign fighters who are languishing in limbo in Syrian detention centres. These issues raise questions about the responsibility that the home states have to foreign fighters and their children. Although these issues are beyond the remit of this thesis, they have been identified as areas of further research.

### *8.2.2 Violations Perpetrated by Islamic State Against Religious and Ethnic Groups*

The following section is taken directly from the *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups*[76] and details the myriad of abuses committed by the group against religious and ethnic minorities and women and children As previously discussed, one of

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[72] Isabel Coles, 'Iraq Sentences Seven ISIS Fighters from France to Death; Trials have shown the difficulties in dealing with fighters captured after the fall of Islamic State's modern-day Caliphate', *Wall Street Journal*, 30 May 2019.

[73] Amina Adanan and Jean Molloy, *The Use of Extraterritorial Jurisdiction to Prosecute Returning Foreign Fighters*, 16 October 2019. Available at: https://criminaljusticeinireland.wordpress.com/2019/10/16/the-use-of-extraterritorial-jurisdiction-to-prosecute-returning-foreign-fighters/. Last accessed 18 March 2021.

[74] Isabel Coles, 'Iraq Sentences Seven ISIS Fighters from France to Death; Trials have shown the difficulties in dealing with fighters captured after the fall of Islamic State's modern-day Caliphate', *Wall Street Journal*, 30 May 2019.

[75] The *European Convention on Human Rights 1953* (ECHR) is an international convention to protect human rights and political freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 1983, Art. 1* "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."; *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, 2002, Art. 1* "The death penalty shall be abolished. No one shall be condemned to such penalty or executed".

[76] *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, (13 March 2015) UN Doc (A/HRC/28/18). The report was been prepared pursuant to Human Rights Council resolution A/HRC/RES/S-22/1. The HR Council requested the High Commissioner for Human Rights to investigate alleged violations and abuses of international human rights law committed by ISIL and associated terrorist groups, and to establish the facts and circumstances of such abuses and violations. The report documents abuses committed between June 2014 to February 2015, as requested in resolution A/HRC/RES/S-22/1.

the aims of Islamic State was to eradicate groups whom they labelled as infidels, i.e. members of other religions and unbelievers. The atrocities that Islamic State engaged in to achieve this aim are chronicled below:

*1. Attacks against religious and ethnic groups*

> 1. The mission gathered reliable information about acts of violence perpetrated against civilians because of their affiliation or perceived affiliation to an ethnic or religious group. It is reasonable to conclude that some of these incidents, considering the overall information, may constitute genocide. Other incidents may amount to crimes against humanity and war crimes. Ethnic and religious groups targeted by ISIL include Yezidis, Christians, Turkmen, Sabea-Mandeans, Kaka'e, Kurds and Shi'a.

*(b) Attacks against Christians*

> 2. Although perceived as the 'People of the Book,[77] a classification that grants them a certain protection in comparison with other ethnic and religious groups, Christians suffered forced displacement and deprivation of property. By 6 August, an estimated 200,000 Christians and members of other ethnic and religious groups had fled from al-Hamdaniya, Ba'shiqa, Bartella, Tel Keif, and other towns and villages in the Ninewa plains before they were taken over by ISIL. Among them were 50,000 persons previously displaced from Mosul, mostly Christians, who had fled in mid-June in fear of ISIL threats when they were given the choice to pay a tax, convert or leave. Houses and property of Christians in Mosul have been seized by ISIL.
>
> 3. On or around 6 August, ISIL stormed the city of al-Hamdaniya (also referred to as Qaraqosh). Many witnesses stated that ISIL fighters pillaged and destroyed buildings in the city including historic Christian cathedrals and churches. Approximately 150 families were unable to flee. Before expelling them, members of ISIL took possession of all their valuables and identity documents. Witnesses also reported that during the attack grenades, mortars and rockets landed in areas still occupied by civilians.

*(c) Attacks against Shi'a*

> 4. Interviews conducted with victims and witnesses, and corroborated by reliable sources, make it reasonable to conclude that attacks were perpetrated against Turkmen, Shabak and other Shi'a groups.
>
> 5. Victims and witnesses from Amerli (Salah ad-Din), Barawjali, Bashir, Jerdghali, Qaranaz in Diyala governorate, as well as Ba'shika, Bazwaya, Gogjali, Omar Kan in Ninewa governorate consistently reported the same pattern. ISIL surrounded the village, killed the inhabitants who could not escape, burned and

[77] Ahl Al Kitab in Islam includes Christians, Jews and Sabea-Mandeans.

destroyed houses and businesses, destroyed Shi'a places of worship, and pillaged private and public properties.

6. On 17 June 2014, for instance, ISIL attacked the predominantly Shi'a Turkmen villages of Barawjali, Jerdghali, Qaranaz, north of Amerli, allegedly burning and destroying houses and property, as well as at least two Shi'a religious places known as Husseiniyas. Several people were killed defending the village, and at least eight were summarily executed by bullet wounds to the head. Also on 17 June, the Shi'a Turkmen village of Bashir, Kirkuk, was attacked by ISIL. More than 60 people were killed, including women, children and elderly.

7. In late June and early July, in Ba'shika, Bazwaya, Gogjali and Omar Kan villages, Ninewa, ISIL members allegedly summarily executed a number of men and abducted numerous Shabak community members. At the end of February 2015, their whereabouts remained unknown. One woman reported that on 20 June, her son and brother-in-law disappeared after being stopped at an ISIL checkpoint. Three days later, they were found dead in a cemetery – her son beheaded and her brother-in-law shot several times.

8. ISIL also laid siege to Amerli, Salah ad-Din governorate, starting 11-12 June 2014. Twenty days into the siege, ISIL members cut off the water and electricity supplies to the town. At least 15,000 people allegedly suffered from lack of power, food, drinking water, medical services and medicine. Residents were forced to drink contaminated water, which caused many to fall ill, especially children and the elderly. A woman and her new-born baby died due to lack of medical services. The city was shelled daily day with mortar rounds. One child, four men and a woman allegedly died from the shelling. The siege was broken on 1 September 2014 by ISF and affiliated armed groups.

9. Based on interviews with survivors, the mission received reliable information that on 10 June, more than 600 inmates of Badoush prison, Ninewa governorate, were summarily executed by members of ISIL. Early in the morning, the prison, which housed over 3,000 inmates, was taken over by ISIL. Prisons guards had allegedly fled before the attack. The prisoners were separated into groups according to their ethnic or religious affiliation. Sunnis were freed, while others, mainly Shi'a, were loaded on trucks, driven to a nearby ravine and shot. Some survivors said they immediately rolled into the ravine and were saved by other bodies landing on top of them. ISIL fighters kept shooting into the ravine at any moving body, including men who were screaming in pain.[78]

[78] *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, (13 March 2015) UN Doc (A/HRC/28/18), 5-7.

*8.2.3 Atrocities in the Caliphate*

The Caliphate is linked to the colonial world, both operating as spaces of exception, it is argued, where brutality was applied routinely and authority was derived from particular religious philosophies, i.e. Christianity and Islam. Continuing the discourse of the colonies, where the Other was projected as savages and barbarians, underserving of being sovereign entities, it was against this very narrative that Islamic State launched its own campaign of violence and cruelty, with the aim of erasing colonial borders and establishing the Caliphate. The Caliphate was presented as a utopia for Sunni Muslims who wanted to live by austere religious principles. However, the reality of life in the Caliphate was diametrically opposed to that message. Islamic State's campaign of religious extremism imposed punishments that included crucifixions, amputations and beheadings.[79] Their barbarism was laid bare through a dossier of publicly available video footage on the internet, which included the beheadings of America journalist James Foley,[80] British humanitarian worker Alan Henning,[81] American aid worker Peter Kassig,[82] and Japanese journalist Kenji Gogo.[83] The burning to death of Moath al-Kasasbeh, a Jordanian pilot captured by Islamic State was revealed in all its horror.[84] On 15 February 2015, Islamic State publicly beheaded twenty-one Egyptian Coptic Christian fishermen in Libya.[85] A video was also released by Islamic State, depicting the beheading of eight Shi'ite Muslim men.[86] The *United Nations Commission on Inquiry on Syria* reported that in the areas of Syria controlled by Islamic State, Fridays were set aside for floggings, amputations, crucifixions and executions.[87] "Executions in public spaces

[79] Kevin Sullivan, 'A Climate of Fear and Violence,' *Washington Post*, October 1, 2015.
[80] Rukmini Callimachi, 'The Horror Before the Beheadings', *The New York Times*, 25 October 2014. Available at: https://www.nytimes.com/2014/10/26/world/middleeast/horror-before-the-beheadings-what-isis-hostages-endured-in-syria.html. Last accessed 29 June 2021.
[81] Ian Cobain, Sandra Laville and Raya Jalabi, 'ISIS video shows murder of British hostage Alan Henning', *The Guardian*, 4 October 2014. Available at: https://www.theguardian.com/uk-news/2014/oct/03/alan-henning-isis-syria-video-murder. Last accessed 29 June 2021.
[82] Margaret Brennan, 'ISIS Beheads American Peter Kassig, Threathens More Deaths', *CBS News*, 17 November 2014. Available at: https://www.cbsnews.com/video/isis-beheads-american-peter-kassig-threatens-more-deaths/. Last accessed 29 June 2021.
[83] Scott Neuman, 'Video Appears to Show Beheading of Japanese Hostage Kenji Goto', *NPR*, 31 January 2015. Available at: https://www.npr.org/sections/thetwo-way/2015/01/31/382902139/video-purports-to-show-beheading-of-japanese-hostage-kenji-goto. Last accessed 29 June 2021.
[84] 'Jordan Pilot Hostage Moaz al-Kasasbeh 'burned alive'', *BBC News*, 3 Feb. 2015. Available at: http://www.bbc.com/news/world-middle-east-31121160. Last accessed: 24 February 2021.
[85] William M. Welch, 'IS Beheads & Led to Death by Teens', *USA Today*, 30 March 2015. Available at: http://www.usatoday.com/story/news/world/2015/03/29/islamic-state-beheads-eight-men/70635014/. Last accessed 6 August 2021.
[86] Kevin Sullivan, 'Justice in the 'IS': A climate of fear and violence', *The Washington Post*, I October 2015. Available at: http://www.washingtonpost.com/sf/life-in-the-islamicstate/2015/10/01/justice/. Last accessed 23 February 2021.
[87] 'Syria and IS Committing War Crimes Say UN', United Nations Commission of Inquiry on Syria 2014, *The Guardian*, 27 August 2014. Available at: https://www.theguardian.com/world/2014/aug/27/syria-IS-war-crimes-united-nations-un. Last accessed: 24 February 2021.

became a common spectacle on Friday in Raqqa and in Islamic State-controlled areas of Aleppo governorate", according to the Commission. "Bodies of those killed are placed on display for several days, ... often on crucifixes ..., terrorising the local population".[88] Islamic State was also responsible for the torture,[89] murder, forced disappearance[90] and forced displacement[91] of the civilian population. Anyone suspected of colluding against Islamic State were promptly beheaded or crucified in local towns with no due process of any sort. Life in the Caliphate was filled with paranoia and uncertainty. Speaking negatively about life in the Caliphate was absolutely forbidden. In seeking to eradicate those who did not subscribe to its doctrine, Islamic State's acts constituted war crimes, crimes against humanity and genocide.[92] The Yazidis were one such group who suffered this fate.

### *8.2.4 The Yazidis*

The atrocities committed against the Yazidis speak to the ruthlessness and barbarity of Islamic State. The Yazidis are an ethnoreligious group, whose religion combines elements from Christianity, Islam, Judaism and Zoroastrianism.[93] Following the re-drawing of the Middle Eastern borders in the aftermath of World War I, they were spread over several Middle Eastern countries.[94] The Yazidis live mainly in Iraq, Syria, Armenia and Turkey. The Yazidis of Sinjar who number approximately 500,000 people,[95] are considered to be one of the most impoverished and vulnerable groups in Iraq, having

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[88] 'Syria and IS Committing War Crimes Say UN', United Nations Commission of Inquiry on Syria 2014, *The Guardian*, 27 August 2014. Available at: https://www.theguardian.com/world/2014/aug/27/syria-IS-war-crimes-united-nations-un. Last accessed: 24 February 2021.

[89] Torture is prohibited under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987*, Art. 2, and the *Declaration on the Protection against Torture 1975*, Art. 3, UN Res. 3452. It is one of rules of international law from which there can be no derogation. "Common Article 3" of the *Geneva Conventions 1948* applies to armed conflict" not of an international character".

[90] *UN Convention for the Protection of All Persons from Enforced Disappearance*, (UN/Res/47/133), 18 Dec. 1992.

[91] *UNHCR 1951 Refugee Convention* is the key legal document in defining who qualifies as a refugee, setting out their rights and the legal obligations of governments to refugees. Article 1 of *1951 Convention* defines a refugee as someone who has fled his or her country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."

[92] Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared IS (IS)" (2016) 16 *International Criminal Law Review*, 1, 4.

[93] V. Cetorelli, I. Sasson, N. Shabila and G. Burnham, 'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) 14(15), PLoS Med. Available at: https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002297#pmed.1002297.ref005. Last accessed 28 June 2021.

[94] Sebastian Maisel, 'Social Change Amidst Terror and Discrimination: Yezidis in the New Iraq' (2018) 18 *The Middle East Institute Policy Brief*. Available at https://www.mei.edu/publications/social-change-amidst-terror-and-discrimination-yezidis-new-iraq. Last accessed 19 August 2021.

[95] Ibid.

suffered from decades of marginalisation, discrimination and abuse during the reign of Saddam Hussein.[96] When the Caliphate was declared in 2014, the Yazidis were subjected to increased persecution by Islamic State. The group mounted an attack on the Yazidis who reside on Mount Sinjar in August 2014, where it is estimated that between 2,000 and 5,500 Yazidis were killed by the Sunni extremists and that more than 6,000 women and children were kidnapped.[97]

The *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*[98] also detailed the sexual and gender-based violence committed against Yazidi women.

> 1. The mission gathered corroborated witness statements indicating clear patterns of sexual and gender-based violence against Yezidi women. When attacking Yezidi villages, ISIL reportedly engaged in the systematic and widespread killing of men, including boys over the age of 14. Women and children were subjected to different violations. Accounts indicate that ISIL views captured women and children as spoils of war which they own. Numerous interviews conducted with Yezidi women and girls who fled ISIL captivity between November 2014 and January 2015 provided reliable information of killings, widespread and systematic enslavement, including selling of women, rape, and sexual slavery, forced transfer of women and children and inhuman and degrading treatment. Many of the women interviewed were able to identify the origin of their ISIL captors, belonging to a wide range of countries.
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> 2. Girls and unmarried women who escaped from ISIL captivity consistently recounted the process by which they were raped and sexually enslaved. ISIL members numbered them or recorded names on lists, and inspected them to evaluate their beauty. While some were given as 'gifts,' others were sold to local or foreign ISIL fighters. Some victims were privy to price negotiations between 'vendors' and 'buyers.' An 'emir'[99] would instruct ISIL fighters to inspect and choose girls for 'marriage.' Girls would

[96] V. Cetorelli, I. Sasson, N. Shabila and G. Burnham, 'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) 14(15), PLoS Med. Available at: https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002297#pmed.1002297.ref005. Last accessed 28 June 2021.

[97] V. Cetorelli, I. Sasson, N. Shabila and G. Burnham, 'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) 14(15), *PLoS Med*. Available at: https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002297#pmed.1002297.ref005. Last accessed 28 June 2021.

[98] *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, (13 March 2015) UN Doc (A/HRC/28/18), 5-6.

[99] 'Emirs', local ISIL commanders, report to Sheikhs in the ISIL chain of command.

> then be prepared for 'marriage' (rape) involving, in some cases, full body searches. Mission investigators met with victims as young as 11 years of age.[100] A 30 year-old woman detailed how young girls were prepared for sale at a house in Mosul. They were ordered to stand and remove their headscarves to be inspected. Then they were forced to smile while ISIL fighters took photographs.[101]

Islamic State subjected the Yazidis to the process of Othering (discussed in in Chapter Two), dehumanising members of the group and stripping them of all their human rights. Trade in sexual slavery was restricted to Yazidi women and girls; Muslim women who joined the Caliphate were not subjected to this particular brutality. Islamic State used the availability of Yazidi females for sexual slavery as a recruiting technique in order to attract men from deeply conservative Muslim societies to the Caliphate. For these men who hailed from Muslim societies where casual sex and dating is forbidden, this proved to be a very effective propaganda tool.[102] There are also reports that hardline Sunni Salafists believed they were waging a legitimate form of holy war by engaging in extramarital sex with multiple partners.[103] Reporting on the treatment of Yazidi victims, Nazand Begikhani, an adviser to the Kurdistan Regional Government on gender issues, stated, "These women have been treated like cattle ... They have been subjected to physical and sexual violence, including systematic rape and sex slavery. They have been exposed in markets in Mosul and in Raqqa, Syria, carrying price tags."[104] Younger women who were used as Islamic State sex slaves had a more expensive their price tag than older women aged 40 to 50 years, who were sold at the cheapest price.[105] Slavery specifically became so popular among its fighters that the group provided guidance to them regarding how many female slaves each fighter was allowed to own. Islamic State

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[100] The pattern described by numerous witnesses is corroborated by an ISIL pamphlet on female slaves released in October/November 2014, entitled, 'Questions and Answers on Taking Captives and Slaves.'

[101] *Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups*, (13 March 2015) UN Doc (A/HRC/28/18), 9.

[102] Rukmini Callimachi, "IS Enshrines a Theology of Rape", *The New York Times*, 13 August 2015. Available at: http://www.nytimes.com/2015/08/14/world/middleeast/IS-enshrines-a-theology-of-rape.html. Last accessed24 February 2021.

[103] Martin Williams, "Sexual Jihad is a Bit Much", *The Citizen*, 25 September 2013. Available at: https://citizen.co.za/news/opinion/52696/sexual-jihad-is-a-bit-much/. Last accessed 29 June 2021.

[104] Ivan Watson, 'Yazidi women 'sold, raped, enslaved, treated like cattle' by ISIS', *CNN*, 30 October 2014. Available at: https://edition.cnn.com/2014/10/30/world/meast/isis-female-slaves/index.html. Last accessed 29 June 2021.

[105] Rukmini Callimachi, "IS Enshrines a Theology of Rape", *The New York Times*, 13 August 2015. Available at: http://www.nytimes.com/2015/08/14/world/middleeast/IS-enshrines-a-theology-of-rape.html. Last accessed24 February 2021.

has been accused of committing genocide against the Yazidis,[106] as thousands of Yazidis perished at the hands of fundamentalist group[107] in its quest to provide an alternative to the modern state and system of international law, and to alter the definition of sovereignty.

Islamic State's interpretation of sovereignty was reminiscent of the colonial encounter and its imposition of sovereignty, which saw Western states engage in the processes of subordination and conquest. Islamic State's actions are also reminiscent of the imperial gaze of the colonies where public torture and punishment were used as a way of displaying the power of the sovereign. As the discussion above examines, the Caliphate operated as a state of exception, beyond the legal norms and protection of the judicial. Abu Bakr al-Baghdadi was the self-appointed sovereign who, in Schmitt's assessment, had the capacity to decide on the exception. The inhabitants of the Caliphate subjected to its barbarity invoked Agamben's *homo sacer*, linking them with the slaves of antiquity, the inhabitants of the colonies, the prisoners of the camp and the inmates of Guantánamo Bay, all of whom resided in the state of exception as 'bare life' deprived of their humanity.

Although Islamic State suffered catastrophic losses through their military defeat, the ultimate demise of the short-lived Caliphate and the death of al-Baghdadi who reportedly committed suicide by detonating a suicide vest[108] during a US special operations raid in Idlib, Syria in October 2019, their existence is still of consequence to the argument of the thesis about the two-tiers of sovereignty in international law. The rise of Islamic State challenged Westphalian understandings of sovereignty and by doing so, "helped to transform a homogeneous and absolute understanding of sovereignty into multiple sovereignties".[109] Islamic State presented a vision of a fundamentally altered social and

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[106] Mohamed Badar, "The Road to Genocide: The Propaganda Machine of the Self-Declared Islamic State (IS)" (2016) 16 *International Criminal Law Review*, 1, 5. In February 2016, the European Parliament unanimously passed a resolution declaring that ISIS has committed genocide against Christians, Yazidis, and other ethnic and religious minority groups. This was the first time the Parliament labelled a genocide while events were unfolding. The US House of Representatives unanimously passed a resolution acknowledging that ISIL perpetrated genocide against Yazidis and Christians. In 2018, the US passed the *Iraq and Syrian Genocide and Relief and Accountability Act*, pledging up to $300 million in aid to ethnic and religious minorities in Iraq and Syria. While the UN declared that genocide was committed against the Yazidis, it did not acknowledge that genocide could have been potentially committed against the other groups identified by the European Parliament.

[107] UNGA, *Report to the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in Light of Abuses Committed by the So-Called IS in Iraq and the Levant and Associated Groups* (27 March 2015) UN Doc (A/HRC/28/18), 6.

**[108]** 'Baghdadi Death: Footage Shows Rubble of IS Leader's Compound', BBC News, 29 October 2019. Available at: https://www.bbc.com/news/av/world-us-canada-50224939. Last accessed 19 January 2022.

[109] Yeşiltaş, Murat and Tuncay Kardaş (eds.), "The New Middle East, ISIL and the 6th Revolt Against the West". in *Armed Non-State Actors in the Middle East: Geopolitics, Ideology and Strategy*, Palgrave Macmillan, 2018, 147-68, 152.

political order in Middle Eastern thereby challenging the *status quo*. The group existed and engaged in what Bull refers to as private international violence,[110] with the intention of transforming both the Middle East and international affairs.[111] According to Buzan, "violence-wielding nonstate actors such as Islamic State challenged the institutions of sovereignty/non-intervention and territoriality, threatening the legitimacy not just of states but also of international society".[112] Mendelsohn identified Islamic State as 'couriers of systemic change', as non-state actors who challenged and rejected the secular state and the Westphalian principles of sovereignty as the established norm of the international law.[113] As Becker Lorca's scholarship on the tripartite system, discussed in Chapter Two, reveals, international law can operated both as a system of domination and of resistance by those who resist the prevailing norms of international law and international legal affairs. The very antithesis of these prevailing norms was a resurrected Caliphate, the very manifestation of a site of resistance to Western approaches of statehood and international affairs. Although the Caliphate has failed, the ideology and views of Islamic State continue to exist in the Middle East and beyond, drawing its strength from disaffected and disenfranchised people who suffer profound social and economic problems in these regions.[114] It is therefore concluded that the death of Al-Baghdadi and the defeat of the Caliphate has not diminished the claims of resistance to Western approaches to statehood and international affairs.

### 8.3 Chapter Conclusions

This chapter identified and discussed Islamic State's challenge to the international system of sovereignty and statehood, epitomised in its competing vision of international society. Islamic State rejected the universalised Western system of statehood and the international legal framework, which emerged from the colonial experience, a system it is argued, that enabled the interference of Western states in the Islamic world. In response to the

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[110] Hedley Bull, *The Anarchical Society: A Study of Order in World Politic*, (2nd ed.), London: Macmillan Press Ltd., 1995.

[111] Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 19 February 2022.

[112] Barry Buzan, 'The English School: a neglected approach to International Security Studies' (2015) 46(2), *Security Dialogue*, 126, 135.

[113] Barak Mendelsohn, "God vs. Westphalia: Radical Islamist Movements and the Battle for Organising the World" (2012) 38(3) *Review of International Studies*, 589 cited in Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1, 4. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 19 February 2022.

[114] Michael Milshtein, 'A Middle Eastern "Apocalypse Now": The Islamic State (IS) as a Social and Cultural Phenomenon' (2019) 13(3) *Tel-Aviv Notes*, 1. Available at: https://dayan.org/content/middle-eastern-apocalypse-now-islamic-state-social-and-cultural-phenomenon. Last accessed 10 January 2022.

Westernisation of international law, Islamic State established the Caliphate as a rejection of this system of law and as the only legitimate mode of governance.[115] This chapter examined the establishment of the Caliphate as a place where Islamic State sought to achieve religious extermination and the religious purification of Islam. Islamic State presented the Caliphate as an alternative to Westphalian notions of the sovereign state and the Western engineered configuration of international law. It sought instead to establish a legitimate entity, declaring a Caliphate where its vision of sovereignty, based on the teachings of Sayyid Qutb, was divinely granted by and solely invested in Allah.[116] In doing so, the group embarked on an unprecedented, sophisticated and extremely ruthless campaign of violence and terror, that, it was argued, existed as a state of exception, operating outside of the normal framework of international law. The chapter argued that the Caliphate and the colonies are linked to each other, as mirror images, both employing the 'civilised'/'uncivilised' distinction and the process of Othering that dehumanised and denied human rights to all those subjected to it. One such group was the Yazidis who were subjected to genocide, physical and sexual violence and sexual slavery. Other atrocities committed by Islamic State included public crucifixions, beheadings, and beatings all of which reduced the population subjected to these atrocities to Agamben's *homines sacri*. The detention and potential prosecution of foreign fighters in Syria was raised as an issue for further research and consideration, given the contentious nature of this issue.

The establishment of the Caliphate traces an arc that extends from the ideology (e.g. civilised/uncivilised distinction) and hegemony that enabled the European domination of the colonies, to the ultimate establishment of the Islamic State Caliphate. The distinctions between the colonies and the Caliphate were also considered, which were identified as the cultural origins of the state, the centrality of economics to that state and the application/suspension of the judicial order. While Islamic State rejected the Western-derived international judicial order, the Caliphate was not devoid of a recognised system of law. A version of *Shari'a* law, derived from a subjective reading of the *Qur'an* was

[115] Peter Mandaville, *Islam and Politics*, 2nd ed, Oxford: Routledge, 2014; Gilles Kepel, *Jihad: The Trial of Political Islam*, MA: Harvard University Press, 2002 cited in Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS' (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.

[116] See M. Muslehuddin, *Philosophy of Islamic Law and the Orientalists: a Comparative Study of Islamic Legal System*, Lohore: Islamic Publications Ltd., 1977; Jonathan Burden, 'The Governance of Savagery: International Society, Sovereignty and the IS, (2018) 5 *E-International Relations*, 1. Available at: https://www.e-ir.info/2018/12/08/the-governance-of-savagery-international-society-sovereignty-and-the-islamic-state/. Last accessed 23 February 2021.

implemented, through which Islamic State justified its barbarity towards infidels and the Yazidi (discussed in sections 8.2.2-8.2.4). Hence, the Islamic State Caliphate committed its atrocities *because* of the law rather than because of an abrogation of the law. The way in which a reading of law by Islamic State was manifested in discussed in the following section.

The plurality of contributing factors and events include the Sykes-Picot Agreement which Islamic State has denounced, colonial expansion in the Middle East through the Mandate System and the imperialistic endeavours by Western nations in the Middle from the 1950s (discussed in Chapter Six), culminating in the War on Terror and its establishment of spaces of exception in such places as Guantánamo Bay and Iraq. While Islamic State did not specifically cite all of the events discussed in Chapter Six as factors in the establishment of its Caliphate, they are indeed privileged events. For example, the ousting of Mossadegh by the CIA-Coup in Iran set the country on a path away from democracy and firmly towards the 1979 Islamic Revolution[117] and the catastrophic Iran-Iraq War with its deadly connections to the 2003 Iraqi War (discussed in Chapter Six). Very significantly, the coup led to a revival of Islamic resistance movements, which coincided with and strengthened a resurgence of resistance in the wider Islamic world, notably the 1952 coup in Egypt,[118] against European imperialism.[119] It was during this period of resistance that one of the most notable and influential Islamist ideologues emerged, Sayyid Qutb,[120] whose political views profoundly influenced the ideology of Islamic State. Islamic State's adoption of Qutb's teachings emphasises the integral position that religious ideology and radicalisation enjoyed in the Islamic State and positioned Islam as a complete system of law, justice, governance and morality based solely upon *Shari'a* law, and as a denunciation of Western dogma. Hence, they rejected all such interference in the Islamic world that violated this religious ideology, including the very international legal framework that facilitated repeated transgressions against the Islamic world. Yet, in its denunciation of the West, Islamic State created the very

[117] Mark J. Gasiorowski, 'The 1953 Coup D'etat in Iran' (1987) 19(3) *International Journal of Middle East Studies*, 261.
[118] Paul Berman, 'The Philosopher of Islamic Terror', *The New York Times Magazine*, 23 March 2003. Available at: https://www.nytimes.com/2003/03/23/magazine/the-philosopher-of-islamic-terror.html. Last accessed 11 January 2022.
[119] Ibid.
[120] Robert Manne, 'Sayyid Qutb: Father of Salafi Jihadism, Forerunner of the Islamic State', *ABC Religious and Ethics*, 7 November 2016. Available at: https://www.abc.net.au/religion/sayyid-qutb-father-of-salafi-jihadism-forerunner-of-the-islamic-/10096380. Last accessed 11 January 2022.

phenomenon it abhorred – the state of exception. The circle that began with the colonies and ended with the Caliphate, both as states of exception, had been completed.

# Chapter Nine: Conclusions and Recommendations

## 9.0 Summary of Thesis

This thesis investigated the multiple cause factors and influences that ultimately led to the establishment of the Caliphate by Islamic State in 2014, examining it through the phenomenon of imperialism, the framework of the state of exception, the history of international law and the colonial influences on the evolution of international law. It considered the 'civilised'/'uncivilised' distinction created between Europeans and non-Europeans in the colonial world. However, colonialism continued to inform the discipline long after the formal end of the phenomenon through the imperialistic endeavours of Western nations. The thesis drew upon US imperialistic practices in particular, to demonstrate how political and economic policies rendered former colonies subservient to unequal economic development and created a new form of imperialism, neo-colonialism, i.e. the use of economic, political, cultural, or other pressures to control or influence former dependencies, through which the claim of sovereign equality was challenged. As a means by which to maintain global hegemony, neo-colonialism perpetuates the inclusion/exclusion discourse of the colonial period but in the process, it has constructed the state of exception, a space in which the exclusionary and repressive dynamics of sovereign power reside. Islamic State presented itself as an alternative to Westphalian notions of sovereign states and sought to establish itself as a legitimate entity and the Caliphate as a legitimate State whilst rejecting international norms based on Western civilisation.

The thesis began with a discussion of the state of exception and the principle of sovereignty in international law in Chapter Two. The chapter highlighted that the principle of sovereign equality has been repeatedly violated by Western states in order to further their own economic agendas. This practice, whilst it contravenes international law, can trace its origins to the colonies and the practice of Othering that colonisers engaged in, in the zone of exception that was the colonies. The chapter offered a nuanced reflection of the production of both sovereignty and quasi-sovereignty in international law and recognised the role of quasi-sovereignty as a structural and functional element of public international law. The periods through which the civilised/uncivilised has evolved were considered (formal colonialism and 20$^{th/21st}$ century imperialism), through which a third tier of categorisation has emerged, that of the semi-civilised.

The space of exception raises issues such as international law's capacity to include and exclude, to humanise and dehumanise and to protect or abandon.

Chapter Three engaged in a discussion on the history and evolution of international law illustrating the Western-centric nature of the legal framework. The law evolved from its Western Judeo-Christian, natural law ethos into a system of law that became universally applied, based as it was upon Christian concepts and the Westphalian principles of sovereignty and authority of states. Sovereignty was granted only to European nations, with few exceptions, whilst the non-European 'uncivilised' world was excluded from the family of nations. Even when sovereignty was eventually granted to non-European nations, it was in the form of quasi-sovereignty that continued to marginalise and subordinate these nations to the economic and political agendas of Western nations.

Chapter Four considered that the Mandate System and state system that emerged after World War I were manifestations of the economic and geostrategic interests of Britain and France.[1] The issue of sovereignty and the Mandate System was also considered, determining that while countries such as Iraq and Syria did achieve sovereignty, it was in a different form to that which was enjoyed by Western states. As the chapter argued, the colonial confrontation between Western powers and their colonial subjects was pivotal to the evolution of international law;[2] the form of law that evolved out of this confrontation drew a sharp distinguished between Europeans and non-Europeans, enabling the governance of non-European people through racial discrimination, violence, cultural and religious subordination and economic exploitation.

Chapter Five contextualised Part I of the thesis, concluding that the type of sovereignty granted to the non-European world was as quasi- rather than full-sovereignty, which ensured the continued economic subordination of these states, even after the official end of colonialism. Hence, the European system of international law and colonialism continued to inform and influence international relations. The framework of the state of exception and sovereignty, the history of international law and the phenomenon of colonialism were then applied to Part II of the thesis. This section of the thesis analysed

[1] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.
[2] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005.

the production of quasi-sovereignty in relation to the fragmentation of Iraqi and Syrian sovereignty, the fragmentation of their broader societies and the crucial role of tribes in the production of that disintegration, concluding that the phenomenon of quasi- and fragmented sovereignty was fundamental to the rise of Islamic State.

Chapter Six identified and examined the rise of Islamic State and the declaration of the Caliphate in 2014, considering the plurality of events, multiple cause factors and influences that shaped the behaviours of states and non-state actors in the Middle. This investigation began with the Sykes-Picot Agreement (1916) and included the CIA-coup against the democratically elected Prime Minister of Iran; the establishment of the Islamic Republic of Iran; the Iran-Iraq War (1980-1988), the Soviet-Afghan War (1980-89), the Gulf War (1991), the 2003 US-led invasion of Iraq and the War on Terror. What these events have in common is a violated sovereignty effected by Western interventionist policies that have denied these states their sovereign rights, producing instead an international legal hierarchy where the imperial, geopolitical and economic interests of Western nations continue to affect the international legal framework, invoking Singh's scholarship of semi-colonialism and Hammoudi's understanding of semi-peripheral sovereignty, with the obvious implications for the continuance of quasi-sovereignty. Hence, the third classification of the semi-civilised (or 'barbarous') state[3] is ever-present in the international legal framework, categorising people who are not the 'savage' of the colonies, but not civilised enough to enjoy full sovereign rights.

Chapter Seven considered the human rights abuses that the US engaged in as part of the War on Terror, positioning them as part of Empire crimes, as practices that extended from colonialism to the War on Terror. In this model of Empire, the War on Terror represented the quintessential expression of imperialism, as the US shaped and reinterpreted the rules in order to impose its regime of neo-liberal capitalism as a means of enforcing its economic and cultural agendas. The issue of legitimising such interventions on humanitarian grounds concealed the true, neo-colonialist intentions of the interventions. The chapter considered the issue of sovereignty, which it concluded, was utilised as the right to decide on the form and administration of justice and the right to determine who could be stripped of their sovereign and human rights, languishing in the state of

[3] Umut Özsu, 'Agency, Universality, and the Politics of International Legal History' (2012) 52 Harv. Int'l L.J., 58, 60.

exception. It concluded that the violated sovereignty of the Middle East directly led to the War on Terror and the rise of Islamic State.

Chapter Eight identified and discussed Islamic State's challenge to the international system of sovereignty and statehood Islamic State rejected the universalised Western system of sovereignty and statehood and the international legal framework, establishing the Caliphate as a rejection of this system of law and as the only legitimate mode of governance. The group embarked on an unprecedented, sophisticated and extremely ruthless campaign of violence and terror, however, establishing the Caliphate as a state of exception, operating outside of the normal framework of international law. The chapter argued that the Caliphate and the colonies were linked to each other, as mirror images, both employing the 'civilised'/'uncivilised' distinction and the process of Othering that dehumanised and denied human rights to all those subjected to it in the state of exception. Yet, Chapter Eight also considered the distinctions could be drawn between the colonies and the Caliphate, firstly in the belief systems that these cultures occupied and secondly, in the area of economics, both of which dominated all aspects of governance, economic, social and cultural policies in these spaces.

### 9.1 Conclusions

A number of conclusions can be drawn from the above discussion and analysis:

1. The doctrine of sovereignty operates at different levels in international law. A two-tier system of sovereignty, full-sovereignty and quasi-sovereignty continues to exist in the international legal framework. The role of quasi-sovereignty is recognised as a functional and structural element of public international law, rather than the formal doctrine that existed in the colonies. Hence, a contingent sovereignty and third tier of categorisation, 'semi-civilised' has become omnipresent in the international legal system, evident in the critical accounts of international legal hierarchy that were considered – Hammoudi's semi-peripheral sovereignty, Singh's work on semi-colonialism, Öuzu's semi-civilised state and Becker Lorca's examination of mestizo international law. This inequitable system has its roots in the colonial experience which was essential to the development and advancement of international law and its founding concept, sovereignty. Sovereignty, as it existed in the colonies, functioned as an instrument of exclusion, denying dominion, authority and control over their own affairs to the non-European world. Non-European sovereignty therefore developed as a distinctive entity to that which was enjoyed by European states, with mechanisms

of inequality and exclusion at the core of its performance. Despite the declarations of equality between European and non-European sovereignty, there are major flaws in the international legal framework that allow, for example, the counties of Middle East to be subjected to a system of law where their sovereignty continues to be violated. This inequitable system is maintained through international law's accommodation of a new international order in which some of the foundational rules of international law are remade to accommodate the agendas of powerful nations. The widening of the principle of the right to self-defence to incorporate pre-emptive self-defence illustrates this point. The use of pre-emptive self-defence has redefined the traditional understanding of sovereignty and sovereign equality, allowing States to claim the right to invade the sovereign territory of another State based on their potential harbouring of terrorists. This is an important development in the trajectory of the international system and one that is open to abuse in order to impose a particular economic or political framework on the invaded State, signalling a return to the 19th century perception of civilised and uncivilised states.

It would therefore be prudent that the principle of sovereignty and sovereign equality should be applied equitably in international law, given the sacredness of the principle of non-interference and the ramifications of violated sovereignty, as the examination of the rise of Islamic State attests to. An assessment of the violation of sovereignty should be undertaken, given that sovereignty is violated *by* Western nations *against* non-Western states without consequences. The position of the UN also needs to be clarified and strengthened in a more equitable way.

2. These systems of control and exclusion that, according to Anghie, deprived the non-European world of Western sovereignty continue to persist and endure in the international legal system,[4] to the benefit of Western economic interests creating a chasm between the freedoms, equality and protections bestowed by international law and the decades of military intervention and economic strangulation suffered by the Iraq and other Middle Eastern countries. The US and its European allies have pursued an agenda based on securing their access to oil, rather than upholding the rule of law and the principle of sovereign equality, engaging in the sustained cultural and

[4] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34(3) *New York University Journal of International Law and Politics*, 513.

economic exploitation of the people of the Middle East. Hence, the achievement of economic security is a driving force in international law, to the detriment of human rights. International law succeeds when it is serving Western interests but has continued to abandon the non-Western world.

3. Imperialism remains a living reality both in international law and international relations, manifested through the continuance of the political and economic exploitation of the non-European world and the legal framework that supports this, i.e. UN sanctions that are disproportionately applied to the non-Western world. This signals a return of "Empire's Law", which elevates the sovereign rights of some cultures, whilst simultaneously denying those rights to others. This engages the process of Othering, where the othered person is subjected to dehumanising and discriminatory practices. Empire's law, grounded in the colonial experience, continues to serve Western interests and is representative of a new form of sovereignty, quasi-sovereignty, in which Empire is the political subject that regulates economic and political agendas and sovereign power governs the international relations.[5] Michael Hardt and Antonio Negri have claimed that:

> Empire is materializing before our very eyes. Over the past several decades, as colonial regimes were overthrown and then precipitously after the Soviet barriers to the capitalist world market finally collapsed, we have witnessed an irresistible and irreversible globalization of economic and cultural exchanges. Along with the global market and global circuits of production has emerged a global order, a new logic and structure of rule—in short, a new form of sovereignty. Empire is the political subject that effectively regulates these global exchanges, the sovereign power that governs the world.[6]

One of the key components of global imperialism is that international law and the use of force are complicit in the advancement of an imperialist Western agenda that is aligned to certain global values (evident, it is argued in this thesis, in the War on Terror). For example, the Responsibility to Protect doctrine (R2P)[7] represents an ideological shift from the policy of humanitarian intervention. The 2005 World Summit Outcome Document states:

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[5] Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449.
[6] Michael Hardt and Antonio Negri, *Empire,* Cambridge, MA: Harvard University Press, 2000, xi cited in Susan Marks, 'Empire's Law' (2003) 10(1) *Indiana Journal of Global Legal Studies*, 449, 449.
[7] The UN states that "The responsibility to protect embodies a political commitment to end the worst forms of violence and persecution. It seeks to narrow the gap between Member States' pre-existing obligations under international humanitarian and human rights law and the reality faced by populations at risk of genocide, war crimes, ethnic cleansing and crimes against humanity." Available at: https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml. Last accessed 29 June 2021.

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[8]

The International Commission on Intervention and State Sovereignty,[9] cites the three pillars of R2P as (i) states have the primary responsibility to protect their own people from genocide, war crime, crime against humanity, ethnic cleansing; (ii) the international community has a responsibility to assist the states to fulfill its primary responsibility in building capacity to protect its people; and (iii) in case the state fails to protect its citizens from the four above atrocities or unwilling to meet that responsibility, the international community has the responsibility to take timely and decisive action to prevent violence and atrocious crimes. Although R2P is championed as a collective means through which to address and combat these crimes there are real concerns that it may be utilised without the principle of impartiality being applied.[10] UNSC Resolution 1973 authorised NATO's intervention in Libya under the auspices of halting "an "impending" genocide in Libya, and especially in Benghazi."[11] However, Erameh and Idachab argue that NATO and its allies were not, in fact, impartial protectors of Libyan civilians, but rather, they pursued their own agenda of toppling Ghaddaffi in order to secure a regime change and to gain access to Libya's resources, including its oil.[12] This precise argument has been echoed by

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[8] 2005 World Summit Outcome Document (A/RES/60/1), para. 139.

[9] ICISS, *The Responsibility to Protect: Report of the International Commission on The Responsibility to Protect*, December 2001. Available at: at http://www.iciss.ca/pdf/Commission-Report.pdf. Last accessed 29 June 2021. Cited in Nicholas Idris Erameh & Enemaku Umar Idachaba, 'Nato Intervention in Libya and its Consequences on Global Security' (2017) 17(3)(1) *Global Journal of Human Social Science: Political Science*, 1.

[10] Nicholas Idris Erameh & Enemaku Umar Idachaba, 'Nato Intervention in Libya and its Consequences on Global Security' (2017) 17(3)(1) *Global Journal of Human Social Science: Political Science*, 1.
For a detailed discussion of the criticism of NATO's intervention in Libya, see J.M. Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25(3) *Ethics and International Affairs*, 255; Dembinski & Reinold, 'Libya and the Future of the Responsibility to Protect: African and European Perspectives', *PRIF-Report No. 107*, Peace Research Institute Frankfurt, 2011.

[11] Nicholas Idris Erameh & Enemaku Umar Idachaba, 'Nato Intervention in Libya and its Consequences on Global Security' (2017) 17(3)(1) *Global Journal of Human Social Science: Political Science*, 1, 2. Libya was the first state to whom the R2P doctrine was applied. The United Nations Security Council (UNSC) Resolution 1973 (March 2011) sanctioned the NATO intervention in Libya.

[12] Nicholas Idris Erameh & Enemaku Umar Idachaba, 'Nato Intervention in Libya and its Consequences on Global Security' (2017) 17(3)(1) *Global Journal of Human Social Science: Political Science*, 1.

Maximillian Forte in his book *Slouching Towards Sirte: NATO's War on Libya and Africa*.[13] There is a strong argument to be made that the use of R2P in Libya is a prime example of the merging of the use of force with certain global values, illustrating the continuance of Western imperialism in the international legal framework as a means of securing and advance Western economic agendas. There are also concerns that interventions into sovereign states under the rubric of R2P could become a normalised, rather than an exceptional occurrence. As Anne Orford explains: "With the emergence of the responsibility to protect concept, we see a movement away from that representation of intervention as an exceptional interference in the domestic affairs of States, and towards the representation of international presence as obligations."[14] In this scenario, "sovereign political spaces"[15] could be compromised and infiltrated in the name of humanitarianism, through the use of legitimate force.[16] This however, could mask the true agenda of toppling the current government in order to impose a Western-friendly regime and programme of government in the infiltrated states.

4. Proxy wars are a living reality of the international legal system and speak to the uncomfortable association between imperialism, law, politics and economics as powerful states seek to impose their own agendas on the global landscape. This is abundantly evident in the Syria conflict. There are significant indicators that China, Russia, Iran and Pakistan are pushing for zones of influence to control parts of Afghanistan, leading to a new proxy war. As this thesis discussed in Chapter Six, the proxy war between the US and the Soviet Union that was played out on the landscape of Afghanistan from 1979-1989 had a direct and indisputable effect on the rise of Islamic State. Yet, these proxy wars continue, with dire consequences for the civilians of the affected states, and with long-term and far-reaching consequences for the international community and the rule of law.

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[13] Maximillian Forte, *Slouching Towards Sirte: NATO's War on Libya and Africa*, Chicago: Independent Publishers Group, 2012 cited in Nicholas Idris Erameh & Enemaku Umar Idachaba, 'Nato Intervention in Libya and its Consequences on Global Security' (2017) 17(3)(1) *Global Journal of Human Social Science: Political Science*, 1.

[14] Anne Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 Michigan Journal of Int'l Law, 981, 999 cited in BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century (2012) 14 *Oregon Review of International* Law, 17, 32.

[15] BS Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century (2012) 14 *Oregon Review of International* Law, 17, 32.

[16] Ibid.

5. The state of exception, where basic laws and norms of a juridical order are suspended, sovereign rights are eroded, and where people are removed from the political community and the protections of international law, has become a permanent fixture of the international system of law where distinctions are drawn between the forms of power in the state of exception employed by historical forms of colonialism versus its more recent imperial, neo-liberal adaptation. The connections between the state of exception, exceptional powers and neoliberalism is central to understanding the permanence of the state of exception in the international legal framework. In this space, the use of violence and interventionism by state and non-state actors is engaged with in order to impose particular economic, political and legal agendas. This marriage of Empire's law and the state of exception exposes the very relationship between exception theory, emergency law and the political economy on one hand, and effect of this marriage on the socio-legal, political and global economic. This is witnessed through the war on terror and the establishment of the Islamic State Caliphate. The political transformations produced by the War on Terror and the Caliphate have ensured that Agamben's figure of *homo sacer* remains a relevant figure in international law, representative of the destructiveness of sovereign power, the banishment of Other to the margins, and political transformations produced through the pursuit of democratising states.

6. The Islamic State Caliphate was a century in the making, beginning with the fall of the Ottoman Empire and the redrawing of the maps of the Middle East. The persistent violation and fragmentation of the sovereignty of the Middle East forms the relationship between the plurality of factors and events that contributed to the rise of Islamic State and the establishment of the Caliphate. Just as Western States have used the law as a political instrument of control, Islamic State used its transgression of international law as an instrument of resistance against Western hegemony. The establishment of the Caliphate was a resounding rejection of the foundational tenet of Western democracy -the separation of religion and state. For Islamic State, Sunni Islam *is* the state.

7. The dehumanisation process that was engaged with in the colonies, then in the exclusion of 'non-civilised' peoples from the Family of Nations and in the state of exception continues through the use of language in international relations. Words such as 'terrorist' and 'uncivilised' have created a situation, where, according to Peter

Rowe, "there is an unwillingness among combatants to accord the "protection" of the law to their adversaries, who are seen in this light".[17] Or, according to Carl Schmitt:

> To confiscate the word humanity, to invoke and monopolize such a term … has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.[18]

Guantánamo Bay, Baghram Airbase, Abu Ghraib and CIA Blacksites are the horrific conclusions of this asymmetry, products of a contagion of inhumanity that began in the colonies and over a century later, materialised in these spaces of exception.

### 9.2 Direction of Future Research

1. The process of creating new states involves the establishment of particular factual conditions and compliance with relevant rules. The accepted criteria of statehood were laid down in the Montevideo Convention on Rights and Duties of States.[19] It is generally agreed that the conditions of the Convention represent customary international law[20] which provides that a state must possess a permanent population, a defined territory, a government, and the capacity to conduct international relations. The international community, including the UN has recognised some states while they were embroiled in a civil war (e.g., the Congo in 1960 and Angola in 1975), thus eroding the effective-government criterion. Crotia and Bosnia Herzegovina were also recognized as new states by much of the international community in 1992, though at the time neither was able to exercise any effective control over significant parts of its territory. Precedence had also been set regarding the declaration of statehood in relation to Kosovo, now the Republic of Kosovo, who unilaterally declared its independence from Serbia on 17 February 2008. Kosovo is now a partially-recognised state and has gained diplomatic recognition as a sovereign state by 98 UN member states.[21]

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[17] Peter Rowe, 'War Crimes' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 203, 204.

[18] Carl Schmitt, *The Concept of the Political*, (George Schwab trans.), Chicago: University of Chicago Press, 1996 [1976], 54.

[19] Montevideo Convention on the Rights and Duties of States**,** agreement signed at Montevido, Uruguay, on December 26, 1933 (and entering into force the following year), that established the standard definition of a state under international law.

[20] Ruth Lapidoth, 'When Is an Entity Entitled to Statehood?' (2012) 1(3) *Israel Journal of Foreign Affairs*, 77.

[21] Kosovo's declaration of independence in 2008 is not recognised by almost half of the UN's members. Crucially, these countries include China and Russia, which are on the UN Security Council and can effectively veto any membership.

The Convention formulates duties and rights of sovereign states, stating:

'[T]he state as an international person should possess the following qualifications:

(a) a permanent population;

(b) a defined territory;

(c) government; and

(d) capacity to enter into relations with other states'.

The Convention stipulates that all states are equal sovereign units consisting of a permanent population, defined territorial boundaries, a government, and an ability to enter into agreements with other states. Among the Convention's provisions are that signatories should not intervene in the domestic or foreign affairs of another state, that they would not recognize territorial gains made by force, and that all disputes should be settled peacefully.

Does this mean that Islamic State should have been recognised as a state? The ICJ had the possibility to provide an answer on the issue of whether the Kosovo Declaration of statehood meant that Kosovo was a state under international law. However, its decision was ambiguous, failing to provide clarification on the boundaries of the right to self-determination.[22]

Islamic State's declaration of statehood and sovereignty were not accepted by the international community however. Indeed, UNSC resolutions urged UN members to take all measures to "eradicate the safe haven they have established over significant parts of Iraq and Syria."[23] Its declaration was also rejected on the basis that as they had engaged in human rights abuses and represented "an unprecedented threat to international peace and order"[24] as outlined in UNSC resolutions 2178 (2014),[25] 2170

[22] In its Advisory Opinion (22.07.2010), the ICJ provided "that the Kosovo declaration did not violate international law when it was asked whether the Kosovo declaration were in conformity with international law (para 123). However, the ICJ refused explicitly to address the consequences of that declaration, particularly the question of whether Kosovo is entitled to statehood (para 51). This narrow opinion failed to clarify the boundaries of the right to self-determination, while also weakening the principle of territorial integrity by giving separatist movements around the world legal license to declare independence."

[23] UNSC 2249 (2015).

[24] Petter Danckwardt, *Conceptualising ISIS in International Legal Terms: Implications, Crises and Failure of Westphalian Notions of Authority*, Faculty of Law, Stockholm University, 2016, 52.

[25] Adopted by the Security Council at its 7272nd meeting, on 24 September 2014. "Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed, and remaining determined to contribute further to enhancing the effectiveness of the overall effort to fight this scourge on a global level."

(2015),[26] 2249 (2015),[27] and 2253 (2015). [28] However, many sovereign states have engaged in horrific human rights abuses and have still retained their sovereign status, so this is not a decisive criterion. Further research on this topic would clarify the issue of statehood and sovereignty recognition.

2. The issue of how to deal with those foreign fighters and their families who remain in detention in Syria and Iraq is an area that requires urgent attention and consideration. Human Rights watch reports that "Nearly 43,000 foreign men, women, and children linked to ISIS remain detained in inhuman or degrading conditions by regional authorities in northeast Syria, two years after they were rounded up during the fall of the Islamic State Caliphate, often with the explicit or implicit consent of their countries of nationality".[29] Letta Tayler, Associate Crisis and Conflict Director at Human Rights Watch, describes the detention of suspected foreign fighters and their families as the creation of another Guantánamo Bay.[30] The question of how to deal with these people is divisive. Should foreign fighters be prosecuted locally, where evidence obtained under torture can be relied upon, and where prisoners risk being sentenced to death? Or should they be returned to their home countries to face prosecution? There issue of prosecutions raises several problems. (i) While the ideal scenario might be to try alleged foreign fighters in an international court, the ICC does not have jurisdiction over Iraq or Syria, so it cannot intervene in these cases; (ii) Iraq

[26] Adopted by the Security Council at its 7242nd meeting, on 15 August 2014 [on terrorist attacks perpetrated by ISIL also known as Da'esh]. "Reaffirming its resolutions 1267 (1999), 1373 (2001), 1618 (2005), 1624 (2005), 2083 (2012) 2129 (2013), 2133 (2014), 2161 (2014), and its relevant Presidential Statements. Imposes the assets freeze, travel ban and arms embargo on six individuals associated with Al-Qaida, Islamic State in Iraq and the Levant (ISIL) and Al Nusrah Front (ANF). Directs the Monitoring Team to report to the Committee on the threat posed by ISIL and ANF."

[27] Adopted by the Security Council at its 7565th meeting, on 20 November 2015. The Security Council, reaffirming its resolutions 1267 (1999), 1368 (2001), 1373 (2001), 1618 (2005), 1624 (2005), 2083 (2012), 2129 (2013), 2133 (2014), 2161 (2014), 2170 (2014), 2178 (2014), 2195 (2014), 2199 (2015), 2214 (2015) and its relevant presidential statements. "Reaffirming the principles and purposes of the Charter of the United Nations. Reaffirming its respect for the sovereignty, territorial integrity, independence and unity of all States in accordance with purposes and principles of the United Nations Charter. Reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable regardless of their motivations, whenever and by whomsoever committed."

[28] Adopted by the Security Council at its 7587th meeting, on 17 December 2015. Security Council Committee pursuant to resolutions 1267 (1999) 1989 (2011) and 2253 (2015) concerning ISIL (Da'esh) Al-Qaida and associated individuals groups undertakings and entities.

[29] 'Thousands of Foreigners Unlawfully Held in NE Syria: Countries Should Bring Citizens Home: Ensure Due Process for ISIS Suspects', *Human Rights Watch*, 23 March 2021. Available at: https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria. Last accessed 30 June 2021.

[30] 'Thousands of Foreigners Unlawfully Held in NE Syria: Countries Should Bring Citizens Home: Ensure Due Process for ISIS Suspects', *Human Rights Watch*, 23 March 2021. Available at: https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria. Last accessed 30 June 2021.

has tried more than 20,000 IS-related crimes. However, its judicial system has been severely criticised due to its due process violations and the fact that it imposes the death penalty,[31] and (iii) The Kurdish forces who run the detention camps in northeastern Syria do not have the authority to hold trials as they are not recognised as a sovereign government,[32] meaning that suspected foreign fighters continue to languish in detention centres indefinitely. Should a permanent international court dealing specifically with terror offences, similar to the ICC, be established to try terror suspects in a neutral environment? There is no clear consensus on this issue, but an urgent international response answer is required in order to deal with the hundreds of people who continue to languish in Syrians prisons.

3. A related issue concerns the fate of the orphaned and unaccompanied children of the Caliphate. This is also an issue that requires urgent consideration. Approximately 64,000 women and children who fled the Islamic State Caliphate in its last months are being held in camps by the Syrian Democratic Forces (SDF), a mostly Kurdish militia that defeated the terror group with US and UK backing.[33] Human Rights Watch reports that only 25 countries have repatriated their nationals from northeast Syria, but the numbers are very few and are mainly orphaned or young children who have been separated from their mothers.[34] This provides for a very precarious and uncertain future for these children. The UN has previously called for all children of foreign Islamic State members to be repatriated to their home countries and some have responded.[35] It is a situation that otherwise has received little attention. It is therefore imperative that the UN take a stronger and more forceful position on this issue.

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[31] Lila Hassan, 'Repatriating ISIS Foreign Fighters Is Key to Stemming Radicalization, Experts Say, but Many Countries Don't Want Their Citizens Back', *Frontline*, 6 April 2021. Available at: https://www.pbs.org/wgbh/frontline/article/repatriating-isis-foreign-fighters-key-to-stemming-radicalization-experts-say-but-many-countries-dont-want-citizens-back/. Last accessed 30 June 2021.
[32] Ibid.
[33] Ibid.
[34] 'Thousands of Foreigners Unlawfully Held in NE Syria: Countries Should Bring Citizens Home: Ensure Due Process for ISIS Suspects', *Human Rights Watch*, 23 March 2021. Available at: https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria. Last accessed 30 June 2021.
[35] Richard Hall, 'UK to repatriate orphaned children of British Isis members from Syria', *Independent*, 21 November 2020. Available at: https://www.independent.co.uk/news/world/middle-east/isis-children-uk-syria-citizens-dominic-raab-a9212921.html. Last accessed 19 March 2021.

### 9.3 Broader Implications for Global International Affairs

Islamic State reshaped the *jihadist* landscape, drawing together anti-imperialistic sentiments, sectarianism and the revolutionary dogma of waging *jihad*. The success of Islamic State, albeit for a period of five years, exposed a crisis in the Sunni Islamic world, experienced as exclusion, disaffection, poverty and expulsion from public office, as was the case in Iraq following the introduction of the Ba'athification Laws. The Caliphate offered hope to people who felt deeply alienated from their societies and secular ideologies both within and outside of the Arab world. According to ʿAbdel Bari Atwan, the former editor-in-chief of the newspaper, al-Quds al-Arabi, and the Palestinian commentator, Hussam Shaker, Islamic State's success was due in no small part to the alternative it offered to the *status quo* that existed in the Middle East - corrupt, authoritarianism that was the product of and deeply affected by Western imperialism.[36] The fall of the Caliphate has neither diminished these problems or eradicated the ideology of Islamic State. The challenges in the Islamic world remain, as does the call of *jihad* for some disaffected Muslims. The success of the Taliban in Afghanistan has been a cause of inspiration for many of these people. More broadly, it has re-energised and re-focussed Sunni *jihadi* groups such as Boko Haram in Nigeria and al-Shabaab in Somalia, who view the Taliban's success in Afghanistan as signs that waging *jihad* is a worthy and fruitful endeavour. ʿAbd al-Sattar al-Khademi, a Tunisian journalist, has cautioned against celebrating the defeat of Islamic State, arguing that the group's ideology still holds a powerful draw for alienated and marginalised people.[37]

The Taliban takeover of Afghanistan in August 2021 and the dire consequences that this represents for the country and the wider international community had laid bare the failure of the imperialistic war on terror. ISIS-K, an ISIS affiliate in Afghanistan and Pakistan has begun its campaign of violence and killing in Afghanistan, launching attacks at Kabul airport on 26th August 2021, in which 170 people died,[38] and it remains to be seen if this inspires attacks further afield. Despite a twenty-year

[36] Michael Milshtein, 'A Middle Eastern "Apocalypse Now": The Islamic State (IS) as a Social and Cultural Phenomenon' (2019) 13(3) *Tel-Aviv Notes*, 1. Available at: https://dayan.org/content/middle-eastern-apocalypse-now-islamic-state-social-and-cultural-phenomenon. Last accessed 10 January 2022.
[37] Abd al-Sattar al-Khademi, 'ISIS: A Phenomenon Capable of Reproduction', *al-Arab* (London), July 19, 2017 cited in Michael Milshtein, 'A Middle Eastern "Apocalypse Now": The Islamic State (IS) as a Social and Cultural Phenomenon' (2019) 13(3) *Tel-Aviv Notes*, 1. Available at: https://dayan.org/content/middle-eastern-apocalypse-now-islamic-state-social-and-cultural-phenomenon. Last accessed 10 January 2022.
[38] Frank Gardner, 'Afghanistan Airport Attacks: Who are IS-K?', *BBC News*, 27th August 2021. Available at: https://www.bbc.com/news/world-asia-58333533. Last accessed 30 August 2021.

campaign by the US and coalition forces and a budget of $978 billion,[39] the Taliban has again taken control of Afghanistan. Such groups could perceive this as defeat for Western nations and a victory for fundamentalist Islam and could use this situation to engage in a renewed international campaign.

The broader context for global international affairs concerns the question of whether states are willing to engage and negotiate with *jihadist* groups who govern sovereign states. To date, Russia, China, Pakistan and Iran have shown willingness to engage into negotiations with the Taliban in Afghanistan.[40] The withdrawal of the US from Afghanistan has placed Russia and China in the powerful positions of being the chief powerbrokers in Central Asia, countries that have been allies on the UN Security Council in opposition to the US, France and the UK. This raises wider issues about the efficacy of the UN Security Council and the veto system, and its use as a political tool by members of the UN in order to promote their own political and economic agendas.[41] These geopolitical agendas continue to perpetuate the cycle of violated sovereignty, and producing semi-peripheral sovereignty, persistently re-producing the

[39] Neta C. Crawford, 'United States Budgetary Costs and Obligations of Post-9/11 Wars through FY2020: $6.4 Trillion', *Watson Institute, Brown University*, 13 November 2019.
[40] Julia O'Driscoll, 'The Countries That Support the Taliban', *The Week*, 16 December 2021. Available at: https://www.theweek.co.uk/news/world-news/955166/countries-that-support-the-taliban. Last accessed 10 January 2022.
[41] Splits among the dominant powers in a divided Security Council have stymied its efforts to resolve acute global problems. Russia and China have become increasingly assertive in the Security Council, challenging Western neo-liberal norms. Both states have blocked a number of intervention proposals by Western states, including a raft of proposed sanctions on Syria. The lack of productivity of the Security Council is of real concern, as efforts at Council reform have failed to make progress. The veto system therefore requires urgent attention and reform to prevent states from inscribing their own political agenda on the veto system. The imposing of sanctions on Iran also raises pertinent questions about the politicised nature of the sanctions process that continue to reflect Western-norms. A question to consider is whether existing international law contains limitations on the use of the veto power by permanent members of the UN Security Council in situations where there are ongoing atrocity crimes, i.e. genocide, crimes against humanity, and/or war crimes? The veto power was created by the UN Charter. Yet, the UN Charter provides a limitation on the Security Council's power. Under Article 24(2), the Security Council must act "in accordance with the Purposes and Principles of the United Nations." See Charter of the United Nations, 1945, Art. 24(2). The "Purposes and Principles" of the United Nations in Articles 1 and 2 of the Charter include respecting "principles of justice and international law," "promoting and encouraging respect for human rights," "co-operation in solving international problems of [a] . . . humanitarian character," and "good faith." See Charter of the United Nations, 1945, Art. 24(2), Arts. 1 and 2. The question arises whether the vetoes that are occurring are consistent with the UN's "Purposes and Principles" (see Charter of the United Nations, 1945, Art. 24(2), Arts. 1 and 2) and if they are not, then permanent member exercising their veto are acting *ultra vires*, i.e. that is, beyond the proper exercise of Security Council power. States at the UN could intensify what many have already been doing, which is speaking out critically at the UN each time the veto is used in violation of these existing legal norms. No longer should the UN system tolerate the veto being used in a way that essentially facilitates or allows the continuing perpetration of atrocities.

disaffected person who is drawn to the ideology of *jihadist* groups such as Islamic State.

## 9.4 Final Observations

The conclusion to be drawn from this research is that the principle of sovereignty operates inequitably in public international law, through a system of international legal hierarchy, full-sovereignty, quasi-sovereignty and the 'semi-civilised'. This system has been created and maintained by Western nations and used to maintain Western hierarchies in international law. At the core of this system is the desire of the West to protect its economic and political interests, using the law as a political instrument in order to achieve this aim. The practice of imperialism is still an influential, formidable force in international law. The war on terror provides an example of this continued phenomenon - the alignment of international law and global values with the use of force, facilitating the supposition that any use of force to deal with terrorism is justified and therefore cannot violate the principle of sovereignty. As Costas Douzinas points out:

> Because terror is not a nation, the war on terror appears as police action, as the war of law. It makes us imagine the world as one, through normative, legal and moral regulation, and the enemies as outlaws. The terrorist as criminal shares the one legal order and as evil-doer repudiates our common ethics.[42]

This process treats individuals differently before the law - some people are included in the political community, provided with its protections, whilst the "citizens of outlaw states"[43] are denied the basic protection of the law, banished to the margins, existing in a space of exception devoid of law and humanity, as *homo sacer*. An imperial, economic and legal formation exists in international law that is backed by a political formation composed of the advanced capitalist states. This alignment of law, global values and the use of force is a concerning precedent and one that serves to legitimise imperialistic endeavours. The invasions of Afghanistan and Iraq, and the proxy war that continues to be played out on the landscape of Syria are testament to this marriage of imperialism, economics, law and politics, as global powers seek to impose their own agendas on the Middle East in order to secure their position in the region and to protect their economic interests. Whilst Islamic State engaged in its own form of imperialistic conquests in Iraq and Syria, the establishment of the

[42] Costas Douzinas, 'Postmodern Just Wars and the New World Order' (2006) *5 International Journal of Human Rights*, 355, 368.
[43] Gerry Simpson, "War in Iraq and International Law (2005) 6(1) *MJIL*, 167, 182.

Caliphate was a real attempt to reject the continuance of global imperialism, Western democracy which promotes the separation of Church and state, and the two-tier system of sovereignty that was imposed by that imperialistic system. It might be said therefore that Islamic State is both the cause and the consequence of imperialism as it sought to exist outside of the international legal framework that formed the modern Middle East.

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