

Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty

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Abstract

This article explores the League of Nations' role in state formation in Third World or peripheral states and its legacy for contemporary understandings of Third World sovereignty. It examines Iraq under British Mandate, and UN and Coalition of the Willing interventions. This research was prompted by the international-law community's outrage when the Coalition invaded Iraq in March 2003. While the invasion was seen by many as an affront to international law, there was also something faintly familiar about the Coalition's reasoning for the invasion. This feeling of déjà vu escalated once regime change was followed by lengthy nation-building. The idea of recreating Iraq was not a new one. The British were tasked with something similar under the League of Nations Mandate System. UN interventions into failed states also attempt comparable transformations. Indeed, the more one contemplates international law's interventions in Iraq, the less shocking the Coalition's invasion becomes. It starts seeming foreseeable and even inevitable.

Key words

failed state; Iraq; League of Nations; sovereignty; TWAIL

I. INTRODUCTION

This article explores the League of Nations' role in state formation in Third World or peripheral states and its legacy for contemporary understandings of Third World sovereignty. I examine the British Mandate in Iraq and recent interventions under the auspices of the United Nations and the Coalition of the Willing. Alongside fellow contributors to this special issue, I contest understandings of the League as a failed international institution, of relevance primarily for understanding political development in the West. The League exercised considerable power and lasting influence from the vantage point of some peripheral regions. While fellow contributors identify the League's economic, legal, and cultural influences on peripheral and semi-peripheral states, my article concentrates on the less subtle control the League exercised over certain regions through its Mandate System.

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This article was prompted by the outrage of the international-law community when the United States-led Coalition of the Willing invaded Iraq in March 2003. Angry articles were written in academic journals and newspapers condemning the legal reasoning of the Coalition and its few supporters.¹ It was easy to sympathize with the scholarly indignation. The invasion was in many ways an affront to international law, particularly the laws on the use of force. At the same time, there was something faintly familiar about the Coalition's reasoning for the invasion. This feeling of déjà vu escalated once regime change was implemented and the Coalition began the task of nation-building. The idea of recreating Iraq – trying to change it for the better – was not a new one. The British were tasked with something similar under the Mandate System of the League of Nations. The more one contemplates the history of international law's interventions in Iraq, the less shocking the Coalition's invasion becomes. Indeed, the invasion starts seeming foreseeable and even inevitable.

The history of international law's interventions in Iraq narrates the birth and development of Iraqi sovereignty and the modern Iraqi nation-state. It also tells a story about the evolution and progress of modern international law. In the lead-up to the 2003 Iraq invasion, the United States attempted to convince the United Nations to authorize the use of force in Iraq. US President George W. Bush challenged the United Nations to 'prove to the world whether it's going to be relevant or whether it's going to be a League of Nations, irrelevant'.² Similarly, the international-law discipline principally portrays the League as failing to maintain peace, its shortcomings addressed through the United Nations. Thus, international-law textbooks generally depict the discipline as improving over time, progressing towards an increasingly perfected global order. This paradigm of disciplinary progress has shaped mainstream understandings of the relationship between colonialism and international law. The League of Nations Mandate System is usually depicted as the first stage of the decolonization process, which was completed through the United Nations Trusteeship Council. In this narrative, international law became progressively more enlightened, to the point at which colonialism was no longer tolerated.

This article tests this narrative by comparing the Mandate System with contemporary interventions into Third World sovereignty – interventions both with and without the support of the United Nations. Iraq makes a useful case study for such comparisons, having been subject to both United Nations-sponsored and Coalition interventions in recent decades, as well as British Mandate under the League.

The Iraq case serves to highlight two points. First, similarities between past and present interventions in Iraq call into question both the general paradigm of disciplinary progress and colonialism as a thing of the past. Second, the case

1 See, e.g., (2003) 97 AJIL, a special issue focused on future implications of the Iraq conflict, and (2003) 14 EJIL, focused on the war on terrorism including the Iraq invasion. See also public letters that international lawyers wrote to their governments: 'Letter: War Would Be Illegal', *The Guardian*, 7 March 2003, 29; 'Howard Must Not Involve Us in an Illegal War', *The Age*, 26 February 2003; H. Michael, *Canadian Law Professors Declare US-Led War Illegal*, World Socialist Website, 22 March 2003, www.wsws.org/articles/2003/mar2003/lawy-m22.shtml; M. Howard, 'The Bush Doctrine: It's a Brutal World So Act Brutally', *Sunday Times*, 23 March 2003, 21.

2 US President George W. Bush, 'Remarks by the President after Visit with Employees at Nebraska Avenue Homeland Security Complex', 19 September 2002.

study allows re-examination of the disciplinary reaction to the Iraq invasion. As most international lawyers condemned the 2003 invasion as illegal, the prevailing impression created by disciplinary scholarship was that of the United States' acting as an errant superpower and ignoring the rule of law. Alongside criticizing the United States, such a perspective portrays international law as the fair and egalitarian arbiter of world order. By comparing the 2003 invasion and occupation with previous actions in Iraq that enjoyed the support of international law and institutions, such as the 1990 Gulf War, it is possible to see that international law and international lawyers may have played multiple inconsistent roles in our response to the Iraq invasion. We may not have been only declaring fair and impartial truths to those in power. We may have been also condemning some exercises of power while permitting and normalizing other acts that were on many levels indistinguishable.

This article bases its comparative analysis around the concept of sovereignty, specifically Iraqi sovereignty. After the First World War, the League placed the colonies of defeated Central powers under the trusteeship of Allied powers, the goal being to teach colonies to become responsible, independent states. Thus, Anghie argued that the League first conceptualized Third World sovereignty as something that could be created through a process of Western tutelage.³ Additionally, the Mandate System classified the former colonies into various stages of evolution towards full sovereignty and thus embraced the concept of partial sovereignty. This article argues that similar assumptions about sovereignty underpin contemporary attempts to save failed states and discipline rogue states. Not only has the League influenced contemporary understandings of Third World sovereignty, but, paradoxically, aspects of the Mandate System exacerbated conflict. Instead of creating responsible sovereigns, the Mandate System sometimes increased the likelihood of state failure or rogue behaviour. Thus, this article argues that, alongside the narrative of disciplinary progress, there also runs a parallel story of an international order that, over time, creates the problems against which it has set itself. In the latter narrative, the League is not a failed institution from which international law learnt its lessons and moved on. Rather, international law has remained fascinated by the dynamic of relating to the Third World or periphery through efforts of construction and reconstruction. The same answers proffered by the League as a solution to the problem of decolonization have successfully recaptured international lawyers' imaginations in the post-Cold War era as a response to state collapse or errant behaviour.

Section 2 explains this article's focus on sovereignty, briefly describes what is meant by sovereignty, and outlines the methodological influence of Third World Approaches to International Law, or 'TWAIL', on this article. Section 3 identifies some shared legal assumptions underlying British attempts to create an Iraqi state under the Mandate System and the Coalition's contemporary endeavour to reconstruct Iraq. Section 4 links both the Mandate System and Coalition's efforts with the

3 See A. Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations', (2002) 34 NYUJILP 513.

post-Cold War trend in international law and institutions for saving failed states and disciplining rogue states.

2. BACKGROUND

2.1. Why sovereignty?

When debating the legality of the 2003 invasion, most international lawyers did not directly address the concept of sovereignty and its application to Iraq. The primary legal argument proffered by the United States and some of its allies was that invasion was permitted under the auspices of the 1990 SC resolution that authorized use of force in response to Iraq's invasion of Kuwait.⁴ The 1990 authorization allegedly revived when Iraq 'materially breached' the ceasefire requirements of the 1990 war by failing to disarm weapons of mass destruction. The argument for revival of old SC resolutions was novel, and many international lawyers contested its validity through a relatively straightforward application of the laws of the use of force.⁵ When debating the merits of the Coalition's case, most international lawyers argued over issues of interpretation and *jus ad bellum*. On a deeper level, however, they were arguing about the territorial and political sovereignty of Iraq. Coalition action was not confined to enforcing ceasefire conditions by searching for and disarming alleged weapons of mass destruction. The Coalition went much further by instituting regime change, undertaking long-term occupation and nation-building, and overseeing a transition to democracy. Therefore, the Coalition's argument raises questions not only about SC authorization, but also about principles of sovereign equality and non-intervention that are traditionally regarded as foundational norms of the international legal system.

The Coalition argument assumes Iraqi sovereignty is in some way different from sovereignty of Western nations. It is difficult to conceive circumstances in which argument for such extensive intervention would be made with regard to a Western nation or its allies, even if the nation had repeatedly violated international law. For example, the United States, through its veto power in the Security Council, has ensured that Israeli violation of more than 30 SC resolutions has remained uncensored, whilst sanctioning Iraq for far fewer violations.⁶ The disciplinary debate's focus on SC resolutions, rather than on Iraqi sovereignty, provoked this article's consideration of what assumptions about Iraqi sovereignty underlie both sides of the debate. If there had been an SC resolution authorizing the use of force in 2003, would that have made the ensuing invasion, occupation, and nation-building more acceptable and legitimate? Or would international lawyers still have been outraged?

4 US Letter to President of the Security Council, UN Doc. S/2003/351 (2003); Australian Letter to President of the Security Council, UN Doc. S/2003/352 (2003); UK Letter to President of the Security Council, UN Doc. S/2003/350 (2003).

5 See, e.g., V. Lowe, 'The Iraq Crisis: What Next?', (2003) 52 ICLQ 859; T. Franck, 'What Happens Now? The UN after Iraq', (2003) 97 AJIL 607; R. Falk, 'What Future for the UN Charter System of War Prevention?', (2003) 97 AJIL 590.

6 M. Ayoub, 'The War against Iraq: Normative and Strategic Implications', in T. Weiss et al. (eds.), *Wars on Terrorism and Iraq* (2004), 155, at 159.

As the Coalition's argument does not withstand a standard application of the laws of the use of force, it may seem that, while the Coalition may not fully respect Iraqi sovereignty, the rules of international law respect all states as sovereign equals. This article considers whether this is the case. How far do Coalition assumptions about Iraqi sovereignty differ from the assumptions of international law? The Iraqi sovereign state was born through the auspices of international law and international organizations. Did the Mandate System create sovereignty in Iraq to equal the sovereign power of Western states? Are there parallels and continuities between the Coalition's reasoning for invading Iraq and the way contemporary international law conceptualizes Iraqi sovereignty? If similarities exist, the invasion of Iraq, rather than an aberration in an otherwise coherent legal system, may be symptomatic of deeper structural problems.

2.2. Sovereignty and Third World approaches to international law

Sovereignty refers to a sealed territorial space within which there is supreme authority for governance.⁷ Sovereignty has been described as an institutional arrangement associated with a particular bundle of characteristics: a defined territory, recognition by other sovereign entities, exclusive authority within a defined territory, and effective internal and trans-border control.⁸ In the international system, sovereignty is manifest in the state. The classical definition of statehood is contained in the 1933 Convention of Rights and Duties of States (the Montevideo Convention): '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.'⁹ In addition to its legal characteristics, the state is also 'a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory'.¹⁰

However, the characteristics associated with sovereignty and statehood do not always accurately describe many entities that have been conventionally viewed as sovereign states. For instance, the autonomy of domestic structures in weak states has frequently been compromised through intervention by powerful states. Recognition of sovereignty has been accorded to entities that lacked juridical autonomy or territory, and denied to entities that possessed these attributes.¹¹ Despite inconsistencies in application, the concept of the sovereign state has been extremely successful. The system of sovereign states is traditionally accepted as originating with the Peace of Westphalia in 1648, which fashioned a system of governance for Europeans.¹² With colonial independence in the mid-twentieth century, this system

7 D. Philpott, *Revolutions in Sovereignty* (2001), 254.

8 S. Krasner, *Sovereignty: Organized Hypocrisy* (1999), 227; M. Fowler and J. Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (1995), 93, 124–5.

9 1933 Convention on Rights and Duties of States, 165 LNTS 19, Art. 1.

10 M. Weber, *Essays in Sociology* (translated and edited by H. Gerth and C. Wright Mills) (1946), 77–8.

11 Krasner, *supra* note 8.

12 L. Gross, 'The Peace of Westphalia, 1648–1948', (1948) 42 AJIL 20, at 21–4.

was replicated everywhere and sovereign states now cover the entire land surface of the globe.¹³

The international legal system is theoretically a system of sovereign and equal states.¹⁴ Although sovereignty is a foundational principle of international law, critical legal scholars have argued that important aspects of sovereignty's development and meaning have remained unquestioned by mainstream international law. Scholars of the Third World Approaches to International Law or 'TWAIL' school have questioned particularly the perceived neutrality of the concept of sovereignty, urging international lawyers not to take this for granted. Otherwise, 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.¹⁵

Recent TWAIL scholarship has argued that sovereignty is not a concrete legal concept but has been shaped through its inconsistent and flexible application in the Third World.¹⁶ Historically, international law took for granted the sovereignty of Western states.¹⁷ Consequently, it was only through denial, restriction, or creation of Third World sovereignty that the concept developed real meaning and content.¹⁸ International law in the sixteenth century contended that the law applied differently on the basis of whether people were considered to be civilized or uncivilized. The distinction was made on the basis of moral assumptions about ethnicity and race. Anghie's seminal TWAIL work maintains that this distinction has not only survived, but, over the centuries, shaped the development of ostensibly neutral international-law concepts such as sovereignty, all the way through to the present-day invasion and occupation of Iraq.¹⁹

Anghie addresses the Mandate System as part of his longer narrative on the historical phenomenon of treating Third World sovereignty differently to Western sovereignty, and identifies the Mandate System's distinctive feature as the notion of 'creating' sovereignty in the Third World. While Anghie briefly identifies the link

13 Philpott, *supra* note 7.

14 Charter of the United Nations, Art. 2(1).

15 M. Bedjaoui, *Towards a New International Economic Order* (1979), 45.

16 See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); V. Nesiah, 'Placing International Law: White Spaces on a Map', (2003) 16 LJIL 1; J. Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Government Legitimacy', (2000) 98 Mich. LR 1996; O. Okafor, *Redefining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000); E. Quashigah and O. Okafor (eds.), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (1999); S. Grovogui, *Sovereigns, Quasi-Sovereigns and Africans: Race and Self-Determination in International Law* (1996); M. Mutua, 'Why Redraw the Map of Africa? A Moral and Legal Inquiry', (1995) 16 Mich. JIL 113.

17 T. Lawrence, *The Principles of International Law* (1895), 85; Lawrence conceived European states as belonging to the family of nations 'since time immemorial'.

18 A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', (1999) 40 Harv. ILJ 1, at 69.

19 Anghie, *supra* note 16.

between Mandate territories and contemporary conflict and insecurity, he does not focus on issues of conflict and state failure, as this article proposes to do. This article tests some of Anghie's insights through application to the particular case study of Iraq. It also extends Anghie's arguments by making the link with the post-Cold War phenomenon of saving failed states and disciplining rogue states.

Iraq's consistent defiance of UN weapons inspections led the United States to label Iraq a 'rogue' state – a state lacking legitimacy.²⁰ This behaviour warranted regime change to ensure the presence of a government acceptable to the Coalition. The implication was that Iraq did not deserve sovereignty. The Mandate System institutionalized the concept of certain states' learning, earning, and deserving sovereignty, while the sovereignty of other states remained sacrosanct. This article argues that, while the criteria for legitimacy have changed, it has remained the prerogative of the West to define them. UK Prime Minister Tony Blair stated, shortly prior to Coalition troops' entering Iraq, 'we will protect Iraq's territorial integrity; we will support representative government that unites Iraq on the democratic basis of human rights and the rule of law'.²¹ How can invasion and occupation protect Iraq's territorial integrity? How can occupying forces impose a representative government? How can an illegal invasion impose the rule of law? This article argues that Prime Minister Blair's reasoning, rather than diverging from international law, is instead part of a historical tradition in international law in which sovereignty in the Third World has had to embrace these contradictory characteristics.

3. CREATING AND RECREATING IRAQ

Critical international lawyers examining interwar international law, such as Kennedy, Berman, Koskenniemi, and Anghie, utilized diverse methodologies including institutional analysis, discourse analysis, and socio-legal and post-colonial approaches.²² This article, focusing particularly on the League's effects on the periphery, attempts to extend TWAIL scholarship on the subject. While TWAIL scholarship is heterogeneous in its methods, most TWAIL scholars share an appreciation for, and insistence on, the importance of historical context. The historical legacies of state formation are significant causal mechanisms of contemporary insecurities and conflicts. As Edward Said states:

[just as] the struggle for control over territory is part of that history, so too is the struggle over historical and social meaning. The task for the critical scholar is not to separate one struggle from another, but to connect them, despite the contrast between the

20 US President George W. Bush, 'State of the Union Address', 29 January 2002.

21 UK Prime Minister Tony Blair, 'Atlantic Summit Press Conference', 16 March 2003.

22 See, e.g., D. Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* 841; N. Berman, 'A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework', (1992) 33 *HILJ* 353, "But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law', (1993) 106 *HLR* 1792, "The Appeals of the Orient": Colonized Desire and the War of the Rif, in K. Knop (ed.), *Gender and Human Rights* (2004), 195; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002); Anghie, *supra* note 16.

overpowering materiality of the former and the apparent otherworldly refinements of the latter.²³

In attempting to make the connection that Said describes, this section examines the creation of Iraqi sovereignty through the Mandate System, and considers the correlation between the legal assumptions of the League and contemporary efforts to rebuild Iraq. It does so primarily through exploring government communications and statements. For the interwar period, reliance is on British sources, particularly papers of the Baghdad High Commission, which describe the quotidian functioning of the Mandate. Similarly, I examine US government statements and communications during the 2003 occupation, particularly that of the Coalition Provisional Authority (CPA). Reliance is also placed on the research of notable Iraq historians such as Peter Sluglett, who specialized on the Ottoman and Mandate period.²⁴

3.1. Disavowal of imperial ambition

The aforementioned quote from UK Prime Minister Blair echoed the sentiments of past Western conquerors in the Middle East. On 19 March 1917, General F. S. Maude, Commander of British Forces, stated in Baghdad:

Our armies do not come into your cities and lands as conquerors or enemies, but as liberators It is the hope and desire of the British people and the nations in alliance with them that the Arab race may rise once more to greatness and renown among the peoples of the earth.

On 29 April 2003, US Secretary of Defense Donald Rumsfeld told the US armed forces, ‘unlike many armies in the world, you came not to conquer, not to occupy, but to liberate, and the Iraqi people know this’.²⁵ Similarly, the League of Nations explicitly renounced imperial ambitions. The Mandate System was devised as a deliberate move away from an international law of colonialism and imperialism, and towards an international law of Third World self-determination and independence.

From the seventeenth to early twentieth centuries, the territory of Iraq was part of the Ottoman Empire. Upon defeat in the First World War, the Ottoman Empire was dismantled and its territories were divided amongst victorious Allied powers. Britain and France drew borders in the region, including the borders of modern Iraq, on the basis of enlarging colonial spheres of influence and exploiting known oil resources.²⁶ The Mandate System placed the colonies of Central powers under the trusteeship of Allied nations. The goal of the trusteeship was to guide territories towards eventual independence.²⁷ Iraq was placed under British Mandate.²⁸

23 E. Said, Afterword to *Orientalism* (1995), 331–2.

24 See especially P. Sluglett, *Britain in Iraq: Contriving King and Country* (2007).

25 R. Khalidi, *Resurrecting Empire* (2004), 37.

26 *Ibid.*, at 32.

27 Covenant of the League of Nations, Art. 22.

28 Britain already had considerable influence in the region cultivated through trade agreements with local leaders, in some cases leading to Britain being the dominant or only trading partner. British companies established special concessions over strategic routes in the Tigris and Euphrates and infrastructure agreements including parts of the Iraqi postal and telegraph services. Ottoman officials accused the British of extending spheres of influence through illegal spread of weapons and money in the region and attempting

Unlike European sovereignty, the League conceived Third World sovereignty as something that needed to be and could be created.²⁹ Sovereignty was initially an all-or-nothing concept: either a society was or was not civilized.³⁰ However, during the nineteenth century, Charles Darwin's theories of evolution were interpreted by some international lawyers as explaining why the West was more civilized than the rest of the world.³¹ Scholars began developing elaborate taxonomies of social evolution, dividing non-European societies into various stages of development. Accordingly, some regions and entities were granted partial recognition – a kind of quasi-sovereignty – as entities with limited legal personality.³² This evolutionary approach was utilized by the Mandate System. Iraq was part of 'Group A' for regions that could be guided to independence relatively quickly. Regions perceived to be more backward were divided progressively into Groups B and C, as part of a longer evolutionary process towards eventual statehood.³³

3.2. Iraq under British Mandate: 1914–32

The type of state that Britain built in Iraq was shaped by two factors. The first was the deep unpopularity of British involvement in Iraq, among both Iraqi and British citizens.³⁴ The second was the tension between Britain's attempts to realize its national interests and, at the same time, fulfil its international obligations to the League. Both the British and the League were together responsible for the 'well-being and development' of Iraq.³⁵ However, when Britain first occupied Iraq in 1914, at the outset of the First World War, they assumed Iraq would become part of their empire. Baghdad was strategic to facilitate the imperial air route between Britain and India. Basra was even more indispensable for ensuring safe access to the Persian Gulf. Iraq was also vital for protecting British interests in Persian oilfields. Thus, despite League rhetoric about trusteeship, Britain began by instituting military control modelled on the Indian colonial regime of direct rule.

Direct rule caused mass popular resentment in Iraq, culminating in an armed revolt of 131 000 Iraqis in 1920. The British unsuccessfully attempted to suppress the rebellion through large, 'cost-effective' aerial bombing and the use of poison mustard gas. In the end, the revolt could only be quelled by overwhelming force administered by 90 000 Indian and British troops, resulting in thousands of Iraqi deaths and 2000 casualties amongst Indian and British soldiers.³⁶

to destabilize Ottoman authority: G. Çetinsaya, 'The Ottoman View of British Presence in Iraq and the Gulf: The Era of Abdulhamid II', (2003) 39 *Middle Eastern Studies* 194.

29 Anghie, *supra* note 3, at 513.

30 Anghie, *supra* note 18.

31 R. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (1996), 72.

32 G. Abi-Saab, 'International Law and the International Community: The Long Road to Universality', in R. MacDonald (ed.), *Essays in Honor of Wang Tieya* (1994), 38.

33 Covenant of the League of Nations, Art. 22.

34 T. Dodge, *Inventing Iraq* (2003), 9–41.

35 *Supra* note 33.

36 Khalidi, *supra* note 25, at 22.

Direct rule proved costly, in terms of lives and financial expenditure, and the Iraq Mandate became increasingly unpopular among British voters.³⁷ After the 1920 rebellion, the Colonial Office's Middle East Department rapidly declared a new policy: '[w]e have committed ourselves to the support of a particular form of government, viz., that of a constitutional monarchy under King Faisal.'³⁸ The British brought in a ruler whom the French had just expelled from Syria, the Hashemite prince, Faisal. He had served British interests well elsewhere, and they hoped that he might act as a buffer against nationalist pressures. As Faisal did not have a constituency of his own, he was assumed to be open to British manipulation, and the British hoped he could rally the moderates in the population behind the new state and build a coalition against radicals. He was installed as king through what was represented as a popular referendum, but in reality was a rigged plebiscite.³⁹ Alongside him there governed a cabinet of urban notables. British advisers were assigned to temper the power of cabinet and king. The High Commissioner was the only point of official British control over the new Iraqi government. Even the High Commissioner's role was not legally codified under the Mandate because of Britain's unpopularity in Iraq. This role was established separately under a formal treaty between the Iraqi and British governments. Thus, the British hoped to set up a flexible regime of control based around cabinet and king.

However, in the lead-up to Faisal's inauguration, he insisted that the High Commissioner's ultimate power be removed. Churchill had to ask the League for special permission to remove this supervisory authority on the basis that Iraq had 'advanced so far towards being able to stand alone'.⁴⁰ Faisal realized both the power and the weakness of his position. While he owed his position to the British, and the British relied upon him to protect their interests, he could not build a constituency for himself unless he showed himself to be more than a puppet king. He sought to build a power base for himself within Iraqi society that would give him autonomy from the British as well as from the nascent political elite forming in the cabinet.

Public opinion in Iraq opposed the notion of Mandate as insulting and patronizing. Ruling elites intentionally fuelled this resentment by translating the term 'Mandate' into Arabic in a manner that suggested the sovereign rule of Britain over Iraq.⁴¹ In 1922, capitalizing on local pressure, the cabinet and king forced Britain to formally replace the Mandate with a 20-year Treaty of Alliance. In the following year, Iraq successfully pushed for the Treaty to be reduced to a four-year protocol. This reduction also sat well with the prevailing sentiment in Britain at the time. Bonar Law was criticizing Lloyd George for his imperial overreach, insisting that 'we cannot alone act as the policeman of the world'.⁴² The British election in November

37 Dodge, *supra* note 34, at 24.

38 CO 730/34, Note prepared by the Middle East Department, Colonial Office, printed for the Cabinet, December 1922, Secret IRQ 3, 783.

39 Khalidi, *supra* note 25, at 99.

40 CO 730/4, CO 41616/21, Telegram from Secretary of State for Colonies to High Commissioner, 20 August 1921, 260–2.

41 P. Cox, 'Historical Summaries', in G. Bell, *The Letters of Gertrude Bell*, Vol. 2 (1939), 522–3.

42 Bonar Law quoted in M. Yapp, *The Near East since the First World War: A History to 1995* (1996), 380.

1922 centred on the Iraq issue. The Conservatives promised 'tranquillity and freedom from adventures and commitments' and the evacuation of Britain from Iraq. Law expressed the futile wish 'that we had never gone there'.⁴³

While everything seemed to be pointing towards the desirability of Britain's speedy exit from Iraq, there were those in the British administration who called for caution. Sir Percy Cox, High Commissioner to Iraq, argued that the majority of ordinary Iraqis welcomed the British, and that British withdrawal would lead to anarchy, a rise in Russian influence, and a return of the Turks.⁴⁴ Similarly, Gertrude Bell, Oriental Secretary to the High Commissioner, portrayed the Iraqi population as mute and passive, favouring benign British rule. She attributed calls for independence to the 'vociferous minority', who, if heeded, would lead the region into 'universal anarchy and bloodshed'.⁴⁵

Britain ended up extending its authority beyond the four-year protocol, not in response to its administrators' advice, but because of other factors. A dispute arose over the sovereignty of Mosul district, claimed by both Turkey and Iraq. The League, when asked to resolve the dispute, sent an inquiry commission to the area. The commission pointed to unresolved tensions in the region between Sunni and Shia, and Arabs and Kurds. The League agreed to give Mosul to Iraq on the condition that Britain extended its Mandate with a view to consolidating internal peace and stability. Colonial Secretary Leopold Amery, determined to secure the oil-rich Mosul area for Iraq, committed both Iraq and Britain to a new 25-year treaty, which could be terminated earlier if Iraq proved itself ready to stand alone. At this time came the discovery of proven oil reserves in other parts of Iraq. Large-scale British investment soon followed to develop them. British policy makers started to agree with the likes of Cox and Bell that it would be too risky for Britain to prematurely loosen its control.⁴⁶ When Faisal and the cabinet realized Iraq was not going to be allowed to enter the League and gain independence in 1929, they brought government in Baghdad to a standstill. However, the British had their way, as, in the last instance, British will was backed by the threat of overwhelming violence as represented by British aeroplanes and bombs kept ready at the main Iraqi airbase in Hinaidi.

Sir Henry Dobbs, the longest-serving of the four British High Commissioners to Iraq, outlined the British relationship with Iraq thus: '[t]he basic principle underlying the relations between the two Governments is cooperation towards a common end, namely the progressive establishment of an independent Government of Iraq, friendly to and bound by gratitude and obligation to His Britannic Majesty's Government'.⁴⁷ Britain's primary concern was the installation of a ruler who would remain favourable to British military and economic interests, even after nominal

43 Bonar Law quoted in *The Times*, 21 February 1923.

44 CO 739/53, CO 6851 7 Feb 23, Cabinet Committee on Iraq; P. Sluglett, *Britain in Iraq: 1914–1932* (1976), 80; E. Main, *Iraq from Mandate to Independence* (1935), 84.

45 E. Burgoyne (ed.), *Gertrude Bell: From Her Personal Papers, Volume 2, 1914–1926* (1961), 104.

46 Sluglett, *supra* note 24, at 156.

47 General Instructions to the Manner the High Commissioner of Iraq Discharges His Duties, Iraq Confidential B, from Devonshire, the Secretary of State for Colonies, to Sir Henry Dobbs, the High Commissioner for Iraq, Downing Street, 20 September 1923, Sudan Collection, University of Durham Library, Box 472/13/141, 1–14.

independence was granted.⁴⁸ Britain agreed to put forward Iraq for League membership and independence in 1932. Before independence, an Anglo-Iraqi treaty was negotiated that gave Britain valuable oil concessions and access to military bases.⁴⁹

Theoretically, Iraq was supposed to measure up to Western standards of sovereign statehood. In reality, Iraq's ability to self-govern was damaged under the Mandate. Britain had undermined the powers associated with effective government in Iraq.⁵⁰ Britain abrogated its Mandate responsibilities and actively colluded with the Iraqi governing elite to build a quasi-state with sufficient administrative capabilities to satisfy the League. Commitments previously given to the League about inclusion of different ethnic and religious communities were discarded. Britain realized that the governing elite were unrepresentative. Although inhabited by a diverse and divided population, Iraq was run by small clique of mainly Sunni politicians who could not control the country without the help of British aeroplanes. The government and the economy remained financially dependent upon the British Exchequer. Thus, while the government was capable of administering essential services, Iraq was nowhere near fulfilling the other four criteria of internationally sanctioned sovereignty: that the state be 'capable of maintaining its territorial integrity and political independence', that it be 'able to maintain the public peace throughout the whole territory', that it have 'adequate financial resources to provide regularly for normal Government requirements', and that it have laws that afforded 'equal and regular justice to all'.⁵¹ In the end, the League granted Iraq its independence on the basis of its ability to stand alone administratively, despite its inability to do so financially or militarily.

Britain did not believe that its Mandatory responsibilities required it to build in Iraq a state comparable to Britain itself. Instead, as Dobbs argued, Britain was only required to raise Iraq to the standards of the weakest members of the League: 'Iraq is at least as stable as China, Portugal, Greece or Abyssinia'.⁵² Dobbs opined that this was the best that Iraq could hope for: 'My hope is that, even without our advice, Iraq may now be so well established, that she may be able to rub along in a corrupt, inefficient, oriental sort of way, something better than she was under Turkish rule'.⁵³

While Dobbs imputed some of Iraq's governing problems to cultural deficiencies, ineffective governance in Iraq was at least partially an inheritance of its time under British Mandate. In the late nineteenth and early twentieth centuries, influential liberal Arab, Turkish, and Iranian intellectuals tried experiments with constitutionalism and democracy but their efforts were repeatedly undermined by colonial powers.⁵⁴ Similarly, after independence, Britain hindered any potential evolution towards representative government. In 1941, an elected and popular government replaced Faisal. The new government, relying on the conditions of Iraq's independence

48 Khalidi, *supra* note 25, at 99.

49 F. Tachau (ed.), *Political Parties of the Middle East and North Africa* (1994), 175.

50 Khalidi, *supra* note 25, at 21–2, 98–9; see also Anghie, *supra* note 3, at 612.

51 CO 730/169/7, 1931, No. 88379/1, Part I, Conditions Governing Termination of Mandatory Control, League of Nations, CPM 1210 (I), Geneva, 26 June 1931, Permanent Mandates Commission, Twentieth Session, 2.

52 Dobbs, DO No. SO 448, Secret Draft, 174–5.

53 Henry Dobbs's letter to Shuckburgh at the Colonial Office, 28 December 1929, CO730/150/12, 1929 Iraq, 4–5.

54 Khalidi, *supra* note 25, at 11–16.

treaty with Britain, revoked permission for British troops to land at Basra. Britain disregarded the treaty provisions, as well as Iraq's territorial and political sovereignty, and invaded.⁵⁵ Britain defeated the newly formed Iraqi army, reoccupied the country, and reinstalled Faisal to do their bidding.⁵⁶ Faisal's regime lasted until ousted by the Baathist Party in 1958. To Britain, the invasion was justified because the exigencies of the Second World War made it a wartime necessity to land troops in Basra. The United States was to echo this reasoning in 2003, when it claimed that regime change in Iraq was a wartime necessity as an integral part of its 'war on terrorism'.

3.3. Coalition efforts to reconstruct Iraq: 2003–ongoing

Seventy years later, another attempt is under way to refashion Iraq into an acceptable sovereign. The Coalition shares the League's conceptualization of Iraqi sovereignty as something that can be created through a process of tutelage by the West. There are numerous parallels with both the challenges Britain faced in the 1920s and 1930s and solutions proffered. The Coalition has also faced intense international scrutiny and has tried to quell a well-armed and resentful society through military might. The cost in lives and money has made the continued Coalition presence in Iraq very unpopular domestically. As a result, many Coalition states have either withdrawn their support or cut the cost of their presence. The United States has also been gradually reducing its Iraq commitments as a result of changes in government and foreign policy. Like Britain in the 1930s, the United States and other Coalition states are striving to balance their long-term military and economic interests in Iraq with domestic demands to cut back on military and financial costs. As a result, the Coalition is at risk of repeating Britain's mistakes by compromising its self-assumed responsibility to build an independent, stable, and liberal Iraqi state.

The rifts in US President George W. Bush's administration fell along similar lines to the disagreements amongst British administrators on how to best manage Iraq. While those such as Paul Wolfowitz, deputy secretary of defense, and Paul Bremer, governor of the CPA, wanted to totally transform Iraq into an example of liberal democracy for the Middle East, Vice President Dick Cheney, Secretary of State Colin Powell, and Secretary of Defense Donald Rumsfeld wanted foreign-policy interests to be narrowly defined to avoid extended forays into state-building. They wanted to replace the upper echelons of government, but leave basic structures of governance and administration intact.

Anghie points out that, during the process of creating sovereignty, the precise location of sovereign power at any given time remains ambiguous.⁵⁷ The shifting and flexible location of sovereignty during the process of recreating Iraq makes it possible for the United States to interpret sovereignty in a way that suits US interests. President George W. Bush stated from early in the occupation that sovereignty

55 G. Schwarzenberger, *Power Politics: A Study of World Society* (1964), 179.

56 Ibid.; Khalidi, *supra* note 25, at 24.

57 Anghie, *supra* note 3, at 578; Anghie, *supra* note 18, at 56–7.

remained with the Iraqi people.⁵⁸ But, at the same time, it was the United States that conditioned the formation of government in Iraq. While Iraq moved towards independence, it was the United States that set the conditions and timetables. While Iraq moved towards democracy, the occupation has continued, with the United States deciding when it will be time for departure.

The United States could allocate and withdraw sovereignty at will and in varying degrees at different stages of the transition towards full independence. For instance, on 30 June 2004, the Coalition claimed to restore full sovereignty to the Iraqi state as represented by the Interim Iraqi Government, and the CPA was dissolved. At the same time, the Interim Government exchanged letters with the Coalition requesting the presence of Coalition troops.⁵⁹ Thus, while the Interim Government was granted a degree of sovereignty commensurate with making such a request, they could not make independent decisions with regard to many other military or governance matters due to the sizeable Coalition military presence.

Partial sovereignty during the lengthy transition and occupation process has meant the United States can limit Iraq's exercise of sovereign power, or endow such power, at US discretion. Such an arrangement has also allowed Coalition states to establish strategic economic and financial reforms and contractual and tendering relationships, ensuring Iraqi short- and long-term economic dependence.⁶⁰ As described in the previous section, the British managed their political and economic interests in Iraq through similarly adaptable supervisory and co-operative arrangements, and flexible understandings of Iraqi sovereignty and independence.

3.4. Understanding Iraq: then and now

The Permanent Mandates Commission, which supervised implementation of the Mandate System, undertook extensive fact-finding missions in Mandate territories and endeavoured to classify and systematize information about varied aspects of life, from labour productivity to mortality, health, and education. This information was used to set standards for the territories to scientifically measure their evolution towards sovereign statehood. Anghie argues that these practices had long-term detrimental consequences for the Third World, foreshadowing, among other things, the World Bank and International Monetary Fund's intervention into development policies.⁶¹ Britain traditionally depended on a similar process of scientific quantification to understand and successfully administer its colonies. However, because of money and troop restrictions in the aftermath of the First World War, Britain could not do this in Iraq. Iraq was not subjected to a detailed examination by any of the four British High Commissioners to Iraq. Britain's weak knowledge of Iraq

58 US President George W. Bush, 'President Bush Discusses Early Transfer of Iraqi Sovereignty', 28 June 2004: 'We pledged to end a dangerous regime, to free the oppressed, and to restore sovereignty. We have kept our word.'

59 Annexes to UN Doc. S/Res/1546 (2004).

60 See, e.g., J. Gathii, 'Historical Dispossession through International Law: Iraq in a Historical and Comparative Context', in B. Gruffydd Jones (ed.), *Decolonising International Relations* (2006), 131.

61 Anghie, *supra* note 3.

was exacerbated by retreating Ottoman officials' taking or destroying government records in 1914. Lack of knowledge greatly undermined Britain's ability to effectively control the populace.

Iraq was understood through dominant cultural stereotypes. To a large extent, Britain's conception of Iraq was influenced by its perception of Ottoman culture.⁶² Urban Iraqi governing elites were seen to be corrupted by the Ottoman way of thinking: the oriental's love of power, intrigue, and scheming. Islam was also seen as a corrupting influence, with Shia Islam seen as more irrational and debilitating than the Sunni strain.⁶³ In contrast to the debased, corrupt urban Iraqi, the rural Iraqi was seen as the noble savage, representing the authentic Iraqi nature uncorrupted by Ottoman influence. The rural Iraqi was perceived to be tribal and irrational, but loyal and trustworthy, as epitomized in the romanticized figure of the sheikh. The British tried to make sense of the rural Iraqis through comparisons with Britain's own feudal past, comparing tribal leaders with Britain's landed aristocrats.⁶⁴ Britain constructed lists to identify tribal leaders and the tribes and geographical areas they controlled. Research was targeted at the leaders, not at the populace they purportedly controlled. There were many peoples and groupings for whom the category of 'tribe' was not particularly fitting or helpful, but the notion of tribe was used in an all-encompassing way in an attempt to make sense of the region. In the process of attempting to understand Iraqi society, Britain was remaking it. Most leaders soon learnt to take advantage of the money, influence, and military support that they could gain by exploiting Britain's lack of knowledge of local conditions.

The British did not understand Iraqi society and had little hope of shaping it into a stable state. The United States is living with the consequences of that failure and is in danger of repeating it. President Bush's administration was unwilling to seek the advice of those who criticized their policies. Lack of knowledge meant the United States was forced to rely on information from Iraqi political parties in exile. The United States supported these parties in an effort to eradicate remnants of Saddam Hussein's Baathist regime. However, long exile meant these parties were not known to or trusted by the majority of Iraqi citizens.

One of the reasons for the Coalition's myriad problems in Iraq is that the United States understands Iraq through distorted cultural stereotypes, just like the British 70 years earlier.⁶⁵ For instance, the United States was unable to anticipate accurately the immediate effects of the Coalition's invasion.⁶⁶ They expected the invasion to be supported by a mass Iraqi popular movement that would remove government leaders while leaving structures of administration, civil service, and army largely in place. In reality, during the invasion, resistance from the army and government was

62 Dodge, *supra* note 34, at 63–6.

63 Ibid., at 64.

64 Ibid., at 1.

65 R. Davis, 'Culture as a Weapon', 255 *Middle East Research and Information Project* (2010); Dodge, *supra* note 34.

66 Khalidi, *supra* note 25, at 49–52; Dodge, *supra* note 34, at 159, 161.

stronger than anticipated.⁶⁷ State structures that were expected to survive had been eroded during the sanctions regime.⁶⁸

As sovereignty has developed differently in the Third World, there are translation problems when attempting to understand Iraqi society through the filter of Western philosophies.⁶⁹ Guha argues that political modernity in the Third World is not necessarily commensurable to Western understandings of modernity. It has taken on its own shape because of the different logic that exists there – a logic shaped not only by its own traditions, but also by the trauma of colonization.⁷⁰ For example, during its time under British mandate, Iraq was introduced to Western ideas of political modernity through quasi-liberal institutional frameworks for a modern nation-state. But, alongside this are unique cultural notions, including those about religion and tribal community. Political modernity in Iraq consists of the braiding together of both Western and indigenous traditions.⁷¹ Coalition attempts to build a liberal nation-state in Iraq require an understanding that Iraq is not an empty vessel waiting to be filled with meaning. Iraq comes with its own inherited plural histories that have already been absorbed by its peoples.

Innumerable parallels between the Coalition's approach in Iraq and that of the League indicate that, while the Coalition may have departed from international laws governing the use of force, it nevertheless adhered closely to some of international law's past patterns of engagement with Iraq. Section 4 links these parallels with trends in international law and institutions in the post-Cold War era.

4. CONTEMPORARY INTERNATIONAL-LAW CONCEPTIONS OF THIRD WORLD SOVEREIGNTY

4.1. The ubiquitous threat of the unruly periphery

In the aftermath of the First World War, US President Wilson and other victorious Allied leaders saw the world as dangerously fractured and unstable. Such a world was perceived as an ever-present threat to the West, posing the risk of another global conflagration. Decolonization through the Mandate System was seen as an important measure to stabilize rising nationalism and independence movements in colonies. In the aftermath of the Cold War, Western leaders saw themselves as facing a similar conundrum. The dangers of instability were again perceived to be emanating from the peripheries of the international system. Once more, the West had to consider to what extent reform of the Third World was needed in order to secure long-term stability. As with the League in the interwar era, international institutions were judged to be the appropriate vehicle through which stability could be imposed. The reconstruction of Third World sovereignty was again the means whereby order could be achieved.

67 Dodge, *supra* note 34, at 163–4.

68 Ibid., 157.

69 D. Chakrabarty, *Habitations of Modernity: Essays in the Wake of Subaltern Studies* (2002), xxii.

70 R. Guha, quoted in D. Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (2000), 14.

71 Chakrabarty, *supra* note 69, at 9.

The end of the Cold War was perceived by many in the West as a victory for Western ideologies of liberalism, capitalism, and democracy.⁷² Although Article 2(7) of the UN Charter prohibits extensive UN direction of a state's internal matters, in the post-Cold War era, Western political and intellectual elites and powerful NGOs began advocating greater international intervention into domestic realms on liberal humanitarian and human-rights issues. Over the last two decades, the United Nations has increasingly forcibly intervened for humanitarian reasons, regardless of whether states formally consented. Intervention became gradually more acceptable, not just for humanitarian reasons, but also for economic reasons. The International Monetary Fund and World Bank started conditioning loans on economic and governance reform.⁷³ Increasing concern about environmental problems such as global warming will also undoubtedly change perceptions about what remains within the domestic jurisdiction of states.

The bipolar security structure of the Cold War was replaced by an opposition between the allegedly peaceful, developed, industrialized world and poorer regions filled with turmoil and pervasive conflict. Mainstream scholarship perceived the post-Cold War security challenge as a new type of war consisting of turbulent civil conflicts within poor states.⁷⁴ Post-Cold War scholarship has largely focused on the 'humane' waging of wars by developed countries against brutality in many parts of the developing world. The peace enjoyed by developed states has increasingly been attributed to democracy, and turmoil in the Third World to the lack thereof, rather than economic or other disparities.⁷⁵

The aforementioned interventionist trends, in addition to globalization and the increasingly free flow of goods and capital across borders, have led to a perception that the post-Cold War era is seeing the slow erosion of state sovereignty.⁷⁶ However, it is primarily Third World sovereignty that is being eroded, whereas the West is increasingly guarding its borders. For instance, alongside increased Western willingness to intervene in humanitarian crises, there is a corresponding unwillingness to accept refugees.⁷⁷ Sovereignty of powerful Western states remains central to international law-making and shaping the global economy. Sovereignty continues to underlie social, political, and economic organization, and it remains the concept through which global hierarchies are maintained.⁷⁸ Thus, this section argues that saving failed states and disciplining rogue states are not just Coalition objectives in

72 F. Fukuyama, *The End of History and the Last Man* (1992); C. Reus-Smit, 'The Return of History', in S. Harris et al. (eds.), *The Day the World Changed? Terrorism and World Order* (2001), 1, at 2.

73 A. Anghie, 'Time Present and Time Past: Globalization, IFIs, and the Third World', (2000) 32 NYUJILP 243.

74 M. Singer and A. Wildavsky, *The Real World Order: Zones of Peace/Zones of Turmoil* (1993); R. Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (2003); J. Goldgeier and M. McFaul, 'A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era', (1992) 46 IO 467.

75 Singer and Wildavsky, *supra* note 74; Cooper, *supra* note 74; Goldgeier and McFaul, *supra* note 74.

76 R. Falk, 'International Law and the Future', (2006) 27 *Third World Quarterly* 727.

77 Office of the UN High Commissioner for Refugees, *The State of the World's Refugees: Human Displacement in the New Millennium* (2006).

78 S. Pahuja, 'Power and the Rule of Law in the Global Context', (2004) 28 *Melbourne University Law Review* 232, at 241.

Iraq, but have been enduring disciplinary tendencies, shaping international law not only during the Mandate System, but also in contemporary international law.

4.2. Rescuing failures, disciplining rogues

The term 'failed state' came to prominence after Helman and Ratner's influential 1993 article.⁷⁹ Their definition of a state 'utterly incapable of sustaining itself as a member of the international community' gained widespread acceptance.⁸⁰ However, as Gordon observed, many of the states deemed failures had problems in their internal realm where they were unable to perform basic governance functions, whereas they continued to function in the international realm.⁸¹ Thus, states and scholars have perceived incapacities in either internal or international spheres as constituting state failure. The term 'rogue' state gained notoriety when US President George W. Bush used the term to define regimes in Iraq, North Korea, and Syria.⁸² While a failed state needs to be saved because governance systems have collapsed, a rogue state needs to be disciplined for its crimes against its own people and the international community.⁸³ Despite their differences, this article analyses failed states and rogue states jointly due to similarities in the intervention process.

The UN Security Council has embraced the notion of saving failed states, undertaking numerous interventions in the past two decades. Thus far, intervention has been inconsistent, with time and resources heavily invested in some states, while other states in similar or greater need have been ignored.⁸⁴ The process of saving failed states is open to the same abuses perpetrated under the Mandate System, as powerful states influencing the nation-building process may pursue self-interest rather than long-term welfare of the target state. As with the Mandate System, while Western sovereignty retains classical characteristics of autonomous government and freedom from intervention, Third World sovereignty is precarious, dependent on the perceptions of outside states and organizations with capacities to intervene that it is not a failure or a rogue.

'Saving' implies rescuing as well as evangelical connotations of redemption from sin, recalling the sacred trust that the League assigned to the Allies over their Mandates. Choice of the term 'failed' – as opposed to states with 'public-order problems', 'infrastructure problems', or 'economic problems' – is unspecific as to how states have fallen short.⁸⁵ 'Failed' is an arresting term, abrupt in its judgement, finality, and arrogance.⁸⁶ Richardson compares the judgement of state failure with free-market ideology, where the poor person is held morally liable for his or her own

79 G. Helman and S. Ratner, 'Saving Failed States', (1992–93) 89 FP 3.

80 R. Wilde, 'The Skewed Responsibility Narrative of the "Failed States" Concept', (2003) 9 *ILSA Journal of International and Comparative Law* 425, at 426.

81 R. Gordon, 'Saving Failed States: Sometimes a Neo-Colonialist Notion', (1997) 12 *AUJILP* 903; K. Musalo, J. Moore, and R. Boswell, *Refugee Law and Policy* (1997).

82 US President George W. Bush, 'State of the Union Address', 29 January 2002.

83 G. Simpson, 'Two Liberalisms', (2001) 12 *EJIL* 537, at 560–5.

84 S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2003).

85 H. Richardson, 'Failed States', Self-Determination and Preventative Diplomacy: Colonialist Nostalgia and Democratic Expectations', (1994) 10 *Temple ICLJ* 1, at 13.

86 *Ibid.*, at 14.

poverty, the assumption being poor people failed to take advantage of freely available opportunities.⁸⁷ Thus, the label of failure acts in some ways as a shield against having to consider *all* the causes and consequences of imbalances of wealth and power.

When a state collapses or commits internal or international crimes, the international community usually attributes primary responsibility to the state itself. As Iraq has had the same status as Western sovereigns since independence, any perceived shortcomings are assumed to be due to Iraq's immaturity (if seen as a failure) or deviancy (if seen as a rogue).⁸⁸ However, as described earlier in this article, since its birth, equal sovereign statehood in Iraq has been more mythical than objective. As Adrian Hamilton argues, 'the deeper truth is that most of these states are failing because they were Western constructs in the first place'.⁸⁹ Governments of failed states have had little hope of resolving root causes of civil conflict and averting external and historical contributing factors. In the case of rogue states, while liability is usually attributed to domestic perpetrators, the blame often equally extends to contributing external actors.

The underlying vision is of a world divided into successful, lawful, rational states (Western states and states that resemble them) and those that are not.⁹⁰ While the concept assumes the universality and neutrality of the concept of sovereign statehood, where all states are equal under international law, it simultaneously assumes that states that do not conform to Western standards are failures.⁹¹ This contradiction is as central to the problem of failed and rogue states as it is to the evolution of modern international law. It replicates an enduring disciplinary dynamic, as evidenced in the Mandate System. International law inevitably perpetuates the problem of failed and rogue states by declaring universal standards in such a way that some states will inevitably fall short. As Fitzpatrick describes, '[w]hen the universal project of Enlightenment confronts the limits of its appropriation of the world, it creates the very monsters against which it so assiduously sets itself'.⁹²

Post-Cold War international law has had to revisit colonialism and decolonization. Upon intervention into a failed or rogue state, some scholars have called explicitly for a return to colonialism.⁹³ However, most have called for temporary supervision of the failed or rogue state through trusteeship.⁹⁴ The idea of 'earned' sovereignty has also been articulated, requiring problem regions to gradually prove their worthiness of independent statehood.⁹⁵ These proposals recall both the League of Nations Mandate System and its successor, the UN Trusteeship Council. Trends

87 Ibid., at 21.

88 Jackson, *supra* note 31, at 21.

89 A. Hamilton, 'The Idea of the Nation State Is Fatally Flawed', *The Independent*, 18 August 2004, 35.

90 M. Olmstead, 'Are Things Falling Apart? Rethinking the Purpose and Function of International Law', (2005) 27 *Loyola LAICLR* 401, at 404.

91 Ibid.

92 P. Fitzpatrick, 'The Desperate Vacuum: Imperialism and Law in the Experience of Enlightenment', in A. Carty (ed.), *Post-Modern Law: Enlightenment, Revolution and the Death of Man* (1990), 105.

93 W. Pfaff, 'A New Colonialism? Europe Must Go Back into Africa', (1995) 74 *FA* 1.

94 Helman and Ratner, *supra* note 79.

95 M. Scharf, P. Williams, and J. Hooper, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty', (2003) 31 *Denver JILP* 349.

of long-term intervention and nation-building raise questions about how far the UN Charter allows a return to colonial practices. The Charter does not permit the establishment of new trusteeships. However, it has been argued that the existence of the Trusteeship Council means the Charter recognizes the legitimacy of colonialism in some instances.⁹⁶ Although the Charter is clear about sovereign equality and self-determination, it does not explicitly declare the illegality of colonial or quasi-colonial practices.

As aforementioned, the Mandate System first conceptualized sovereignty as something that could be created. Anghie argued that aspects of the Mandate System created or exacerbated war and conflict, and points out that Iraq, Palestine, and Rwanda are all former Mandate territories.⁹⁷ Yet, international law has embraced contemporary efforts to create sovereignty artificially in failed and rogue states. There is continuity between international-law trends to save failed states and the Coalition's reasoning for invading Iraq. While the United Nations did not support the Iraq invasion, international law and institutions created an environment that made the invasion of Iraq possible, foreseeable, and perhaps even inevitable.

Despite the long tyrannical rule of Saddam Hussein, Iraq was only perceived as a rogue when it invaded Kuwait in 1990. The UN Security Council determined the invasion to be a breach of international peace and security.⁹⁸ After Iraq was driven from Kuwait in 1991, the Security Council employed several techniques to discipline and control Iraq. UN observers were stationed 10 miles inside the Iraqi border to monitor a demilitarized zone and a border commission redetermined Iraq's frontiers. Weapons inspectors were to search and oversee the destruction of chemical, biological, and nuclear weapons. Severe trade sanctions were imposed.⁹⁹ Later, no-fly zones were enforced in Iraq's north and south, after the Security Council condemned the suppression of Kurds and Shiites.¹⁰⁰ Iraq was divided, monitored, supervised, and visibly subjugated and Resolution 687 (1991) indicated no deadline for sanctions and surveillance.¹⁰¹

Simpson compares such a regime with prison:

In the case of criminal states, there is control through exclusion followed by a mixture of surveillance and community-sanctioned violence . . . Pushing this metaphor further, one might argue that the outlaw state is incarcerated within a separate legal regime without rights and subject to continual surveillance and occasional disciplinary violence.¹⁰²

The United Nations explicitly and implicitly gave the United States and its allies authority to carry out disciplinary procedures in the 1990s. It was the United States and its allies, not the United Nations, that determined when, where, and how to

⁹⁶ Charter of the United Nations, Arts. 73–91.

⁹⁷ Anghie, *supra* note 3, at 622.

⁹⁸ UN Doc. S/Res/46 (1990); UN Doc. S/Res/678 (1990).

⁹⁹ UN Doc. S/Res/687 (1991).

¹⁰⁰ UN Doc. S/Res/688 (1991).

¹⁰¹ UN Doc. S/Res/687 (1991).

¹⁰² G. Simpson, *Great Powers and Outlaw States* (2004), 293–4, 313–14; M. Foucault, *Discipline and Punish: The Birth of the Prison* (translated by Allan Sheridan) (1977).

enforce the Security Council's resolutions. The United States, the United Kingdom, and France bombed Iraqi territory at their discretion, and implemented no-fly zones, without seeking additional resolutions.¹⁰³ The 2003 invasion was the continuation of a long-standing understanding on the part of the United States that they can indefinitely continue the process of disciplining Iraq.

Between 1991 and 2001, although Saddam Hussein's regime was by no means docile and obedient, Iraq seemed to have returned to a manageable state. While Iraq would occasionally defy authority and be disciplined with bombings, the situation was perceived to pose no immediate international threat. However, after the 9/11 attacks, the United States returned to disciplining through a massive use of force.

Despite US deviation from *jus ad bellum* during the 2003 invasion, the disciplinary machinery of international law can be recognized in the invasion's aftermath. The disciplinary debate fixated on whether SC authorization existed for the invasion, suggesting that, if authorization existed, then the violence that ensued would have somehow been more justifiable and less imperial.¹⁰⁴ Although there was no indication from Iraqis that they wanted international help in rebuilding their nation, Coalition forces were soon joined by thousands of private contractors for everything from security to rebuilding infrastructure, writing the constitution, and privatizing the oil industry.¹⁰⁵ The CPA issued orders on great and small issues pertaining to the building of a new liberal democracy, including removing Baath Party adherents, privatizing state-owned industries, establishing banks, and amending intellectual property laws.¹⁰⁶ Despite temporary deviance from the laws of the use of force, Iraq was soon placed in a nation-building context familiar to post-Cold War international law.

4.3. Democracy promotion: a departure from past practices?

Alongside aforementioned legacies of the Mandate System, the contemporary international order differs from the League in its prioritization of democracy. In contrast with the British partiality for constitutional monarchy, US President Bush takes pride in an American tradition that 'after defeating enemies, we did not leave behind occupying armies; we left constitutions and parliaments'.¹⁰⁷ In his opinion, regime change and the democratization of Iraq will be an example for the region and 'old patterns of conflict in the Middle East can be broken'.¹⁰⁸

In Iraq, democracy promotion is particularly mistrusted. Under the Mandate, the British either impeded existing democratic tendencies or set up undemocratic regimes.¹⁰⁹ Additionally, just as the British compromised their mandatory responsibilities due to political and financial exigencies, Iraqis are suspicious as to how

103 R. Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Pre-Emptive Self-Defense', (2003) 97 AJIL 576, at 579; J. Yoo, 'International Law and the War in Iraq', (2003) 97 AJIL 563, at 567, 570.

104 L. Damrosch and B. Oxman, 'Agora: Future Implications of the Iraq Conflict: Editors' Introduction', (2003) 97 AJIL 553.

105 R. Chandrasekaran, *Imperial Life in the Emerald City* (2006).

106 Orders and Regulations of Coalition Provisional Authority.

107 US President George W. Bush, 'President Discusses the Future of Iraq', 26 February 2003.

108 Ibid.

109 See subsection 3.2, *supra*.

committed the Coalition is to democracy in Iraq. Genuine democratization will lead to free expression of popular will, most likely resulting in removal of US military bases; in Iraq's Shia majority sympathizing with its predominantly Shia neighbour, Iran; in support for the Palestinian cause; and in opposition to Israeli occupation and settlement of Palestine. Given that the United States finds all these consequences objectionable, a significant proportion of the Iraqi population has responded to the Coalition's democratization efforts with cynicism and hostility.¹¹⁰

Despite Middle Eastern antipathy to forcible democratization, and notwithstanding the lack of SC authorization, the United Nations has supported Coalition efforts to democratize Iraq. While there were many international lawyers who condemned the illegal invasion of Iraq, there were also numerous international legal and political scholars discussing how to best build a democratic Iraq even before Coalition forces reached Baghdad,¹¹¹ perhaps because the rush to democratize after hostilities cease is familiar territory for the discipline.

The United Nations has to some extent accepted the Iraq invasion *ex post facto*. After the invasion, the Security Council passed resolutions on Iraq acknowledging US control. The Fourth Geneva Convention and the Hague Regulations require an occupying power to preserve, as far as possible, the existing government and legal system, because occupation is generally understood to be temporary.¹¹² While Resolution 1483 (2003) makes reference to the Convention and the rules, it authorizes behaviour beyond legal limits.¹¹³ The Coalition was to create 'conditions in which Iraqi people can freely determine their own political future' and 'establish national and local institutions for representative governance'.¹¹⁴ Additionally, the resolution established no accountability mechanism to ensure Coalition behaviour did not exceed that which was authorized.¹¹⁵

Resolution 1483 further declared the Coalition could distribute proceeds of the Iraqi oil trade.¹¹⁶ While the resolution asks funds to be used to benefit Iraqis, again, there is no accountability mechanism. Benefit is to be assessed by the Coalition, allowing use of oil money to pay Western corporations to repair Iraqi infrastructure that the Coalition forces had destroyed.¹¹⁷ Resolution 1483 directed the Coalition to promote 'the welfare of the Iraqi people through the effective administration of the territory' and 'economic reconstruction and the conditions for sustainable

¹¹⁰ Ibid., at 8.

¹¹¹ D. Byman, 'Constructing a Democratic Iraq: Challenges and Opportunities', (2003) 28 IS 47; A. Dawisha and K. Dawisha, 'How to Build a Democratic Iraq', (2003) 82 FA 36; K. Makiya, 'A Model for Post-Saddam Iraq', (2003) 14 *Journal of Democracy* 5.

¹¹² 1949 Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 75 UNTS 287, Arts. 47–78; 1907 Regulations Concerning the Laws and Customs of War on Land, 205 ConTS 277, Art. 43.

¹¹³ UN Doc. S/Res/1483 (2003).

¹¹⁴ Ibid.

¹¹⁵ J. Gathii, *supra* note 60, at 131.

¹¹⁶ UN Doc. S/Res/1483 (2003).

¹¹⁷ D. Whyte, 'The Crimes of Neo-Liberal Rule in Occupied Iraq', (2007) 47 *British Journal of Criminology* 177; D. Atkinson, 'Selling Iraq: Reconstruction, Privatization and Empire in Denial', (April 2007) *Conflict in Focus* 18; International Crisis Group, 'Reconstructing Iraq', in *ICG Middle East Report No. 30 (Amman, Baghdad, Brussels)* (2004); US Government Accountability Office, *Rebuilding Iraq: US Mismanagement of Iraqi Funds* (2005), 13.

development'.¹¹⁸ The Coalition could interpret the scope of the mandate as it saw fit, and the mandate was seen as sufficient to transform Iraq into a free-market economy.¹¹⁹ Initial Coalition action included abolition of barriers to foreign investment and trade and facilitating Iraq's eventual entry into the World Trade Organization. While the CPA was dissolved in June 2004,¹²⁰ Iraq's Transitional Administration Law carried forward all the CPA's economic reforms.¹²¹ In May 2005, the Transitional Government confirmed its intentions to continue market reforms of the CPA. The Iraqi constitution also guarantees the path of economic liberalization.¹²²

US overhaul of Iraqi political and economic structures is identical to that in many other Third World states after international intervention. The aberration in Iraq was the lack of UN authorization, and the debate focused mainly on this. Regardless of authorization, there are important justice issues raised by the forcible recreation of Third World states in the Western image, not the least of these being the resurrection of legal concepts from the Mandate System. This is particularly problematic given that the discipline usually portrays the League as an institutional failure from a bygone era, surpassed by the more enlightened edicts of contemporary international law.

5. CONCLUSION

US President George W. Bush repeatedly declared that Iraq was invaded because of *its* deviance from international law.¹²³ As the source of violence is attributed to Iraq, he argued it was justifiable to suppress this through more intense violence.¹²⁴ The latter type of violence is legitimated as having humanitarian motives, seeking to save Iraq from itself. While the United States faced heavy condemnation for their invasion, their reasoning echoes both the British Mandate and post-Cold War intervention into failed and rogue states. When British High Commissioner Dobbs stated that Iraq need only aspire to be as sovereign as 'China, Portugal, Greece or Abyssinia', and could not realistically hope to be a sovereign such as Britain, he was subscribing to a two-tiered conceptualization of sovereignty rather than the contemporary doctrine of sovereign equality.¹²⁵ Post-Cold War international law evidences remnants of this binary understanding.

While globalization and other contemporary trends are seen as threatening the concept of the sovereign state, the binary logic of sovereignty endures by re-inventing and modifying itself.¹²⁶ While sovereignty is challenged and

¹¹⁸ UN Doc. S/Res/1483 (2003).

¹¹⁹ Gathii, *supra* note 60, at 142.

¹²⁰ UN Doc. S/Res/1546 (2004).

¹²¹ 2004 Law of Administration for the State of Iraq for the Transitional Period, Art. 26(c).

¹²² Constitution of the Republic of Iraq, Arts. 25, 26, 110.

¹²³ US President George W. Bush, 'President Says Saddam Hussein Must Leave Iraq within 48 Hours', 17 March 2003.

¹²⁴ A. Anghie and B. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2003) 2 *Chinese Journal of International Law* 77, at 85.

¹²⁵ Dobbs, *supra* note 52 and corresponding text.

¹²⁶ A. Burke, 'The Perverse Perseverance of Sovereignty', (2002) 1 *Borderlands E-Journal* 2.

reconstituted, exclusions remain ongoing. The concept of sovereignty has always been tainted by the Other it aims to exclude. Foucault describes the psychology thus: 'The international society is controlled, not through the enforcement of the laws, but rather by defining the normal, the standard, and the truth against which deviations are identified and then remedied.'¹²⁷ Despite the goal of sameness, new deviations always have to be identified, because the pursuit of homogenization justifies, energizes, and motivates international law.¹²⁸ The logic is problematic, as the international system creates and exacerbates the differences that it ostensibly seeks to eliminate. In this sense, international law successfully produced failed and outlaw states, precipitating a crisis that international law can then propose to solve.

The 2003 Iraq invasion was a moment at which the limits of co-option through international law were reached. Legal methods had failed to civilize (discipline and control) Iraq sufficiently and power had to be exercised openly and flagrantly. President Bush laid down the 'new' international order, stating that '[e]very nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists'.¹²⁹ He declared at the UN General Assembly that '[e]very civilized nation here today is resolved to keep the most basic commitment to civilization Civilization itself, the civilization we share, is threatened. History will record our response The civilized world is now responding'.¹³⁰ For many in the Third World, the new order must have seemed strangely familiar. After the initial moment of defiance, the United States placed Iraq back into the familiar international-law mould of state-rebuilding, heralding a return of more subtle forms of co-option.

International lawyers largely reacted to the Coalition's legal arguments as novel and controversial interpretations of the *jus ad bellum*. Thus, many perceived the Iraq invasion to be a moment of disciplinary crisis.¹³¹ This article argues that the law cannot be regarded as a neutral discipline whose otherwise efficient workings were compromised by an opportunistic Coalition. Through examining the League's legacy, both for Iraq specifically and for international law more generally, it is possible to appreciate how the international community's understanding of sovereignty in peripheral states was shaped. International law has been deeply implicated in both the genesis and the prolonging of conflict and protracted international intervention in Iraq.

¹²⁷ Foucault, *supra* note 102, at 170.

¹²⁸ G. Gong, 'The Standard of "Civilisation"', (1984) 56 *International Society* 54, at 63.

¹²⁹ US President George W. Bush, Address to a Joint Session of Congress and the American People, 20 September 2001.

¹³⁰ US President George W. Bush, Address to UN General Assembly, 10 November 2001.

¹³¹ L. Damrosch and B. Oxman, 'Editor's Introduction', (2003) 97 *AJIL* 556; D. McGoldrick, *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity* (2004), 8; UK Prime Minister Tony Blair, 'Debate on Iraq', 18 March 2003, 410 *Hansard* HC 768; Editorial, 'New World Order', *The Guardian*, 11 March 2003.