Intervention Legitimisation and the Modern Democratisation Movement

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This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text.

It is not substantially the same as any work that has already been submitted before for any degree or other qualification except as declared in the preface and specified in the text.

It does not exceed the prescribed word limit for the Politics and International Studies Degree Committee.

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This thesis in totality has been over 15 years in the making, with the initial thoughts forming during my first mission to Afghanistan in 2005. In the subsequent decades much that we understood about democracy has become contested and this study both contributes to those debates as much as it reflects them. None of this would have been possible without the continual support and dedication of my supervisor Dr. Roxane Farmanfarmaian and the generous community of academics in which I found myself. Specific gratitude is given to MRA, SD, KB, AI, AS, JJ, CB, CJ, FL, LM, SG, HW, TF and PJ to the faculty and staff of POLIS, and most of all my family, who have survived this adventure as they have all others, with humour and kindness.

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Abstract

At the beginning of the 21st century, the US led invasions into Afghanistan and Iraq. While both invasions were initially framed as security imperatives, the subsequent occupations were situated within a narrative of democracy promotion, liberalism and development. The act of invasion and the imposition of democratisation, raises the question can 'democracy by force' be reconciled in international law and international relations?

There is little agreement of a theoretical definition of democracy in any discipline. The democracy which this study examines is both specifically Anglo-American and 'liberal' in terms of its origins and structural understanding. The form of democracy brought to Afghanistan and Iraq was a specific construction undertaken by the occupier, containing 'exceptional' characteristics and values: 'freedom', 'prosperity', 'capitalism', and 'peace' It is this combination of norms reflexively described as democratic, that was subsequently adopted by the UN and the development community.

Revisions to the international legal system sought to legitimise the use of force to prevent gross violations of human rights. This was accompanied by the reframing of the State as illegitimate, where it pursued illiberal policies. In the occupations of Afghanistan and Iraq prohibitions on the use of force and transformative occupations were disregarded, in part to accomplish regime change, with far reaching implications to both international law and the international order.

In addressing these events this thesis examines how democracy has been described over time, the form which has been exported and the claims made for it. It asks, where is democratisation situated in international law, and is this understanding affected by its imposition? Finally, it considers whether and what kind of democracy was delivered in Afghanistan and Iraq and how did the occupiers principles interact with overriding interests.

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1. Introduction

At the beginning of the 21st century, the US led invasions into two countries; Afghanistan and Iraq. While both invasions were initially framed as security imperatives, the subsequent occupations were situated within a specifically Anglo-American narrative of democracy promotion, liberalism, development and security. The act of invasion and the imposition of democratisation, raises the question can 'democracy by force' be reconciled in international law and international relations?

What is democracy? In what form has it been exported? and What is democracy supposed to provide? Where is democratisation situated in international law, and is this understanding affected by its imposition? Finally, was democracy delivered in Afghanistan and Iraq?

There is no agreed theoretical definition of democracy in any discipline. It broadly has a common understanding, as shorthand for a representative government, elected through universal franchise.[1] Added to that is an underlying idea that government is legitimised by the demonstrable consent to be governed by the citizenry, through elections.[2] The democracy which this study examines is both specifically Anglo-American and 'liberal' in terms of its origins and structural grounding. The form of democracy brought to Afghanistan and Iraq was a specific construction understood by the occupier, containing 'exceptional' characteristics and values: 'freedom', 'prosperity', 'capitalism', and 'peace'.[3] It is this combination of norms reflexively described as democratic, within the UN, and the development community, which confirms Macpherson's claim that democracy was liberal first and then democratic.[4]

Freedom has a totemic value within this governance model. Thus, the paradox: Can a government system dependent on freedom and consent as the basis of its legitimacy, be delivered through military intervention? It can be argued that it can, if the target population is being liberated from suppression and given back its freedom, but this requires the assumption

Footnotes throughout will be formatted as follows: Books and Articles by Name (Date) Page. All Reports, Legal Instruments, Media citations will be spelt out in full. Bibliography is divided into the same categories.

[1] R. Dahl (1998a), p.2. R. Dahl (2005).
[2] Borrowing from J. Schumpeter, (1950). R. Dahl (1989). L. Diamond (1990), pp.48–60.
[3] D. Bell (2010a), p.207. D. Bell (2012), pp. 40-42. D. Bell (2013). D. Bell (2016). S. S. Smith (2011), p.108. R. Aron (2003). G. J. Ikenberry (2004), p.620. L. Hartz (1955), pp.8-14. Q. Wright (1954), p.619.
[4] C. B. Macpherson (1965), p.6.

that the population wants to be liberated, in the manner proposed. The assumption does not examine the nature of the freedom involved or how this takes place.[5] Can freedom be delivered without consent? International law, as part of the constituent framework upon which relations between States are conducted, clearly states it cannot. Firstly, the use of force or military intervention, is highly proscribed in international law and secondly, democracy is not an agreed obligation or norm in international law. Freedom as a driver is a concept, not a right or a norm and its forcible implementation presages the end point of liberal internationalism.

Theory plays two distinct roles within this thesis, both as a subject and as an interpretative instrument. The theoretical bases of liberalism, liberal democracy and the international legal system are examined from a realist perspective. The development of liberal democracy from liberalism is traced through the writings of Locke, Kant, Bentham, and J.S. Mill, while modern understandings of democracy are drawn from Schumpeter, Dahl, and Habermas. These constructs are viewed through a realist understanding of the role of power as a driver within the international system, setting aside liberal claims for altruism in foreign policy decisions.
This study references Stephen Walt and John Mearsheimer, both in terms of their analysis of the role of liberalism in the foreign policy of post-Cold-War United States and in terms of the realist assessment of that policy.[6] They state that following the conclusion of the Cold War, the US found it no longer had to act in conformity with strictly realist approaches and instead adopted a liberal foreign policy programme.[7] Concurring with this proposition, this thesis examines the promotion of democracy as a liberal construct and further, the attempts during the US unipolar period from 1990-2005, to change the international legal framework to legalise military intervention for human rights purposes. These initiatives attempted to remove political or realist understandings from international law and international relations, an enterprise which has both failed and critically damaged the UN. This movement is analysed through Koskenniemi's writing, that international legal structures must exist within both normativity and concreteness "reflect[ing] what actually takes place in the political and economic world."[8]
The Cold War also plays a significant role in this thesis, both in relation to the liberal development of our understanding of democracy and of international law. While both the US and the Soviet system claimed to be democratic, liberal democracy was distinguished and

[5] I. Berlin (2002), p.18.
[6] J. J. Mearsheimer & S. Walt (2016), pp.70–83. J. J. Mearsheimer & S. Walt (2013). S. Walt (2018). J. J. Mearsheimer (2009).
[7] S. Walt (2018), p.11.
[8] M. Koskenniemi (2012), p.60.

promoted by the US. Deeply individualistic and consumerist, this form of democracy, as a governance system understood to guarantee freedom and human rights, was articulated during this time as a counter to communism.

The international legal system adopted at the end of World War II was apolitical. Primarily concerned with regulating State-to-State interaction, the new framework prohibited interference in the domestic affairs of the State.[9] Human rights standards applicable to the international community as a whole were agreed, including political rights, but a preferred governance system was not defined, nor was an enforcement mechanism.[10] During the Cold War, democracy was not actively promoted through the UN, but following the collapse of the Soviet Union the field was open to allow for the promotion of universal democracy according to the Anglo-American model.[11] This promotion was coupled with claims that neither rights nor freedoms were present in non-democratic regimes. Economic and cultural rights, both promoted under communism, were not emphasised within capitalist understandings of liberal democracy.[12] Revisions to the law sought to legitimise the use of force to prevent gross violations of human rights. This was accompanied by the reframing of the State as illegitimate, where it pursued illiberal policies.[13]

It was these movements in the conception of democracy that framed the invasions of Afghanistan and Iraq. Analysis suggests none of the claims made for democracy came into being, and the imposition of democracy instead led to long-term extreme conflict in both States. The attempts to change the law, which would have legalised the use of force on humanitarian grounds, failed.[14] The law was then simply ignored by the acting states. Prohibitions on the use of force and transformative occupations were disregarded in the remaking of both Afghanistan and Iraq, with far reaching implications to both international law and the international order.

1.1. Thesis plan

[9] U.N. Charter, Art. 2
[10] International Covenant on Civil and Political Rights 1966.
[11] T. Franck, (1992). T. Franck (1994), p.26. T. Franck (2000). F. Teson (1992). A. M. Slaughter (1995).
[12] C. Frazer (2013), p.483. See also M. Dudziak (2000), p.57. A. J. Delton (2013).
[13] A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, (II, Part 2) YBILC. A/57/303 (2002) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*. F. Teson (2005). F. Teson (2014). S. Woodward (2017).
[14] E. Strauss (2009). J. M. Welsh (2003).

The thesis is organised in the following way. Chapter 1 outlines the theoretical structure, incorporating a methodological and literature review.

Chapter 2 focuses on democracy, tracing the assumptions made about its attributes to their origins in the Enlightenment and 19th Century. Locke, Kant, Bentham and Mill identified the attributes of what is understood to be liberal and what is subsequently called democracy.[15] The democracy, envisaged by these earlier thinkers is a governance system, comprising of government institutions, representation systems, and civil institutions.[16] The discussion follows the adoption of forms of representative government over the course of the 20th Century during which the nature of democracy was redefined, from what it will do for society, to how it is constituted. It analyses how democracy became the right to elect and the right to participate, shifting from a governance system, to a government appointment system.[17] The chapter looks at the subsequent representation of democracy through the Cold War, as the vehicle through which all human rights could be promoted and protected. It concludes by reviewing how the collapse of the Soviet Union led to democracy being incorporated into UN human rights promotion and State-building processes. It is this form of democracy which was exported to Afghanistan and Iraq.

Chapter 3 examines the international legal structure following World War II. It begins by placing the UN structure in context: Liberal internationalist in outlook, the UN system was nonetheless grounded in a realist understanding of power which emphasised State sovereignty and non-intervention. In this structure, State sovereignty was confirmed, there was an absolute prohibition on interference in the domestic affairs of the State, and the use of force was highly proscribed.[18] At the same time a second structure evolved, focusing on human rights standards, which sought to constrain State behaviour.[19] The US became the champion of this movement, and part of this narrative was the promotion of democracy as a system uniquely capable of realising human rights.[20] The discussion then analyses developments following the collapse of the Soviet Union when a revaluation of the international legal system took place. International

[15] J. Locke (2013). M. Doyle (1983a). M. Doyle (1983b). E. Kant (1996) ZEF p.311. J. Bentham (1970). J. S. Mill (1977), Ch. 3. p.399. J. Bentham (1927). J. S. Mill (2003).
[16] P. Schofield (2006).
[17] J. Schumpeter (1950). J. Habermas (1996). J. Habermas (1994). R. Dahl (1989). J. Dunn (1992). C. B. Macpherson (1977). D. Held (1997)
[18] UN Charter Article 2.
[19] J. Crawford (2006).
[20] R. (2010).

law now sought to define democracy as a human right and to reframe State sovereignty as conditional, and revocable in the case of grave breaches of human rights. This culminated in two attempts to change the law, on which intervention into the domestic affairs of a State could be based: Draft Articles on Responsibility of States for Internationally Wrongful Acts and the Responsibility to Protect doctrine.[21] This chapter examines these attempts to re-frame the international legal system and the role played by these ideas in the invasions and occupations of Afghanistan and Iraq.

Chapters 4 and 5 provide case studies of Afghanistan and Iraq. The democratisation processes which took place in Afghanistan and Iraq following the US-led invasions offer concurrent lenses by to examine the shifts in international interpretations (legal and theoretical) of sovereignty and the imposition of democracy. Both interventions are legally unique in the post-World War II legal system, as invasions which did not wholly conform to UN Charter 'use of force' strictures and where regime change took place which was not at the behest of an incumbent government.[22] The experience of each State is distinct; the reason behind military intervention and the form it took varies, as does the impact of these actions. The invasion of Iraq differs from that of Afghanistan in terms of the objectives. Afghanistan became a battleground in the War on Terror. Regime change was very much a secondary consideration, with government formation acting to create a State which could give permission for the ongoing conduct of hostilities. Democracy was in effect an add-on which was very much subsidiary consideration. The invasion of Iraq was largely driven by ideological considerations and the reordering of the idea of threat as a more immediate idea. Regime change removed the threat and created America as a liberator. The remaking of Iraq as a liberal democracy was a central element of US policy. Actions which breached or compromised representations of what it is to be democratic therefore took on great significance.

Viewed together they form a detailed picture of a specific form of intervention and democratisation. The State building activities which took place in Afghanistan and Iraq drew on extensive UN experience and expertise, but conceptually they were a complete departure for the organisation.[23] The UN had previously only operated at the invitation of some element

[21] A/56/10 (2001) *Draft Articles on Responsibility of States*. A/57/303 (2002) *The Responsibility to Protect*.
[22] C. Gray (2013), K. von Hipple (2000), J.L. Cohen (2006).
[23] L. Brahimi (2007).

of the incumbent government; in Afghanistan and Iraq the organisation stepped into hostile environments unasked, partnering with the invading military forces.

The act of State-building in occupation was in contravention of the Hague and Geneva Conventions, and analysis focuses on how this coloured the entire enterprise.[24]Two key points emerge. First, the conflicting national imperatives of occupier and occupied. Liberal democracies serve and evolve from the citizenry, creating both high standards for participants, and a high level of citizen ownership. The US-led occupations claimed that democracy would deliver freedom, development, security and human rights to the populations, but as occupiers they had motivations which were often at odds with these outcomes: namely their own national interests.

Second, a high tolerance for the disregard of democratic principles can be seen when required by the occupier. In Afghanistan, the coalition chose to deputise non-Taliban warlords in the conduct of the War on Terror.[25] Despite provisions in both the Constitution and subsequent legislation banning combatants from political participation, the occupiers encouraged the participation of some armed groups, while excluding others. The election processes were also highly compromised. In 2005 the President was effectively appointed by the occupier and was re-elected in 2009 in a process riddled with fraud.[26] In the 2014 election, the formation of a government of national unity effectively set aside the elections results.

The same pattern on the part of the occupation can be seen in Iraq, if not the same actions. The imposition of the de-Ba'athification process, a reimagined version of de-Nazification, was intended to lend World War II credibility to the occupation as a 'liberation'.[27] In reality, de-Ba'athification was almost immediately employed to eliminate political opposition, splitting the country along sectarian lines. In both 2005 and 2010 the US-led occupation also actively

[24] L. Oppenheim (1935), pp.349, 345 & 350. N. Bhuta (2005), pp.725-726. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. See also A. Roberts (1985), p.262. E. Benvenisti (2010), p.632.
[25] A. Rashid (2008), Z. Khalilzad (2010), p.45.
[26] S. S. Smith (2011), Ch. 16.
[27] E. Sky (2015), p.56, B. Isakhan (2015), p.22, Zeren (2017), Paul L. Bremer, *What We Got Right in Iraq* Washington Post 13 May 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/11/AR2007051102054.html?noredirect=on

sought to influence who would receive power. In 2005 when the Dawa party won the election, its leader, Ibrahim Jafaari should have been appointed Prime Minister, but instead, was removed at the request of President George W. Bush and replaced with Nouri al-Maliki. In 2010 Ayad Allawi, Head of the Al-Iraqya coalition, won the election, but with US backing Nouri al-Maliki refused to relinquish power, and he went on to form the government.

Chapter 6: the conclusion brings together the strands of analysis considered in depth throughout the thesis, in which democracy, understood as having undergone change within both international relations and international law, is reassessed as both a system of governance and a tool of politics. In finding that attributes which democracy is claimed to provide did not materialise in either Afghanistan or Iraq, it is argued that rule of law-based ideas of democracy were not compatible other drivers prioritised by the occupier, including the War on Terror. In these instances, democratic principles were set aside, suggesting that instrumentalising democracy promotion is by definition unable to be either altruistic or clean. Further, if democracy is defined narrowly as purely a process of election, this analysis reveals that it delivers representation, but without the necessary rule of law, rendering representation meaningless. The conclusion considers the effect on international law, and the damage to the international legal system, which is yet to fully be addressed. This research in part seeks to assess the impact to the international system of these events. An indication is given in the Kosovo Report.[28] Commissioned following the NATO action in Serbia which side-stepped the Security Council; the Panel of Enquiry noted that while the actions could be seen as legitimate, they were illegal. The action exposed the limitations of international law in balancing between the rights of citizens and the rights of States[29] In order to safeguard the international legal system, reform was required to clarify the stance of international law and the rules of engagement.[30] The Commissions have been become eerily prescient, foreshadowing events in Iraq and Afghanistan and how these occupations have been narrated in relation to democracy and legitimacy.

What is clear is that as the level of violence that followed the occupations continued and indeed rose over several years. Attempts to bring order to either Iraq or Afghanistan proved not only inadequate but unable to protect the populations from human rights violations hardly less

[28] The Independent International Commission on Kosovo (2000).
[29] Ibid, p.297.
[30] Ibid, p.298.

egregious than those that had gone before, the liberal wave which drove these actions has abated and with it the blind faith in democracy as a catch-all panacea.

2. Exploratory Arch and Theoretical Approach

2.1 The Beginnings of the Enquiry

While this thesis is not principally concerned with elections, electoral processes were the starting point for this research. In 2002, in my capacity as an international lawyer, I worked with the United Nations on the preparations for the 2004 Indonesian parliamentary elections. It was my first experience with electoral assistance, during the period which is now discussed as the high point of liberal internationalism.[1] Subsequently, in 2005 I joined the UN Elections Team in Afghanistan as a legal officer for the parliamentary elections. I worked with the UN as a legal adviser to electoral teams and national electoral commissions in Iraq, Sierra Leone, repeatedly in Afghanistan, Libya, the Solomon Islands, Albania and Papua New Guinea among others. Throughout these processes I made a number of observations, of both the elections themselves and their placement within in the process of democratisation. These observations encompassed actual events, as well as patterns of discourse around those events. I observed three patterns Pattern 1: elections as democracy; Pattern 2: elections as rights guarantee; Pattern 3. Elections as Empowerment.

Firstly, elections as democracy. The primary action of democratisation was the conduct of national level elections, be that Parliamentary or Presidential. Significant financial and material resources were mobilised for these processes, which the population in each country broadly greeted with enthusiasm.[2] These processes were not discussed merely as elections, but as democracy. Through the act of an election the country was 'becoming', or 'would be', or 'was' a democracy and democracy included both the act of voting and the act of standing as a candidate.[3]

The second observed pattern, in the context of mainly post-, or intra-conflict arenas, framed elections as a contest which would end conflict and would result in a governance system which

[1] J. J. Mearsheimer (2019), p.24. S. Walt (2018). D. Joyce (2016).
[2] NDI (2007) *Final Report on Sierra Leone's 2007 Elections*. International Mission for Iraqi Elections (IMIE) (2006) *Final Report of the December 2005 Elections*. EU Election Observation Mission Afghanistan (2005) *Final Report Parliamentary and Provincial Council Elections*.
[3] E/CN/4/1999/57 (1999) *Office of the High Commissioner for Human Rights Resolution 1999/57, Promotion of the Right to Democracy*. J. M. Scott & C. A. Steele (2011). A. J. F. Dobbins, S. G. Jones, K. Crane & B. C. DeGrasse (2007).

guaranteed rights.[4] In this framing, the 'will of the people' was expressed through voting and should the people favour one group, they would be declared as having won the contest. Faced with this collective decision, participants who had previously taken up arms, would set aside their competition for power, and accept the outcome of the process. This was a temporary state of affairs for participants, who would have another opportunity to engage in the contest, once the electoral terms expired. Most importantly, particularly for those countries such as Sierra Leone and Afghanistan which had experienced decades of brutal conflict, or those like Iraq emerging from totalitarianism, democracy would bring about the end of repression and conflict, and would provide peace, freedom, stability, and economic growth.[5]

The multiple understandings of the attributes of democracy were completely 'good'. The starting point for my enquiry was the way the UN represented democracy. As the UN has been one of the key institutions in the implementation of democracy globally, the representation is particularly relevant, as this is how the organisation understands democracy and what its adoption will bring to a given State. In his 1996 treatise, *An Agenda for Democratization* Secretary-General Boutros-Ghali sets out the first pattern:

> "Because democratic Governments are freely chosen by their citizens and held accountable through periodic and genuine elections and other mechanisms, they are more likely to promote and respect the rule of law, respect individual and minority rights, cope effectively with social conflict, absorb migrant populations and respond to the needs of marginalized groups. They are therefore less likely to abuse their power against the peoples of their own State territories. Democracy within States thus fosters the evolution of the social contract upon which lasting peace can be built. In this way, a culture of democracy is fundamentally a culture of peace. Democratic institutions and processes within States may likewise be conducive to peace among States."[6]

His comments were subsequently echoed by Secretary-General Annan in 1997:

[4] Writing on behalf of the Institute for Democracy and Electoral Assistance (IDEA). Burcher & Perotti (2017) Is democracy good for peace? *Washington Post*, pp.5–9. Retrieved from https://www.washingtonpost.com/news/democracy-post/wp/2017/09/15/is-democracy-good-for-peace/?noredirect=on&utm_term=.cf3f496c4a7b see also B. Boutros-Ghali (1995). C. C. Joyner (1999), p.350.
[5] Ibid, see also J. R. & B. M. Russett (1997).
[6] B. Boutros-Ghali (1996), p.10.

> "[Democratic] principles are: (1) effective public sector; (2) accountability/transparency of processes and institutions; (3) effective participation of civil society/political empowerment; (4) effective decentralisation of power; (5) access to knowledge, information and education; (6) political pluralism/freedom of association and expression; (7) rule of law/respect for human rights; (8) legitimacy/consensus; (9) attitudes and values fostering responsibility, solidarity and tolerance; (10) equality/voice for the poor; (11) and gender equality. Those 11 principles of good governance also reflect the fundamental principles of a democratic society. If an additional 12th principal – free and fair elections – is added, all essential elements for a solid framework for democratisation assistance by the United Nations… Would be in place.[7]

Directly related to the promises of this second pattern, the third pattern, elections as empowerment: the election would be followed by significant expectation on the part of the society in general, that democracy would result in a different way of being.[8] The conduct of the election meant that the country was now democratic, and democracy came with a set of social attributes as described by Kofi Annan above. Democracy as a governance system was understood to guarantee a comprehensive set of human rights, and in all of these countries in which I worked, Constitutions were adopted which protect all of the rights listed under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).[9] Democracy would also guarantee that economic development would take place.[10] Even if these attributes were not immediately apparent, through elections the State was on the path to the full realisation of those rights and attributes, as illustrated through democratic transition literature and matrices.[11]

During the 1990s and early 2000s the apparent certainties surrounding sovereignty and the freedom for States from overt external interference, also appeared to slip away. Works such as

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[7] Statement by UN Sec. Gen. Kofi Annan A/52/515 (1997) *Report of the Secretary General: Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* 21 Oct.. p.5.
[8] B. Boutros-Ghali (1995). B. Boutros-Ghali, A/51/761 (1996) *An Agenda for Democratization.*
[9] Constitution of Afghanistan, Constitution of the Republic of Iraq, Constitution of the Democratic Republic of East Timor 2002
[10] E/CN.4/RES-1999-57 *Promotion of the Right to Democracy preamble and para 1.*
[11] T. Carothers (2002). V. Gel'man (2003). E. Mansfield & J. Snyder (2002a). N. Guilhot (2002). Democratisation matrices: www.Freedomhouse.org, www.democracymatrix.com, Polity IV in www.systemicpeace.org/polity/polity4.htm, EIU index in www.eiu.com/topic/democracy-index.

Samantha Powers' *A Problem from Hell* and the *Report of the International Commission on Intervention and State Sovereignty on the Responsibility to Protect* (2001) advocated for the adoption of qualified sovereignty. Sovereignty was re-framed as responsibility to the populace rather than the preservation of the State and intervention would be allowed to prevent or stop "cases of violence which so genuinely "shock the conscience of mankind.""[12] In the same year, work on the Draft Articles on State Responsibility was finally concluded, creating the framework for State culpability for wrongful acts.[13] State and territorial inviolability no longer appeared to be absolute, with a new paradigm, humanitarian (military) intervention finding increasing acceptance.[14] While neither the invasions of Afghanistan or Iraq were undertaken on these bases, (Afghanistan was invaded as the first act of the War on Terror and Iraq was invaded on the basis of pre-emptive self-defence), the subsequent framing of both invasions highlighted the benign removal of a despotic regime bringing human rights and democracy to their respective populations. Increasingly, non-democratic States were represented as 'illegitimate', a previously unused concept within law.[15] The UN also had a new mandate structure. Where previously the UN had only provided assistance at the behest of existing governments, we now were deployed by the Security Council to create governments.[16] I first worked in Afghanistan in 2005, on the first Parliamentary elections after the invasion. At that point, the working assumption within the UN elections team was that the election would result in the formation of a government which would enjoy popular support and that this body could lead the country to stability.[17] This did not happen; if anything Afghanistan prior to the elections had achieved a fragile stability, but subsequent to the elections, violence again began to spiral.[18] Elections which had taken place in Iraq in the same year, also did not result in the stabilisation which had been the presumed outcome. By 2008 when I arrived in Iraq to assist in the preparations for the 2009 Provincial elections, the country was dipping in and out of civil war.[19]

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[12] A/57/303 (2002), *Report of the International Commission on Intervention and State Sovereignty (2001) The Responsibility to Protect*, pp.xi, 31.
[13] A/56/10 (2001), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* Article 40, p.112, para 3. Article 26, p.85, para 5. See also p.112-113
[14] A/57/303 (2002). A/56/10 (2001). see also C. Greenwood (1993). M. Wood (2007).
[15] G. Simpson (2001). T. Franck (2000), pp.33-34.
[16] For Iraq see SC. Res. 1483, for Afghanistan see SC. Res. 1401.
[17] For a first-hand account from within the decision making apparatus at the UN in Afghanistan at that time see S. S. Smith (2011).
[18] ICG (2005) *Afghanistan Elections…* ICG (2006) *Countering Afghanistan's Insurgency*. A/60/224-S/2005/525 (2005), *The situation in Afghanistan and its implications for international peace and security, Report of the Secretary-General 12 August*. Human Rights Watch (2004).
[19] ICG (2008) *Iraq After the Surge I…*

These events viewed from my perspective as a practitioner led me to question, what was this democracy which I was promoting? Did it have an ideological origin? Was democracy now the only acceptable form of governance within the international community, and could the delivery of democracy justify invasion? Could it indeed be 'delivered'? Finally, based on the time I spent in both countries I wanted to understand what took place in the 'democratisation processes' of Afghanistan and Iraq.

2.2 Theoretical Approach

This thesis is grounded in international law, both as a basis to my professional life and also as an academic. I primarily understand the world and international politics from an international law perspective: law creates the functional framework in which States interact and the arguments developed herein are based on that understanding. As a discipline law is also deeply grounded in hermeneutic exploration in a similar manner to historical enquiry, the interpretation of texts and arguments and the method of this study conforms to that understanding.[20] My research also encompasses international relations and a coherent theoretical approach had to address both disciplines.

The overall theoretical lens through which I interpret both the historical context of this thesis and the understanding of liberal internationalism and democracy promotion, combines Morgenthau's classical realism with Mearsheimer's and Walt's structural realism. Morgenthau was a lawyer and following the publication of *Politics Among Nations* he advocated that the balance of power theory was "a prerequisite for international law" in line with a similar approach by Lassa Oppenheim.[21] Oppenheim viewed the distribution of power as a "defining structural feature of international politics, and thus one of the fundamental conditions for international law."[22] This understanding was removed from the subsequent edition edited by Hersch Lauterpacht, constructing international law as normative, not positivist.[23] I argue that the international legal structure established in the UN Charter is positivist and realist in that it exists within, and serves power. I explore these themes through the writings of Martti Koskenniemi and Jean d'Aspremont.[24] Normative and liberal understandings of both politics

[20] M. van Hoecke (2011), p.4.
[21] H. Morgenthau (1948b), pp.493–497.
[22] O. Jutersonke (2010), p.72. L. Oppenheim (1928), p.99.
[23] L. Oppenheim (1935), pp.80-2. H. Morgenthau (1948b), p.494. O. Jutersonke (2010), p.71.
[24] M. Koskenniemi (2012), p.60. J. d'Aspremont & E. de Brabandere (2010), pp.190–235.

and law portrayed democracy promotion as apolitical and would re-frame the role of international law, attempting to style military intervention as a non-political act.[25] It is these portrayals which are examined in this study, and ultimately refuted.

Liberal theories and modern theories of democracy are examined in order to trace our understandings of democracy and identify where they came from. This thesis examines the effect of the post-Cold-War liberal wave on the international legal structure, as an overwhelmingly normative reinterpretation of a realist structure, anchored in political and power dynamics. This thesis does not undertake a realist critique of liberalism as a whole, but rather it is a realist critique of liberal internationalism, as it pertains to the promotion of democracy and the attempted changes to the international legal system.

The main period of study is the post-Cold War era between 1990 and 2010. However, the research also examines the development of systems and ideologies prior to this time frame. Nevertheless the events which are central to this research took place in this period and were catalysed by what I describe as a 'liberal wave' resulting from the positioning of the US as a sole hegemon.[26] During this time liberalism became the ideological centre of US foreign policy, as it reimagined the international system in its ideological image.[27] The choice of Morgenthau, Mearsheimer and Walt mark two points in realist thought reflecting the key historical periods in this broader study. Morgenthau resurrected realism in the immediate post-war period at the dawn of the Cold War and captures that time during which the UN was established and the international legal system as we understand it was designed and adopted.[28] The framing of politics, why political actors act, the function of theory and the intrinsic critique of liberalism at that time is reflected in the systems which this thesis analyses. The classical realist model proposed by Morgenthau confirms six key principles: 1. that politics is governed by objective laws; 2. that "interest defined as power" is the central focal point of politics, but motives are to be avoided as effectively inexplicable;[29] 3. "interest" does not have a set meaning and will vary depending on a range of influences and drivers; 4. "political realism is aware of the moral significance of political action", and that morality should be measured by

[25] J. J. Mearsheimer (2018).
[26] S. Walt (2018), p.11.
[27] Ibid see also J. J. Mearsheimer (2019), p.24
[28] H. Morgenthau (1948a).
[29] Ibid, pp.5-6.

context;[30] 5. "Political realism refuses to identify the moral aspirations of a particular nation with the moral laws that govern the universe" as all States are inclined to impute morality to their actions;[31] and, 6. The political realist "parts company with other schools when they impose standards of thought appropriate to other spheres… political realism takes issue with the legalistic moralistic approach to international politics."[32] This theoretical structure speaks to various elements of this thesis, and is counter to the representations of 'oughtness' which sit within the form of liberal democracy and international law that developed during the time period under investigation.

While Kenneth Waltz is the father of structural realism, of which both Mearsheimer and Walt are proponents, I specifically do not reference him for the following reasons. His understanding of realism in relation to what his theory does and does not address, limits its utility in this study. As a defensive structural realist, Waltz argues that power acquisition is not the primary focus for States. When States pursue power to their detriment, for example Nazi power expansion in Europe, they are not acting rationally. A separate foreign policy theory is required to explain the role of irrationality. Walz is therefore clear that the function of structural realism is not to address domestic drivers, which instead is focused on "international outcomes, not state behaviour".[33] This thesis, on the other hand, discusses democracy as an internal political system, which is promoted internationally in the service of the domestic objectives of the hegemonic power, and as such is counter to Waltz's theoretical direction. In contrast John Mearsheimer also a structural realist, argues that the primary motivation for States is overt power competition where States are driven to amass as much power as possible.[34] This approach, termed 'offensive realism', easily explains acts which are self-destructive on the part of the State in the achievement of a goal, irrationality is not imputed and foreign policy can be addressed as a factor in State behaviour.[35] Supported by realist voices including Walt, Colin Eldman and James Feron, these understandings cut to the heart of what theory is for.[36] Walt raises this question in terms of the utility of theory to policy makers arguing that theories which do not have direct utility, deny policy makers of important evaluation tools.[37] I would contend

[30] Ibid, p.12.
[31] Ibid.
[32] Ibid, p.13.
[33] K. N. Waltz (1996), p.57.
[34] J. J. Mearsheimer (2009), p.245. J. J. Mearsheimer (2013), p.83.
[35] Ibid.
[36] C. Elman (1996). J. D. (1998).
[37] S. Walt (2005). See also B. Jentleson (2002).

that the role of international relations theory is to accurately explain political events and patterns, and the disassociation of domestic drivers inhibits this capacity.[38] Certainly within this study, domestic political considerations are intrinsic to every element which is discussed.

While rationality as discussed by Waltz is a broad and lightly defined concept, it is conceptually closely linked to explicability. As Mearsheimer notes "To assume that states are rational is to say that they are aware of their external environment and they think intelligently about how to maximize their prospects for survival."[39] Conversely in the denial of rationality; while the interpreter may not understand why a course of action was chosen, this does not mean that the participants lacked understanding, nor that it was irrational.[40] While Mearsheimer identifies as a structural realist in the mode of Waltz, he shares more in common with Morganthau in these areas which are key to this study. The choice of Mearsheimer and Walt is also based on the context in which they write. The post-Cold-War period was marked by US promotion of liberalism and democracy in its role as the 'liberal hegemon'. Mearsheimer and Walt extensively examine this movement, which redefined how power was to be perceived and seen to be implemented. In their view, the imposition of liberal ideology was represented as fundamentally benign, and above or removed from politics.[41] Mearsheimer brings a further critical observation to this thesis, that "liberalism has to have a night watchman if it is to work: it demands a hierarchic political system such as exists inside the state itself."[42] In its absence, liberalism reverts to realism, a pattern which has been closely observed in the democratisation processes in Afghanistan and Iraq.[43]

During this period, I initially welcomed this benign, human rights-focused hegemonic representation of democracy and liberalism. While the democracy which was being promoted did not appear to result in the governance systems which it was claimed it would provide, it was part of a movement where traditional conceptions of power were sublimated into this deeply altruistic reality. The motivations for intervention in the case of Iraq in 2003 did not conform to realist understandings underpinning the exercise of power. The US was not facing a significant power rival, nor was Iraq of particular strategic importance.[44] Weapons of mass

[38] J. J. Mearsheimer & S. Walt (2013), p.432.
[39] J. J. Mearsheimer (2009), p.244.
[40] Ibid.
[41] S. Walt (2018). J. J. Mearsheimer (2018).
[42] J. J. Mearsheimer (2018), p.122.
[43] Ibid.
[44] J. J. Mearsheimer (2014).

destruction while initially a credible threat, did not materialise and as such, were set to one side. Eventually the liberal democratic project provided a focal point, albeit after the fact and imperfectly. Walt and Mearsheimer are at the forefront of placing these events and the form of liberalism which this movement championed, into a realist understanding of the role of power and international relations.[45]

The central role of power and the absence of morality in Morgenthau's world, sits in contrast to liberal representations of interstate interaction.[46] This community, according to Doyle, is both peaceful and democratic, built on ideological synchronicity.[47] Liberalism in this form ended the focus on balance of power considerations and shifted instead to the remaking of the world in the US's image. This was driven by a shared conviction on the part of both the neoconservative Republicans and the liberal internationalist Democrats that, as Walt describes it, "the United States had the right, the responsibility, and the wisdom to create a liberal world order."[48] This was a moral responsibility, afforded by the manifest destiny expressed through American exceptionalism. It would result in a world populated by free, liberal allies, ideologically connected to the liberal 'west', led by the US, an established aim expressed in the 1992 Defence Planning Guidance paper and the subsequent 2002 National Security Strategy.

Writing in 1939, Carr's critique of the export of liberal democracy is remarkably relevant and speaks to the underlying representation of these ideas.

> "The view that 19th-century liberal democracy was based, not on the balance of forces peculiar to the economic development of the period and the countries concerned, but on certain a priori rational principles which had only to be applied in other contexts to produce similar results, was essentially utopian; … Rationalism can create a utopia, but cannot make it real."[49]

This critique captures the conclusions I came to regarding the events leading to and following the invasions of Afghanistan and Iraq and the democratisation exercises which were

[45] J. J. Mearsheimer (2018). J. J. Mearsheimer (2019).
[46] S. Walt (2018), p.8. J. J. Mearsheimer (2018), p.51.
[47] M. Doyle (1983a). M. Doyle (1983b).
[48] S. Walt (2018), p.12. see also S. S. Smith (2011).
[49] E. H. Carr (2001), p.29.

subsequently undertaken. In this model, intervention, military and otherwise is not 'political' and does not engender 'political consequences'. An example of this form of representation can be found in John Ikenberry's claims that the promotion of liberalism by the US in the post-Cold War era was not an example of ideological hegemonic consolidation. Rather the promotion of democracy was a demonstration of the disavowal of power for the greater good of the global community.[50] This thesis refutes this representation.

2.3 Democracy

The examination of democracy in this thesis focuses on the liberal theories which have contributed to our overall understanding of democracy and the modern theoretical basis of the specific form of democracy which is discussed in this thesis. It is important to note two points. Firstly, that the foundational elements of what we currently understand as democratic are based in 18th century liberalism, which were subsequently incorporated into ideas of liberal democracy. Secondly, the idea of democracy that is central to this thesis is the form which was implemented in Afghanistan and Iraq, a specifically Anglo-American, liberal model.

The specific understanding of Anglo-American democracy as a subset with a clear personality, is informed by the writings of Duncan Bell[51] and Alan Ryan.[52] In the 19th century, the idea of the Anglo-Saxon race uniquely suited to global leadership with virtues and sensibilities, which extended to the political, was adopted by British and US thinkers. [53] These attributes included "goodness and greatness", an emphasis on justice and the rule of law, and the rejection of violence and oppression.[54] These attributes are delivered within an understanding of freedom which conforms with liberal values. Pointedly, 'freedom' does not extend to the capacity to reject 'freedom', the logic of which is discussed by Isiah Berlin.[55]

Three central attributes combine to provide the distinct character of the Anglo-American vision. First, is the focus on the primacy of individual rights and political power, as opposed to the focus on the society as a whole.[56] Second, is the role of freedom in the construction of

[50] G. J. Ikenberry (2011), pp.545-548.
[51] D. Bell (2007a). D. Bell (2014). D. Bell (2016). D. Bell (2013).
[52] A. Ryan (2012a & b).
[53] D. Bell (2007a), pp.254-259.
[54] A. V. Dicey (1897), pp.471-2.
[55] I. Berlin (2002), p.180.
[56] A. Ryan (2012b), Ch. 13.

society. The individual is free, and society is ordered to enable that freedom.[57] Third is the role of private property as a right and capitalism as an organising structure within the State.[58] These ideas sit at the core of English enlightenment thinkers and have been actively adopted into the American representation of itself as liberal, and the democracy it champions.[59] Two other attributes which are specific to the representations of democracy which this thesis examines are, democracy as synonymous with development, and democracy as inherently pacific.[60] This thesis traces these attributes to Locke, Kant, Bentham, and J. S. Mill.

There is also a structural understanding of democracy which directly relates to the Anglo-American tradition in a similar manner to Common Law judicial legal systems. As described by John Dryzek and Patrick Dunleavy these characteristics include a strong emphasis on political parties as conduits for the organisation of representation and majoritarian voting systems.[61] A hallmark of the liberal democratic model has two main political parties, with government formed by the political party with the largest number of votes, while smaller groups sit in opposition.[62] In relation to voting, the UK is a majoritarian system and variants of this system were adopted throughout the Anglo-sphere during the enlightenment period and the 19th century.[63] By the latter part of the 20th century these forms of representation were expanded into commonly held views of democracy, rarely articulated in the context of liberalism.[64] In fact, democracy in any definition, does not require political parties or multiple parties, but liberalism and liberal democracy is a multi-party construct.[65] Understanding the origins of these claims for democracy within theory is the function of the chapter on democracy.

Modern 20th century theories for democracy are in effect interpretive, as opposed to constitutive. They generally all address the same question, what is democracy? Where early thinkers focused on what government should do, how it should be structured, and how it is constituted, modern theories of democracy largely focus on how a government is formed: less

[57] M. Doyle (1983a), pp.206-7. In contrast to the ideas of freedom in the French liberal tradition as outlined in L. Siedentop (2012), p.30.
[58] F. von Hayek (1960). M. Friedman (2002). See also J. Dunn (2007).
[59] L. Hartz (1955), p.3.
[60] M. F. Plattner (1998). A. Alvarez, et al (2000). M. Doyle (1983a).
[61] J. S. Dryzek & P. Dunleavy (2009), p.179.
[62] P. Norris (1997).
[63] Ibid. A. Lijphart (2008), p.25.
[64] D. Held (1997).
[65] F. Fukuyama (1992), pp.276–7. also T. Franck (1992). T. Franck (2001).

a government system, and more a government appointment system. Schumpeter argues that democracy is in essence an election and it is largely this understanding of democracy which is implemented by the UN under 'state building' mandates.[66] Robert Dahl has a similarly 'spare' or 'thin' understanding of democracy with seven requirements. He identifies the right to vote, the right to participate, the conduct of elections, the right to join political parties, freedom of expression, varied sources of information, and government dependence on voter approval, as democracy.[67] In this he follows almost exactly the rights listed in the International Covenant on Civil and Political Rights which, as a framework, is specifically and pointedly not confined to democracies but rather sets out rights which could apply in a range of governance systems including monarchies and forms of communist governments. Habermas follows these patterns in outlining the nature and exercise of power in democracy.[68] It is important to note that none of these thinkers address 'liberal' democracy, but instead have contributed to how we 'do' democracy. Amartya Sen also defines democracy as a series of virtues as opposed to a governance system; aside from elections and the rule of law, his understanding of democracy is of a governance model where people have political freedom, can participate in government and where the government must adhere to the needs and demands of the people.[69] The re-election of both the Blair and Bush governments after the Iraq invasion, in the face of significant opposition, confirm Schumpeter understanding of the role of the voter.

The structural or substantive understanding of democracy i.e. the systems and institutions required to form a democracy, over and above simply representation, has not been the focus of democratisation theories in the past 25 years. Also absent from any discussion about democracy is the role of power within it. Liberal democracy is presented as a system which contains power competition, power is transient and power holding is temporary and fleeting, by design.[70] But examining democracy through a classical realist theoretical lens would contradict this view. Within mature democracy such as in the US, powerholders elected into safe seats retain power holding positions throughout most of their careers.[71] Power is defused but it is pooled around the representative assembly, with actors cycling in and out of posts as Representatives, in Committees within opposition, within lobby groups, think tanks, the media, and hedge funds.

[66] J. Schumpeter (1950).
[67] R. Dahl (1982), p.11. See also P. C. Schmitter & T. L. Karl (1991), p.81.
[68] J. Habermas (1996).
[69] A. Sen (1999).
[70] J. J. Linz (1997), p.419.
[71] S. Ansolabehere & J. M. Snyder (2002), see also Cook Partisan Voting Index at https://cookpolitical.com/sites/default/files/2019-11/EC%20102919.pdf

The history of the evolution of democratic rights is also a story of the evolution of a very complex power structure. When the West (formerly Anglo-sphere) export this model, they do not export either a full understanding of the evolution of democracy or an understanding of the manifestation of power within it – nor indeed, as this thesis shows, the mechanisms to develop the evolution of democracy in the same way it has evolved in the West.[72]

I started the study by examining the claims made for the specific attributes of democracy. The UN does not have specific instruments which establish in law, the components which democracy must have, in order to be considered a democracy. International human rights law lists franchise and participation, within the rights guaranteed under the Covenants.[73] But legal instruments, and the subsequent development of international electoral best practice, have nothing to say about political parties, or whether a certain number of parties are required for a system to be considered democratic.[74] There are no agreed legal guidelines relating to voting system requirements, or assembly structures. There are no legally binding rules which stipulate that parliament should consist of a government and an opposition. Equally, the economic system adopted under democracy is not prescribed, but overwhelmingly democracy and free-market economies are portrayed as intrinsic. There is no singular agreed definition of democracy in law, political science or in international relations theory. Indicative of the complexity of the subject, David Held identifies 12 distinct models of democracy with 72 characteristics, many of which are contradictory. [75]

The next step was to examine claims made for what democracy would deliver, starting with the democratic peace theory.[76] The hypothesis, put forth by Michael Doyle, Bruce Russet and others of this school, that democracies did not fight other democracies, seemed at best optimistic, at worst jingoistic, but it was referenced within Presidential speeches and formed a

[72] P. Allott (1999), p.48.
[73] Article 25 ICCPR
[74] European Commission for Democracy Through Law (Venice Commission) (2002) *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report. Adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002)*. OSCE (1990) *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*. European Commission. (2007) *Compendium of International Standards for Elections* (Third). Brussels: European commission. Vidmar (2010).
[75] D. Held (1997) see also M. Coppedge (2012), pp.15-6.
[76] M. Doyle (1983a). M. Doyle (1983b). J. M. Owen & M. Owen (1994). Thompson & Tucker (1997). N. P. Gleditsch & H. Hegre (1997). M. Ward & K. S. Gleditsch (1998). K. S. Gleditsch & M. Ward (2000). J. M. Oneal & B. M. Russett (2000). J. M. Oneal & B. M. Russett (1997), presenting a range of views see S. Chan (1997), p.59, and a sharp refutation C. Layne (1994). H. Farber & J. Gowa (1995).

basis for US democracy funding in the '90s.[77] Two characteristics of this research body became apparent, firstly that this research did not address the democracies formed in the 1990s, secondly that these studies appeared to fit statistics into the democratic peace hypothesis, which was also presented as ideologically neutral.[78]

At the same time, it was clear from my own experience that the claims made for democracy were not coming to fruition in the countries which were democratizing.[79] The explanations as to why democracy was ostensibly 'not working' were numerous. One set of explanations, promoted by Paul Collier and Barbara Geddes, among others, focused on economic development, arguing that democracy would not take root unless the population had reached a certain level of economic development.[80] Another source of enquiry was whether the structural elements within a society which were required for democracy, were in place, and indeed considered what those requirements were.[81] Government and societal institutions were examined by Juan Linz and Alfred Stepan, Edward Mansfield, Jack Snyder and others within a given State to assess the readiness of institutions to democratise.[82] Another thread of enquiry focused on cultural considerations as discussed by Eli Kedourie and Samuel Huntington, while Linz discusses the role of civil society and so on and so forth.[83] It is the case that these bodies of research increased understanding about the conditions required to create a democratic society, presenting a more nuanced and complex picture than had previously been understood. However, the working assumptions of all of these studies were the same, that democracy was effective, but it had simply been planted in ill-prepared ground. What none of these academics considered was that the concept of democracy itself was flawed. This research led to the question: are our assumptions wrong about democracy? Which in turn led to the deeper question, where did our assumptions relating to democracy come from? It is this question which has become one of the central themes of this research.

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[77] Scott & Steele (2011). President Clinton 1994 State of the Union Address 25th January 1994 https://millercenter.org/the-presidency/presidential-speeches/january-25-1994-state-union-address see also President G. W. Bush's Address to the Nation 7 October 2001 at http://www.johnstonsarchive.net/terrorism/bush911d.html

[78] J. M. Oneal & B. M. Russett (2000). J. M. Oneal & B. M. Russett (1997). K. S. Gleditsch & M. Ward (2000) claims to include information up to 1996 but does not include any post-Soviet States. H. P. Gleditsch & H. Hegre (1997) has included some information on the period 1992-1995 but looks at wars, not democracies per se., which is also the case with M. Ward & K. S. Gleditsch (1998).

[79] C. Zürcher, (2011).

[80] P. Collier (2009). Collier & D. Rohner (2008). B. Geddes (1999).

[81] J. J. Linz & Stepan (1996). T. J. Farer (1993).

[82] E. Mansfield & J. Snyder (1994). E. Mansfield & J. Snyder (1995), p.8. E. Mansfield & J. Snyder (2002a). E. Mansfield & J. Snyder (2002b). P. Collier (2009). J. D. Fearon & D. D. Laitin (2004).

[83] E. Kedourie (1992). G. (1995). S. Huntington (1993). J. J. Linz & Stepan (1996). J. J. Linz (1997).

In the period between 1990 and 2010 the representation and promotion of democracy as a deliverer of peace, stability, rights, security and growth, developed into the portrayal of democracy as a human right, otherwise known as the 'democratic entitlement school'.[84] My research into the claim for democracy as a human right started with the interpretation of the right to self-determination, but ultimately ended in a completely different literature, the US African American civil rights histories. In order to fully understand both self-determination and the claims for it, I went back to the records of the original UN debates which established the principle within the International Covenant on Civil and Political Rights. While the US actively supported and promoted the development of the non-binding Universal Declaration of Human Rights, they equally actively opposed the development of the binding Covenants. US opposition to the creation of legally binding human rights instruments was based on a concern that the Covenants would result in UN censure over Jim Crow laws.[85] In the early 1950s human rights, and claims for which system was the human rights exemplar, became a battleground in the US/Soviet propaganda war. In order to win, the US had to abolish Jim Crow laws, and only when this happened could US liberal democracy be presented as the system through which human rights were guaranteed. Carol Anderson, Mary Dudziak, Laura Belmonte and Thomas Borstelmann discuss representations of democracy by the US during this period.[86] This literature describes the construction of democracy as the embodiment of human rights, central to the counter-communism narrative. In effect, democracy become anything and everything to all peoples, and also became deeply aspirational. Referencing Martti Koskenniemi who explains the representation succinctly: "the universality of human rights boils down to a call; look at us, and think for yourselves if you wouldn't like to live this way too."[87] The later writings of Harald Wydra, examine his understanding of democracy in Germany during the latter part of the Cold War, as a recipient of this representation.[88]

2.4 Legal

[84] T. Franck (1992).
[85] C. Anderson (2003), pp.180-81.
[86] Ibid. T. Borstelmann (2009). M. Dudziak (2000). K. Osgood (2006). M. Dudziak (1988). R. Jervis (2010). Belmonte (2008).
[87] M. Koskenniemi (2012), p.161.
[88] H. Wydra (2007).

The political rights adopted by the international community through the ICCPR did not prescribe a specific governance system, instead focusing on rights which could be accommodated, and ultimately defended, within a wide range of governance/government appointment systems. The structure reflected the needs of a system, which was ideologically and politically heterodox.[89] The framing of democracy as a human right would set aside the heterodox nature of the legal system, and democracy would become a defensible principle.

In order to address where democratisation is situated in international law, and whether or not this understanding was affected by its imposition, I initially examined the claims that democracy had become a human right. The claim was based on the reframing of self-determination as a *personal* right, exercised through periodic government selection processes, in combination with the political rights listed in the International Covenant on Civil and Political Rights. The proposition that democracy was a human right, was accompanied with an underlying representation that non-democratic governance systems were illegitimate, and that sovereignty could be qualified to address human rights breaches.[90] Democracy, framed in this manner as a defensible human right, could become a driver for intervention, military and otherwise, where democratic 'rights' are denied. It certainly could form the basis of a justification for and the legitimation of military intervention, as 'democracy' is equated with 'freedom' and emancipation. This 'democratic entitlement school' as identified by Gerry Simpson, included Anne-Marie Slaughter, Thomas Franck, Gregory Fox, Brad Roth, Michael Reisman and Fernando Teson.[91] The effect of transforming democracy into a human right could result in the defence of that right, contributing to a broader discussion of the limits of sovereignty.

I argue that the existing legal structure was originally formed with overt political or 'realist' understandings of the State as a political actor within the law. The promotion of liberalism has attempted to remove the realist understanding of power and politics from international law and

[89] For a review of the debates see A/C.3/SR.355-410 documents can be located at https://documents.un.org/prod/ods.nsf/xpSearchResultsM.xsp see also GA Res. 545 (VI) point 1. See also GA Res. 543 (VI), GA Res. 545 (VI) and GA Res. 549 (VI) & E/2256 (E/CN.4/669), GA Res. 1514 (XV), AHG/Res.16

[90] J. d'Aspremont (2010), pp.64-67. A/57/303 (2002). *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty* see also Reisman (1990), 84. Slaughter (1995). F. Teson (1992). F. Tesón (2011). F. Tesón (2014).

[91] Simpson (2001), p.561. T. Franck (2000), pp.33-34. T. Franck (1994), p.77. G. Fox (1992). C. Cerna (1995), p.295. G. Fox & R. B. Roth (2000).

international relations, or as Allot terms it, the development of 'politics-free power'.[92] In its place was an exaggerated emphasis on a normative understanding of the function of law, that is, what law 'ought' to be.[93] This movement is analysed through Koskenniemi's proposition, that international legal structures exist within both normativity and concreteness, "reflect[ing] what actually takes place in the political and economic world."[94] I argue that liberalism has driven an increased focus on normativity, tipping the balance way from the understanding of international law within its political context. A critical weakness with the over-emphasis on a normative understanding of international law, is that 'oughtness' can be used to de-legitimise governments which do not conform to an external understanding of what a government system should be.[95] More broadly I draw on Jennifer Welsh to argue that this perspective indirectly contributed to the invasions of Iraq and Afghanistan through the creation of a narrative whereby legality could be abrogated to serve 'legitimate' or humanitarian ends.[96] The claim that democracy is a human right is discussed on the basis of the literature outlined above and also includes writing by Christina Cerna, Anthony D'Amato and Marc Plattner.[97] Counter arguments are provided by James Crawford, Oscar Schachter, Thomas Carothers and Jure Vidmar who closely analyse the political rights within the international human rights framework and their co-relation or absence thereof, with prescriptive understandings of 'liberal' democracy.[98]

I then looked at whether or not space had been created within the law which would make it legal to militarily intervene into a country to make it democratic. On the surface the answer is obviously, no. However, in 2001 two proposals were tabled at the General Assembly which, if adopted, could create State liability for illegal acts, and would enable intervention, including military action, for humanitarian purposes, including the defence or protection of human rights. Both the Responsibility to Protect doctrine (R2P) and the Draft Articles on State Responsibility presented a qualified understanding of sovereignty, through which space was created to allow for egress into the internal affairs of a State, not for reasons of acquisition or power, but

[92] P. Allott (1999), p.48.
[93] O. Jutersonke (2016), p.330.
[94] M. Koskenniemi (2012), p.60.
[95] J. d'Aspremont & De Brabandere (2010). J. d'Aspremont (2005). R. B. Roth (1999).
[96] J. Welsh (2003).
[97] C. Cerna (1995), p.295. M. F. Plattner (1998). A. D'Amato (1990b).
[98] J. Crawford (2000), p.106. Schachter (1984). T. Carothers (1992), pp.261–267. J. Vidmar (2013a). J. Vidmar, (2014). J. Vidmar (2013b). J. Vidmar (2010).

ostensibly for non-political, 'humanitarian' reasons.[99] I find that in part, the basis for these developments is underpinned by a specific utilisation of the *jus cogens* principle. Inserted into the Vienna Convention on the Law of Treaties, *jus cogens* renders treaties void which are in breach of 'peremptory norms'.[100] What peremptory norms were, was not defined at the time of drafting, but was later outlined by the International Law Committee as including prohibitions on the aggressive use of force, genocide, torture, crimes against humanity, slavery and slave trade, piracy, racial discrimination and apartheid, and hostilities directed at civilian populations. The right to self-determination was also given peremptory norm status.[101] In the context of the Vienna Convention, the rule was clearly implementable, with obvious parameters. However, according to Andreas Paulus, its subsequent insertion into the Draft Articles on State Responsibility appeared to transform the principle into '[a]n instrument against power, to bring the powerful into legal constraints they would otherwise reject, and an instrument of and for power allowing for intervention where otherwise State sovereignty prevents interference of any kind.'[102] Thomas Weatherall, Alexander Orakhelashvili and D'Amato claimed that the use of the principle in this manner effectively overhauled the international legal structure, making it more analogous to domestic systems with the codification of *jus cogens* 'establishing a public order in international law by explicitly incorporating considerations of morality into norms that cannot be modified by the conventional sources of international law'.[103]

Jus cogens, R2P and the Draft Articles on State Responsibility all purported to constrain sovereign States and claimed a capacity to censure, without regard to State consent. The abrogation of consent was to take place, regardless of the engagement of the State. For example, under the R2P nexus where actions were taking place that would 'shock the conscience' within a State boundary, other States could legally act to stop those actions, to effectively rescue the population. In such an instance, military action would not be styled as an

[99] A/57/303 (2002) *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty.*, A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,*

[100] Vienna Convention on the Law of Treaties, (1969) Art. 15 *see also* Art. 3, p.106. Note the reference to "certain rules and principles which are above and outside the scope of jus dispositivum… treaties must not violate binding rules of international law". Weatherall (2015), p.xxxviii.

[101] A/CN.4/L.6 (2006), M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* p.189, para. 374. See also M. E. O'Connell (2012), p.85.

[102] A. L Paulus (2005), p.299.

[103] T. Weatherall (2015), p.xxxviii. A. D'Amato (1990). J. Weiler & A. L. Paulus (1997), p.562. J. A. Green (2011), p.217. P. Weil (1983), p.427. A. Orakhelashvili (2008) pp.8-10.

illegal act, force would be legitimised and legalised. Similarly, the Draft Articles on State Responsibility, styled as the codification of existing customary rules, placed the censuring capacity against the State, not on its agents as is the current focus of international criminal law, but on the State itself.[104] Because it is claimed that the Draft Articles are an expression of customary international law, the Articles are binding regardless of State consent.[105] The Draft Articles do not regulate the substantive use of force rules and as such appear to have at best a tangential relevance to this discussion. However, they establish the principle that the State, as opposed to its agents, can be held responsible for its actions. In that case, it is a short conceptual step to view the Draft Articles as a framework through which the setting aside of consent and sovereignty can be justified under the right circumstances. Underpinning both the Draft Articles and R2P is the foundational claim that *jus cogens* acts to prohibit State action, albeit in a rather broad and slightly undefined manner. When this idea meets the promotion of democracy as a human right and the creation of the idea the democratic rights can or even *should* be aggressively pursued and/or delivered, then these movements can be viewed as drivers to legitimise intervention for democratisation. The magnitude of the claims made for the interventionist capacity of these mechanisms has not been endorsed by the ICJ nor have either the Draft Articles on State Responsibility or R2P been formally incorporated into legal instruments. I see them both as specifically liberal initiatives which attempted to change the international legal system, removing the emphasis on sovereignty, and while they have ultimately failed, they created space within the law that was used to justify or 'legitimate' invasion.

An understanding for why these proposals were made, can be found in the 2000 Report of the Independent Commission on Kosovo headed by Judge Richard Goldstone.[106] Written during the period where R2P and the Draft Articles for State Responsibility were being developed, the Report addresses NATO action in Kosovo which took place outside of Security Council authority. Examining the idea of humanitarian intervention through military action, the report identifies the Gordian knot at the heart of egress framed as a primarily altruistic exercise. State sovereignty is of paramount importance within international law, and most intervention activities are illegal. However, the framing of intervention within a humanitarian imperative

[104] A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries, (II, Part 2) YBILC, para 1.
[105] J. Crawford (2002).
[106] The Independent International Commission on Kosovo (2000).

confers a compelling legitimacy on these actions. While acknowledging this, the Report urges legal reform, which was arguably attempted through the creation of the Draft Articles on State Responsibility and R2P.

This research was followed with an analysis of the prohibitions on transformative occupation. The State-building activities which took place in Afghanistan and Iraq drew on extensive experience of the UN, but conceptually they were a complete departure for the organisation.[107] The UN had previously only operated on the invitation of some element of incumbent government; in Afghanistan and Iraq the organisation stepped into hostile environments, partnering with the invading military forces. The very act of State-building in occupation is in contravention of the Hague and Geneva Conventions, and yet regime change and State transformation was a stated aim of these occupations.[108]

2.5 The Case Studies

When discussing the occupations within the case studies I refer to the 'occupier' or the 'US' as blanket terms for the coalition invasionary forces. In both cases the US was the lead country and exercised command control over the War on Terror, Operation Enduring Freedom (Afghanistan), Operation Iraqi Freedom and the subsequent campaigns.

The case studies focus on the constitution formation and electoral processes in both Iraq and Afghanistan. In Afghanistan the first three presidential elections, and two accompanying parliamentary elections are observed. While provincial elections took place concurrently, they are not incorporated into this analysis which only focuses on national level electoral processes. It is noted that three Parliamentary elections should have taken place, but that no such election was conducted between 2009 in 2018. In Iraq, the study observes the 2005 and 2010 processes, after which point the US-led coalition withdrew and Iraq was able to meaningfully exercise sovereignty. As this study is concerned with democratisation processes under occupation, no further elections are examined.

[107] L. Brahimi (2007).
[108] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. See also L. Oppenheim (1935), pp.345, 349-50., see also N. Bhuta (2005), pp.725-726., See also A. Roberts (1985), p.262. E. Benvenisti (2010), p.632.

Both case studies heavily reference UN reports. Specific emphasis is placed on periodic reports from the Secretary General to the Security Council. These reports are written by the respective Special Representatives of the Secretary General (SRSG) in each country, and in my view they present an absolutely accurate snapshot of political and physical developments on the ground. All of these reports are in the public domain. In addition, a number of books have been written by people who were directly involved at key points during these occupations and have been referenced herein. These include articles and memoirs by Peter Galbraith, former Deputy Special Representative of the Secretary General in Afghanistan, Scott Steward Smith, former UN electoral official in Afghanistan, Jeremy Greenstock former British Ambassador to Iraq, James Dobbins, former US Ambassador who led the Bonn Conference (Afghanistan), Douglas Feith, Undersecretary of Defense for Policy in the Bush II Regime, and architect of the de-Ba'athification process, Ali Khedery, a US diplomat who served in Baghdad and Emma Sky, former principal adviser to US General Ray Odierno in Iraq. Sky and Khedery describe conversations and meetings which I attended as a UN officer while in Iraq and their comments reflect my recollections of events.

This thesis also references reports from a number of research and analysis groups. International Crisis Group (ICG) reports are heavily referenced throughout this study. ICG is viewed as highly credible by those in the field, as it maintains a constant presence from wherever it reports. Its focus on political developments in each country make it particularly relevant to this study. In relation to Afghanistan the reports from the Afghan Research and Evaluations Unit (AREU) and the Afghan Analysis Network (AAN) have also been referenced. The AREU was founded in 2002 and is funded as a political think tank by Swedish International Development Agency, the EC, USIP and the UN.[109] AAN is a research organisation which aims to inform policy development in Afghanistan. It was founded in 2009 and receives SIDA, Norwegian and UK funding.[110] Both entities have extensive knowledge networks within Afghanistan and provide in-depth reports on political developments within the country. The works of Ahmed Rashid are refenced as an acknowledged expert on the political dynamics of Afghanistan. In relation to Iraq, the Chilcot Report and the works of Patrick Cockburn were also found to be of significant value.

[109] https://areu.org.af/about-us
[110] https://www.afghanistan-analysts.org/about-us/

I also cite reports, including electoral observation reports, from international organisations including National Democratic Institute (NDI), the European Union (EU), the Organisation for Security and Cooperation in Europe (OSCE), the International Foundation for Electoral Systems (IFES), and the International Institute for Democracy and Electoral Assistance (International IDEA). A number of interviews were also conducted, including with US Force Commander General David Petraeus, former Special Representative of the Secretary General (SRSG) Michael Von der Schulenberg, and former SRSG Ad Melkert. None of these interviews have been directly quoted, but they do broadly inform the discussion.

My observations in the 'field' would commonly be situated in participant observation methods, but this approach has not been taken. I was not an academic at that time and any observations were made without the understanding that they were being recorded for future use. I was a practitioner and was in Afghanistan and Iraq in a professional capacity as a UN official. I took extensive notes during that time, all of which are privileged and have not been used in this thesis. I have only used information and materials which are in the public domain. The Reports of the Secretary General to the Security Council relate to events in both countries and are in the public domain. They have been a significant resource which I have used in both case studies. For the sake of transparency, it is important to note that between 2009-2011 I was the unaccredited author of these reports in Iraq.

Bias, both in terms of personal bias and confirmation bias undoubtedly plays a role in this study and within the findings. I was opposed to the invasion of Iraq and to a lesser but still strongly held degree, to the invasion of Afghanistan. I understood both invasions to be in breach of international law, and the subsequent occupations as transformative in breach of prohibitions in the Geneva and Hague Conventions.[111] It was the contrast between witnessing events on the ground, while observing the rationales used to justify these actions within international law and on the international stage, that led to this enquiry, and the examination of the processes that underlay these developments – and their inherent contradictions. Both occupations have

[111] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

resulted in continuing conflict, which could arguably be attributed to the occupation and the acts of the occupier. Assumptions and beliefs that are central to how I conducted this research and how I have presented my findings, were formed during the time I spent in both countries and more broadly in the UN. In three areas, the two case studies and engagement with the promotion of democracy itself, I formed initial conclusions prior to initiating this research.

3. Liberalism and Democracy

This chapter examines the claims made for the attributes of democracy as it is promoted to non-democratic States. It examines the origins of these ideas, how they have been utilised both relation to Cold-War dynamics and also latterly within the UN during the post Cold War democratisation wave.

Understanding democracy, both in terms of the claims made for it and what it actually is, sits at the heart of this thesis. In a range of studies democracy is given an elaborate history, born in ancient Athens, abandoned during the 'dark' ages and resurrected in the Enlightenment.[1] This ancestry places democracy within the human quest for liberty in the 18th century and has steadily developed through to the 20th century as the ultimate governance system.[2] The modern framing of democracy is as a human rights exemplar, beyond a political, or governance system. Fukuyama's description of democracy in the *End of History* is illustrative.

> "Liberal democracy may constitute the "end point of mankind's ideological evolution" and the "final form of human government," and as such constituted the "end of history. That is, while earlier forms of government were characterized by grave defects and irrationalities that led to their eventual collapse, liberal democracy was arguably free from such fundamental internal contradictions."[3]

The form of democracy which is addressed in this thesis is specifically Anglo-American and liberal. This democracy is represented as not having a single negative attribute, a system which has been exported into States to 'cure' human rights abuses, to 'liberate' populations and to create peaceful and prosperous societies. It is this understanding of democracy which has been promoted through the UN since the fall of communism and was supposed to remake Afghanistan and Iraq. What this narrative in part belies, is that the history of democracy is not a singular history of a type of governance structure. It is a series of histories, of a range of philosophies and ideals, some of which have been retrospectively restyled as democratic or

[1] J. Dunn (1992). J. Dunn (2006). D. Held (1997). C. B. Macpherson (1977).
[2] C. B. Macpherson (1941), p.565. J. Dunn (2006). F. Fukuyama (1992). J. Dunn (1992). D. Held (1997). R. Dahl (1998a).
[3] F. Fukuyama (1992), p.xi quoting from F. Fukuyama (1989).

attributes of democracy.[4] This chapter seeks to examine how these claims for democracy have evolved and what is now meant when we talk about liberal democracy.

Starting with the examination of Anglo-American liberalism in the context of the Anglosphere, the chapter identifies enlightenment and early modern thinkers who are credited with the development of a specific understanding of liberalism. This form of liberalism goes on to underpin modern liberal democracy.[5] This thesis focuses on the writing of Locke, Bentham and J. S. Mill and examines the influence of Kant in the broader development of this specifically Anglo-American tradition. While he is clearly not English or American, Kant is brought into the Anglo-American canon through the writings of Doyle and the linkage of the *Perpetual Peace* with the "liberal internationalist model".[6] Eighteenth and 19th century thinkers developed concepts of complex and detailed governance systems, which were largely academic exercises of how societies could work. These ideas formed the basis for the construction of liberal democracy, as distinct from forms of democracy claimed by communism.[7] These include: the perpetual re-iteration of 'the will of the people', freedom, the right to property, rule of law, development, an independent media and judiciary, (qualified) suffrage, representation, the separation of powers, transparency and accountability in public administration.[8] In the latter part of the 20th century many of these ideas were adopted into the systems and institutions required for the structural development of democracy. However, Schumpeter, Dahl and Habermas examined herein, approached democracy as a philosophical-political construct, which is largely procedural. This focuses on the exercise of democracy through elections.[9]

The attributes of liberal Anglo-American democracy extend to voting and representation systems, where specific characteristics include majoritarian voting systems and multiple political parties.[10] A subsequent hallmark of the liberal democratic model, is that government is formed by the political party with the largest number of votes, and smaller groups sit in opposition.[11]

[4] H. Wydra (2007), p.2.
[5] G. J. Ikenberry (2004), p.620. J. Beetham (2007). C. B. Macpherson (1977). J. M. Owen & M. Owen (1994). A. M. Slaughter-Burley (1992).
[6] D. Bell (2014), p.648. A. M. Slaughter-Burley (1992), p.1909.
[7] D. Bell (2016), p.88.
[8] L. Hartz (1955), p.8-14.
[9] L. Whitehead (1997), p.124. J. Vidmar (2013a), pp.16-17.
[10] J. S. Dryzek & Dunleavy (2009), p.179.
[11] P. Norris (1997).

At the end of the Second World War, liberal democracy as promoted by the US also becomes a counter to Soviet communism. Human rights development became part of the pro-democratic narrative. This chapter discusses the portrayal of democracy through the US civil rights movement and into the Helsinki protocols. Following the collapse of the Soviet Union, liberal democracy was integrated into UN programming; the chapter concludes with an analysis of six UN democratisation exercises, examining the components of Anglo-American democracy. These include majoritarian voting systems, multiple political parties and the institutionalisation of the opposition.[12]

The chapter defines democracy specifically within Anglo-American liberalism, investigating the origins of this representation through early liberal and modern thinkers. Exploring the attributes of this form of democracy it looks at the specific role of the political party before undertaking an examination of the Cold-War and post-Cold-War applications of democracy. The chapter concludes with an examination of the UN understanding of democracy as it is promoted and implemented.

3.1 Anglo Americanism, Liberalism, and Liberal Democracy

3.1.1 Liberalism in the Anglosphere

What is Anglo-American liberalism? As observed by Bell and Ryan, liberalism is highly contested by those claiming to be liberal.[13] Bell argues that liberals have "supported the welfare state and its abolition, the imperial civilising mission and its passionate denouncement, the necessity of social justice and its outright rejection; the perpetuation of the sovereign state and its transcendence".[14] However, of the attributes accredited to liberalism, three combine to provide the distinct character of the Anglo-American vision. First, the emphasis is on the individual as the central political unit.[15] The individual votes, and it is through the individual that politics is enacted. Second, is the role of freedom in the construction of society. The individual lives to be free, and society is ordered to enable that freedom.[16] Third is the role of private property as a right to be upheld by the State, bringing capitalism directly into the heart of liberalism, while not an exclusive attribute of Anglo-Americanism it is intrinsic.[17] These

[12] J. S. Dryzek & P. J. Dunleavy (2009), p.179. P. Norris (1997).
[13] D. Bell (2016), Ch. 3. A. Ryan (2012a), pp.21-45.
[14] D. Bell (2016), pp.62-63, 70-71.
[15] A. Ryan (2012b) Ch. 13.
[16] M. Doyle (1983a). L. Siedentop (2012), p.3.
[17] K. von Hayek (1960). M. Friedman (2002). see also J. Dunn (2007).

ideas sit at the core of English enlightenment thinkers and have been actively adopted into the American representation of itself as liberal, and the democracy it champions.[18] These ideas are also grounded in the cultural understanding of America as being part of a distinct Anglo political and cultural union.

The Anglosphere, bound by language and history, holds certain virtues to be innate, which include freedom, tolerance, and justice, and are supposed, by advocates of Anglo-American governance systems, to produce societies which are inherently peaceful.[19] The origins of Anglo-Americanism can be found within the promotion of the Anglo-Saxon Union in the latter part of the 19th century and focused on representations of a superior linguistic, cultural and political union between Britain and its settler colonies.[20] Uniquely equipped to ensure global peace, the United States was envisaged as the lead partner in the project to promote and deliver the universal adoption of 'British' values, at a time when Britain was increasingly aware of US power.[21] By co-opting American power in this way, Britain ensured that it would not be eclipsed by it, instead placing itself in the heart of a union "that would serve as a template, catalyst, and leader of a future global political association".[22]

The core proposition for this union, that the Anglo-Saxon race was uniquely constituted, proved to be a recurrent and enduring idea.[23] British and American leaders such as Balfour, Carnegie and Rhodes, all expressed this concept which extended beyond the Victorian era, with clear echoes into the 21st century, anchored within US exceptionalism.[24] The distinct political and societal values included the repudiation of violence, an emphasis on justice and the rule of law and civic virtue equal to "goodness and greatness".[25] This is a representation which could legitimately be enforced.

[18] L. Hartz (1955), p.3.
[19] D. Bell (2013).
[20] D. Bell (2016), p.175. Vucetic (2011), p.131. A. V. Dicey (1897). J. R. Seeley (1883), p.158-9. D. Bell (2010), p.203. Dilke (1868), p.150, 156-7.
[21] A. V. Dicey (1897). D. Bell (2014b), p.432.
[22] D. Bell (2012), p.35.
[23] D. Bell (2007), pp.254-259. D. Bell (2014), p.432. J. P. Katzenstein (2012), pp.2-3.
[24] E. Said (1994), pp.7-9, 24. D. Bell (2012), pp.40-42. S. S. Smith (2011), p.108. D. Bell (2010a), p.207-9.
[25] A. V. Dicey (1897), pp.471-2.

All men are free, but must be brought to liberal freedom through the remaking of society in the image of the Empire.[26] Communities which were largely populated by settler groups, were capable of "representative government". Those societies which were comprised of indigenous populations were not capable of self-rule and had to be 'civilised'.[27] This narrative is strikingly similar to claims for the necessity of democracy. Berlin provides a concept of how this logic fits within liberalism and ideas of freedom, a logic that is otherwise highly contradictory. In this understanding freedom and intervention to 'civilise' can sit together when freedom is framed within rational best interest and 'self mastery'. Berlin describes this thought process:

> "I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their 'real' selves, in the secure knowledge that whatever is the true goal of man (happiness, performance of duty, wisdom, a just society, self-fulfillment) must be identical with his freedom – the free choice of his 'true', albeit often submerged and inarticulate, self."[28]

This freedom confirms acceptable norms of 'civilisation', which in turn can be brought to the uncivilised. The modern incarnation of this understanding is a liberation narrative achieved by democracy. Dahl captures this attitude:

> "Moral and political relativists may contend that if the people of the country choose to be governed by a nondemocratic regime, their choice of a political system is as valid as any other. But this is paradoxical and ultimately nonsensical. For people cannot truly choose how they are to be governed unless they have the opportunities, rights, privileges, and institutions provided by democracy." [29]

Represented at face value it is logical: How can 'a people' choose if they cannot choose? The question is predicated on a specific understanding of democracy, which is not satisfied simply by representative government, universal franchise and periodic elections. American democracy uniquely provides this choice.[30] In the post-World War II era of the 20th century, America was represented as the 'liberal hegemon', but this was a hegemon with unique characteristics. Devoid of colonial ambitions, this was empire by agreement.[31] America may be the liberal

[26] U. S. (1999), p.81.
[27] J. S. Mill (1859), p.4., see also J. S. Mill (2003), p.81.
[28] I. Berlin (2002), p.180.
[29] R. Dahl (1998b), p.389.
[30] Ibid, pp.388, 391.
[31] M. Shifter (2004), pp. 61–7. R. Aron (1975).

world leader but its power "was infused with liberal characteristics and put at the service of supporting an expanding system of democracy and capitalism".[32] Realist understandings of international relations and power dynamics have no place in this vision which is essentially, above politics.[33]

3.1.2 Early Liberal Thought

Locke's *Two Treatises of Government* articulated a range of ideas which would subsequently form the basis of natural individualistic rights principles and liberal State composition.[34] A key component in Locke's construction of the State and its relationship with man, is absolute freedom which man possesses through his capacity to reason within the 'state of nature'.[35] Man exists in a "state of perfect freedom to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of nature, without asking leave or depending on the will of any other man."[36] The delivery and maintenance of freedom is the paramount consideration of the State.

Kant also strongly emphasised individual freedom as the 'universal principle of right' within a society. "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to everyman by virtue of his humanity".[37] Freedom for Kant took three forms, "freedom as autonomy, freedom as non-interference, and freedom as self-legislation."[38] Freedom as autonomy or 'pure will' formed the basis of his ideas in the *Groundwork of the Metaphysics of Morals*, the freedom of the individual as an internal concept.[39] Freedom of choice or more accurately freedom of choices, refers to the relationship between free will and the obstacles placed by society, the balance between restriction and right.[40] Finally, freedom of self-legislation brings the two strands together in the public domain as the right "to obey no other external laws than those to which I could have given my consent" on the basis of equality

[32] G. J. Ikenberry (2004), p.620.
[33] H. Morgenthau (1948a), pp.5-13. J. J. Mearsheimer (2018), pp.51, 120-151.
[34] D. (2009), pp.152-3 See also J. M. Finnis (2011a).
[35] J. Locke (2013), p.95.
[36] Ibid p.268, para 4.
[37] E. Kant (1996) *The Metaphysics of Morals* (RL) 6:237, p.393, see also I. Berlin (2002).
[38] R. (2009a), p.429.
[39] E. Kant (1996) *Groundwork of the Metaphysics of Morals* (GMM) 4:391, p.41.
[40] Ibid, RL 6:213-4, pp.374-6.

of law.[41] Consent emerges as a key right, excluding authoritarianism as a legitimate form of governance.

Locke mirrors these views with an absolute rejection of authoritarianism. Political power can only be exercised with the consent of the majority of the governed, society confers authority on the government through those who govern, answerable to the people.[42] The purpose of government is to preserve the 'public good', that being "life, liberty and estate".[43] In his concept of governance, power was split between the legislative and the executive forming in effect a 'modern' governmental system of checks and balances.[44] A pivotal assertion by Locke was that people were possessed with innate 'natural rights' and that "citizenship, bestows upon the individual both responsibilities and rights, duties and powers, constraints and liberties"[45] The State exists to safeguard the rights of its citizens, and protect their property through the creation of public and private spheres.[46] A second, equally influential theme, was the definition of property as anything created by a person, and the absolute ownership by people of the products of their own industry.[47]

Kant's enduring legacy in the modern liberal cannon does not focus on a governance model, but on the claim that a government answerable to the people is inherently pacific. The equation for the end of war, has three elements: "the civil constitution of every State should be republican", "that the law of nations shall be founded on a federation of free States", and that "the law of world citizenship shall be limited to conditions of world hospitality."[48] These three components would result in the removal of the absolute power of monarchs, civil oversight of the State and the establishment of a pacific international community. While monarchy could unilaterally "decide upon war, as upon a kind of pleasure party, for insignificant cause"[49] a civil constitution would result in the requirement for the consent of the citizenry to go to war, which was unlikely to be forthcoming. "Nothing is more natural than that they will be very hesitant to begin such a bad game, since they would have to decide to take upon themselves all the hardships of war".[50] Kant also overtly rejected propositions which saw peace within

[41] Ibid, *Towards perpetual peace* (ZEF) 8:350, p.323.
[42] Locke (2013), pp.330-1, 367, para 95-7, 149. Held (1997), 52.
[43] Locke (2013), p.357 para 135, p.350 para 123, p.412 para 222.
[44] Locke (2013), pp.364-66 paras 143-148. Dunn (2003) p.34.
[45] Held (1997), p.54. Locke (2013), pp.117-8.
[46] Held (1997) pp.54, 59.
[47] Locke (2013), p.101. Dunn (1969), Ch.10., see also Dunn (2003), pp.57-58.
[48] Kant, ZEF 8:343-386, pp.317-351
[49] Ibid, ZEF 8:351, p.324.
[50] Ibid, ZEF 8:350, p.323.

'balance of power' constructs.[51] Instead he proposed a federation of States, which would effectively curb sovereignty, ushering in a pacific community.[52] At the centre of this proposition is commerce, which "cannot coexist with war and which sooner or later takes hold of every nation…[through] the power of money…States find themselves compelled …to promote honourable peace."[53] When these articles are accepted under a 'treaty' by all nations, universal peace will be established. Within late 20th century liberalism, peace would be realised through the universal adoption of liberal democracy.[54]

In contrast to earlier centuries, in which thinkers focused more on the principles which should guide society, the 19th century saw thought turn to the development of governmental systems. Embracing the ideas of the earlier enlightenment, the 19th century saw the development of the hard components of democracy, namely, representative government, periodic free and fair elections, universal suffrage and secret ballot, as the expression of the will of the people. Spanning the 18th and 19th centuries, Bentham was an avid reformer focusing on governance, both nationally and internationally. Coining the phrase, if not the concept, of "international law", his writings addressed ethics, suffrage, the development of trade unions, elections by secret ballot, free press and speech, education and health care as part of the public expenditure, and property registration.[55] His inclusion in this study is based on his vision for democracy.[56]

Bentham was an early advocate of democracy, as a system of government tempering and constraining power, for the protection of the individual.[57] Bentham explicitly endorsed the adoption of a majoritarian parliamentary system and proposed four reforms relating to the appointment of government: Secret ballot, universal suffrage, equal suffrage and annual elections.[58] As a lawyer and a technocrat, he argued these reforms focused on the creation of systems which would guarantee the delivery of ethical government, free of corruption. Bentham's theories, despite the lack of emphasis placed on individual rights, are deeply liberal, primarily manifest in his belief that government should be restricted in order to ensure the greatest level of liberty for the citizenry.[59] "Liberty is individual freedom in the realm of civil

[51] Ibid, *Theory in Practice* 8:312, p.308.
[52] Easley (2004), p.34.
[53] Kant, ZEF 8:368, p.337.
[54] Doyle (1983a). Doyle (1983b).
[55] Bentham (1970), p.296. Macpherson (1977), p.24. Viner (1949), pp.361-2.
[56] Macpherson (1977), p.24.
[57] Schofield (2006), pp.137-170.
[58] James (1981), p.55.
[59] Pratt (1955). Peonidis (2011), p.448.

society. Democracy can be a means of achieving this end but is not the end itself."[60] His system of government placed power in the hands of the people, with the administration acting as conduit for the wishes of the majority, as the expression of freedom and the will of the people.[61]

The difference between the visions of democracy put forward by Bentham and subsequently, J. S. Mill, focus on what democracy is for. Bentham saw democracy as offering protection to the population against government, while Mill viewed democracy as a vehicle for human development.[62] The role of government is to create the environment to enable both freedom and the capacity to develop across society as a whole.[63] Both ideas would be incorporated into our modern understanding of liberal democracy.[64]

It is within Mill's writing that many of the core assumptions made about modern democracy are formed.[65] In contrast to the Benthamite emphasis on the good of the majority as a singular construct, Mill recognised that unequal distributions of wealth made uniform development throughout all sections of society an impossibility.[66] To this point Locke, Bentham and Mill examined the role of government and the freedom of the individual within the society so governed. The ideal government enables freedom and promotes the development of its citizens. However, with increased levels of franchise leading ultimately to universal franchise as a reality, how the power of the masses should be martialled and controlled became the next issue. Holding the view that democracy was uniquely placed to allow for betterment of the population as a whole, Mill also believed that until this development was realised, power should be denied to those who were not educated and therefore not qualified to exercise it.[67]

Mill held that society was comprised of two blocs, workers and employers and that democracy would result in the eradication of the employer class should universal franchise be directly applied. His logic was simple, under one man one vote, workers would have no incentive to accept the current exploitative system and would therefore dismantle it, including rights to amassed property. In order to avoid this, Mill proposed a system of 'plural voting' whereby in principle every man would have a vote, but that those more qualified, would have more than

[60] Sorensen (1993), p.7.
[61] Peonidis (2011), p.450. Schofield (2006), pp.149-153, 234-5, 250-1.
[62] C. B. Macpherson (1977), p.47.
[63] J. S. Mill (2010) [1861] pp.30-34.
[64] D. Held (1997). Coppedge (2012), pp.15-16
[65] J. S. Mill (2010). J. S. Mill (2003).
[66] C. B. Macpherson (1977), p.52.
[67] J. S. Mill (1977), pp.435-447.

one, weighting the vote against those less qualified, such as those who could not read, or who paid no direct taxes.[68] This concern was not confined to Mill; Rawls also expressed concern at the possible overpowering of one class group over another:

> "Their influence should be great enough to protect them from the class legislation of the uneducated, but not so large as to allow them to enact class legislation in their own behalf. Ideally, those with superior wisdom and justice, should act as a common force for the idea of justice and the common good…." [69]

The political party, identified as "one of the transforming inventions of the nineteenth century"[70] is, according to Macpherson, a key reason for the abandonment of plural or weighted voting. He noted that the political party system not only controlled which issues were to be discussed, but also framed who should represent the electorate.[71] The political party had total control over candidate nomination and with that, control over electorate choice. In effect "the party system has been the means of reconciling universal equal franchise with the maintenance of an unequal society."[72] Party leadership became the focus for elite power brokerage, regardless of origins or ideology.[73] Subsequently, the party manifesto took precedence over the views of the individual representative, who was then constrained.[74] The "will of the people is the product and not the motive power of the political process".[75] Democracy does not require multi-parties in order to be democratic, but liberalism and liberal democracy are intrinsically multi-party constructs.[76] Mill's idea of democracy was also representative, viewing direct participation as unworkable in the modern context.[77]

The creation of a truly equal society resulted from development, and development was the undertaking of government. Yet this then raised another dilemma: with the expansion of government and the greater range of functions which it preforms, it asserts greater control. While advocating that government must enable the development of the population, Mill also states that "the most cogent reason for restricting the interference of government, is the great

[68] Ibid, pp.467-481.
[69] J. Rawls (1971), p.232., see also Fawcett (2014), p.341.
[70] Dalton, Farrell & McAllister (2011), quoting Scarrow (2002).
[71] C. B. Macpherson (1977), pp.68-69.
[72] Ibid.
[73] Manin (1997), pp.207-11.
[74] Katz & Crotty (2006), p.35. Manin (1997), p.211. J. S. Dryzek & J. P. Dunleavy (2009), p.23.
[75] J. Schumpeter (1950), p.263.
[76] F. Fukuyama (1992), pp.276–7. T. Franck (1992), p.46. T. Franck (2001).
[77] J. S. Mill (1977), pp.374-413. D. Held (1997), p.93.

evil of adding unnecessarily to its power". Universities, charities, banks and municipal corporations should not be part of government, as such an enlarged government would restrict freedom.[78] This mirrors Bentham's vision of the liberal State, which existed to create the conditions that would enable people to act in their own interests, without interference.[79] The core of modern liberalism sits within these competing and somewhat contradictory ideas, that democracy is the only system though which societal development can take place, and that government is a threat to liberty and should be constrained.[80]

Both Locke and Mill are also closely associated with the promotion of the Anglosphere. In *Liberalism and Empire* Mehta identifies paternalism as intrinsic to the liberalism of Locke and Mill, both of whom worked for the colonial administration in India.[81] These administrations served to civilise and develop their colonial territories in the British or Anglo, model of government and social ordering.[82] Inherent to both was the understanding that other societies would be brought to civilisation and that this was a common good, based on the universal nature of the core principles of Lockean thought.[83]

3.1.3 Liberal Democracy

While democracy developed and was implemented from the beginning of the 20th century, it is the post-World War II iteration that will be examined here. It is from this point that the modern international legal order is established. It is also the point where liberal democracy is framed in opposition to communism, a theme which will be examined in some detail. Another conceptual shift also takes place between democratic thinkers of the 18th and 19th centuries and their 20th century counterparts. Earlier thought on 'democracy' largely focused on the structural or substantive definitions of the form of government and governance which make a system 'democratic'. By the 20th century theorists such as Schumpeter, Dahl and Habermas largely approached democracy as procedural, focusing on the exercise of democracy through elections.[84]

[78] Mill (2003), pp.120-171.
[79] Held (1997), pp.95-96.
[80] Held (1997) pp.102-3.
[81] Mehta (1999), p.11.
[82] Ibid, pp.32-3.
[83] Ibid, pp.32-3, 52.
[84] Whitehead (1997), p.124. Vidmar (2013a), p.17.

In 1942 Schumpeter identified a number of assumptions that had been made about democracy to that point. Democracy was spoken of as "that institutional arrangement for arriving at political decisions which realises the common good by making the people itself decide issues."[85] He argued that contrary to this accepted narrative, the existence of the 'common good' and the 'will of the people' as constructs which could be identified and established, were not grounded in fact and were impossible to realise in any meaningful form.[86] The 'will of the people' was the will of the majority, which could be somewhat, but not completely mitigated by voting systems.[87] The classical ideal of the 'people' was based on a presumption that they hold 'definite and rational opinion[s] about every individual question" and that representatives are appointed in order to implement these opinions. Schumpeter shifted the focus from the implementation of opinions, be that direct or indirect, to the appointment of government, as a viable expression of democracy.[88] Schumpeter proposed a new definition of democracy which would step away from such majoritarian assumptions and instead would be limited to the factual reality of its operation; the acceptance of leadership.[89]

> "The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."[90]

In this definition, democracy was simply an exercise by the population to appoint a government and leadership, with the business of politics existing separately. If democracy is a system whereby the people select their representatives who act as power entrepreneurs, then claims for its more romantic attributes "about citizenship and popular sovereignty, emancipation and social justice" fall away.[91] Schumpeter linked democracy with capitalism as a product of its process, but in order for it to accommodate socialism (which he desired) and remain relevant, it had to be able to accommodate differing ideological strands within it. His definition of democracy is therefore extremely spare, to enable latitude in its internal application.[92] Susan

[85] Schumpeter (1950), p.250.
[86] Ibid, pp.251, 268.
[87] Ibid, p.272.
[88] Marks (2003), p.51. Schumpeter (1950), pp.269-273.
[89] Schumpeter (1950), pp.250-256.
[90] Ibid, pp.269, 273.
[91] Ibid, pp.282-3., and Marks (2003), p.50.
[92] Marks (2003), p.50.

Marks refers to Schumpeter's model as 'low intensity democracy' which by its nature is silent on the internal characteristics of democracy, as applied by States.[93]

Despite the minimal approach which Schumpeter adopted in relation to defining democracy, he was concerned with the components of a successful administrative system. Following in the Benthamite mould, Schumpeter attributed the ability to appoint government, and the consistent need to be re-elected, as protection from 'tyranny'.[94] Democracies, to succeed must benefit from a 'well trained bureaucracy', and government must limit itself to issues which are directly within its remit, understanding that not every element of public life is the subject of government.[95] The people who present themselves for election must be "of a sufficiently high quality" and must exercise 'democratic self-control'.[96] In other words, the elected person is subordinate to the will of the political party, he must follow the party line. In turn, voters must accept that having made the choice of who to elect, they delegate their authority: "once they have elected an individual, political action is then his business and not theirs."[97] The 'classical doctrine of democracy' in which the politician is understood as having been employed by the electorate and perpetually acts 'in the name of the people', is not accurate.[98] Regardless of how the electorate perceives the dynamic of appointment and delegation, politicians act independently, forming secret deals and concealing commitments and intentions. Finally, democracy required tolerance of a wide variety of opinions, to the point that subordination of opinions was not only acceptable but required in balance, to enable society to function within a given elected regime. This was true of both the electorate and the elected.[99] This analysis is both factually accurate and entirely logical, once voting/appointment takes place the voter retreats from the process and has little actual say over subsequent political actions. Electorate control exists only in the electoral cycle. There are clear contemporary examples within the UK which would support this interpretation, one being the anti-Iraq war demonstrations, which had little effect on the actions of the elected government of the time.[100]

[93] Ibid, p.51.
[94] Macpherson (1977), p.78.
[95] Schumpeter (1950), p.292-5.
[96] Ibid, p.290.
[97] Ibid, p.295.
[98] Ibid, pp.290, 295.
[99] Ibid, pp.271-72 see also Marks (2003), p.51.
[100] As demonstrated in the documentary film *We are Many* 2014 Amir Amirani (Amirani Media)

Dahl takes a much broader view, and while his model primarily focuses on an electoral process, it is implicitly supported by rights which ensure the validity of the voting exercise, such as freedom of press and principles of the rule of law. This is a blending of procedural and structural components. In 1982 Dahl outlined seven broad criteria.

> "1) Control over government decisions about policy is constitutionally vested in elected officials.
>
> 2) Elected officials are chosen in frequent and fairly conducted elections in which coercion is comparatively uncommon.
>
> 3) Practically all adults have the right to vote in the election of officials.
>
> 4) Practically all adults have the right to run for elective offices in the government…
>
> 5) Citizens have a right to express themselves without the danger of severe punishment on political matters broadly defined…
>
> 6) Citizens have a right to seek out alternative sources of information. Moreover, alternative sources of information exist and are protected by law.
>
> 7) … Citizens also have the right to form relatively independent associations or organizations, including independent political parties and interest groups."[101]

The first four points fall into the procedural category, providing the baseline for representation, while the latter three points address essential rights, which in turn implies some form of structural development. For example, in order to provide the right to information, a free press is required. Subsequently, Schmitter and Karl added to Dahl's definition by including two additional criteria.

> "Popularly elected officials must be able to exercise their constitutional powers without being subjected to overriding (albeit informal) opposition from unelected officials. The polity must be self-governing; it must be able to act independently of constraints imposed by some other overarching political system." [102]

[101] R. Dahl (1982), p.11., see also Schmitter & Karl (1991), p.81.
[102] Discussed in Schmitter & Karl (1991), p.81.

Elections assign and legitimate power, the election itself does not materially reference the broader governance system which is created.[103] Ideologically neutral, an election can result in the formation of any type of government, from liberal to authoritarian. This is a significant point, as these definitions are largely blind to the discussions of what democracy does or is, being simply the exercise of political appointment and subsequently created power systems, conferred through mass franchise.

The function of democracy is also viewed through a specific prism; for Schmitter and Karl, this is not a governance system, so much as a set of objectives which can be realised through democratic ordering. By way of illustration, democracy functions 'by the consent of the people', as opposed to its structural composition, for example bi-cameral with an independent judiciary.[104] This is illustrated by Habermas, in *Between Facts and Norms* where democracy is viewed in the conceptualisation of government, as opposed how and through what systems it works.[105] Habermas's procedural democracy discusses liberal democracy as a series of "compromises among interests" where the "fairness" of the system is secured through the exercise of balanced rights and curbs on the administration.[106]

> "The democratic will-formation of self-interested citizens is laden with comparatively weak normative expectations. The constitution is supposed to tame the state apparatus through normative constraints (such as basic rights, separation of powers, etc.) and to force it, through the competition of political parties on the one hand and that between government and opposition on the other, to take adequate account of competing interests and value orientations."[107]

Democratization draws on both traditions: its function and its exercise. Enlightenment thinkers developed truths about liberal democracy which are presented as absolute: modern political thinkers emphasise the implementation of democracy, or elections, as being the primary focus of its exercise. This inclusive embrace has led to a deeply contradictory stance where economic and sociological development, and freedom, are presented as natural bi-products of democracy,

[103] Habermas (1996), p.299.
[104] Schmitter & Karl (1991), p.82.
[105] Habermas (1996) pp.295-302.
[106] Ibid, pp.296-98.
[107] Habermas (1994), p.7.

whereas the governments in question do not actually create internal institutions which would bring this democracy about. In Dahl's 1998 paper, *What Political Institutions Does Large-Scale Democracy Require?* he addresses the question by listing as institutions: elected officials, free, fair, and frequent elections, freedom of expression and information, associational autonomy and, inclusive citizenship. He does not discuss the components of governance structures, such as an independent judiciary.[108]

Early democratic thought focused on the development of detailed administrative systems, through which power could be controlled by the electorate. With the adoption of universal franchise, the focus of democratic theories shifted to understanding the exercise of that power through elections and political parties.

3.1.4 The Political Party and Liberal Democracy

A multiparty government structure is a distinct element of the liberal formulation of democracy. The winning political party forms the government, while the losing party[ies] sit in opposition, as an element of the checks and balances which restrain the government.[109]

There are a range of representative governmental systems which could be called democratic were this dual understanding, multi-party-adversarial, not imposed. Communist systems regarded themselves as democratic within a one-party structure, allowing for representative choice over individual candidates. Consociational systems are not structured to create an opposition, and while political parties will contest elections, it is understood that government will be comprised of all factions.[110] This is the system in Lebanon and by default it is the system which has involved in Afghanistan but was not designed to work this way. Within the list of political rights established under international law there is no requirement for a multi-party representational system.[111] However, a multi-party system is intrinsic to our understanding of democracy and it comes from a specifically Anglo-American, liberal construction of the idea.[112]

[108] Originally printed in R. Dahl (1998a), pp.83-100 issued as an article in R. Dahl (2005).
[109] Lipset (2000), p.48.
[110] Lijphart (2004). Lijphart (2008).
[111] Vidmar (2010).
[112] Held (1997).

The role of parties in this model is to provide a focal point for voters in identifying issues and as an effective system of organisation, particularly within larger electorates.[113] Parties define and simplify the range of issues which an electorate will consider, and provide a focal point for participation.[114] The role of political parties is also deeply anchored in a discussion of power and its retention by minority elites. As noted, J. S. Mill identified significant risks inherent in direct democracy. Once the working-class majority had the vote, there would be nothing to prevent them from dominating politics through force of numbers, leading to a decline of middle and upper class interests.[115] Macpherson noted that the political party system acted to not only control who should represent the electorate, but also framed which issues were to be discussed.[116]

Reference to discussions which took place in the later part of the 19th century indicates, however, that this effect of political party control over nomination processes was a cause of concern. The initially held belief was that the party structure would bring those who represented working groups into power, particularly those parties who were identified as focused on worker interests or were socialist.[117] It rapidly became clear that this was not the case, and party leadership transformed into a focus for elite power brokerage, regardless of origins.[118] Subsequently the party manifesto, a feature of many though not all current democracies, takes precedence over the views of the individual representative, who is now constrained.[119] The will of the people is then created by the political parties which they vote for, in Schumpeter's words, "the will of the people is the product and not the motive power of the political process".[120]

Democracy does not require political parties or multiple parties to be democratic, but liberalism and liberal democracy is intrinsically a multi-party construct.[121] If indeed we can conclude that democracy does not require multiple parties to exist, this opens the doors to a much broader range of governance models which can be validly discussed as democratic.

[113] Stokes (1999), pp.244-5.
[114] Dalton, Farrell, & McAllister (2011), p.6.
[115] J. S. Mill (1977), Ch. 6, pp.xix 445-447, 67, 76
[116] C. B. Macpherson (1977), pp.68-69.
[117] Michels, [1911] (1962), part IV. See also Manin (1997), pp.207-11. Katz & Crotty (2006), p.35.
[118] Manin (1997), pp.207-11.
[119] Katz & Crotty (2006), p.35. Manin (1997), p.211.
[120] J. Schumpeter (1950), p.263.
[121] F. Fukuyama (1992), pp.276–7. See also T. Franck (1992). T. Franck (2001).

3.2 Democracy Applied

If the definition of democracy veers between a government appointment model and a description of a broadly sketched governance system, how are we to gain a broader understanding of what democracy is understood to be in practice?

Post-World War II representations of liberal democracy by the United States served as both a self-representation of national values, imagined national virtues and as a counter to the Soviet Union. American liberal democracy focusing on individual liberty, was presented as a counter to the Soviet 'illiberal' brand. During this period, democracy became whatever was 'not communism' in a sustained propaganda war. This section looks at the development of this image of democracy, through the American civil rights movement and into the 1980s.

3.2.1 Democracy as a Cold War Contest

The depiction of western Anglo-American liberal democracy as the exclusive vehicle for human rights and 'freedom' in opposition to a totalitarian restrictive communism became a core element of the propaganda battle in the post war II era. Certainly, by the 1970s this narrative was well established, with the Helsinki Accords presenting a package of rights and liberties which were positioned as synonymous with the West, and wholly absent within the Soviet bloc.[122]

The contested understanding of human rights between the systems framed the subsequent representations made by both sides in the immediate aftermath of World War II. Liberalism focused on individual rights, which were essential for protection from State power. In contrast, under the Soviet system, rights were collective and derived from the State.[123] Through the development of international human rights instruments in the 1950s the US and 'the West' placed the greatest importance on civil and political rights as the primary rights afforded under liberalism. In line with its ideology, the USSR insisted on the inclusion of economic, social and cultural rights as equally actionable and enforceable.[124] In this it faced significant

[122] Snyder (2011), pp.6-7.
[123] von Mangolt (1990), pp.27-57. Keys & Burke (2013), p.489.
[124] E/SR/523 (1951) *United Nations Economic and Social Council Official Records, Thirteenth Session, 523rd Meeting 28 August*, p.408. Hevener (1986), p.235., see also Foot (2010), p.445. Whelan (2010), pp.112-35.

opposition from the US, which contended that these rights were to be treated as "objectives to be achieved progressively" depending on the conditions within the State.[125] As noted by Vincent, this distinction was at the core of an ideological contest between two competing political systems.[126]

The contested ideal of democracy, and what constituted basic human rights, provided a focal point for both sides in undermining the other. [127] The Soviet narrative depicted the US an oligarchic, racist, imperialist, and immoral nation unconcerned with the lives of "the people", which capitalism was more than happy to exploit.[128]The US narrative, described by Laura Belmonte, in *Selling the American Way: US Propaganda and the Cold War,* presented the US system within the Eisenhower propaganda machine as one of freedom against oppression and as a specific counter to communism.

> "Where democracies permitted patriotism and individuality to flourish, communist states compelled nations and peoples to abandon their identities. Where democratic countries allowed multiparty elections, representative government, and open political debate, communist societies deprived their citizens of genuine political participation. Where democratic legal systems protected civil liberties and personal property, communist laws authorized widespread police surveillance, detention camps, and dramatic restrictions of individual liberties."[129]

The Soviet Bloc placed strong emphasis on social and economic rights of the population, in contrast to capitalist models, where the emphasis was placed exclusively on political rights, within a laissez faire economic structure.[130] The first round of this exchange initially strengthened the USSR in the propaganda battle. As an intrinsic element of Leninist thinking, the Soviet Union strongly supported the emergent legal principle of self-determination, advocating for decolonisation, and racial and class equality.[131] The US had taken a strong

[125] E/SR/524 (1951) *United Nations Economic and Social Council Official Records, Thirteenth Session, 524th Meeting 28 August*, p.406
[126] Vincent (1986), p.62., see also Foot (2010), p.445.
[127] Keys & Burke (2013), p.487. Foot (2010), p.445.
[128] Belmonte (2008), pp.96-97.
[129] Ibid, pp.114-115.
[130] E/SR/523 (1951) *United Nations Economic and Social Council Official Records, Thirteenth Session, 523rd Meeting 28 August*, p.408. Hevener (1986), p.235. Whelan (2010).
[131] V. I. Lenin, *Collected Works*, 4th English Edition, Progress Publishers, Moscow, 1964 Vol. 22, pp.143-56. for UN discussions see A/3077 (1955) *Draft International Covenants on Human Rights: report of the 3rd Committee Rapporteur Mr. Hermod Lannung (Denmark) 8 Dec.*, pp.11-35. Wydra (2008), pp.119-120. Cassese (1995), pp.18-19. Miller (2002), pp.617-8.

leadership role in the development of human rights during the drafting of the non-binding Universal Declaration of Human Rights, appointing Eleanor Roosevelt as the Chair of the UN Human Rights Committee. However, it changed position when those rights were presented in binding Covenants, as they could have resulted in possible challenges to a range of national and economic interests.[132] Throughout the latter drafting process, the US and the UK actively opposed the adoption of the principle of self-determination or any expression of economic rights, with particular opposition to the right of the State to control citizens' wealth. In contrast the USSR actively supporting both self-determination and economic rights over natural resources, effectively ensuring their inclusion.[133] In this, they enjoyed the support of newly-independent post-colonial States and national liberation movements, keen to have their future resources protected.[134] In contrast, the US and its allies' opposition to enshrining these rights looked self-interested, cynical, and in some cases, rapacious.

A highly illustrative exchange took place in the drafting committee in October 1955. Discussing the inclusion of the right of self-determination the USSR delegate stated:

> "The Government of the Soviet Union was profoundly convinced that recognition of the right of self-determination of peoples was the primary condition for the exercise of all the other human rights…[135]

In the same meeting the US delegate opened her comments by noting to general surprise that the "United States Government had decided not to sign or ratify the Covenants on human rights."[136]

> Referring to the provision "concerning "the right of peoples to ... permanent sovereignty over their natural wealth and resources" in Article 1 of the draft Covenants… the attempt to combine [these] idea[s] would surely hamper the efforts of those who supported the progressive realization of the right of peoples freely to determine their

[132] Hevener (1986), pp.233–244.
[133] A/C.3/SR.676 (1955) *General Assembly Tenth Session, Third Committee 676th Meeting, 29 Nov.* para 30-33 Hevener (1986), p.239.
[134] A/C.3/SR.646 (1955) *General Assembly Tenth Session, Third Committee 646th Meeting, 27 Oct.* paras 12-13.
[135] Ibid.
[136] Ibid, para 30.

> own political future and of those who wished to promote international co-operation in world economic development."[137]
>
> Further, "[I]t would detrimentally affect the "climate of investment" to which the General Assembly had in the past attached such importance."[138]

The reason for this volte-face was domestic. The principles of free enterprise and private property were a lynchpin of liberalism, which national ownership threatened, and they were not to be defined within the human rights construct. In addition, while slavery was abolished in 1865, African-Americans did not enjoy equal political and economic rights in the United States, and considerations of its internal race relations landscape increasingly soured US interactions with the United Nations. Indeed, fears that it would allow the UN to prosecute lynching fuelled America's refusal to sign the Genocide Convention when it was first opened for signature in 1948.[139] The stance on race highlighted a deep contradiction, where the claimed 'leader of the free world' was supporting racial oppression.[140] It was a contradiction that the USSR was happy to exploit, and that American policy makers were acutely sensitive to.[141] As noted by Elinor Roosevelt:

> "Anyone who has worked in the international field knows well that our failure in race relations in this country, and our open discrimination against various groups, injures our leadership in the world. It is the one point where we can be attacked and to which the representatives of the United States have no answer".[142]

In the same vein, Truman observed that "[R]acial discrimination furnishes grist for the Communist propaganda mills, and raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith".[143] As it was, Soviet policy contributed to the divestment of territories from the colonial empires, and allowed the representation of the Soviet Union as a human rights defender for the Global South.[144] Decolonisation also fuelled and fed

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[137] Ibid, paras 33-35.
[138] Ibid.
[139] Anderson (2003), pp.180-81., see also Patterson (1952).
[140] Frazer (2013), p.480. Borstelmann (2009). UNESCO (1952), p.5. Lauren (2003) pp.26-27.
[141] Dudziak (2000), pp.48-49, 59. Borestelmann (2009), p.2. Anderson (2003), p.175.
[142] Eleanor Roosevelt, "My Day" syndicated column, 9 February 1948 at https://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1948&_f=md000884
[143]Truman, "*Special Message to the Congress on Civil Rights*,", Quote from the Brief for the United States as Amicus Curiae, pp. 4–6, Brown, 347 U.S. 483 reproduced in Dudziak (2000), p.101.
[144] T. Borstelmann (2009), p.75., see also C. Frazer (2013), p.483. M. Dudziak (2000), p.57. A. J. Delton (2013), p.97.

into the American civil rights movement, demonstrating that race need not be a bar to equality.[145] The democracy which the US was presenting as a counter to the USSR, clearly did not apply to African-Americans, a point not lost on rapidly decolonising Africa, where the US was vying for influence against the USSR.[146] Indeed, it did not apply to diplomats from newly established African countries who were now coming to America and were experiencing Jim Crow laws first hand.[147] The internal policies of the US also resulted in uncomfortable alliances, Eleanor Roosevelt opposed condemnation of South African racial abuses at the UN in case it might lead to the investigation of the "condition of negroes in Alabama".[148]

In 1949 the US presented allegations of alleged human rights abuses within the Soviet Bloc to the General Assembly in an attempt to regain some ground on the propaganda front.[149] The cases centred on events in Hungary, Bulgaria and Romania. As the US was opposing the development of legally binding human rights instruments, the cases focused instead on the breach of treaty provisions.[150] The ICJ in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* Advisory Opinion did remind the parties that they were subject to human rights provisions within the treaties they had signed, an ostensible victory by the US, but it did little to offset the damage to American standing caused by internal American race relations.[151]

In 1952 the US Department of Justice took the matter into its own hands through the submission of an *amicus brief* in support of the NAACP, in the desegregation case *Brown v. The Board of Education*.[152] In that submission, Secretary of State Dean Acheson summed up the problem:

> "During the past six years, the damage to our foreign relations attributable to [racial discrimination] has become progressively greater… Soviet spokesmen regularly exploit this situation in propaganda against the United States, both within the United

[145] C. Frazer (2013), p.483. M. Dudziak (2000), p.57., A. J. Delton (2013), p.97.
[146] Lauren (2003), p.28.
[147] C. Anderson (2003), p.181. Lauren (2003), p.28. M. Dudziak (2000), p.99.
[148] C. Anderson (2003), p.3.
[149] Sohn (1949), pp.1023–1025.
[150] *ICJ Communique 50/9 Peace Treaties with Bulgaria, Hungary and Romania*, p.2 available at http://www.icj-cij.org/docket/files/8/11904.pdf?PHPSESSID=6b97bcd2d914320f066d1f9aa0a181c4 See also Anderson (2003), pp. 189-192.
[151] *ICJ Interpretation of Peace Treaties with Bulgaria, Hungary and Romania. Summary of the Advisory Opinion of 30 March 1950, & Summary of the Advisory Opinion of 18 July 1950* at http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=8b&case=8&code=bhr&p3=5 see also Dudziak (2000), Ch. 6, C. Anderson (2003), p.190.
[152] Klinkner & Smith (1999), p.234.

> Nations and through radio broadcasts and the press which reaches all corners of the world…[T]he undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare… the view is expressed more and more vocally that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country."[153]

It was to prove to be a compelling argument. The subsequent desegregation of schools triggered by the court ruling in *Brown v. The Board of Education* was broadcast in thirty-four languages through Voice of America and was hailed as both a "shining hour for democracy" and the "greatest defeat that communism has received".[154]

The presentational difficulties posed by racial segregation were effectively removed with the adoption of the 1964 Civil Rights Act and the 1965 Voting Rights Act, which guaranteed African Americans' civil, if not economic, rights. Discussions of the inequalities brought about by capitalism were scrupulously avoided, with the hard policy stance to ensure that class and race issues were never conflated, effectively resulting in a 'civil' rights process for African-Americans, as opposed to a 'human' rights process.[155] Publicised globally, foreign press coverage praised the passage of the bills and stated that the action had "vindicated the US democratic system".[156] By 1966 a report by the United States Information Agency noted foreign reporting of race relations in the US had shifted from criticism of the government and its policies, to condemnation of white supremacist minority groups.[157]

After 1965, with civil rights no longer an area for defensiveness, US public diplomacy and propaganda efforts could once again focus on the lack of individual political and economic freedom under the Soviet system. Eisenhower had instituted a sophisticated and diverse anti-Soviet propaganda machine in the 1950s, and following the end of segregation, claims for democracy as the exclusive vehicle for human rights became more strident and formed an intrinsic element in the ideological battle against communism.[158] The focal point for this development became the Multilateral Preparatory Talks for the Conference on Security and

[153] Ibid, p.236.
[154] *Brown v. The Board of Education Topeca* 347 U.S. 483 (1954) in Klinkner & Smith (1999), p.239.
[155] C. Anderson (2003), p.5., see also A. J. Delton (2013), p.97-98. Gerstle (1995).
[156] Klinkner & Smith (1999), p.278, Ch. 8. Dudziak, (2000), pp.210-3, 235-8.
[157] M. Dudziak (2000), pp.240-1 quoting 'Racial Issues in the US: Some Policy and Program Indications of Research' March 14, 1966 RG 306.
[158] Osgood (2006), p.362.

Cooperation in Europe, which became known as the Helsinki Consultations. Helsinki was originally conceived of as a forum for the discussion of pan-European security issues and did not contain a human rights component. [159] That element was introduced in 1969 through the Davignon committee, via a proposal for foreign policy cooperation, which included emphasis on the free movement of people.[160] By 1972, Western European countries involved in the dialogue saw the emphasis on human rights, as a counter to the communist system, which would deliver a "contagion of liberty".[161] 'Human rights' became a central issue through which the Soviet bloc would be addressed, providing a focal point both to internal dissidents appealing to a western audience and western European States in their interaction with the Soviet bloc.[162]

In 1973, Denmark on behalf of the European Community, presented document CESC/HC/19 proposing the adoption of human rights provisions within the Consultation process as a stated objective of the western European bloc.[163] These proposals were integrated into the Helsinki Final Act, adopted by 35 States in 1975, and were directly framed as addressing the stated absence of fundamental rights within the Soviet system.[164] Subsequently, a number of 'Helsinki Watch' entities were formed to advocate compliance with the provisions. Styled as 'independent initiatives' by national dissidents, in reality they received heavy backing from the US.[165] The US branch of Helsinki Watch, which would become Human Rights Watch, was founded by Arthur Goldberg, former US Supreme Court Justice and US Ambassador to the UN. Appointed by President Carter, he was the Head of the US delegation to the Helsinki review conference in Belgrade 1977-78.[166] Funded by the Ford Foundation with a board recruited from the Council on Foreign Relations, Helsinki Watch was imbedded within the US policy apparatus.[167] Human rights protection therefore became a potent foil for the US in the Cold War confrontation. However, underlining the tactical nature of this engagement, this did not translate into the US consistently advocating human rights globally: the Reagan Administration saw no contradiction in simultaneously backing human rights groups to observe

[159] Thomas (2001), and Keys & Burke (2013), pp.492-5.
[160] Thomas (2001), pp.41-42.
[161] Foreign and Commonwealth Office, *The Conference on Security and Cooperation in Europe 1972-1975* G. Bennet and K. A. Hamilton eds. Document on British Policy Overseas Series 3 Vol 2 (London, Her Majesty's Stationary Office, 1997), p.51
[162] Thomas (2001), pp.27-53., Keys & Burke (2013), pp.492-4.
[163] Thomas (2001), p.53.
[164] Sellers (2002). Keys & Burke (2013), p.495. Sherer (1980), p.155.
[165] Thomas (2001), p.118., Sellers (2002), p.139.
[166] Sellers (2002), p.139.
[167] Korey (1998). Sikkink (1993), pp.420-422. Foot (2010), p.460.

the enforcement of Helsinki commitments in the Soviet bloc, and right wing and or anti-communist authoritarian governments throughout Central and Latin America.[168]

Helsinki did not just represent the promotion of human rights; it was the promotion of liberal democracy, in line with US framing of human rights as 'civil', confirming the superiority of freedom through representation. As noted, both liberal and communist systems claimed to be democratic. Liberal democracy represented itself as 'freedom', individual rights, private property and the multiparty state. Communism was the people's democracy, where collective rights were the primary focus, "the People-as-One, which would appropriate total control over society, set its laws, redefine its past, and predict its future".[169] But the West claimed that real democracy was the liberal one and throughout the Cold War "a "totalitarian East" was positioned against a "democratic West" which "endowed the concept of democracy with a magical attraction" for those in the West, and those in the East hoping to be more like them.[170]

What democracy actually was, was a secondary consideration, as this was an ideological battle for moral and military superiority. Democracy could mean any or all of a smorgasbord of philosophical notions and governance forms, including human rights, freedom, the welfare state, small government, a free press, an independent judiciary, sexual and reproductive rights, elections and multiple political parties. Democracy could be development, it could be moderate, peaceful and stable; its portrayal was everything that communism was not, rooted in the individual choices of the members of the population. As Wydra observed commenting from the position of a German consumer of the projection of democracy: "The popularity of democracy as a slogan arose from its capacity to mean different things to different groups in society"[171] This notion of anti-communist democracy could be anything, a *tabula rasa* onto which the disparate desires of communities under totalitarian rule could be projected. At a minimum, democracy was held as the only system through which human rights could be guaranteed, with counterpart claims that human rights were not present in non-democratic regimes.[172] By implication these statements also hold that breaches of human rights within democratic regimes are exceptional, as the regime itself assures the rights of individuals.[173]

[168] Foot (2010), pp.450-1. Sellers (2002), p.139.
[169] H. Wydra (2007), p.293., Shibusawa (2013), p.41.
[170] H. Wydra (2007) p.25.
[171] Ibid, p.10.
[172] T. Franck (1992). T. Franck (1994), p.26. T. Franck (2000). F. Teson (1992). A. M. Slaughter (1995).
[173] Doty (1996).

The blanket representation of democracy as 'rights' led to the creation of the concept of democracy as the provider of all freedoms within a civic construction to all people. Less a governance system, democracy became an iconic and ideological movement. However, in reality, because it was more of an ideology than a governance system, because it was more a construct to contradict and delegitimate another governance system – the Soviet model, what democracy actually is, remained undefined. After the end of the Cold War, policy development and implementation bodies led by the United Nations, developed a de-facto understanding of liberal democracy through the funding and implementation of elections and democracy programmes. There are two separate representations of democracy within this system: descriptions of democracy contained in UN documents and the components of democratic governance developed and delivered through UN programmes.

3.2.2 UN Democracy

Representations of democracy by the UN is a relatively new phenomenon. As noted, the United Nations structure, developed in 1945, placed State sovereignty at the centre of the international legal and political system. Explicitly non-hierarchical, the framework specifically did not address individual State governance systems or assume any role in examining the internal workings of an individual State.[174] The human rights framework established by the ICCPR and ICESCR did not include reference either to the word 'democracy' or the right to government based on a multi-party system.[175] The formulation was ideologically neutral as it accommodated both the western 'liberal democratic' systems and the 'Soviet style' democracies, affording legitimacy to both. The 1975 Helsinki Declaration continued in this vein. While framed as a liberal human rights manifesto counter to the Soviet system, the Declaration did not actually mention democracy.[176]

[174] UN Charter Article 2(4)
[175] ICCPR Article 25, see also *The Final Act of the Conference on Security and Cooperation in Europe,* Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration).
[176] Gaddis (2005). Stover (2013), p.179.

The universal promotion of democracy did not start until the late '80s as the Soviet Union declined, and then accelerated its collapse.[177] One of the earliest texts was the 1988 Manila Declaration, which emerged from the First International Conference of New or Restored Democracies and declared: "We believe that only participatory democracy and decentralised government can genuinely bring about the exercise of people's sovereignty and increased benefits of economic and social development."[178] This was followed in December of the same year by a GA resolution on 'Enhancing the effectiveness of the principle of periodic and genuine Elections'.[179] The GA resolution linked democracy as a human right to countering apartheid, leading to assertions that the resolution established a right to democracy to all members.[180] The GA reissued a form of the statement each year from 1988 to 1994.[181]

Subsequently repeated every three years, the Manila declaration was confirmed through the Managua Declaration in 1994, Bucharest 1997, Cotonou 2000, Ulaanbaatar 2003 and Doha 2006.[182] The General Assembly also tabled annual Resolutions confirming its commitment to the promotion of democracy, which were informed by annual reports from the Secretary General.[183] In addition, democratisation featured prominently in both the Millennium Declaration[184] and the 2005 World Summit report, in which democracy was defined as a 'universal value' and a United Nations Democracy Fund was established.[185]

The UN Human Rights Commission has also been active in democracy promotion through a series of Resolutions, the most important of which are 'Promotion of the Right of Democracy' 1999, 'Promoting and Consolidating Democracy' 2000 and 'Strengthening of popular

[177] Newman & Rich (2004), p.193.
[178] GA RES A/43/538 (1998) *The Manila Declaration of 1988, International Conference of newly Restored Democracies*, 16 August, p.3. See also Rich (2001), p.25 and Boutros-Ghali (1996), p.16.
[179] GA RES A/RES/43/157 (1998) *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*
[180] Haack (2011), p.62.
[181] GA RES A/RES/44/146, 45/150, 46/137, 47/138, 48/131, 49/190
[182] GA RES A/RES/49/713 (1994), 52/334 (1997), 55/889 (2000), 58/387 (2003), 51/581 (2006) the Second, Third, Fourth, Fifth and Sixth International Conferences of New or Restored Democracies
[183] GA RES A/RES/49/30, 50/133, 51/31, 52/18, 53/31, 54/36, 55/43, 56/96, 58/13, 60/556, 61/226 and so on.
[184] GA RES A/RES/55/2 (2000), Part V.
[185] GA RES A/RES/60/1 (2005), p.30 para 135-137.

participation, equity, social justice and non-discrimination as essential foundations of democracy' 2001.[186]

In his *An Agenda for Democratisation*, then Secretary General Boutros-Ghali stated that:

> "It is not for the United Nations to offer a model of democratization or democracy or to promote democracy in a specific case ... [because there is] ... no one model of democratization or democracy suitable for all societies ...".[187]

Yet, in the same breath he stated that "democracy can and should be assimilated by all cultures and traditions".[188]

It was not until 2002 that the UN Human Rights Commission comprehensively outlined the component and constituent parts which form a democracy and the rights which that system of governance would guarantee. In essence, to live in a democracy includes the right to vote and to participate, and the positive assertion that representation shall be through a multi-party system – i.e. all civic interpretations of freedom. As delineated by the Commission:

> "The essential elements of democracy include respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion, access to power and its exercise in accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media"[189]

The 2002 statement quoted here is not binding and has little legal effect, but it indicates the informal and increasingly consistent statement of a definition of democracy within UN documentation and more broadly, policy. The representations of democracy in UN documents are striking and very uniform. Democracy is the only vehicle through which human rights and

[186] Office of the High Commissioner for Human Rights E/CN.4/RES/1999/57 and 2000/47 and 2001/36 respectively.
[187] Boutros-Ghali (1996), p.4, also A/52/513 (1997) *Report of the Secretary-General: Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, 21 October.
[188] Boutros-Ghali (1996), p.4.
[189] Commission on Human Rights RES 2002/46 (23 April 2002) para 1.

fundamental freedoms can be adequately protected. The pacific nature of democracy is also confirmed, as is the rule of law as core democratic principles. Further, democracy is synonymous with development, as demonstrated in the small sample from UN documents below.

> General Assembly Resolution 52/18 (1998) *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies*: "*Bearing in mind* the indissoluble links between the principles enshrined in the Universal Declaration of Human Rights and the foundations of any democratic society"[190]
>
> Office of High Commission on Human Rights (1999) *Promotion of the Right to Democracy*: "Democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing…[and] Affirms that democracy fosters the full realization of all human rights,"[191]
>
> United Nations Millennium Declaration (2000): "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development."[192]
>
> Secretary General Kofi Annan (2001): "[L]iberal democracy is essentially an open and transparent system, which contains in-built safeguards against military adventurism. Democratic rulers cannot mobilize their countries for war without convincing most of the citizens that war is both just and necessary."[193]
>
> World Summit Outcome (2005): "[R]ule of law and democracy… are interlinked and mutually reinforcing and … they belong to the universal and indivisible core values and principles of the United Nations"[194]

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[190] GA RES A/RES/52/18 (1998*) Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies,* preamble.
[191] Office of the High Commissioner for Human Rights E/CN.4/RES/1999/57 *Promotion of the Right to Democracy,* Preamble and para 1.
[192] A/Res/55/2 (2000) *United Nations Millennium Declaration,* p.6 para 24.
[193] SG Annan, Cyril Foster Lecture *Why Democracy Is an International Issue* 19 June 2001 http://www.un.org/press/en/2001/sgsm7850.doc.htm
[194] A/Res/60/1 (2005) *World Summit Outcome* 16 September, p.27 para 119. This document also confirmed that there "there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination" p.30 para 135.

> Secretary General Ban Ki Moon (2010) *International Day of Democracy*: "Robust oversight, a vibrant civil society, the free exchange of information and ideas, popular participation- all these hallmarks of democracy as also crucial ingredients in generating economic growth and securing social justice."[195]

The importance of this representation cannot be overestimated, as core claims for democracy, such as constituting the only means by which to deliver and guarantee human rights, are established as a truism when declared by the body which institutionalised human rights in the modern era.

The active promotion of democracy by the UN, was a highly loaded ideological statement, indicating approval for the Western/capitalist model. By the time of the dissolution of the Soviet system in 1990, 'democracy' as an ideological construct was no longer being acknowledged; democracy had become ideologically neutral and was just the best way forward. In Secretary General Boutros-Gali's view:

> "This worldwide drive for democracy is more than a search for an ideal. In this new age of instant communication, the freedom of thought, the right to property, and the impetus to creativity are all elements of practical economic progress-and they are best fostered and protected within systems of democracy."[196]

In sum, through UN implementation since 1990 of State and government formation processes, a substantially uniform idea of government, representation, ownership and 'freedom' emerges, which is profoundly liberal in character. While all of the attributes of the system may indeed be accurately described through the rhetoric adopted, the fundamentally ideological nature of this construction of democracy cannot be ignored. In turn this has hampered the UN in its capacity to assess the actual application of democracy and to address where it has not delivered the promised developments. The rigid adherence to the ideal has arguably led to the failure to consider alternative systems based on their merits, particularly in post-conflict environments.

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[195] Secretary General Message on the International Day of Democracy 15 September 2010 https://www.un.org/sg/en/content/sg/statement/2010-09-15/secretary-generals-message-international-day-democracy

[196] Boutros-Gali (1995), p.5.

3.2.3 UN: Democracy Applied

In line with the rise in endorsement of democracy as essential for the realisation of human rights, the UN moved to provide assistance in the conduct of elections. In 1991 the General Assembly adopted Resolution 46/137, which allowed for the appointment of a Senior UN official to assist Member States in the conduct of elections.[197] In 1992 the Electoral Assistance Division within the Department of Political Affairs, was formed. From the inception of the programme, demand for assistance was high; within a year of its establishment the Division provided technical assistance to 43 countries.[198] By 2002, 89 countries had received technical assistance in all elements of the electoral process including constituency boundary delimitation, voting systems, voter education, training, support to electoral management bodies, tabulation and electoral dispute management.[199] The Global Project for Electoral Cycle Support, now in its second phase, was launched in 2009 in order to more closely align activities in the area of elections and democratisation. The programme supported 52 countries in 2015. Most were recipients of on-going electoral programmes which form part of the democratisation initiatives by the UN.[200] The exclusive focus of these activities is the conduct of elections, based on the view that elections 'deliver democracy'.[201] The United Nations overwhelmingly adheres to the concept of democratisation put forward by Dahl and Schumpeter, that democracy is a government appointment system.

In a small number of instances, the UN has gone beyond the role of technical support and has adopted the role of State creator, conducting elections and state-building activities in the absence of existing structures. States which have received this assistance are Afghanistan, Iraq, Kosovo, Bosnia, East Timor, and South Sudan.[202]

The case studies in this research, Afghanistan and Iraq, analyse the particular elements of UN state-building and the application of liberal democracy in greater detail. However, a review of the components of government of the other four, offer a useful indication of what the UN understands democracy to be in practice. While by no means a universal or comprehensive

[197] GA RES A/RES/46/137 (1991) *Enhancing the Effectiveness of the principle of periodic and genuine elections*.
[198] A/RES/49/675 (1994) *Report of the Secretary-General Enhancing the effectiveness of the principle of periodic and genuine elections,* paras 3 & 37.
[199] UNDP (2002) *UNDP and Electoral Assistance: 10 Years of Experience*, pp.11-13.
[200] UNDP (2015) *Global Project for Electoral Cycle Support Phase II Annual Report*
[201] International IDEA (2005) *Ten Years of Supporting Democracy Worldwide: IDEA 10th Anniversary Publication*. p.99.
[202] The process was started in Libya in 2011, but discontinued prior to the drafting of a Constitution, due to widespread violence and unrest. Similar efforts in Somalia have also been hampered by continual instability.

study, analysis of the components of government in these cases can enable a greater understanding of how democracy is instituted and its efficacy in the post-Cold-War era.

Afghanistan and Iraq are both similar and exceptional, in that state-building took place after the hostile removal of an incumbent government by an occupying army. These circumstances were unique in the post-Cold-War era and to date have not been repeated. Their unique attributes are useful in this study, as the incumbent governments were styled as illegitimate due to their authoritarian leanings, and 'rectified' through the creation of a new democratic system. They stand in contrast to Kosovo, Bosnia, East Timor and South Sudan, which were territories that were the subject of movements to create independent States separate to existing territorial entities. While elections in Kosovo and Bosnia were technically administered by the Organisation for Security and Cooperation in Europe (OSCE), they did so under the auspices of UN administration missions.[203]

All six States have similarly structured Constitutions which contain a comprehensive Bill of Rights including all of the rights contained in the two International Covenants.[204] These include freedom of the press, assembly, association, information, the right to vote with universal franchise and the right to participation in government. All six States have adopted some form of quotas for female representatives in the main national assemblies. East Timor provides female seats according to 'one per every group of four candidates' or 25% in a closed list system where the voter votes for a party list, as opposed to a candidate.[205] South Sudan provides for the reservation of 25% of seats in the National Assembly and the Council of States for women.[206] In Afghanistan two houses make up the National Assembly, of which two women from each Province (34) will be elected for the lower house (House of the People) and 50% of representatives appointed by the President to the upper house will be female (House of the Elders) (one third of the total membership).[207] Iraq has a 25% female quota for the Council of Representatives through proportional representation on a semi-open list system where the voter has some candidate choice, but the gender quota is not affected by this choice.[208] All of these

[203] Hyslop (2008), p.19.
[204] 1966, the Covenants expand the rights listed in the Universal Declaration of Human Rights and form comprehensive bill of rights, see Office of the High Commissioner for Human Rights E/CN.4/21 *Report of the Drafting Committee to the Commission on Human Rights*. Constitution of Afghanistan ratified 26 Jan 2004, Chapter 2. Constitution of the Democratic Republic of East Timor 2002 Part II. The Transitional Constitution of the Republic of South Sudan, 2011, Part II and the Constitution of the Republic of Iraq Part II.
[205] Article 12 Law on the Election of Parliament no.6, 2006
[206] Article 60 National Elections Act 2012 no.39,
[207] Sections 83-84 Constitution of Afghanistan
[208] Section 49 Constitution of Iraq. Article 13 Law No (45) of 2013 Iraqi Council of Representatives Elections

electoral systems broadly result in female participation in Government established by law. While seat allocation systems can result in some variance, this is limited as much as possible. The picture differs somewhat in both Kosovo and Bosnia, both of which adopted 30% quotas for female candidates within open list systems.[209] What this means is that while political parties must nominate female candidates, it is up to the voter to select the candidate from the party lists. [210]A female quota does not exist for independent candidates which are allowed in each jurisdiction. As such, while women stand, their overall proportion can be below the agreed 30% (in each jurisdiction) with no guarantee of election.

Of the six States, East Timor, South Sudan and Afghanistan have adopted an Executive Presidential system of government conforming to the US model. In these cases, the President is both the Head of Government and the Head of State, with command control over the armed forces and the power to appoint Cabinet/Council of Ministers. In all cases, the election of the President requires the attainment of 50% + 1 of the electorate; should this not be achieved, a run-off election is held. Afghan and East Timorese Presidents are limited to two terms whereas South Sudanese Presidents are not term-limited.

Iraq has adopted a parliamentary system along the UK model, where by the majoritarian party appoints the Prime Minister as the Head of Government. The Iraqi Prime Minister appoints the Council of Ministers, who in turn make up the executive. Kosovo is also a parliamentary system with executive authority vested in the Prime Minister,[211] with a President elected by Parliament.[212] Reflecting the weights of the three major ethnic groups, and the negotiating process that led to the Dayton Accords, the Bosnian system is by far the most complex. At the Federation (ie, State) level, it has a directly elected, rotating Presidency, comprised of three people who act as a collective Head of State. They in turn nominate the Prime Minister who is then approved by the National Assembly. The Prime Minster appoints the Cabinet and effectively leads the government.[213] All six States have adopted an independent judiciary, with a range of other state organs including a central bank, administrative bureaucracy and taxation systems.

[209] Article 27 Law No. 03/L-073 on General Elections in the Republic of Kosovo and Article 4.19 Election Law of Bosnia and Herzegovina 2001 amended.
[210] Article 20 Kosovo and Article 4.2 Bosnia
[211] Constitution of the Republic of Kosovo, Section 92.
[212] Ibid. Section 67.
[213] Constitution of Bosnia and Herzegovina, Section 5.

In terms of electoral systems, the Presidential polls all adopted a one-person-one-vote model through a single constituency on a two-round voting system; likewise, all States have adopted some form of proportional representation where there are multi-seat constituencies. Political party membership somewhat varies in the group. In East Timor it is not possible to stand for election to the National Assembly without party membership.[214] While the preamble of the Constitution of South Sudan commits the State to multi-party democracy, independent candidates can stand for election to the national assembly.[215] Afghanistan is unusual in that while both political party and independent candidates can stand, political party membership is informally seen as a disincentive to electors, and as such, most candidates choose to stand as independents, effectively ignoring the political party emphasis within the system.[216] In the 2010 National Assembly electoral cycle for instance, only 36% of winning candidates were political party members. The Iraqi electoral system favours political party membership, though independent candidates can stand.[217] In both Kosovo and Bosnia it is possible to stand for election as an independent candidate, although the main emphasis is on political parties.[218] All of the Constitutions confirm the right to private property and the importance of private sector development.

In 2018 Freedom House issued the following rating for the democracies created in the six countries. East Timor had the best rating with 2.5 out of 7, (where lower scores indicate a more democratic state), but East Timor but is listed as only 'Partly Free', followed by Kosovo at 3.5 and Bosnia at 4 with the same rating. Afghanistan and Iraq shared the same designation of 5.5 and are listed as 'Not Free'. South Sudan was rated 7, the lowest possible score, and 'Not Free'. None of the States is listed as functionally democratic.[219]

In all of the States reviewed, a constitution drafting process was the first step to establishing sovereignty, followed by an election. It is the combination of these two acts which are

[214] Constitution of the Democratic Republic of East Timor 2002, Section 7 and Article 11., Law on the Election of Parliament no.6, 2006.
[215] National Elections Act 2012 no.39, Article 66.
[216] National Democratic Institute '*The 2010 Wolesi Jirga Elections in Afghanistan'* pp.66-7
[217] Law No (45) of 2013 Iraqi Council of Representatives Elections, Article 12.
[218] Law No. 03/L-073 on General Elections in the Republic of Kosovo, Article 20 and Election Law of Bosnia and Herzegovina 2001 amended Article 4.2.
[219] https://freedomhouse.org

understood within the UN to create, or recreate, a sovereign governance system and are the first steps to introducing democracy.

Criticisms of this election-focused approach within the practitioner community centres on two points: Firstly that elections are a starting point for the creation of democracy, but that in and of itself, an election does not deliver democratic governance, or indeed, 'state build'.[220] Secondly that the preferred system of one-man-one-vote with first-past-the-post allocations systems produces winner-takes-all polities systems which are predominantly preferred in UN administered processes. Particularly in post-conflict environments this leads to dangerous levels of exclusion.[221]

In relation to the first point, the phenomenon of 'elections without democracy' and 'illiberal democracy' are manifestations of this criticism. Critics argue that the selection of a governance-appointment system, an election, is only the beginning of the process, if indeed democracy is to provide the rights and liberties which it claims to deliver.[222] Without the development of robust governance institutions, such as a free media, an independent judiciary, and a range of checks and balances to ensure regular rotation of political power among interest holders, and public education of the issues, democracy cannot be said to exist – or indeed to have a chance to develop.

The second school of thought looks to the forms of electoral or voting systems designed to create a political appointment system which, according to the UNDP, "ensure[s] that there are multiple arenas of contestation, constraints on executive rule and divisions of power— all factors that reduce the winner-take-all politics antithetical to mutual security."[223] In this approach, the success of a democracy is found in the broadest representation of interest groups within a polity, while maintaining both a multi-party system and a 'parliamentary' government-opposition dynamic. Strictly majoritarian systems, usually appointed on the basis of a one-person-one-vote, first-past-the-post voting system, do not allow for minority representation. They are not suitable for post-conflict or highly diverse polities or populations, as broad representation is not accommodated through this system. Particularly in relation to societies with contested political dynamics, this absence of representation can perpetuate the same

[220] International IDEA (2006), pp.49-50.
[221] International IDEA (2012), p.27.
[222] Sadiki (2008). Fareed (1997).
[223] Fareed (1997), p.28.

tensions which led to conflict in the first place. The argument is that if the most basic form of representation, first-past-the-post, does not work, proportional representation, which results in a greater number of political factions forming a government, will deliver the level of diversity required within contested polities. The core dynamic of government-opposition remains, but the degree of inclusion into government is expanded to greater and greater degrees of participation. This approach "avoid[s] this winner-take-all situation and instead create[s] a political system in which even losers have an incentive to participate."[224]

The 2002 UNDP retrospective on its role in electoral assistance highlights the short-comings of the democratisation activities undertaken.[225] Showcasing Bangladesh, Brazil, Cambodia, Guyana, Indonesia, Kyrgyzstan, Malawi, Mozambique, Nigeria and Yemen, all of which were recipients of electoral assistance and democratic development from the early '90s, the report notes their continued receipt of support in 2002. By 2019 only Brazil and Guyana are listed by Freedom House as 'Free', with Cambodia and Yemen as 'Not Free'. All of the other countries are listed as 'Partially Free'.[226] With the exception of Brazil, all of the countries listed in the 2002 report were still in receipt of electoral assistance in 2016. Malawi, for example, which received UN support to conduct a referendum in 1993 which ushered in multi-party democracy, is still receiving UN support 26 years later.[227]

3.2.4 Democracy within the State

What is absent in the UN understanding of democracy, is power. That it is obtained or lost through an election is acknowledged as a central mechanism of democracy, but power within established, 'mature' democracies is complex and situated within a range of national institutions. Early thinkers formulated democracy as a mechanism through which power could be diffused throughout the population, transforming leadership into public service. Bentham particularly created complex systems through which power would be limited and constrained within an administration.[228] The evolution of democracy struggled with the diffusion of power, as can be seen in the proposals of Mill to limit voting capacities. Within the US, elections see the regular transfer of power between two parties, but power holder retain their power through

[224] International IDEA (2012), p.27.
[225] UNDP (2002).
[226] www.freedomhouse.org
[227] http://www.mw.undp.org/content/malawi/en/home/operations/projects/democratic_governance/malawi-electoral-cycle-support-.html
[228] Schofield (2006), pp.137-170.

a range of institutions regardless of whether or not they are in government. The role of opposition is a power holding function and committees, institutions, think tanks, media outlets and lobby systems, have developed to allow power holders to transition in and out of government and remain engaged.

When liberal democracy is exported, the exchange of power between factions through an election is articulated, but the broader understanding of power distributed through these systems is not communicated. The UN adheres to this latter representation of democracy, assisting in the creation of Constitutions and the conduct of elections and while programming does take place less emphasis is placed on the creation of administrations. For example, the 2005 Afghan Parliamentary election cost $149 million, the same year the entire United Nations Development Programme global governance budget was $34 million.[229] Even with assistance, dynamic improvement in 'exported' democracy is unlikely as these power systems require evolution, at presented the basic understanding of power within democracy is barely articulated.

[229] UNDP is the lead agency for governance programming for the UN. A/59/744-S/2005/183 (2005) *Report of the Secretary-General 18 March.* Para 14. A/61/5/Add.1 (2005) *UNDP Financial report and audited financial statements for the biennium ended 31 December 2005, Report of the Board of Auditors General Assembly Official Records Sixty-first Session.*

4. Intervention and the Law

Theories of democracy differ in the understanding of its function from thick definitions realised through complex administration systems to thin definitions which focus on the effect of democracy as opposed to its exercise. Democratisation mirrors these differing understandings, with debate on the role of elections and the broader role of institution development, in the realisation of the rights at the centre of claims for democracy as a governance system. In contrast, democratisation within international law raises issues of enforceability, legality and legitimacy within a range of competing norms. Following the end of the Cold War steps were taken to limit State sovereignty in order to ensure the protection of human rights. To this end initiatives were presented to the international community which would change the international legal system to enable such actions. This chapter will firstly examine the basis for the assertion that democracy is a human right and therefore is defensible and will then address the most radical proposition within the new framework – that the use of force can be legally justified for humanitarian purposes.

In the 1990s, as part of the rise of liberalism, a group of American legal academics proposed that democracy had become a human right, enforceable against the State.[1] Political rights were established in the Universal Declaration of Human Rights and in the ICCPR, but a preferred governance system was not identified. Governance was a domestic issue for the State and therefore protected under sovereignty provisions. Were democracy to be adopted as a human right, this dynamic would change, allowing enforceability of the right into an area previously viewed as outside of the ambit of international law.

As these claims were being made, two initiatives were presented to the General Assembly which would create a system for the attribution of wrongful acts to the State and enable intervention for humanitarian purposes: The Draft Articles on Responsibility of States for Internationally Wrongful Acts and the Responsibility to Protect doctrine (R2P).[2] This chapter examines the claims made for democracy in the context of the existing international legal

[1] Simpson (2001). T. Franck (2000), pp.33-34. T. Franck (1994), p.77., G. Fox (1992). C. Cerna (1995), p.295. G. Fox & R. B. Roth (2000), pp. 1-24

[2] A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, A/57/303 (2002) *The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty (ICISS)*, 14 Aug.

system, and seeks to establish if the claims made about the development of international law to curtail sovereignty have actually taken place. This chapter will first examine the basis for the assertion that democracy is a human right and therefore is defensible and will go on to examine how these reports were received by the International Community. The chapter will argue, that the most radical proposition within the new framework – that the use of force can be legally justified for humanitarian purposes – requires clear and unequivocal adoption, and that this has not taken place.

Immediately following the conclusion of World War II an international legal order was created, which guaranteed the sovereignty of each State and prohibited interference in domestic affairs. This sovereignty was devoid of moral considerations: the nature of the government, or the rights afforded to the citizens therein, was not a consideration, as the structure of the State was inviolate. This is set out in Art 2(4) and Art 2(7) of the UN Charter:

> 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.[3]

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.[4]

While ostensibly liberal in philosophy, the structure acknowledged the role of power in the international system and the role of law in providing a framework which could accommodate that power, while also providing a semblance of legal certainty and equality.[5] States could only be bound through consent with the exception of the Security Council, whose decisions are binding on all Member States, in the conduct of its mandate: the maintenance of peace and security within the United Nations.[6] While Security Council members clearly wielded power over and above that of other States, the Council is restrained by the veto held by all members,

[3] UN Charter Article 2(4)
[4] UN Charter Article 2(7). Chapter VII empowers the Security Council.
[5] Koskenniemi (2001a), p.513., U.N. Charter Article. 2, para. 1.
[6] Article 103, Articles 24 & 25

ensuring either collective action, or no action at all.[7] In all other matters, the system is based on State consent, is non-hierarchical, and unlike domestic legal systems, has no overarching enforcement body. Within this structure there is no concept of illegitimate or failed States, ideas which would not be articulated until the l990s.[8]

At the same time that the UN framework guaranteeing sovereignty and State equality was adopted in 1945, another legal movement in part articulated by Hersch Lauterpacht and Roberto Ago, sought to define prohibited State actions and create a human rights framework.[9] Completely liberal in nature, this understanding of law did not acknowledge power dynamics and claimed that prohibitions and human rights provisions universally applied to all States, in a manner analogous to domestic, hierarchical law.[10] However, in terms of actual powers to compel or coerce, the instruments which were created were very limited in capacity. The 1948 Universal Declaration of Human Rights is a non-binding instrument. In the same year the Genocide Convention was adopted. It was presented as a treaty which would bind signatory States, but while the prosecution of individuals was provided for, State accountability was not overtly included.[11] These instruments were followed by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both completed in 1966. The human rights canon sets out essential political rights, which could in theory, be met by a range of governance systems. They are:

1. Self-determination;[12]
2. The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly;[13]
3. The right to freedom to seek, receive and impart information and ideas through any media;[14]
4. The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections;[15]

[7] Articles 27, Chapter V, VI & VII. Article 103, Articles 24 & 25., Gray (2014), p.619.
[8] Helman & Ratner (1992). Woodward (2017).
[9] Koskenniemi (2001b), p.338. Koskenniemi (1997).
[10] Koskenniemi (2001b), pp.338-9.
[11] Article 6, Article 8
[12] ICCPR Article 1
[13] ICCPR Article 18-22
[14] ICCPR Article 19
[15] ICCPR Article 25

5. The right of political participation, including equal opportunity for all citizens to become candidates;[16]
6. The right to equal access to public services in one's own country.[17]

These rights were drafted without reference to the word democracy, or any other ideological chapeaux. Instead they focused on the conduct of elections and political participation mechanisms, which could be incorporated into a broad range of systems. Indeed, any attempt to favour a single system in the ideological battle ground of the Cold War, would have precluded their passage. For example, in response to a 1986 claim that the Nicaraguan Government was totalitarian, the ICJ found that:

> …adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State… The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.[18]

As this judgment makes clear, international legal bodies like the ICJ saw the political rights expressed in the ICCPR as compatible with a range of political systems, as long as the capacity to vote and to participate were up-held. Following the collapse of the Soviet Union, the prevailing understanding that the United States had 'won' the Cold War was accompanied by the recognition that the American model of 'liberal democracy' had effectively 'won' the attendant ideological battle.[19] This gave rise to an intense period of democracy promotion, through organisations such as the US funded Asia Foundation, the International Foundation for Electoral Systems, the Organisation for Cooperation of Security in Europe, and the UN Electoral Assistance Division. These groups explicitly rejected or qualified innate State legitimacy of non-democratic, non-liberal governments. While democracy had been an informal criterion for European Union membership, this was formalised in 1993 through the

[16] Ibid.
[17] Ibid.
[18] I.C.J. Rep. (1986) *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*. para 263
[19] P. Allott (1999).

adoption of the 'Copenhagen Criteria'.[20] It was in this period that proposals were made that democracy was a human right.[21]

In 1999. NATO bombed sites within the former Yugoslavia in order to end the Kosovo war. The action was taken without Security Council approval, due to Russian and Chinese opposition and was the first time that the Council was circumvented in this manner. The action was undertaken on humanitarian grounds, but as noted by Emeritus Prof. of International Law Vaughan Lowe, was in breach of Article 2(4) of the Charter, with humanitarian grounds not a basis for legality under international law.[22] Nonetheless, invoking a humanitarian imperative addressed a rising sense that the international community had to act when faced with events like Rwanda, and that the law had to change.

These issues were examined in the 2000 report by the Independent International Commission on Kosovo.[23] Headed by Judge Richard Goldstone, the report examined NATO's military action in Kosovo, to prevent ethnic cleansing and the escalation of the civil war.[24] While defining NATO's intervention into Kosovo as "illegal but legitimate", the Commission report found that prohibitions on the use of force could be modified to allow military intervention in response to, or to prevent, gross violations of human rights.[25]. The Commission made it clear that change in the law required agreement by the international community.[26] In 2001 two documents were presented to the General Assembly which would do just that.

In 2001, Articles on Responsibility of States for Internationally Wrongful Acts were presented to the General Assembly.[27] Their prohibitions for serious breaches of human rights provisions, including genocide, torture, and crimes against humanity still focused on acts of the individual, thereby avoiding the tricky issue of State attribution.[28] Yet, while not defining the subject matter or a list of proscribed acts, the Articles allowed for attribution of wrongful acts to the State.[29]

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[20] 'Copenhagen Criteria' Presidency Conclusions. Copenhagen European Council 21-22 June 1993 http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf
[21] T. Franck (1992). F. Teson (1992). C. Cerna (1995)
[22] The Independent International Commission on Kosovo. (2000),pp.85-97., Lowe (2000)
[23] Ibid. pp.163-200.
[24] Ibid, pp.2, 4.
[25] Ibid, pp.10, 169.
[26] Ibid. p.171.
[27] *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (II, Part 2) YBILC Annex to GA RES/56/83 (2001), corrigendum A/56/49(Vol. I)/Corr.4. Articles 26 & 40
[28] *International Military Tribunal for the Trial of the Major War Criminals, judgement of 1 October 1946*, p.221., A. Cassese (2005). Schabas (2011).
[29] *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (II, Part 2) YBILC annex to GA Res. 56/83 of 12 December 2001, corrigendum A/56/49(Vol. I)/Corr.4. Article 1

In the same year, the Responsibility to Protect doctrine (R2P) was presented to the Secretary General.[30] In cases where a population was suffering serious harm due to acts or omissions by the State, the report proposed a revised concept of qualified sovereignty.[31] Proponents of both initiatives claim, that like the Universal Declaration of Human Rights, the instruments are now binding under customary international law.[32]

The broader question of whether imposing democracy assists in making military intervention for the purpose, legitimate, also finds its origins in the Kosovo intervention, and to a degree, its answer. The finding of 'illegal but legitimate' gave credibility to any sufficiently powerful actor to look beyond the legality of their actions and instead focus on legitimacy.[33]

4.1. Democracy as a Human Right and the Question of Intervention

The origins of the claims for democracy as a human right lie in the scholarship of a group of predominantly American academics writing in the 1990s during the unipolar moment at the end of the Cold War. They advocated for the universal promotion of liberal democracy as a human right and its transformation into a criterion for State legitimacy.[34] While each author approaches the premise differently, the overall argument advanced is that democracy as a human right was established through two key acts: the inclusion of self-determination in the UN Charter and the adoption, under treaty provisions, of the political rights listed in the ICCPR.[35] This school dominated the American Society for International Law and key international law positions at Harvard and Yale; these were voices which directly shaped policy and the direction of US understandings of international law and the position of the State.[36] Thomas Franck, former President of the American Society for International Law, discusses how the adoption of the self-determination principle into the ICCPR expanded the principle to all 'peoples' and "entitl[es] them to determine their collective political status through democratic means… [It]

[30] A/57/303 (2002) *The Responsibility to Protect: The Report of the International Commission on Intervention and State Sovereignty (ICISS) 2001, 14 Aug.*
[31]Ibid, p.XI synopsis, p.8, para 1.35., Thakur Weiss (2009), p.27 building on the work of Deng (1995)
[32] Thakur & Weiss (2009). T. Weatherall (2015), p.392.
[33] Welsh (2003). Brownlie & Apperley (2000).
[34] T. Franck (1992). See also T. Franck (2000), pp.33-34. T. Franck (1994), p.77. Reisman (1990). A. M. Slaughter (1995). F. Teson (1992). G. Fox (1992). C. Cerna (1995), M. F. Plattner (1998).
[35] T. Franck (1994). G. Fox & R. B. Roth (2001), p.333. M. F. Plattner (1998), p.171. G. Fox (1992).
[36] W. Michael Reisman is the Myres S. McDougal Professor of International Law at Yale; Anne-Marie Slaughter former President of the American Society for International Law, Director of Policy Planning under President Obama, held Professorships at Princeton and Harvard; Thomas Franck is former President of the American Society for International Law.

stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate."[37] How this actually occurs and whether it is in fact adopted in law, is a point on which he is silent, as noted by Jure Vidmar.[38]

More radically, Christina Cerna argued that the political rights contained within the ICCPR create a 'democratic entitlement' for all peoples which have "have gained the legitimacy and currency of universal values" and on that basis can become a justification for intervention.[39]

> "What the democratic entitlement thesis does suggest, however, is that whereas intrusive political, economic, and military measures would previously have been excluded as violative of international law, they may now be included on the menu of lawful options for foreign powers seeking—collectively or perhaps even unilaterally—to implement democratization in a recalcitrant state." [40]

This democracy stands in opposition to totalitarian, despotic systems, which are absent of rights.[41] In this model, sovereignty devolves from the State to the people, and the State can be compromised to defend the rights of the people.[42] Reisman is a proponent of this utopian interventionism. The State is not important, he argues, but rather the point is the championing of human rights, the political will of the 'people' and its defence, through military means if necessary. He does not address two key considerations, who should intervene and how to determine the will of the people. While acknowledging that "restoring democracies is not always that simple" he nonetheless sees the purity of the enterprise:

> "Monarchical and elitist conceptions of national sovereignty cannot be invoked to immunise them from the writ of international law. The princes may not like this, but for peoples languishing under despotism and dictatorship, the development promises, at least, the condemnation by international law of the violation of their sovereignty and the possibility uncertain as it may be, of a remedy."[43]

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[37] T. Franck (1992), pp.52-55, 58-59 see also F. Teson (2005), p.8.
[38] J. Vidmar (2013b), p.354.
[39] C. Cerna (1995). T. Franck (1998).
[40] G. Fox & R. B. Roth (2001).
[41] M. F. Plattner (1998)
[42] W. M. Reisman (1990).
[43] W. M. Reisman (2000), pp.245-250, 254 see also A. D'Amato (1990).

Teson presents a similar argument in defending the invasion of Iraq.

> "International law, should enable human flourishing and protect freedom, autonomy, and dignity. Therefore, we should look at whether the intervention has furthered those goals, rescued the victims of tyranny, and restored justice and human rights."[44]

The core assumption is that any entity intervening to defend democratic rights is doing so for the right intentions. These intentions do not include political self-interest, or if they do it is of secondary consideration. Another assumption is that all populations would naturally welcome these interventions, that the institutions and values being promoted are unquestioningly universal. Writing in 1993 James Crawford identified a number of serious problems with the proposal that "democracy can be installed by the unilateral assertion of external force".[45] Firstly, the "vast majority of governments" would not accept such actions. Secondly, intervention has been exercised to date in an arbitrary manner. Thirdly, democracy could not be "installed by a foreign force in a few days" making it "difficult to establish local legitimacy".[46] Crawford points to Schachter's crystal clear argument in his 1984 riposte to Reisman, that invasion for democratic purposes;

> "would introduce a new normative basis for recourse to war that would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will… that invasions may at times serve democratic values must be weighed against the dangerous consequences of legitimising armed attacks against peaceful governments."[47]

Aside from the practical and political dynamics, critical issues are not addressed in the assertion that democracy is a human right. Firstly, the framing of democracy as a human right would require democracy to have a legal definition, a factor which has not been discussed by any of the proponents. In its absence, there is no attempt to define what the political system is, what it contains or how it could or should work.

[44] Teson (2005), p.8.
[45] Crawford (2000), p.106.
[46] Ibid, p.107.
[47] Schachter (1984).

Broadly, these authors are referencing a liberal understanding of democracy.[48] Reisman exuberantly places the right to freedom and democracy within the concept of 'we the peoples' anchored in the American and French Revolutions.[49] Others, while not identifying their 'democracy' as a liberal construct, outline a system, which to all extents and purposes appears to conform to the liberal, Anglo-American model.[50] For example, Anne-Marie Slaughter (1995) argued "Six attributes describe a hypothetical world of liberal States, a world of peace, democracy, and human rights" as well as market economies, transnational networks and a unified foreign and domestic policy posture.[51] Secondly, while legal principles clearly change and evolve over time, these narratives do not attempt to address historical understandings of self-determination and then reframe them: the principles underpinning self-determination were simply ignored.

4.2. Self-Determination

The framing of self-determination as a foundational principle for democracy as a human right, largely ignores the history of its formulation. In the immediate post-war period, self-determination had two origins, one Wilsonian and liberal, and the other Leninist and communist. Wilson's concept of self-determination focused on self-government where peoples had the right to elect political leaders; it was 'democracy' based on "consent of the governed".[52] Under Lenin's conception, self-determination advocated the right to secession from an 'oppressor' nation, allowing ethnic or national groups the right to break-away from their controlling power and organise their affairs independently.[53] The Soviet model was an explicitly external conception of self-determination, which emphasized independence from colonial powers. Internal self-determination, which emphasised the necessity of democracy, followed the Wilsonian construct and was not applied.

"Self-determination" first appears in the Atlantic Charter issued by Roosevelt and Churchill, in 1941. The Charter promises to ensure "the right of all peoples to choose the form of government

[48] For a critical review see S. Marks (1997).
[49] W. M. Reisman (2000), p.240. T. Franck (1992). See also T. Franck (2000), pp.33-34. T. Franck (1994), p.77. F. Teson (1992). G. Fox (1992). C. Cerna (1995). M. F. Plattner (1998).
[50] T. Franck (1994), pp.75, 81. A. M. Slaughter (1995).
[51] A. M. Slaughter (1995).
[52] Thornberry (1993), p.106. Baker & Dodd (1925), pp.65,66 & 98., see also A. Cassese (1995), p.19. Pomerance (1976), p.2. J. Vidmar (2013a), p.142.
[53] I. V. Lenin (1964), pp. 145.

under which they will live; and wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them".[54] This concept was subsequently incorporated into the UN Charter,[55] but the parameters of principle itself was unclear, as the wording in both documents did not create any absolute requirements for defining self-determination.[56]

Instead, the understanding as to the nature of the right to self-determination was subsequently developed in the 1950's during the drafting process for the ICCPR and ICESCR in an ad hoc manner within the United Nations, by newly established Councils and Committees. The initial discussions as to the nature of self-determination were spread over three main institutions: the General Assembly 3rd Committee (Social, Humanitarian, Cultural), the Economic and Social Council and the Commission on Human Rights.[57] In 1952 in its sixth session, the General Assembly adopted the following text: "All people's shall have the right of self-determination" and stipulated that the realisation of the right should take place in "conformity with the principles and purposes of the United Nations". The General Assembly also decided that States which administered non-self-governing States had a responsibility to "promote the realisation of that right".[58] The General Assembly did not define "peoples" or address secession. In 1952 the Economic and Social Council distinguished between 'self-determination' to facilitate independence of the State from the control of another State, and 'self-government' which was defined as "autonomy in the domestic administration of a country" with self-government being rejected for inclusion in the final text as it addressed the domestic sphere, compromising the non-interference principle.[59] The form of self-determination considered was implicitly outlined in the preamble: *"Whereas* such slavery exists where an alien people hold power over the destiny of a people".[60] This iteration of self-determination was external in focus, the right to choose international status. It was essentially a struggle against colonisation, but was not concerned with personal rights, minority rights or ethnic tensions within the State.[61]

[54] The Atlantic Charter Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom 14 August 1941 http://www.nato.int/cps/bu/natohq/official_texts_16912.htm
[55] Articles 1(2) and 55
[56] Cassese (1995), pp.42-43.
[57] For a review of the debates see A/C.3/SR.355-410 General Assembly Sixth Session Third Committee 355th meeting to 410th meeting 1951, documents can be located at https://search.un.org
[58] GA RES A/RES/545 (VI) point 1. See also A/RES/543 (VI), A/RES/545 (VI) and A/RES/549 (VI)
[59] E/2256 (E/CN.4/669) (1952) *Commission on Human Rights Report to the Economic and Social Council on the eighth session of the Commission, held in New York*, from 14 April to 14 June, p.5.
[60] Ibid, p.11.
[61] Tunkin (1974), pp.7-14, 60-9. Cassese (1995), p.45.

The principle was again debated in 1955, spurred by the Bandung Conference in the same year. As an unprecedented expression of the political will of the non-European colonial world, Bandung actively called for unilateral decolonisation of the global south as an active iteration of self-determination. This was opposed to the passive assertion of the principle as a framework for peaceful relations between existing sovereign States.[62] While the principle of self-determination was a step towards the recognition of self-government, it was not directly associated with 'internal' or 'minority' independence movements.[63] It was strictly an 'external' concept concerning the "status of the people in relation to another people",[64] and enshrined the right of colonised populations to "freely determine their political status and freely pursue their economic, social and cultural development".[65] The exclusive focus of self-determination was the removal of the colonial power, with the right effectively expiring once this was achieved.[66] The rights of the populace to decide their government, were disregarded as outside of the ambit of the principle.[67]

The final text agreed in 1955 was subsequently incorporated into the Covenants.[68] The decolonisation movement was further supported through the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Resolution 1514 (XV) was adopted, which called for the consideration of the status of non-self-governing territories.[69] The wording adopted in the UN Charter noted the importance of the "freely expressed wishes of the peoples".[70] This was mirrored in the Covenants where the right to "freely determine their political status" was confirmed.[71]

Before self-determination was adopted, limitations were already being placed upon its application. The 1960 Declaration on the Granting of Independence, while confirming self-determination in principle, actively rejected succession: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible

[62] Cassese (1995), p.44.
[63] Ibid, p.66.
[64] Thornberry (1993), p.101.
[65] GA RES., A/RES/1514 (XV) (1960) *Declaration on the Granting of Independence to Colonial Countries and Peoples*, para 2.
[66] Cassese (1995), p.73.
[67] Ibid, p.74.
[68] A/3077 (1955) *Draft Covenant on Human Rights, Report of the 3rd Committee*
[69] A/RES/1514 (XV)
[70] Article 76.
[71] Article 1.

with the purposes and principles of the Charter of the United Nations."[72] In 1964, the newly formed Organisation of African Unity announced the adoption of the principle of *uti possidetis* in their first assembly. The principle confirmed that the existing colonial boundaries in existence at the point of independence for each African country would be retained.[73] The effect of this undertaking was to reinforce the territorial integrity of the State above all other considerations, including the rights of minorities and secessionist groups who did not want to remain within the existing colonial boundaries, as well as irredentist claims from neighbouring States.[74] Effectively, the form of self-determination adopted in the Covenants exclusively emphasised independence of States in their entirety and the right of freedom from colonial influence.[75] As noted in subsequent commentary by the former President of the ICJ, Rosalyn Higgins, "The context was clearly the rights of peoples of one State to be protected from interference by other States or governments…it was the equal rights of States that was being protected for, not of individuals".[76]

By 1970 some softening of this stance was indicated through the adoption of the "so called 'safe-guard' clause" in the 1970 Declaration on Friendly Relations.[77] The clause allows for the consideration of the internal circumstances in the State in relation to minority rights, where those rights are not respected.[78] The adoption of the safeguarding clause indicates a "shift in tone" from the absolute stance found in the strict application of external self-determination, to the more liberal democratically inclined internal iteration of the rule.[79] This was followed in 1975 by the Helsinki Final Act which declared: "All peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status".[80]

4.3. Draft Articles on State Responsibility and *Jus Cogens*

A second period of legal evolution took place around the introduction of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "the Articles"),

[72] Principle 6
[73] AHG/Res.16(1) (1964) *Border Disputes Among African States*
[74] Crawford (1999), p.89.
[75] Cassese (1995), p.66.
[76] Higgins (1993), p.29.
[77] Crawford (2007), p.118.
[78] GA RES. A/RES/2625 (1970) *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, principle 5, para 7. See also GA RES A/RES/47/135 (1992) *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, 18 Dec.*
[79] Musgrave (1997), p.24 See also Rosas (1993), p.229.
[80] Helsinki Final Act (1975), *Conference on Security and Cooperation in Europe Aug 1,* Chapter VIII at 1295

presented to the General Assembly for consideration and review in 2001. The culmination of a 45-year project, in principle the Articles conform to key norms established in the 1945 framework, and set out 'secondary' rules of responsibility within that framework.[81] They address the "consequences of a breach", regardless of the "nature of the obligation" or its origin.[82]

While the Articles do not list or define 'wrongful acts', in addressing them, States must not threaten or use force, must protect fundamental human rights, are prohibited from undertaking reprisals and must adhere to "peremptory norms of general international law".[83] The Articles do not define the nature of peremptory norms, stating that to do so would be inappropriate, though some guidance is provided in the accompanying 'Commentaries' where peremptory norms are said to include "the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[84] The remedies listed, include reparations, restitution, compensation and satisfaction.[85] Provisions are also included to allow States which are not directly affected by a peremptory norm breach, to "invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach".[86]

The incorporation of a prohibition on breaches of peremptory norms is an expression of the *jus cogens* principle.[87] The principle, adopted into the Vienna Convention on the Law of Treaties 1969 but brought into wider usage by its inclusion in the 2001 Articles, established that a "treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law".[88] The importance of *jus cogens* is not due to its implementation in this context, but rather the nature of the peremptory norms which would void a treaty. *Jus cogens* prohibitions focus on acts which are more broadly identified as criminal, such as genocide, the illegal use of force and slavery. Following the end of the Second World War the attribution of these acts through doctrine such as superior responsibility, focused on the individual not on the State. The inclusion of the prohibitions into treaty law was not without controversy but

[81] Crawford (2002a), pp.14-16.
[82] I.C.J. Reports (1997) *Gabˇcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, p.38, para 46.
[83] Article 50
[84] A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Article 40, p.112, para 3. Article 26, p.85, para 5. See also pp.112-113.
[85] Chapter II, Articles 34-39
[86] Article 54 see also Article 42 & 48
[87] Crawford (2002a), pp.1-10
[88] Vienna Convention on the Law of Treaties, 1969, Article 53.

ultimately had an enforceable outcome, the voiding of a treaty. However, the inclusion of *jus cogens* prohibitions into the Articles, which create *State attribution* for wrongful acts, invokes the censure of *the State* for those acts.[89]

The *jus cogens* principle is somewhat anomalous in international law, in that it presents a rule binding on States regardless of their consent and implies the existence of a hierarchy of law which international law does not otherwise contain.[90] Under this principle, any State may censure prohibited acts by any other State which breaches a peremptory norm.[91] Commentators such as Paulus, Weatherall, D'Amato and Orakhelashvili claim that *jus cogens* is:

> "an instrument against power, to bring the powerful into legal constraints they would otherwise reject, and an instrument of and for power allowing for intervention where otherwise State sovereignty prevents interference of any kind".[92]

Further, Weatherall has argued, *jus cogens* was "codified with the intent of establishing a public order in international law by explicitly incorporating considerations of morality into norms that cannot be modified by the conventional sources of international law".[93] Its originator, UN Special Rapporteur on the Law of Treaties Hersch Lauterpacht, inserted a single clause invalidating treaties whose performance involved an act "illegal under international law".[94] Acknowledging the difficulty of articulating such a rule, he maintained that there was a category of law which prohibited objectives that were inconsistent with "overriding principles of international law which may be regarded as constituting principles of international public policy".[95] These prohibitions were "expressive of rules of international morality" and were viewed as "essential in any codification of the law of treaties".[96] In discussing the content of the prohibitions, he referenced slavery and aggression as examples which were "expressive of rules of international morality".[97] Lauterpacht did not elaborate beyond these specific prohibitions, "cogent that an international tribunal would consider them as forming part of those

[89] A/RES/60/1, (2005) *World Summit Outcomes* paras 138-9.
[90] M. Koskenniemi (2001b).
[91] *Responsibility of States for Internationally Wrongful Acts (II, Part 2) YBILC annex to GA Res. 56/83 of 12 December 2001, corrigendum* A/56/49(Vol. I)/Corr.4. Articles 26, 40, 41, 48, and 54
[92] A. L. Paulus (2005).
[93] T. Weatherall (2015), p.xxxviii.
[94] A/CN.4/63 (1953) *Law of Treaties Report by Mr. H. Lauterpacht Special Rapporteur*, Article. 15 *see also* Commentary on Article 3, p.106. Note where he references "certain rules and principles which are above and outside the scope of jus dispositivum… treaties must not violate binding rules of international law".
[95] Ibid, p.155, para. 4.
[96] Ibid, and note 1.
[97] Ibid.

principles of law generally recognised by civilised nations".[98] The principle in its open ended form, was ultimately adopted.

Jus cogens was first discussed in the context of the Articles, by Special Rapporteur on State Responsibility, Roberto Ago, in 1976.[99] Ago found that such was the importance of peremptory norms, their breach would result in the modification of accepted rules of jurisdiction. This modification would allow States, other than the interested Parties, to punish actors on the basis of personal liability.[100] It was argued that this right existed regardless of location or jurisdiction and should State organs be implicated, then the State itself would "be subject to a special regime of state responsibility".[101]

The inclusion of *jus cogens* within the Articles did not prove popular, a point discussed in James Crawford's first report as Special Rapporteur in 1998.[102] Nonetheless, in the report of that year Crawford referenced *jus cogens* and obligations *erga omnes* as "confirm[ing] the view that within the field of general international law there is some hierarchy of norms".[103] In the following year Crawford undertook a broader examination of the rule confirming "the norm must prevail over any other international obligation not having the same status".[104] When he did introduce the rule into the State Responsibility discussion, he did not do so within the discussion of international obligations and prohibited acts by States. He chose instead to discuss *jus cogens* in the context of "circumstance precluding wrongfulness". These included the defence of consent, necessity, force majeure, and self-defence.[105] He justified his introduction under this heading, as being consistent with the place in which Special Rapporteur Fitzmaurice grouped *jus cogens* in his draft of the Vienna Convention, as grounds for the non-implementation of a treaty.[106]

Jus cogens was inserted within the defence of 'necessity', and he concluded that "necessity can excuse the wrongfulness of genuine humanitarian action, even if it involves the use of force,

[98] Ibid.
[99] A/CN.4/291 (1976); Add.1 & 2 and Corr.1. *Fifth report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur - The internationally wrongful act of the State, source of international responsibility* (continued). Vol 2, (1) 3 YBILC 31 para. 98-99.
[100] Ibid, paras. 98-101.
[101] Ibid, para. 101.
[102] A/CN.4/490 (1998) *Crawford, First Report on State Responsibility,* para. 52.
[103] Ibid, p.17, para. 65.
[104] A/CN.4/498 (1999) *Crawford, Second Report on State Responsibility,* p.77, para. 313
[105] Ibid, p.57, para. 215.
[106] Ibid, p.58, para. 217.

since such action does not, at any rate, violate a peremptory norm".[107] He framed *jus cogens* as a provision that could be invoked to mitigate wrongfulness, where the State in question was forced to commit a 'wrongful' act in order to comply with or protect a *jus cogens* norm. This would mean that a State could breach the prohibition on the use of force in order to prevent genocide: It was a brilliant, if little examined approach, where the rule would be both sword and shield simultaneously.[108]

In both the 1998 and 1999 reports Crawford made reference to a general unwillingness to incorporate *jus cogens* into the State Responsibility doctrine, with States voicing concerns that the rule, if used to censure States, would "destabilise treaty relations".[109] He reported that States also voiced concerns as to who would implement *jus cogens*: "the provision could be read as implying that any State could, with very serious consequences, arrogate to itself the right to act as an international policeman by invoking, for example, human rights".[110] While this concern was not addressed, the Special Rapporteur did note that "he saw no reason why, in the case of genocide, the obligation of prevention did not have the same status as the obligation not to commit genocide."[111]

The way in which *jus cogens* was subsequently utilised was to take a clear and somewhat radical path. In the subsequent 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *jus cogens* was expanded within the draft to encompass two roles. One role was within defences; the second was as the focal point for Chapter 3, Serious Breaches of Obligations under Peremptory Norms of International Law, prohibiting said breaches and thereby bringing the rule fully within the draft as a basis for prohibitions.[112] In the commentaries, Crawford discusses the disengagement of *jus cogens* from treaty law as almost an aside: "One State cannot dispense another from the obligation to comply with a peremptory norm, e.g. in relation to genocide or torture, whether by treaty *or otherwise*".[113]

[107] Ibid, p.72, para. 288.
[108] Manard (2010), p.451.
[109] Austria, France and the UK, A/CN.4/498, para. 312 and 236; see also A/CN.4/490, para. 62 & A/CN.4/SER.A/1999/Add.1.
[110] A/CN.4/SER.A/1999/Add.1.
[111] Ibid, p.77, para. 317.
[112] A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, (II, Part 2) YBILC 84 & 110-116.
[113] Author's emphasis Ibid, p.85, para. 6.

Styled as secondary rules, the Articles sought to create an "overarching, general framework which sets the consequences of a breach of an applicable primary obligation."[114] The inclusion of peremptory norms and the provisions surrounding them are the most problematic aspect of the Articles. They move the attribution of responsibility for breaches of peremptory norms from the individual to the State. The majority of acts prohibited by *jus cogens* are crimes by individuals against individuals, for example crimes against humanity, or genocide. If *jus cogens* is applied as the Articles suggest, however, it creates State attribution for these acts.[115]

As noted, until the formulation of the Articles, international law as it relates to *jus cogens* prohibitions, focused on attribution to the individual. As Allott observes, "The wrongful act of a state is the wrongful act of one set of human beings in relation to another set of human beings."[116] The Nuremberg trials established this approach, with international criminal liability focusing strictly on the actions of people, thereby avoiding issues of State attribution.[117] The Articles deliberately set this approach aside, switching the focus instead to those who "should be considered as acting on behalf of the State...".[118] Within the formulation of the Articles, reference to 'crimes' were originally included, but this was replaced with 'wrongful act' to "avoid the penal implications of the term".[119] In his commentaries, Crawford raises the question of the ability of attributing crimes to States and concludes that it is possible, noting that such a development would be "a reversion to the discredited idea of the State being above the law".[120] Further, the inclusion of peremptory norms which are identified and identifiable, belies the statement by Crawford that the Articles are purely a secondary framework, as opposed to a primary statement of obligations.

Throughout the existing international legal structure, State consent is a foundational principle, particularly in relation to any system which would create obligations for the State. This has been particularly true in addressing breaches of peremptory norms, most of which form the basis for prosecution under international criminal law.[121] Prosecution is focused on the

[114] Crawford (2012b), p.3.,
[115] A/RES/60/1 (2005) *World Summit Outcomes* paras 138-9.
[116] Allott (1988), p.14
[117] Cassese (2005). Schabas (2011).
[118] A/56/10 (2001) *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* Article 2 para 5 page 35. For a caustic critique of this stance see Allott (1988), p.14.
[119] A/CN.4/SER.A/1996/Add.l (Part 2) *Report of the International Law Commission on the work of its forty-eighth session* (6 May-26 July 1996) p 63. Footnote to Article 40
[120] Crawford (2002a), p.19.
[121] UN Charter, Rome Statute,

individual attribution and the Member State can withdraw consent during the proceedings at any time.[122] In contrast, the Articles opens the door to any State acting against another regardless of consent. Consent is mentioned, but only in relation to circumstances precluding wrongfulness.[123]

State consent, or the notion of it, serves to reduce in part, the friction resulting from very obvious political inequalities between parties, as both weaker and stronger States can rely on consent or the absence of it as a point of balance. Overarching claims that *jus cogens* prohibitions are grounded in custom, removes consent as a block to action or a basis for inaction.[124] The absence of action against a State, which undertakes to breach a peremptory norm, would become glaringly political.[125] It is the absence within the Articles, of consideration of the reasoning behind the structures within the Charter, which is most concerning. While it can be widely understood that the international legal system is political and fundamentally operates as such, principles such as consent enable the international community to point to sovereign equality and claim balance. Side-stepping of those principles, as in the Articles, leads to a situation in which some States will be censured and others will not, with no option but to accept the inequality.

4.4. Responsibility to Protect

A third significant shift in the law revolved around the development of the "Responsibility to Protect" in the early 2000s. In September 2000, UN Secretary General Kofi Annan delivered a Report to the United Nations Millennium Summit where he stated:

> "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?.... The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed

[122] Article 15, bis ss(4)
[123] Part I, Chapter V.
[124] Shaw (2008), p.125
[125] Allott (1988).

intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished."[126]

Annan was effectively proposing a radical overhaul of sovereignty as it was understood, to allow for the abrogation of the principle of non-intervention where grave breaches of human rights were threatened or occurring. In the 55th session of the General Assembly (2000), the ICISS was formed to develop a possible approach in cases. In December 2001 the Commission presented a document entitled "The Responsibility to Protect" to the UN Secretary General.[127] It provided that, in cases where a population was suffering serious harm due to acts or omissions by the State "the principle of non-intervention yields to the international responsibility to protect.".[128] The State was responsible for and to the citizens of its State, therefore sovereignty was responsibility and contingent on the States capacity to protect its citizens..[129]

The report clearly defines the scope as "action taken against a State or its leaders, without its or their consent, for purposes which are... humanitarian or protective."[130] These measures explicitly include the establishment of legitimacy for military intervention where there is a threat of or actual State actions leading to large scale loss of life or ethnic cleansing, acts which "shock the conscience of mankind."[131] The Commission emphasised that the starting point of its deliberations was the norm of non-intervention and that this guiding principle was only to be breached in exceptional circumstances and in line with six stated criteria: "Right authority, just cause, right intention, last resort, proportional means and reasonable prospects."[132]

The Security Council was granted the primary or 'right authority' to order military intervention in line with its Article 42 powers.[133] The General Assembly was the secondary source via provisions under Article 51 of the UN Charter, with the final trigger being the individual State right of self-defence.[134] The Commission confined 'just cause' for military intervention to large scale loss of life (with or without genocidal intent) and/or large scale ethnic cleansing.

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[126] A/54/2000 *Report of the Secretary General "We the Peoples: The role of the United Nations in the 21st Century* p.48 at http://www.un.org/millennium/summit.htm
[127] A/57/303 (2002) *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* p.VII.
[128] Ibid, p. XI synopsis
[129] Thakur & Weiss (2009), p..27.
[130] A/57/303 (2002), p.8 para 1.38.
[131] Ibid, p.11 paras 2.3 & 4.13.
[132] Ibid, para 4.13 & 4.16.
[133] UN Charter.
[134] A/57/303 (2002), para 6.7.

State collapse was also included as an event which would trigger intervention in order to prevent harm through starvation, civil war, or as a result of natural disasters where assistance was not forthcoming from the State.[135] The 'right intention' for military intervention is in reality a statement of moral intent: "intervention must be to halt or avert human suffering."[136] Explicitly stated, the overthrow of regimes is not a legitimate aim of intervention, nor is occupation, though the Commission conceded that this may well be an unavoidable outcome.[137] The strictures of 'last resort' made it necessary to explore all possible non-military solutions prior to deployment and confined the use of force to the minimum level necessary to achieve the objectives of the intervention.[138] 'Proportional means' required that the "scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question."[139] Finally, all of these considerations were subject to the stricture of 'reasonable prospects' where the Commission emphasised that military intervention must have a reasonable chance of success, "halting or averting atrocities", in order to be justified.[140] Interestingly, the report acknowledged that the reasonable prospects rule was likely to preclude military action against many of the five permanent members of the Security Council. In addressing this double standard, the Commission stated that while "interventions may not be able to be mounted in every case where there is justification for doing so, [this] is no reason for them not to be mounted in any case."[141]

4.5. The Articles on the Responsibility of States & R2P

In addition to concerns about their content, both the Articles and the R2P doctrine suffer from ambiguity about their legal status, as neither has been formalised as part of a UN Convention. After adoption by the ILC, the Articles were submitted to the General Assembly in 2001. The General Assembly passed a resolution taking note of the Articles that year, as well as nearly identical resolutions in 2004, 2007, 2008, 2010, 2013, and 2016. In these resolutions, the General Assembly "continues to acknowledge the importance and usefulness of the articles, and commends them once again to the attention of Governments, without prejudice to the

[135] Ibid, paras 4.20, 4.26-7.
[136] Ibid, para 4.33.
[137] Ibid, para 5.1.
[138] Ibid, paras 4.38-4.40.
[139] Ibid, para 4.39.
[140] Ibid, para 4.41.
[141] Ibid, para 4.42.

question of their future adoption or other appropriate action".[142] These resolutions, and subsequent reports, raise the possibility of incorporation of the Articles into a Convention, but to date the Articles have not been submitted for adoption in the form of a Convention or any other legal instrument.[143] The General Assembly again reviewed the matter in 2019.[144] Attempts to incorporate *jus cogens* into law have, in the main, similarly failed. As the Articles containing *jus cogens* have failed so far to be incorporated into a convention or other legal instrument, the ICJ has follow this trend by pushing back on the application of *jus cogens* in the absence of State consent.[145]

Proponents of the Articles, including Crawford, are quick to claim State engagement with the Articles as evidenced by their utilisation in the courts.[146] At the request of the UN Secretary General Ban Ki Moon, a report was compiled in 2007 of all cases which had referenced the Articles in "international courts, tribunals and other bodies".[147] The report was compiled again in 2010, 2013 and most recently 2016.[148] Of the 204 cases listed over the four reports, 153 were commercial in nature and were addressed in the International Centre for Settlement of Investment Disputes (ICSID) structure. The customary status of specific clauses of the Articles were discussed in cases at the ICTY, and the ICJ, though by no means all of them or the Articles as a whole.[149] Aside from the discussion of *jus cogens* as custom, attempts to incorporate it into positive international law have, in the main, failed. Its insertion into the Articles has not materialised into the hoped-for Convention, as the Articles are nowhere nearer to Convention

[142] GA RES. A/RES/59/35, Article 1., A/RES/62/61 Article 1., A/RES/65/19 Article 1., A/RES/68/104 Article 2., & A/RES/71/133 Article 2.
[143] GA RES. A/62/63, A/62/63/Add.1., A/65/96., A/65/96/.Add.1., A/68/69., A/71/79., A/71/505.
[144] A/RES/71/133
[145] ICJ Rep. (2007) *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro),* paras. 75, 140-141, 147, 167, 170-178.
[146] Crawford (2012b), p.3.
[147] A/62/62 *Report of the Secretary-General, Responsibility of States for internationally wrongful acts Compilation of decisions of international courts, tribunals and other bodies*, p.5, para 3
[148] A/62/62/Add.1, A/65/76, A/68/72, and A/71/80.
[149] For ICTY cases see A/62/62/Add.1, ICJ cases include ICJ Rep. (1999) *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights* Advisory Opinion. ICJ Rep. (1997) *Case Concerning the Gabčíkovo-Nagymaros Project*. ICJ Rep. (2004) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories Advisory Opinion of 9 July*. ICJ Rep. (2005) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* Judgment, ICJ Rep. (2010) *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* ICJ Rep. (2012) *Jurisdictional Immunities of the State Germany V Italy: Greece intervening.* ICJ Rep. (2012) *Republic of Guinea v. Democratic Republic of the Congo*, Judgment of 19 June, ICJ Rep. (2011) *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece),* Judgment of 5 December. ICJ Rep. (2015) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment of 3 February

status than in 2001, when they were initially presented to the General Assembly for adoption.[150] A similar stagnation has beset the Responsibility to Protect Doctrine, which could equally have ushered the *jus cogens* principle of peremptory norms, into legal adoption, but instead has been beset with contradictory statements and repudiation.

Following the presentation of the ICISS Report in 2001, the R2P doctrine appears in two paragraphs of the *World Summit outcomes* (2005). The non-binding Resolution contained a declaration by the General Assembly to take collective action, on the basis of the responsibility to protect. [151] The following year, the Security Council adopted Resolution 1674 where it reaffirmed the adoption of R2P by the World Summit and "its readiness to consider such situations and, where necessary, to adopt appropriate steps."[152] While this action did represent a binding act, there was considerable resistance within the Security Council and the broader General Assembly to the full implementation of the principle. In 2007 China argued that:

> ''there are still differing understandings and interpretations of this concept among Member States. The Security Council should therefore refrain from invoking the concept of the responsibility to protect. Still less should the concept be misused. The Security Council should respect and support the General Assembly in continuing to discuss the concept in order to reach broad consensus''[153]

Even before its adoption at the General Assembly, States and groups of States which were signalling their acceptance of R2P were simultaneously refusing to apply it. Despite having just incorporated it into its new Constitutive document, the African Union refused to invoke its own Article 4(h) in addressing the situation in Darfur in 2004-5 despite the fact that the situation arguably qualified for R2P intervention as set out in the principle.[154] A further indicator of the mood was seen in the Security Council discussion of 9 December 2005, where the representative from Algeria noted that the GA Resolution 60/1 was an agreement to

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[150] ICJ Rep. (2007) *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro)*, paras. 75, 123, 140-141, 147, 167, 170-178.
[151] A/57/303 (2001) *The responsibility to protect: Report of the International Commission on Intervention and State Sovereignty*. A/RES/60/1, (2005) *World Summit Outcomes* paras 138-40, specifically see wording in para 139. While an important step, GA Resolutions are not binding legal instruments. Strauss, E. (2009).
[152] SC/RES/1674 (2006), para 4. & 26.
[153] S/PV.5703, (2007) 22 June, p.17., see also Bellamy (2009), pp.115-6.
[154] Williams P. (2006), p.277. S/PV.5319 (Resumption 1) (2005), 9 Dec. pp.3, 7. Article 4.h http://www.africa-union.org/root/au/aboutau/constitutive_act_en.htm#Article4.

continue consideration of a possible approach to R2P, not that any binding measures had been agreed, despite clear wording to the contrary in the 2005 World Summit Resolution.[155] The Representative from Egypt echoed these sentiments warning against the expansion of protection measures from the protection of civilians in armed conflict to humanitarian arenas.[156] Discussions in the General Assembly Fifth Committee in 2008 continued in a similar vein. In that session, the adoption of the R2P doctrine was repudiated by delegates and "manifold concerns of the Member States with respect to the conceptual range and application" were expressed.[157] Relating the debates within the Security Council after receipt of the ICISS report, Jennifer Welsh the UN Secretary-General's Special Adviser on the Responsibility to Protect, describes how China refused to accept the doctrine in its entirety, the US resisted the formulation of pre-conditions for military engagement and Russia insisted on the limitation that all military action was to be subject to Security Council endorsement.[158]

In 2009 the Secretary General (SG) reported on the implementation status of the R2P doctrine, noting:

> "there are substantial gaps in capacity, imagination and will across the whole spectrum of prevention and protection measures relating to the responsibility to protect. Nowhere is that gap more pronounced or more damaging than in the realm of forceful and timely response to the most flagrant crimes and violations relating to the responsibility to protect" with a further call to define the scope and limit of 'consideration'.[159]

In the 2009 report, the SG identified three pillars for R2P: pillar one, the responsibility of the State to protect its own citizens; pillar two, the responsibility of the international community to assist States when in need; pillar three, the responsibility of Member States to respond collectively where protection of civilians is not provided. This third pillar specifically retains

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[155] Security Council discussion 9 December 2005. S/PV.5319 (Resumption 1), p.3 authors italics, 'continues consideration was secondary wording used in para 139 of A/RES/60/1.
[156] Ibid, p.6.
[157] https://www.un.org/press/en/2008/gaab3837.doc.htm the discourse is reported in Evans (2008), p.288., and is obloquy referred to the 5th Comm. Report which refers to further discussion of the 'ideas' presented in the GA Res A/Res/60/1 to be addressed and where the agreement to continue the debate was noted, but not adoption of the motion.
[158] Welsh (2003), p.180., see also Bellamy (2005), p.36.
[159] A/63/677 (2009) *Report of the Secretary General to the General Assembly: Implementing the Responsibility to Protect*, 12 January., para.60 p.26 & para.71(b), p.30.

a use of force component.[160] In the discussions held in the UN, the President of the General Assembly, Mr. D'Escoto Brockmann (Nicaragua) asked:

> "Has the time for a full-fledged R2P norm arrived, or, as most of the panelists this morning felt, do we first need to create a more just and equal world order, including in the economic and social sense, as well as a Security Council that does not create a differential system of international law geared towards the strong protecting, or not protecting, whomever they wish?"[161]

In response, the General Assembly passed a second resolution, deciding "to *continue its consideration* of the responsibility to protect" with no definition as to what this actually meant.[162] The resolution effectively shifted the focus of the development of the doctrine from implementation to discourse and, by extrapolation, to stasis. The core of State objection to R2P was a growing suspicion, noted by Gareth Evans quoting an interlocutor in 2007: "The so called responsibility to protect is nothing but a licence for the white man to himself intervene in the affairs of dark sovereign countries, whenever the white man thinks it is fit to do so."[163] The comment reflected a common anxiety among post-colonial States, which were particularly sensitive to any possible infringement to their hard won sovereignty.[164] Subsequently, the Secretary General has continued to issue reports calling for the implementation of R2P, with emphasis placed on Pillar One obligations, prevention and assistance to the State, and a de-emphasis on Pillar Three provisions.[165]

The invasion of Iraq has been widely credited with the almost simultaneous adoption and rejection of the R2P doctrine.[166] The US invasion was justified by its proponents in R2P

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[160] Ibid, para 11, pp.8-9.
[161] A/63/PV.97 (2009) *General Assembly 63rd session,* 97th plenary meeting, 23 July.
[162] Emphasis added A/RES/63/308, 7 October (2009). The UN is long practiced at shifting issues into a state of suspended animation as the list of the open "matters of which the Security Council is seized and of the stage reached in their consideration" illustrates. The list includes long since moribund issues such as the 'Hyderabad question' dating from 1949. See SC Res. S/2012/10, 2 January (2012).
[163] Evans (2008), p.289 see also Williams (2006), p.276, for a taste of the debate please see Security Council discussion 9 December 2005, UN Doc. S/PV.5319.
[164] Ayoob (2002), p.84, see also Ayoob (2004), p.101.
[165] A/72/884-S/2018/525 *Report of the Secretary-General, Responsibility to protect: from early warning to early action*. A/71/1016-S/2017/556 *Report of the Secretary General Implementing the responsibility to protect: accountability for prevention. Follow up to the outcome of the Millennium Summit*. A/67/929– S/2013/399 *Report of the Secretary General, Responsibility to protect: State Responsibility and Prevention Report.* See also Morris, J. (2013).
[166] Evans (2008).

terminology in relation to Saddam Hussain and his crimes, despite the fact that the case did not adhere to any of R2P's rules of qualification ('large-scale loss of life').[167] For example, the gassing of the Kurds in Halabja in 1985 was claimed as the basis for invoking R2P, a point actively rejected by Gareth Evans as the attack had taken place over a decade before and was not imminent.[168] Because of this association, Gareth Evans claimed that the Iraq war effectively "choked [the norm] at birth."[169]

A core problem with R2P as it has been conceptualised, is that it requires intervention to be devoid of politics, be that power balancing, geostrategy, or State interest.[170] It ignores the intrinsic political nature of States and conflict between States as an expression of power and strength, and instead attempts to make such conflicts wholly about humanitarian considerations. Writing in 1990, Koskenniemi challenged such attempts to separate law from politics, identifying it as a liberal impulse to create a semblance of objectivity in law.[171] While law may indeed be objective, States, he argues, are inherently political: "It is impossible to make substantive decisions within the law which would imply no political choice."[172] It is States, that will enforce R2P and this contradiction at the heart of the idea has led to its inability to function. For it to be possible to implement R2P as its architects intended, one would require a completely different, pure, world order, one which is not focused on the State and where war and politics do not sit hand-in-hand. The limitations of the liberal ideal with the attendant swing away from initiatives such as R2P have been noted by Jennifer Welsh:

> "Arguably, RtoP was born in an era when assertive liberalism was at its height, and sovereign equality looked and smelled reactionary. But as the liberal moment recedes, and the distribution of power shifts globally, the principle of sovereign equality may enjoy a comeback."[173]

Following the Libya intervention, which was closely identified with R2P, concerns about the principle revived. As noted by the Permanent Representative for Brazil to the UN to the Secretary General in submitted comments following the World Summit: "There is a growing

[167] Evans (2004), pp.70. Thakur (2006), pp.227, 262. Welsh (2003), p.184.
[168] Evans (2004), pp.70-1.
[169] Evans (2004), p.63.
[170] Morris (2013), p.1282.
[171] Koskenniemi (1990), p.7, see also Koskenniemi (2011), p.37.
[172] Koskenniemi (1990) pp.7, 31.
[173] Welsh (2010), p.426.

perception that the concept of the responsibility to protect might be misused for purposes other than protecting civilians, such as regime change."[174] In the wake of the Libya invasion, Brazil, for example, proposed a shift to a doctrine of 'responsibility while protecting', taking the focus away from the use of force.[175]

4.6. Conclusion

The Articles and R2P represented an attempt to change the international legal system, and if successful, to create space for State attribution of acts previously ascribed to individual actors, and military intervention in defence of non-derogable rights. Two questions arise from this: first, has the law changed? and second, would the threat to or absence of western-style liberal democracy serve as a trigger for intervention?

The claim for democracy as a human right, rests on redefining self-determination from an external to an internal construction, a broader more aggressive development of the rights listed in the ICCPR, a move that the community of States has viewed very conservatively. Further, until liberal democracy is distinguished from the political rights as they currently exist, it is hard to see how it could be framed separately as a human right. It should be noted that this proposition has not come from the General Assembly, the International Law Commission or the International Court of Justice but has been specifically commentator led.[176]

The Draft Articles on State Responsibility for Wrongful Acts and R2P were presented to the international community at a clear historical and ideological point. Colonialism had faded, the US unipolar moment was at its height, and R2P responded to events including Rwanda and Kosovo, both of which were perceived as unresolvable without the use of force.[177] Any intervention into the domestic affairs of the State is illegal under the Charter. However, at core was a growing belief that gross violations of human rights should trigger intervention on the part of the international community and intervention should include the use of force against States if necessary. [178] Both instances are the triumph of what the law between States 'ought'

[174] A/66/551–S/2011/701 *Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General and Annex. Responsibility while protecting: elements for the development and promotion of a concept.,* para.10.
[175] Ibid.
[176] Kammerhofer (2010).
[177] The Independent International Commission on Kosovo. (2000), pp.163-200.
[178] Ibid, p.167.

to be, a subjective truth, as opposed to what it actually is.[179] In a system based on State equality, how this subjectivity is to be martialled and implemented, is not addressed.[180]

As for the instruments, far from being included as Protocols to the Conventions, or as a stand-alone Statute or Treaty, both proposals have effectively ended up in the same place: discussed as possibly being reflective of elements of customary international law, but by no means being incorporated into the existing legal system as it stands. The international community's unwillingness to embrace these structures stems from the understandable fear that these rules could provide justification for use of force to achieve politically motivated ends.[181] As stated in the Kosovo Report:

> "[there is a] continuing suspicion… that, 'humanitarian intervention' is a new name for Western domination. For the UN to give such claims any sort of legitimacy would be to create a "Trojan Horse" that could be used to undermine political independence and even the territorial integrity of weaker sovereign states."[182]

In the intervening period since Kosovo, these concerns have largely been confirmed in the interventions in Iraq, Libya and Syria and the justifications which accompanied them.

Both the Articles and the R2P contain the same structural weaknesses. Firstly, they do not address the existing inequalities within the UN Charter system, whereby the five permanent members of the Security Council and their closest allies are immune from any of the consequences which these initiatives propose. While the Charter system was based on this inequality, the notion of sovereign equality and State consent acts to both mitigate and frame this inequality. Whilst more powerful States are able to deny consent to any action which might affect them, so can any other State, and this denial of consent then becomes the reason why action is not taken.

While the equality of States is in part a legal fiction, it allows the claim that the rule of law exists within public international law. In setting aside consent, R2P removes this fig-leaf and

[179] Allott (1971), p.103.
[180] Koskenniemi (2002), pp.171-175.
[181] The Independent International Commission on Kosovo. (2000), p.170.
[182] Ibid, p.189.

very starkly exposes political hierarchy within the system of public international law. Neither proposition engages with the reality of the presence of politics within the implementation of intervention. Ramesh Thakur, one of the architects of R2P, stated that "interventions cannot become the pretext for imposing external political preferences", which as a statement of principle is worthy, but it begs the question, how to avoid this outcome?[183]

If intervention is predicated on the understanding that the regime in question is guilty of gross violations and therefore must be removed, then regime change is both an objective and an inevitable outcome, which will have political consequences. The Kosovo enquiry accepted this dilemma with a clarity absent in later dialogues: "[I]t is unrealistic to expect humanitarian intervention to evolve according to the rule of law such that equal cases are treated equally. The only viable option is to prohibit such interventionary claims altogether, or to accept their selective implementation."[184] Brownlie, commenting on the Kosovo Report took a step further: "Forcible intervention to serve humanitarian objectives is a claim which is only open to powerful States to make against the less powerful."[185]

The Kosovo Commission's finding that the NATO intervention was "illegal but legitimate" gave credibility to military action as long as it was framed within an appropriate narrative. What could be more legitimate than the protection and defence of human rights and the alleviation of a suffering population? The invasion of Afghanistan was not initially framed in relation to this narrative, but the ongoing war against the Taliban and the creation of democracy certainly was. As the weapons of mass destruction failed to materialise, the justifications for Iraq were entirely embodied within this approach. As Jennifer Walsh, observed, the dangers of the approach are significant:

> "If the Kosovo war is employed as a precedent for allowing states, whether singly or in coalition, to ignore or contradict the UNSC based on their own interpretation of international morality, the stabilizing function of the UNSC will be seriously imperiled, as will the effort to circumscribe the conditions under which recourse to force by states is permissible."[186]

[183] Thakur (2013), p.66.
[184] The Independent International Commission on Kosovo, (2000), p.187.
[185] Brownlie & Apperley (2000), p.905.
[186] The Independent International Commission on Kosovo, (2000), pp.173-4., Welsh (2003), p.182.

It was on this basis that the Kosovo Commission advocated for the law to change, so that 'illegal but legitimate' would not arise again.[187] In the absence of legal change, illegal but legitimate has instead become the focus of States when engaging in this category of acts. What Kosovo taught was that illegality did not have to pose an unsurmountable obstacle to the achievement of legitimacy. From this vantage point, as long as the State which is the focus of intervention, can be styled as breaching human rights, then the virtue of the outcome, the alleviation of suffering, and the delivery of democracy can legitimise the action. It is not 'legal', but it is politically viable and is no bar to legitimacy.

Within the international community of States it is clear that while repeated attempts to establish a hierarchical mechanism, with a promise of undefined enforceability, over the State have been attempted, they have consistently failed. As observed by Whitehead, a liberal international order could only adopt such a hierarchy on the basis of both trust and an absolute adherence to the rule of law.[188] In an international community where these conditions do not exist, sovereignty and State equality become tools through which weaker States defend their positions, and it is clear there is no appetite within the General Assembly to weaken these rules. Despite this, the opening of legitimacy outside legality, has in effect, changed the course of State behaviour, at least where it relates to hegemonic States, where morality is acted upon and law ignored.

[187] The Independent International Commission on Kosovo, (2000), pp.10, 173-4.
[188] Whitehead (2009a), p.224.

5. Legality within Invasion and Occupation

Two aspects of legality affect the invasion and subsequent democratisation in Afghanistan and Iraq. The legality of the use of military force and the legality of the transformation of the States themselves by the occupier. Under the UN Charter the legal use of force is effectively limited to self-defence, and the transformation of States in occupation is forbidden as it falls under the Definition of Aggression adopted by the UN General Assembly in 1974.[1] And yet these actions were taken. This chapter briefly outlines the law and how it was breached.

5.1. Afghanistan

Following 9/11 the US identified the perpetrator of the attacks on the US as Al Qaeda, a non-State terrorist group whose leader, Osama Bin Laden, was located in Afghanistan. Indeed, the Taliban, which accepted Al Qaeda's presence, was itself not in control at the time of the country as a whole.[2] It was not at any point alleged that the Afghan State ordered the attacks, nor had they armed the attackers. The legal framing of an appropriate response to an armed attack is based on what form an armed attack takes and who undertakes it.

It is broadly accepted by international legal scholars that the invasion of Afghanistan in response to the 9/11 attacks was not illegal and was based on both Security Council authorisation under Chapter VII provisions and self-defence.[3] However, the authorisation of the use of force in this case did not take place strictly within the parameters of international law norms. [4] The international legal system envisages that the right to self-defence as it is stated in the UN Charter (individually or as a collective) applies to States against States. The underlying assumption within the system is in effect Hobbesian, the State (sovereign) is the defining political unit and has a monopoly on use of force, and the right to use force.[5] External threats to the States are presumed to originate in other States be that through the State deployment of regular or irregular forces; as such, self-defence is understood as a State

[1] Charter of the United Nations Article 2(4) and 51. GA Res 3314 (XXIX) (Definition of Aggression) was adopted by the United Nations General Assembly on December 14, 1974
[2] Byers (2002). Murphy (2002).
[3] Grey (2018), pp.200-202, see also Byers (2002).
[4] Grey (2018), pp.200-210.
[5] Waters & Waters (2015), p.136.

defending itself from the actions of other States.[6] In 1974 the General Assembly adopted Resolution 3314 (XXIX) of 14 December 1974 (Definition of Aggression). Aggression was defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." It is assumed that the monopoly on the use of force is held by the State within the State, and that it will be brought to bear on violent non-State actors acting within the State, as an expression of sovereign jurisdiction.[7] As it is a matter for domestic law, the international legal system, does not envisage actions from non-State actors triggering UN Charter self-defence provisions.

It is arguably the case that the customary provisions on what is permissible within the strictures of self-defence are broader and therefore could form the basis for a legal justification whereby self-defence is invoked against nonstate actors.[8] However, in examining this issue in the *Nicaragua* case, the ICJ ruled that an armed attack occurs when a State sends regular military forces, or armed mercenaries, against another State.[9] The court found that arming or assisting rebel groups or non-State actors in another State does not constitute an armed attack, in the context of Article 51 of the UN Charter.[10] Confirming this stance in the 2004 *Wall* Case, the ICJ found that a claim of self-defence could only be applied by a State against another State.[11] This was confirmed in the *Armed Activities* case in 2005 where the Court denied claims of self-defence by Uganda in response to attacks by irregular actors within Uganda, allegedly sponsored by the Democratic Republic of the Congo.[12]

On 12 September 2001 the day after the Al Qaeda 9/11 attacks in the US, both the Security Council and NATO separately met and defined key approaches to the attacks. NATO agreed the applicability of Article 5 of the Washington Treaty, that the attacks on one member

[6] Charter of the United Nations Article 51. Murphy (2002). Moir (2015). *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, 27 June 1986, ICJ Reports 1986*, para 195.
[7] Stalker (2010).
[8] Brownlie, (1981), pp.272-5.
[9] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, 27 June 1986, ICJ Reports 1986*, p.98, § 14, 103 & 110
[10] Ibid.
[11] ICJ Reports (2004) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* Advisory Opinion of 9, July, p.194, paras 138-144.
[12] See also ICJ Rep (2005) *Case concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* Judgement of 19 Dec, para 146.

constituted an attack on all.[13] This stance was confirmed on 2 October.[14] The UN Security Council subsequently issued two binding resolutions, 1368 and 1373, both titled "Threats to international peace and security caused by terrorist acts".[15] They accepted the invocation of the right of self-defence as per Article 51 of Charter in a response to terrorist attacks and in Res 1373 authorised States to suppress and prosecute terrorist acts under Chapter VII provisions. Both resolutions address the emerging 'war on terror', as opposed to specifically addressing Afghanistan. Indeed, Res 1373 does not mention military action in the range of responses and sanctions made available to States in the suppression of terrorism. Neither resolution addressed the State/non-State attribution of force or mentioned Afghanistan. This approach raises a number of questions as to the parameters of self-defence, which go beyond the study of this thesis, but which indicate a disquieting capacity to override foundational norms. An aspect of those norms is that the sovereign State is solely responsible to address issues which take place within its boundaries.[16] Abrogation of these norms create an unsettling precedent in the arena of self-defence, and one which to this point, had not been accepted by the ICJ.[17]

On 20 September President Bush, requested that the government of Afghanistan deliver known Al Qaeda participants to US custody.[18] As the head of the Taliban, Mullah Omar agreed to surrender Al Qaeda and Bin Laden, if evidence was provided; it was also suggested that he be surrendered to Saudi Arabia. Both options were refused by President Bush, on the basis that there would be no negotiations, dismissing requests for evidence.[19] On 28 September the Security Council passed resolution 1373 which as noted, confirmed the collective right of self-defence as stated in Article 51 of the Charter; but did not define what a terrorist act was, nor did it explicitly authorise the use of force in Afghanistan or against any other State. It also did not identify Afghanistan, the Taliban or Al Qaeda as responsible for the attacks.

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[13] NATO, "Statement by the North Atlantic Council," NATO Press Release (2001) 124, Brussels: 12 September 2001, accessed at http://www.nato.int/docu/pr/2001/p01-124e.htm
[14] NATO Statements, 2 October 2001 at http://www.nato.int Murphy (2002), p.48.
[15] SC Res 1368, SC Res 1373.
[16] Grey (2018), p.75-84.
[17] I.C.J. Rep (1986) *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*. and ICJ Rep (2005) *Case concerning Armed Activities on the Territory of the Congo (DRC v Uganda) Judgement of 19 Dec.* ICJ Rep. (2004).*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories Advisory Opinion of 9 July.*
[18] President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1348 (20 September 2001) [Bush, Joint Address] http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html
[19] Rashid (2010), p.219. Bush Rejects Taliban Bin Laden Offer 14 Oct 2001 Washington Post https://www.washingtonpost.com/wp-srv/aponline/20011014/aponline135016_000.htm?noredirect=on U.S. Refusal of 2001 Taliban Offer Gave bin Laden a Free Pass 3 May 2011 Interpress Service http://www.ipsnews.net/2011/05/us-refusal-of-2001-taliban-offer-gave-bin-laden-a-free-pass/

Subsequently, in letters dated 7 October the governments of the US and UK informed the Security Council of their intention to take military action based on collective self-defence.[20] The letter from US Ambassador John Negroponte included the following statement: "my Government has obtained clear and compelling information that the Al-Qaeda (sic) organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks."[21] The statement was echoed in the letter from the UK government. On the same day combat action was initiated. The invasion of Afghanistan began on 7 October 2001 with the coalition initially relying on air strikes and narrowly defined, specific ground missions, initially in Kandahar and Kabul.[22] On 19 October ground troops were deployed in small numbers to assist the Northern Alliance in taking Taliban-held areas.[23] The 'fall' of the Taliban was achieved within 62 days, being completed by the second week of December.[24]

On 14 November the Security Council issued resolution 1378, its first since the beginning of combat operations. The resolution condemned the use of Afghan territory by the Taliban in support of Al Qaeda, but did not refer to the presence of US and coalition troops within the territory. It called on "the Afghan people to establish a new and transitional administration leading to the formation of a government," and "on all Afghan forces to refrain from acts of reprisal, to adhere strictly to their obligations under human rights and international humanitarian law, and to ensure the safety and security and freedom of movement of United Nations and associated personnel, as well as personnel of humanitarian organizations". It goes on to affirm the role of the UN in supporting the new government.[25] There was no reference within the text to the invasion, or indeed why a new government was required. The Security Council did not in fact *order* or at this point *sanction* the action, but in effect, requested the

[20] Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001. http://www.undocs.org/s/2001/946 Letter from Stewart Eldon, Chargé d'Affaires, UK Mission to the UN in New York, to the President of the Security Council, S/2001/947, 7 October 2001. http://undocs.org/en/S/2001/947 Reproduced in Smith & Thorp (2010). The legal basis for the invasion of Afghanistan. *House of Commons Research Paper*, (SN/IA/5340). Retrieved from http://194.109.159.7/ukparliament/20100423142209/http://www.parliament.uk/commons/lib/research/briefings/snia-05340.pdf

[21] Letter from Ambassador John Negroponte, Permanent Representative of the USA to the UN in New York, to the President of the Security Council, S/2001/946, 7 October 2001.

[22] "Operation Enduring Freedom and the Conflict in Afghanistan: An Update." *House of Commons Research Paper* 01/81, 31 October (2001), pp.16, 25 & 38.

[23] Ibid p.25.

[24] Johnson (2007), p.95. It has been argued that the Taliban was not in fact defeated it simply 'melted away'. ICG (2006) "Countering Afghanistan's Insurgency: No Quick Fixes" Asia Report N°123 – 2 November, 2.

[25] SC RES 1378

Afghan population to accept the action and to participate with the occupying force in stabilising the country.

The Security Council would not reference military presence within Afghanistan until the adoption of Resolution 1386 on 20 December, which established NATO's presence within the State. At no point was the physical act of entering territory to locate an enemy referenced. In effect, while Al Qaeda was pursued, Afghanistan was not invaded. Afghanistan was not the focus of the action, and the governmental and political consequences of invasion were not mentioned. The sovereign State, when addressed at all, was simply 'terrain'. *Operation Enduring Freedom*, the mission name for the War on Terror in Afghanistan is the only case according to Kimberly Trapp,

> "in which the international community accepted a States' right to use force in self-defence against both non-State actors *and* the State from whose territory such terrorist actors operated, when the terrorist attack being responded to was not attributable to the territorial State."[26]

Vaughan Lowe has argued that the overwhelming approval on the part of the international community, for the invasion of Afghanistan has created space to allow States to invoke self-defence against non-State actors located inside sovereign States.[27] A discussion hosted by Chatham House argued that intervention is lawful as a last resort, where the host State does not have the capacity to act, in line with the broad approach for intervention within R2P.[28] However, this has not as yet solidified into law and leading commentators such as ICJ Judge Sir Christopher Greenwood have cautioned that: "We do not want to give credence to a theory that as soon as any State has a group of terrorists which have operated from its territory, it exposes itself to armed attack. That very broad approach opens up the most horrific possibilities…"[29]

5.2. Iraq

[26] Trapp (2011).
[27] Lowe (2007), p.278.
[28] "The Chatham House Principles of International Law on the Use of Force in Self-Defence," (2006) International and Comparative Law Quarterly Vol. 55(4), p.970., see also Trapp (2015).
[29] Sir Christopher Greenwood in Borch & Wilson (2003), p.145.

The origins of the invasion of Iraq in 2003 and the legal justifications for that invasion begin with the invasion of Kuwait by Iraq in 1990. From the perspective of the US, a series of Security Council Resolutions, dating Gulf War I provided legal justification of the use of force against Iraq in 2003.

Resolution 660 (1990) demanded the immediate withdrawal of Iraq from Kuwait, in response to the invasion of 2 August 1990. This was followed by Resolution 678 of the same year which granted UN member States the right to use force in order to compel the withdrawal of Iraq from Kuwait. Following the expulsion of Iraqi forces, the Security Council adopted Resolution 687, which established the terms of peace and both the weapons monitoring system and the sanctions apparatus, which would subsequently be applied against Iraq.

In 2002 the UNSC passed Resolution 1441. The Resolution declared that Iraq was in breach of its obligations under Resolution 687, including the provisions requiring weapons inspections. It reminded Iraq that "…in its resolution 687 (1991) the Council declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution, including the obligations on Iraq contained therein". Resolution 1441 then ordered Iraq to comply with its "disarmament obligations". Following the passage of Resolution 1441, the US argued that in breach it allowed the 'revival' of the use of force provisions under Resolution 678 without further recourse to the SC. [30] The argument went on to state that as the original ceasefire was between participant States, not the UN, those participant States could define its breach.[31] Further, that Article 51 of the UN Charter did not limit State action to self-defence in a response to an actual armed attack, but could be based on a perception of threat under broader customary law rights. This perception, it was argued, based on magnitude, i.e. anticipated build-up of weapons of mass destruction (WMD), created a valid foundation for the use of force.[32] It was on this basis that the anticipatory or pre-emptive self-defence justification was made to invade Iraq and was central to the US argument that further Security Council endorsement was not required.[33]

The stance obscures months of debate in the UK and US as to whether or not Resolution 1441 could be framed as a trigger for military action, a stance that had previously been denied within

[30] For a detailed analysis of the history of the revival principle see Chilcot (2016) *Volume 5: Section 5 Advice on the Legal Basis for Military Action, November 2002 To March 2003*, pp.22-25
[31] Yoo (2003).
[32] Ibid. pp.570, 574.
[33] Gray (2008), pp.358-366.

the Security Council in the drafting and adoption phases.[34] As recounted to the Chilcot enquiry: "If there was a further Iraqi breach … the matter would return to the Council for discussion as required under [Operative Paragraph] OP12. We would then expect the Security Council to meet its responsibilities."[35] The subsequent US stance also obscured the general support for a conservative interpretation of the powers granted under the Resolution, so that non-compliance would require further recourse to the Security Council. For example, France was "content to proceed 'in the logic of UNSCR 1441'; but it could not accept an ultimatum or any 'automaticity' of recourse to force"[36] Subsequent statements of the Mexican and Irish delegations, sitting as non-permanent members, were clear in limiting the Resolution to inspections, with future Resolutions required to authorise any military action: "[W]e welcome the assurances given by the sponsors that their purpose in presenting this resolution was to achieve disarmament through inspections and not to establish a basis for the use of military force".[37] The joint statement of France, Russia and China backed this stance in clear terms: "Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force. In this regard, we register with satisfaction the declarations of the representatives of the United States and the United Kingdom confirming this understanding in their explanations of vote and assuring that the goal of the resolution is the full implementation of the existing Security Council resolutions on disarmament of Iraq's weapons of mass destruction. All Security Council members share this goal".[38] Both the US and UK confirmed the absence of 'automaticity' during the adoption phase of the Resolution.[39] Resolution 1441 was adopted unanimously in light of these undertakings.

In his initial provision of advice in January 2003, relating to the powers held under the Resolution, the UK Attorney General, Lord Goldsmith, held that the Security Council would have to make an explicit decision to use force if a material breach was found to have occurred. He discounted humanitarian or self-defence considerations as grounds for action.[40] Analysing the Resolution he acknowledged there was a trigger in Operative Paragraph ('OP') 1, which in turn was suspended by OP 2. With OP 3 setting out the instruction to Iraq, OP 4 then explicitly

[34] Chilcot (2016) *Executive Summary*, p.19
[35] Chilcot (2016) *Volume 1: Section 3.5.*, p.343
[36] Chilcot (2016) *Executive Summary*, p.36 quoting Letter Cannon to Owen, 14 March 2003, 'Iraq: Prime Minister's Conversation with President Chirac, 14 March'.
[37] Chilcot (2016) *Volume 1: Section 3.5.*, pp.348-9 see also Greenstock (2016), p.147.
[38] UN Security Council, Annex to Letter dated 8 November 2002 – 'Joint statement by the People's Republic of China, France and the Russian Federation' (S/2002/1236).
[39] Chilcot (2016) *Volume 1: Section 3.5.*, p.346.
[40] Chilcot (2016) *Volume 5: Section 5*, p.36.

refers breach back to the Security Council. "Failure by Iraq at any time to comply with, and cooperate fully in the implementation of this resolution shall constitute a further material breach of Iraq's obligations and will be reported to the Council for assessment in accordance with paragraphs 11 and 12 below." OP 11 and OP 12 then require reporting to the Security Council by inspectors. "Decides to convene immediately upon receipt of a report in accordance with paragraphs 4 or 11 above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security."[41] He concluded that Resolution 1441 contained "no express authorisation by the Security Council for the use of force."[42] His draft reflected his earlier advice delivered in October, November and December of 2002.[43]

However, following a visit to Washington on 10 February 2003 Lord Goldsmith would come to a 'better view', concurring with the revival principle proposed by the US, that breach of Resolution 1441 could trigger the use of force provisions in Resolution 678 without further recourse to the SC.[44] The UK Attorney General further confirmed that use of force was legal for UK troops, should they be deployed.[45] The interpretation of Resolution 1441 by the US and UK was more indicative of what they wanted the Security Council to have agreed, than what it actually agreed. The reframing of Resolution 1441 as allowing the use of force, was not in conformity with the law. This was a unilateral exercise of power by a State which subsequently called it 'law'.

In March 2003, at a Summit in the Azores, attended by the US, the UK and Spain an attempt was made to table a second Security Council Resolution endorsing the use of force in Iraq.[46] Only four members of the Security Council were in agreement with the action, short of the nine required to carry a motion in the absence of a veto.[47] Ultimately the Security Council did not

[41] Minute [Draft] [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'. http://webarchive.nationalarchives.gov.uk/20171123122433/http://www.iraqinquiry.org.uk/media/76099/2003-01-14-Minute-Goldsmith-to-Prime-Minnister-Iraq-Interpretation-Of-Resolution-1441.pdf at p.3.
[42] Minute [Draft] [Goldsmith to Prime Minister], 14 January 2003, 'Iraq: Interpretation of Resolution 1441'. Chilcot (2016) *Volume 5: Section 5*, p.37
[43] Ibid, p.57.
[44] Ibid, pp.76-7 & 123.
[45] Ibid.
[46] Taylor & Youngs (2003), p.8.
[47] Bright, Vulliamy, Beaumont: "Revealed: US dirty Tricks to win vote on Iraq War *The Observer* 2 March 2003 http://www.guardian.co.uk/world/2003/mar/02/usa.iraq Anderson, Bennis, & Cavanagh, "Coalition of the Willing or Coalition of the Coerced? Institute for Policy Studies (2003) at http://www.ips-dc.org/reports/coalition_of_the_willing, at p.3.

adopt the requested Resolution. Both the US and the UK decided to continue with invasion plans, absent SC authorisation.[48] They went on to form a 30-country 'coalition of the willing'.[49] The coalition invaded Iraq on 20 March 2003 on the basis of 'pre-emptive self-defence' a stance without basis in international law.[50]

On 22 May 2003, two months after the invasion, the Security Council adopted Resolution 1483. The Resolution recognised the US and UK as occupying powers, referred to as 'the Authority'. The Resolution goes on to grant wide ranging powers to the Authority which will remain in coalition hands until such time as "an internationally recognised representative government is established by the people of Iraq and assumes the responsibilities of the Authority".[51] These powers included control over the Development Fund for Iraq (which contained all Iraqi oil revenues) and the revenues from the Oil for Food Programme (in use since the 1990 invasion), to be used by the Authority for Iraqi reconstruction.[52] Effectively, Iraqi revenues were to be used to pay for the destruction caused by the coalition invasion. The Resolution did not refer to the legality or otherwise of the use of force, or occupation.

It has been claimed that the US chose to invade, understanding that the SC would veto any direct request to it, and in doing so, presented an argument that as a veto was not applied, no laws were broken.[53] However, Article 39 of the UN Charter states that it is the exclusive domain of the SC to "determine the existence of any breach of the peace, or act of aggression". In neither the case of Afghanistan nor Iraq, did the SC so act. Allegations of the illegality of the action persisted, with the UN Secretary General Kofi Annan denouncing the invasion of Iraq the following year.[54] The international community was not silent on the matter, both

[48] The Right Honourable Tony Blair Statement to the Iraq Enquiry 14 January 2011, p.9 http://www.iraqinquiry.org.uk/media/50743/Blair-statement.pdf
[49] Afghanistan, Albania, Australia, Azerbaijan, Colombia, the Czech Republic, Denmark, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Hungary, Iceland, Italy, Japan, Korea, Latvia, Lithuania, Macedonia, the Netherlands, Nicaragua, the Philippines, Poland, Romania, Slovakia, Spain, Turkey, the United Kingdom, and Uzbekistan US Department of State press release, 18 March 2003, from http://usinfo.state.gov/topical/pol/arms/03031800.htm
[50] M. Weller (2011), p.138.
[51] OP 9
[52] OP pp.13, 14, 16 & 20
[53] Bayers & Nolte (2003)
[54] "War is Illegal says Annan" *BBC* 16 September 2004 http://news.bbc.co.uk/1/hi/3661134.stm see also T. Franck (2003), p.613.

France and Germany publicly condemned the decision to invade, and Turkey denied the US flyover rights on the basis that the invasion was illegal.[55]

5.3. Transformative occupations[56]

The objective of occupation and regime change is explicitly prohibited under international law. The practice is known as 'belligerent' or 'transformative occupation', has been prohibited within *jus post bellum* since the adoption of the 1899 and 1907 Hague Conventions.[57] The absolute prohibitions on transformative occupations and the explicitly protected norms of sovereignty and non-intervention are inextricably linked. The stated aims of the military interventions in Afghanistan and Iraq varied on a number of points but converged in the identified aim of dismantling existing State structures and creating new systems of government.

Military occupations have two forms under international law. First *occupatio bellica*, in which military control of a territory is achieved and administration is undertaken on a provisional or short-term basis. Sovereign rights do not transfer to the occupier and State systems are preserved in a relationship which is analogous to a 'trusteeship'.[58] The second variant, *debellatio* or the complete defeat/destruction of the sovereign State and its institutions, where the invader re-forms the political order of the territory.[59] No longer an acceptable practice of war, except in those instances where occupied land is annexed to become part of the conquering State, *debellatio* was outlawed through the adoption of the 1889 and 1907 Hague Conventions.[60] The Conventions established that military authorities exercising control over

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[55] T. Franck (2003), p.618. Sciolino (2003). Threats and Responses: Discord; France to Veto Resolution On Iraq War, Chirac Says 11 March 2003. *The New York Times*. Retrieved from https://www.nytimes.com/2003/03/11/world/threats-and-responses-discord-france-to-veto-resolution-on-iraq-war-chirac-says.html . EU allies unite against Iraq war 22 January 2003. *BBC News World Edition*. Retrieved from http://news.bbc.co.uk/1/hi/world/europe/2683409.stm. Turkey rejects U.S. troop proposal 2 March 2003. *CNN International*.

[56] This section was previously contained in Stewart-Jolley (2013), this text was submitted for examination but was not published and complete intellectual property resides with the author.

[57] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

[58] L. Oppenheim (1935), p.349, see also pp.345, 350.

[59] N. Bhuta (2005), pp.725-726 reflecting the view that occupations primarily existed in two forms see also Freeman (1946).

[60] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

hostile territory were bound to ensure public order and safety "while respecting... the laws in force in the country."[61] Family and private property rights were to be respected and taxes raised only to defray the cost of the administration of the territory. The occupying State "shall only be regarded as administrator of the public... [assets] belonging to the state."[62] The Conventions prohibited the alteration of the political order of the territory and occupation did not grant sovereignty over the occupied territory to the occupier.[63] The main rationale was the protection of the sovereign rights of the legitimate government of the territory and the protection of the inhabitants from exploitation.[64] Otherwise known as the 'conservation' principle. Based on the "inalienability of sovereignty through the actual or threatened use of force" the conservation principle places the occupier as a temporary trustee.[65]

With the advent of WWII the rules relating to transformative occupations were disregarded by the Allies in their occupation of Germany and Japan. However, the restatement and expansion of the 'Hague' provisions in the 1949 Geneva Convention, point to the rejection, as a point of principle, of transformative occupations under the laws of war.[66] The 1949 Convention increased liability for the destruction of private property and includes a prohibition on the alteration of the status of public officials, judges, or the penal system.[67] The 1977 Geneva Protocol I, confirms the approach established in the Hague provisions; "neither the occupation of a territory nor the application of the Conventions and this Protocol shall effect the legal status of the territory in question".[68] The US signed and ratified all noted Conventions except the 1977 Protocol on the basis that it granted irregular combatants rights.[69] In substance relating to occupation the main provisions were contained in the 1948 Conventions.[70] The combination of these legal instruments effectively results in the outlawing of transformative occupations.

[61] Section III Article 43 (1899 & 1907)
[62] Articles 46, 48 & 55 (1899 & 1907)
[63] N. Bhuta (2005), p.726. E. Benvenisti (2012), p.8.
[64] Jennings (1946), p.136.
[65] E. Benvenisti (2012), p.5. J.L. Cohen (2012), p.224.
[66] A. Roberts (2006), p.587.
[67] Articles 53, 54 & 64.
[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Article 4
[69] "Message from the President of the United States: The Protocol Addition to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflict, Concluded at Geneva on June 10, 1977," 29 January 1987, http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf
[70] Ratification information can be found at http://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp

Both the invasions of Afghanistan and Iraq were followed by the immediate removal of the existing governments and their systems, as detailed in the following case study chapters. The attempt to create alternative, democratic, governments was implemented and overseen by the occupying authorities.[71] In both cases, existing legislative, military, judicial and penal systems were disbanded, breaching Article 43 of the Hague Conventions (the obligation to respect the laws of the invaded State) as well as Articles 53, 54 and 64 of the Geneva Convention (to respect existing government structures).[72]

In relation to usages of national revenue, also covered under the Conventions, the provisions are clear. Funds of the occupied State can only be used to defray the costs of the administration of the territory.[73] Two months after the invasion of Iraq, the Security Council passed Resolution 1483 establishing the Development Fund for Iraq (DFI), with an initial funding of US$23 billion.[74] Defining the coalition as "occupying powers under unified command" under the Hague and Geneva Conventions, the Resolution referenced the prohibitions on transformation and at the same time "granted a mandate allowing the occupants to … transform the previous legal and political system".[75] Benvenisti noted the ""schizophrenic" approach of a text that calls for the application of the law of occupation while recognizing the transformative mission of the CPA."[76] He suggests that transformation can be authorised if the transformation is in order to create and support human rights provisions.[77] Pointing to the recognition in the Resolution of "the right of the Iraqi people freely to determine their own political future" indicate that the prohibitions on transformation were pushed to its limits but not breached.[78] In this stance he echo's John Yoo 2004 paper justifying the occupation and transformation.[79] Challenging this view Gregory Fox rightly notes that if that were the case would result in a "blank check" for any reforms.[80] A realist interpretation of Resolution 1483 would view it as a fundamentally political document as opposed to a legal one, representative of "global hegemonic international law".[81]

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[71] A. Roberts (2006), p.604.
[72] Section III Article 43 (1899 & 1907). Articles 53, 54 & 64 of the 1949 Geneva Convention
[73] Articles 46, 48 & 55 (1899 & 1907 Conventions)
[74] Macrae & Fadhil: "Iraq was awash with cash. We played football with bricks of $100 bills" *The Guardian Newspaper* 20 March 2006 http://www.guardian.co.uk/world/2006/mar/20/usa.iraq
[75] J.L. Cohen (2012), p.235.
[76] E. Benvenisti (2012), p.271., Fox (2005), p.260.
[77] E. Benvenisti (2012), pp.271-2
[78] Ibid, p.275.
[79] J. Yoo (2004).
[80] Fox (2005) p.243.
[81] Alvarez (2003), p.887. Cohen J.L. (2012) p.243.

The Resolution goes on to release monies gathered from Iraqi State sources, including frozen State assets and the monies accumulated within the Oil for Food Programme. The funds were used by the occupying authority to meet the infrastructural and humanitarian needs of the Iraqi people.[82] Had this purely been the case then it is likely that legality could be claimed under the Hague Conventions which allow for the use of national funds for the administration of the territory. However, allegations have emerged that funds were used directly to support the activities of the invading forces, in active breach of provisions.[83] This took place through payment of DFI funds to private contractors described as a "second private army."[84] As early as 2004, the Special Inspector General for Iraq Reconstruction (SIGRI), the US audit authority, found accounting anomalies in relation to the administration of the funds.[85] The 2010 SIGRI audit found that of the US$9.1 billion granted to the US Department of Defence from DFI funds, US$8.7 billion remained unaccounted for.[86] These issues did not arise in Afghanistan as there was little by way of national funds to appropriate.

5.4. A Conclusion

The US claimed that the occupation of Iraq ended with the closure of the CPA in June 2004 which restored sovereignty, with the election concluding the transition process.[87] For Afghanistan, sovereignty was 're-established' at the conclusion of the Bonn Agreement and the formation of the Interim Authority.[88] This approach reduced the duration of the occupation to the shortest time possible and acted to both signal the return of legitimacy and the ability to blame nationality politicians and citizen for their failure to adopt democracy. Yet legitimacy was not based on new institutions, there were no checks and balances, no "Night Watchman".[89] Sovereignty under these circumstances also showed itself to be bifurcated and limited. Finding that command control was retained by the US administration after the closure of the CPA in

[82] Ibid, paras 12-14.
[83] James Risen, Use of Iraq Contractors Cost Billions Says Report: *New York Times*. 11 August 2008 http://www.nytimes.com/2008/08/12/washington/12contractors.html?em&_r=0 Donald L. Bartlett and James B. Steele "Billions Over Baghdad" *Vanity Fair* (Oct 2007) http://www.vanityfair.com/politics/features/2007/10/iraq_billions200710
[84] "Iraq hunting $17 billion missing after U.S. invasion" *Reuters* 19 June 2011 http://www.reuters.com/article/2011/06/19/us-iraq-usa-money-idUSTRE75I20S20110619
[85] SIGIR (2012), p.8.
[86] SIGIR (2010), p.13.
[87] Mason (2009), p.2.
[88] S/2001/1154 (2001) Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement) 5 December, para 3.
[89] Mearsheimer (2018), p.122.

Iraq, Benvenisti claims that sovereignty did not transfer to the appointed Transitional Authority as it had no political mandate, nor command of armed forces. Rather, the occupation ended in April 2005 following the election and the formation of the newly elected government – although even then, legitimacy and sovereignty remained unanchored.[90] The occupation in Afghanistan officially concluded on October 2004 with the election of President Karzai. However, neither government subsequently exercised any control or authority over US forces who remained in sizable numbers within the State, and those forces enjoyed absolute immunity during their deployment.[91]

International rules such as sovereignty, State equality and the prohibitions on transformation and the use of force, serve to constrain realist power competition. A somewhat deeper representation is that the liberal democratic order requires the rule of law and adherence to it. The recognition of law is intrinsic to 'civilised' States, so noted in the Statute of the International Court of Justice.[92] Those rules included an absolute assurance of sovereignty, State equality and an undertaking not to use force.[93] Within war, international law also created limits to State conduct.[94] The laws aim to ensure that as little damage as possible is inflicted on the society and territory at the centre of the conflict, looking beyond the immediate theatre of war.[95] Once war has finished and the occupation ends, the law functions to leave the recipient State as it was, sovereign with State institutions intact.[96] Disregarding these laws, the occupier in this instance took the sovereignty of the State into its own hands, with the specific aim to remake the State.[97] In doing so, the foundational act of invasion and occupation was not bound by law. The invasion was an act of power, and within the occupation, realist considerations of interest informed the entire process, abrogating democratic principles as it attempted to institute democracy.[98]

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[90] E. Benvenisti (2012), p.256., see also A. Roberts (2005).
[91] CPA Order No.17 Status of the Coalition Provisional Authority, MNF- Iraq, Certain Missions and Personnel in Iraq,
[92] Article 38
[93] UN Charter Article 2, Chapter VII
[94] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Article 4. N. Bhuta (2005), p.726. E. Benvenisti (2012), p.8.
[95] J.L. Cohen (2012), p.224., Hague Regulations Respecting the Laws and Customs of War on Land, 1899, Article 43; Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949 Article 64.
[96] Jennings (1946), p.136.
[97] DeYoung & Slevin (2003) Full U.S. Control Planned for Iraq, *Washington Post*, 21 February, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/27/AR2006092701468.html.
[98] Whitehead (2009), p.220.

6. Afghanistan

Morgenthau's understanding that the focal point of politics is "interest defined as power", generally not governed by considerations of morality, find resonance in the invasions of both Afghanistan and Iraq.[1] Both invasions were motivated by deeply realist considerations of power, and democracy provided a liberal narrative which sat beside or was a substitute for these more realist motivations. Iraq was an attempt to ensure the protection of hegemonic interests in the Middle East.[2] The legitimacy of the invasion, the removal of WMD's, the removal of Saddam Hussein, and the liberation of the population was to be achieved through democracy.[3] Afghanistan was a reaction to 9/11 and the invasion was viewed as both defensive and retributive. The 'liberalisation' of international law to allow intervention for humanitarian purposes found its underpinning in a form of legitimacy which could justify otherwise illegal action if the motivation was sufficient. Of more relevance to the Iraq study, the creation of democracy in Afghanistan nonetheless benefited from this representation.[4] Not only was this the first instance where international liberal rules for imposing democracy was undertaken but secondly, that it was being attempted while conducting a new form of conflict, the War on Terror. Thus, the US found itself on the horns of a dilemma – how to conduct both simultaneously.

The prosecution of the War on Terror, subsequent to the events of 9/11, was accompanied by the establishment of a new State in Afghanistan based on liberal principles through which the ensuing occupation could be justified and legitimised.[5] The aims were not inherently contradictory. Had the overall interests of the Afghan State and its development been the central focal point, the creation of a strong and coherent military could have taken place in step with the drafting of a robust Constitution, and emplacement of an Executive, Legislative and Judiciary. Whether the newly formed State apparatus could have fought the War on Terror in a manner which was not incompatible with liberal principles, including rule of law and the protection of human rights is a matter of speculation. However, at the point of the invasion in Afghanistan, Secretary of Defence Rumsfeld ordered as light a military footprint as possible,

[1] Morgenthau (1948a), pp.5-6, 12. Morgenthau (1952), p.946.
[2] 2002 US National Security Strategy. Walt (2018), p.10.
[3] Mearsheimer (2014), p.19. Mearsheimer (2005), p.4.
[4] Resiman (2000), pp.245-250.
[5] Mearsheimer (2018), p.164.

as his approach was to delegate the conduct of the War on Terror to a number of warlords. Correspondingly, President Bush refused to consider a State-building mandate for the occupation.[6]

The term warlord is used in this study, as defined by Giustozzi, as "a type of ruler, whose basic characteristics are his independence from any higher authority and his control of a 'private army".[7] Operating outside of, or in tandem with the government, they were not controlled by it.[8] The policy of delegation resulted in the inability of subsequent civilian governments to gain control over the 'pro-government' irregular military actors operating in the State.[9] In effect, "the U.S.'s preference of security over liberalization strengthened the power of those parties which opposed the creation of a liberal, democratic state."[10] The emphasis within the US Constitution on the civilian control of the military and the disregard of these principles in Afghanistan lends an irony to the subsequent decisions.[11] Coupled with an almost exclusive reliance on elections as the primary 'democratisation' activity, and an ad-hoc approach to institution building, the policy resulted in the hollowing out of the State apparatus by the occupier, even as it was being created. Where US political requirements were at odds with democratic principles, democratic principles such as the rule of law were systematically set to one side.[12] This was particularly resonant in light of the portrayal of the democracy which would result from the occupation: freedom, peace, prosperity and equality.[13]

Viewing the War on Terror through a realist theoretical lens provides a coherent explanation as to why the conduct of that conflict has been apparently incompatible with the creation of a liberal democracy. Repeatedly non-rule-bound expedient actions, which conformed to the requirements of the occupier, were preferred over normative options which would have

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[6] Rumsfeld, D. (2001) *Memorandum for the President: Strategic Thoughts, 30 Sept*. http://library.rumsfeld.com/doclib/sp/272/2001-09-30%20to%20President%20Bush%20re%20Strategic%20Thoughts.pdf and *House of Commons Research Paper* 01/72, 3 October 2001, p.91 see also *Letter from Dana Rohrabacher to Donald Rumsfeld 26 September* (2001). Retrieved from http://library.rumsfeld.com/doclib/sp/803/2001-09-26 from Rohrabacher re Northern Alliance

[7] Giustozzi (2002).

[8] Rumsfeld (2011), p.408., see also Paul Wolfowitz, "Using Special Forces on 'Our Side' of the Line," Memo to Secretary of Defense Donald Rumsfeld, September 23, 2001, 2

[9] Rumsfeld (2011), p.408.

[10] Barnett, Feng & Zuercher (2008), p.30.

[11] R. Dahl (1997), p.179. Bailey & Braybrooke (2003), p.112.

[12] Yoo (2006b)., Mearsheimer (2018), p.184.

[13] Statement by President Obama 6 July 2016 https://obamawhitehouse.archives.gov/the-press-office/2016/07/06/statement-president-afghanistan see also https://www.usaid.gov/afghanistan/democracy-governance

conformed to liberal strictures. Breach of the prohibition on transformative occupation illustrates this point. The Conventions preventing transformation implicitly recognise that the occupier is a politically interested party and seeks to shield the occupied State from the imposition of systems imposed by the occupier.[14] The legislation in effect, serves to temper realist motivations, broadly adhering to liberal principles of the rule of law as expressed by the theory of legalization discussed by Abbot, Keohane, et al.[15] With those laws set aside, decision-making in this instance appears to adhere to realist understandings of interest and power.[16] In this way, the principles underpinning liberal democracy were negatively affected by their professed imposition. The effects were seen almost immediately, through the determination by US leaders to ensure that their candidate for Head of State was appointed, compromising the interim government formation processes.

The democratisation of Afghanistan also illustrates the underlying confusion as to the substantive definition of democracy: whether it is a governance system with complex government institutions, and checks and balances within the government structure; or a government appointment system in line with Schumpeter's understanding. While the narrative of democratisation implies the creation of government institutions, in reality beyond the conduct of election in Afghanistan, minimal steps were taken to democratise the State in any meaningful manner. Unwillingness on the part of the occupation to meaningfully assist in the development of national institutions have severely impacted the few steps which have been taken. For example, the main reason why national elections have been marred by widespread fraud, is due to the US refusal to fund and develop a credible voter register in the country.[17]

This chapter examines the actions taken to re-create Afghanistan, while simultaneously conducting a war. Looking briefly at the modern history of Afghanistan in order to contextualise the role it played in 9/11, the chapter reviews the initial decisions made in the conduct of the ensuing War on Terror. It then examines the government formation process and

[14] Cohen J.L. (2012). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Article 4. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Section III Article 43, 46, 48 & 55 (1899 & 1907), Articles 53, 54 & 64. (1949)
[15] Abbott, Keohane, Moravcsik, Slaughter, & Snidal (2000).
[16] Walt (2018), p.7, Cohen J.L. (2012), p.242, for an illustration within the US rationale see Yoo (2004), p.22.
[17] Smith (2011), p.276.

the subsequent elections which took place between 2004 and 2014. Taken together, the two processes are revealed to have degraded the efficacy of each in achieving their separate aims, and instead, to have delivered an insecure State lacking in the foundations of democracy.

6.1. Historical Context

Before the events of 9/11, Afghanistan endured decades of conflict, firstly as a Cold-War battleground and latterly in a civil war which tore the country apart. The Cold-War conflict which took place between 1978 and 1989 pitched a Russian-backed communist government, against a US-funded and Pakistan-supported Islamist Mujaheddin. One of the latter was Osama Bin Laden who arrived in Pakistan to support Pashtun factions within the Mujaheddin in 1979.[18] Recipients of over $10 billion in military and financial aid, of which $5 bn came directly from the US in the period between 1980 and 1992, the Mujaheddin were comprised of factional commanders who would take central roles in the subsequent civil war following the Soviet withdrawal in 1989.[19] The Soviet withdrawal was mirrored by a withdrawal of the US, which handed Afghan affairs to Pakistan and Saudi Arabia.[20] Almost immediately, hostilities broke out amongst the Mujaheddin. The ensuing civil war split the country on ethnic lines: Pashtun, Tajik, Hazara and Uzbek, and was exceptionally brutal, fought purely for the self-interests of the military commanders and warlords, including control of the opium industry.[21]

The Taliban came into being as a counter to these forces. A Pashtun movement, the Taliban originated from the Madrassas, or religious schools, in Pakistan as an aesthetic moral movement against the warlords. The movement was intent on ending the civil war and the wanton destruction and corruption which the warlords had overseen.[22] The Taliban agenda was fourfold: Restore peace, disarm the population, enforce Sharia Law and re-establish Afghanistan as an Islamic State.[23] It was a message which garnered significant popular support. That is not to say these objectives were achieved. The Taliban became an active military

[18] Who is Osama Bin Laden? 18 Sept. (2001). *BBC*. Retrieved from http://news.bbc.co.uk/1/hi/world/south_asia/155236.stm
[19] Rubin (1996).
[20] Rashid (2008) p.12, Perlez (2001) A nation challenged: warlords, corrupt, brutal, reclaim afghan thrones evoking chaos of Somalia. *New York Times*, (19 Nov).
Retrieved from www.nytimes.com/2001/11/19/world/nation-challenged-warlords-corrupt-brutal-reclaim-afghan-thrones-evoking-chaos.html
[21] Rashid (2010), p.8.
[22] Ibid, pp.27-30. Human Rights Watch (2001), pp.14-17.
[23] Rashid (2010), p.22.

movement with a record of human rights violations, which included draconian policies against women. However, in its initial formation, it promised a real alternative to the discredited warlords – and on that basis, retained a constituency among Pashtuns, particularly in the south.[24] Al Qaeda's support base was from the same area and the two groups were allied. [25] With the withdrawal of US funds to the Mujaheddin in the 1990s, Pakistan shifted its support to the Taliban, providing arms, personnel and money, thereby indirectly also supporting Al Qaeda.[26] The national government headed by Tajik Commander Burhanuddin Rabbani was exceptionally weak, and unable to extend the State's control over Taliban areas, or to expunge al-Qaeda from its territory.[27] It was ultimately overthrown by the Taliban in 1997.[28]

Following the emergence of the Taliban, warlords from each ethnic and regional grouping, specifically former President Rabbani; Uzbek Generals Rashid Dostum and Mohammed Atta; Tajik leader Ahmed Shah Massod; anti-Taliban Pashtun leaders Gulbuddin Hekmatyar, Hazrat Ali and Abdul Qadir; and Hazara leader Karim Khalili, would be restyled as the anti-Taliban, Northern Alliance. They would become key allies of the US in the subsequent invasion and the War on Terror. Massod was killed by Al Qaeda on September 8, 2001. His Tajik faction, now led by General Daud, Ismeal Khan and Mohammed Fahim would come to dominate the Northern Alliance and the new Afghan Military.[29]

6.2. The War on Terror

The motivation for the invasion was the War on Terror. Following 9/11, the US identified the perpetrator of the attacks as Osama bin Laden in his role as a commander of Al Qaeda. With the adoption of Resolution 1368 on 12 September, 2001, the Security Council confirmed the right of self-defence in response to the attacks. On 20 September President Bush, requested that the government of Afghanistan deliver known Al Qaida participants to US custody.[30] The request was declined, with the Taliban refusing to surrender Bin Laden. On 28 September the

[24] Human Rights Watch (2001)
[25] Hamilton & Kean (2004), Chapter 2.
[26] Rashid (2008), pp.17, 25 see also Davis (2001). Confirmed by Clinton (2004).
[27] Rashid (2010), pp.61-2.
[28] Ibid, p.64.
[29] Fergusson (2010), p.153
[30] Rashid (2008), pp.27-31., President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347, 1348 (20 September 2001) [Bush, Joint Address] at http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html

Security Council passed resolution 1373 accepting the right of self-defence in relation to terrorist attacks. On this basis, the US formed a 'coalition of the willing' and invaded the country on 7 October 2001.[31] Immediately following the invasion, the CIA funded and armed Northern Alliance commanders and their affiliates, in exchange for their support in removing the Taliban, and helping in the hunt for Al Qaeda and Bin Laden.[32] The 'fall' of the Taliban was achieved within 62 days, being completed by the second week of December.[33] All semblance of government collapsed with the remnants of the Taliban retreating to Pakistan.[34] After the removal of the Taliban the light US footprint was retained as Northern Alliance commanders continued to fight the War on Terror, pursuing what remained of the Taliban and Al Qaeda. By 2002 only 4,500 coalition troops had been deployed in Afghanistan and all were based in Kabul. In this way, the War on Terror could be fought without committing the number of troops required if the country were to be completely occupied.[35]

Although the invasion was an act of self-defense against al-Qaeda, the US transitioned from invasion to occupation, and did so by promoting a narrative of democratic transformation. "Freedom is taking hold in Afghanistan...[a]nd our nation has special responsibilities to these countries, responsibilities we will keep… This summer, at town hall meetings across the country, Afghans will discuss the working draft of a new constitution. And in the fall, a national assembly will convene to ratify the constitution of a free and democratic Afghanistan."[36] The promotion of democracy was accompanied by the promotion of human rights and the rule of law.

However, despite the adoption of national laws stating the contrary, warlords were promoted into positions of political prominence, as long as they continued to support the US.[37] Under

[31] "Operation Enduring Freedom and the Conflict in Afghanistan: An Update." *House of Commons Research Paper* 01/81, 31 October (2001), pp.16, 25 & 38.
[32] A. Rashid (2008), pp.62-3, 128., D. Rumsfeld, (2001) *Memorandum for the President: Strategic Thoughts, 30 Sept.* http://library.rumsfeld.com/doclib/sp/272/2001-09-30%20to%20President%20Bush%20re%20Strategic%20Thoughts.pdf and *House of Commons Research Paper* 01/72, 3 October 2001, p.91 see also *Letter from Dana Rohrabacher to Donald Rumsfeld 26 September* (2001). Retrieved from http://library.rumsfeld.com/doclib/sp/803/2001-09-26 from Rohrabacher re Northern Alliance
[33] T. H. Johnson (2007). It has been argued that the Taliban was not in fact defeated it simply 'melted away' ICG (2006) "*Countering Afghanistan's Insurgency: No Quick Fixes*" Asia Report N°123 – 2 November, 2.
[34] Rashid (2010), pp.220-221.
[35] ICG (2006) *Countering…*, p.3.
[36] President Bush Presses for Peace in the Middle East Remarks in Commencement Address at the University of South Carolina May 9, 2003 https://georgewbush-whitehouse.archives.gov/infocus/afghanistan/20040708.html
[37] Paul Wolfowitz, "Using Special Forces on 'Our Side' of the Line," Memo to Secretary of Defense Donald Rumsfeld, September 23, 2001, p.2

this policy it was impossible for the State to assert control over the security apparatus, most of which consisted of irregular forces. The Afghan population, far from seeing the warlords as liberators, viewed them as figures who had perpetrated gross human rights abuses and war crimes, which is why they had previously welcomed the Taliban to contain them.[38] The role of the US in returning power to the warlords signalled to the population that the new occupier saw democracy formation as secondary to military aims. The government formation process would confirm it.

6.3. Occupation and Governance

6.3.1. Bonn

The second action of the occupation was to sponsor the 'Bonn Conference', as a concrete measure to begin the process of democratic transformation. The Conference was convened on the 27 November 2001 under the auspices of the UN, in order to appoint an interim Afghan-led authority.[39] The UN was the appropriate organisation to conduct the Conference having previously convened intra-Afghan talks aimed at ending the civil war.[40] The aims of the Conference were also absolutely appropriate. Under the Montevideo Convention, statehood is in part reliant on the presence of a national government, and the creation of a government would somewhat defuse claims that the occupation was transformative in contravention of international law.[41] According to US Special Envoy to Afghanistan James Dobbins, the US was also concerned that the absence of a national government would reduce the credibility of the occupation and distract from the overarching objective of pursuing Al Qaeda and Bin Laden.[42]

The factions in attendance were: the 'Northern Alliance' comprised of the non-Pashtun warlords; The 'Peshawar group' made up of anti-Taliban Pashtuns from the north, the 'Rome group' which supported reinstatement of the former King, so called because that's where he

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http://papers.rumsfeld.com/library/default.asp?zoom_sort=0&zoom_query=Using+Special+Forces+on+Our+Side+of+the+Line&zoom_per_page=100&zoom_and=1&Tag+Level+1=-1~0&Tag+Level+2=-1~0 ICG (2006) *Countering…* 3. ICG (2002) *The Afghan Transitional…* A. Rashid (2008), p.129. F. Ayub & S. Kouvo (2008). Smith (2011), pp.8, 32-33.

[38] AIHRC (2005), pp. 51-52, 75. F. Vendrell (2011), p.54.

[39] S. S. Smith (2011), p.7.

[40] Ibid, p.15.

[41] *Montevideo Convention on the Rights and Duties of States* (1933), Article 1. A. Roberts (2006), p.604.

[42] A. J. F. Dobbins (2008), p.30.

resided; and the 'Cyprus Group' an expatriate group comprised of 'moderate' Pashtuns and Hazaras (Shia) with links to Iran.[43] Non-Cyprus faction Hazaras, Uzbeks and Heratis had a token presence. Critically, there was only one Pashtun representative from the south and none from Kandahar, the Pashtun and Taliban stronghold.[44] The notable absence was the Taliban, resulting in the exclusion of the largest ethnic and political bloc in Afghanistan.[45]

The southern Pashtun representative was Hamid Karzai, chief of the Popalzai tribe.[46] The Karzai family was both prominent and political. Hamid's father was a former deputy speaker of Parliament and had been killed by the Taliban in 1999.[47] In the '80s Karzai had joined the Mujaheddin, but had had minimal military involvement, becoming a civilian political actor instead. Politically moderate, he was a nationalist, and following his father's death he had actively worked to bring the Northern Alliance factions together to undermine the Taliban.[48] Within Afghan political circles he was popular, having not been tainted by involvement in the civil war. As a moderate Pashtun who had defied the Taliban, he also had broad, cross factional, support.[49] He had come to the attention of both London and Washington in the years before 9/11, and was rapidly identified as a leader of interest following the attacks. By 30 October he was in receipt of both financial and military support and in a tour of conflict flash points in 14 November was accompanied by a CIA close protection team.[50] According to then Head of the CIA, George Tenet, before the Bonn Conference started, Karzai was identified as the preferred candidate for the US.[51] Dobbins confirms this claim, adding that Karzai was supported by Pakistan, Turkey and Iran, all of whom had been canvased by the US prior to the start of the Conference.[52]

At the conclusion of the 9-day Conference, the participants agreed to the formation of an Interim Authority, with 29 government posts distributed among the attending groups. While not representing the country as a whole, the distribution did reflect the existing balance of power based on US alliances.[53] The Northern Alliance was the overwhelming victor at Bonn,

[43] S. S. Smith, (2011), p.8.
[44] A. Rashid (2008), pp.72, 103-105.
[45] L. Brahimi (2012), pp.47-51. S. S. Smith, (2011), p.8. A. Rashid (2008) p.104 quoting Brahimi.
[46] A. Rashid (2008), p.3.
[47] Ibid, p.17.
[48] Ibid, pp.4-5, 10-19
[49] Ibid.
[50] G. Tenet (2007), pp.219-225.
[51] Ibid, p.224.
[52] A. J. F. Dobbins (2008), pp.4, 57, 75.
[53] S. S. Smith (2011) p.9.

taking three of the five Deputy President spots in addition to 17 cabinet posts, including intelligence, interior, defence, and foreign affairs. The Peshawar group took four cabinet posts, the Rome group took nine, while the Cyprus group gained no seats, indicating their overall exclusion as Iranian allies.[54] A number of the factions had proposed the appointment of the King as Chair of the Interim Authority.[55] This was opposed by both the US and Iran. Instead, Karzai was appointed interim Chairman; the agreement noted that the former King had been invited but had declined.[56]

It was agreed that the formation of the Interim Authority would trigger a cascade of staged events. The Interim Authority, sitting for 6 months would convene an Emergency 'Loya Jirga' to be held in Afghanistan and attended by a broader cross section of national groups. A Loya Jirga is an ad-hoc assembly which is analogous to a Parliament, and is the mechanism through which legal authority is conferred in Afghanistan.[57] In turn the Loya Jirga would appoint a Transitional Authority from its membership, which would then appoint a Constitutional Loya Jirga to draft a new Constitution. Subsequently, national elections would take place. The staged development was designed to ensure increasing levels of participation throughout the process, providing opportunities for political engagement from factions not represented at the initial Bonn Conference.[58] The agreement also stipulated the exclusion of the Taliban from these processes.[59]

The meetings were chaired by Lakhdar Brahimi, Special Envoy to the UN Secretary General who was accompanied by a small UN team. The meetings were completely closed, details of which have not been extensively reported. However, the ensuing Agreement does provide an indication of the direction relating to a number of key considerations. The agreement clearly confers sovereignty to the Interim Authority and mandates the creation of government institutions such as a Supreme Court, a Central Bank and the Loya Jirga.[60] There were also a number of omissions. It is noted by Barnett Rubin, a UN official present at the talks, that the agreement had no disarmament provisions, despite attempts by the UN to insert them.[61] It also

[54] A. Rashid (2008), p.105.
[55] A. J. F. Dobbins (2008), p.75.
[56] *S/2001/1154* The Bonn Agreement: Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions s/2001/1154 5 Dec 2001 para III(2).
[57] J. A. Thier (2006), p.563, A. Rashid (2008), p.7.
[58] S. S. Smith (2011), p.8.
[59] *S/2001/1154* para 1 General Provisions
[60] Ibid.
[61] B. R. Rubin (2003), p. 40.

did not address power-sharing provisions or principles.[62] This reflected the will of the participants but also indicated the priorities of the US at the time. As Bonn was taking place, the US command structure within Afghanistan was shifting from the CIA and State Department to one dominated by the Department of Defence.[63] As observed by Scott Smith, also in attendance at Bonn, the new US power holders were "unconcerned with the necessity of projecting governance and security."[64] The Bush administration, intent on a restricted vision of nation-building, refused to allow the deployment of peacekeepers throughout the State and retained the reliance on warlords as the basis of the State security apparatus.[65]

6.3.2. The Emergency Loya Jirga

The Emergency Loya Jirga, took place on schedule in June 2002. The primary function for the Jirga was to elect the Transitional Authority, in turn triggering the Constitutional drafting and electoral processes.[66] The selection of delegates was undertaken by a 'Special Independent Commission' and 1,051 delegates were selected, with an additional 450 elected from refugee groups, universities and other civil society entities through a national consultation process. Of those nominated, 200 were women.[67] However, the Loya Jirga exposed two disquieting trends: the first was the inclusion of warlords, the second was the level of control the US displayed in ensuring the appointment of its preferred candidates.

The Chairman of the Commission, Ismeal Qasimyar, a national Constitutional expert, was focused on broad representation in order to ensure the body's legitimacy. He noted that the only disqualification criteria "is that members cannot belong to terrorist groups or the Taliban" but there were no rules for these designations.[68] Warlords or militia leaders were not designated as terrorists, despite exercising military capacity outside of the control of State forces.[69] According to ICG reports, among the delegates were 32 Governors, all of whom conformed to the definition of 'warlord'.[70] The UN maintained that their presence simply mirrored the power structure in the country, but it effectively rewarded impunity. Non-militia delegates reported

[62] Ibid, p.41.
[63] A. J. F. Dobbins (2008), pp.157-8
[64] S. S. Smith (2011), p.18.
[65] A. J. F. Dobbins (2008), pp.157-8 & 163-4.
[66] ICG (2002) *The Afghan Transitional Administration*, p.2
[67] A/56/1000–S/2002/737 (2002) *Report of the Secretary General* 11 July, p 5. ICG. (2002) *The Afghan Transitional Administration*, p.2.
[68] Quoted from an interview conducted by Rashid in A. Rashid (2008), p.138.
[69] Ibid.
[70] ICG. (2002) *The Afghan Transitional Administration*, p.3 see also W. Mehran (2018), p.93.

intimidation by Governors, who sought to control voting.[71] In addition, security for the Jirga was provided by the National Security Directorate which was directly controlled by Mohammad Fahim, the Tajik commander, as well as anti-Talaban Pashtun leader Abdul Qadir, and Hazara leader Karim Khalili, all of whom maintained private armies. They were subsequently appointed Vice-Presidents in the interim government, cementing their positions and authority within the new power structure despite their roles in the civil wars of the 1990s and their (at this stage) on-going armed struggles.[72] Fahim also took control of the Ministry of Defence, thereby consolidating Tajik dominance over the military.

A key task for the Jirga was the election of an interim Head of State. Despite calls for the return of the King as a unifying figure within Afghan politics, the US and Iran both maintained their support of Karzai, then Chairman of the Interim Authority.[73] Under pressure from the US the King withdrew, as he had during the Bonn Conference. This time his withdrawal was managed in a particularly public and ham-fisted manner, with U.S. Special Envoy Zalmay Khalilzad announcing the decision at a press conference two hours before the King did so himself. When he at last made the announcement, his statement was read out for him, as he sat between Khalilzad, Foreign Minister Abdullah, and Karzai.[74] Karzai announced his candidacy that same evening. The Loya Jirga Chair, Ismael Qasimyar, subsequently stated that Karzai had already been elected "by applause", prior to holding the vote. Qasimyar's statement indicated an uncomfortable degree of pre-determination in the outcome.[75] Karzai would win the nomination with 1295 votes, a landslide over the other two candidates who polled 171 and 109 votes respectively, The principles of State Sovereignty, norms of non-intervention and liberal democracy itself, including transparency, civilian leadership of the military, and legal certainty i.e. rule of law considerations, were all compromised in this process, critically undermining domestic legitimacy.[76]. In effect the US at this point was acting more akin to a 'sovereign dictator' than a benign hegemon.[77] Yet, the legal protections for occupied States existed to prevent this form of State re-creation by *fiat* and avoid concerns of bias or self-

[71] Ibid, ICG (2002) *The Afghan Transitional Administration*
[72] Ibid p 8
[73] A. J. F. Dobbins (2008), p75, ICG (2002), p.3
[74] ICG (2002), *The Afghan Transitional Administration*, p.4. Steele J. Former king renounces throne to save Afghan council *The Guardian* 11 June 2002 https://www.theguardian.com/world/2002/jun/11/afghanistan.jonathansteele
[75] ICG (2002) *The Afghan Transitional Administration*, p.4. "Loya Jirga Chaos Result of Unclear Rules", IWPR, 13 June 2002. https://iwpr.net/global-voices/loja-jirga-chaos-result-unclear-rules
[76] J.L. Cohen (2012), p.236., SG Annan, Cyril Foster Lecture *Why Democracy Is an International Issue* 19 June 2001 http://www.un.org/press/en/2001/sgsm7850.doc.htm
[77] J.L. Cohen (2012), p.236.

interest.[78] Attempts, however, to replace these prohibitions with constructs such as the Responsibility to Protect overtly ignored the abusive dynamics of power and politics that international law had previously recognised and developed rules to protect against..[79]

6.3.3. Constitution and the Electoral System

The democratic system is implicitly embedded in concepts of certainty and accountability through rule of law. A critical element of liberal democracy and how it understands itself is constitutionalism. Certainly, in the American tradition, the Constitution is the bedrock of government structure, through which all rights are guaranteed, and it is inviolate. In this understanding, breach of the Constitution is fundamentally destabilising, and extremely dangerous for the State. While these ideas have been central to the US understanding and domestic practice of government, they did not extend to the foreign spaces which the US occupied, as will be seen in the Constitution formation process in Afghanistan, and the document's subsequent adoption.

The Constitutional Loya Jirga convened in December 2003, and a draft Constitution was completed in record time, just a month later, in January 2004.[80] The Constitution established a presidential system, with the President acting as Head of State and Government.[81] There are no provisions for impeachment, giving the President virtually unassailable authority. Bi-cameral in structure, the lower house (the Wolesi Jirga or Parliament) is directly elected through universal suffrage, with a quota of two female seats for each province.[82] The upper house (the Meshrano Jirga) is made up of three classes of members, each of which is to be separately appointed. One third was to be made up of members elected by newly formed Provincial Councils, one third was to be elected from newly formed District Councils, and one third was to be appointed by the President.[83]

The Constitution's provisions were complicated, and contained significant flaws that would directly impact both the drafting of the electoral law, the resulting electoral system, and all of the subsequent elections. These flaws were particularly evident in relation to the structure of

[78] N. Bhuta (2005), p.726. E. Benvenisti (2010), p.8.
[79] R. Thakar & T. G. Weiss (2009).
[80] J. A. Thier (2006), p.569.
[81] The Constitution of the Islamic Republic of Afghanistan 2004, Articles 60 & 71
[82] Ibid, Article 83
[83] Ibid, Article 84

Parliament, the electoral timetable and voting systems. The first issue was the national elections timetable. The Constitution allowed for the conduct of four direct electoral cycles and one indirect cycle. The lower house (the Wolesi Jirga) and the President both had 5-year terms, with elections to take place in the same year. Provincial Council elections were to take place every 4 years and District Councils were to be elected every 3 years.[84] Over a 20-year period the Constitutional provisions would result in the conduct of 23 elections, taking place in 13 of the years. The result: the Constitutional rules have simply been ignored. Since 2004 only the Presidential elections have taken place in accordance with the electoral calendar as set out in the Constitution.[85] Parliamentary elections should have been conducted simultaneously with Presidential elections, but instead were held the following year in both 2005 and 2010. They would not occur again until 2018. Provincial Council elections took place in 2005 and in 2009 but have not been held since. District Council elections have not taken place to date. As such the upper house, the Meshrano Jirga, has not formed as per the Constitutional provisions.

The electoral boundaries in Afghanistan were in complete disarray at the time the Constitution was adopted, with the boundaries reflecting historic divisions and local factional boundaries. Electoral boundary delimitation in countries with developed infrastructure where the State has a monopoly on the use of force, is in any event complicated. In Afghanistan, hindered by security and political impediments, it was to prove impossible, and a national district-level boundary delimitation exercise has not taken place to date.[86] The Constitutional provisions relating to electoral boundaries and the requirements for proportionate representation, also have never been implemented.[87]

The voting system for the Wolesi Jirga was also extremely complex. Members were to be elected from the provinces which would be afforded representation based on the constituency size, and two women were to be returned from each constituency.[88] The voting system which can accommodate female reserved seats is proportional representation (PR). While independent candidates are possible in PR systems, the system in effect requires political parties, as discussed by Norris, who notes that PR results in the development of coalition

[84] The Constitution of the Islamic Republic of Afghanistan 2004, Articles 61, 83, 138 and 140 respectively.
[85] Ibid, Articles 61, 83,
[86] S. S. Smith (2011), p.20.
[87] Ibid Articles 83. S. S. Smith (2011)
[88] The Constitution of the Islamic Republic of Afghanistan 2004, Article 83

politics which requires parties in order to provide coherence.[89] Karzai, however, was adamant that a political party system was not suitable for Afghanistan and rejected voting systems based around political parties, which he viewed as diminishing the power of the presidency.[90] In the absence of parties, the only voting system which could provide female-reserved seats was the Single Non-Transferable Vote System, (SNTV) which allows voters to cast ballots for one person in multi-seat constituencies.[91] The system virtually guarantees the absence of strong party development, a critical factor in the liberal principles this process was supposed to enact. According Seymore, Lipset and Held, the party system ensures that those out of power will provide a viable opposition, a fundamental element in functioning liberal democracy.[92] Karzai's strategy was based on his belief that Pashtun MPs would be broadly loyal to his presidency and thus form a front of sorts, while MPs from other ethnic groups would be more fragmented and less likely to form an effective opposition, and as such SNTV suited his personal agenda.[93] The UN Electoral team was concerned that the system would result in a highly fragmented, virtually powerless Parliament, but these concerns were not shared by the US, which like Karzai, favoured a strong Presidency, rather than a strong legislature.[94]

The premise of justifiable intervention and regime change is implicitly based on the understanding that the occupier will conduct itself in accordance with democratic principles, according to the UN rules reflecting the new liberal interpretation of democracy as a human right. In this instance, the occupier in primary control of the national political dynamic in Afghanistan, was the US, a vocal proponent of democracy promotion on two counts: as a security measure in accordance with the democratic peace, and as a governance system reflecting popular will. The assumptions made by Franck, Teson, Cerner, who advocated for military intervention in order to democratise relied on a specific vision of a moral occupier capable of abrogating self-interest for the good of the occupied State.[95] In principle, the US fulfilled the requirements. In reality, by this point, the acting President of Afghanistan had in effect been appointed by the occupier. The Government was populated with warlords who were

[89] P. Norris (1997), p.303.
[90] A. Reynolds (2006). S. S. Smith. (2011), p.161 **A.** Saikal (2004), p.155. A. Arnold (1994), p.37.
[91]Single Non-Transferable Vote: ACE Practitioners Network http://aceproject.org/ace-en/topics/es/esd/esd04/esd04a/esd04a01
[92] S. M. (2000), 48. D. Held (1997), see also J. S. Dyrzek & P. Dunleavy (2009).
[93] A. Reynolds (2006), p.111.
[94] S. S. Smith (2011), p.161.
[95] F. Teson, (1992), (2005), (2011) & (2014). G. Simpson (2001). T. Franck (2000). T. Franck (1994). G. H. Fox (1992). C. Cerna (1994) G. H. Fox & R. B. Roth (2000).

about to consolidate and institutionalise their presence. The Constitution, far from being an unassailable framework, was a set of rules too complex and too removed from the demands of the situation, and hence, barely applied.

6.3.4. Disarmament, Demobilisation and Reintegration

The Bonn conference had introduced warlords into power-holding positions. These roles were maintained in the appointment Mohammad Fahim, the Tajik commander, anti-Talaban Pashtun leader Abdul Qadir, and Hazara leader Karim Khalili as Vice Presidents of the Transitional Authority. As a civilian authority slowly began to develop, attempts were made to reduce or address this presence. The national Disarmament, Demobilisation and Reintegration (DDR) programme which was intended to disarm the militias and incorporate irregular forces into the national military began, belatedly, in 2003. With technical and financial support from the UNDP, the "Afghanistan New Beginnings Program" (ANBP) was established with a $41 million allocation, mainly from the Government of Japan. While this initiative was being undertaken, the War on Terror continued, and continued to rely on local commanders for the hiring and deployment of local fighters. Private security companies, which the US had contracted, proliferated in Afghanistan following the invasion and were dependent on local commanders for sourcing personnel.[96] By mid-2002 over $1 billion was being spent on the deployment of 45,000 Afghan mercenaries in the service of US forces.[97] A 2010 report published by the U.S. House of Representatives Subcommittee on National Security and Foreign Affairs found that the entire US supply chain in Afghanistan was reliant on warlords who operated the trucking companies and effectively ran protection rackets, which the US funded.[98] The report found that $2.16 billion was being spent by the US and NATO on warlord-controlled private security groups.[99] As Rashid noted, it was a "military intelligence-driven strategy, that ignored nation building, creating state institutions, or rebuilding the country's shattered infrastructure."[100]

[96] Dennys (2005), p.9.
[97] A. Rashid (2008), p.136.
[98] Rep. John F. Tierney, & Subcommittee on National Security and Foreign Affairs House of Representatives. (2010). Warlord, Inc. Extortion and Corruption Along the US Supply Chain in Afghanistan. *Subcommittee on National Security and Foreign Affairs Committee on Oversight and Government Reform U.S. House of Representatives.* S. S. Smith (2011), pp.32-33.
[99] Ibid, pp.1, 49.
[100] Ibid, p.133.

The DDR programme operating with a fraction of the funding, was virtually meaningless. The programme was primarily implemented by Vice President-Minister for Defence Fahim (himself a warlord) and aimed to demobilise 100,000 combatants.[101] The Ministry controlled the selection of those to be demobilized, and those who would be reintegrated into the military, and it set the standard for the munitions to be surrendered.[102] A study undertaken in 2006 found that 56% of participants came from the faction controlled by the Minister for Defence and that Tajik forces were the largest group integrated back into the State security apparatus.[103] In subsequent studies it was found that a sizable percentage of weapons surrendered (36%) were not serviceable.[104] As Franscesco Vendrell, then UN Special Envoy for Afghanistan noted "so the 60,000 dubious Northern Alliance combatants went through the charade of handing their (inevitably) oldest weapons to their erstwhile commander in his capacity as Defence Minister".[105]

6.4. Elections

As previously observed, thinkers such as Locke, Bentham and Mill focused on the details of administrative systems which would create and serve as the foundations for democracy. However, in the modern application, it has been the Schumpeterian interpretation of democracy as an election, which has overwhelmingly been exported. Discussed as 'procedural democracy' by Whitehead, borrowing from Dahl, Schmitter and Karl the components which make a State democratic are exceptionally 'thin' and look at broadly sketched rights as opposed to institutions. Briefly summarised, these rights are: empowered elected officials, frequent fair elections, universal franchise, the right to participate, freedom of expression, information and association.[106]

Most of the provisions could be said to have existed in Afghanistan, once the Constitution was adopted. All citizens had franchise, government officials had real authority albeit through individually controlled force, all adults could run for election and many did, freedom of

[101] F. Vendrell (2011), p.55. S. Rossi & A. Giustozzi (2006), p.5. C. A. Hartzell (2011), p.9.
[102] Ibid, p.9.
[103] S. Rossi & A. Giustozzi (2006), p.5. P. Gossman (2009), p.15. ICG. (2005) *Afghanistan: Getting Disarmament Back on Track* p.4.
[104] S. Rossi & A. Giustozzi (2006), p.4. F. Vendrell (2011), p.55.
[105] F. Vendrell (2011), p.55. Vendrell would subsequently be appointed the EU Representative and is also referred to by that title. A. Rashid (2004).
[106] R. Dahl (1982), p.10 see also P. C. Schmitter & T. L. Karl (1993), p.81

expression largely existed in an absence of formal censorship and there was broadly freedom of association.[107] The criteria on which Afghanistan would fail is the requirement for fair elections, but that then invokes a requirement to improve the electoral process, a step which would be largely superficial. These criteria also contain both a subjective and objective 'truth' which can be claimed. Dahl's first criterion is illustrative: "Control of government decisions about policy is constitutionally vested in public officials".[108] In Afghanistan that is an objectively true, factually accurate statement, but it does not address the nature of the official, nor the lack of adherence to the Constitution. It is not subjectively what Dahl intended in the creatiuon of his criteria, but it can be claimed, and reasons why the criterion is largely empty were easily ignored. It is a representation of democracy which does not require institutional development; it allows for the assumption that if an election is provided, and a declaration made that rights exist, their inability to manifest in reality can be attributed to some other, exogenous reason.[109] Importantly, it serves to illustrate why democracy cannot be imposed – for every aspect of that criterion rests on the will of the people and their participation in the structures that compose it. Without that, elections mean little, and the process fails.

In Afghanistan the overwhelming emphasis by the occupying forces for democratisation programming was on the elections, and this can be seen through the funding, provided through the UN and US funded USAid. Information for each election was not available but figures were found for the 2005, 2009 and 2010 processes. The 2005 Parliamentary election cost $149 million, the same year the entire United Nations Development Programme global governance budget was $34 m.[110] Subsequent election comparisons are similarly astounding. The 2009 Presidential Election cost $220 million, the UNDP figure was $61 million.[111] The 2010 Parliamentary election cost '$149 million, the UNDP global governance amount was $41 million.[112] Information is not available for specific Afghan programming, but a 2010 ICG

[107] L. Whitehead (2002), pp.10-11., P C. Schmitter & T. L. Karl (1993), p.45. R. Dahl (1982).
[108] R. Dahl (1982) p.11.
[109] See E. Mansfield & J. Snyder (1995), B. M. Russett, W. Antholis, C., Ember, M. Ember, & Z. Moaz, (1993), P. Collier (2009) for examples of this approach.
[110] UNDP is the lead agency for governance programming for the UN. A/59/744-S/2005/183 (2005) *Report of the Secretary-General 18 March.* Para 14. A/61/5/Add.1 (2005) *UNDP Financial report and audited financial statements for the biennium ended 31 December 2005, Report of the Board of Auditors General Assembly Official Records Sixty-first Session.*
[111] A/63/751-S/2009/135 (2009) *Report of the Secretary General 10 March.* para 11. A/65/5/Add.1 (2009) *UNDP Financial report and audited financial statements for the biennium ended 31 December. Report of the Board of Auditors General Assembly Official Records Sixty-fifth Session.*
[112] ICG. (2011) *Afghanistan's Elections Stalemate*, p.13. A/67/5/Add.1 (2011) *UNDP Financial report and audited financial statements for the biennium ended 31 December. Report of the Board of Auditors General Assembly Official Records Sixty-seventh Session.*

report on the Judiciary found that little to no development had taken place during the subsequent 7 years of occupation due to an absence of programming and funding.[113]

All of the elections conducted in Afghanistan contained serious flaws which have led to the erosion of legitimacy of the electoral processes, but two issues stand out as having had the most profound negative effect. The absence of a voter roll and the inclusion of warlords within the process. The inability to draw accurate electoral boundaries had a knock-on effect on the creation of a voter register, which has never been adequately undertaken. In normal circumstances, as an anti-fraud provision, a voter roll is produced for each polling centre. Voters cast their ballots at the polling centre where their names appear on the roll. Election administrators will then know exactly how many people are registered to vote at that facility and through a process of confirming identification, who voted. Reliable voter turnout figures are thereby gathered in this manner. Fraud is easy to establish: if 50 people are present on the roll and 50 vote this is 100% turn out, which is unlikely. If 55 people vote, then 110% have turned out, and as this is legally impossible, it is indictive of fraud. In the absence of a voter roll it is not possible to establish voter numbers and turnout percentages, leaving the system blind. In Afghanistan, this absence has led to widespread fraud.[114]

Most of the anti-fraud measures which can be applied to an election process hinge on an accurate voter roll, in its absence the election processes were extremely vulnerable. The inclusion of former combatants into political processes is not in itself unusual, but the Afghan case had unique characteristics which made it particularly problematic. Legislation was passed which actively banned militia leaders from the standing for election and Taliban commanders were completely excluded from the process.[115] However, the occupier actively encouraged the participation of those commanders who were participating in the War on Terror, fatally damaging the integrity of the process. Because of this dynamic, security in the country was not brought under the control of the State resulting in the inability to access and conduct the election in certain provinces.

[113] ICG (2010) *Reforming Afghanistan's Broken Judiciary.*
[114] S. S. Smith (2011).
[115] *Decree of the President of the Transitional Islamic State of Afghanistan on the Adoption of the Electoral Law* 2004, Article 16(3)(e) reiterated under Article 12.7 of the *Electoral Law* 2010

This study reviews five elections, the 2004 Presidential Election, 2005 Parliamentary election, the 2009 Presidential election, the 2010 Parliamentary and the 2014 Presidential election. The study will examine in pairs the 2004 Presidential and 2005 Parliamentary elections, and the 2009 Presidential and 2010 Parliamentary elections, as each pair of elections was conducted back to back with issues relating to candidate vetting, voter registration and fraud applying across both polls. The 2015 Parliamentary election was never conducted, in breach of the Constitution. The 2004-2005 process has the greatest level of detail as the problems within the process were established at this point and then replicated over the subsequent processes.

6.4.1. 2004 and 2005

In 2004 the elections were to be conducted by the UN and the first step in the electoral preparations was the conduct of voter registration.[116] The creation of a voter register depended on the gathering of verifiable and correct data, neither of which proved to be possible. Initially the process was hampered by an extremely tight deadline established by the Bonn Agreement as well as critical delays in the issuance of donor funding.[117] Due to the complete collapse of the State civil registration system through decades of war, there was no available documentation to verify eligibility. As such there was no system in place to prevent individuals from registering multiple times.[118] Finding sufficient numbers of literate people to conduct the process in rural areas also proved difficult, a direct result of decades of war and the collapse of the education system.[119] Finally, the lack of clarity over the electoral boundaries also impacted the process. It proved impossible to allocate voters located on the edges of the as yet unspecified administrative boundaries, to specific constituencies.[120] Combined, these factors resulted in the compilation of voter information so flawed that it was impossible to create a verifiable voter register and from that, a voter roll.[121]

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[116] ICG. (2004) *Afghanistan: From Presidential to Parliamentary…*
[117] S. S. Smith (2011), pp.76-78.
[118] "Applicants are not required to produce any documentation when registering to vote." Voter Registration trainers Manual, JEMB, Process and training Section, Afghanistan Voter Registration 2003–2004, p.8. http://aceproject.org/ero-en/regions/asia/AF/Afghanistan%20-%20Voter%20Registration%20Trainers%20Manual.pdf S. S. Smith (2011), p.145. OSCE. (2005), p.7.
[119] A UNICEF survey in 2003 showed that the male literacy rate was 49 percent while female literacy was only 19.6 percent. (http://www.irinnews.org/report.aspx?reportid=26342)
[120] S. S. Smith (2011), p.145. European Union Democracy and Election Support Mission. (2004). *Final Report: Afghanistan Presidential Election*, p.10.
[121] Ibid, pp.9-10. S. S. Smith (2011), pp.122, 145. ICG. (2004). *Afghanistan: From Presidential to Parliamentary…* p.13.

The 2004 Election law stipulated that voters had to cast their ballots in the polling stations where they were registered.[122] In the absence of a voter roll which would have allocated voters to polling stations, the law was ignored; instead, 700 ballots were assigned to each polling station, and the10.5 million people who had obtained voter registration cards, were allowed to vote in whatever centre they chose.[123] With no knowledge as to the actual number of voters for each polling centre, there was no way to verify how many people voted, or whether polling figures were an accurate expression of voter turnout, or whether instead, there had been ballot-box stuffing.[124] The inability to monitor polling centres in insecure areas exacerbated the vulnerabilities in the system. A report produced in 2011 by IFES, the US Aid-funded electoral programme, found that the 2004 voter registration process had been conducted with no effective anti-fraud provisions.[125]

The 2004 Elections law stated that individuals who "command or have links to unofficial military forces or armed groups" were barred from standing for election.[126] However, the law did not specify how a determination of military status should be made. No court was established to take these decisions, seemingly in breach of Articles 33 and 27 of the Constitution. Instead, candidate qualification was delegated to UN and coalition forces, in the absence of a judiciary, which had still not been formed. The Electoral Complaints Commission (ECC) was formed by the UN to undertake this task.

Acknowledging that the growth of the militias was destabilising for the State, Karzai tried to assert some control, initially refusing to appoint Fahim as a running mate in the 2004 Presidential election, despite US insistence that he do so.[127] Instead he named both Vice President Khalili and Ahmad Zia Massoud, brother of the assassinated Panjshiri Tajik commander, though they both maintained extensive militia forces as well.[128] Other warlords who ran for election that year included Yunus Qanuni (a military ally of Mohammed Fahim),

[122] *Decree of the President of the Transitional Islamic State of Afghanistan on the Adoption of the Electoral Law* 2004, Article 14(1). This was amended in the 2005 Election Law which stated that voters should vote in the constituency listed on their registration card. Islamic Republic of Afghanistan Electoral Law 2005 Article 16(1)
[123] IFES. (2011) p.58. A/59/581-S/2004/925, Report of the Secretary-General, 26 November 2004, para 5.
[124] ICG. (2004). *Afghanistan: From Presidential to Parliamentary*… p.11. European Union Democracy and Election Support Mission. (2004), p.10.
[125] IFES. (2011) p.56.
[126] *Decree of the President of the Transitional Islamic State of Afghanistan on the Adoption of the Electoral Law* 2004, Article 16(3)(e) reiterated under Article 12.7 of the *Electoral Law* 2010
[127] A. Rashid (2004).
[128] ICG. (2004) *Afghanistan: From Presidential to Parliamentary*… pp.8, 14.

Haji Muhammad Mohaqiq (a member of the Hazara military caucus) and General Abdul Rashid Dostum. Khalili again became Vice President, while Qanuni, Mohaqiq and Dostum placed 2nd, 3rd, and 4th respectively in the election. All continued to maintain an independent military presence while participating in the election, and despite the legal prohibitions no attempt was made to disqualify any of them as candidates.

The Presidential election took place on 9 October 2004 without major incident and Karzai won convincingly with 55.4% of the vote.[129] However, in terms of the integrity of the process, the absence of a voter register and the blatant inclusion of warlords significantly compromised the election. It was further damaged by Karzai's use of State resources to promote his campaign. A report by the Afghan Independent Human Rights Commission found that Karzai received significantly higher media coverage than the other candidates and that he repeatedly announced government initiatives such as road building while campaigning, in clear breach of the electoral rules.[130] Consistently accompanied by his US bodyguards and US Ambassador Khalilzad, Karzai launched a series of US-funded initiatives until the very eve of the election.[131]

The 2005 Parliamentary elections saw 2,707 candidates compete for 249 seats. Candidate vetting based on militia links was conducted by the UN-backed body, the ECC and produced an initial list of 233 potentially excluded candidates, which included a number of warlords. This list was then sent to the Joint Secretariat of the Disarmament and Reintegration Commission (JSDRC) for verification.[132] The JSDRC was headed by Vice President Khalili, himself a militia commander. The Senior Legal Advisor for the ECC recounted how the Commission was approached by US and NATO military representatives and diplomatic figures, and asked not to exclude identified candidates who were active military members.[133] In addition, as the law was interpreted as addressing the present, those militia members who disarmed or made positive statements that they would disarm, were deemed eligible to stand.[134]

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[129] Ibid. A/59/581-S/2004/925 (2004*)* Report of the Secretary General *26 November*, para 7 -8.
[130] Afghanistan Independent Human Rights Commission, "UNAMA Joint Verification of Political Rights Third Report, 24 August", 30 September 2004. https://www.refworld.org/docid/47fdfad10.html
[131] ICG (2004) *Afghanistan: From Presidential to Parliamentary*…, p.8.
[132] Comprised of representatives from the International Security Assistance Force (ISAF)(NATO), the Combined Forces Command Afghanistan (CFC-A) (US forces), the Ministry of Defence, the Ministry of Interior, the Ministry of Security and the UN. ICG (2005) *Afghanistan Elections: Endgame or New Beginning?* Asia Report N° 101- 21 July, 17.
[133] Interview Sean Gralton former Senior Legal Advisor to the Electoral Complaints Commission 22 February 2013. Previously quoted in Stewart-Jolley (2013)
[134] Ibid.

On completion of the vetting process on 12 July 2005, only 17 of the original 233 were disqualified, and of those, only 11 mid-ranking members of armed groups were disqualified for breaches of the disarmament provisions.[135] It was noted by Sean Gralton, former Senior Legal Advisor to the ECC, that candidates who posed a threat to the emergent regime were assisted to engage with the process, while those with lesser military links were not.[136]

Following the 2005 election, a report by the Afghan Research and Evaluation Unit, an independent research institute, found that "among the 249 legislators [elected], there are 40 commanders still linked to militias, 24 who belong to criminal gangs, 17 drug traffickers, and 19 against whom there are serious war-crimes allegations.[137] An even more pessimistic assessment was given by the Deputy Head of the Afghan Independent Human Rights Commission, who stated that "more than 80 percent of winning candidates in the provinces and more than 60 percent in the capital Kabul have links to armed groups"[138] The International Crisis Group succinctly described the outcome of this approach: "Commanders raced to establish their own authority, creating a patchwork of predatory, competing fiefdoms. A culture of impunity was allowed to take root in the name of "stability", with abusers free to return to their old ways as long as they mouthed allegiance to the central government."[139] There was no consideration for democratic principles, most particularly the rule of law.

Fraud was rampant in the election and widely reported by candidate agents, observers and media groups, triggering a partial recount and the subsequent disqualification of 2.5% of polling stations nationwide.[140] The percentage, if accurate, indicates that fraud at this level would not have affected the overall integrity of the results, but the perception of a flawed process was widespread.[141]

In 2005 the Post-Election Strategy Group (PESG), a consultation body formed of UN elections team advisors and the Electoral Commission reviewed the electoral process and proposed to

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[135] Ibid.
[136] Ibid. ICG (2005) *Afghanistan: Elections and the Crisis of Governance*, p.18. P. Gossman (2009), p.20.
[137] A. Wilder (2005), p.14 quoting an unnamed International Official.
[138] Ibid.
[139] ICG (2006) *Countering…,* p.3
[140] EU Election Observation Mission Afghanistan 2005. (2005), p.32. Joint Electoral Management Body. (2005). *Final Report: National Assembly and Provincial Council Elections*, 18. Retrieved from http://www.iec.org.af/jemb.org/pdf/JEMBS MGT Final Report 2005-12-12.pdf
[141] S. S. Smith (2011), p.248. A. Wilder (2005), pp.35-36.

undertake a combined civil registry and voter registration exercise.[142] The proposal would not be implemented, and instead the voter register was simply updated by adding more people.[143] The reasons why this approach was taken were regrettably mundane. The 2004-5 elections were expensive, an estimated $300 million had been spent and donor fatigue had set in. Support, which was supposed to be provided to establish a permanent electoral administration, simply did not materialise.[144] In addition, the deteriorating security situation in the country that followed the election prevented the government from implementing the civil registration process.[145]

6.4.2. 2009-2010

The integrity of the next three elections, the 2009 Presidential election, the 2010 Parliamentary elections and 2014 Presidential elections, would be increasingly compromised, largely due to the innate flaws in the system adopted in 2004-5. These flaws were compounded by the absence of institutional development for the electoral administration bodies. In 2006 the elections administration was wound down as donor funds were redirected.[146] Experienced national staff were let go, and the work of the Commission was effectively suspended until the initiation of the new electoral cycle.[147] The electoral institutions would go through repeated cycles of creation, disbanding and re-creation for every subsequent election.[148]

The US policy of utilising warlords to conduct the War on Terror had counterproductively resulted in increased support for the Taliban, this trend coupled with the absence of an national security force saw an increase in instability and conflict.[149] A highly centralised system of governance evolved during this period, with areas of the country simply not accessible, for example by 2009, 16% of the country was without a police presence.[150] In the intervening years Institutional development did take place, 33 ministries and agencies had been formed and were distributed between warlords, creating factional spheres of influence, which one UN report

[142] Post-Election Strategy Group (PESG) (2005). Annex VIII
[143] A/63/751-S/2009/135 (2009) *Report of the Secretary General, 10 March*, para 10.
[144] OSCE. (2005), p.5. S. S. Smith (2011), p.251.
[145] S. Worden (2010), p.16.
[146] ICG (2009) *Afghanistan's Elections Challenges*, p.9.
[147] S. S. Smith (2011), pp.257-8.
[148] Ibid, pp.258, 263-7.
[149] UNDP (2009) *Assessment of Development Results, Evaluation of UNDP Contribution: Islamic Republic of Afghanistan*., p.12. http://web.undp.org/evaluation/evaluations/adr/afghanistan.shtml
[150] Ibid, pp.34, 64.

termed "fiefdoms".[151] A Human Rights Commission was established in 2002 and new Supreme Court in 2007, but these institutions had little to no reach outside of Kabul. [152] As the War on Terror ground on, 2008 was recorded as the most violent year since the occupation began, rendering over a third of the country partially or completely inaccessible. In March 2009 the UN reported that "…of the country's approximately 400 districts… 10 were considered completely beyond the Government's control and access to 165 remained difficult or problematic." [153] Illustrating the impact of these trends, between 2004 and 2007 poverty increased under the occupation, from 33% to 42%.[154] Violence would increase further still in 2009.[155]

In the 2009 Parliamentary election warlord participation was again a feature. This time, in line with previous US pressure, Karzai nominated former Vice President and Minister for Defence Mohammed Fahim as his first Vice President.[156] Western media announced 'dismay' at this nomination due to Fahim's links to the drugs trade.[157] In the run up to the election, of the 123 Presidential and Vice Presidential Candidates, 50 were subject to challenge based on their alleged military and criminal activity, though only three were eventually excluded: one for a criminal conviction, one for holding dual citizenship and one due to militia membership.[158]

The 2009 elections would be marked by allegations of widespread fraud. The controversy once again centred on the voter registration system and voter cards.[159] Polling took place on the 20 August and it became quickly apparent that there had been a significant level of fraud throughout the country with reports from around the country of blatant ballot-box stuffing, and

[151] Ibid, pp.16-17.
[152] Ibid, pp.17, 34.
[153] A/63/751-S/2009/135 (2009) *Report of the Secretary General 10 March*, paras 19 – 24. S. S. Smith (2011) p.256
[154] UNDP. (2009) *Assessment of Development Results, Evaluation of UNDP Contribution: Islamic Republic of Afghanistan*., p.20.
[155] A/63/892-S/2009/323 (2009) *Report of the Secretary General 23 June, para 18.*
[156] ICG (2009) *Afghanistan's Elections Challenges*, p.17.
[157] James Risen & Mark Landler "Accused of Drug Ties, Afghan Official Worries U.S." *The New York Times* 26 August 2009 https://www.nytimes.com/2009/08/27/world/asia/27kabul.html Tom Coghlan. "Dismay as Hamid Karzai Picks Mohammad Qasim Fahim as Running Mate." *The Times* [London]. 4 May 2009. https://www.thetimes.co.uk/article/dismay-as-hamid-karzai-picks-mohammad-qasim-fahim-as-running-mate-0pz08nlk62c
[158] ICG. (2009) *Afghanistan's Elections Challenges* p.19. IFES. (2009). *Afghanistan 2009 Presidential and Provincial Council Elections Kit*.
[159] ICG (2009) *Afghanistan: Elections and the Crisis of Governance* p.10.

voters using multiple voter cards to vote repeatedly.[160] Security was also a significant problem with over 300 polling centres unable to open.[161].

Karzai's southern constituency was particularly badly affected by fraud, with Election Commission staff, local commanders and members of the security forces all implicated.[162] A UN report which was leaked to the press, indicated that in the Pashtun dominated Southern Helmand province, 134,804 votes were counted, while the UN estimated that only 38,000 voted. In Paktika province 212,405 votes were counted while only 35,000 were registered to vote.[163] In truth the international community's understanding of the electoral process as it actually occurred on the ground was in itself largely conjecture. The actual population figures were unknown, security was so bad that oversight of polling centres was impossible in large parts of the country. UN maps showed the location of polling centres, but there was no way to verify that the election was actually conducted in these locations.[164] The only real capacity that the elections team had, was to identify fraud after the fact.

Boxes displaying characteristics identified as fraudulent under Electoral Commission rules were largely coming in from the south, Karzai's power base and the disqualifications were impacting his results.[165] Following an investigation the Election Commission ordered the disqualification of 447 polling stations reducing Karzai's lead from 54.6% to 49.6%, bringing his result below the 50% threshold and triggering a second round in the election.[166] The follow-up election, however, would not take place. Following a fatal attack on a UN guest house which housed members of the UN elections team, the second leading candidate Abdullah Abdullah, withdrew from the contest.[167] Karzai was subsequently declared the winner.[168]

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[160] Ibid., see also M. van Bijlert (2009).
[161] ICG (2009) *Afghanistan: Elections and the Crisis of Governance*, p.8. A/64/364-S/2009/475 (2009) *Report of the Secretary General 22 September*, para 17. Smith (2011), p.261.
[162] ICG (2009) *Afghanistan: Elections and the Crisis of Governance*, p.8.
[163] Colum Lynch and Joshua Partlow, "U.N. data show discrepancies in Afghan vote", *The Washington Post*, 7 October 2009. https://www.rferl.org/a/UN_Data_Show_Discrepancies_In_Afghan_Vote_Report/1845329.html
[164] M. van Bijlert (2009), p.4.
[165] M. van Bijlert (2009), p.2.
[166] Independent Election Commission (IEC) Press Release: On Announcement of Partial Results for Presidential Election (6 Sept. 2009) http://iec.org.af/pdf/pressrelease/partial_results06%2009%202009.pdf IEC Press Release: On Announcement of Presidential Election partial results (8 Sept. 2009) http://iec.org.af/pdf/pressrelease/partial_results08%2009%202009.pdf *"IEC - Presidential & Provincial Council Elections - Afghanistan 2009 Elections - Final certified results released October 21, 2009 2PM" https://web.archive.org/web/20091103222205/http://www.iec.org.af/results/leadingCandidate.html*
[167] UN Chief Condemns Kabul Killing *BBC* 28 October 2009 http://news.bbc.co.uk/1/hi/world/south_asia/8329543.stm Abdullah pulls out of Afghan vote *BBC* 1 November 2009 http://news.bbc.co.uk/1/hi/world/south_asia/8336388.stm
[168] IEC Press Release: On IEC (2 Nov. 2009)

The issue of candidates with links to illegally armed groups would return in 2010, when the next parliamentary electoral process took place. What little oversight there was in support of the stated aims of the law were abrogated when the Electoral Complaints Commission, which had been charged with candidate vetting in 2009, became a wing of the executive branch, with President Karzai having the sole power of appointment of the Commission.[169] The law was changed via a Presidential decree, and passed three days before Parliament resumed session.[170] Despite resistance by MPs, the law was retained and applied during the 2010 election cycle.[171] Candidate vetting was passed to "a separate commission comprised of representatives from the Ministries of Defence, and Interior, and the National Directorate of Security"[172]Again, the same patterns emerged, the Afghanistan Research and Evaluation Unit found that "the criteria for candidate vetting was vague, inconsistent and arbitrary, allowing some candidates with extensive criminal associations but disqualifying others without any."[173] Of 2,635 candidates in the preliminary list, 36 were excluded for membership of illegal military groups.[174] The vetting process did not remove Dostum, Rabbani, Mohaqiq or Qaunui, the most prominent warlords, or the 36 people who ran for election as relatives of warlords, 21 of whom won their seats.[175] Those who were challenged could claim employment by US funded private security contractors, thereby coming within the legally acceptable framework.[176]

Allegations of fraud again dogged the 2010 electoral process, facilitated by the lack of a voter register and the virtually unchecked distribution of voter cards. The Electoral Commission

decision http://iec.org.af/pdf/pressrelease/pressrIECDecision20091102.pdf

[169] Decree of Islamic Republic of Afghanistan on Ratification of Electoral Law No.43, 17 February (2010) & Electoral Law 2010 Article 61 ICG. (2009). *Afghanistan's Elections Challenges*, p.19. A/64/705–S/2010/127 (2010) *Report of the Secretary General 10 March* para 8.

[170] NDI (2010), pp.12-13.

[171] S/2010/318 (2010) *Report of the Secretary-General 16 June* para 26 & 27. J. Partlow, (2010) Afghan parliament's lower house rejects Karzai election proposals 1 April 2010. *The Washington Post*, pp. 2–3. Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033102778_pf.html NDI. (2010). *The 2010 Wolesi Jirga Elections in Afghanistan* p12. J. Boone, (2010). Hamid Karzai Takes Control of Afghanistan Election Watchdog 22 February. *The Guardian*. Retrieved from http://www.guardian.co.uk/world/2010/feb/22/karzai-afghanistan-electoral-complaints-commission. ICG. (2011) *Afghanistan's Elections Stalemate*, p.7

[172] Electoral Law No.43, 17 February 2010 & Electoral Law 2010 Article 12 NDI. (2010), p.31.

[173] P. Coburn & N. Larson (2011).

[174] S/2010/318 (2010) *Report of the Secretary-General 16 June, para 11* and A/64/911–S/2010/463 (2010) *Report of the Secretary General 14 September, para 8*

[175] K. Clarke (2010).

[176] Rep. John F. Tierney, & Subcommittee on National Security and Foreign Affairs House of Representatives. (2010). Warlord, Inc. Extortion and Corruption Along the US Supply Chain in Afghanistan. *Subcommittee on National Security and Foreign Affairs Committee on Oversight and Government Reform U.S. House of Representatives*, p.20

ordered an audit which ultimately resulted in the disqualification of 2,891 polling stations from a total of 17,744, or 16.29%. In terms of votes, 1,330,782 were disqualified from the final results.[177]

The results of the absence of a political party system in Afghanistan also came to the fore in the 2010 election. Analysed in a series of reports by the Afghanistan Research and Evaluation Unit, what emerged was a strong President and a deeply fragmented Parliament with a complete blurring of concepts of 'government' (those in power) and 'opposition' (whose who were not). Political parties such as they existed were formed around individuals and their promotion or support, splintering as leadership and allegiances changed.[178] Alliances, based on personal relations and force of character, were fluid so support bargaining became almost constant. With less an understanding of government in the form of a party than a person, the term 'pro-Karzai' was in many ways more accurate than 'pro-government' when describing political allegiances within Parliament.[179] While the SNTV voting system has been attributed as creating the fragmentation of Parliament, the reliance on the warlord system by the US both in relation to the War on Terror and as allies within the overall security apparatus, rewarded individuals, both militarily and politically. Combatant participation within politics is not problematic per say, if the national law did not make it illegal and if all factions were represented. This was not the case in Afghanistan where the open support by the US of warlord inclusion was against the national law. If liberal democracy is critically dependent on the rule of law as an operational imperative, it was publicly failing.[180] Increasingly democracy, such as it was experienced, was serving the interests of factional leaders to the exclusion of those areas and communities associated with the Taliban, eroding democratic concepts of equality and inclusion.[181] By focusing on elections as the expression of liberal democracy, the practice of actual governance could be ignored, the country was democratic.

6.4.3. 2014

The intervening period between 2010 and 2014 again saw minimal development of the electoral institutions. Between each election funding to the Electoral Commission was

[177] A/65/612– S/2010/630 (2010) *Report of the Secretary General 10 December* para 5-6.
[178] A. Larson (2010), p.14. A. Larson (2011). N. Coburn & A. Larson (2009b). N. Coburn & A. Larson (2011).
[179] Ibid.
[180] L. Hartz (1955), p.8-14. L. Whitehead (2002), p.117. G. J. Ikenberry (2009), p.72.
[181] K. Höglund, A. K. Jarstad, & M. S. (2009).

effectively cut-off, and the work of the Commission was suspended until the initiation of the new electoral cycle.[182] The electoral institutions would go through repeated cycles of creation, disbanding and re-creation for every subsequent election.[183] Each newly re-formed Electoral Commission effectively had to start again from scratch.[184]

Broader development within Afghanistan effectively stalled, poverty rates remained static at 42%.[185] Nationally policing remained inadequate with only 13,000 deployed while 30,000 were needed. Those that were present received minimal training and little oversight. A House of Commons Report found that "units were implicated…in killings, abductions illegal raids, and beatings."[186] A 2011 UN report found virtually no development within judicial or legislative systems, governance capacity or the capacity to gather tax revenues at the provincial and district levels.[187]

Having completed two terms, and in line with the provisions in the Constitution, President Karzai would not contest the 2014 election.[188] The election took place on the 5 of April, with the announcement of the results of the first round of the Presidential Election taking place on the 15 of May. Candidate Abdullah Abdullah received 45% of the vote while Ashraf Ghani received 31.6%. With no candidate receiving 50% of the vote in the first round, a second round was called for 14 June, outside of the Constitutionally mandated term of two weeks.[189] While neither candidate had been a combatant, Abdullah was a medical doctor, while Ghani was an economist with the World Bank, both fielded running mates who were warlords.[190] Abdullah

[182] UNDP (2014) *Assessment of Development Results, Evaluation of UNDP Contribution: Islamic Republic of Afghanistan*.p.81, http://web.undp.org/evaluation/evaluations/adr/afghanistan.shtml, S. S. Smith (2011), 257-8.
[183] S. S. Smith (2011), pp.258, 263-7.
[184] A/67/889– S/2013/350 (2013) *Report of the Secretary-General 13 June*, para 5. A/67/981*– S/2013/535* (2013) *Report of the Secretary-General 6 September*, para 8.
[185] UNDP (2014) *Assessment of Development Results, Evaluation of UNDP Contribution: Islamic Republic of Afghanistan*., p.17.
[186] House of Commons International Development Committee, 'Sixth Report - Afghanistan: Development progress and prospects after 2014', July 2012., pp.20-21.
[187] UNDP (2011) *Final Evaluation Report: Programme Evaluation of Afghanistan Sub National Governance Programme – I (ASGP I) 2006 to 2010.Programme Review of Afghanistan Sub National Governance Programme – II (ASGP II) 2010 to 2014*, pp.31-34.
[188] ICG (2014) *Afghanistan's Political Transition,* p.i.
[189] A/68/910– S/2014/420* (2014) *Report of the Secretary-General 18 June*, para 10. A/68/988– S/2014/656 (2014) *Report of the Secretary-General 9 September*, para 2. NDI (2014) p.67.
[190] ICG (2014) *Afghanistan's Political Transition,* p.i., 6. BBC *Profile Abdullah Abdullah* 1 Nov 2009 http://news.bbc.co.uk/1/hi/world/south_asia/1672882.stm

allied himself with Haji Mohammad Mohaqiq, while Ghani appointed General Dostum as his running mate.[191]

Allegations of fraud had been made in relation to the first round with some provinces reportedly running out of ballots and others returning results in areas where there was virtually no turnout.[192] Following investigation by the Electoral Commission, audits were conducted in 1,967 polling stations, but these events were largely overlooked as the participants focused on the second round of the process.[193] Following the conduct of the second round election on 14 June allegations of massive levels of fraud were repeatedly made by both candidates.[194] On 4 July the Electoral Commission ordered a complete audit (and an effective recount) of the entire ballot of 22,828 ballot boxes. It would begin on 17 July and complete on 5 September.[195]

In the meantime, under the auspices of Secretary of State Kerry, a series of meetings were held with the candidates which would reach a political settlement on 12 July "that the next president would form a "government of national unity". This new structure, established without reference to the Constitution established a new the position of government "Chief Executive Officer" a title to be used until the formation of the post of Executive Prime Minister.[196] The terms of the agreement and an outline of the roles has never been published, instead a joint communiqué was issued on 8 August.[197] The government of national unity would be "based on… agreed principles of merit and parity with the opposition".[198] This was a power sharing agreement which effectively set aside the electoral competition, hammered out between militia leaders.[199] It was also as an exclusively political expedient exercise, "reached with support from the international partners of our country".[200] The agreement announced before the completion of the audit and therefore before the results were established, was not in conformity with the Constitution and the Supreme Court was not consulted, nor was Parliament.[201] The position of Chief Executive Officer (CEO) was not envisaged under the Constitution and appeared to

[191] ICG (2014) *Afghanistan's Political Transition,* p.i.,
[192] ICG (2014) *Afghanistan's Political Transition*, p.11-12.
[193] Ibid, p.14. NDI (2014), p.57
[194] A/68/988– S/2014/656 (2014) *Report of the Secretary-General 9 September,* para 2.
[195] Ibid paras 7-9, 17.
[196] Ibid paras 7-9. Political Framework Agreed on July 12, 2014, para 3, available in M. van Bijlert (2014).
[197] M. van Bijlert (2014).
[198] A/68/988– S/2014/656 (2014) *Report of the Secretary-General 9 September* para 15.
[199] N. Coburn (2015).
[200] Political Framework Agreed on July 12, 2014 available in M. van Bijlert (2014), para 2.
[201] N. Coburn (2015), p.4., ICG (2014) *Afghanistan's Political Transition,* p.20.

breach it, as the terms of the agreement precluded the President from dismissing the CEO.[202] This did not prevent Secretary Kerry from issuing an op-ed in the Afghan national media calling for the acceptance of the agreement "whoever wins".[203] With the agreement however, the election and its outcome had effectively become moot, calling in to question the point of an election in the first place.[204]

The audit was completed on 5 September, and Ghani subsequently was declared to have won with 55.27% of the ballot, though the exact result was never actually released.[205] A formal agreement establishing the government of national unity was signed between the factions on 21 September and Abdullah Abdullah was appointed as Chief Executive Officer. The inauguration of Ashraf Ghani as President of Afghanistan took place on 29 September 2014.[206] His first act as President was to sign the Bilateral Security Agreement with the United States, on 30 September.[207] The Agreement allows for the retention of US troops in Afghanistan until 2024.[208] Troops have complete immunity from prosecution by Afghan authorities while in Afghanistan and the US, while it will support and cooperate with Afghan forces, retains full command control.[209]

The creation of the government of national unity brokered by the US, effectively side stepped the electoral competition and promotion of liberal democracy, if the framing of that construct is understood to require government, opposition, winners and losers based on electoral choice. The election provided voters with a choice of candidates and competition between them to a point, but the second round of voting in effect lost its significance before it was even conducted. Instead, as elite bargaining reached a settlement that abrogated through *fiat* the enfranchisement of the population. Fraud, and the continued and blatant participation of warlords and illegal combatants, hollowed out the integrity of the ideal of democracy. Fraud was largely attributed to the absence of a voter register, while the US policy of co-opting

[202] Political Framework Agreed on July 12, 2014 available in M. van Bijlert (2014)
[203] "Op-Ed From Secretary Kerry", Tolo News, 30 July 2014. https://www.tolonews.com/opinion/op-ed-secretary-kerry
[204] N. Coburn (2015).
[205] A/68/988– S/2014/656 (2014*) Report of the Secretary-General 9 September*, para 17. A/69/647– S/2014/876 (2014) *Report of the Secretary-General 9 December,* para 8. N. Coburn (2015), p.4.
[206] Ibid, paras 7-8.
[207] Ibid, para 11.
[208] *Security and Defense Cooperation Agreement between the Islamic Republic of Afghanistan and the United States of America. 30 September*. (2014), Article 26
[209] Ibid, Article 13, Articles 2 & 4.

warlords and irregular combatants empowered a group which were generally identified among the populace as both lacking legitimacy and requiring removal.[210] The emptiness of the elections process reflects the reality of the continued conflict in Afghanistan. As of January 2019, the Afghan government held actual control of only 53.8% of the State, with 12.3% held by the Taliban and 33.9% or 138 districts not held by either force.[211] Not only is Afghanistan not democratic, it is increasingly ceasing to exist.

[210] R. E. Neumann (2015), p.12.
[211] SIGAR (2019), p.69.

7. Iraq

While a number of motivations were presented to justify the invasion of Iraq, the transformation of Iraq from a totalitarian State to a liberal democracy permeated the enterprise. As discussed by Ikenberry, in the years following the end of the Cold War, the US actively promoted its specific form of liberal democracy as the means through which human rights could proliferate, the community of States could peacefully coexist, and trade could unify.[1] It was a liberal vision embedded in Kant and Wilson, and served the additional purpose of ensuring that American values and an American world vision was dominant.[2] In the context of Iraq, during the 1990's, democracy became the means through which both Iraq and the broader Middle East could be transformed.[3] This vision served to legitimise what would otherwise be illegal: invasion through a humanitarian and liberation narrative, as democracy served as both a defensible human right and as a route through which global peace is achieved.[4] The democracy brought to Iraq required the reconstruction of the State, otherwise known as regime change.

However, Mearsheimer contends that liberalism demands a hierarchical system to provide oversight and ensure adherence to liberal principles, or as he calls it a 'night watchman'. The emphasis of the rule of law within liberalism is a manifestation of this characteristic. This structure exists within domestic systems where liberalism is exercised through the rule of law and internal checks and balances. In its absence in the international arena, according to Mearsheimer, "liberalism devolves into realism" which governs expressions of power and imposition, regardless of the originating motivations.[5] Ikenberry addresses this paradox in his discussion of the Responsibility to Protect doctrine which, he argues, acts to render sovereignty contingent.[6] "This gradual erosion in norms of state sovereignty means that the international system has created a new "license" for powerful states to intervene in the domestic affairs of weak and troubled states,"[7] which sounds remarkably close to the Melian dialogue in Thucydides. In both the cases discussed here, the occupier experiences power and interest in a

[1] G. J. Ikenberry (2009), pp.79-80.
[2] Ibid. pp.72-74., Joyce (2016), p.474.
[3] Defense Planning Guidance 18 February 1992, 1 & 4, S. S. Smith (2011), Chapter 1.
[4] 2002 US National Security Strategy. Walt (2018), p.10. G. J. Ikenberry (2009), p.72. M. Doyle (1983a). The Independent International Commission on Kosovo (2000), p.186.
[5] J. Mearsheimer (2018), pp.120-5, 131,
[6] G. J. Ikenberry (2009), p.72.
[7] Ibid. p.79.

manner at odds with foundational liberal principles including the rule of law.[8] As a result, liberal principles are compromised or disregarded in the achievement of the overriding goals of the occupier, as realist objectives remain paramount. Viewed through the events in Iraq, attempting to make the State democratic does not remove the interests of the occupying State, nor does it result in an ethical liberal occupier. As observed by Walt, the role of occupier as an assertion of power and force, is subsequently dominated by decisions which contradict liberal principles.[9]

The events in Iraq raise core questions about the nature of democracy as to whether it is a governance system or a government appointment system? Descriptions of governance. Models which we now understand as democratic by Locke, Bentham, and Mill imply the former, but within Iraq the main focus of democratisation in line with the approach established by the UN was the creation of a constitution and the holding of elections. This pared down Schumpeterian view, implicitly discards the idea of democracy as an expression of the 'will of the people', instead exclusively functioning as a constitutive exercise.[10] In this case the focus was on the constitution drafting process and the elections as opposed to the creation of a governance system. While the capacity for norm breach throughout the course of the occupation undertaken by a liberal hegemon without oversight provides a very real context for Mearsheimer's observations. Repeatedly self-interest and an ideological vision which created the US as a liberator dominated US decision making, warping the political process and the aims of regime change in as much as they were articulated.

Following a brief outline of the historical background of Iraq between Gulf War I and Gulf War II, this study will examine three processes undertaken in the dismantling and re-formation of the State: de-Ba'athification, the Constitution formation process and the constitutive elections conducted in 2005. The chapter concludes with a review of the 2010 process where the patterns of norm breach or disregard, political expedience and realist patterns of interest advancement, are played out.

7.1. Background: 1991-2003.

[8] Ibid.
[9] S. Walt (2018).
[10] J. Schumpeter (1950), pp.250, 290-295.

In 1991 with the ending of the Cold War and the conduct and conclusion of Gulf War I the US took its place as the single global superpower. President George Herbert Bush captured the moment in the State of the Union Address of January 1992. Having "won the Cold War", America in its own understanding it was, "the strongest nation on earth". The US was presented as a uniquely moral and benign power, "the world trusts us with power, and the world is right. They trust us to be fair, and restrained. They trust us to be on the side of decency. They trust us to do what's right."[11]

In 1992, following the address, then Secretary of Defence Dick Cheney commissioned the Defence Planning Guidance (DPG). Written by Undersecretary of Defence Paul Wolfowitz and Deputy Undersecretary Zalmay Khalilzad, the DPG set out a strategy for the maintenance of power:[12] To prevent the emergence of a new rival to the now singular hegemonic status in which the US found itself, they proposed the creation of a "Democratic Zone of Peace" over which the US would have the controlling authority and the spread of democratic reforms worldwide as an expression of national interest.[13] It identified the "discrediting of Communism" and the defeat of Iraq as defining events in "US Global leadership."[14] National interest was expanded to include access to essential raw materials including "Persian Gulf oil."[15]

Following the defeat of Iraqi forces in Gulf War I, President George H Bush and subsequently, President William J. Clinton adopted a policy of sanctions and containment that stopped short of the removal of President Hussain, focusing instead on close monitoring by the UN and the

[11] Transcript of President George H. Bush's Address on the State of the Union, 29 January. (1992). In *New York Times*. https://doi.org/10.1097/ta.0000000000000988

[12] Gardner (2008), p.98. In 1992 the draft DPG was leaked to both the New York Times and the Washington Post.. The excised versions were not released until 2007 under freedom of information provisions, both these drafts and segments of the leaked files can be found at http://www.gwu.edu/~nsarchiv/nukevault/ebb245/index.htm. In 1993 Secretary of Defence Cheney released the official version: "The Defence Strategy for the 1990's" which can be found at http://work.colum.edu/~amiller/wolfowitz1992.htm Patrick E.Tyler "U.S. Strategy Plan Calls for Insuring No Rivals Develop: A One-Superpower World" *New York Times*. 8 March 1992 http://www.nytimes.com/1992/03/08/world/us-strategy-plan-calls-for-insuring-no-rivals-develop.html?pagewanted=all&src=pm

[13] Ibid. 1 & 2

[14] Defense Planning Guidance 18 February 1992, 1 & 4

[15] Ibid. pp.2, 22

strict application of no-fly zones. It was this policy which was expressed through the Oil for Food programme and the IAEA weapons inspector regime.[16]

With the end of the Bush Sr. presidency, the unilateral vision contained in the DPG was shelved. However, the American understanding of itself as victor, unipolar hegemon, and uniquely moral actor sparked an activist phase in liberal democratic promotion throughout Eastern Europe and the rest of the world.[17] During this decade, while human rights were delivered through various revolutions across the former Soviet bloc, the Middle East was characterised by oppression, totalitarian governments, and sclerotic monarchies.[18]

In this period Saddam Hussain adopted a policy of active brinkmanship, denying and obstructing UN weapons inspector access, signalled greater military capacity than he actually possessed.[19] It was an approach that was to convince the more hawkish US political communities that he was a credible threat and that military action had to be taken.[20] Identified by the DPG as a pivotal focal point of interest for the future, by the end of the '90s an increasingly strong argument was being made for the invasion and transformation of Iraq.[21] With the return of Dick Cheney to government in 2000, this time as Vice President, the DPG blueprint he had constructed with Wolfowitz, was revived. It would form the basis of the unilateralist 'Bush Agenda' permeating the 2002 National Security Strategy.[22] The promotion of democracy as a fundamental human right and system of peace became international policy.[23] In the words of Richard Perle former Assistant Secretary of Defence for Reagan then head of the Neoconservative think tank the Project for the New American Century: "The lesson of history is that democracies don't initiate wars of aggression, and if we want to live in a peaceful

[16] J. Chilcot (2016) *The Chilcot report: Report of the Iraq Enquiry: Executive Summary,* p.7 see also the *Joint Memorandum by the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of Defence*, 17 May 1999, 'Iraq Future Strategy' at http://webarchive.nationalarchives.gov.uk/20171124153729/http://www.iraqinquiry.org.uk/media/247558/1999-05-17-sofs-fco-and-sofs-defence-iraq-future-strategy.pdf

[17] S. Walt (2018), pp.11-12. C. Krauthammer (2005), pp.197-8., See also William J Clinton, *A National Security Strategy of Engagement and Enlargement* (Washington, DC: The White House, 1995), https://history.defense.gov/Portals/70/Documents/nss/nss1995.pdf?ver=2014-06-25-121226-437 pp.22-23.

[18] S. Walt (2018), pp.11-12.

[19] T. Ricks (2007), p12-20.

[20] R. N. Perle (2000), pp.108-9., see also *Open Letter from the Project for the New American Century (PNAC) to President Clinton dated 26 Jan 1998*, urging the abandonment of containment for the text of the letter see http://www.robmacdougall.org/4301/4301.25.USsince2001.pdf

[21] S. Halper & J. Clarke (2004) pp.146-9.

[22] *The National Security Strategy of the United States of America*, September (NSS0-2002): 6, available at http://www.whitehouse.gov/nsc/nss/pdf.

[23] K. von Hipple (2000), pp.94-5

world, then there's very little we can do to bring that about [that is] more effective than promoting a democracy."[24] President G. W. Bush in his second inaugural address referenced this stance, "…it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world… The concerted effort of free nations to promote democracy is a prelude to our enemies' defeat."[25]

The events of 9/11 were to recast US foreign policy onto a war footing, primarily in relation to the War on Terror, but also more broadly in terms of democracy promotion and its relationship to security.[26] Hostile State and non-State actors alike could no longer simply be contained, they had to illicit a military response with a virtually non-existent evidentiary threshold. Referred to as the 'Cheney doctrine', if an entity posed a threat which was assessed as a more than one percent likelihood of taking place, then the US should act against it.[27] As observed in the Chilcot Report, "The lesson of 11 September [for the US] was to ensure that "groups" were not allowed to develop a capability they might use."[28] This new tone was encapsulated in the 2002 Presidential State of the Union Address, later known as the Axis of Evil speech: "Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade… States like these… pose a grave and growing danger."[29] On 6 April 2002 President Bush declared that regime change was now US policy in relation to Iraq, with the UK providing full support to this stance.[30] President Bush would go on to emphasise the importance of Iraq as a direct threat to America and the transformative function of democracy:

> "The safety of the American people depends on ending this direct and growing threat. Acting against the danger will also contribute greatly to the long-term safety and stability of our world. The current Iraqi regime has shown the power of tyranny to

[24] PBS Think Tank with Ben Wattenberg interviewing Richard Perle *'The Making of a Neo-Conservative'* 14 Nov. 2002, http://www.pbs.org/thinktank/transcript1017.html.
[25] President Bush's Second Inaugural Address 20 January 2005, Retrieved from https://www.npr.org/templates/story/story.php?storyId=4460172.
[26] D. A. Lake (2010), p.23.
[27] G. Tenet (2007), p.264.
[28] J. Chilcot (2016) *The Chilcot report: Report of the Iraq Enquiry: Executive Summary,* p.13.
[29] The White House, 29 January 2002, *The President's State of the Union Address* *https://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html*
[30] J. Chilcot, *The Chilcot report : report of the Iraq inquiry : executive summary / report of a committee of Privy Counsellors.* Iraq Inquiry (Great Britain), Kingston upon Thames: Canterbury Press, 2016. P493

> spread discord and violence in the Middle East. A liberated Iraq can show the power of freedom to transform that vital region, by bringing hope and progress into the lives of millions. America's interests in security, and America's belief in liberty, both lead in the same direction: to a free and peaceful Iraq."[31]

The role of this transformation in Iraq was to provide a template for broader regional governmental reform in a manner that could be described as a domino effect.[32] Specifically addressing Iraq, Vice President Cheney said:

> "Regime change in Iraq would bring about a number of benefits to the region. When the gravest of threats are eliminated, the freedom-loving peoples of the region will have a chance to promote the values that can bring lasting peace. As for the reaction of the Arab "street," the Middle East expert Professor Fouad Ajami predicts that after liberation, the streets in Basra and Baghdad are "sure to erupt in joy in the same way the throngs in Kabul greeted the Americans." … Our goal would be an Iraq that has territorial integrity, a government that is democratic and pluralistic, a nation where the human rights of every ethnic and religious group are recognized and protected."[33]

The elimination of threats to human rights requires liberal democracy, therefore liberal democracy can justify regime change. According to Halper, a US historian, these assumptions about the role democracy would play in the Middle East, were a central pillar of neo-conservative thinking and they are absent discussions of power and self-interest.[34] Democracy was the political manifestation of freedom which would legitimise invasion and regime change.[35] Once freed, people would ensure their continued freedom through the adoption of democracy, which would in turn continue to deliver freedom. In effect, democracy was a default position.

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[31] The White House, 26 February 2003 *The President Discusses the Future of Iraq* *https://georgewbush-whitehouse.archives.gov/news/releases/2003/02/20030226-11.html*
[32] C. Tripp (2004), p.547.
[33] Vice President Cheney to the Veterans of Foreign Wars, Nashville Tennessee, 27 August 2002. (2002). *The Guardian*, 1–10. Retrieved from https://www.theguardian.com/world/2002/aug/27/usa.iraq
[34] S. Halper & J. Clarke (2004)., see also C. Tripp (2004). President Bush's Second Inaugural Address 20 January 2005, Retrieved from https://www.npr.org/templates/story/story.php?storyId=4460172. See also comments by Wolfowitz in Bowden (2005).
[35] A. Arato (2009), p.255.

7.2. A Liberal War: 2003

Gulf War II began on 20 March 2003. The war lasted just 2 months and on 1 May 2003, President Bush announced the end of hostilities and the initiation of reconstruction activities.[36] Prior to the invasion the US State Department Bureau of Near Eastern affairs undertook a study called the Future of Iraq which set out the difficulties which a future administration would face and key tasks which need to be undertaken in the initial phase of the occupation to stabilise the State and the subsequently re-build it.[37] However, the Bush administration's vision for both the invasion and the occupation was completely at odds with this approach. Obsessed with a light footprint and convinced that nation building was not to be part of the mission, these plans were shelved.[38] The delivery of freedom was a goal in itself which would simply right the society.[39] Under Rumsfeld's supervision the Department of Defence took complete control of the post-invasion administration process.[40] A mere eight weeks before the start of the conflict he established the Office of Reconstruction and Humanitarian Assistance (ORHA) under the leadership of Lt. General Jay Garner.[41]

Under-resourced and functioning with no post-invasion plans at all, Garner attempted to formulate one. He advocated working with existing Iraqi state institutions including the military, a proposal which did not support Defence Secretary Rumsfeld's agenda of radical transformation.[42] The ORHA was disbanded within weeks of the invasion when Garner was replaced by Paul Bremer on 9 May 2003.[43] Bremer was in effect, the governor of Iraq with the capacity to rule by decree, a position he would hold until 1 July 2004.[44] Under the direction of Sec. Defence Rumsfeld, with the agreement of Gen. Tommy Franks, Bremer formed the Coalition Provisional Authority (CPA) under his leadership and immediately implemented a policy of 'de-Ba'athification' of Iraq. Arriving in Baghdad on 12 May, de-Ba'athification was passed into law through CPA Order No. 1 on 16 May.[45]

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[36] Text of Bush Speech 1 May 2003 https://www.cbsnews.com/news/text-of-bush-speech-01-05-2003/
[37] J. Greenstock (2016), p.237
[38] G. Packer (2006), p.112-5., Greenstock (2016), p.237.
[39] G. Packer (2006), p.148
[40] J. Greenstock (2016), p.237
[41] G. Packer (2006), pp.120-2
[42] Ibid. 136
[43] G. Packer (2006), p132-3 CFLCC-OHRA APO AE-09304 CPA Legal Instrument 22 May 2003. P. Bremer, A. J. F. Dobbins, D. Gompert (2008), p.39.
[44] CFLCC-OHRA APO AE-09304 CPA Legal Instrument 22 May 2003. P. Bremer, A. J. F. Dobbins, D. Gompert (2008), p.39.
[45] G. Packer (2006), p.145. CPA/ORD/16 May 2003/01.

7.2.1. De-Ba'athification

Conceived prior to the invasion, de-Ba'athification was strongly encouraged by Iraqi exiles who saw it as an opportunity to clear the political landscape.[46] For the US it was seen as essential to the freeing of the population, and harking back to 1945, couched the invasion in a very clear liberation narrative.[47] The de-Ba'athification message was simple: this evil apparatus held an innocent population in thrall, and in order to cure the body through democracy, the complete extraction of the party should take place.[48] In this narrative, de-Ba'athification was a structural rather than a political act, of and for the common good. It was also the first illegal act for the furtherance of regime change, disbanding national institutions and military all in contravention of international law. Garner knew the restrictions and had sought to protect the State apparatus. However, the US administration under Bremer had no such restraint.

CPA Order No. 1. declared that all Ba'ath party members of senior rank (top 4 grades) "should be removed from their positions and banned from future employment in the public sector".[49] The Order also provided that the top three layers of management in all public institutions, including schools and hospitals should be investigated, if found to be Ba'athists they should be dismissed.[50] The policy was drafted outside of Iraq with no reference to the actual dynamic within Iraqi society or to the role of the Ba'ath party – and was therefore a highly illiberal policy.[51] The Order was followed by Order no. 2 which dissolved the State security apparatus in its entirety including the military, the Ministry of Defence and the National Security Bureau.[52]

The introduction of de-Ba'athification had less to do with Iraqi society in 2003, and more to do with the interests of diaspora figures with whom the US were allied prior to the invasion, upon which much of US planning had become reliant.[53] Their interests were diverse including

[46] G. Packer (2006), p.108.
[47] J. Greenstock (2016), pp.243-4
[48] C. Tripp (2004), p.546.
[49] CPA/ORD/16 May 2003/01., para 2.
[50] Ibid, para 3.
[51] Frontline Interview with Lt. Gen. Jay Garner *The Lost Year in Iraq* 11 August 2006 https://www.pbs.org/wgbh/pages/frontline/yeariniraq/interviews/garner.html confirmed by Under Secretary of Defense for Policy Douglas Feith, in D. Feith (2009), pp.427-30., see also M. Sissons, & A. Al-Saiedi (2013), p.35. A. J. F. Dobbins, S. Jones, B. Runkle, & S. Mohandas (2009), p.113.
[52] CPA/ORD/23 May 2003/02, Annex.
[53] C. Tripp (2004), p.548.

Shia political-theocratic agendas, Kurdish nationalism, those simply pursuing regime change, they were not necessarily either liberal or democratic in leaning.[54] To achieve this would "involve minimising the role of former members of the old regime, and also identifying and marginalising other political forces that might destabilise a pro-US agenda."[55] The effect of de-Ba'athification was to cast all Sunni's as Ba'athist, hostile to the US project and therefore illegitimate. This suited the group of Iraqi political figures which the occupation would empower, because it removed a potential opposition. Predominantly consisting of exiles and exiled political parties, they included: the Iraqi National Accord founded in the UK by Ayad Allawi and the Iraqi National Congress formed in the US by Ahmed Chalabi, which represented the 'western' diaspora.[56] The Dawa party and the Islamic Supreme Council of Iraq both of which were based in Iran and Syria during the Ba'ath period represented Shia interests, while the KDP and PUK Kurdish parties represented the breakaway region. They brought with them a specifically sectarian understanding of Iraq, which did not reflect the make-up of the society within Iraq, but was more reflective of their narrow interests and experiences in exile.[57] None of these groups had been based in Iraq and under the influence of the State, nor did they represent local political interests or factions, giving credence to claims by academics including Toby Dodge and Charles Tripp that the US was neither aware of the complexity of the forces at play, nor interested in vesting political power in local political actors.[58] At the forefront of this broad disparate group was Ahmed Chalabi, recipient of CIA funds and convicted embezzler, who had vigorously agitated for the removal of Saddam Hussain in US political circles since the mid '90s.[59] The main aim of this group would not be to address the gross human rights violations of the Saddam years; a judicial or truth and reconciliation process would have provided this but was never really pursued.[60] The main aim was the promotion and protection of their own political interests.[61]

On 25 May 2003, Bremer formed the Iraqi de-Ba'athification Council, the first administrative entity to be created under his authority. It was to be headed by Ahmed Chalabi, himself a Shia,

[54] T. Dodge (2005a), pp.25-31.
[55] Ibid, p.25. See also A. J. F. Dobbins, S. Jones et al (2009), p.112.
[56] G. Packer (2006), pp.66-99.
[57] T. Dodge (2005a), p.31.
[58] Ibid, pp.42-3., C. Tripp (2004), p.548.
[59] G. Packer (2006), pp.30, 66-99., T. Dodge (2005a), p.29., Leigh (2003). New bank scandal evidence against family of leader in waiting. *The Guardian.* 17 April. https://www.theguardian.com/world/2003/apr/17/iraq.davidleigh
[60] E. , M. Sissons, P. Pham, et al (2008). M. Sissons (2008).
[61] M. Sissons & A. Al-Saiedi (2013). J. Greenstock (2016), p.298.

and exclusively staffed with people selected by Bremer.[62] The CPA Order assumed that Party membership was synonymous with culpability and collective guilt. De-Ba'athification itself broke the international law prohibitions on transformative occupation, which forbid an occupying power from changing the system of government within the occupied State or its institutions, nor did it adhere to liberal rule of law principles.[63] People were penalised not based on their deeds, but purely on the basis of Ba'ath party membership and rank.[64] There was no presumption of innocence and at this point, no provision for appeal or mention of fair or due process.[65]

Chalabi quickly moved to have de-Ba'athification integrated into the Iraqi governance system as an 'enduring framework' and included in the Constitution.[66] Ba'ath Party membership became grounds for exclusion from the political process for those who had been members within the previous 10 years.[67] In effect this allowed key political figures who had been Ba'ath party members, but were then exiled for longer than the 10 year moratorium, such as Ayad Allawi to stand, but eliminated those who had remained in the State. In the subsequent elections, Chalabi overtly politicised the implementation of the de-Ba'athification process, granting exemptions to Shia politicians, while pursuing Sunni figures.[68] In each of the subsequent electoral processes de-Ba'athification would be used to target those identified as political adversaries to Chalabi and his expatriate group. In the December 2005 election 170 candidates were disqualified based on alleged Ba'ath membership. As the political parties replaced the candidates that had been disqualified with new ones, these new nominations were subject to de-Ba'athification, leading to a rolling cycle of disqualifications, which continued virtually until election day. [69] The total number of actual disqualifications was reduced to 40,

[62] CPA/ORD/25 May 2003/05, B. Isakhan (2015).
[63] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 29 July 1899. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Section III Article 43 (1899 & 1907). Articles 53, 54 & 64 of the 1949 Geneva Convention
[64] M. Sissons (2008).
[65] CPA/ORD/25 May 2003/05 Section 3 & 4, para 2 (d)., M. Sissons & A. Al-Saiedi (2013), p.11. CPA/MEM/3 June 2003/01. Higher National De-Ba'athification Commission Procedures for De-Ba'athification of the Public Sector and the State 10 January 2004, 17 Section 4(b)(1) & (2), (c), in S. Talmon (2018) Part 2, p.1244.
[66] M. Sissons & A. Al-Saiedi (2013), pp.12 & 14., E. Stover, H. Megally & H. Mufti (2005), p.847. Constitution of Iraq 2005, Article 7, Article 135.
[67] Law of Administration for the State of Iraq for the Transitional Period 8 March 2004 (Candidates for the national Assembly) Article. 31(B)(2), (3) & (4). (Presidential Candidates) Article 36 (B)(3). (Recognition of the HNDC under law) Article 49.
[68] E. Sky (2015), p.58.
[69] ICG (2006) *The Next Iraqi War*… p.10., M. Sissons & A. Al-Saiedi (2013), p.15-16.

with de-Ba'athification overwhelmingly affecting secular and Sunni parties.[70] De-Ba'athification continued to play a divisive role in the 2010 elections, at which time 511 candidates, including the Minister for Defence and other sitting Parliamentarians were challenged and an attempt was made to ban 15 political parties, the majority of which were Sunni in basis.[71] The decision directly benefited then Prime Minister Maliki's Dawa Shia faction.[72]

De-Ba'athification had scant consideration of conditions on the ground. While the populace did want to see very senior and criminal actors punished, the broad understanding within the population was that rank and file party members should be left alone.[73] The portrayal of Iraq as riven by sectarian tensions which would be 'cured' by de-Ba'athification was an understanding held by exiles who "argued that Iraq was irrevocably divided between sectarian and religious groupings, mobilised by deep communal antipathy."[74] This view was not only inaccurate, but had huge implications. In 2003 as is the case today, the State was the single biggest employer with approximately 1 million civilian employees, of which it is estimated that 150,000 were party members. De-Ba'athification affected the entire administration: for example, the education sector was particularly severely impacted as the CPA rescinded the national curriculum and dismissed 12,000 teachers, stalling the national education system.[75] This was minor in comparison to the devastation of the security apparatus, where it was estimated that over 750,000 were employed, all whom were summarily dismissed.[76] Already weakened through a decade of sanctions, the de-Ba'athification project now under factional control, decimated the public sector, effectively triggering State collapse.[77]

7.2.2. Governance and Constitution

It is not an overstatement to claim that the government formation process undertaken by Bremer and overseen by the US administration did not adhere to any democratic principles.

[70] Ibid.
[71] S/2010/76 (2010) *Report of the Secretary-General pursuant to paragraph 6 of resolution 1883 (2009)* 8 Feb, Sky (2015), p.315., M. Sissons & A. Al-Saiedi (2013), p.20
[72] Ibid.
[73] NDI (2003), pp.8 & 29., E. Stover, M. Sissons, P. Pham, et al (2008), p.21. Alkadiri & Toensing (2003).
[74] T. Dodge (2005 b), p.712.
[75] World Bank Group (2017), p.64., M. Sissons & A. Al-Saiedi (2013), p.6. E. Stover, M. Sissons, P. Pham, et al (2008), p.20
[76] T. Dodge (2005a), p.16.
[77] T. Dodge (2012), p.54., T. Dodge (2005a). T. Dodge (2005b), p.710.

The process was marked by cronyism, as Bremer now effectively ruling Iraq, surrounded himself with pro-US Iraqi exiles. Setting aside concepts such as the rule of law and the sacrosanct nature of the 'will of people' resulted in a government formation process focused largely on the protection of their interests. In short, the US directly conformed to Mearsheimer's hypothesis. This can be most clearly seen in the Constitution drafting process. A Constitution establishes the governance system within the State, sets out the administrative organs and establishes the checks and balances within the State. Constitutions, particularly within the US understanding are inviolate and are a foundational act in the formation of the State; a Constitution creates the State. It is because of this that Constitution drafting requires extensive consultation and input across all communities within the State.[78] In this instance the opposite took place. The US, keen to end the occupation as quickly as possible, facilitated a drafting process absent public consultation and inclusion. The project as a whole can be characterised as a form of 'false normativity', the production of a Constitution taking primacy over its contents and its implementation, and being completed in a matter of a few months. This approach extended to the government formation process as a whole, where basic democratic rights such as representation were contested, leading to the bizarre dynamic where the leading Shia cleric, Ayatollah al Sistani, issued a fatwa to ensure that elected, not appointed representatives, would draft the Constitution.

On 13 July 2003, Bremer formed the Interim Governing Council (IGC), through the allocation of posts based on sectarian identifications.[79] The Council served as an advisory body to the CPA, giving the impression of an Iraqi role in governance prior to the transfer of sovereignty to the Iraqi Interim Government in June 2004. In reality the formation of the IGC was largely symbolic, with Bremer having no intention of handing power to it.[80] The membership of the Council was directly selected by Bremer drawn from the newly returned groups.[81] As observed by Dodge, sectarian understandings of Iraq "clearly influenced the way the first governing council was formed, but it bore little resemblance to the real state of Iraqi society in 2003-04."[82] Repeated polls conducted throughout 2003-2005 showed an absence of sectarian considerations among the voting public where national unity was the majority preference.[83]

[78] A. Arato (2009), p.61-4.
[79] ICG. (2003) *Governing Iraq,* p.ii.
[80] D. Feith (2009), p.447.
[81] T. Dodge (2005a), pp.31-33. ICG. (2003). *Governing Iraq*, p.12.
[82] T. Dodge (2005 b), p.712.
[83] E. Herring & G. Rangwala, pp.148-150 quoting Galup, IRI and IIACSS polls.

However, with the CPA contained in the Green Zone with limited access to the Iraqi population and no actual consultation process being undertaken, it is easy to see how these understandings took hold.

Discussed by Dodge, the exclusivity of the political appointment process and the subsequent de-Ba'athification enterprise process led to the characterisation of Sunni national political actors as suspect. It became legitimate to exclude them from what had become an exclusive elite bargaining process as opposed to anything resembling a democracy. At this point governance could not even claim to be representative.[84] The IGC had five 'Sunni' members but only two were members of national political groups and neither was able to claim or deliver engagement with the 'Sunni community'.[85] Combined with the effects of de-Ba'athification, the Sunni population was effectively placed outside of the political and civil system.

In place of liberal democracy, the conduct of the CPA and the democratisation process was more akin to 'electoral authoritarianism' or 'coercive democratization' as identified by Whitehead.[86] Referring back to the UN literature promoting liberal democracy, at a minimum freedom of association and representation should have underpinned the 'democratic' systems which the State was being destroyed to create.[87] The government formation process as it was conducted through the CPA illustrates this point, and was initially marked by what did not happen, most notably the absence of national or public consultation or participation.

Shortly after its establishment, the IGC as an appointed body, was charged with the drafting of a new Constitution which would form the basis for government creation scheduled to take place in 2004.[88] The US was not keen to open the process to the electorate and did not want to embrace 'one man one vote' on the basis that such an electoral system would result in a Shia majority government, which was thought might be pro-Iranian.[89] In an attempt to diminish Shia influence, Bremer proposed to institute a system of caucuses in each governorate, with membership appointed by the US, who in turn would choose delegates, who would choose the government.[90] The national Shia political community, led by Grand Ayatollah al Sistani,

[84] T. Dodge (2012), p.40-43.
[85] Ibid.
[86] L. Whitehead (2009), pp.221, 228, 235.
[87] Commission on Human Rights, RES. 2002/46 (23 April 2002) para 1.
[88] J. Greenstock (2016), p.331.
[89] P. Galbraith (2006), p.174.
[90] Ibid, p.137.

grasped that this would effectively remove the ability to choose their government from the population. Al-Sistani's fatwa, calling for direct elections, and a directly elected body to write the new Constitution - an approach previously not considered by the US which favoured an appointed panel,[91] forced Bremer to back down.[92] The IGC instead adopted "The November 15 Agreement" which established another convoluted system of transition, though one involving direct elections.[93] Firstly, it would draft and adopt a Transitional Administration Law (TAL); second, a caucus would appoint a Transitional National Assembly. Sovereignty would be passed to this body on 30 June 2005. Thirdly a national election would be conducted to elect a Constitutional Convention. This body would then draft the permanent Constitution. Following the adoption of the Constitution a second national election would take place to elect the new Iraqi government, thereby ending the transitional phase.[94]

The TAL was in effect an interim constitution. Jeremey Greenstock then UK Ambassador to Iraq describes a protracted and difficult drafting process, conducted entirely behind closed doors in the Green Zone, open only to appointed political figures and occupation officials.[95] The exception was Sistani who was the only 'internal' figure to play a significant role in the process.[96] He was also pivotal in essentially ensuring that the TAL would be of relevance for as little time as possible, maintaining constant pressure on the need for national elections.[97] Within the group of factions which influenced the process, the Kurds were well represented through established political parties and actors, as were both the expatriate and, via Sistani, national Shia voices. Wholly absent were national Sunni figures, having neither established national representation, nor expatriate representation with broad national appeal.[98] The importance of the TAL centred on one issue, federalism. Both Kurdish and Shia factions wanted the new Iraq to function as a federal state with significant powers devolved to the regions. In relation to the Kurds this would protect their de facto independence. This re-imaging

[91] T. Ricks (2007), p.254., Amy Waldman, "Cleric Wants Iraqis to Write Constitution", The New York Times, 1 July 2003 https://www.nytimes.com/2003/07/01/world/after-the-war-democracy-cleric-wants-iraqis-to-write-constitution.html
[92] Ibid. see also P. Cockburn (2008), p.175. Edward Wong "US Tries to give moderates an edge in Iraqi elections" *New York Times* 18 January 2004 http://sitemason.vanderbilt.edu/files/f/fQw30k/U.S%20ON%20ELECTIONS.pdf
[93] Coalition Provisional Authority *Law of Administration for the State of Iraq for the Transitional Period, 8 March* (2004)
[94] November 15 Agreement (2004) https://govinfo.library.unt.edu/cpa-iraq/government/AgreementNov15.pdf
[95] J. Greenstock (2016), pp.361-85. A. Arato (2009), p.87. Galbraith (2006), p.139.
[96] For a discussion on the internal/external dynamic (internal meaning national, external meaning exile) see ICG (2003) *Iraq's Constitutional Challenge*, p.8.
[97] ICG (2004) *Iraq's Transition…* p.25-7. T. Dodge (2005 b), p.716.
[98] A. Arato (2009), p.155-170.

of the State was bitterly opposed by Sunni groups who were predominantly nationalist and saw their own interests threated by an emboldened Kurdistan and a Shia South.[99] With no effective Sunni voices, the TAL established Iraq as a federal State.[100] The TAL was signed on 8 March 2004; the first national election would take place in January 2005.

Following the January 2005 election, the Transitional Authority formed the Constitution Drafting Committee. A Constitution for Iraq fulfilled a number of totemic roles both for the occupier and for political factions in Iraq. For the US, the creation of a Constitution was a foundational step in the establishment of a liberal democracy and was a demonstratable step in the nation-building process.[101] For national political actors, particularly the Kurds, the Constitution was seen as a structural peace-treaty which would establish factional goals such as defining the boundaries between the national and local governments and the distribution of resources.[102] What was absent was the understanding that the Constitution would form a governance system for the Iraqi population and should have been an opportunity to re-establish the State in line with their needs of and for the State.

The process should have provided an entry point for the integration of a wide variety of national actors, but this did not happen. Of the 55 members only two were Sunni Arab, reflecting their diminished numbers in the Transitional Assembly. Attempts to nominate Sunni candidates from the existing parties were received with distain in local media, fairly reflecting the sense that such appointments were merely acts of tokenism.[103] Subsequently, at the behest of Sectary of State Condoleezza Rice fifteen local Sunni political figures were appointed, a move resisted by the Kurds who accused the membership of Ba'athist links.[104] In reality, the composition of the Committee became moot as it was side-lined by Kurdish and Shia leaders who undertook negotiations informally and bilaterally, without Sunni input.[105] Styling themselves as the 'Leadership Committee', meetings took place on an ad hoc basis in residences and private

[99] Ibid, p.180.
[100] Article 4.
[101] J. Morrow (2005), p.5.
[102] P. Galbraith (2006), p.193.
[103] ICG (2005) *Iraq: Don't Rush the Constitution*, p.2.
[104] Ibid, p.3., see also P. Galbraith (2006), pp.193-4, Jawad (2013), p.10. "Shiites Offer to Give Sunnis Larger Role on Broader Panel Writing a Constitution", The New York Times, 26 May 2005. https://www.nytimes.com/2005/05/26/world/middleeast/shiites-offer-to-give-sunnis-larger-role-on-broader-panel.html
[105] J. Morrow (2005) p.9. S. N. Jawad (2013) p.10

compounds and while Sunni delegates requested attendance, they were rarely invited.[106] Some of these meetings were attended by US Ambassador Khalilzad and took place at the US embassy, where its agenda on issues such as the management of petrochemical resources were both expressed and agreed to.[107]

Despite a requirement in the TAL for public consultation on the draft constitution this too did not take place.[108] In part this was due to the extremely restricted drafting time-line of 3 months which the US was vigorously enforcing, to consolidate the formation of the State which they envisaged.[109] It was also due to the overall culture within the polity that members were only answerable to their factional interests and not to the Iraqi population as a whole – a culture that the US had expressly claimed to change through the promotion of a liberal democratisation process. The Committee had an outreach department which distributed questionnaires and received over 150,000 submissions. These were compiled but were not distributed to drafters until mid-August by which time the draft Constitution had been agreed.[110] The final draft was completed in August 2005 and was presented to the population via a referendum on 18 October. The draft was accepted by the broader electorate, but not by Sunni voters, 96% of which were in Anbar province, and rejected it.[111]

During this period of occupation, a national insurgency overtook the country. The insurgency was a direct reaction to the "attempt by those empowered by regime change to impose a political settlement on the country."[112] The assumptions which drove the invasion had been found to be absolutely groundless, both in relation to WMDs, and the 'liberation' which the occupation was to deliver. Instead the occupation had delivered State collapse.[113] The disbanding of the security forces provided the manpower for the subsequent war, and the alienation of Sunni and national Shia figures provided the ideological basis for conflict.[114] The identification of the insurgency as largely being either Sunni or irregular and irrational Shia in

[106] Ibid.
[107] J. Morrow 14-15.
[108] S. N. Jawad (2013), p.11., J. Morrow (2005), p.8.
[109] ICG (2005) *Iraq: Don't Rush the Constitution*, p.9.
[110] J. Morrow 19.
[111] J. Morrow (2005), p.3.
[112] T. Dodge (2012), p.53.
[113] T. Ricks (2007), p.149.
[114] A. A. Allawi (2007), p.144

the form of the Saddirists, placed them in direct military conflict with occupation forces, rather than incorporating them as participants in the democratisation of the State.[115]

7.2.3. Elections: 2005

As the main and final act of State formation, the elections in January and then December 2005 were described as the key that would make Iraq a democracy. In fact, beyond the conduct of the elections little to no institutional development was taking place, with the political community assembled by the US instead sequestered in the Green Zone.[116] For the US however, success was the creation of a democracy and democracy, demonstrably, was an election.

The first national election held in January 2005 was well conducted and largely incident free.[117] The United Iraqi Alliance (UIA), a Shia coalition, headed by Ibrahim al-Jafaari came first in the polls winning 140 of 275 seats.[118] Kurdish parties took 75 seats while Sunni candidates won only 17 seats.[119]

The second general election would then take place in December to elect the government.[120] Severely marginalised through the de-Ba'athification process and the dominance of Shia expatriates and Kurds in the political arena, the Sunni boycotted the elections.[121] Despite the boycott the December election was technically sound and largely passed off without incident.[122] The UIA again won the largest number of seats and Ibrahim Jafaari moved to form the government as Prime Minister.[123] The US however, believed him to be too closely allied with Iran.[124] Going against its own democratic rules, in which elected leaders serve out the term of office, or voluntarily resign resulting in a new election, President Bush forced Jafaari

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[115] ICG (2006) *In their own words reading the Iraqi insurgency.*
[116] T. Dodge (2005a), p.17. R. Chandrasekaran (2006)
[117] ICG (2005) *Iraq: Don't Rush the Constitution*, p.2.
[118] Ibid.
[119] Ibid. S/2005/373 (2005) *Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004)* 7 June.
[120] BBC. (2005). Q & A: Iraqi election 13 February 2005. *BBC News World Edition*. http://news.bbc.co.uk/1/hi/world/middle_east/3971635.stm & BBC Guide to Iraq's election 13 December 2005. *BBC News World Edition.* http://news.bbc.co.uk/1/hi/world/middle_east/4522060.stm
[121] J. Greenstock (2016), p.404.
[122] S/2006/137 (2006) *Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004)* 7 March.
[123] Ibid., E. Herring & G. Rangwala (2006), pp.45-6
[124] P. Galbraith (2006), p.142.

to step down, without legal or constitutional justification. Bush was quoted as saying that he "doesn't want, doesn't support, doesn't accept Ibrahim Jaafari as prime minister" dealing a death blow to the credibility of democratic processes and principles as practiced by the US in Iraq, as well as the credibility and legal force of the Constitution that had just been adopted.[125]

Ali Khedery, then a serving US diplomat in Baghdad described the process which he participated in: "Washington decided that change at the top was essential. After the December 2005 parliamentary elections, U.S. Embassy officials combed the Iraqi elite for a leader who could crush the Iranian-backed Shiite militias, battle al-Qaeda, and unite Iraqis under the banner of nationalism and inclusive government."[126] The man they picked was a relatively unknown politician called Nouri al Maliki, it has been said largely because to his political weakness.[127] The replacement of Jafaari with Maliki was purely on the basis of US interests, undertaken without the consideration of any legal protocols. It would set the stage for Maliki in turn to effectively emulate the same brand of impunity in 2010, further discrediting the Constitution and the rule of law.

While the 2005 elections may have been technically sound,[128] they made a mockery of the democratic principles which the occupiers claimed to represent. A Prime Minister was removed by *fiat* by a Head of State of another country, that act alone completely negating any credibility or 'rightness' which democracy was supposed to deliver. All too easily, the US was complicit in politically expedient, if not authoritarian action.

7.2.4. Elections: 2010

The 2010 elections capture all of the aspects of power, expedience and realism which this thesis seeks to highlight. In the conduct of this democratic exercise, the Constitution was disregarded, as was the outcome of a popular vote. It captures the absence of law at a granular level,

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[125] "US Envoy 'Calls for New Iraqi PM'" *BBC* 28 March 2006 http://news.bbc.co.uk/1/hi/world/middle_east/4855210.stm

[126] Ali Khedery, 'Why We Stuck with Maliki — and Lost Iraq 3 July 2014', *The Washington Post*, 2014, pp. 1–24 <http://www.washingtonpost.com/opinions/why-we-stuck-with-maliki--and-lost-iraq/2014/07/03/0dd6a8a4-f7ec-11e3-a606-946fd632f9f1_story.html>.

[127] A. Khedery ibid. D. Serwer & S. Parker (2009), p.3.

[128] International Mission for Iraqi Elections (IMIE). *Final Report 15 December 2005 Elections* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=2ahUKEwiBzZvkpOvfAhUMaFAKHV4-AA8QFjAIegQIABAC&url=https%3A%2F%2Fpolsci.umass.edu%2Ffile%2F906%2Fdownload%3Ftoken%3DRkhDE2y4&usg=AOvVaw009lHcRyWe5AF68tjWcIVT ICG (2005) *Iraq: Don't Rush the Constitution*

normative considerations simply did not apply. The 2010 elections lay bare the shallowness of the concept of democracy within the occupation, and the realist conduct of the US in the pursuit of its interests. There is little to no adherence to liberal principle or democratic ones, nor did they have to, having stepped outside of the normative framework there was no incentive to adhere to them and nor any discernible cost in their breach.

Still headed by Ahmed Chalabi, the de-Ba'athification Commission again threatened to bring the process to a halt with sectarian mass candidate exclusions. Although significant international diplomatic pressure was brought to bear to halt de-Ba'athification, including interventions by then Vice President Biden, it served only to somewhat soften its effects, not to stop it.[129] There are a number of reasons why this was the case. The US had created the system, had vigorously backed it and now were in the almost impossible situation of condemning their creation. Further, the US focus at this time was the extension of the Status of Forces Agreement (SOFA) which would expire in 2011; for this they needed the support of the Prime Minister, and Maliki was a known entity believed to be able to deliver a new framework agreement favourable to US interests. He was also viewed as being able to guarantee a sufficiently stable Iraq so that the main withdrawal could take place. Under the circumstances, the international community had little leverage over the political dynamic.[130]

The election took place on 7 March, with the preliminary announcement of results on 26 March 2010.[131] The Al-Iraqia party led by Ayad Allawi won 91 seats, two more than the State of Law Coalition led by incumbent Prime Minister Nouri al Maliki, which polled 89 seats.[132] Allawi effectively won the election, but did not have the required number of seats to create a government.[133] In line with the Constitution, Allawi should have been invited by the new President to form the next government. Should he fail to form a coalition with the required number of seats, the President would call on the next winning list.[134] This did not happen.

[129] ICG. (2010). *Iraq's Uncertain Future…,* p.31.
[130] E. Sky (2015), p.267. A. Khedery (2014).
[131] S/2010/240 (2010) *Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004) 14 May*.
[132] Williams & Nordland "Allawi Victory in Iraq sets up Period of Uncertainty" *New York Times* 26 March 2010 http://www.nytimes.com/2010/03/27/world/middleeast/27iraq.html?_r=1&pagewanted=all
[133] With 325 seats, 163 are required for a majority. Fact Sheet: 2010 Iraq Parliamentary Elections Legal Framework and Operational Planning Facts www.uniraq.org/documents/ElectoralMaterial/280110/UNAMI_EAO_Fact%20Sheet_2010%20CoR%20Elections_20100128_EN.pdf
[134] Article 76, Constitution of Iraq see also S/2010/240 *Report of the Secretary-General pursuant to paragraph 30 of resolution 1546 (2004) 14 May 2010*

Instead the Shia bloc with US support sought to retain Maliki as Prime Minister. There is little first-hand reportage or analysis of this time. Two of the few people present, who went on to write about the negotiations, are Emma Sky and Ali Khedery. Former aide to General Ray Odierno, Sky was present at key meetings and can describe both the actions and the apparent thought processes of political and diplomatic actors. Her observations are telling and provide a coherent narrative as to the role of the international community, specifically the US, in the retention of Maliki as Prime Minister. Khedery was a US career diplomat and at the time was special assistant to US Ambassador Jeffery.[135]

The Constitutional provisions surrounding the elections were clear. The new Council of Representatives was to be elected 45 days prior to the conclusion of the electoral term of the previous Council, to allow for an appropriate handover period (Article 56). During this time, the previous government would continue until the date that ratified results were announced. Thereafter, the new Council had to meet within 15 days and a new government formed (Article 54). The election took place on 7 March, the ratification of results took place on 2 June, 87 days after the election. When the Council of Representatives sat on 14 June, the first task was to elect a Speaker, which they did, (Article 55), but the second was to elect a new President (Article 61), which failed to occur. The President was supposed to invite the leader of the largest winning bloc to form the government, as per the provisions in Article 76 of the Constitution. This also did not happen. As ordered by Maliki, and subject to significant political pressure, Chief Justice, Medhat al-Mahmoud, decided that the definition of the largest bloc could be either the bloc that won the highest number of seats in the election, or the largest coalition bloc formed in Parliament.[136] The door remained open for Maliki's retention.[137]

The Constitution was silent as to what should happen if any of the established dates were to overrun, or actions failed to happen. An Extraordinary session of Parliament could be called, but only for 30 days (Article 58). There were no provision for a caretaker government, and so the government formation process which subsequently took place, did so outside of the Constitution and the law. Maliki refused to step down from power, insisting that he and he alone would form the government. Forced outside of the legally structured system for government formation, Al-Iraqia was not able to form the required coalition to definitively

[135] E. Sky (2015), p.250. A. Khedery (2014).
[136] A. Khedery (2014). C.P. Trumbull & J. B. Martin (2011).
[137] E. Sky (2015), p.315.

remove Maliki.[138] If the success of the occupation was measured by the production of a Constitution, it clearly did not matter what it actually constituted. In the meantime, the de-Ba'athification Committee continued to attempt to remove candidates, eventually stopping because of international pressure.[139] Biden was charged with ensuring a smooth government formation process which would in turn, create a solid footing on which the US could successfully complete withdrawal of its forces by the end of 2011. Adding to the overall corruption of the democratic process, Biden is identified as the person who led the policy to retain Maliki.[140] The presented logic was two-fold. Firstly, Biden felt that Maliki could deliver a government in time for the US mid-term elections and had proved himself to be a strong enough leader to enable the US drawdown. As such, he was a preferable candidate over Allawi, who it was felt was not able to give the same assurances. The reality of who was elected was decidedly secondary to US interests.

Secondly, Biden's understanding of Iraq was through the prism of Anglo-Irish relations. Biden is quoted as commenting that his Irish grandfather had hated the British and that this was an animus which assisted in his understanding of the Sunni-Shia dynamic. In this view, the Shia majority would not accept a Sunni-led government, so Ayad Allawi would be incapable of forming a government, despite his electoral win. With these beliefs in place, both Sky and Khedrey claim that Biden actively promoted the retention of Maliki, and in effect the setting aside of the election results, in favour of a predictable government able to cater to US requirements of the moment, despite being contrary to the law.[141] The origins of this stance undoubtedly can be found in sectarian representations of Iraqi society in de-Ba'athification narratives.

Allawi had won the election but had lost the right to form a government. In March 2011, after nearly a year of negotiations, Allawi announced that he would no longer seek a position and withdrew from government.[142] Writing about the early years of the occupation, Herring and Rangwala note the inherent contradiction in the US project of bringing democracy to Iraq and with it 'freedom' and independence, into a State over which they wanted pre-eminence. This

[138] S/2010/406 (2010) *Report of the Secretary-General pursuant to paragraph 6 of resolution 1883 (2009) 29 July*
[139] Jim Loney "Biden Visits Iraq amid Election Row" *Reuters* 23 January 2010 http://www.reuters.com/article/2010/01/23/us-iraq-usa-biden-idUSTRE60M0LV20100123
[140] E. Sky (2015)
[141] Ibid, 335-8., A. Khedery (2014).
[142] S/2011/213 (2011) *Second report of the Secretary-General pursuant to paragraph 6 of resolution 1936 (2010) 31 March*

led to the "hollowing out of the national political process" in order to prevent the emergence of entities which could challenge US rule and to ensure outcomes in a given instance that the US desired.[143]

The invasion un-made the State of Iraq and the occupation proved ineffective in remaking it in the subsequent years. Following the outbreak of the insurgency in 2003 whereby an active war was being fought between the occupation and the population, national institutions were not built in any meaningful manner. The Bertelsmann Stiftung's Transformation Index, a German governance measurement system partnered with the World Bank found that in 2018 Iraq was still experiencing the negative effects of de-Ba'athification and the CPA's emphasis on a sectarian understanding of Iraq.[144] The index finds that Iraq has a basic administration capacity of 3 out of 10, and an affective capacity to govern of 4 out of 10. The democracy which was instituted therefore entirely conformed to the Schumpeterian emphasis on elections as a singular demonstrable practice of democracy. Further, without a 'night watchman' to temper realist drivers, this formula proved unable to deliver democracy as either a liberal enterprise or one suited to governance.

[143] E. Herring & G. Rangwala (2006), pp.2 & 124
[144] BTI 2018 Iraq Country Report at https://www.bti-project.org/en/reports/country-reports/detail/itc/IRQ/

8. Conclusion

The invasions and subsequent occupations of Afghanistan and Iraq raised fundamental questions about law, democracy, power and 'morality'. The liberal narrative placed democracy as the means through which human rights would be protected, freeing populations from illiberal regimes. Regime change, illegal under international law but justified by this narrative raised the question can 'democracy by force' be reconciled in international law and international relations? In addressing this question this thesis has examined what democracy is, what democracy is supposed to provide and in what form has it been exported? Further, it has considered where democratisation is situated in international law, and is there legal 'space' for its imposition? And finally, it asks, was democracy delivered in Afghanistan and Iraq? Within this framework, the thesis reaches two separate sets of conclusions, which will be discussed in more detail below.

The first set of conclusions relate to democracy in the context of war and occupation as a discussion of paradox: can democracy, an ideology rooted in the rule of law, be imposed through an act of force, and thus illegally? Can liberal democracy be established while conducting a war? The concepts are intertwined. The rule of law is the principle on which democratic function depends, while war creates the context in which the principle is compromised. Finding that democracy, cannot be imposed by force, while in the midst of war, this thesis identifies conflicting demands on the invader/occupier which affect both the legality of the exercise as a whole and the legitimacy of the process. Due to the nature of the claims made for liberal democracy - a system embedded in the protection and maintenance of the rule of law - it simply cannot credibly function when the rule of law is set aside. This finding recasts the debate around the Kosovo Report which suggested that legitimacy can emerge, despite illegality, when exercised to avert significant humanitarian crises, as discussed in Chapter 4.

The processes of democracy creation engage political actors and the population in a political settlement. Undertaking these activities in the wake of invasion and during the conduct of war, introduces a third component, the separate national interests of the occupier, which can be exercised and imposed with no external control or 'night watchman', as Mearsheimer described it.[1] Further, as the occupier is engaged in hostilities against a group within the State, that group

[1] J. Mearsheimer (2018) p.122.

(or groups) are excluded from the process, inverting Whitehead's democratic model of conflict resolution through inclusion.[2] These findings lead to the conclusion that building democracy on liberal principles is unable to take adequate root where sovereignty is viewed as limited or qualified, as the basic principles of the rule of law, and the liberal principles referring to the 'will of the people' can only pertain within a democracy on an inclusive, rather than partial basis. The underlying expectation of legitimacy within liberal democracy is that democracy must be delivered to all the people – not just some. By redefining democracy as an expression of human rights freedoms, it raised the bar on its definition, and that definition has to be practiced in order to make its imposition legitimate.

The second set of conclusions addresses understandings of democracy; is it a governance system or a government appointment system? Linked to this question is how power functions in democracy and how it is presented to States where it is exported by force of arms. Democracy in its exported form is described as a governance system but in implementation conforms exclusively to a government appointment system: it becomes simply an election. This follows Schumpeter's theory of the factual operation of democracy, that the power of the electorate is limited to voting, and where an election is not an expression of the 'will of the people', it simply confers power.[3] This results in an expedient, streamlined mechanism to establish what is called a democracy, demonstration through a vote, but without the liberal institutions and principles which would provide the ground for democratic governance. The styling of democracy as an electoral competition also impacts the ability to see democracy structurally, as a series of power holding institutions, which work together as a whole. Aside from the Judiciary, whose function is understood, and judiciaries, though often not sufficiently independent, are often formed in these cases, in totality these institutions, including parliamentary committees, parties, lobby groups and an independent or even functioning media, which have evolved as a feature of liberal Western democracy and are critical to sustaining its liberal practices, are not described or developed within exported or imposed democracies. Without them, liberal democracy simply cannot be realised.

[2] L. Whitehead (2009a) pp.216-219., see also UNSSC (2011) *The role of elections in peace processes. When and how they advance stability or exacerbate conflicts*. Turin.
[3] J. Schumpeter (1950) p.250.

8.1. Democracy Creation in the Context of War

Whitehead describes the liberal order as based on "trust and reciprocity, together with the rule of law", as central to our understanding of both liberal democracy and liberal internationalism.[4] In his view, this combination of rules, and trust in the adherence to those rules, were what allowed the international community to consider qualified or limited sovereignty through the Responsibility to Protect doctrine.[5] The international human rights architecture is legally defined, guaranteed and defended through the liberal construct of rule of law.[6] Liberal democracy also requires the rule of law as an intrinsic element of its composition and operation.[7]

The nature of the invasions and occupations of Iraq and Afghanistan therefore profoundly confronted the international liberal order, as both were mired in illegality. Liberal States, of course, at times will break or disregard the law, as seen in the *Nicaragua case*, one of several examples.[8] However, the scale of the breaches to international legal norms in Afghanistan and Iraq was unprecedented, and included: circumventing the Security Council as a foundational liberal institution, openly waging war in contravention of the UN Charter, refusing to consider the prohibitions on transformative occupation, justifying torture, and setting aside International Humanitarian Law (the laws of war) as they relate to combatant status.[9] Despite this litany, there were indications that illegality did not automatically affect legitimacy. The Kosovo Report found that military action by NATO was illegal due to the absence of Security Council approval, but as it was undertaken to avert an extreme humanitarian crisis, was deemed legitimate.[10] On the basis of this logic the motivations for invasion and the outcome of the occupation could legitimise the action.

However, the US invasions of Iraq and Afghanistan revealed the flaw in this analysis, as in both cases, it was an act of power for national interest, and within the occupation, realist considerations, particularly around issues of security, informed the entire process, leading

[4] L. Whitehead (2009a), p.224.
[5] Ibid.
[6] M. Koskenniemi (2005), p.5.
[7] G. A. O'Donnell (2004).
[8] I.C.J. Rep. 1989 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*
[9] M. Weller (2011), p.138., J. Yoo (2003)., *USDOJ - Office of the Assistant Attorney General- Memo from John Yoo to Alberto Gonzales Counsel to the President. Re: Standards for Interrogation under 18 U.S.C. 2340-2340A.* (2002).
[10] The Independent International Commission on Kosovo. (2000), pp.4, 198.

Washington to abrogate liberal democratic principles as it attempted to institute democracy. Democracy and war are antithetical and are understood to be so across the literature, having been addressed by both legal and international relations scholars, including Issacharoff, Centreno and Kryder .[11] The exercise of democracy requires the expansion of rights and privileges to everyone, such that debate and contrasting visions for society and personal freedoms become paramount.[12] War is understood as a state of exception or emergency, during which time rights are restricted and State institutions adopt unilateral authority.[13] The ICCPR envisions this taking place and identifies which rights can be restricted, such as freedom of information, and which rights cannot, such as the right to life.[14] Both the US and UK governments sought to limit the applicability of international human rights instruments in Iraq. The US claimed the ICCPR was not in force or applicable within the State and the UK claimed that the European Convention on Human Rights did not govern the actions of their soldiers.[15] The US also sought to limit freedoms of assembly during its governance in Iraq.[16] As articulated by Whitehead: "the problem [was] that if the occupiers really stood back and allowed the free expression of Iraqi political opinions the results could be contrary to their security needs."[17] As the rule of law was set aside in the act of invasion and the declared intention by US leaders to undertake regime change, it would continue to be set aside within the occupation and the democracy-building phases. A coherent explanation for this can be found in Mearsheimer's theory that liberalism requires a 'night watchman' a hierarchical restraint of an overriding authority, such as a binding court, and in its absence the occupying State will revert to fulfilling its own interests through the practice of realism.[18] If, as claimed by Dahl, democracy is dependent on equal and effective participation by the population who have control of the political agenda, then democracy under the control of an occupation would always be critically compromised.[19]

[11] S. (2009), p.195. M. A. Centeno (2010), pp.254-6. D. Kryder (2010).
[12] W. Merkle (2008).
[13] S. P. Sheeran (2013).
[14] Article 4 see also Office of the High Commissioner for Human Rights (2001) CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* *Adopted at the Seventy-second Session of the Human Rights Committee, on 31 August 2001 CCPR/C/21/Rev.1/Add.11, General Comment No. 29. (General Comments)*
[15] E. Benvenisti (2012), p.254.
[16] Ibid, p.260. Penal Code, Order No. 19 of July 9, 2003
[17] L. Whitehead (2009), p.220.
[18] J. Mearsheimer (2018), p.122.
[19] R. Dahl (1998a), pp.37-38., see also J. Dunn (1999).

The process of State dismemberment and re-formation in both the occupations considered here followed a broadly similar pattern, with the identification of national groups supportive of US interests who were then promoted into political power. In Afghanistan this group was selected from the Northern Alliance and a handful of warlords, in Iraq it was comprised of exiled political activists. It was from these groups that a leader, Ahmed Chalabi in Iraq and Hamid Karzai in Afghanistan, was selected before the democratisation process formally began. Neither of the governments which were subsequently formed, exercised any control or authority over US forces within the State, and those forces enjoyed absolute immunity during their deployment.[20] Not only did this impact the governments' legitimacy, but in effect, as long as US forces were in situ and answerable only to Washington, the new governments' sovereignty was limited. In the electoral competitions which followed, the US maintained a clear interest and acted on that interest in the effective selection of key political figures. Whitehead's characterisation of the US as exercising 'coercive democratization' identifies an absence of the rule of law adherence across the democratisation process, and certainly that has been borne out in this study.[21]

In both case studies within this thesis the sponsorship of political allies within both governments, was mirrored by the exclusion of communities identified as hostile to US interests, from the political and democratic processes. In Afghanistan this was the 'Taliban' which broadly translated into southern Pashtun communities, and in Iraq, the Sunni insurgency identified with the broader Sunni community in Iraq. They were subsequently the focus of military action, and in the case of the Taliban in Afghanistan continue to be. The majority of literature addressing democratisation and war, discusses the transition to democracy at the close of hostilities.[22] Theorists discussing the nexus between democracy and war either envisage democracy resulting from revolutionary movements sweeping aside oppressive regimes, the basis of Tilly's thesis, or as Linz discusses, at the conclusion of a civil conflict.[23] In these instances democracy is part of the political solution.[24] Even Whitehead, one of the few academics to observe that the absolute control of military occupation is at odds with

[20] CPA Order No.17 Status of the Coalition Provisional Authority, MNF- Iraq, Certain Missions and Personnel in Iraq,
[21] L. Whitehead (2009a), p.228.
[22] E. Mansfield & J. Snyder (2010)., Merkel (2008).
[23] C. Tilly (1992), Chapter 4., J. J. Linz (1997).
[24] UNSSC (2011) *The role of elections in peace processes…* See also B. Boutros-Gali (1996).

democratisation, still does not address the conduct of a war within a State, while making it a democracy.[25]

A somewhat odd feature of much of the literature relating to Afghanistan and Iraq is either an absence of acknowledgement by the US commentators and western scholars that active conflict was taking place in either country during the democratisation process, or more starkly, the claim that each country could at the time be described as post-conflict.[26] In an anthology on Nation Building edited by Fukuyama in 2006, of six contributors not one discussed democratisation in the context of active conflict.[27] In an article by former US Ambassador to both Afghanistan and Iraq respectively, Zamay Khailizad, published in 2010 he repeatedly discusses democratisation in Afghanistan and Iraq as taking place in post-conflict environments.[28] There is a clear gap in the literature related to democracy within war, particularly as it relates to an external occupier, as opposed to a civil war, and to the representations of democratisation within these conflicts. It is clear this area requires further research, but in preliminary form this thesis concludes that the exclusion of a sector of the population from the political process, and the continued conduct of war, is not compatible with the creation of a liberal democracy.

The case studies demonstrate the conflicting demands of democracy creation versus the demands of war and conclude that the demands of war will always take priority, leading to the setting aside of rule of law principles at the time of democracy creation. Further, and significantly, the conduct of war meant the exclusion from the democratic process of the communities identified as opposing US/coalition military interests – or indeed, of consultation with the populace in general, on security grounds. This study finds that liberal democracy cannot flourish in an environment where human rights are abrogated or un-equally practiced to ensure immunity for some but not all within the State. Further, that the illegal imposition of democracy becomes 'coercive democracy', as sovereignty, a crucial element for democracy, becomes a tool of the occupier, and cannot be claimed unreservedly by the populace and leaders of the State undergoing regime change.

[25] L. Whitehead (2009), pp.220, 228, see also B. Klass (2016), pp.73-5.
[26] D. A. Lake (2013). P. Marton & N. Hynek (2013) see also R. O. Hatch (2005).
[27] F. Fukuyama (2006)
[28] Z. Khailizad (2010).

8.2. Redefining the Meaning, and Practice, of Democracy

The second set of conclusions addresses a fundamental lack of clarity within our understanding of democracy as a governance system versus a government appointment system. This thesis concludes that democracy as it is implemented under current UN rules, and under the occupations examined here, is as a government appointment system. In this limited form, the range of power-holding institutions of which liberal democracy as a governance system is structured, does not develop. A corollary to this absence, is that the reception mechanism is flawed, in that the national political community to which democracy is being delivered does not see how power actually functions within a democratic system, viewing power in democracy as strictly within the election system.

A governance system would imply that the creation of a constitution and the conduct of an election was simply the start of the democratisation process. Early thinkers including Locke and Bentham wrote extensively about rights and privileges situated in judicial, administrative and political systems which would contribute and are fundamental for their delivery.[29] They understood elections to function as a method through which leaders can be both selected and deselected, with officials sitting within an administrative system, ensuring the implementation of agreed policies and the distribution of public goods.[30] Law was the system through which all actions would be regulated within the State and between States.[31] This was the creation of governance within a society, aspirational certainly, as most of the ideas put forward would not be implemented in either Locke's or Bentham's lifetime. But they created and gird our understanding of what democracy, as we have come to call it, would be composed of and the principles behind its operation. As these ideas were implemented in the 20th century, what democracy actually entailed, was more closely examined. Schumpeter developed a new concept of democracy in terms of how it functioned. Repudiating the notion that the 'will of the people' was something which was quantifiable or knowable in any real manner, Schumpeter re-defined democracy as being a system of government appointment, manifest in an election.[32] The role of the population was to regularly elect leadership.[33] Concepts of consultation, and the will of the people in the formation of democratic institutions faded in the

[29] J. Locke (2013), pp.119-120, Schoflied (2006), pp.149-53.
[30] M. James (1981), p.55.
[31] C. B. (1971), pp.26-7.
[32] J. Schumpeter (1950), pp.250, 269, 290-295.
[33] Ibid, p.250.

face of the efficiency and immediacy of electing representatives on an occasional basis. Indeed, once elected, politicians were not bound to enact the 'will of the people', as he concluded that popular control ended at the point when a vote was cast.[34] Democracy was an election, and this approach was adopted in the democratisation processes promoted by the United States within the framework of UN support.

An election is an easily quantifiable exercise, an exception in an otherwise morally ambiguous terrain: democracy is a 'moral' good, but when the method of its delivery is through norm breach the moral aspect is confused. The paradox is most easily resolved by the creation of a rights-laden constitution and the conduct of an election as quickly as possible, an attempt at re-establishing sovereignty and hence morality, which now can be called 'legitimacy'.[35] Accepting the argument that liberalism and its motivations revert to realism when undertaken by a hegemon acting without normative constraints, confirms Morgenthau's thesis of realism and morality.[36] The Schumpeterian electoral solution to offset this conundrum, in that it offers a streamlined mechanism to establish what is called a democracy, though without liberal principles, and lacking in the structures to sustain governance. Indeed, as the needs of the occupier in the cases under review was in part to control and contain systems which could compromise its interests in the context of war, the creation of strong institutions was not an objective.[37]

The second part of these conclusions addresses the structural formation of democracy. What democratic governance system requires in order to function has largely not been the focus of democratisation analysis in the past 25 years. Critical analysis has discussed the societal, cultural and historical landscape within a State to explain why democratisation falters.[38] What appears to be absent is analysis of power within democracy, how it functions, transfers, balances, the maintenance and containment of that power, and the role of administrative and political systems of which democracy is comprised in the exercise.. In other words, there is a gap in the literature on the structure of how democracy as a power holding system, works.

[34] Ibid, p.272.
[35] A. M. Slaughter, O'Connell, Falk, T. Franck, & J. R. Crawford, (2004), p.269.
[36] H. Morgenthau (1948a), p.12.
[37] M. A. Centeno (2010), pp.254, 270.
[38] P. Collier (2009). P. Collier & D. Rohner (2008). B. Geddes (1999). J. J. Linz & A. Stepan (1996). T. J. Farer (1993). E. Mansfield & J. Snyder (1994). E. Mansfield & J. Snyder (1995). E. Mansfield & J. Snyder (2002a). E. Mansfield & J. Snyder (2002b). J. D. Fearon & D. D. Laitin (2004). Kedourie (1992). Salame (1995). S. Huntington (1993). J. J. Linz (1997).

In the Schumpeterian definition of democracy, power transfers through a vote and only those elected into government hold power.[39] The current articulation of democracy, in its exported form is as follows: An electoral competition will result in the election of a representative body comprised of an opposition and a government which will hold power for a defined period of time. Thereafter, another electoral competition will take place, where those power holders may or may not retain their position.[40] Power holding is both immediate and singular, elected representation in government.

This is not how power actually functions within evolved 'western' democracies. The civil service, the judiciary, parliamentary committees, think tanks, lobby groups, and the media are all power holding institutions. The effect of these institutions is two-fold: they form the checks and balances within democracy which insure its liberal performance. They also create an entire system and range of functions through which power is held. As such, a power holder can start a career as an elected representative in government, can then enter opposition, can leave the representative forum and join a lobby group or a media outlet, all of which are power holding positions, and possibly then return to government as an elected official. This understanding of the structure of liberal democracy and how power is distributed within it, is significantly more inclusive than the spare Schumpeterian representation. These evolved systems are also extremely stable, despite frequent electoral competition, the establishment, for example, of 'safe seats' through the drawing of electoral boundaries and voting systems creates significant levels of stability in incumbency.[41]

The evolution of democracy as a power-holding structure is as critical to its sustainability as the liberal principles upon which democracy must be constructed. The rapid democratisation processes which States have largely experienced since 1990, suffers from an absence of evolutionary progression. Generally, the broader infrastructure has not developed which would enable effective institutional retention of power by power holders, or place limits on the power they wield.[42] Faced with this alien, seemingly volatile system, participants in imposed democracy adjust the mechanism to stay in control; Fareed Zakaria's thesis of 'illiberal

[39] J. Schumpeter (1950), pp.269-273.
[40] UNSSC (2011) *The role of elections in peace processes*…. See also K. Haack (2011), pp.16-7
[41] https://www.electoralcalculus.co.uk/homepage.html
[42] See the democratic governance indices at www.freedomhouse.org

democracy' describes exactly this process.[43] He notes that liberal democracy within the US functions within a broad range of democratic institutions which exist to constrain power and do not develop within these illiberal polities.[44] He rightly argues that "it is easy to impose elections on a country, it is more difficult to push constitutional liberalism on a society. The process of liberalization and democratization is gradual and long-term, in which an election is only one step."[45] However he sees illiberalism in "non-Western countries… because political elites like the prospect of empowering the state, since that means empowering themselves."[46] While this may or may not be the case as it relates to the personal motivations of a given politician, the Schumpeterian expression of democracy ensures that power competition focuses entirely on an election and that power resides within government office only. What Zakaria does not discuss is the impact of this understanding, where the risk of losing an election becomes an all-or-nothing gambit, in turn promoting practices of political and economic corruption in order to disenfranchise opposing power centres. In this model power in democracy is not seen in the context of a network of interlaced institutional structures, but as isolated, individually mandated nodes of power existing only in government office. It is this form which was exported in the democratization processes in Afghanistan and Iraq.

Further, because those elected to government, as outlined above, did not have sovereign authority while elections took place, the political considerations of the occupation drove government formation, in many instances disregarding laws, constitutional provisions, and electoral outcomes. The assumptions of what democracy would bring to the table, such as freedoms, peace, human rights, and the rule of law as realised through elections, did not materialise. It could even be argued that the democratisation processes in Afghanistan and Iraq laid bare the emptiness of these assumptions. Ultimately, within a system where the expression of the 'will of the people' is foundational, but not the focus of the electoral exercise, it becomes irrelevant, and the system fails.

The idea that military interventions can be styled as a humanitarian act and not be tainted by realist power considerations, is absolutely contingent on adherence international rules in order to support the premise. [47] It collapses when implemented through norm breach, as it was in

[43] F. Zakaria (1997), pp.38-39.
[44] Ibid.
[45] Ibid, p.39.
[46] Ibid, p.39.
[47] L. Whitehead (2009a), p.224.

these cases. A final conclusion therefore is that liberalism, which has been a potent force within the international community for the last 70 years, was firmly based on realist understandings of power. This was somewhat forgotten in the euphoria at the end of the Cold War and the ensuing liberal triumphalism and unipolar moment. Afghanistan and Iraq have demonstrated to the international community the limits of that delusion – and that ultimately, liberal democracy itself is grounded in realist practice and national interest.

In sum, this thesis, which I set out to undertake to answer significant questions that arose during my service as a UN official in Afghanistan and Iraq, has addressed whether 'democracy by force' can be reconciled in international law and international relations by looking at the evolution of democracy and liberal principles within those disciplines.

The conclusions point to three findings. First, liberal democracy cannot be realised in the absence of the rule of law. This absence is manifest in the invasions and the transformative occupations of Iraq and Afghanistan which were not legalised through the attempted liberal reframing of sovereignty. The absence of the rule of law adherence permeates into the conduct of the occupation, where realist considerations of power set aside liberal structures and principles when expedient to do so, even in the conduct of liberal democratisation processes.

Secondly the formation of liberal democracy is incompatible with the conduct of war. Again relating to the absence of rule of law, realist requirements of the occupier will compromise the political formation process, based on its own national interests, limiting and curtailing the sovereignty of the State undergoing democratisation. The conduct of war also involves the identification and exclusion of communities within the State, who subsequently operate outside of the State governance and political system. As democracy is critically reliant on inclusion, the conduct of war within a State and the simultaneous attempt to create a sovereign liberal democracy have been shown to be incompatible.

Thirdly the form of democracy which is exported and imposed through these exercises was a government appointment system: an election. Absent an understanding of the broader power structures and government institutions in which evolved liberal democracies sit, these new government systems became unstable revolving election processes. Liberal democracy requires the evolution of these broader institutions to exist. The requirements of imposition

were the expedient implementation of ‘democratic’ processes such as a constitution or the conduct of an election. In this form, liberal democracy does not come into being.

Cumulatively, accepting the role of realism within force and the nature of liberal democracy, this thesis concludes that ‘democratisation by force’ cannot be reconciled either within international law or international relations.

9. Bibliography

The Bibliography is organised in Sections:

1. Books and Articles: Alphabetical.
2. UN and Government Materials. Sections for Treaties, UN Committees, Legislation etc. within each section chronological.
3. Media Reports: Divided by publication listed alphabetically, within each section listed chronologically.
4. Interviews.

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