

**States in Crisis:  
Sovereignty, Humanitarianism, and Refugee Protection in the  
Aftermath of the 2003 Iraq War**

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## Abstract

Although the refugee protection regime is grounded in principles of international human rights and refugee law aimed at protecting individuals from abuses of state power, in practice it still privileges and produces state sovereignty. Principles of protection can become subverted to serve state interests, normalising the increasingly exceptional treatment of refugees. The tensions that result from this paradox, however, may also present opportunities for contesting and denaturalising such exceptionalism. This thesis explores this phenomenon as it emerged in the post-2003 Iraqi refugee crisis. Grounded in Agamben's work on sovereignty and the "state of exception", it considers how sovereignty and exceptionalism were expressed through biopolitics and governmentality in the governance of refugees. Using methods of critical legal geography, it maps and analyses how state, institutional, and individual practices reproduced, intersected with, or contested sovereignty and exceptionalism in four spaces of the Iraqi refugee crisis: the Iraqi state, host states in the region, camps in the borderlands, and resettlement. This thesis argues that Iraqi refugees, their legal status, and the spaces they occupied came to embody the contests for identity, power, and authority lodged between states, local actors, and the United Nations High Commissioner for Refugees. In the process, the technologies of power deployed in the governance of these spaces revealed the persistence and proliferation of the logic of sovereignty. Yet at the same time, they also created opportunities to expose and un-work sovereign violence and to envision forms of protection beyond the state.

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## List of Acronyms

AI	Amnesty International
CCR	Canadian Council for Refugees
CIC	Citizenship and Immigration Canada
CPA	Coalition Provisional Authority
DFID	Department for International Development
DRC	Danish Refugee Council
EC	European Commission
ECRE	European Council on Refugees and Exiles
FTO	Foreign Terrorist Organisation
HRF	Human Rights First
HRW	Human Rights Watch
ICRC	International Committee of the Red Cross
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
IDMC	Internal Displacement Monitoring Centre
IFHR	International Federation for Human Rights
IGC	Iraqi Governing Council
IIA	Iraqi Interim Authority
IIACSS	Independent Institute for Administration and Civil Society Studies
IIG	Iraqi Interim Government
IOM	International Organization for Migration
IRC	International Rescue Committee
IRCS	Iraqi Red Crescent Society
ISF	Iraqi Security Forces
MoU	Memorandum of Understanding
MNF	Multinational Force Iraq
NGOs	Non-Governmental Organisations

OCHA	Office for the Coordination of Humanitarian Affairs
ORHA	Office of Reconstruction and Humanitarian Assistance
PLO	Palestinian Liberation Organization
PNA	Palestinian National Authority
PMOI	People's Mujahadeen of Iran
RI	Refugees International
SCIRI	Supreme Council for Islamic Revolution in Iraq
TPR	Temporary Protection Regime
TNA	Transitional National Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestinian Refugees in the Near East
UNSC	United Nations Security Council
USCRI	U.S. Committee for Refugees and Immigrants
USDS	United States Department of State
WMD	Weapons of Mass Destruction

## Introduction

Although the refugee protection regime is grounded in principles of international human rights and refugee law aimed at protecting individuals from abuses of state power, in practice it still privileges and produces state sovereignty by providing a regulatory framework for states to decide whom to include or exclude from their protection. The exercise of sovereign power through such decisions defines and protects the citizen body through either the re-territorialisation or exclusion of the non-citizen. This is critical for states in constructing their boundaries, reproducing their fictions of themselves, and circumscribing their national identities. Refugees seeking protection are the symbolic front on which this sovereign power is both exercised and affirmed.

International refugee law is therefore not simply a set of rules for the protection of certain non-nationals by states. It is also a social and political phenomenon that produces and maintains state power through the regulation of individual bodies. Principles of protection can become subverted to serve state interests, normalising the increasingly exceptional treatment of refugees. The tensions that result from this paradox, however, may also present opportunities for contesting and denaturalising such exceptionalism.

This thesis explores this phenomenon as it emerged in the post-2003 Iraqi refugee crisis. Grounded in Agamben's work on sovereignty and the "state of exception", it considers how sovereignty and exceptionalism were expressed through biopolitics and governmentality in the governance of refugees. Using methods of critical legal geography, it maps and analyses how state, institutional, and individual practices reproduced, intersected with, or contested sovereignty and

exceptionalism in four spaces of the Iraqi refugee crisis: the Iraqi state, host states in the region, camps in the borderlands, and resettlement.

This thesis argues that Iraqi refugees, their legal status, and the spaces they occupied came to embody the contests for identity, power, and authority lodged between states, local actors, and the United Nations High Commissioner for Refugees (UNHCR). In the process, the technologies of power deployed in the governance of these spaces revealed the persistence and proliferation of the logic of sovereignty. Yet at the same time, they also created opportunities to expose and un-work sovereign violence and to envision forms of protection beyond the state.

To begin this project, the following sections introduce first the paradox of sovereignty and international refugee protection in the Iraqi refugee crisis, then the theory of sovereignty that guides this inquiry and the methodology used in the research, and finally an outline of the substantive chapters of this thesis.

## **I. The paradox of sovereignty and refugee protection in the Iraqi refugee crisis**

The 2003 war in Iraq and subsequent internal security crisis led to the flight of four million Iraqis from their homes, displacing 17 percent of the population,<sup>1</sup> and forcing two million to seek refuge in neighbouring countries in the region.<sup>2</sup> An additional 40,000 refugees of other nationalities, who had received protection in Iraq under Saddam Hussein's regime, were further displaced, fleeing to makeshift camps along Iraq's borders with Syria, Jordan, and Iran.<sup>3</sup> Such displacements were driven by the violence of insurgency and counter-insurgency operations and the emergence of sectarian militias in the aftermath of the war. The numbers of

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<sup>1</sup> IDP Working Group (2008). *Internally displaced persons in Iraq*. (Update 24 March 2008). UNHCR and IOM; Iraqi Red Crescent Organization (2008). *The internally displaced people in Iraq*. (Update 31).

<sup>2</sup> Bruno, A., Margesson, R., & Sharp, J. (2009, February 13). *Iraqi refugees and internally displaced persons: A deepening humanitarian crisis?* United States: US Congressional Research Service; UNHCR (2007, September). *Statistics on displaced Iraqis around the world*.

<sup>3</sup> UNHCR (2007, July). *Iraq situation response: Update on revised activities under the January 2007 supplementary appeal*.

refugees who fled testified to widespread and systematic kidnappings, rapes, murders, torture, lootings, forcible evictions, and threats against their lives. Seeking refuge in the territories of neighbouring states, whose initial warm welcome quickly turned into reluctant acquiescence to their presence, the refugees often found themselves living in legally precarious and physically dangerous situations. Often having no long-term residence or work permits and only limited access to public services, they lived in constant fear of arrest, detention, and deportation to the violence they had escaped from in Iraq.

In cooperation with host countries in the Middle East and donor states, UNHCR mobilised resources in response to the enormity of this crisis, with the goal of increasing protection space for persons forcibly displaced from and within Iraq.<sup>4</sup> It first convened a conference in April 2007 to obtain commitments from donor states to help meet the refugees' escalating needs, and the agency's budget increased to USD 271 million by 2008.<sup>5</sup>

In 2007, I joined UNHCR's regional office for the Middle East and North Africa for two years as a consultant in their Iraqi resettlement programme, resettling refugees from the region to the Americas, Europe, and Australia where they could obtain permanent residence and eventual citizenship. The office served as a "hub", situated at the juncture between the refugee communities, host states in the Middle East, UNHCR headquarters and field offices, and resettlement and donor states. From this unique position, I witnessed first-hand the consequences of the convergence of these actors' varying interests and activities for the realisation of refugee protection. While these actors all pursued ostensibly similar objectives of

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<sup>4</sup> UNHCR (2007, January 8). *Supplementary appeal, Iraq situation response: Protection and assistance to Iraqi refugees in neighbouring states and to IDPs and non-Iraqi refugees in Iraq*. Protection under UNHCR's mandate requires preventing *refoulement* (expulsion to a country where a refugee will face persecution, other ill-treatment, or torture); ensuring access to an asylum determination procedures, release from detention, and issuance travel and identity documents; facilitating voluntary repatriation, family reunification, and naturalisation; and promoting access to educational institutions, the rights to work, and access to medical treatment. See Statute of the Office of the United Nations High Commissioner for Refugees (3 December 1949) UN Doc. A/RES/428; Goodwin-Gill, G. & McAdam, J. (2007). *The refugee in international law*. New York: Oxford University Press, pp. 201, 447; Kelley, N. (Ed.). (2006). *Protection gaps: Framework for analysis, enhancing protection of refugees*. Strengthening Protection Capacity Project, European Commission and UNHCR.

<sup>5</sup> UNHCR (2009, July). *Surviving in the city: A review of UNHCR's operation for Iraqi refugees in urban areas of Jordan, Lebanon and Syria* (PDES/2009/03), p. 3.



managing the Iraqi refugee crisis, their respective commitments to promoting protection varied widely based upon their political interests. Some engaged in strategies for “managing” the refugees that at times conflicted with others’ efforts to protect them. Such conflicts often occurred at great cost to the refugees’ safety and dignity.

Despite this, there were some significant successes in obtaining protection for Iraqi refugees, particularly in the form of resettlement for over 100,000 and securing limited access to basic social and health services in host countries in the Middle East. However, these successes were often circumscribed and hard-won, given the larger political environment of restrictive state policies resistant to “burden-sharing” and often derogating from fundamental principles of refugee protection enshrined in the 1951 Convention and 1967 Protocol relating to the Status of Refugees.<sup>6</sup>

A further complicating factor in securing protection specifically for Iraqi refugees was that both states party to the 1951 Convention and 1967 Protocol<sup>7</sup> – many of whom comprised UNHCR’s largest donors<sup>8</sup> – and states not party to these international instruments,<sup>9</sup> continued to construct and respond to the Iraq crisis more in terms of the need for humanitarian aid,<sup>10</sup> than the obligation to protect fundamental rights. Refugee rights were often subsumed within a broader

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<sup>6</sup> Younes, K. (2007, March 14). The Iraqi refugee crisis. *Foreign Policy in Focus*; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (“1951 Convention”); Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (“Optional Protocol”).

<sup>7</sup> Ibid.

<sup>8</sup> Amongst the primary donors to the UNHCR Iraqi refugee operation are the United States, the United Kingdom, Canada, and Australia. See Table A: List of all commitments/contributions and pledges as of 05 May 2009’ in UNHCR (2007). *Iraq 2007 (incl. Iraqi refugees in neighbouring countries)*. Other states in the region heavily involved in the Iraq refugee response and who are parties to the 1951 Convention include Turkey and Egypt. However, Turkey entered a geographic reservation in acceding to the protocol, and Egypt entered reservations to several provisions of the 1951 Convention (*supra* note 6) concerning Articles 20 (Rationing), 22 Para.1 (Primary Education), 23 (Public Relief), and 24 (Labour Legislation and Social Security).

<sup>9</sup> States not party to the 1951 Convention include Syria, Jordan, Iraq, and Lebanon.

<sup>10</sup> See Bruno, A., Margesson, R., & Sharp, J. (*supra* note 2); Zaiotti, R. (2006). Dealing with non-Palestinian refugees in the Middle East: Policies and practices in an uncertain environment. *International Journal of Refugee Law*, 18 (2), 333-353, p. 343; Rajaram, P. & Grundy-Warr, C. (2004). The irregular migrant as Homo Sacer: Migration and detention in Australia, Malaysia, and Thailand. *International Migration*, 42 (1), 33-64, p. 39; Harrell-Bond, B. (2002). Can humanitarian work with refugees be humane? *Human Rights Quarterly*, 24, 51-85, p. 53; Hazelzet, H., Salomon, M., Tostensen, A., & Vandenhole, W. (2007). Conclusions: New human rights duty-bearers: A conversation on policy implications. In M. Salomon, A. Tostensen, & W. Vandenhole (Eds.).  *Casting the net wider: Human rights, development, and the new-bearers* (pp. 395-415). Oxford: Intersentia, p. 396.

humanitarian agenda, evident in a discourse of charitable compassion superseding one of responsibility and obligation.<sup>11</sup> This dynamic was also evident in disproportionate donor funding for discretionary humanitarian assistance, particularly resettlement for less than five percent of Iraqi refugees and basic aid for the most vulnerable,<sup>12</sup> in the face of much wider human rights protection needs for the vast majority of Iraqi refugees in the Middle East.

Within discussions at UNHCR, states' reluctance to address refugee protection from a rights-based framework was often attributed to their sovereign prerogative and their framing of the crisis in terms of emergency. Not only were states able to exercise influence through funding, but they also were recognised as having the final power to define the terms upon which they would receive and protect Iraqi refugees. In accordance with its mandate, UNHCR continuously advocated for states to assume greater responsibilities for the protection of Iraqi refugees, but decisions on both legal protection and acceptance of refugees for resettlement remained ultimately state decisions made under their recognised sovereign powers.

Given the continued persistence of state sovereignty and UNHCR's reliance on state funding, advocacy and monitoring by UNHCR could be influential, but it could not guarantee state accountability. As a consequence, there emerged continuous debates within the agency as to how, as an international organisation mandated to promote international norms of refugee protection, it could most effectively navigate and negotiate the realities of state sovereignty as expressed in state decisions on Iraqi refugee protection.

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<sup>11</sup> See UNHCR (2008). *Iraq situation supplementary appeal*. Beyani notes that most states do not recognise the protection of refugees to fall within the scope of their international obligations (Beyani, C. (2006). The role of human rights bodies in protecting refugees. In A. Bayefsky (Ed.). *Human rights and refugees, internally displaced persons, and migrant workers: Essays in memory of Joan Fitzpatrick and Arthur Helton* (pp. 269-281). Leiden: Martinus Nijhoff Publishers, p. 271), although it may be possible to argue that states have a complementary obligation to protect human rights of refugees. See Salomon, M., Tostensen, A., & Vandenhoe, W. (2007). Human rights, development, and new duty-bearers. In M. Salomon, A. Tostensen, & W. Vandenhoe (Eds.) (*supra* note 10) (pp. 3-24), p. 15. Also note that material assistance was increasingly used by UNHCR to quietly promote the protection of economic and social rights. See UNHCR (*supra* note 5).

<sup>12</sup> This calculation includes both registered and unregistered refugees. See UNHCR (*supra* note 11), pp. 7-8; Loescher, G. (2003). *The UNHCR and world politics: A perilous path*. Oxford: Oxford University Press, pp. 15, 363.

Facing such obstacles to ensuring effective protection, and under pressure to provide urgent humanitarian aid, UNHCR focused its goals for the Iraqi refugee crisis on education and health within host states in the Middle East, registration with UNHCR, resettlement to states where refugees could become permanent residents, and food and financial assistance to those most in need.<sup>13</sup> However, these activities did not always automatically secure the legal protection of refugees. Resettlement, for example, was a tool for protecting the most vulnerable refugees. It was also used strategically: burden-sharing through resettlement was offered to host states in exchange for their increased protection of those refugees remaining on their territories.<sup>14</sup> However, resettlement is neither a legal right of refugees nor an obligation of states,<sup>15</sup> and it is available to very few.<sup>16</sup> Consequently, although it secures legal protections in practice, it is effectively a form of discretionary humanitarian assistance.

Similarly, registration does provide identity documentation and can also serve as a tool for identifying refugees' protection needs. However, it is inconsistently recognised as legitimate by those host states not party to the 1951 Convention, leaving most refugees in the Middle East in situations of legal uncertainty.<sup>17</sup> In downplaying UNHCR's role in providing other forms of protection beyond limited humanitarian assistance, whether within host states in the Middle East or resettlement states further afield, states could obfuscate the legal right of protection in the interest of posing discretionary political solutions that did not threaten their respective interests.

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<sup>13</sup> See UNHCR (*supra* note 11), p. 2.

<sup>14</sup> UNHCR (2007, March 12). *Resettlement of Iraqi refugees*, p. 2; UNHCR (1991, July 9). *Resettlement as an instrument of protection: Traditional problems in achieving this durable solution and new directions in the 1990s*. (UN doc. EC/SCP/65); UNHCR (2002, April 25). *Strengthening and expanding resettlement today: Challenges and opportunities*. (Global Consultations on International Protection, 4th Meeting, UN doc. EC/GC/02/7).

<sup>15</sup> Goodwin-Gill, G. & McAdam, J. (*supra* note 4), p. 489.

<sup>16</sup> See UNHCR (2010, June 18). *UN chief announces 100,000 landmark in resettlement of Iraqi refugees*. This number comprised five percent of the nearly two million Iraqi refugees living in the region, and one-fourth of the Iraqi refugee population registered with UNHCR.

<sup>17</sup> UNHCR (2001). *Registration of refugees and asylum-seekers*. (Executive Committee Conclusion No. 91). Executive Committee of the UNHCR Programme (52nd Session), para. (b)(vi); IPSOS (2007, November). *Second IPSOS survey on Iraqi refugees: Preliminary results*; Danish Refugee Council (2007, November). *Iraqi population survey in Lebanon: A report*; FAFO (2007, November). *Iraqis in Jordan: Their number and characteristics*.

Such policies exacerbated the instability of Iraqi refugees' lives almost as often as they achieved small measures of protection. Lacking any definitive legal status, most Iraqi refugees lived without legal protection and risked deportation or *refoulement* to Iraq.<sup>18</sup> They had no right to work and minimal rights of residence and travel, and often faced exploitation and abuse by employers, police, landlords, and others who capitalised upon their status.<sup>19</sup> They frequently lacked access to education and health care, although this began to change as UNHCR provided funding for increased access to these services.<sup>20</sup> Facing such obstacles to basic survival in their daily lives, they were often reduced to seeking dangerous solutions in the forms of human trafficking and smuggling, engaging in exploitative work at risk of arrest and detention, or returning to the threats of violence in Iraq.<sup>21</sup>

Academic literature has attributed these failures in the protection of refugees to narrow legal interpretations and procedural restrictions, state and economic interests in the containment of forcibly displaced persons, and institutions constrained by state interests and their own flourishing bureaucracies. For example, in post-2003 Iraq, both Frelick and Woodall critiqued states' procedural regulations restricting access to asylum for Iraqis.<sup>22</sup> Romano detailed the impact of states' legal developments upon the security of Iraqi refugees.<sup>23</sup> Gabiem and Zaiotti analysed how negotiations between UNHCR and states, which resulted in some positive developments in refugee protection, were also undermined by security threats in the

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<sup>18</sup> Younes, K. (*supra* note 6).

<sup>19</sup> Barnes, A. (2009, January). *Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan, and Lebanon* (Research Paper No. 167, New Issues in Refugee Research). UNHCR, pp. 21-23; Human Rights First (2008, December). *How to confront the Iraqi refugee crisis: A blueprint for the new administration*, p. 3.

<sup>20</sup> UNHCR (2008, April/May). *Iraq situation update*.

<sup>21</sup> Danish Refugee Council (*supra* note 17); Ferris, E. (2008, August). *The looming crisis: Displacement and security in Iraq*. (Policy Paper No. 5), Foreign Policy at Brookings, p. 37; Mac Allister, K. (2007, Autumn). *When solutions are not solutions: Palestinian refugees stranded in and fleeing from Iraq* (Issue. No. 35, *Al Majdal*). BADIL Resource Center for Palestinian Residency and Refugee Rights; UNHCR (*supra* note 11).

<sup>22</sup> Frelick, B. (2007). Iraqis denied right to asylum. *Forced Migration Review: Iraq Special Issue*, June 2007, 24-26; Woodall, L. (2006). No asylum support, no safe route to Iraq: What happens next? *Legal Action*, January 2006, 19-20.

<sup>23</sup> Romano, D. (2005). Whose house is this anyway? IDP and refugee return in post-Saddam Iraq. *Journal of Refugee Studies*, 18 (4), 430-453.

region and states' reluctance to admit Iraqi refugees.<sup>24</sup> Feller, Barnes, and Lewis addressed the critical challenges faced by UNHCR in negotiating with states in an atmosphere of heightened security concerns and little political will to grapple with the true scope or implications of the Iraqi refugee crisis.<sup>25</sup>

Working within the Iraqi resettlement programme, it became apparent that such political, economic, and institutional interests that undermined the protection of Iraqi refugees primarily centred upon the critical question of states' sovereign powers. Sovereignty expressed through "state interests" was referred to within academic, legal, and political discourse as a critical factor affecting the relative success of UNHCR in securing protection for Iraqi refugees. States' frequent recourse to discretionary humanitarian assistance in lieu of the obligatory protection of rights in the Iraqi refugee crisis, although contested in legal analysis and advocacy, was often in practice pragmatically treated as falling within the purview of their sovereign rights. The power and force of state sovereignty persisted, accounting for why so many state decisions effectively left Iraqi refugees excluded from most basic forms of legal protection and social integration, despite UNHCR's interventions and state obligations under international human rights and refugee law.

Given the trenchancy of state sovereignty as it was manifested in decisions on the lives of refugees in the Iraqi context, it became evident that this theme required further exploration if UNHCR, states, and refugees themselves were ever to find a meaningful way to secure sustainable forms of protection. In an era when state sovereignty is often viewed as eroded by emerging international legal norms and globalisation, the tendency in much legal scholarship on the promotion of international norms has been to focus more on the substantive content of these norms and their application in refugee and humanitarian emergencies. Such norms

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<sup>24</sup> Gabiam, N. (2006). Negotiating rights: Palestinian refugees and the protection gap. *Anthropological Quarterly*, 79 (4), 717-730; Zaiotti, R. (*supra* note 10). See also UNHCR (2007, June). *On the current conditions of Palestinian refugees in Iraq*. (Information Note No. 7). Iraq Operation.

<sup>25</sup> Barnes, A. (*supra* note 19); Feller, E. (2006). Asylum, migration, and refugee protection: Realities, myths, and promises of things to come. *International Journal of Refugee Law*, 18 (3-4), 509-536; Lewis, C. (2005). UNHCR's contribution to the development of international refugee law: Its foundations and evolution. *International Journal of Refugee Law*, 17 (1), 67-90.

are important for setting standards, decreasing social exclusion, and pressing communities to become more welcoming of persons who have no states to protect them.

At the same time, the continued role of sovereignty must also be taken seriously in the project of promoting and realising such protection norms. State sovereignty is largely addressed by scholars of political science and dealt with pragmatically in the field, but is less addressed in legal scholarship promoting and interpreting refugee protection standards. This divergence between practice and theory risks producing a situation in which it becomes difficult to imagine possibilities for effectively recognising and addressing the presence of both political sovereignty and emerging norms of human rights law in refugee protection operations. The gaps between practice and theory do not simply have consequences for the direction of esoteric academic debates. Responses in the field risk also premising pragmatism, compromise, and acquiescence to sovereign prerogatives over grounding in theoretical and normative principles of protection. As such, this divide also has implications for whether and how refugees will be able to move beyond mere survival in spaces of exile to a place where they may live fully as human beings with dignity and political recognition.

Therefore, in this thesis, I attempt to undertake exactly this project: to identify, expose, and consider the implications of state sovereignty in the context of emerging legal and normative frameworks for international refugee protection. Inspired by critical reflections upon my experiences and observations working in the Iraqi resettlement programme, I approach this question by first asking how sovereignty was expressed, naturalised, or contested in the Iraqi refugee crisis. I argue that state-centric conceptions of sovereignty are insufficient for understanding the implications of sovereignty for refugee protection, as the logic of sovereignty became de-territorialised, fragmented, and expanded across multiple state and non-state actors in the governance of refugees in the crisis. I then theorise whether, in such new configurations of sovereignty, ruptures and dissonances occurred that

made it possible to secure greater protections for Iraqi refugees in accordance with international human rights norms and expanded concepts of responsibility beyond the state.

## II. Introducing the theoretical approach

Tracing the development of a theory of sovereignty from Thomas Hobbes, to Jean Bodin, to Carl Schmitt, Wendy Brown summarised the hallmarks of modern sovereignty as:

“supremacy (no higher power), perpetuity over time (no time limits), decisionism (no boundedness by or submission to the law), absoluteness and completeness (sovereignty cannot be probable or partial), nontransferability (sovereignty cannot be conferred without transferring itself), and specified jurisdiction (territoriality)”.<sup>26</sup>

However, in keeping with Brown’s reading of Bodin,<sup>27</sup> stressing that sovereignty should read through “its attributes and activities, rather than through abstract essential qualities”, this thesis argues that in contests for authority and power in the Iraqi refugee crisis, many of these hallmarks of sovereignty within the state were contested, expanded, or shifted to new actors.

Most significantly, the attributes and activities of decisionism existed at the crux of these contests for control, as measures to govern refugees in the Iraqi crisis and to determine whether they would benefit from state recognition and protection, were often enacted in contradiction to or in the absence of the law, or were justified in the name of emergency. The work of Agamben serves as a departure point for

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<sup>26</sup> Brown, W. (2010). *Walled states, waning sovereignty*. New York: Zone Books, p. 22. See also Bartelson, J. (1995). *A genealogy of sovereignty*. Cambridge: Cambridge Studies in International Relations: 39.

<sup>27</sup> Ibid., p. 138.

this analysis because his theory of sovereignty is based on the power of decisionism, recognising that state legitimacy is secured not only through the management of life, but also in decisions on its exclusion from protection in times of emergency. His theory also provides a means for conceptualising the interactions of law and politics central to the rationality of sovereignty. It further helps illuminate why and how Iraqi refugees became the embodiments of states of emergency, as they were often perceived and categorised as political, economic, racial, or security threats to sovereign states, and consequently were located increasingly outside of the protection of state law.

Drawing upon Foucault's theory of biopolitics, Agamben theorised that sovereign power is located, exercised and produced through management of the life of populations, or practices of biopolitics, which make human life the target of political power.<sup>28</sup> In a biopolitical world, the sovereign has the ultimate authority to enact decisions regarding whether one will have access to political and legal protection and recognition of the state or will be excluded from it, living an existence of unprotected basic survival, in a form of life that Agamben termed "bare life".<sup>29</sup>

The location of sovereign power in decisions upon forms of life (whether one will have access to the politically qualified and protected life of the citizen or be relegated to the bare life of the exile) is most clearly evident in times of emergency when states enact exceptional measures against individuals whom they deem threatening to their security and identity. State actions restricting such persons' rights or lifting their legal protections altogether, relegating them to an existence of bare life in what Agamben referred to as a 'state of exception', assume an extra-legal quality, as these persons are no longer recognised or protected by law.<sup>30</sup> Concentration camp survivors, Guantanamo Bay detainees, and refugees are all

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<sup>28</sup> Foucault, M. (1978). *The history of sexuality: An introduction* (R. Hurley, Trans.) London: Penguin Books (Original work published 1976), pp. 139-140,143.

<sup>29</sup> Norris, A. (2005). The exemplary exception: Philosophical and political decisions in Giorgio Agamben's *Homo Sacer*. In A. Norris (Ed.). *Politics, metaphysics, and death: Essays on Giorgio Agamben's Homo Sacer* (pp. 262-283). London: Duke University Press, p. 268.

<sup>30</sup> Agamben, G. (2005). *State of exception* (K. Attell, Trans.). Chicago: University of Chicago Press (Original work published 2003).



examples of persons subjected to such emergency measures, who have lost the protection and recognition of the law and have been reduced to their bare lives, living between exile and belonging, life and death, as their biological lives are laid bare before the authority of state power.<sup>31</sup> Sovereignty is this power that both defines the law and those situations in which law no longer applies.<sup>32</sup> This is clearly evident in the Iraqi refugee crisis, where states' recourse to extra-legal measures to govern Iraqi refugees relegated the vast majority of them to states of exception, living in precarious situations of legal liminality, relative invisibility, and physical insecurity.

Yet as these states of exception were manifested in lived social spaces, it is necessary to ask how one might understand the operation of bare life in a state of exception, and what this might reveal about the workings of sovereignty as a spatial practice. Can the state of exception, when translated to a lived social space, ever be entirely a space where bare life exists in a relation of pure exclusion from the political by a unilinear exercise of sovereign power? As many of Agamben's critics have argued, the lived material spaces produced by exceptional measures may be far more contested and processual. And as this thesis will show in the case of Iraqi refugees, persons relegated to states of exception are never passive, as they act to either contest or collude with the logic of the decisions that placed them there. The state of exception, when translated into lived space, can never exist wholly outside of human sociality. Rather, there will always be the production of new forms of life and law.<sup>33</sup>

The spaces in which humans survive in a state of exception are therefore produced through the confluence of the exercise of sovereign power and the ways

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<sup>31</sup> Perera, S. (2002). What is a camp...? *Borderlands* 1(1), pp. 175, 187.

<sup>32</sup> Agamben, G. (1998). *Homo sacer: Sovereign power and bare life* (D. Heller-Roazen., Trans.). California: Stanford University Press (Original work published 1995), drawing upon Schmitt, C. (1985). *Political theology: Four chapters on the concept of sovereignty* (G. Schwab, Trans.). Cambridge: MIT Press (Original work published 1922), p. 5.

<sup>33</sup> DeCaroli, S. (2007). Boundary stones: Giorgio Agamben and the field of sovereignty. In M. Calarcom & S. DeCaroli, (Eds.). *Giorgio Agamben: Sovereignty and life* (pp. 43-69). Stanford: Stanford University Press, p. 46; Laclau, E. (2007). Bare life or social indeterminacy? In M. Calarcom & S. DeCaroli (Eds.), *ibid.* (pp. 11-22), pp. 11-22.

that the excluded negotiate this power. Foucault's theory of governmentality provides a means for conceptualising such processes, as it recognises that in addition to state actions, many other actors reproduce, legitimise, problematise, or counter the power of the state. In this analysis, sovereignty was revealed as powerful and persistent, but also as contingent and constructed, subject to the challenges of resistance and negotiation. The operations of the refugees' individual micropower and UNHCR's institutional macropower, as much as state actions, drove the realisation and materialisation of sovereignty in social space. This theoretical approach was particularly useful in the Iraqi context as a purely state-centric analysis of the effectiveness of refugee protection would surely have missed the many moments and opportunities found by UNHCR and refugees themselves for either collusion with or contestation of the logic of sovereignty. It is critical that these moments be identified in the project of exposing the violence of sovereignty and in envisioning alternative sites of responsibility and forms of political ordering that could ensure greater protections for refugees.

### III. Methodology

Using this theoretical approach to structure this investigation, this thesis employs methods of critical legal geography to consider how legal and normative practices of exceptionalism within the spaces of the Iraqi refugee crisis reproduced sovereignty in new configurations, not only producing refugees as bodies without rights, but also revealing spaces where such rightlessness could be contested, negotiated, and exposed.

Critical legal geographers recognise that social spaces involve many more terrains and sites than simply the geographical,<sup>34</sup> and relations of power are

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<sup>34</sup> Holder, J. & Harrison, C. (2003). Connecting law and geography. In J. Holder & C. Harrison (Eds.). *Law and geography*, Current Legal Issues 2002, Vol. 5 (pp. 3-16). Oxford: Oxford University Press, p. 16.

continuously produced,<sup>35</sup> contested, and reified through legal and spatial processes.<sup>36</sup> In the same way that law is not only textual or discursive, but also a violent phenomenon,<sup>37</sup> geography is concerned not only with images and representations, but also their locations and distribution.<sup>38</sup> Space can make intelligible the law and hence the reach of power,<sup>39</sup> giving law a “physical presence”,<sup>40</sup> as it works to create particular representations, practices, and configurations.<sup>41</sup> In this sense, law and space work in concert to shape the relationships between people and territory and between materiality and meaning.<sup>42</sup> Territory is used to legally circumscribe and define a population, and law and norms are used to delimit and legitimise a particular ordering of space or bodies in space.<sup>43</sup>

The state of exception may become increasingly reified in space as the sovereign power to lift the law moves from its grounding in an abstract principle to technologies and knowledge to master both bodily and territorial spaces. As law requires space for its deployment, sovereignty needs a body to be in force.<sup>44</sup> At the same time, however, in this move from the abstract to the concrete, law encounters contingency and contestation. Law attempts to produce a homogenous medium to define space, while space is contingent and chaotic.<sup>45</sup> In Deleuzian terms, space in this sense is itself alive rather than inert or fixed.<sup>46</sup> Conflicts over how states are organised spatially in both the human body and social territory are the spatial

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<sup>35</sup> Delaney, D., Ford, R.T., & Blomley, N. (2001). Preface: Where is law? In D. Delaney, et al (Eds.). *The legal geographies reader: Law, power, and space* (pp. xiii-xxi), USA: Blackwell, p. xvi.

<sup>36</sup> Blomley, N. (2003). Law and geography in retrospect. In J. Holder & C. Harrison (Eds.) (*supra* note 34) (pp. 17-33), pp. 22-23.

<sup>37</sup> Holder, J. & Harrison, C. (*supra* note 34), p. 27; Delaney, D., et al (*supra* note 35), p. xx.

<sup>38</sup> Delaney, D., et al, *ibid*.

<sup>39</sup> *Ibid.*, p. xviv.

<sup>40</sup> Holder, J. & Harrison, C. (*supra* note 34), p. 5.

<sup>41</sup> Blomley, N. (*supra* note 36), pp. 27, 29.

<sup>42</sup> *See ibid.*

<sup>43</sup> Rajaram, P.K. & Grundy-Warr, C. (2007). Introduction. In P.K. Rajaram & C. Grundy-Warr (Eds.). *Borderscapes: Hidden geographies and politics at territory's edge* (pp. ix-xi). Minneapolis, University of Minnesota Press, pp. xxviii, xxxi.

<sup>44</sup> Agamben (*supra* note 32), pp. 124-125.

<sup>45</sup> Pavoni, A. (2010). Atmospheres of exception: FIFA fan fests and urban space in the 2010 South Africa World Cup. *Critical Legal Conference*, 10-12 September 2010. Utrecht University, the Netherlands.

<sup>46</sup> Deleuze, G. (1997). *Essays critical and clinical* (D.W. Smith & M.A. Greco, Trans.). Minneapolis: Minnesota University Press (original work published in 1993).

expressions of conflicts about power.<sup>47</sup> Therefore, using critical legal geography to conceptualise and investigate practices of sovereign exceptionalism as spatial practices in the Iraqi refugee crisis also exposes the slippages, fissures, and inconsistencies that emerged when law was applied to social space, which provided openings for envisioning possibilities for human protection beyond the state.

The legal, normative, and political practices that functioned as technologies of power in reproducing or contesting the logic of sovereignty in the spaces of the Iraqi refugee crisis were identified from several sources. As this thesis is the result of *praxis*, or reflection-in-action, foremost, my experience working with the Iraq operation at UNHCR for two years served as the primary ground for identifying these practices. Following my work with this programme, I considered how I might reflect upon and draw lessons from this experience in my research. Having reviewed several thousand Iraqi refugee testimonies and participated in policy and operational discussions with both field offices and states, I was particularly struck by the variety of practices we encountered that functioned as *de facto* sovereign decisions, producing spaces of both protection and isolation in the Iraqi refugee crisis, and I decided to make these the focus of my inquiry. Due to obligations of confidentiality,<sup>48</sup> I cite here only public sources that document these practices, including international refugee law; state legislation, regulation, and policy; UNHCR policy, reports, and guidelines; bilateral agreements between states and UNHCR; refugee testimonies; and human rights and news reports.

In each chapter, the practices identified are grouped into discrete categories of practices that are argued to function according to the logic of sovereignty. Such practices included those that were developed in the name of crisis or emergency, determining whether refugees would lose their juridical subjectivity through

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<sup>47</sup> See Massey, D. (1995). *Spatial divisions of labor: Social structures and the geography of production*, 2<sup>nd</sup> ed. Basingstoke: Macmillan, p. 317; Massey, D. (1991). A global sense of place. *Marxism Today*, June, 24-29.

<sup>48</sup> The director of the programme where I worked supported my plan to focus upon the Iraqi refugee crisis and my experiences in the operation as part of my dissertation research. However, I am bound by agreement with UNHCR to keep non-public information confidential for purposes of protecting both individual refugees and the integrity of the agency's operations in politically sensitive environments. For these ethical reasons, I use only public sources to document the key practices I identified from my observations.

exclusion, expulsion, or banishment. They also included the institutionalisation of norms that either excepted or recaptured refugees within the ambit of the state system through mechanisms of expulsion or re-territorialisation. These were practices that refugees and UNHCR also attempted to appropriate, internalise, evade, subvert, or transform in an effort to secure greater refugee protection. Therefore, this descriptive survey of practices is also argumentative in its categorisation of them, as they were identified and ordered according to the tenets of the theory of sovereignty as the power to decide upon the exception.

The identification of these sets of practices provided the grounding data for then considering how sovereignty was materialised in the social spaces that resulted. The material and truth effects of these practices were analysed to determine whether they enabled refugee protection as it is conceptualised in international refugee and human rights law, what they revealed about how refugee bodies were bound up in practices of statecraft,<sup>49</sup> and ultimately how they reconfigured the logic of sovereignty.

Following Chapter One, which presents the theoretical framework, Chapters Two through Five of this thesis map and analyse four particular spaces of the Iraqi refugee crisis between the years 2003, when Iraq was invaded, and 2011, when the Multinational Forces withdrew from Iraq, and the numbers of refugees fleeing Iraq began to wane, recognising, however, that this crisis had by no means come to an end. Each space of the Iraqi refugee crisis was identified and conceptualised according to Agamben's theory of sovereignty: in the context of an "emergency" or "crisis", a specific population was biopolitically determined and governed through practices of sovereign decisionism in or across a particular geographical space.<sup>50</sup> The four primary spaces that emerged in the Iraq war and subsequent refugee crisis included: the space of the war that displaced the refugees, the spaces of refugees' exile in host states in the Middle East, the spaces of refugee encampments along the

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<sup>49</sup> See Soguk, N. (1999). *States and strangers: Refugees and displacement of statecraft*. Minneapolis: University of Minnesota Press, p. 37.

<sup>50</sup> See Diken, B. & Laustsen, C. (2006). The camp. *Geographical Analysis*, 88 B (4), 443-452, p. 443.

borders of Iraq, and the spaces of refugee resettlement from the Middle East to states in the global north. Chapters Two through Five each begin with a survey of the sets of practices that functioned as sovereign decisions on the exception in these spaces of the Iraqi refugee crisis, and then follow with an exegesis on the implications of these practices for the workings of sovereignty in the field of refugee protection.

#### **IV. Outline of chapters**

Chapter One provides the theoretical framework that guided the development of this thesis. It conceptualises the link between refugees and state sovereignty by tracing the history of the refugee protection regime as part of a larger project of sovereign state formation. It then presents Agamben's theory of sovereignty as the power to decide upon the exception of persons from state protection or legal recognition in the name of emergency. It theorises how this form of exceptionalism has increasingly emerged as the norm in the context of contemporary refugee crises. It finally argues that in order to understand how such exceptionalism is translated into lived social space, it is necessary to examine the political and legal practices that produce these spaces and materialise the operations of law. It suggests that in the translation of the state of exception to a space of exception, such practices also produce moments of contestation, opportunities for exposure, and possibilities for envisioning forms of political community and responsibility that exceed the boundaries of the sovereign state.

Chapter Two investigates how law, exceptionalism, and the violent politicisation of life combined to reconfigure the logic of sovereignty in the space of the 2003 invasion of Iraq and its aftermath, which produced the Iraqi refugee crisis. Technologies of power that realised the violence of this logic included justifications for military intervention, the imposition of neoliberal democratic governance, *de facto* states of emergency, normative discourses of identity, and the politicisation of

humanitarian aid. These technologies were also spatial practices in the formation of the new Iraqi state, facilitating the emergence of differing visions of political authority within it. They enabled the spatiotemporal manifestations of the states of exception that proliferated within Iraq. Iraq was designated as an exception within the international order, and insurgent and sectarian militias challenged, appropriated, and reproduced the logic of sovereign exceptionalism through decisions upon life in their violent competition for control of the state. However, as the state of exception became the dominant paradigm of governance in Iraq, and the state of emergency became indistinguishable from the normal mode of politics, sovereignty was revealed as contingent and delocalised in this highly contested social space.

Chapter Three examines the legal topographies of the protection space that resulted from negotiations between host states in the Middle East and UNHCR, and considers their implications for the spatial location and exercise of sovereign power and authority in the region. It maps how the logic of sovereignty shaped refugee spaces by tracing the technologies of power enacted by the governments of Syria, Jordan, and Lebanon to contain and manage the refugee population, and also the strategies employed by UNHCR in its attempts to counter many of the devastating effects of these practices. These technologies included frameworks and bilateral agreements for the legal protection of Iraqi refugees, border controls and visa regimes, and the regulation of refugees' access to economic and social rights. This topography revealed new configurations of sovereignty, contesting the reach of both the power of the state and the authority of UNHCR. Sovereignty was delocalised through humanitarian management, yet its logic persisted and was reproduced in new forms. At the same time, the ruptures that resulted from the social spaces produced by these contests for control and management of the refugee crisis also presented possibilities for envisioning forms of global governance and responsibility for refugee protection beyond the state.

Chapter Four investigates how the logic of sovereignty was reconfigured in the liminal refugee spaces of Iraq's borderlands. Palestinian, Kurdish, Iranian, and Sudanese refugees, once hosted by the state of Iraq, were violently driven from their homes by militia groups who filled the power vacuum following the fall of Saddam Hussein. Construed as security threats, these refugees were largely denied entry into neighbouring states, and were compelled to reside in a series of *ad hoc* encampments in or near the "no-man's lands" along the borders of Iraq, Syria, and Jordan. The technologies of power that functioned as expressions or contestations of the logic of sovereignty in these refugee spaces included violence and expulsion, displacement and re-emplacement, and exclusion and inclusion. Functioning as spatial practices, these technologies not only instrumentalised the border in the production of specific forms of sovereignty, but also produced spaces of isolation and resistance and shaped processes of citizenship and territorialisation within the region. Trapped in the margins, the refugees were often relegated to no state at all, their very presence contesting the myth of social closure that undergirds the rationality of statism. As they mobilised their vulnerabilities and encampments to call for their recognition within the state system, and humanitarian organisations assumed greater powers of governance in the border zones, the contingency and processuality of sovereignty became apparent. Their emplacements and assertions of new political subjectivities, while still premising the citizen as the proper subject of politics, also exposed the violence of the sovereign decisions that produced them as refugees.

Chapter Five investigates how the logic of sovereignty was reconfigured in the space of resettlement of Iraqi refugees to states in the global north. Resettlement was framed as a means of protecting the rights of the most vulnerable and for increasing their self-reliance. But it also served as a filter for some resettlement states to screen out those refugees deemed to have insufficient "integration potential" or to be security threats. Within this system, technologies of power included administrative classifications of vulnerability and rights, self-reliance and



integration, and inadmissibility and threat. These concepts functioned as ideologies in the normalisation of sovereignty, the assertion of the neoliberal state, the production of hyper-visible and invisible refugee bodies, and the construction of the citizen as the ideal political subject. At the same time, however, these technologies were mobilised by refugees and UNHCR to contest state sovereign authority, as tensions emerged between agendas for humanitarian aid and human rights protection, and refugees appropriated ideologies of vulnerability towards their own protection interests. These practices and tensions, while reproducing the logic of sovereignty embedded within a statist paradigm, also presented possibilities for it to be contested and exposed in the project of promoting expanded forms of refugee protection.

This thesis concludes that within each of these spaces of the Iraqi refugee crisis, sovereignty was reproduced in many forms, and its logic was expanded as the power to decide upon the exception was no longer the sole purview of states, but also migrated to non-state actors and international institutions. At the same time, given the ongoing forms of appropriation and contestation of practices of sovereign exceptionalism, the spaces produced by such decisions were neither static and hegemonic nor uncontested. Rather, as legal and political decisions were realised on the bodies and spaces of refugee lives, slippages in the logic and practice of sovereignty were continuously revealed. Within the small fissures that emerged, it became possible to envision how norms of human dignity and international refugee protection might gain greater purchase in the face of the persistence of sovereignty.

## Chapter 1

### Theorising the relationship between state sovereignty and refugee protection

This chapter outlines the theoretical approach that guides the development and direction of the inquiry into the relationship between sovereignty and refugee protection in the post-2003 Iraqi refugee crisis. Section One introduces the framework for conceptualising this relationship by theorising the role of refugees in state formation, the challenges refugees pose to the logic of the state system, and how states have attempted to resolve these problems through the development of the refugee protection regime.

Section Two theorises how the refugee protection regime is unable to resolve these problems fully, as it also serves as a device for either including or excluding refugee bodies from state protection and functions according to the logic of sovereignty.<sup>1</sup> This theory, rooted in the philosophy of Agamben and later scholars of his work, is based upon the power to decide upon the exception of human bodies from legal recognition or political protection of the state in the name of emergency.

Section Three theorises that as forced displacement has engendered increasingly exceptional treatment of refugees in the name of crisis, the exclusion of refugees has emerged as the norm. It suggests that in this convergence of the exception and the norm, the fundamental logic of sovereignty undergirding the

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<sup>1</sup> Biswas, S. & Nair, S. (Eds.) (2010). *International relations and states of exception: Margins, peripheries, and excluded bodies*. NY: Routledge, Introduction.

ideology of liberal democracy and its implicit protection of human rights may be exposed, denaturalised, and delegitimated.

Section Four then investigates how such political and legal exceptionalism is translated into lived social space. Drawing upon Foucault's theory of governmentality, it argues that the state of exception theorised by Agamben can never be fully totalising or hegemonic when it is realised in social and bodily space. Rather the spaces produced by practices of states, international institutions, and forms of micropower are fraught with contestation, sometimes reproducing and at other times exposing the violence of sovereign power. Therefore, while Agamben's theory of exceptionalism serves as a departure point for investigating the workings of sovereign exceptionalism in refugee spaces, it is also necessary to investigate the specific practices that reproduced or contested it – particularly those that enabled the entry of human rights norms that countered the reach of state power.

The final section describes how the analytical structure of this theory of sovereignty is used to identify and map the practices of the four primary spaces of the Iraqi refugee crisis identified and investigated in this thesis: the space of forced displacement from Iraq, the urban centres of Iraq's neighbouring states hosting refugees, the refugee camps in Iraq's border zones, and the resettlement programme admitting refugees into states in the global north.

## **I. Refugees as a symbolic affront to the logic of the state system**

Refugee status in modernity is a by-product of the post-Westphalian state system in which state borders and identities were formalised by tying bodies to territories in fundamentally new ways. The post-Westphalian state system views the citizen as the only agent capable of democratic practice, the state as the sole facilitator of conditions necessary to enable democracy, and territory as critical to

the coherence of a national community.<sup>2</sup> This rationality provides the basis for conceptualising state sovereignty as the power to define the scope and terms of this community framed as citizens.<sup>3</sup>

This power is realised through the convergence of territorial jurisdiction and political authority, in the process creating boundaries that then make the exclusion of non-citizens and expulsion from territories possible.<sup>4</sup> Boundaries structure political relationships within and outside the field of sovereign power,<sup>5</sup> enclosing political communities of citizens founded upon the power to define any subject as a potential enemy.<sup>6</sup> Citizenship is a status which must be continuously produced, differentiated, and institutionalised through boundary-making in order to ground and legitimate the authority of the state.<sup>7</sup> Such processes both normalise and de-contest the existence and necessity of the state.<sup>8</sup>

Only in a world made up of sovereign states with citizens can refugees exist in juridical terms.<sup>9</sup> As “territorial constructs”,<sup>10</sup> refugees as a legal category are created by the actions of their states of origin establishing territorial and bodily boundaries around a delimited political community. Yet they also become “problems” to their host states and are naturalised as a category because they are uprooted and severed

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<sup>2</sup> Soguk, N. (1999). *States and strangers: Refugees and displacement of statecraft*. Minneapolis: University of Minnesota Press, p. 217.

<sup>3</sup> Ibid., p. 100, referencing Hobsbawm, E. & Ranger, T. (1992). *The invention of tradition*. Cambridge: Cambridge University Press; Barnett, M. (2001, Spring). Humanitarianism with a sovereign face: UNHCR in the global undertow. *IMR* 25(1), 244-277, p. 251.

<sup>4</sup> DeCaroli, S. (2007). Boundary Stones: Giorgio Agamben and the Field of Sovereignty. In Calarcom, M. & DeCaroli, S. (Eds.) (2007). *Giorgio Agamben: Sovereignty and life* (pp. 43-69) (Stanford: Stanford University Press), p. 47.

<sup>5</sup> Ibid., p. 65.

<sup>6</sup> Salter, M. (2008). When the exception becomes the rule: Borders, sovereignty, and citizenship. *Citizenship Studies* 12 (4), 365-380, p. 375.

<sup>7</sup> Soguk, N. (*supra* note 2) p. 39, citing Appadurai, A. (1996). Sovereignty without territoriality: Notes for a postnational geography. In P. Yager (Ed.) *The geography of identity*. Ann Arbor: University of Michigan Press, p. 43, and Ashley, R. (1993). Statecraft as mancraft. Unpublished manuscript, pp. 4-9.

<sup>8</sup> See Freeden, M. (2003). *Ideology: A very short introduction*. Oxford: Oxford University Press, p. 54; Glynos, J. (2001). ‘The grip of ideology: A Lacanian approach to the theory of ideology’. *Journal of Political Ideologies*, 6 (2), 191-214.

<sup>9</sup> Barnett, M. (*supra* note 3), p. 251; Soguk, N. (*supra* note 2), p. 100, referencing Hobsbawm, E. & Ranger, T. (*supra* note 3).

<sup>10</sup> Tuitt, P. (2004). Refugees, national, laws and the territorialisation of violence. In P. Tuitt & P. Fitzpatrick (Eds.). *Critical beings: Law, nation and the global subject* (pp. 37-56). UK: Ashgate, pp. 41, 47.

from those territories and communities which are expressed in states.<sup>11</sup> As the identity and authority of a state turns upon its ability to inscribe its power over a delimited social body, individuals such as refugees who are unconnected to any state, while produced by states, also constitute a threat to states as an organising social principle.<sup>12</sup>

The presence of refugees also undermines the ideology of the state as the protector of the domestic community. As personifications of human insecurity,<sup>13</sup> refugees highlight the fragility of borders circumscribing communities and represent a threat to the idealised national citizen.<sup>14</sup> Refugees become “scandalous” in light of how state sovereignty is practiced and how the “body politic” is articulated and imagined against a perceived danger.<sup>15</sup> Refugees are thus individuals “between sovereigns”,<sup>16</sup> representing the fragility of sovereignty, contesting it as a paradigm and the international state system as a natural and stable permanent entity, and exposing it as a “contingent historical effect”.<sup>17</sup> In this sense, as Arendt noted, the problem that refugees pose is not only one of space, but also of how politics

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<sup>11</sup> Soguk, N. , *ibid.*, p. 10; Haddad, E. (2003). The refugee: The individual between sovereigns. *Global Society* 17 (3), 297-322, p. 299; Nyers, P. (1999). Emergency or emerging identities? Refugees and transformations in world order. *Millennium – Journal of International Studies*, 28, 1-26, p. 11; Rajaram, P. & Grundy-Warr, C. (2004). The irregular migrant as Homo Sacer: Migration and detention in Australia, Malaysia, and Thailand. *International Migration*, 42 (1), 33-64, p. 35.

<sup>12</sup> See Goodwin-Gill, G. & McAdam, J. (2007). *The refugee in international law*. New York: Oxford University Press, p. 21; UN Ad Hoc Committee on Refugees and Stateless Persons (1949, August 1). *A study of statelessness*. (UN Doc. E/1112; E/1112/Add.1), p. 9; Pickering, S. (2005). Crimes of the state: The persecution and protection of refugees. *Critical Criminology*, 13, 141-163, p. 160.

<sup>13</sup> Helton, A. (2002). *The price of indifference*. Oxford: Oxford University Press, pp. 12-13.

<sup>14</sup> Agamben, G. (1998). *Homo sacer: Sovereign power and bare life* (D. Heller-Roazen., Trans.). California: Stanford University Press (Original work published 1995), p. 131; Soguk, N. (*supra* note 2), p. 77; Benhabib, S. (2007). Twilight of sovereignty or the emergence of cosmopolitan norms? Rethinking citizenship in volatile times. *Citizenship Studies*, 11 (1), 19-36, p. 25. See Holt, M. (2002). Biopolitics and the ‘problem’ of the refugee. In: M. Leach & F. Mansour (Eds.) *Critical perspectives on refugee policy in Australia, Proceedings of the Refugee Rights Symposium, 2003* (pp. 89-101) Burwood. Deakin University. See also Tuitt, P. (2004). Refugees, national, laws and the territorialisation of violence. In P. Tuitt & P. Fitzpatrick (Eds.) *Critical beings: Law, nation and the global subject* (pp. 37-56). UK: Ashgate, p. 47, noting that internally displaced persons, as markers of the limits of a state’s tolerance, also problematise the notion of the state guaranteeing a form of political community for citizens on its territory.

<sup>15</sup> Anderson, B. (2006). *Imagined communities* (New ed.). London: Verso; Muller, B. (2004). Globalization, security, paradox: Towards a refugee biopolitics. *Refuge* 22 (1), 49-57, p. 51; Dillon, M. (1999). The scandal of the refugee: Some reflections on the ‘inter’ of international relations and continental thought. In D. Campbell & M. Shapiro (Eds.) *Moral spaces: Rethinking ethics and world politics* (pp. 92-124). Minneapolis: University of Minnesota Press, p. 114.

<sup>16</sup> Haddad, E. (*supra* note 11).

<sup>17</sup> Soguk, N. (*supra* note 2), p. 213, citing Ashley, R. (*supra* note 7), p. 28.

organise individuals,<sup>18</sup> as refugees and stateless persons threaten to confound the normalcy and legitimacy of the state,<sup>19</sup> sovereignty, and the political order itself.<sup>20</sup>

Therefore, faced with their own threatened dissolution<sup>21</sup> (not only marked by the presence of refugees, but also by processes of globalisation, supra-nationalism, and transnationalism),<sup>22</sup> states must continuously work to assert their sovereignty in order to reinstate the linkages between territory and nation. The stabilisation of sovereignty is in this sense always immanent and ongoing.<sup>23</sup> Therefore, a refugee crisis, while certainly invoking a humanitarian plight, might also be considered a crisis of the state.

Posed as threats to the ideology of the sovereign state system, refugees then become imbricated in the constitution and continual re-making of the sovereign state in crisis. They are created by states as problems that can only be solved by states.<sup>24</sup> They become representations of the necessity of state(ism) to recapture them within the ambit of the state system.<sup>25</sup> They are thus instrumentalised by the state to privilege and normalise the citizen/nation/state hierarchy as the solution to their refugee-ness,<sup>26</sup> and are produced as the reference point for privileging the citizen and the state as the proper subject of the politics, in which the citizen is both the constitutive and representative agent of the state.<sup>27</sup> Refugee bodies are hence problems and representations of marginality that produce, circulate, and privilege citizen bodies as only possible within the territorial state.<sup>28</sup> Therefore, refugees are

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<sup>18</sup> Arendt, H. (1966). *The origins of totalitarianism*. New York: Harcourt, Brace, and World, p. 294; Nyers, P. (*supra* note 11), p. 3.

<sup>19</sup> Butler, J. (2004). *Precarious life: The powers of mourning and violence*. London: Verso, p. 49.

<sup>20</sup> DeCaroli, S. (*supra* note 4), pp. 51, 57.

<sup>21</sup> Murray, A. (2010). *Giorgio Agamben*. London: Routledge, p. 72.

<sup>22</sup> Soguk, N. (*supra* note 2), pp. 42-43.

<sup>23</sup> DeCaroli, S. (*supra* note 4), p. 50.

<sup>24</sup> Foucault, M. (1984). *The Foucault reader*. P. Rabinow (Ed.). New York: Pantheon, p. 389.

<sup>25</sup> Soguk, N. (1996). Transnational/transborder bodies: Resistance, accommodation, and exile in refugee and migrant movements on the US-Mexican border. In M.J. Shapiro & H. Alker (Eds.). *Challenging boundaries: Global flows, territorial identities* (pp. 285-325). Minneapolis: University of Minnesota Press, p. 294.

<sup>26</sup> Soguk, N. (*supra* note 2), pp. 11, 17, 35; Rajaram, P. & Grundy-Warr, C. (*supra* note 11), p. 57.

<sup>27</sup> Soguk, N., *ibid.*, pp. 9-10.

<sup>28</sup> *ibid.*, pp. 51, 244.

not wholly “outsiders”; they are also “practical insiders” in the process that makes the state.<sup>29</sup>

Solutions to the refugee problem, then, have long been posed in these terms,<sup>30</sup> finding ways to re-instate refugees within the category of citizenship. Restoring international society requires reaffirming the citizen-state-territory hierarchy through re-territorialising refugees through mechanisms for obtaining citizenship.<sup>31</sup> Refugee bodies become the sites and spaces where this re-territorialisation occurs, “just as political and open to reinscription and redrawing as the maps they negotiate and shift”.<sup>32</sup> They provide the “corporeal links” between sovereign rationalities and practices of statecraft.<sup>33</sup>

The refugee protection regime was created towards this end, as Soguk argued, as a form of “intergovernmental regimentation” – coordination between states – and as a set of practices of statecraft,<sup>34</sup> which stabilised the boundaries of citizenship and sovereign statehood. This was critical at a time when the strength of state borders was deeply in flux due to the Balkan wars, WWI, counterrevolutionary wars in Russia, and the collapse of the Ottoman, Austria-Hungarian, and Russian Empires.<sup>35</sup> Territorial nation-states faced a crisis of representation, which many attempted to neutralise through forced population exchanges, mass expulsions, and exterminations dominated by nationalist revision projects.<sup>36</sup> However, the expulsions of problematic bodies simply shifted the problem to other national

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<sup>29</sup> Ibid., p. 240.

<sup>30</sup> See UN General Assembly (1993). 44<sup>th</sup> Session. Executive Committee of the High Commissioner’s Programme. *Note on international protection*. 31 August (GA, A/AC. 96/815), 2.3; Haddad, E. (*supra* note 11), p. 308. Rajaram, P. & Grundy-Warr, C. (*supra* note 11), p. 41, note the urge to turn the refugee as “inchoate human being” into a “governable citizen”.

<sup>31</sup> Muller, B. (*supra* note 15), p. 52.

<sup>32</sup> Soguk, N. (*supra* note 2), p. 204.

<sup>33</sup> Ibid.

<sup>34</sup> See Devetak, R. (1995). *Incomplete states: Theories and practices of statecraft*. In J. Macmillan & A. Linklater (Eds.). *Boundaries in question*. London: Pinter Publishers; Devetak, R. (2001). *Postmodernism*. In S. Burchill, R. Devetak, A. Linklater, M. Paterson, C. Reus-Smit, & J. Ture (Eds.). *Theories of international relations*. New York: Palgrave; Pickering, S. (2004). *Narrating women and asylum*. In S. Pickering & C. Lambert (Eds.). *Global issues, women and justice*. Sydney: Institute of Criminology Monograph Series/Federation Press.

<sup>35</sup> Soguk, N. (*supra* note 2), pp. 20-21, 43-44, 48, 51, 111, 113, 140.

<sup>36</sup> Ibid., pp. 114-115, citing Hobsbawm, E. (1992). *Nations and nationalism since 1780: Programme, myth reality*. 2<sup>nd</sup> ed. Cambridge: Cambridge University Press, p. 135.

territories.<sup>37</sup> Hence, the need for intergovernmental coordination became the primary solution to the problems that mass populations of refugees posed to projects of statecraft. The challenges were rearticulated as techniques or knowledge that states could harness in reasserting their primacy and authority.<sup>38</sup>

The refugee regime that emerged grew from early states' attempts to create an international mechanism to re-territorialise the 20 million displaced Jews, Russians, Poles, Germans, Greeks, Turks, Hungarians, and Armenians during the decline of the Ottoman and the Tsarist Empires.<sup>39</sup> It was conceptualised under the League of Nations High Commissioner for Refugees (LNHCR)<sup>40</sup> created in 1921 in the inter-war period as the first international organisation established to deal with what Count di Valminuta termed "the racial chaos" and instability to the world order posed by refugees.<sup>41</sup> The LNCHR launched intergovernmental relief efforts that provided the basis for later incarnations of the refugee protection regime which responded to refugees in terms of the statist hierarchy.<sup>42</sup> Through its activities, the LNHCR determined and formalised the ontology of the refugee that became central to later developments of the refugee regime; it problematised and normalised human displacement, placed the state as the corrective agent at the centre of refugee events, made the refugee the object of intervention, and institutionalised formal intergovernmental legal regimes to address refugee problems in statist terms, tracing a history of statecraft in crisis as much as trajectories of human displacement.<sup>43</sup> The LNHCR's centrality to statecraft was further evident in the activities it undertook in managing refugee populations. Not only providing humanitarian aid, the LNHCR also coordinated the forced exchanged of two million

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<sup>37</sup> Soguk, N., *ibid.*, p. 116.

<sup>38</sup> *Ibid.*, p. 118.

<sup>39</sup> Armstrong, D., Farrell, T., & Lambert, H. (2007). *International law and international relations*. Cambridge: Cambridge University Press, p. 166; Haddad, E. (*supra* note 11), pp. 306, 313-14; Nyers, P. (*supra* note 11), p. 12; Soguk, N. (*supra* note 2), p. 103.

<sup>40</sup> Soguk, N., *ibid.*, p. 165.

<sup>41</sup> *Ibid.*, pp. 122-123, citing League of Nations (1924). Records of the fifth assembly plenary meetings: text off the debates. *Official Journal*, special supplement 23, 24 September, 144-159, p. 148.

<sup>42</sup> Soguk, N., *ibid.*, pp. 58, 103-104.

<sup>43</sup> *Ibid.*, pp. 111, 119, 121, 127, 131, 140-141, 256.



Greeks and Turks between the two countries as a means of “mediating” the conflict.<sup>44</sup>

One of the most significant activities linking refugees to the practice of statecraft was the invention of the refugee identity certificate in 1922, also known as the “Nansen passport”, which linked refugees directly to statist subjectivities and institutions, and identified, documented, and mapped a certain form of otherness in the process of producing the citizen as the norm.<sup>45</sup> While they permitted a certain freedom of movement, the identity certificates also provided states with frameworks for intervention and management of persons displaced across borders.<sup>46</sup> Revealing its intricate link to the production of the state, the creation of this refugee identity document coincided with the resurrection of national passport systems by states after WWI, when states began systematically issuing them to citizens and requesting them of non-citizens who entered their territories.<sup>47</sup>

The LNHCR was succeeded by a number of organisations, most predominantly the Nansen International Office for Refugees, the Intergovernmental Committee on Refugees, the International Refugee Organisation of 1946, and then UNHCR following World War II, which was lauded as the ideal institutional arrangement for protecting refugees.<sup>48</sup> During the evolution of these refugee agencies, the process of refugee regimentation intensified, perhaps most dramatically realised in the adoption of the Convention Relating to the International Status of Refugees in 1933,<sup>49</sup> which enlarged the legal scope of the refugee regime.<sup>50</sup>

The progressive universalisation and individualisation of the legal definition of a refugee followed, capturing and encoding individuals within a system of rights,

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<sup>44</sup> Ibid., p. 133.

<sup>45</sup> Ibid., pp. 128, 130, referencing Carter, D. (1994). The art of the state: Difference and other abstractions. *Journal of Historical Sociology*, 7(1), 73-102, p. 93.

<sup>46</sup> Soguk, N., *ibid.*, p. 133, referencing Morley, F. (1932). *The society of nations: Its organization and constitutional development*. Washington, D.C.: Brookings Institution, p. 246.

<sup>47</sup> Soguk, N., *ibid.*, pp. 131-133; Arendt, H. (2007). We refugees. In J. Kohn (Ed.). *The Jewish writings / Hannah Arendt* (pp. 264-274). New York: Schocken Books, p. 273.

<sup>48</sup> Soguk, N., *ibid.*, pp. 110, 120.

<sup>49</sup> (28 October 1933) League of Nations, Treaty Series Vol. CLIX No. 3663.

<sup>50</sup> Soguk, N. (*supra* note 2), p. 148.

privileges, inclusions, exclusions, duties, and responsibilities.<sup>51</sup> This definition was enshrined in the 1951 Convention Relating to the Status of Refugees [hereinafter the “1951 Convention”], stating that a refugee is any person who:

As a result of events occurring [in Europe] before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>52</sup>

The advent of postcolonial developments and wars of independence in former colonial states produced increasing numbers of refugees, to whom the international community responded with the 1967 Protocol Relating to the Status of Refugees, removing the temporal and geographical restrictions on the definition of the refugee that were present in the 1951 Convention.<sup>53</sup>

Later regional instruments expanded the refugee definition’s substantive causes of flight; subject to geographical location, persons fleeing serious disturbances to public order (1969 Organization for African Unity Convention)<sup>54</sup> or widespread human rights violations (1984 Cartagena Declaration)<sup>55</sup> could now also assert their claims for protection. While expanding the possibilities for persons forcibly displaced to find re-entry into state protection, these universalising instruments also worked to define the parameters of the authentic refugee event, disciplining and

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<sup>51</sup> Ibid., pp. 160, 163.

<sup>52</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (“1951 Convention”), Arts. 1A and 1B.

<sup>53</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (“Optional Protocol”).

<sup>54</sup> Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45.

<sup>55</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, (22 November 1984).

regimenting refugee identities, experiences, and voices<sup>56</sup> in terms premising and centralising the state as both the arbiter and protector of human life.

In this context, UNHCR works to promote international standards of protection in the legislation adopted by states.<sup>57</sup> However, such standards rarely translate into the emergence of binding customary international law, as UNHCR is caught between its own strictly non-political humanitarian mandate<sup>58</sup> and state interests, often participating in statecraft, institutionalising statist definitions of refugees, constructing refugees as problems in terms of states, and developing an institutional identity which respects state sovereignty.<sup>59</sup> At the heart of the refugee regime, then, states remain the fundamental arbiters of protection.

Hence, the refugee regime seeks to re-establish refugees within the ambit of state territorial control through either repatriation to one's country of origin,<sup>60</sup> local integration in a state of asylum, or permanent resettlement to a third state.<sup>61</sup> Such re-territorialisation measures reproduce state power across borders and mobilise populations to recognise states as the legitimate agents for solving the problems that refugees pose to the stabilisation of sovereign territorial relations.<sup>62</sup> Although the refugee regime was also intended to provide a transnational solution connected to the development of universal human rights instruments,<sup>63</sup> it is questionable whether this was really possible within the statist paradigm of the international system in which the protection of human rights is ultimately dependent on state action.<sup>64</sup> Modern refugee law, as Hathaway argued, in this respect may have derived

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<sup>56</sup> Soguk, N. (*supra* note 2), p. 176.

<sup>57</sup> See Boyle, A. & Chinkin, C. (2007). *The making of international law*. Oxford: Oxford University Press, p. 13; Soguk, N. *ibid.*, p. 145.

<sup>58</sup> See Statute of the Office of the United Nations High Commissioner for Refugees (3 December 1949) UN Doc. A/RES/428.

<sup>59</sup> Boyle, A. & Chinkin, C. (*supra* note 57), p. 317; Soguk, N. (*supra* note 2), p. 119.

<sup>60</sup> UN General Assembly (1986). 41<sup>st</sup> Session. Special Political Committee. *International co-operation to avert new flows of refugees*. 9 October (A/SPC/41/L.5).

<sup>61</sup> Haddad, E. (*supra* note 11), p. 309.

<sup>62</sup> Soguk, N. (*supra* note 2), p. 52.

<sup>63</sup> Haddad, E. (*supra* note 11), p. 319.

<sup>64</sup> Turner, B. (6 Feb 2012). City, nation, globe: Three movements in the history of citizenship. *Oecumene Opening the Boundaries of Citizenship Conference*, 6-7 February 2012. UK: The Open University. See also, Passavant, P. (2004). The paradox of human rights. In P. Tuitt & P. Fitzpatrick (Eds.). *Critical beings: Law, nation and the global subject* (pp. 137-158). UK: Ashgate.

more from states' interests in governing "disruptions of regulated international migration" than in meeting the humanitarian needs of refugees.<sup>65</sup>

## II. Exclusion and expulsion as a practices of state sovereignty

The role of the state in refugee protection is particularly evident in the legal regime which determines whom to admit and whom to exclude from state territories,<sup>66</sup> a set of representations that shape and limit the possibilities for refugees' lives.<sup>67</sup> Although developed as a re-territorialisation mechanism, the refugee protection regime also guarantees states the continued sovereign power to exclude persons from legal protection by either determining that they fall outside of the definition of a refugee or should be excluded from international protection.<sup>68</sup> The "refugee" as a juridical construct therefore provides the mechanism for states to determine whether to bring bodies expelled from the protection of one state under the jurisdiction and control of another or whether to relegate them to a marginal existence, often in state territories without the benefit of any state protection.

Why is it critical that the power of exclusion be built into the refugee regime? The exclusion clauses in the 1951 Convention are intended to maintain the integrity of the refugee protection regime, ensuring that it does not protect individuals who have themselves participated in persecutory acts. However, the definition of persecution can be elusive, circumscribed and shaped according to political and national interests, demonstrated most clearly in the popular saying that "one man's terrorist is another man's freedom fighter".<sup>69</sup> In this respect, then, the power of exclusion also provides states with a mechanism for denying legal recognition to certain persons seeking asylum on their territories.

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<sup>65</sup> Hathaway, J.C. (1990). A reconsideration of the underlying premise of refugee law. *Harvard International Law Journal*, 31, 129, p. 133.

<sup>66</sup> See 1951 Convention (*supra* note 52), Articles 1A (defining a refugee) and 1F (defining who may be excluded).

<sup>67</sup> Soguk, N. (*supra* note 2), p. 258.

<sup>68</sup> See the exclusion clauses of the 1951 Convention (*supra* note 52), Art. 1F.

<sup>69</sup> Seymour, G. (1975). *Harry's game*. New York: Random House.

Refugees, having no state to represent them, expose the fragility of the state, the porousness of its boundaries, and the myth that it is capable of fully encompassing human need. Hence, the state must continually work to shore up its borders and to legitimate and produce itself as the normative mode of political ordering. How does the state engage in such a project when faced with refugee crises? Following the theoretical work of Agamben<sup>70</sup> elaborated below, in order for the state to be produced and legitimated, there must be a threatening “outside” of politics against which the state can be defined as the norm. This outside must also be construed as the danger against which only the state can protect its citizens. And this outside is often populated with persons deemed undeserving of or ineligible for asylum.

Therefore, in producing itself as the norm, the state must also produce an exception. It is in this creation of the threatening outside or exception that states found and legitimate their power. This power is seated in the ability to render certain bodies to the exceptional space outside of law or politics and to capture other bodies within the citizenry. In this process, the citizen body is defined and delineated, and the threatening refugee body is continuously produced, recouped, or expelled. For example, states delimit their political identities by producing refugees – expelling individuals perceived to challenge a particular national identity (such as expulsions from Russia and Turkey); by admitting refugees as symbols of a particular political goal (such as admittance of Eastern Europeans and Russians by Western capitalist states to demonstrate their opposition to Communism); or by excluding refugees from legal recognition (particularly where states have no domestic asylum legislation).

The production of refugees and their exclusion from recognition therefore become expressions of sovereignty implicit in state formation. They provide the

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<sup>70</sup> Agamben, G. (*supra* note 14); Agamben, G. (2005). *State of exception* (K. Attell, Trans.). Chicago: The University of Chicago Press (Original work published 2003).

“other” against whom the state can define itself and assert its sovereignty,<sup>71</sup> marking the division between inside and outside, self and other, identity and difference, community and anarchy,<sup>72</sup> legal and non-legal, and citizen and exile.<sup>73</sup> They are external bodies which states regulate in order to define the social body within. Refugees, having no state protection, are thus created and relegated to this boundary between the norm and the exception. It is in this space between citizenship and exile that they must contend with state decisions about whether to exclude them from legal recognition and protection. Such decisions, while often grounded in norms, law, and regulatory administrative codes, are nonetheless deeply political and discretionary. They are reflections of national identities, ideologies of democracy, and claims for security.

And for all the iterations of responsibility in which popular sovereignty finds its legitimacy, it is this power of exception, “the capacity to impose authority in the last instance”,<sup>74</sup> that continues to form the core of sovereignty. States retained this power in the development of the refugee protection regime and in the drafting of the 1951 Convention. An underlying concern was maintaining the sovereign power to decide upon full inclusion within the state. While refusal of the right to seek asylum may arguably be construed as contrary to the legal principle of *non-refoulement*,<sup>75</sup> the drafters of the Convention nonetheless agreed that states would not be required to admit all refugees at their borders on a permanent basis.<sup>76</sup> Hence, it is unsurprising that most of the world’s refugees do not benefit from traditional schemes of re-territorialisation through repatriation to their states of

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<sup>71</sup> Haddad, E. (*supra* note 11), p. 298. See Benhabib, S. (*supra* note 14), p. 24; Rajaram, P. & Grundy-Warr, C. (*supra* note 11), p. 39; see Gregory, D. (2006). The black flag: Guantánamo Bay and the space of the exception. *Geographical Analysis*, 88 B (4), 405-427, p. 410.

<sup>72</sup> Walker, R. (1993). *Inside/outside: International relations as political theory*. Cambridge: Cambridge University Press, p. 174. See Pickering, S. (*supra* note 12), p. 158; Nyers, P. (*supra* note 11), p. 4.

<sup>73</sup> DeCaroli, S. (*supra* note 4), p. 51.

<sup>74</sup> de Benoist, A. (1999) What is sovereignty? (J. Kostova, Trans. from “Qu’est-ce que la souveraineté?”) *Éléments*, No. 96, 24-35).

<sup>75</sup> Grahl-Madsen, A. (1997). Commentary on the Refugee Convention. UNHCR, p. 136.

<sup>76</sup> Hathaway, J. (1997). *Reconceiving international refugee law*. USA: Kluwer Law International, pp. xviii-xix.

origin, local integration in their asylum states, or resettlement to third states, but instead are excluded from legal protection or living in “protracted situations”.<sup>77</sup>

Therefore, the refugee protection regime, represented as a practice of facilitating refugee inclusion in the *polis*, and state processes of expulsion might not be entirely oppositional. Rather, they may represent complementary governmental practices which turn on the power of discretionary state decisions, re-inscribing sovereign power and promoting state identities, which refugees, by virtue of their very existence, at the same time contest. The paradox lies in refugees both being central to and challenging the state system.

The frequent failure of states to protect refugees may thus be attributed to the tenuous and uneven balance between refugees’ human rights and interests of state sovereignty. States legislate access to asylum to mediate their power over refugees’ lives in the act of reproducing relations critical for maintaining sovereignty, subordinating humanitarianism to the requirements of statism.<sup>78</sup> They intercept displaced persons as objects of political instability as much as they receive them as subjects requiring refuge.<sup>79</sup> The project of premising the state system in the development of the refugee protection regime may then explain why the human rights of refugees have only partially served as the fundamental basis for state responses to refugee crises, and protection regimes have been so easy to undermine. The refugee protection regime not only protects the individual from state violence, but also reproduces it, as it regulates the relationship between the individual and the state.

This theory of the centrality of exceptionalism to sovereign power serves as the theoretical departure point for investigating the workings of sovereignty in the Iraqi refugee context. As experience repeatedly demonstrated, Iraqi refugees rarely enjoyed the full protections of international refugee and human rights law within their host states. More often than being granted asylum or resettlement, they were

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<sup>77</sup> See UNHCR Executive Committee of the High Commissioner’s Programme, Standing Committee (24-26 June 2008). *NGO statement on protracted situations*, 42<sup>nd</sup> meeting, p. 1.

<sup>78</sup> Soguk, N. (*supra* note 2), pp. 19, 125

<sup>79</sup> *Ibid.*, p. 153.

deemed threatening others, illegitimate, or unwelcome and were left to fend for themselves in situations of considerable legal uncertainty and often outright extralegality. Sovereignty, as it was expressed in decisions on the exception of Iraqi refugee bodies from state recognition and protection, was continuously produced by law and regulation as a means of normalising and legitimising state authority and power, and it had profound, violent, and material implications for refugees' lives.

This demonstrated how sovereignty is ultimately realised in the lives and bodies of refugees whose very existence materialises the border between exile and inclusion. This expression of sovereign power through the production and regimentation of refugees reveals the unique relationship between human life and state law that is at play in the operations of sovereignty – what could be termed the biopolitical nature of refugee protection, meaning that human lives are placed at the center of politics.<sup>80</sup> As human bodies serve as the sites upon which sovereign control is exercised and national identities are forged, the body becomes the primary site of political legitimacy<sup>81</sup> and statist intervention. The body (or life itself) becomes a space of sovereignty, and it is this politicised form of life that was implicated in every aspect of the Iraqi refugee crisis all the way from the violence and expulsion of bodies in displacement to the movement of bodies in re-territorialisation projects. Biopolitical theory can bring the dilemmas and paradoxes of sovereignty and the refugee protection regime into sharper focus.

Foucault theorised that biopolitics accounted for how the relationship of individual life to political power evolved in the modern era. He posited that sovereignty, originally expressed in the unconditional right to decide on death, evolved in the 18<sup>th</sup> century to focus increasingly on the administration of life as new technological innovations led to a heightened awareness of the ways in which human welfare could be controlled and improved. This new awareness of power over life, termed “biopower”, marked a transformation in the workings of power, as

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<sup>80</sup> Foucault, M. (1978). *The history of sexuality: An introduction* (R. Hurley, Trans.) London: Penguin Books (Original work published 1976).

<sup>81</sup> Fassin, D. (2001). The biopolitics of otherness: Undocumented foreigners and racial discrimination in French public debate. *Anthropology Today*, 17 (1), 3-7, p. 7.



the human body became the centre of power's focus. Aristotle's "living being with an additional capacity for a political existence" was replaced by the "modern man whose politics places his existence as a living being in question".<sup>82</sup> In the emergence of biopower, the sovereign's exclusive right of death began to appear more prominently as the right of society to improve upon its life.<sup>83</sup>

Agamben expanded upon Foucault's theory of biopower, arguing that biopolitics is not a modern phenomenon, but has always been the ground of sovereign power. He traced how unqualified human life became implicated in political existence from antiquity to the present. Classical Greek thought considered human beings to be truly "human" only when they engaged in a specific form of politics in which the political was distinguished and premised above one's animal existence. Referencing Aristotle's distinction between the animal life which one is born into (*zoë*) and the "good" life of political participation into which one enters (*bios*),<sup>84</sup> Agamben theorised that to pass from *zoë* into *bios* implies that animal life is a prerequisite for entrance into political life and therefore exists in a relationship of exclusion to political life.

Agamben argued that in one's movement towards political existence, animal life therefore becomes bare life by virtue of being excluded from political recognition, while still existing in a radical relation to it<sup>85</sup> – in Strathern's terms, a hybrid between the human and nonhuman.<sup>86</sup> The human being is politically constituted in part by the existence of the vulnerability of the body.<sup>87</sup> The inclusion of this bare life in the realm of politics is constitutive and fundamental to the exercise of sovereignty,<sup>88</sup> as the law of the sovereign needs a body in order to be in force.<sup>89</sup>

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<sup>82</sup> Foucault, M. (*supra* note 80), pp. 139-140, 143.

<sup>83</sup> *Ibid.*, p. 136.

<sup>84</sup> Agamben, G. (*supra* note 14), pp. 1-3. See de la Durantaye, L. (2009). *Giorgio Agamben: A critical introduction*. Stanford: Stanford University Press, p. 205.

<sup>85</sup> Agamben, G., *ibid.*, pp. 1-3, 6-7, 88, 106, 109.

<sup>86</sup> Strathern, M. (1996, September). Cutting the network. *The Journal of the Royal Anthropological Institute*, 2(3), 517-535, p. 522.

<sup>87</sup> Butler, J. (*supra* note 19), p. 20.

<sup>88</sup> Agamben (*supra* note 14), p. 6. Arriving at a similar conclusion from a different analytical direction, Lefebvre noted that the violence that drove the accumulation of capital and the production created the conditions for the state to concentrate political life and existence within itself and premise it above all other forms of life. Lefebvre,

Biopolitics thus locate decisions over life (whether one will have entry into political life or remain excluded from it, existing at the level of bare survival) as the target of political power. Sovereignty operates at this borderline, masking its unlimited power to decide upon life with legal norms that legitimise the state's authority, but always retaining the ability to exercise this power over life without legal constraint.<sup>90</sup> Biopolitics, Agamben argued, thus underpin the paradigm of sovereignty (or what Biswas and Nair termed the "logic of sovereignty")<sup>91</sup> whose function is to politicise and exercise control over forms of life,<sup>92</sup> and which turns on states' ability to subject human lives to spaces outside of law's protection<sup>93</sup> – to bare life.

Agamben used the juridical category of the sacred man, having its origins in *homo sacer* in Roman law, to investigate what it means to be relegated to bare life.<sup>94</sup> *Homo sacer* was a criminal whom the state deemed worthy of death, but who was banned by the state from being legally executed or religiously sacrificed, meaning that he had no clear legal or moral status. The sacred man could be killed by anyone with impunity, and it would not be considered murder. He lived in a bare life of exile in a "state of exception", an empty legal form, subject to state violence, but unprotected by law.<sup>95</sup>

Agamben argued that the logic of sovereignty becomes most evident in times of emergency, when individuals may be subject to bare life in a state of exception.

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H. (1991). *The production of space* (D. Nicholson-Smith, Trans.). Oxford: Blackwell (Original work published 1974), p. 279.

<sup>89</sup> Agamben (*supra* note 14), pp. 124-125.

<sup>90</sup> Norris, A. (2005). The exemplary exception: Philosophical and political decisions in Giorgio Agamben's *Homo Sacer*. In A. Norris (Ed.) *Politics, metaphysics, and death: Essays on Giorgio Agamben's Homo Sacer* (pp. 262-283). London: Duke University Press, p. 268.

<sup>91</sup> Biswas, S. & Nair, S. (*supra* note 1).

<sup>92</sup> See Murray, A. (*supra* note 21), p. 2.

<sup>93</sup> Agamben, G. (*supra* note 14), p. 6. See Diken, B. & Laustsen, C. (2006). The camp. *Geographical Analysis*, 88 B (4), 443-452, p. 447.

<sup>94</sup> Agamben, G., *ibid.*, p. 110; de la Durantaye, L. (*supra* note 84), pp. 206-207.

<sup>95</sup> Agamben, G., *ibid.* pp. 82-86. See Hardt, M. & Negri, A. (2000). *Empire*. Cambridge: Cambridge University Press, p. 366, for a critique of bare life. In anthropological terms, this is similar to what Patterson has called in the context of slavery "social death" (existing as degraded individuals between life and death) through "institutionalized marginality" (yet included in social relations). Patterson, O. (1982). *Slavery and social death: A comparative study*. USA: President and Fellows of Harvard College. See also Mills, C. (2007). Normative violence, vulnerability, and responsibility. *Differences: A Journal of Feminist Cultural Studies*, 18 (2), 133-156, p. 148.

States abandon them, removing them from law's application or protection, in order to preserve sovereign authority.<sup>96</sup> This concept is derived from Schmitt's theory of sovereignty as a power that both defines the scope of the law and the situations in which law no longer holds.<sup>97</sup> Schmitt argued that sovereignty is not simply a monopoly on violence, or legitimised by a population or another state's recognition; its roots may also be found in situations of emergency when it manifests itself in decisions regarding the application or suspension of the law.<sup>98</sup>

The power to decide upon the state of exception is central to understanding sovereignty.<sup>99</sup> Life and death enter the realm of the political through the exercise of such sovereign decisions.<sup>100</sup> Not simply a punishment enacted within the legal order of the state, to be abandoned by the law and left to a state of exception is to be placed outside of the juridical-political order that defines the frame of the "city" or the *polis*. Yet the act of being placed outside of law's protection is to also be subject to the power that places one there,<sup>101</sup> exposed continuously to an unconditional threat of a death that cannot be classified as murder. For the body caught in the sovereign ban, excluded from recognition or protection, survival is sought in constant flight.<sup>102</sup> As Agamben noted, "In this sense, no life, as exiles and bandits know well, is more 'political' than [this]."<sup>103</sup>

How is it possible to reconcile at once being excluded by legal recognition yet also being subject to the continued violence of the state? Schmitt defined the sovereign as the one who decides on the exception, and in so doing, merges the legal and the non-legal by means of a political decision that has the force of law.<sup>104</sup> Humphreys critiqued Schmitt's definition as a legal construct intended to domesticate pure or "non-state" violence and called it an attempt "to legislate for

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<sup>96</sup> Agamben, G. (*supra* note 70).

<sup>97</sup> Schmitt, C. (1985). *Political theology: Four chapters on the concept of sovereignty* (G. Schwab, Trans.). Cambridge: MIT Press (Original work published 1922). See Rajaram, P. & Grundy-Warr, C. (*supra* note 11), p. 36.

<sup>98</sup> *Ibid.*

<sup>99</sup> Agamben, G. (*supra* note 14), pp. 6-7, 28-29.

<sup>100</sup> *Ibid.*, p. 164.

<sup>101</sup> Dean, M. (2004). Four theses on the powers of life and death. *Contretemps*, 5, 16-29, p. 24.

<sup>102</sup> *Ibid.*; Agamben, G. (*supra* note 14), p. 183.

<sup>103</sup> Agamben, G., *ibid.*, p. 184.

<sup>104</sup> Schmitt, C. (*supra* note 97), p. 5.

anomie” in a move towards closure within the legal system.<sup>105</sup> Fitzpatrick argued that the state of exception cannot exist outside of the law because law has no foundation; it continuously expands and absorbs exteriority to contain what it excludes.<sup>106</sup> Other scholars alternatively read the state of exception as essentially political – the exclusive product of executive action, however closely it might be regulated once the emergency is declared.<sup>107</sup>

These critiques converge to some extent with Agamben’s own theory of the relationship between law and the state of exception. In asking what law does when confronted with “the irreducibly non-legal”, meaning human beings reduced to “life itself” in a state of emergency, he pointed to the encompassing nature of law, as it attempts to embed lawless spaces within itself through constitutionalism or rules of derogation.<sup>108</sup> Therein is revealed the internal contradiction of sovereignty – the exception is not a complete exclusion, but rather a partial inclusion. It is created and required to maintain the validity of the law that governs and defines the normal situation by providing a means for this law to be temporarily suspended in times of emergency. The creation of the exception gives the law its meaning and validates the political order as the norm. It is the originary form of law, enabling law to work by creating an “inside”, or that which is within the juridical and political order, and an “outside”, where law is no longer able to recognise, protect, or prosecute – the space occupied by the *homo sacer*.<sup>109</sup>

The *homo sacer* therefore remains tied to the state in a relationship of abandonment by the law.<sup>110</sup> The ban is what ties together bare life and sovereign

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<sup>105</sup> Humphreys, S. (2006). Nomarchy: On the rule of law and authority in Giorgio Agamben and Aristotle. *Cambridge Review of International Affairs*, 19 (2), 331-351, p. 335.

<sup>106</sup> Fitzpatrick, P. (2005). Bare sovereignty: *Homo sacer* and the insistence of the law. In A. Norris (Ed.) (*supra* note 90) (pp. 49-73).

<sup>107</sup> See Gross, O. (2003). Chaos and rules: Should responses to violent crises always be constitutional? *Yale Law Journal*, 112 (4), 1011-1134, pp. 1021-1024; Fitzpatrick, J. (1994). *Human rights in crisis: The international system for protecting human rights during states of emergency*. Philadelphia: University of Pennsylvania Press.

<sup>108</sup> Agamben, G. (2005) (*supra* note 70), p. 59; Humphreys, S. (*supra* note 105), p. 334; Butler, J. (*supra* note 19), pp. 58, 62; Papastergiadis, N. (2006). The invasion complex: The abject other and spaces of violence. *Geographical Analysis*, 88 B (4), 429-442, p. 435.

<sup>109</sup> Agamben, G. (*supra* note 14), pp. 19, 26-29; Agamben, G. (2005) *supra* note 70), pp. 36, 40; Murray, A. (*supra* note 21), pp. 52, 63; Schmitt, C. (*supra* note 97), p. 13; Norris, A. (2005). Introduction. In Norris, A. (Ed.) (*supra* note 90) (pp. 1-30), p. 9.

<sup>110</sup> Agamben, G. (*supra* note 14), pp. 19, 26-29; Murray, A., *ibid.*, pp. 52, 63.

power.<sup>111</sup> The state of exception is hence a legal fiction claiming to maintain the law in the act of suspending it, but is actually a violence that has “shed every relation to law”, producing what Butler called “a law that is no law”,<sup>112</sup> and a “paralegal universe that goes by the name of law”.<sup>113</sup> This reveals how the state of exception both binds and abandons human beings to the law.<sup>114</sup>

Therefore, Agamben reasoned, the state of nature which was presupposed as on the outside, reappears on the inside as the state of exception: “The state of exception is neither internal nor external to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with one another.”<sup>115</sup> Or as Rasch pithily stated, “The state from which Hobbes’s sovereign rescues us is the state into which Agamben’s sovereign plunges us;”<sup>116</sup> “the problem that Hobbes thinks he solves is in reality the product of the political space he creates and the consequence of the sovereign ban.”<sup>117</sup> The state of exception is therefore not the chaos preceding a political order, but rather the result of the suspension of that order,<sup>118</sup> and it is the ground and source of the law that governs that order.<sup>119</sup> It does not exist prior to the foundation of the *polis*, but is rather a product of it.<sup>120</sup> It is a consequence of

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<sup>111</sup> Agamben, G., *ibid.*, p. 109.

<sup>112</sup> Agamben, G. (2005) (*supra* note 70), pp. 59, 79; Humphreys, S. (*supra* note 105), p. 334; Butler, J. (*supra* note 19), pp. 58, 62; Papastergiadis, N. (*supra* note 108), p. 435.

<sup>113</sup> Butler, J., *ibid.*, p. 61.

<sup>114</sup> Agamben, G. (2005) (*supra* note 70), p. 1.

<sup>115</sup> *Ibid.*, p. 23; Agamben, G. (*supra* note 14), pp. 36-37. See Schmitt, C. (2003). *The nomos of the earth in international law of the jus publicum Europaeum*. (G. Ulmen, Trans.). New York: Telos (Original work published 1950).

<sup>116</sup> Rasch, W. (2007). From sovereign ban to banning sovereignty. In Calarco, M. & DeCaroli, S. (Eds.) (*supra* note 4) (pp. 92-108), p. 101.

<sup>117</sup> *Ibid.*, p. 102.

<sup>118</sup> Agamben, G. (*supra* note 14), p. 18. See also Agamben, G. (2005) (*supra* note 70), p. 29.

<sup>119</sup> See Agamben, G. (2005), *ibid.*, pp. 26, 51. de la Durantaye (*supra* note 84), p. 351 argues that this presents a limitation for conceptualising solutions or other possibilities. In grounding politics in the state of exception, it becomes difficult to conceive of an answer in terms of politics, thereby opening only the possibility for a kind of utopia outside of politics, ultimately unrealisable and nihilist in its persuasion. However, Khurana has suggested that a different reading would be that Agamben is calling not for a “political project”, but an “ethical turn”, not immediate and concrete political action, but new modes for understanding and constructing value. Khurana, T. (2007). *Desaster und Versprechen. Eine irritierende Nähe im Werk Giorgio Agambens*. In: *Die gouvernementale Maschine. Zur politischen Philosophie Giorgio Agambens*. Böckelman, J. and Meier, F. (Eds.) (pp. 29-44). Münster: Unrast, pp. 34-35.

<sup>120</sup> Agamben, G. (2005) (*supra* note 70), pp. 105-109.

sovereignty producing its own field of application, and in the process, asserting itself as the norm; it confers reality and constitutes itself through repetition.<sup>121</sup>

And in so doing, sovereignty is inherently violent. Violence operates in the repetition and production of norms of law, political ordering, and ideology. Norms of sovereignty grounded in biopolitics constrain the possibilities for life and render those lives which are unliveable within the normative framework susceptible to violence. And, as Mills argued, norms themselves not only allow for violence, but also are ontologically violent, as their “world-making capacity” requires the exclusion of those who are unintelligible within the normative framework of the state from the space of “appearance” to the state.<sup>122</sup>

Therefore, to understand the operations of sovereignty in the Iraqi refugee context, it is necessary to ask how biopolitics, law, regulation, norms, and violence were implicated in responses to the crisis. Iraqi refugees, perceived as sources of threat and instability, and relegated to spaces of violence, extralegality, and containment, became embodiments and expressions of bare life in a state of exception. And states attempted to ground, realise, and normalise their visions of political identity, law, and sovereign authority in both the production of and contests for control over these spaces of exile.

### **III. Normalising the exception of refugees from state protection**

Subjected to repeated decisions withholding their protection in the name of crisis and emergency, Iraqi refugees were relegated to states of exception. Yet as the Iraqi refugee crisis became protracted, and Iraqis faced interminable waits for durable solutions, their presence in their host states moved from a status of temporary emergency to one of growing permanency. The state of exception to which they were relegated thus became increasingly difficult to distinguish from the

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<sup>121</sup> Mills, C. (*supra* note 95), p. 136.

<sup>122</sup> *Ibid.*, pp. 140, 150.

normal situation. This reflected Agamben's contention that modernity has been marked by the state of exception becoming the rule. He postulated that the extension of military power into the civilian sphere has merged with the suspension of constitutional protections of civil liberties by means of governmental decrees.<sup>123</sup> As life increasingly becomes the primary object of state power, bare life, once situated at the margins, has begun to enter the political realm such that *bios* and *zoë* have become indistinguishable.<sup>124</sup> As modern states in crisis attempt to cope with anxieties about threats to the sovereign state system,<sup>125</sup> employing exceptionalism during peacetime to justify broadened executive powers,<sup>126</sup> the state of exception increasingly has become the paradigm constituting the juridical order.<sup>127</sup>

The previous temporary displacement of law in the time of emergency has now become the norm,<sup>128</sup> and provisional and exceptional measures have been transformed into techniques of government. The danger of this convergence is the extent to which the sovereign may resort to violence in the state of exception, providing for the growth of authoritarianism within the hearts of liberal democratic orders.<sup>129</sup> Agamben noted, "The state of exception, which was essentially a temporary suspension of the juridico-political order, now becomes a new and stable spatial arrangement inhabited by the bare life that more and more can no longer be inscribed in that order."<sup>130</sup>

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<sup>123</sup> For example, the US' indefinite detention and removal from judicial oversight of non-citizens suspected of terrorism. Agamben, G. (2005) (*supra* note 70), p. 5.

<sup>124</sup> Agamben, G. (*supra* note 14), p. 9. See Dean, M. (*supra* note 101), p. 27.

<sup>125</sup> See Salomon, M., Tostensen, A., & Vandenhoe, W. (2007). Human rights, development, and new duty-bearers. In M. Salomon, A. Tostensen, & W. Vandenhoe (Eds.) *Casting the net wider: Human rights, development, and the new-bearers* (pp. 3-24). Oxford: Intersentia, pp. 4-5.

<sup>126</sup> Humphreys, S. (*supra* note 105), p. 334.

<sup>127</sup> Agamben, G. (*supra* note 14), p. 175.

<sup>128</sup> Raulff, R. (2004). Book review – Misery knows no law. Giorgio Agamben thinks the state of exception. *German Law Journal* 5 (5), 615-617.

<sup>129</sup> Agamben, G. (2005) (*supra* note 70), pp. 2-3, 6-7, 13-14; Raulff, U. (2004). An interview with Giorgio Agamben. *German Law Journal* 5 (5), 609-614, p. 609.

<sup>130</sup> Agamben, G., *ibid.*, p. 175; see Papastergiadis, N. (*supra* note 108), p. 431; Benjamin, W. (1968) *Illuminations*, (H. Zohn, Trans.). New York: Schocken Books. However, Gregory, D. (*supra* note 71), p. 421, argues that ongoing resistance struggles and legal battles surrounding exceptionalism indicate that the space of exception is a potential rather than paradigmatic space of political modernity.

Agamben's primary example of the exception becoming indistinguishable from the norm, or what he referred to as the total politicisation of life<sup>131</sup> in modernity, is the World War II concentration camp.<sup>132</sup> He posited two models of social organisation – the camp and the *polis*. The *polis* is the state in which citizens participate in full life. The camp represents the space created when the state of exception suspending rules on the basis of perceived danger becomes normalised, confused with the juridical rule, and extended to an entire population.<sup>133</sup> The state of exception becomes concretised in the space of the camp.<sup>134</sup>

Agamben argued that the camp is the exemplary biopolitical space of modernity where normal order is suspended, and ethics and civility, rather than law, determine whether atrocities will be committed by the authorities against those relegated to bare life.<sup>135</sup> In the continuous state of emergency, the biological body and political body are no longer distinguishable,<sup>136</sup> and law loses all content and abandons those once within it to the vagaries of state power.<sup>137</sup> The state of exception, which is an order without localisation where law is suspended, corresponds to the camp, which is a localisation without order where the state of exception becomes permanent.<sup>138</sup>

Critics have asked whether Agamben's theory grounding the logic of sovereignty in biopolitics and the state of exception essentialises a form of sovereignty over time,<sup>139</sup> making it ahistorical or lacking in empirically grounded argument.<sup>140</sup>

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<sup>131</sup> Norris, A. (*supra* note 109), p. 11.

<sup>132</sup> See Agamben, G. (*supra* note 14), pp. 4, 114.

<sup>133</sup> *Ibid.*, pp. 166, 168-170.

<sup>134</sup> Gulli, B. (2007). The ontology and politics of exception: Reflections on the work of Giorgio Agamben. In Calarcom, M. & DeCaroli, S. (Eds.) (*supra* note 4) (pp. 219-242), p. 236.

<sup>135</sup> Agamben, G. (*supra* note 14), pp. 171, 174.

<sup>136</sup> *Ibid.*, p. 153.

<sup>137</sup> Wall, T.C. (2005). Au Hasard. In A. Norris (Ed.) (*supra* note 90) (pp. 31-48), p. 41.

<sup>138</sup> Agamben, G. (*supra* note 14), p. 175.

<sup>139</sup> Laclau, E. (2007). Bare life or social indeterminacy? In Calarcom, M. & DeCaroli, S. (Eds.) (*supra* note 4) (pp. 11-22), p. 22.

<sup>140</sup> See Lewis, S. (1999). Book review: Homo sacer: Sovereign power and bare life. *Modernism/Modernity*, 6.3, 163-166, p. 163; Raulff, U. (*supra* note 129), p. 609; Levi, N. & Rothberg, M. (2004). Auschwitz and the remains of theory: Towards an ethics of the borderland. *Symploke* 11(1-2), 23-38, 30; Robinson, B. (2003). The specialist on the Eichmann precedent: Morality, law, and military sovereignty. *Critical Inquiry* 30(1), 63-97; Mesnard, P. & Kahan, C. (2001). *Giorgio Agamben à l'épreuve d'Auschwitz*. Paris: Editions Kimé; Patton, P. (2007). Agamben and Foucault on biopower and biopolitics. In Calarcom, M. & DeCaroli, S. (Eds.) (*supra* note 4) (pp. 92-108). See Kalyvas, A. (2005). The sovereign weaver. In A. Norris (Ed.) (*supra* note 90), pp. 107-134), p. 112, critiquing Agamben for producing a totalising and "agentless" history in which politics are devoid of contingency.



However, Agamben claimed that he was theorising a paradigm, or a kind of logic, rather than a historical event,<sup>141</sup> using concrete and real occurrences to “elucidate a larger historical experience”,<sup>142</sup> first contextualising them,<sup>143</sup> and then revealing the connections between phenomena that “might escape the historian’s gaze”.<sup>144</sup> This provided a structure for understanding “the historical present and its concealed structures of discipline and control”.<sup>145</sup> Gulli concurred, arguing that the only way that a radically new understanding of the political and living could be found in Agamben’s approach was to examine the structure that makes possible the factual – the ontological structure of contingency.<sup>146</sup>

Towards this end, Agamben theorised that the absolutism of the concentration camps provides a basis for conceptualising other camp-like spaces which share similar juridical situations. In these spaces, *homo sacer* and the normalisation of the camp emerge in new forms.<sup>147</sup> Such spaces, where bare life and juridical rule enter a zone of indistinction, must be recognised regardless of their specific topographies or the forms of violence that occur within them.<sup>148</sup> Although not directly extermination camps in the sense of the Holocaust, these spaces of exception depersonalise, isolate, and deny humanity,<sup>149</sup> and the power to kill or let live transforms into the power to cause to survive<sup>150</sup> – “the production of survival in bare life”.<sup>151</sup>

Agamben cited refugees, comatose persons, persons held in *zones d’attentes* in airports, persons subjected to military intervention on humanitarian grounds, and death row inmates as examples of persons reduced to bare lives, living in spaces

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<sup>141</sup> Agamben, G. (*supra* note 14), pp. 6, 19, 26, 83, 90. See Genel, K. (2006). The question of biopower: Foucault and Agamben (C. Carson, Trans.). *Rethinking Marxism* 18 (1), 43-62; Raulff, U. (*supra* note 129), p. 609.

<sup>142</sup> Agamben, G. (2001) *Das unheilige Leben: Ein Gespräch mit dem italienischen Philosophen Giorgio Agamben*. Interview with Hannah Leitgeb and Cornelia Vismann. *Literaturen* (Berlin), 2(1), 16-21, p. 19.

<sup>143</sup> *Ibid.*

<sup>144</sup> Agamben, G. (2008). *Signatura rerum: Sul metodo*. Turin: Bollati Boringhieri, p. 33. See *ibid.*, p. 11.

<sup>145</sup> de la Durantaye (*supra* note 84), p. 220. See *ibid.*, pp. 243-246.

<sup>146</sup> Gulli, B. (*supra* note 134), p. 220.

<sup>147</sup> Agamben, G., (*supra* note 14), p. 123.

<sup>148</sup> *Ibid.*, pp. 123, 174. See de la Durantaye (*supra* note 84), p. 337.

<sup>149</sup> Perera, S. (2002). What is a camp...? *Borderlands* 1(1), para. 53, referencing Dudley, M., et al (2002, January 22). Ruddock’s concentration camp for kids. Letter to the Editor. *Sydney Morning Herald*.

<sup>150</sup> Agamben, G. (1999). *Remnants of Auschwitz: The witness and the archive* (D. Heller-Roazen, Trans.). New York: Zone Books, p. 108.

<sup>151</sup> Arán, M. & Peixoto Júnior, C. (2007). Vulnerability and bare life: Bioethics and biopolitics today. *Rev Saúde Pública*, 41 (5), 849-857.

between life and death. These persons represent the paradoxical relationship between *homo sacer* and the law, as biological life is laid bare before the authority of state power.<sup>152</sup>

Refugees are indeed emerging as the *homo sacer* of the modern state – often existing at the level of survival in the liminal space between their country of origin and their country of asylum. Similar to one who in bare life is subject to law's power by virtue of being excluded from it, many refugees are subject to the violence of state power by virtue of their exclusion from state recognition.<sup>153</sup> When they are refused recognition under refugee law or are denied any kind of subsidiary protection, they lose all legal status and become “irregular” or “extralegal” migrants, no longer recognisable or legible to state law. Having no law to which they may turn, they exist in host states in situations of exile, fearing the violence of state power through arrest, detention, or deportation, but unable to seek recourse as refugees through the state juridical system.

In the context of increasing restrictions on refugee rights, exclusionary practices towards refugees are becoming normalised. The principle of inscribing life in the order of the state is subject to new and restrictive regulation. Struggling to stay alive in their countries of origin, people are fleeing in greater numbers, encountering states reluctant to meet the challenges posed by this new reality. Soguk noted the emergence of a permanent refugee crisis as repatriation becomes politically impossible, host countries fail to accommodate vast numbers of refugees, and resettlement is restricted to a small minority.<sup>154</sup> Refugee rights advocates, making claims for refugees as recognised members of a human community through international law,<sup>155</sup> are losing traction as Foucault's theory of the power over life in excess of death, perhaps envisioned in early refugee rights instruments, now enters into reverse.

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<sup>152</sup> Agamben, G., (*supra* note 14), pp. 175, 187.

<sup>153</sup> Žižek, S. (2002, May 23). Are we in a war? Do we have an enemy? *London Review of Books*.

<sup>154</sup> Soguk, N. (*supra* note 2), p. 177.

<sup>155</sup> Fitzpatrick, P. (*supra* note 106), p. 69.

However, in using Agamben's theory of sovereignty to analyse responses to the Iraqi refugee crisis, there are several critical points that must be considered. These points suggest that while this theory may well serve as a departure point for investigating conditions of exceptionalism towards refugees in modernity, it is necessary also to consider both the places where this theory resonates and those where sovereignty's reach is more tenuous and contested.

First, Agamben does not theorise the distinctions between the different states of exception he postulates.<sup>156</sup> Whereas the camps represented the paradigmatic state of exception emerging from a fundamental either/or decision, the *zones d'attentes* or refugee camps might involve a question of how much to exclude. The decision to exclude in modernity may be far more variegated, permitting individuals certain degrees of inclusion based upon their biopolitical or legal categorisation. This is particularly evident in how various categories of migrants are tied to different forms of restricted protection. For example, under Article 3 of the European Convention on Human Rights, prohibiting torture and inhuman or degrading treatment, persons may be excluded from refugee protection or deemed irregular migrants, yet still remain legally on the territory until the security situation in their country of origin enables their safe return.<sup>157</sup>

Second, theorising a paradigm rather than historical events, and tracing genealogies of structures of thought in order to understand the development of the rationalities of the state,<sup>158</sup> Agamben focused almost exclusively on the juridico-political foundations of the state of exception. The judicial and legislative measures undertaken to delimit the scope or parameters of this space were less of a focus in his project. He did point to how the law attempts to encompass the state of exception through legislating states of emergency historically, but he did not address

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<sup>156</sup> Khanna, R. (2009, May 20). Hope, demand, and the perpetual... *Arendt, the refugee, and the end of the nation state*, conference, Southampton: University of Southampton.

<sup>157</sup> See *Ahmed v. Austria*, Judgment of 17 December 1996, Reports 1996-VI; *Chahal v. United Kingdom*, Judgment of 15 November 1996, Reports 1996-VI; Rajaram, P. & Grundy-Warr, C. (*supra* note 11), p. 39; Landau, L. & Monson, T. (2008). Displacement, estrangement and sovereignty: Reconfiguring state power in urban South Africa. *Government and Opposition*, 43 (2), 315-336, p. 334.

<sup>158</sup> Murray, A. (*supra* note 21), p. 112.

further how the state of exception is produced and legitimised as a social space through multiple techniques of government, such as legal discourse, institutional ordering, and regulation.

In this sense, Agamben's theory of sovereignty provides a purely state and law-centric analysis, which risks losing valuable insight into how the logic of sovereignty persists and is reproduced through both laws and norms by those individuals and institutions who are subject or beholden to the power and interests of states. Agamben's focus was on how states produce the kinds of subjectivities that conform to, support, and enable the conditions that their sovereign authority requires for its power.<sup>159</sup> However, the spaces of the Iraqi refugee crisis were shaped not only by state decisions, but also by the practices of UNHCR and refugees themselves, all of whom played roles in reproducing or contesting the logic of sovereignty and the necessity of the state.

Third, accepting that the decision on the exception is originary and fundamental to the logic of sovereignty, the question still arises as to how the state of exception then translates into lived spaces of exception, as Agamben's reference to the camp (in Schmittian terms the new "*nomos* of the earth")<sup>160</sup> implies a spatial expression of the state of exception. Some Agamben scholars are opposed to the empirical application of his philosophy to particular spatial contexts, arguing that his theory should only be understood in terms of his larger philosophical project of theorising a "coming community".<sup>161</sup> However, Agamben himself noted the importance of identifying the legal architectures enabling the state of exception, acknowledging the need to investigate the juridical procedures and deployments of power by which human beings are so deprived of rights that no violence committed against them

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<sup>159</sup> DeCaroli, S. (*supra* note 4), p. 45.

<sup>160</sup> Drawing on the Greek *nomos* referring to land appropriation and primordial division, Schmitt theorises that *nomos* indicates a linkage between localisation (*ortung*) and order (*ordnung*) and reveals how land functioned to both "measure and nominate law and justice", and law provided a set of rules for partitioning the earth. Sociality was related to the ordering geographical space. Diken, B. & Laustsen, C. (*supra* note 94), p. 444. Gregory, D. (*supra* note 72), p. 407, conceptualises space as performance in order to demonstrate how passages are effected between inside and outside and between law and violence. See Rajaram, P. & Grundy-Warr, C. (*supra* note 11), p. 37.

<sup>161</sup> See Murray, A. (*supra* note 21); Agamben, G. (1993). *The coming community* (M. Hardt, Trans.). Minneapolis: University of Minnesota Press.

could appear as a crime.<sup>162</sup> The translation of the state of exception to a *space* of exception, from an “essence” to a spatial “relation”,<sup>163</sup> is facilitated by such juridical and normative practices.

Agamben also did not fully investigate what happens when the state of exception is translated into lived social space as it is experienced by its inhabitants. His theorising of how the state of exception at the same time produces sites of experience and contestation is restricted to a citation of the speechless and apathetic *Musselman* as the example of the most abject figure of bare life in the concentration camps, exemplifying the absolute expression of the convergence of law and life. No longer able to distinguish between nature and politics, pain and power, the *Musselman* appears immune to the threats of the SS officers against him, and therefore comes to exemplify the kind resistance that can only result from carrying the state of exception to its extreme logical conclusion.<sup>164</sup>

However, beyond this paradigmatic expression of the ultimate convergence of law and life, also exist human beings subject to bare life who still struggle to live “in the world of men”<sup>165</sup> by negotiating and challenging the increasing convergence of law and life in the state of exception in multiple ways. Persons relegated to states of exception are neither neutral nor passive, and they continually act to contest or legitimise not only their treatment within the space that results, but also the decision to place them there.<sup>166</sup> The state of exception, when translated into lived space, can never be purely anomic, devoid of human agency or sociality, but is always a social space where the production of bare life outside of state law can yield new forms of life and alternative forms of law,<sup>167</sup> producing two laws that do not read each other, and creating possibilities for an emancipatory politics.<sup>168</sup> The repetition of norms of sovereignty in creating social space also risks their

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<sup>162</sup> Agamben, G. (*supra* note 14), p. 171.

<sup>163</sup> Pickering, S. (*supra* note 12), p. 158.

<sup>164</sup> Agamben, G., (*supra* note 14), p. 185.

<sup>165</sup> Papastergiadis, N. (*supra* note 108), p. 430, 439.

<sup>166</sup> See Hubbard, P., Kitchin, R., & Valentine, G. (Eds.) (2004). *Key Thinkers on Space and Place* (pp. 209-218). London: Sage Publications, Henri Lefebvre, p. 210.

<sup>167</sup> DeCaroli, S. (*supra* note 4), p. 46.

<sup>168</sup> *Ibid.* See Murray, A. (*supra* note 21), p. 134.

misappropriation in their re-enactment, thus presenting possibilities for sovereignty's transformation.<sup>169</sup> Hence, in the production of the space of exception, the lived experience of such space is fraught with contestation and the production of new norms and orders, and as such can never be wholly hegemonic or totalising. Examining the practices of law and life in refugee spaces of exception therefore reveals not only how bodies are politicised and bare lives produced by state actions, but also how refugees in turn negotiate them. In this respect, the spaces emerging from the decision on the exception are arguably far more nuanced.

In light of these concerns, this thesis investigates the means by which sovereignty and state of exception are expressed and contested spatio-temporally. Scholars have called for critical examinations of how sovereign exceptionalism functions and is socially expressed. To counter the normative force of sovereignty underlying failures in refugee protection, Schramm and Kottow advocated for a bioethics of protection that profanes the frontiers between the rule of law and the state of exception by revealing specifically how sovereignty and governmentality operate to reproduce refugees continually in their bare lives.<sup>170</sup> In another project of profanation, in *Remnants of Auschwitz: The Witness and the Archive*, Agamben investigated the role of witnessing and testimony that can operate as a form of memorial.<sup>171</sup> He argued that "speaking Auschwitz" (or bearing witness) provides a challenge to the notion that the state of exception is too horrific to be speakable, and it exposes the link between the camps and the law, moving the camps from a mystical, fetishised realm beyond law's reach to a sphere where they may be articulated and their relation to law exposed.<sup>172</sup>

Kennedy also called for an examination of how hierarchy and domination are reproduced when the spaces in between the centres and peripheries come to construct knowledge of one another, and "walls and will" reinforce differences

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<sup>169</sup> Mills, C. (*supra* note 95), pp. 136, 139.

<sup>170</sup> Schramm, R. & Kottow, M. (2001). Bioethical principles in public health: Limitations and proposals'. *Cad Saúde Pública*, 17 (4), 949-956.

<sup>171</sup> Agamben, G. (*supra* note 150).

<sup>172</sup> Ibid. See McKim, J. (2008). Agamben at ground zero: A memorial without content. *Theory Culture Society*, 25, 83-103, p. 100.

between them.<sup>173</sup> Mapping the terrain of exceptional spaces is critical for locating areas for analysis and contestation, rather than rendering them a legal black hole and a “site of dogmatic rejection”.<sup>174</sup> It is important to understand, as Latour advised, how sovereignty is “rooted and routed” in practices, to produce “insides and outsides”, to “subjectify and objectify”, to create shared notions of place that empower, reinforce, and remake particular economic, political, and social orders.<sup>175</sup> It is necessary to map the spaces that expose how power and knowledge function to produce the present.<sup>176</sup> Categories of inclusion and exclusion are ultimately spatial relationships and “geometries of negativity”<sup>177</sup> occupied by figures projected by a society attempting to position itself in contrast to those deemed less than human.<sup>178</sup>

Perhaps, then, exposing the legal and normative processes at play in asserting the logic of sovereignty and statist hierarchies in the spaces of the Iraqi refugee crisis may serve as a form of human *praxis* exposing the devices that tie law to life. Towards such a project of deconstruction, exposure, and profaning borders, subsequent chapters of this thesis examine the practices of the Iraqi refugee protection regime as it was enacted in social space. They consider whether these practices reproduced or challenged the logic of sovereignty, created or recouped refugee bodies, and normalised the inclusion or exclusion of refugees, and in the process whether such contested assertions of sovereignty also revealed opportunities to expose and unwork the violence and reach of state power.

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<sup>173</sup> Kennedy, D. (2008, January 25). *The mystery of global governance* (Kormendy Lecture). Ohio Northern University, Pettit College of Law) (on file with author), pp. 6, 23.

<sup>174</sup> Dean, M. (*supra* note 101), p. 27.

<sup>175</sup> Hubbard, P., Kitchin, R., & Valentine, G. (Eds.) (*supra* note 166). Bruno Latour, p. 205. *See* *ibid.*, Editors’ Introduction, pp. 9-10.

<sup>176</sup> *Ibid.*, Michel Foucault, p. 124.

<sup>177</sup> Major-Poetzl, P. (1983). *Michel Foucault’s archaeology of western culture: Towards a new science of history*. Brighton: Harvester Press, p. 120.

<sup>178</sup> Elden, S. (2001). *Mapping the present: Heidegger, Foucault and the project of a spatial history*. London: Continuum, pp. 94-95.

#### IV. Reproducing the logic of sovereignty through governmentality

How might one map the workings of sovereignty revealed by interactions of law and politics in the social spaces of the Iraqi refugee crisis, recognising that these spaces were fraught with contestation and populated and produced by multiple actors? Foucault's theory of governmentality provides an approach to this kind of exercise. He argued that power in the era of biopolitics is not solely state-centred. It is also expressed through a variety of individuals and institutions assuming roles in governing and regulating themselves and each other. Formal techniques of government are being displaced by informal techniques, and new actors are appearing within the field, transforming constructions of statehood, while preserving state power.<sup>179</sup> Political techniques of power over life and care of individuals, both through state law and individual forms of micropower, infiltrate every level society. They develop, sustain, and ultimately normalise specific economic processes and constructions of statehood by segregating bodies through the creation of hierarchies to ensure relations of domination and hegemony.<sup>180</sup>

Schmitt's constitutional state has thus evolved into Foucault's regulatory state. The state, according to Foucault, is now "nothing more than the mobile effect of a regime of governmentality [...] It is necessary to [...] analyze the problem of the state by referring to practices of government,"<sup>181</sup> which function as technologies of power in the continual constitution of the state and the logic of sovereignty. Johns similarly argued that states do not have a monopoly on all political decisions and that there is a much broader range of decisions made by a much wider range of "agents,

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<sup>179</sup> Lemke, T., (2000). Foucault, governmentality, and critique. Paper presented at the *Rethinking Marxism Conference*, University of Amherst (MA), Sept. 21-24, 2000, p. 11.

<sup>180</sup> Ibid.; Foucault, M. (1979). *La phobie d'état* (Excerpt from the lecture of 31<sup>st</sup> January 1979 at the Collège de France, June 1984) *Libération* 967 (30/31), 21, p. 21; Foucault, M. (*supra* note 80), p. 141. See Sicakkan, H. (2008). Political asylum and sovereignty-sharing in Europe. *Government and Opposition*, 43 (2), 206-229, p. 210; Pickering, S. (*supra* note 12), p. 158; Sparke, M. (2006). A neoliberal nexus: Economy, security and the biopolitics of citizenship on the border. *Political Geography*, 25, 151-180, p. 170.

<sup>181</sup> Foucault, M. (*supra* note 180), p. 21.



aggregations or arrogations” than what was envisioned by Schmitt.<sup>182</sup> Rabinow and Rose also called for a more nuanced account of sovereign power in contemporary society in order to understand better the current rationalities and technologies used to serve this power.<sup>183</sup>

Foucault differed from Agamben in that he tended to treat sovereignty as a product of power relations rather than as an originary force, arguing that sovereignty also depends upon microphysics of power for its legitimacy. Rather than focusing on how the norm is suspended as Agamben does, Foucault asked how the norm is produced through mechanisms operating behind or beneath the law.<sup>184</sup> Butler attempted to reconcile the tension between Foucault’s theory of governmentality and Agamben’s theory of sovereignty by proposing that they are not mutually exclusive. Rather, biopolitics expressed in governmentality permit the bureaucratic establishment of administrative regulations that obfuscate, under the cover of para-legal rules and their discretionary application by bureaucrats,<sup>185</sup> the hidden sovereign power to decide upon the exception.<sup>186</sup> This also permits the institutionalisation and appropriation of ideologies of sovereignty through the normative practices of individuals and institutions.

The logic of sovereignty is reproduced and re-emerges within the field of governmentality in hidden forms,<sup>187</sup> increasingly unhinged from the law intended to constrain it as law becomes replaced by bureaucratic and technocratic techniques of management.<sup>188</sup> In this field, the power of the state is dispersed and decentralised, assuming what McRobbie termed “spatial and bodily characteristics”, and

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<sup>182</sup> Johns, F. (2005). Guantanamo Bay and the annihilation of the exception. *European Journal of International Law*, 16 (4), 613-635, p. 633, referring to Schmitt, C. (1996). *The concept of the political* (G. Schwab, Trans.). Chicago: University of Chicago Press, p. 37.

<sup>183</sup> Rabinow, P. & Rose, N. (2003, October 1). *Thoughts on the concept of biopower today* (Lecture), at <[http://www.molsci.org/research/publications\\_pdf/Rose\\_Rabinow\\_Biopower\\_Today.pdf](http://www.molsci.org/research/publications_pdf/Rose_Rabinow_Biopower_Today.pdf)>, pp. 11-12.

<sup>184</sup> Lemke, T. (2005). ‘A zone of indistinction’- A critique of Giorgio Agamben’s concept of biopolitics. *Outlines-Copenhagen*, 7 (1), 3-13, p. 7.

<sup>185</sup> See Lipsky, M. (1980). *Street-level bureaucracy: Dilemmas of the individual in public services*. New York: Russell Sage, p. 3.

<sup>186</sup> Butler, J. (*supra* note 19), p. 96.

<sup>187</sup> *Ibid.*, pp. 58, 60, 62.

<sup>188</sup> *Ibid.*, p. 96.

sovereignty becomes “embodied, corporeal, and bio-political”.<sup>189</sup> Governmentality consists of procedures that spatially distribute and make visible and rationalise the individual body towards the purpose of increasing its useful force in the production of the logic of sovereignty.<sup>190</sup>

For example, while the exceptional space of Guantanamo was arguably extra-legal, once the decision on the exception had been made to detain individuals there indefinitely as enemy combatants, they were then subjected to techniques of heavy regulation and rules, in which “rightlessness” coexisted with “lawfulness”, and inmates became legal objects rather than legal subjects.<sup>191</sup> In a related vein, Agamben himself described how historically, the state of exception was represented by the legal system’s attempt to include its own exception through invoking rights of self-defence, *inter alia*,<sup>192</sup> creating a space in which the sovereign power to suspend the rule of law became masked by legal rationalities and regulations. It is at this point that the sovereign decides upon the political relevance of life, and when finding life without value, subjects it to “the pure exercise of technique”.<sup>193</sup> The logic of sovereignty is reproduced and normalised through techniques of governmentality that transform life into bare life.<sup>194</sup>

Butler’s proposition is a useful a way of conceptualising how legal rationalities, regulations, norms,<sup>195</sup> and administrative processes within the refugee protection regime were used as “bureaucratic fig leaves to conceal the raw power of the

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<sup>189</sup> McRobbie, A. (2006). Vulnerability, violence and (cosmopolitan) ethics: Butler’s *Precarious life*. *The British Journal of Sociology*, 57 (1), 69-86, p. 76.

<sup>190</sup> Arán, M. & Peixoto Júnior, C. (*supra* note 151), p. 851.

<sup>191</sup> Kennedy, D. (*supra* note 173), p. 20; Wilke, C. (2005). ‘War vs. justice’: Terrorism cases, enemy combatants and political justice in US courts. *Politics and Society*, 33, 637-669, p. 62; Gregory, D. (*supra* note 71), p. 413. Johns, F. (*supra* note 182) argues that the proliferation of rules at Guantanamo was more of an example of a retreat of the exception as they operated to prevent administrators from having to make a decision on the exception.

<sup>192</sup> Agamben, G. (2005) (*supra* note 70), p. 43.

<sup>193</sup> *Ibid*, p. 854.

<sup>194</sup> *Ibid*, p. 855.

<sup>195</sup> Norms are not identical with either the law or rules: “‘While norms govern social action, they are nevertheless irreducible to that action, and the independence of the norm means that the norm governs intelligibility, allows for certain kinds of practices and action to become recognizable as such.’ A norm does not have ontological status in itself, but instead “only persists as a norm to the extent that it is acted out in social practice [. . .] reidealized and reinstituted in and through the daily social rituals of bodily life’ (48).” Mills, C. (*supra* note 95), p. 138, referencing Butler, J. (2004). *Undoing gender*. New York: Routledge, pp. 41, 42, 48.

sovereign to decide” upon the exception and to produce refugee spaces.<sup>196</sup> The technologies of regulation employed by both state and non-state actors often concealed their functions as sovereign decisions on life. However, at times these technologies also produced new configurations of political and legal ordering in space, either reproducing the logic of sovereignty as the norm or contesting certain expressions of it.

Subsequent chapters of this thesis therefore examine the legal and normative practices, which functioned as technologies of power both producing and reconstituting sovereignty in the spaces of the Iraqi refugee crisis, as practices of governmentality. They theorise how such practices collectively provided rationalities, produced new meanings, fetishised the imaginary of the international state system, reproduced the logic of sovereignty, and normalised the state of exception. They then consider how the repetition and re/performance of these practices in social, territorial, and bodily space also produced gaps and inconsistencies in the logic of sovereignty – suggesting opportunities for its own exposure and undoing, as it was contested or appropriated in projects that countered the authority of the state.

## **V. Theorising spaces of exception in the Iraqi refugee crisis**

Based upon the theoretical framework outlined above, each of the following chapters in this thesis begin with a survey of the sets of practices enacted through governmentality that functioned as sovereign decisions in the spaces of the Iraqi refugee crisis, and then follow with an exegesis on the implications of these practices for the workings of sovereignty in the field of refugee protection. These chapters are based upon four primary spaces that emerged in the Iraq war and subsequent refugee crisis: the space of the war that produced the initial displacements of refugees, the spaces of asylum and exile in host states in the Middle East, the spaces

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<sup>196</sup> Salter, M. (*supra* note 6), p. 377.

of encampments along the borders of Iraq and its neighbours, and the spaces of resettlement from the Middle East to states in the global north.

Each space of the Iraqi refugee crisis was identified and conceptualised according to the theoretical structure of sovereignty:<sup>197</sup> There were distinctions imposed between law's inside and outside, the norm and the emergency, providing the basis for deciding upon the exception and limiting refugees' access to the *polis* of their host states to varying degrees based upon the relative threat they posed to the security of the state. These distinctions, grounded in biopolitical categories and constructions of refugees and internally displaced persons, both served as devices for deciding upon the inclusion or exclusion of bodies and legitimising the governance of bodies on either side of the divide. And the materialisation of legal exceptionalism in each of these spaces, as it was realised in biopolitical and territorial terms, worked not only to produce the state of exception, but also to expose the violence of it.

These spaces were also characterised by the increasing convergence of the norm and exception, which contained the seeds for sovereignty's own undoing, as its logic was undermined, and the violence of its power was exposed. As the line between persons as political beings entitled to rights and persons as bodies trying to survive began to blur, humanitarian aid began merge with human rights protection, and discretion often supplanted obligation in state responses to the forcibly displaced. The refugee crisis could only be viewed as an emergency within the state system, and as it became protracted, it represented the increasing convergence between the exception and the norm. Hence, the normal response to it was to govern and manage the refugees according to decisions on the exception. At the same time, inherent contradictions were revealed in this merging of law and life, in which the refugees, by virtue of their very existence and often resistance, sometimes in concert with UNHCR, exposed the violent underside of state sovereignty, denaturalised it, and revealed it as an ideology. Such contradictions also created

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<sup>197</sup> See Diken, B. and Laustsen, C. (*supra* note 93), p. 443.

opportunities for considering the forms of life and political ordering that could emerge alongside or even beyond the parameters of a state-centric conception of sovereignty and responsibility for refugee protection.

## Chapter 2

### “I am Iraq”: Law, life, and violence in the formation of the new Iraqi state\*



Source: Children of Iraq Association-UK™  
available at: <http://www.coia.org.uk/>

#### I. Introduction

Following the 2003 war in Iraq, the Children of Iraq Association published a photograph of a small girl standing in a field of rubble, holding a hand-drawn sign stating, “I am Iraq”.<sup>1</sup> While evocative in its own right, raising poignant questions about the human costs of war, this image also revealed the biopolitical cast of a sovereign exceptionalism that led to the invasion of Iraq and its devastating

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\* Part of this chapter was published as an article by the author in 2011: Ali, P. (2011). “I am Iraq”: Law, Life and Violence in the Formation of the Iraqi State. *Utrecht Law Review*, 7 (2), 4-28.

<sup>1</sup> See <http://www.coia.org.uk/>.

aftermath. International military forces, state actors, and insurgent militias, in their violent bids to assert their claims for authority in crafting a new Iraqi state, realised their visions of who would belong within its borders in bodily terms. They conflated state with society, categorised citizens according to their ethno-sectarian identities, and targeted those deemed unworthy of protection with extreme violence, forced displacement, and often death.

This chapter investigates how law, life, and violence combined to configure sovereign power in the spaces produced by the 2003 invasion of Iraq and the subsequent rise of the insurgency, which led to the forced displacement of nearly 4 million persons, 2 million of whom fled to neighbouring countries. It considers how sovereignty was produced and maintained through political and legal practices – technologies of power – which were exercised upon the bodies of the population and territory of the state. Towards this project, the chapter first maps the technologies of power that were employed in the invasion of Iraq, its subsequent occupation, and the creation of the new Iraqi state. These technologies worked in concert to produce the space of displacement that constituted the Iraqi refugee crisis. It next considers how these technologies were also spatial practices of territorialisation and citizenship in the formation of the new Iraqi state, as they enabled both the spatiotemporal expression and contestation of sovereignty at the levels of the international state system, within the context of the state formation process, and through decisions on the life of the population. Finally, this chapter reflects upon the challenges that these new configurations of sovereignty posed not only for the future of the Iraqi state, but also for sovereignty's traditional grounding in the citizen/nation/state nexus and its legitimation through law.

## **II. Mapping the spaces of exception in the Iraq war**

Technologies of power that functioned as decisions on the exception, including international law, state legislation, institutional policies, and normative assertions of

micro-power by individuals and groups, proliferated within Iraq as international, state officials, and non-state actors produced legal justifications and normative discourses to legitimise their competing claims for control of the state. In the process, both the logic of sovereignty, located in the power to decide upon the exception, and the increasing centrality of the exception to the constitution of the political order were replicated, expanded, and refracted across the spaces of political territories and human bodies. In mapping how these technologies translated states of exception into political and juridical spaces of exception in the invasion of Iraq and its aftermath, the following section identifies and details five categories of technologies employed in the Iraq war. They include normative discursive practices and legal justifications for military intervention; the installation of neoliberal democratic governance; the imposition of functional states of emergency; the violent expression of ethno-sectarian normativity; and the politicisation of humanitarian aid. Following this mapping exercise, an exegesis reflects upon the kinds of spaces produced by these technologies of power and their implications for the understanding sovereignty and the state of exception as a theory of space.

### **A. Legal justifications for the war in Iraq**

The normative discourses and legal justifications for military intervention and the use of force in Iraq were a key set of spatial practices that produced and expanded the logic of sovereign exceptionalism and contested specific relationships between states within the international order and the law that governs them. Both the demarcation of outlaw states and assertions of political authority beyond state territory in defiance of international law challenged traditional conceptions of sovereignty in the international state system.

The exception of Iraq from equal status with other states in the international system started from the time of its creation under a British mandate and appeared in various iterations throughout the state's short history, particularly in its later



struggles under a devastating sanctions regime. Norms that legitimated such exceptional treatment were reproduced in the discursive practices employed by the Bush administration to build support for the US-led intervention in 2003. President Bush stated that "this is a regime that has something to hide from the civilized world",<sup>2</sup> which harkened back to the earlier designation of Iraq as a "rogue state", and in his State of the Union address, he named Iraq as part of the "axis of evil".<sup>3</sup> This discourse was driven by a neoconservative agenda of using unilateral US military and political intervention in Iraq to promote neoliberal democracy and to position the US on the side of the "good and virtuous" and Saddam Hussein as the epitome of evil,<sup>4</sup> a politics characterised by some as "democratic imperialism".<sup>5</sup>

The Bush Administration also capitalised upon the 9/11 terror attacks by focusing on Iraq as the primary source of terrorist threats against Americans, linking the alleged presence of weapons of mass destruction (WMDs) in Iraq with terrorism. In two speeches in August 2002, Vice President Cheney publicly accused Saddam Hussein of using WMDs to politically dominate the Middle East and to threaten US access to oil.<sup>6</sup> In a speech to the UN General Assembly, President Bush stated that the US' "greatest fear is that terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale",<sup>7</sup> and US Secretary of State Colin Powell suggested links between the state of Iraq and terrorist groups in his remarks to the UN Security Council.<sup>8</sup>

What were the productive purposes and effects of such rhetoric? Zunes argued that the focus on nuclear proliferation provided a pretext for ongoing US military presence in the Middle East and for attacking any states which challenged its

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<sup>2</sup> Office of the Press Secretary, US White House (2002, January 29). President delivers state of the union address.

<sup>3</sup> Ibid.

<sup>4</sup> Herring, E. & Rangwala, G. (2006). *Iraq in fragments: The occupation and its legacy*. London: Hurst & Company, p. 7.

<sup>5</sup> Daalder, I. & Lindsay, J. (2003). *America unbound: The Bush revolution in foreign policy*. Washington, D.C.: Brookings Institution Press, pp. 46-47.

<sup>6</sup> Office of the Press Secretary, US White House (2002, August 26). Vice President Speaks at VFW 103d National Convention, <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/08/20020826.html>>; Office of the Press Secretary, US White House (2002, August 29). Vice President Honors Veterans of Korean War, <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/08/20020829-5.html>>.

<sup>7</sup> Bush, G.W. (2002, September 12). Remarks at the United Nations General Assembly, New York.

<sup>8</sup> Powell, C. (2003, February 5). Remarks to the United Nations Security Council.

dominance,<sup>9</sup> thereby asserting its power as a "world sovereign".<sup>10</sup> This expression of expanded sovereign power was the most recent iteration of similar positions adopted in the 1992 Defense Planning Guidance paper,<sup>11</sup> the neoconservative 1997 Project for the New American Century paper *Rebuilding America's Defenses*,<sup>12</sup> the 1998 Iraq Liberation Act stating that the official US policy was to support efforts to remove Saddam Hussein's regime in order to replace it with a democratic government,<sup>13</sup> and the 2002 US National Security Strategy.<sup>14</sup>

This discursive regime framed both the problem and the solutions conceptualised by proponents of the military intervention in Iraq. Therefore, although there were neither direct evidence of the alleged development of a WMDs program in Iraq,<sup>15</sup> nor a founded link between Iraq and the 9/11 attacks,<sup>16</sup> the Bush Administration still argued that military action was needed to prevent the spread of WMDs, cause a regime change, and promote democracy in Iraq for the benefit of its population.<sup>17</sup> In support of this project, the UK affirmed its commitment to regime change in July 2002.<sup>18</sup> On 16 October 2002, the US Congress passed the resolution P.L. 107-243, authorising the President to use the US military to defend the US' national security from the threat posed by Iraq.<sup>19</sup> On 8 November 2002, the UN Security Council (UNSC) passed Resolution 1441, giving Iraq a "final opportunity" to

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<sup>9</sup> Zunes, S. (2004). The US obsession with Iraq and the triumph of militarism. In T. Ismael & W. Haddad (Eds.) *Iraq: The human cost of history*, 167-215, London: Pluto Press, pp. 173, 175, 183.

<sup>10</sup> See Gregory, D. (2006). The black flag: Guantánamo Bay and the space of the exception. *Geographical Analysis*, 88 B (4), 405-427, p. 410.

<sup>11</sup> Wolfowitz, P. (1992). *Defense planning guidance*. US Department of Defense.

<sup>12</sup> Project for the New American Century (2000, September). *Rebuilding America's defenses: Strategy, forces and resources for a new century*, pp. 14, 17.

<sup>13</sup> Iraq Liberation Act of 1998 (1998, October 31). H.R. 4655, Public Law 105-388, 105<sup>th</sup> United States Congress.

<sup>14</sup> US White House (2002, September). *The national security strategy of the United States of America*.

<sup>15</sup> Hallenberg, J., & Karlsson, H. (2005). *The Iraq war: European perspectives on politics, strategy and operations*. London and New York: Routledge, p. 234. See Zunes, S. (*supra* note 9), p. 168; Butler Commission (2004, July 14). Review of intelligence on weapons of mass destruction: Report of a committee of privy counsellors. UK House of Commons. HC 898; US Senate (2004, July 7). Senate report on the US intelligence community's pre-war intelligence assessments on Iraq.

<sup>16</sup> See Scheer, R. (2002, May 7). President Bush's wag-the-dog policy on Iraq. *Los Angeles Times*.

<sup>17</sup> Katzman, K. (2003). U.S. policy. In R. Copson (Ed.) *The Iraq war: Background and issues*. New York: Novinka Books (excerpted from CRS Report RL31715), p. 10.

<sup>18</sup> See the "Downing Street Memo": UK Prime Minister (23 July 2002) Iraq: Prime Minister's meeting 23 July.

<sup>19</sup> US Congress (2002, October 10). Authorisation for the use of military force against Iraq, Resolution of 2002 107<sup>th</sup> US Congress.

"comply with its disarmament obligations" or "face serious consequences".<sup>20</sup> With the exception of Britain, however, most states were not ready to agree to a resolution calling for military action against Iraq. The US responded by proposing a resolution concluding that Iraq had failed to take the "final opportunity" in Resolution 1441, which suggested that the US recognised a further resolution was legally required to authorise the use of force, but this was tabled for lack of support.<sup>21</sup>

Therefore, the US in its "preemptive self-defense" policy,<sup>22</sup> and the UK in its "revival doctrine",<sup>23</sup> turned to the argument that the use of force was already legally authorised.<sup>24</sup> Attorney General Lord Goldsmith of the UK issued opinions on 7 and 17 March 2003, first recommending a UNSC resolution authorising the use of force, and then ten days later reversing his position, concluding in a short statement that the use of force without a UNSC resolution would be lawful.<sup>25</sup> Similarly, the White House reported to Congress on 19 March 2003 that the material breach of UNSC Resolution 687<sup>26</sup> revived the authorisation to use force under its previous Resolution 678.<sup>27</sup> These assertions were further supported by legal scholars Ruth Wedgwood in the US and Christopher Greenwood in the UK.<sup>28</sup>

The US and the UK then unilaterally declared Iraq to be in violation of Resolution 1441 and gave Saddam Hussein and his sons 48 hours to give up power and leave Iraq. On 20 March 2003, the Coalition Forces, led by the US, launched Operation

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<sup>20</sup> UNSC (UNSC) (2002, November 8). Resolution 1441 (UN Doc. S/2002/1294).

<sup>21</sup> See Sands, P. (2005). *Lawless world: America and the making and breaking of global rules from FDR's Atlantic Charter to George W. Bush's illegal war*. USA: Penguin, pp. 185-186.

<sup>22</sup> See US White House (*supra* note 14), p. 15; Report in connection with Presidential determination under Public Law 107-243 (2003, March 19). H. Doc. 50, 108<sup>th</sup> US Congress, 1<sup>st</sup> Session; Bush, G.W. (2002). *Remarks at the 2002 graduation exercise of the United States Military Academy, Washington*; Bush, G.W. (2003). Remarks by the President in address to the nation. The Cross Hall; Simspon, G. (2005). The war in Iraq and international law. *Melbourne Journal of International Law* 6, 167-188, p. 171.

<sup>23</sup> See UK Attorney General Lord Goldsmith (17 March 2003). Statement by the Attorney General, Lord Goldsmith, in answer to a parliamentary question.

<sup>24</sup> Sands, P. (*supra* note 21), p. 187.

<sup>25</sup> UK Attorney General Lord Goldsmith (7 March 2003). Iraq: Resolution 1441 (Note to the Prime Minister of 7 March 2003); UK Attorney General Lord Goldsmith (*supra* note 23).

<sup>26</sup> UNSC (1991, April 3). Resolution 687 (UN Doc. S/RES/687).

<sup>27</sup> UNSC (1990, November 29). Resolution 678 (UN Doc. S/RES/678).

<sup>28</sup> Wedgwood, R. (2003). The fall of Saddam Hussein; Security Council mandates and pre-emptive self-defense. *American Journal of International Law* 97(579), 576-585; Greenwood, C., CMG, QC (2005, March 21). The legality of using force against Iraq. Select Committee on Foreign Affairs.

Iraqi Freedom with an aerial bombing campaign and ground troop invasion from Kuwait. They secured Iraq's oil facilities and then entered Baghdad. The combat operations were declared ended on 1 May 2003,<sup>29</sup> and Saddam Hussein was captured seven months later,<sup>30</sup> tried in an Iraqi tribunal in 2005, and executed the following year.<sup>31</sup>

The Coalition Forces sought recognition by the UNSC post-invasion, successfully securing the passage of US-sponsored Resolution 1483, recognizing the UK and the US as "occupying powers under unified command" in Iraq and involving the UN in post-war reconstruction.<sup>32</sup> However, critics argued that this was effectively a "legalisation of the outcome of an illegal invasion",<sup>33</sup> giving the appearance of multilateralism to a unilateral act, imbuing the concept of democracy with "legal sophistry and political manipulation",<sup>34</sup> and providing a "veneer of non-proliferation law cover"<sup>35</sup> at the least and formal legalism at the most.<sup>36</sup> Similarly, the sudden about-face in legal opinions adopted by the US and UK governments that the invasion was permitted under international law also arguably masked a moment of exceptionalism. In keeping with these contentions, in 2004 the UN Secretary General Kofi Annan publicly declared that the Iraq war was illegal.<sup>37</sup>

## B. Instilling neoliberal democracy

Following the war, US neoliberal policies of reconstruction, economic liberalisation, and sectarian apportionment of Iraq's government were also

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<sup>29</sup> Cleveland, W. (2004). *A history of the modern Middle East* (3<sup>rd</sup> ed.). USA: Westview Press, pp. 545, 547.

<sup>30</sup> UNSC (2004, February 24). 4914<sup>th</sup> Meeting (UN Doc. S/PV.4914).

<sup>31</sup> BBC (2009, December 31). Timeline: Iraq. See Harding, J. (2004). *After Iraq: War, imperialism and democracy*. California: Fernwood Publishing, p. 32; Ridha, J. (2004). The trouble with the tribunal: Saddam Hussein and the elusiveness of justice. *Middle East Report*, 34 (3) (232), 40-43.

<sup>32</sup> UNSC (2003, March 28). Resolution 1483 (UN Doc. S/2003/1483).

<sup>33</sup> Hallenberg, J. & Karlsson, H. (*supra* note 15), p. 239.

<sup>34</sup> Shiner, P. (2008). The Iraq war, international law and the search for accountability. In P. Shiner & A. Williams (Eds.). *The Iraq war and international law*, 17-54, Oxford: Hart Publishing, p. 54.

<sup>35</sup> Joyner, D. (2008). The challenges of counter-proliferation: Law and policy of the Iraq intervention. In P. Shiner & A. Williams, *ibid.*, p. 78, citing Sands, P. (*supra* note 21), pp. 182-184.

<sup>36</sup> Žižek, S. (2006). *The universal exception*. London: Continuum, p. 298.

<sup>37</sup> BBC (2004, September 16). Iraq war illegal, says Annan.

technologies that facilitated new configurations of exceptionalism and expressions of sovereignty. They institutionalised the power of the Coalition Forces, debilitated the Iraqi population, and deepened the sectarian divisions in Iraq.

Assuming that most Iraqis would welcome the invasion, embrace democracy,<sup>38</sup> and initiate state-building from within, the Bush administration devoted scant resources to planning what would happen after Saddam Hussein was deposed.<sup>39</sup> The initial post-war state-building plan in the US State Department's "Future of Iraq" project<sup>40</sup> was severely undermined by bureaucratic rivalry and lack of communication across agencies in Washington, D.C.<sup>41</sup> The US Pentagon's Office of Special Plans eventually won out over this project in supervising the reconstruction of Iraq.<sup>42</sup> Leaders were selected from exiled Iraqi and Kurdish political groups allied with the US Department of Defense to form the Iraqi Interim Authority (IIA) mandated to draft a new constitution and hold elections. The process was envisioned as a rapid transition to democracy, which would occur within a few months, enabling the new government to implement longer-term strategies of state-building. Hence, the US Office of Reconstruction and Humanitarian Assistance (ORHA) dealt more with immediate humanitarian crises resulting from the invasion than long-term reconstruction needs.<sup>43</sup>

However, this thinking proved to be short-sighted. The Bush administration replaced the OHRA with the Coalition Provisional Authority (CPA) in May 2003, administered by L. Paul Bremer. However, the CPA was external to Iraqi society, dictating the actions of the IIA.<sup>44</sup> The Iraqi exiles installed in the IIA had little political legitimacy or reach amongst local Iraqis.<sup>45</sup> In addition, the primary focus of the US,

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<sup>38</sup> See Cheney's speech: Office of the Press Secretary, US White House (*supra* note 6).

<sup>39</sup> Herring, E. & Rangwala, G. (*supra* note 4), p. 10.

<sup>40</sup> US Department of State (2003, April). *Duty to the future: Free Iraqis plan for new Iraq*.

<sup>41</sup> Feith, D.J. (2003, January 20). *The future of Iraq*, Senate Hearing 108-43, Senate Committee on Foreign Relations, pp. 20-21, 23-24; Bhatia, M. (2005). Postconflict profit: The political economy of intervention. *Global Governance*, 11, 205-224, p. 219; Mowle, T. (Ed.) (2007). *Hope is not a plan: The war in Iraq from inside the Green Zone*. Westport, Connecticut: Praeger Security International, pp. xi-xii, 141-142.

<sup>42</sup> Feith, D.J. (*supra* note 41), pp. 20-21, 23-24.

<sup>43</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 12-13, 82-83.

<sup>44</sup> Bremer, P. (2003, May 16). Coalition Provisional Authority regulation number 1. CPA/REG/16 May 2003/01; Herring, E. & Rangwala, G., *ibid.*, p. 94.

<sup>45</sup> Herring, E. & Rangwala, G., *ibid.*, p. 15.

prior to the establishment of any democratic process,<sup>46</sup> was to radically liberalise the Iraqi economy and promote corporate-led privatisation and marketisation by abolishing most restrictions on foreign direct investment and permitting foreign domination of the banking sector.<sup>47</sup> In September 2003, every sector of the state economy, except for those dealing with natural resources, was put up for sale, and a 15 percent corporate and individual gains tax was levied.<sup>48</sup> US corporations were awarded the most significant reconstruction contracts in infrastructure, public services, police and judicial training, and military development, which heightened reconstruction costs, crowded out Iraqi companies, and imported cheaper labour from South Asia, despite rampant unemployment in Iraq.<sup>49</sup> These measures displaced the private sector, causing asset stripping,<sup>50</sup> and destabilised the Iraqi business class which was unable to compete.<sup>51</sup>

In addition, many state entities under the former regime were dissolved.<sup>52</sup> More than 30,000 Ba'athist civil servants were removed under the CPA's de-Ba'athification policy,<sup>53</sup> many of whom came under attack for atrocities committed or privileges received under the former regime,<sup>54</sup> and 400,000 police and armed forces were disbanded.<sup>55</sup> In the absence of new forms of government to replace them in the immediate term, the state apparatus was destabilised,<sup>56</sup> and lawlessness began to fill the power vacuum that resulted.<sup>57</sup> This compelled people to turn to

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<sup>46</sup> Harding, J. (*supra* note 31), pp. 161-162.

<sup>47</sup> Beattie, A., (2003, September 22). Iraq to lift curbs on investment. *Financial Post*; Herring, E. & Rangwala, G. (*supra* note 4), p. 17.

<sup>48</sup> Bhatia, M. (*supra* note 41), p. 219.

<sup>49</sup> Pelham, N. (2003, October 14). Contractors in Iraq are accused of importing labor and exporting profit. *Financial Times*.

<sup>50</sup> Bhatia, M. (*supra* note 41), p. 219.

<sup>51</sup> Harding, J. (*supra* note 31), p. 142.

<sup>52</sup> Coalition Provisional Authority (2003, May 23). *Dissolution of entities* (Order No. 2) (CPA/ORD/23 May 2003/02).

<sup>53</sup> Coalition Provisional Authority (2003, May 16). *De-Ba'athification of Iraqi society* (Order No. 1) (CPA/ORD/16 May 2003); Bremer, P. (2003, June 12). US Department of Defense news briefing. This policy was condemned in 2007 by Hoshiyar Zebari, the Minister for Foreign Affairs of Iraq for its failure to differentiate between criminals and non-criminals in the Ba'ath Party, and he announced the drafting of new legislation to remedy these failures. UNSC (2007, June 13) 5693<sup>rd</sup> Meeting (UN Doc. S/PV.5693).

<sup>54</sup> UNHCR (2005, October). *Guidelines relating to the eligibility of Iraqi asylum-seekers*. Geneva, pp. 14-17.

<sup>55</sup> Under Coalition Provisional Authority (*supra* note 52). See Anderson, J.L. (2004, November 15). Out on the street. *New Yorker*.

<sup>56</sup> UNHCR (*supra* note 54), p. 2.

<sup>57</sup> Harding, J. (*supra* note 31), p. 161; Mowle, T. (*supra* note 41), p.10.

vigilante and tribal forms of settling disputes,<sup>58</sup> motivated many of those who were removed from their governmental posts to revolt, and undermined the CPA's reputation, despite its later attempts to rescind some of these measures.<sup>59</sup>

As a consequence of the failures in post-war reconstruction planning and its promotion of neoliberal market reforms, the project to promote a liberal democracy produced "illiberal effects"<sup>60</sup> that, in Foucauldian terms,<sup>61</sup> themselves became instruments of violence against the Iraqi social body. Structural violence was built into everyday life, the economy, political system, and environment,<sup>62</sup> reproducing inequalities in daily life.<sup>63</sup> Hundreds of thousands of Iraqi citizens were forcibly displaced as a result of the failures to restore damaged infrastructure in a timely manner; criminal gangs proliferated,<sup>64</sup> and serious shortages in fuel, water,<sup>65</sup> housing,<sup>66</sup> food,<sup>67</sup> employment,<sup>68</sup> sanitation,<sup>69</sup> and electricity<sup>70</sup> became protracted problems that continued long after the invasion.<sup>71</sup> The NGO Coordination

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<sup>58</sup> UNHCR (2004, September). *UNHCR return advisory regarding Iraqi asylum seekers and refugees*. Geneva, p. 2.

<sup>59</sup> Herring, E. & Rangwala, G. (*supra* note 4), p. 74.

<sup>60</sup> Simpson, G. (2004). *Great powers, outlaw states: Unequal sovereigns in the international order*. Cambridge: Cambridge University Press, p. 78.

<sup>61</sup> See Foucault, M. (1979). *Discipline and punish: The birth of the prison*. New York: Vintage.

<sup>62</sup> See Bornstein, A. (2002). *Crossing the Green Line between the West Bank and Israel*. Philadelphia: University of Pennsylvania Press, pp. 6-7.

<sup>63</sup> *Ibid.*, p. 25. By 2007, one-third of the population lived in poverty. Kälin, W. (2007). A tragedy of increasing proportions: Internal displacement in Iraq. *Forced Migration Review*, June 2007, 14-15, p. 14. Half lived on less than US\$ 1 per day, and half of school-age children did not attend school. See Billing, L. (2007). Iraq's children pay the price of war. *Forced Migration Review: Iraq Special Issue*, June 2007, 42-43; UN Assistance Mission in Iraq (UNAMI) (2007). *Human Rights Report, 1 January – 31 March 2007*, p. 14.

<sup>64</sup> Harding, J. (*supra* note 31), p. 161.

<sup>65</sup> Coalition Provisional Authority (2004). *An historic review of CPA accomplishments*. Iraq: Baghdad, p. 27. By 2007, 70 percent of the population lacked access to potable water. UNHCR (2007, March 30). *Humanitarian needs of persons displaced within Iraq and across the country's borders: An international response* (HCR/ICI/2007/2), p. 6; Oxfam International (2007, July). *Rising to the humanitarian challenge in Iraq*. Briefing Paper.

<sup>66</sup> UNHCR (*supra* note 58).

<sup>67</sup> Severe food shortages resulted from the US privatisation of agriculture. Harding, J. (*supra* note 31), p. 161. Child malnutrition rates doubled as a result. Agence France-Presse (2004, December 19). UNICEF sounds Iraq malnutrition alarm. More than 2 million Iraqis were forced to sell their food rations in order to meet other basic needs. Herring, E. & Rangwala, G. (*supra* note 4), p. 80.

<sup>68</sup> Unemployment rates ranged from 60 to 80 percent. Harding, J. (*supra* note 31), p. 161.

<sup>69</sup> By 2007, 80 percent lacked effective sanitation. UNHCR (*supra* note 65), p. 6; Oxfam International (*supra* note 65).

<sup>70</sup> UNSC (2004, April 16). 4944<sup>th</sup> Meeting (UN Doc. S/PV.4944). See Prados, A. (2003). Implications for the Middle East. In R. Copson (*supra* note 17), p. 60; UNSC (2004, September 14). 5033<sup>rd</sup> Meeting (UN Doc. S/PV.5033).

<sup>71</sup> Harding, J. (*supra* note 31), pp. 83-84; UNHCR (2006, December 18). *UNHCR return advisory and position on international protection needs of Iraqis outside Iraq*. Geneva, p. 2.

Committee in Iraq determined that Iraq had fallen from the status of the most developed country in the Middle East to one more akin to a developing country.<sup>72</sup>

Herring and Rangwala observed that the state was therefore unable to establish itself as the primary service provider, which was critical to the legitimation of its sovereign power and the management of Iraqi society by non-coercive means. Iraqi society began to align itself with political groupings that could better provide access to these services through systems of patronage.<sup>73</sup> These groups were often sectarian in nature, and sought state sponsors for their support, such as the Supreme Council for Islamic Revolution in Iraq (SCIRI), Al-Dawa, and the Islamic Task Organisation.<sup>74</sup> Patronage, re-emerging from Iraq's colonial past as the key mechanism for structuring power outside of the state and binding individuals to specific state personnel, caused political fragmentation, resulting in sectarianism beginning to structure politics and society.<sup>75</sup>

Faced with these setbacks, the US attempted to assume greater direction of the state-building process, a policy presented as necessary until the Iraqis were ready to assume control, paralleling the initial formation of the state of Iraq under the British-administered Mandate established by the League of Nations, and couched in the language of eventual sovereign statehood.<sup>76</sup> This position was reiterated by the UNSC, for example, in its expression of "resolve that the day when Iraqis govern themselves must come quickly";<sup>77</sup> its call upon the occupying powers to work "towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future";<sup>78</sup> and its statement that it looked "*forward* to the day Iraqi forces assume full responsibility for the maintenance of security and stability in their country, thus

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<sup>72</sup> Chulov, M. (2009, December 23). The new Iraq: The bombing goes on, but the building has begun. *The Guardian*.

<sup>73</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 97, 131-132, 136-137, 159.

<sup>74</sup> *Ibid.*, p. 151. See Hashim, A. (2009). *Iraq's Sunni insurgency*. Adelphi Paper 402. Oxon: Routledge, p. 70; UNSC (2005, December 14). 5325<sup>th</sup> Meeting (UN Doc. S/PV.5325).

<sup>75</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 73, 80, 97, 131-132, 136-137, 159.

<sup>76</sup> See Covenant of the League of Nations, The Treaty of Versailles (Part I) (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 288.

<sup>77</sup> UNSC (*supra* note 32).

<sup>78</sup> *Ibid.* para. 4.



allowing the completion of the multinational force mandate and the end of its presence in Iraq".<sup>79</sup>

In controlling the state-building process, the US engaged in practices of sectarian balancing; limited the authority of state institutions; dispersed power between the state apparatus and political parties, local groups, and tribal leaders; and remilitarised society.<sup>80</sup> The IIA was replaced by the Iraqi Governing Council (IGC) on 13 July 2003,<sup>81</sup> again comprised of US-aligned parties in Iraq, including exiles and representatives from the Shi'ah Islamists (SCIRI's Badr Brigades and Al-Dawa), secular US allies (the Iraqi National Congress and the Iraqi National Accord), and the Kurds (the Kurdistan Democratic Party and the Patriotic Union of Kurdistan).<sup>82</sup> The appointments were based upon the relative proportions of sectarian and ethnic groups in Iraq.<sup>83</sup> Although presented as a "representative government", the structure of the IGC prevented the emergence of a cohesive Iraqi political body to administer the state, as each political party represented in the IGC secured control of a different government ministry, appointing its own members as staff.<sup>84</sup> The US constrained the IGC's powers by retaining financial and military control and balancing the IGC's power against that of regional actors by using tribal structures as an alternative power base for the Coalition.<sup>85</sup>

Sectarian divisions continued to deepen in this political climate. On 8 June 2004, the UNSC passed Resolution 1546, declaring the end of Iraq's occupation,<sup>86</sup> and the beginning of its exercise of full sovereignty and independence to be 30 June 2004, when an Interim Government would assume authority<sup>87</sup> in accordance with the 15

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<sup>79</sup> UNSC (2007, December 18). Resolution 1790 (UN Doc. S/RES/1790).

<sup>80</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 57-59, 94, 161, 207, 260-261, 265-266, 269.

<sup>81</sup> UNSC (2003, August 14). Resolution 1500 (UN Doc. S/RES/1500), para. 1.

<sup>82</sup> ICG, pp. 10-12, App. B.

<sup>83</sup> *Ibid.*

<sup>84</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 87-88, 107-108.

<sup>85</sup> *Ibid.*, pp. 87-88, 94, 97, 159; Hashim, A. (*supra* note 74), pp. 21-22; Kimmitt, M. (2003, November 21). *CPA press briefing*.

<sup>86</sup> UNSC (2004, June 8). Resolution 1546 (UN Doc. S/RES/1546), para. 2. See UNSC (2004, March 24). Statement by the President of the Security Council (UN Doc. S/PRST/2004/6); UNSC (2004, June 8). 4987<sup>th</sup> Meeting (UN Doc. S/PV.4987).

<sup>87</sup> *Ibid.*, para. 1. See UNSC (2004, April 27). 4952<sup>nd</sup> Meeting (UN Doc. S/PV.4952); UNSC (2004, April 27). 4953<sup>rd</sup> Meeting (UN Doc. S/PV.4953); UNSC (2004, May 19). 4971<sup>st</sup> Meeting (UN Doc. S/PV.4971).

November 2003 Political Agreement between the Coalition Provisional Authority and the Iraqi Governing Council and Article 2(B)(1) of the Transitional Administrative Law of 8 March 2004.<sup>88</sup> It reaffirmed the presence of Multinational Forces (MNF) authorised under UNSC Resolution 1511 to ensure Iraq's security and stability.<sup>89</sup> The Coalition Forces had already been replaced by the MNF on 15 May 2004, and as of May 2005 were comprised of 160,000 personnel from 28 states.<sup>90</sup>

On 28 June 2004, the Iraqi Interim Government (IIG), headed by Prime Minister Ayad Allawi, replaced the IGC, two of whose Cabinet members were also members of the former IGC,<sup>91</sup> and few of whom represented the marginalised Sunni minority. The IGC's ministers were largely technocrats with limited political affiliations.<sup>92</sup> UN Special Envoy Lakhdar Brahimi conducted extensive consultations with political parties, civic organisations, and tribal, religious, and community leaders prior to the transition in an attempt to build consensus for the structure of this non-elected body, as it was determined that Iraq would not be prepared to hold "genuine and credible" elections by this date.<sup>93</sup> An Independent Electoral Commission was established to oversee the process of elections for the Transitional National Assembly (TNA). Despite such efforts to avoid reinforcing sectarianism in the formation of the IIG,<sup>94</sup> many segments of Iraqi society felt excluded and alienated from the political process.<sup>95</sup> On 30 January 2005, national elections were held for the TNA, resulting in a government dominated by religious Shi'ah and secular Kurds,

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<sup>88</sup> UNSC (2004, June 7). 4984<sup>th</sup> Meeting (UN Doc. S/PV.4984).

<sup>89</sup> Ibid., para. 9-10, Annex; UNSC (2003, October 16). Resolution 1511 (UN Doc. S/RES/1511), para. 13. The mandate for the MNF in Iraq was extended to 31 December 2006 under UNSC (2005, November 8). Resolution 1637 (UN Doc. S/RES/1637), para. 1; UNSC (2005, November 8). 5300<sup>th</sup> Meeting (UN Doc. S/PV.5300), largely due to increased efforts to combat the insurgency; to the end of 2007 under UNSC (2006, November 28). Resolution 1723 (UN Doc. S/RES/1723); and to 31 December 2008 under UNSC (*supra* note 79), para. 1, Annexes I and II, under Chapter VII of the UN Charter as UNSC determined that the situation in Iraq continued to constitute a threat to peace and security.

<sup>90</sup> UNSC (2005, May 31). 5189<sup>th</sup> Meeting (UN Doc. S/PV.5189). The number increased to 30 states by September 2005. UNSC (2005, September 21). 5266<sup>th</sup> Meeting (UN Doc. S/PV.5266).

<sup>91</sup> Dodge, T. (2005, March). *Iraq's future: The aftermath of regime change*. London: International Institute for Strategic Studies, p. 36; UK Foreign and Commonwealth Office (2007). *Country profile: Iraq*.

<sup>92</sup> UNSC (*supra* note 88).

<sup>93</sup> Ibid.; UNSC (2004, June 3). 4982<sup>nd</sup> Meeting (UN Doc. S/PV.4982).

<sup>94</sup> UNSC (*supra* note 88).

<sup>95</sup> UNSC (2004, December 13). 5099<sup>th</sup> Meeting (UN Doc. S/PV.5099).

with the notable absence of significant Sunni participation,<sup>96</sup> although the US hailed the elections as a step forward for democracy in Iraq.<sup>97</sup> In April, Kurdish leader Jalal Talabani was appointed as President and Shi'ah leader Ibrahim Jaafari as Prime Minister.

The referendum of 15 October 2005 to approve the new Constitution,<sup>98</sup> reinforced sectarianism further, fostering the development of extreme forms of sectarianisation and providing fodder for recruitment to opposition militias.<sup>99</sup> Although Sunni Arabs were included in the drafting committee,<sup>100</sup> they were marginalised in the drafting process and their objections overridden. The constitution set out a federalist structure, but ensured that oil resources would be distributed across federalist lines, away from Sunni-dominated oil-rich governorates. Except for the Iraqi Islamic Party, no other Sunni Arab political group supported the constitution. A two-thirds majority vote against the constitution in three governorates was required to veto it, and Sunni Arab parties unsuccessfully tried to use this provision to block the constitution.<sup>101</sup>

From 22 April to 8 June 2006, the new constitutionally elected Iraqi government was inaugurated, with President Jalal Talabani and a cabinet led by Prime Minister Nouri Kamel Al Malaki, a move welcomed by the President of the UNSC as achieving a significant benchmark in the political process.<sup>102</sup> However, in August 2007, Iraq's main Sunni Arab political party, the Iraqi Accordance Front, withdrew from the cabinet following a disagreement about power-sharing. In response, the Kurdish and Shi'ah leaders attempted to form an alliance in support of the government, but were unable to bring back the Sunni leaders until the following year.<sup>103</sup> Following a split in the Shi'ah United Alliance, which had won the 2005 elections, the Prime Minister Al

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<sup>96</sup> UNSC (2005, February 16). 5123<sup>rd</sup> Meeting (UN Doc. S/PV.5123); UNSC (2005, April 11). 5161<sup>st</sup> Meeting (UN Doc. S/PV.5161); Herring, E. & Rangwala, G. (*supra* note 4), pp. 33-34.

<sup>97</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 33-34. See UNSC (*supra* note 87).

<sup>98</sup> UNSC (*supra* note 89).

<sup>99</sup> See Brubaker, R. (2004). *Ethnicity without groups*. Cambridge: Harvard University Press, p. 20.

<sup>100</sup> UNSC (*supra* note 96).

<sup>101</sup> Mowle, T. (*supra* note 41), p. 9.

<sup>102</sup> UNSC (2006, May 24) 5444<sup>th</sup> Meeting (UN Doc. S/PV.5444); UNSC (2006, June 15) 5463<sup>rd</sup> Meeting (UN Doc. S/PV.5463).

<sup>103</sup> BBC (2010, August 19). Iraq timeline.

Maliki formed the State of Law, an alliance of 40 political parties. Then in 2010, after a controversy over the banning of candidates with suspected links to the former Ba'ath party from participating in parliamentary elections, the ban was overturned in court. However, the elections of March 2010 resulted in a parliament with no majority party, and in August of that year, the two main political blocs suspended further talks on the formation of the government, thereby resulting in a stalemate.<sup>104</sup>

Through these architectures that enabled the exclusion of particular sectarian groups, Iraq had emerged as the site of competition for sovereign rule, rife with political tensions, and producing sectarian aspirations for control of the state-building process. Although opinion polls showed that the majority of Iraqis desired a strong centralised authority in the state, the institutionalisation of sectarianism, the fragmentation of power, the externalisation of the state from civil society, and the state's dependence upon foreign actors for its authority<sup>105</sup> resulted in a proliferation of claims upon Iraqi sovereignty.

### **C. States of emergency**

The states of emergency that led to the lifting of legal protections, ambiguities in the application of the law, and increasing militarisation of Iraq in response to the rise of the insurgency were further politico-legal technologies that enabled new expressions and iterations of sovereignty and exceptionalism in Iraq. In the face of increasing sectarianism and political fragmentation, a predominantly Sunni Arab insurgency emerged,<sup>106</sup> pitting their bids for sovereign power against the assertions of the Coalition Forces' control over the political process and the claims of certain Shi'ah and Kurdish parties to the authority of the state. As the police chief of Basra

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<sup>104</sup> Ibid.

<sup>105</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 271-273.

<sup>106</sup> Mowle, T. (*supra* note 41), p. 140.

aply noted in 2007, "Each party believes that it represents the law, and each element thinks of himself as a state hero."<sup>107</sup>

Perceiving the government as primarily Shi'ah in composition, the Sunni Arabs believed that without US backing, it would collapse.<sup>108</sup> The insurgent groups were largely nationalist Islamists, all arguing the legitimacy of their cause against an illegitimate occupation and government, although they differed in some ways ideologically and in the scope of their goals. They included groups variously comprised of former Ba'athist officials and officers of the previous Iraqi Army, nationalist Islamist organisations, Iraqi Salafists, Iraqi tribes, and transnational Salafi jihadists.<sup>109</sup> The primary groups included al-Qaeda in Mesopotamia, the Islam Front of the Iraqi Resistance, the Islamic Army of Iraq, the Partisans of the Sunna Army, and nine other smaller militias.<sup>110</sup>

Coming from a political culture defined by authoritarian rule and the suppression of dissent,<sup>111</sup> and very experienced in negotiating the world of sovereign exceptionalism and its "topographies of cruelty",<sup>112</sup> many insurgent groups appropriated these tactics in their competition for control of statecraft, and saw themselves as what Patel and McMichael characterised in other contexts as "sinned against and unsinning, demonizing [...] the imperial apparatuses of control without implicating themselves in its functioning".<sup>113</sup> They engaged in attacks against the occupying forces, soon widening their scope to target persons perceived to be working in cooperation with the occupiers or the US-backed political process,<sup>114</sup> including international aid and UN agencies, foreign contractors,<sup>115</sup> intellectuals,<sup>116</sup>

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<sup>107</sup> Adas, B. (2007, October 7). Basra police chief 'ready to deal with armed militias'. *Gulf News*.

<sup>108</sup> Herring, E. & Rangwala, G. (*supra* note 4), p. 44.

<sup>109</sup> Hashim, A. (*supra* note 74), p. 17-25, 60, 64.

<sup>110</sup> *Ibid.*, p. 37; Herring, E. & Rangwala, G. (*supra* note 4), pp. 168, 170.

<sup>111</sup> Al Khafaji, I. (2004). Not quite an Arab Prussia: Revisiting some myths on Iraqi exceptionalism. In T. Ismael & W. Haddad (Eds.) *Iraq: The human cost of history*, 213-257, London: Pluto Press, p. 226.

<sup>112</sup> Mbembe, A. (2003). Necropolitics (L. Meintjes, Trans.). *Public Culture* 15 (1), 11-40, p. 40.

<sup>113</sup> Patel, R. & McMichael, P. (2004). Third worldism and the lineages of global fascism: The regrouping of the global south in the neoliberal era. *Third World Quarterly* 25 (1), 231-254, p. 236.

<sup>114</sup> UNAMI (*supra* note 63), p. 6.

<sup>115</sup> UNAMI (2005, March 10). *Iraq media monitoring*.

<sup>116</sup> O'Malley, B. (2007, April 27). *Education under attack*, Study commissioned by UNICEF.

medical professionals,<sup>117</sup> journalists,<sup>118</sup> lawyers and judges,<sup>119</sup> athletes,<sup>120</sup> artists and singers,<sup>121</sup> police, politicians, and government officials.<sup>122</sup>

The rise of the insurgency signalled the prospect of prolonged military occupation in the country,<sup>123</sup> involving violent counter-insurgency operations, increasing militarisation of the country, and derogations from human rights law under the auspices of emergency. On 16 October 2003, the UN Security Council passed Resolution 1511 to establish a US-led Multi-National Force in Iraq to help "restore peace and stability to a sovereign and independent Iraq".<sup>124</sup> The following month, the US military escalated its use of force against insurgents by launching Operation Iron Hammer in Baghdad and Operation Ivy Cyclone II in Tikrit, Ba'qubah, Kirkuk, and Baghdad,<sup>125</sup> and then in 2004, attacking the Mahdi Army (Sadr's Shi'ah militia opposed to the US occupation in Iraq)<sup>126</sup> and Fallujah.<sup>127</sup>

By referring to the insurgents as "terrorists",<sup>128</sup> the Coalition Forces constructed distinctions between authentic and enemy assertions of sovereignty.<sup>129</sup> They excluded those marked as terrorist from any positive legal status,<sup>130</sup> and subjected them to unmitigated violence. Iraqi state sovereignty was functionally "suspended" in enemy-controlled areas of Iraq until the Coalition Forces/MNF could bring these territories back under state control,<sup>131</sup> exemplified by one US Army Colonel when he stated that "we still own the people of Samarra".<sup>132</sup> However, given the high levels

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<sup>117</sup> UNHCR (2009, April) *UNHCR eligibility guidelines for assessing the international protection needs of Iraqi asylum-seekers*, pp. 168-169.

<sup>118</sup> Committee to Protect Journalists (2008, December 18). *For sixth straight year, Iraq deadliest nation for press*.

<sup>119</sup> Tawfeeq, M. (2008, June 30). *Iraqi judges targets of bombing attacks*, CNN.

<sup>120</sup> UNHCR (*supra* note 117), p. 184.

<sup>121</sup> Sarhan, A. & Davies, C. (2008, May 11). Iraqi artists and singers flee amid crackdown on forbidden culture, *The Observer*.

<sup>122</sup> UNHCR (*supra* note 54), pp. 14, 32.

<sup>123</sup> Bowman, S. (2003). Military issues. In R. Copson (*supra* note 17), p. 19.

<sup>124</sup> UNSC (*supra* note 89); UN Secretary General Annan, K. (2003, September 23), BBC.

<sup>125</sup> Banusiewicz, J. (2003, November 12). AF supports Operation Iron Hammer. *American Forces Press Service*; Banusiewicz, J. (2003, November 16). Army launches "Ivy Cyclone II" to target insurgents. *American Forces Press Service*.

<sup>126</sup> Harding, J. (*supra* note 31), p. 115.

<sup>127</sup> Salt, J. (2005). Falluja: Slaughter of a city. *Arena Magazine*, 77, 30-32.

<sup>128</sup> See UNSC (*supra* note 88) for comments by Lakhdar Brahimi.

<sup>129</sup> See Mbembe, A. (*supra* note 112), p. 19.

<sup>130</sup> See Žižek, S. (2002, May 23). Are we in a war? Do we have an enemy? *London Review of Books*.

<sup>131</sup> See Simpson, G. (*supra* note 60), pp. 84, 86.

<sup>132</sup> *Ibid*.

of civilian casualties that resulted, the violence in the end destroyed many of those it was ostensibly intended to protect.

In Fallujah, for example, insurgents were dehumanised in the project of legitimating the use of violence without sanction. After US forces killed 20 and wounded 86 anti-US demonstrators on 23 and 30 April 2003 in Falluja, a move characterised by Human Rights Watch as a "disproportionate use of force",<sup>133</sup> insurgents killed and dismembered four US private security employees from Blackwater. The Deputy Director for Coalition Operations in Iraq, Mark Kimmet, stated that the Coalition would take "overwhelming" action to pacify Falluja [...].<sup>134</sup> Political dissent in Fallujah was portrayed as terrorist, fanatic, extremist, and intended to prevent the democratisation of Iraq.<sup>135</sup> Justifying violent counter-insurgency strategies in Fallujah, the US Army Colonel Horvath stated, "The Nazi's Gestapo and Eastern European communists were best at this. Without becoming tainted or infected by their methods and attitudes, we have picked up some of their systems and processes."<sup>136</sup>

The first Fallujah operation resulted in hundreds of people being forcibly displaced,<sup>137</sup> and over 600 killed within days, a death toll that the US-allied IGC even deemed both "illegal and totally unacceptable" and a form of "collective punishment".<sup>138</sup> The civilians and combatants were indiscriminately targeted on the assumption that by virtue of their position and existence, they were terroristic. The organisation Iraq Body Count estimated that of the 800 reported deaths following this operation, 572 were civilians, including 308 women and children.<sup>139</sup> After the second operation in November, nearly 203,000 people were displaced – 80 percent of the city's population<sup>140</sup> – and 1,200 were killed.<sup>141</sup> Many Iraqi security forces

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<sup>133</sup> Human Rights Watch (2003). *Violent response: The US army in al-Falluja*.

<sup>134</sup> Kimmet, M. (2004, April 1), Coalition Forces will pacify Falluja. *US Department of Defense news briefing*.

<sup>135</sup> Wintour, P. (2004, April 12). Defeat would be victory for fanatics, says Blair. *Guardian*.

<sup>136</sup> Defense Tech (2004, November). Army's Insurgent manual author speaks, <<http://defensetech.org/2004/11/17/armys-insurgent-manual-author-speaks/>>.

<sup>137</sup> UNHCR (*supra* note 58).

<sup>138</sup> Steele, J. (2004, April 12). Shells and rockets were falling like rain. *Guardian*.

<sup>139</sup> Iraq Body Count (2004, October 26). *No longer unknowable: Falluja's April civilian toll is 600*.

<sup>140</sup> UNAMI Emergency Working Group (2005, January 18). *Fallujah bulletin update*; Samra, D. (2007). Military-induced displacement. *Forced Migration Review: Iraq Special Issue*, June 2007, 37-38, p. 37.

deserted their posts in protest or in a desire to fight on the side of the insurgency, decreasing the size of the forces by up to 80 percent and decreasing the police force by 99 percent in various parts of the region.<sup>142</sup>

In the absence of reliable security forces, in 2004 the US turned to localised militias for support in its counter-insurgency efforts. Neither fully controlled by the Iraqi government nor by the Coalition Forces, these brigades were comprised of the personal forces of tribal or sectarian sheikhs and government ministers and included the Wolf Brigade by the military leader of SCIRI, Abu Walid, 'Allawi's Muthana Brigade, Husayn al-Sadr's Defenders of Khadhamiyya, Shaykh 'Ali Sha'lan's Second Defenders of Baghdad Brigade, the Iraq Freedom Guard, and the Freedom Fighters. The truce that was concluded between the US forces and insurgents in Falluja in May 2004 also established a Falluja Brigade to control the city, ironically comprised mostly of former insurgents, resulting effectively in the US' recognition of the militia. Such brigades worked with the Coalition Forces in alliances of convenience, which Herring and Rangwala observed further institutionalised the fragmentation of the state through the fragmentation of the use of force.<sup>143</sup> However, when the US and Iraqi security forces attacked Falluja again in November 2004, most of the insurgents simply dispersed to other cities.<sup>144</sup> Thus, when the state lost its monopoly on violence, it attempted to reconstitute itself through military interventions that employed the use of proxy forces, revealing the ambiguities in the meaning of resistance.<sup>145</sup>

Having little legitimacy amongst Iraqis who viewed the US occupation as the proximate cause of most killings in these insurgency and counter-insurgency operations,<sup>146</sup> the Coalition Forces/MNF and the Iraqi state engaged with the population in increasingly coercive and militarised terms. They promoted the use of

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<sup>141</sup> Herring, E. & Rangwala, G. (*supra* note 4), p. 35.

<sup>142</sup> *Ibid.*, pp. 197-199.

<sup>143</sup> *Ibid.*, pp. 29-31, 35, 200-201, 208.

<sup>144</sup> *Ibid.*

<sup>145</sup> See Sanford, V. (2004). Contesting displacement in Columbia: Citizenship and state sovereignty at the margins. In V. Das & D. Poole (Eds.). *Anthropology in the margins of the state* (pp. 253-278). Santa Fe: School of American Research Press, p. 256.

<sup>146</sup> IIACSS (2004, May). *Public opinion in Iraq*, p. 39.



force through a surge of troops in 2007,<sup>147</sup> the proliferation of private security firms, and the strengthening of Iraqi security forces<sup>148</sup> at an "accelerated pace".<sup>149</sup> Such measures, similar to the rhetoric of preparing Iraq for self-government, were couched in the language of increasing the capacity of the Iraqi military to maintain security and stability without the assistance of the MNF.<sup>150</sup>

The growing militarisation of Iraq was institutionalised by the establishment of the Ministry of Defence, Ministry of Interior, and Ministerial Committee on National Security.<sup>151</sup> It was also reflected in the division created between the civilian CPA, staffed by less than 1,200 personnel,<sup>152</sup> and the military CJTF-7, having over 150,000 personnel. In this sense, Herring and Rangwala observed that the US military came to control post-war reconstruction and governed Iraq more in accordance with principles of fighting the war on terror than with those of administering and developing civil society. The US focused on increased training of the Iraqi security forces to counter the insurgency at the expense of its investment in the development of Iraq's civil infrastructure. Thirty-three percent of the Iraq Relief and Reconstruction Fund was allocated to security, law enforcement, and prisons – more than any other sector of reconstruction.<sup>153</sup> Ironically, by 2008, there were over 580,000 personnel in the Iraqi Security Forces alone,<sup>154</sup> 1.3 times the size of the military under Saddam Hussein.<sup>155</sup>

The US and the British forces, often in conjunction with Iraqi Security Forces (ISF) and paramilitaries, employed violent tactics against perceived insurgents with a high level of impunity,<sup>156</sup> as policing came to represent the convergence of the

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<sup>147</sup> See UNSC (2007, March 15) 5639<sup>th</sup> Meeting (UN Doc. S/PV.5639).

<sup>148</sup> See UNSC (*supra* note 90); Herring, E. & Rangwala, G. (*supra* note 4), pp. 91-95, 119, 162.

<sup>149</sup> UNSC (*supra* note 70).

<sup>150</sup> See UNSC (*supra* note 90).

<sup>151</sup> UNSC (*supra* note 87).

<sup>152</sup> CPA Inspector General, (2004, June 25). Management of personnel assigned to the Coalition Provisional Authority in Iraq, pp. 1, 3.

<sup>153</sup> Herring, E. & Rangwala, G. (*supra* note 4), pp. 38, 91, 99-100, 102.

<sup>154</sup> UNSC (2008, August 6). 5949<sup>th</sup> Meeting (UN Doc. S/PV.5949).

<sup>155</sup> See US Department of State (2006, January 25). *Weekly report*, pp. 7, 24; Cordesman, A. (2003, February 7). *Iraqi armed forces on the edge of war*. Washington, D.C.: CSIS, pp. 1, 37.

<sup>156</sup> UK Home Office (2008, October). *Operational guidance note: Iraq*. See UN Assistance Mission for Iraq (2009) *Human rights report 1 January – 30 June 2009*, pp. 12-13.

violence that makes law and the violence that preserves it.<sup>157</sup> The CPA set up the Central Criminal Court of Iraq to prosecute cases related to terrorism,<sup>158</sup> but there were reports of defendants detained without due process and tortured,<sup>159</sup> practices which continued despite Iraq's ratification of the Convention Against Torture in 2008,<sup>160</sup> and the establishment of the Independent High Commission for Human Rights in accordance with the Iraqi Constitution (Article 102),<sup>161</sup> which was ratified on 14 January 2009.<sup>162</sup>

On 6 July 2004, the IIG passed the Order for Safeguarding National Security, a state of emergency law containing some provisions for safeguarding citizens.<sup>163</sup> However, despite declarations of states of emergency,<sup>164</sup> most arrests were made under the auspices of the MNF and therefore were not constrained by such legislation.<sup>165</sup> Hence, many Iraqis were detained by the MNF and ISF without due process of law in Iraqi courts.<sup>166</sup> Their detentions did not fall within the ambit of state penal law, but were carried out under an ambiguous form of martial law, in which pre-emptive arrests and detentions suggested an operation of pure force in a space where law's application was almost completely withdrawn.<sup>167</sup> There were further reports of operations conducted by the MNF/ISF resulting in mass arrests, killings, excesses of violence, torture, and extra-judicial executions,<sup>168</sup> one of the

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<sup>157</sup> See Gulli, B. (2007). The ontology and politics of exception: Reflections on the work of Giorgio Agamben. In M. Calarcom & S. DeCaroli (Eds.) (2007). *Giorgio Agamben: Sovereignty and life* (pp. 219-242) (Stanford: Stanford University Press), p. 235.

<sup>158</sup> Coalition Provisional Authority (2004, April 22). *The central criminal court of Iraq* (Order no. 13, revised, amended).

<sup>159</sup> US Department of State (2009, February 25). *Country report on human rights practices 2008, Iraq*, p. 6; UNAMI (*supra* note 156), p. 4.

<sup>160</sup> US Department of Defense (2009, March 15). *Measuring stability and security in Iraq*, Report to Congress in Accordance with the Department of Defense Appropriations Act 2007 (Section 9010, Public Law 109-289), p. 5.

<sup>161</sup> UN (2008, November 17). *Iraq: UN official welcomes creation of Human Rights Commission*.

<sup>162</sup> UNSC (2009, February 26) 6087<sup>th</sup> Meeting (UN Doc. S/PV.6087).

<sup>163</sup> Iraqi Interim Government (2004, July 6). *Order for safeguarding national security* (Order 1 of 2004). See US Department of State (*supra* note 159), s. d.

<sup>164</sup> UNHCR (*supra* note 54), p. 3; UK Home Office (*supra* note 156), p. 3.

<sup>165</sup> Herring, E. & Rangwala, G. (*supra* note 4), p. 37.

<sup>166</sup> UNHCR (*supra* note 54), p. 3.

<sup>167</sup> See DeCaroli, S. (2007). Boundary stones: Giorgio Agamben and the field of sovereignty. In M. Calarcom & S. DeCaroli (*supra* note 157), p. 63.

<sup>168</sup> UNAMI (2007). *Human rights report 1 April – 30 June 2007*, pp. 8-9.

most public being the spectacle of torture by US military forces at the Abu Ghraib prison.<sup>169</sup>

Private actors were increasingly enlisted to carry out acts traditionally within the purview of the state. In its efforts to promote privatisation, the Bush administration contracted out the authority to exercise violence to private firms such as the Blackwater security firm that killed seventeen civilians in September 2007.<sup>170</sup> The US declared these firms immune from prosecution in Iraq and subject only to the laws of their countries of citizenship.<sup>171</sup> It was therefore unsurprising that when US combat troops withdrew from Iraq in August 2010, they left behind numerous private security firms in their stead, increasing number of these private forces from 2,700 to nearly 7,000.<sup>172</sup>

As the MNF, the Iraqi state, and private contractors became increasingly predatory upon Iraqi citizens due to the lack of sufficient constraints on their actions,<sup>173</sup> the transfer of formal sovereignty to the Iraqi government was not automatically accompanied by a strengthened application of the rule of law. Iraqi police and military forces continued to commit human rights violations, including arbitrary arrests and detentions, denial of access to legal representation, torture, and inhumane treatment,<sup>174</sup> even imposing the death penalty in some cases based on confessions gained from torture.<sup>175</sup> These violations were routinely perpetrated in spite of the Iraqi government's increased efforts to investigate such abuses, enshrine human rights principles within its new constitution, and train its security forces on international human rights standards,<sup>176</sup> and despite its stated commitment in May 2006 to release 2,500 detainees.<sup>177</sup>

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<sup>169</sup> See Diken, B. & Laustsen, C. (2003). Zones of indistinction – Security, terror, and bare life. Department of Sociology, Lancaster University, 1-14, p. 6.

<sup>170</sup> Tran, M. (2009, January 29). US security firm Blackwater faces expulsion from Iraq. *The Guardian*.

<sup>171</sup> US Senate Armed Services Committee (2004, May). *National Defense Authorisation Act for fiscal year 2005 report*. Senate Report 108-260, 108<sup>th</sup> US Congress, section 864.

<sup>172</sup> MacAskill, E. (2010, August 20). US officials face uphill task without troops. *The Guardian*.

<sup>173</sup> See Herring, E. & Rangwala, G. (*supra* note 4), p. 264.

<sup>174</sup> UNAMI (*supra* note 63), p. 14.

<sup>175</sup> UN (2007, June 19). *Special Rapporteur on the independence of judges and lawyers calls for halt in application of death penalty in Iraq*.

<sup>176</sup> UNSC (2006, March 15) 5386<sup>th</sup> Meeting (UN Doc. S/PV.5386).

<sup>177</sup> UNSC (*supra* note 102).

#### D. Ethno-sectarian normativity

The CF/MNF's heavy-handed military responses to the Sunni insurgency and the privileging of the Shi'ah-Kurdish alliance in establishing the Iraqi state deepened sectarian tensions to the point that violent competition for who would exercise sovereign power within Iraq was no longer restricted to fighting the occupation and its supporters. The emergence of new ethno-sectarian norms of identity and belonging also functioned as technologies of power that drove competing claims for control of the new Iraqi state by different sectarian groups, particularly following the bombing of the Shi'ah Al-Askariya shrine in Sammara' on 22 February 2006 by Sunni Arab insurgents.<sup>178</sup> Unlike the criminal gangs that emerged as chaotic or anarchic responses to political instability, these parties fought to assert their political authority and to promote their respective political visions of a new Iraq along sectarian lines. They enacted a project to instate territorially circumscribed national identities<sup>179</sup> through the extermination and forced displacement of Iraqis perceived as threats to these ideological agendas. Such attempts to control the state formation process not only enacted decisions on the exception, but also fragmented sovereign power in Iraq.

Who were the parties engaged in the violent competition for sovereign power in Iraq? The Sunni insurgency was by this time divided by infighting, and amongst the Shi'ah were divisions between the poor (al-Sadr's movement) and middle-class (Islamic Supreme Council of Iraq and al-Dawa Party).<sup>180</sup> Sectarian violence was exacerbated by the control of many local police and security forces by Shi'ah sectarian groups, primarily the Badr organization and Al Mahdi Army,<sup>181</sup> which targeted Sunnis perceived to be supporting the insurgency with arbitrary arrests and unlawful detentions, torture and ill-treatment, and extra-judicial executions.<sup>182</sup>

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<sup>178</sup> Ibid.

<sup>179</sup> See Connolly, W. (2007). The complexities of sovereignty. In M. Calarcom & S. DeCaroli (*supra* note 157), p. 42.

<sup>180</sup> Hashim, A. (*supra* note 74), p. 74.

<sup>181</sup> Mowle, T. (*supra* note 41), p. 9.

<sup>182</sup> UNHCR (*supra* note 54), p. 8.

Violence also broke out amongst the Kurds, Arabs, and Turkmen in 2006, in a bid for control over the traditionally mixed areas of the Kirkuk, Ninewa, Salah Al-Din, and Diyala Governorates, which were previous targets of Saddam Hussein's "Arabisation" policies, and now came under the *de facto* control of Kurdish parties after the fall of the former regime.<sup>183</sup> Kurdish parties were accused of trying to promote Kurdish settlement in these villages in anticipation of a referendum which would decide the final status of Kirkuk.<sup>184</sup> Many Arabs living in Mosul and Kirkuk were subjected to threats, harassment, discrimination, and arbitrary detention;<sup>185</sup> they often fled or were forcibly returned to central and southern Iraq by the Kurdish authorities or the Peshmerga.<sup>186</sup>

In addition, members of ethnic and religious minorities were also systematically categorised and targeted in southern and central Iraq by both Islamist movements and militias such as the Badr Organization, Ansar al-Sunna, and Al Mahdi Army. Christians, comprising eight to twelve percent of the Iraqi population, were subjected to discrimination, harassment, violence, murder, kidnappings, intimidation, threats, forced taxation for being non-Muslims, and destruction of their property. Churches were bombed; Christian-owned liquor shops were forcibly shut down; women were compelled to wear the veil; and some were forced to convert to Islam. This violence was often due to the perception that Christians supported and assisted the US-led invasion and occupation of Iraq, although some were also targeted with kidnapping for ransom based on their perceived wealth.<sup>187</sup> Sabean Mandaean, a religious group following John the Baptist and viewed as heretics, were subjected to extreme forms of violence,<sup>188</sup> increasing in 2007 and 2008,<sup>189</sup> as

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<sup>183</sup> Global Security (2005, June 22). Christians in Iraq.

<sup>184</sup> Herring, E. & Rangwala, G., (*supra* note 4), p. 24.

<sup>185</sup> UK Foreign and Commonwealth Office (*supra* note 91), Opposition to the KRG.

<sup>186</sup> *Ibid.*, Arabisation and de-Arabisation; UK Home Office (*supra* note 156), p. 19.

<sup>187</sup> Global Security (*supra* note 183); UNHCR (2005, October) *Background information on the situation of non-Muslim religious minorities in Iraq*, pp. 2-4; US Department of State (2007, September 14). *International religious freedom report 2007 – Iraq*; UNAMI (2007). *Human rights report 1 July to 31 December 2007*; Lamani, M. (2009, January). *Minorities in Iraq: The other victims*, The Center for International Governance Innovation; UNAMI (2008) (*supra* note 63), p. 17.

<sup>188</sup> Amnesty International Australia (2004, May 17). *Iraq - Country information*, pp. 6-15.

<sup>189</sup> Mandaean Human Rights Group (2008, March). *Mandaean annual human rights report*.

their families were often attacked multiple times with kidnapping and ransoms to fund insurgent and militia groups.<sup>190</sup> Several *fatwas*, or religious edicts, were issued by the Sunni teacher al-Saied al-Tabtabee al-Hakeem and the Information Foundation of Al-Sadr Office against Sabians, calling them "impure" and calling upon Muslims to "lead" them to Islam.<sup>191</sup> Yazidis, numbering half a million, were another significant religious minority not considered "people of the Book" and targeted with violence.<sup>192</sup> In one attack, 500 Yazidis were killed – one of the highest death tolls in Iraq since 2003.<sup>193</sup> Following the rise of Islamist and anti-occupation militias, many Jews also fled the country, and only around 10 remained in 2008.<sup>194</sup> Turkmen and Kurds were similarly targeted for their perceived political alliances with the West.<sup>195</sup>

In addition, any person not conforming to strict social mores and Islamic traditions came under threat of attack by Islamist militia groups.<sup>196</sup> Women faced severe restrictions in their freedom of movement and access to education, employment, and healthcare, and were punished for perceived transgressions or the commission of "honour crimes" with kidnapping, rape, forced prostitution, trafficking, beating, torture, decapitation, and murder at the hands of both militias and sometimes members of their own families.<sup>197</sup> Women who were heads of their households were at greater risk, having no male family members to protect them.<sup>198</sup> Men and women seen mingling in public places, wearing Western clothing and

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<sup>190</sup> UNHCR (*supra* note 54), p. 11.

<sup>191</sup> *Ibid.*, p. 5.

<sup>192</sup> *Ibid.*, p. 7; Maisel, S. (2008, August 18). *Social change amidst terror and discrimination: Yazidis in the new Iraq*, Policy Brief No. 18, The Middle East Institute.

<sup>193</sup> Fadel, L. & Taha, Y. (2007, August 15). Death toll from Iraq bombings likely to be worst of war, *McClatchy Newspapers*.

<sup>194</sup> US Department of State (2008, September 19). *International religious freedom report 2008 – Iraq*, §1.

<sup>195</sup> Kendall, E. (2003, September 29). *Iraq: Christians and Mandeans – Cousins in faith*. World Evangelical Alliance; Institute for War and Peace Reporting (2004, November 15). *Kurds find northern resettlement tough*. Iraqi Crisis Report no. 90; UNHCR (*supra* note 54), p. 14.

<sup>196</sup> UNHCR (*supra* note 117), pp. 191-195.

<sup>197</sup> IRIN (2005, March 21). Iraq: Focus on threats against progressive women; Institute for War and Peace Reporting (2005, July 5). Insurgent impose curbs on women. Iraqi Crisis Report no. 131; UK Home Office (2004, October). *Country report-Iraq*; UNHCR (*supra* note 54), p. 4; Dakkak, H. (2007). Tackling sexual violence, abuse and exploitation. *Forced Migration Review: Iraq Special Issue*, June 2007, 39-40, p. 40; UNHCR (*supra* note 117), pp. 195-196, Honour killings.

<sup>198</sup> UNHCR (*supra* note 54), p. 21.

hairstyles, working in the sex trade, selling "un-Islamic" items such as CDs and videos, or perceived as sexual minorities,<sup>199</sup> were also targeted with violence.<sup>200</sup>

In the context of this violence, the terrain on which these wars for sovereign authority were waged became a wasteland of human death and environmental decay. Rates of criminality escalated, leading many to fear the emergence of a full-scale civil war.<sup>201</sup> These fears were reinforced by the lack of a functioning judicial or police system, resulting in impunity for crimes committed.<sup>202</sup> As of April 2005, nearly 6,000 civilians were killed and at least 5,000 kidnapped by insurgent groups and criminal gangs,<sup>203</sup> and in 2006 the rate of violence increased by 51 percent over the course of three months,<sup>204</sup> with an estimated 5,000 deaths per month.<sup>205</sup> People were hired to search dumps, river banks, and morgues for the bodies of missing family members.<sup>206</sup> Ninety percent of persons who died violent deaths were men, leaving high numbers of widows and orphans vulnerable to further violence and exploitation.<sup>207</sup> By 2006, nearly 100 civilians were killed each day, and medical facilities struggled to cope with the influx of bodies and the lack of capacity in their morgues.<sup>208</sup> In 2006, the John Hopkins Bloomberg School of Public Health estimated that approximately 655,000 Iraqis had died due to consequences of the US-led invasion of the country, deaths referred to as "excess deaths".<sup>209</sup> By 2011, Iraq Body

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<sup>199</sup> Human Rights Watch (2009, January). *World report 2009 – Iraq*; UNAMI (2009) (*supra* note 63), p. 16.

<sup>200</sup> IRIN (2005, August 8). Iraq: Focus on boys trapped in commercial sex trade; Jane's Intelligence Review (2005, June). Battle for Iraq lies in the south, pp. 14-15; UNHCR (*supra* note 54), p. 4; Al-Khalidi, A. & Tanner, V. (2007). Iraq bleeds: The remorseless rise of violence and displacement. *Forced Migration Review*, June 2007, 6-9, p. 7; Dakkak, H. (*supra* note 197), p. 39; IRIN (2007, November 20). Iraq: Extremists fuel anti-women violence in Basra.

<sup>201</sup> See UNSC (2006, November 28) 5574<sup>th</sup> Meeting (UN Doc. S/PV.5574); UNSC (2006, December 11) 5583<sup>rd</sup> Meeting (UN Doc. S/PV.5583).

<sup>202</sup> UNHCR (*supra* note 54), p. 2.

<sup>203</sup> Reuters (2005, April 5). Iraq insurgency has killed 6,000 civilians.

<sup>204</sup> UNSC (2006, September 14) 5523<sup>rd</sup> Meeting (UN Doc. S/PV.5523).

<sup>205</sup> UNSC (*supra* note 201).

<sup>206</sup> Al-Khalidi, A. & Tanner, V. (*supra* note 200), p. 9.

<sup>207</sup> Couldrey, M. & Morris, T. (Eds.) (2007, June). Delivering is never remote: NGOs' vital role. *Forced Migration Review: Iraq Special Issue*, June 2007, 27-29, p. 27.

<sup>208</sup> Zimmerman, R. (2007). Responding to Iraq's ever-deepening violence. *Forced Migration Review: Iraq Special Issue*, June 2007, 29-31, p. 30.

<sup>209</sup> Burnham, G., Lafta, R., Doocy, S. & Roberts, L. (2006, October 11). Mortality after the 2003 invasion of Iraq: A cross-sectional cluster sample survey. *The Lancet*.

Count calculated that 114,212 civilians had been directly killed since the inception of the conflict.<sup>210</sup>

The consequences of this violence were further evident in the rates of forced displacement both within Iraq and to neighbouring countries.<sup>211</sup> Twenty-eight percent of internally displaced persons in Iraq were women, many of whom became increasingly vulnerable to sexual and gender-based violence, and 48 percent were children, who risked recruitment into militias as child soldiers.<sup>212</sup> The internally displaced faced increasing problems of food security as they were prevented access to the Public Distribution System for rationing unless they returned to their home communities to register,<sup>213</sup> despite that they fled these communities on fear of death. Those who were displaced sought shelter with relatives in other areas of the country, lived in makeshift accommodations, abandoned buildings, and tents,<sup>214</sup> or went to the Kurdish Northern Governorates. However, those who did not originate from the Kurdistan region or did not have family links there, were often denied entry to the Governorates; and even when able to cross the border, they faced challenges to achieving physical protection, housing, employment, or legal residency,<sup>215</sup> a practice replicated in Governorates outside of Kurdistan, as well, violating the right to freedom of movement for persons escaping violence.<sup>216</sup>

Sectarian violence was spatially realised in territorial fragmentation and the seclusion of communities.<sup>217</sup> The sectarian ordering of new territories of control was evident in the following map prepared by the US military in 2006, demarcating those

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<sup>210</sup> For 2003-2011 statistics, see Iraq Body Count (2012, January 2). Iraqi deaths from violence 2003-2011. *The Iraq Body Count Database*, <<http://www.iraqbodycount.org/analysis/numbers/2011/>>.

<sup>211</sup> Rosen, N. (2007, May 13). The flight from Iraq. *The New York Times*.

<sup>212</sup> UNHCR (*supra* note 65), p. 7; Riera, J. & Harper, A. (2007). Iraq: The search for solutions, *Forced Migration Review*, June 2007, 10-13, p. 11.

<sup>213</sup> Kälin, W. (*supra* note 63), p. 14.

<sup>214</sup> UNHCR (*supra* note 65), p. 7.

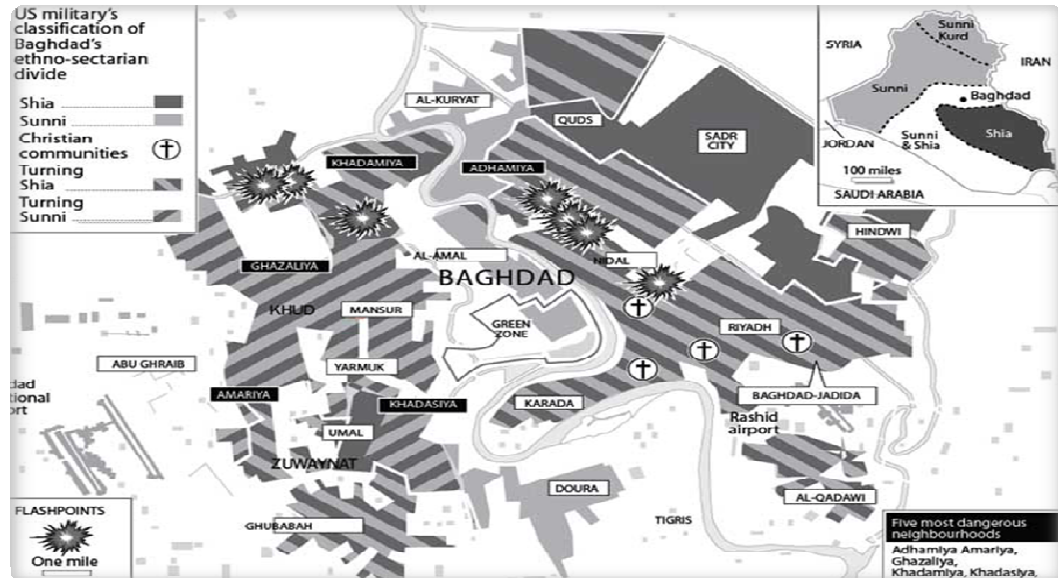
<sup>215</sup> UNHCR (2005, September). *UNHCR return advisory regarding Iraqi asylum seekers and refugees*. Geneva, p. 2; UNHCR (*supra* note 65), p. 6.

<sup>216</sup> Kälin, W. (*supra* note 63), p. 15; UN (1998, February 11). *Guiding principles on internal displacement* (UN Doc. E/CN.4/1998/53/Add.2), Art. 14(1).

<sup>217</sup> See Mbembe, A. (*supra* note 112), pp. 28-30.



areas of Baghdad whose ethno-sectarian composition was shifting or "turning" as a result of the violence:<sup>218</sup>



Source: US Military (2006). 'US military's classification of Baghdad's ethno-sectarian divide' available at: <http://images.thetimes.co.uk/TGD/picture/0,,374645,00.jpg>

This displacement was compounded by previous displacements resulting from Saddam Hussein's violent campaigns.<sup>219</sup> Although 325,000 dissident Iraqis had initially returned to Iraq between 2003 and 2005, the subsequent increasing violence led nearly 2 million to flee the country by 2007.<sup>220</sup> Nearly 4 million Iraqis remained displaced as of 2007,<sup>221</sup> including 1.9 million internally displaced and 45,000 non-Iraqi refugees. This number increased as 40,000-50,000 Iraqis fled their homes each month<sup>222</sup> – meaning that one in six Iraqis remained displaced. In countries in Europe, North America, and Asia, Iraqis constituted the largest group of asylum-seekers, and their asylum applications increased from 12,500 in 2005 to 22,000 in

<sup>218</sup> US Military (2006). 'US military's classification of Baghdad's ethno-sectarian divide' (Map), <<http://images.thetimes.co.uk/TGD/picture/0,,374645,00.jpg>>. See also Parker, N. & Hamdani, A. (2006, December 14). How violence is forging a brutal divide in Baghdad. *The Times*.

<sup>219</sup> Medway, P. (2007). Insufficient world focus on Iraqi IDPs. *Forced Migration Review*, June 2007, 47-48, p. 47.

<sup>220</sup> UNHCR (2007, June 19). *Summary of presentation by UN Assistant High Commissioner for Refugees, Mrs. Erika Feller, at the launch of Forced Migration Review Special Iraq Issue*, p. 1.

<sup>221</sup> UN Cluster F (2007, May 23). *Internally displaced persons in Iraq*.

<sup>222</sup> UNHCR (*supra* note 65), pp. 4-5.

2006.<sup>223</sup> Because these human rights violations were related to the grounds of the 1951 Convention Relating to the Status of Refugees and were occurring in the southern and central parts of Iraq,<sup>224</sup> UNHCR advised UN Member States that Iraqi asylum-seekers from these areas should be considered *prima facie* refugees.<sup>225</sup> This displacement became protracted as Iraqis were reluctant to return to environments rife with political and criminal violence, lack of employment opportunities, escalating inflation, and inadequate basic services.<sup>226</sup>

Nowhere did statistics, a key biopolitical technology for the writing and quantification of life,<sup>227</sup> demonstrate so persuasively its evolution into a tool for measuring death. As physical violence destroyed the social fabric of community, dignity, hope, and normalcy,<sup>228</sup> Iraqis became abject "others", driven from the territories on which they made their homes, and subjected to unrelenting violence without recourse to protection or remedies of the law.

## **E. The politicisation and prioritisation of humanitarian aid**

In the wake of the escalating violence wrought by battles with insurgents and between sectarian groups, and the forced displacement of 4 million Iraqis, a humanitarian crisis emerged on an unprecedented scale. The provision of humanitarian aid was a key means of governing displaced Iraqis, but even this was severely limited in scope due to the ongoing violence. Having no access to sustainable legal protection, Iraqis became increasingly reliant on survival aid, and the pragmatic primacy of humanitarian aid over human rights projects functioned as

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<sup>223</sup> Ibid., p. 5; Riera, J. & Harper, A. (*supra* note 212), p. 10.

<sup>224</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ("1951 Convention").

<sup>225</sup> UNHCR (*supra* note 71), p. 3; UNHCR (2007, December) *Addendum to UNHCR's eligibility guidelines for assessing the international protection needs of Iraqi asylum-seekers*, p. 7; UNHCR (*supra* note 65), p. 5.

<sup>226</sup> UNHCR (*supra* note 65), p. 4.

<sup>227</sup> Seremetakis, C.N. (1996). In search of the barbarians: Borders in pain. *American Anthropologist* 98(3), 489-491, p. 490.

<sup>228</sup> Bornstein, A. (*supra* note 62), p. 15.

a technology of power to reproduce displaced Iraqis in their bare lives, struggling to survive, while remaining excluded from political protection.

Initially, donor countries were reluctant to contribute to humanitarian activities in Iraq, as doing so would constitute a public acknowledgement of the failures of the reconstruction and nation-building projects, which they had already heavily funded.<sup>229</sup> John Bolton, who served as Ambassador of the US to the UN, went so far as to state that there was no relationship between the Iraqi refugees and the US invasion and occupation and that the US had no obligation to compensate them for the "hardships of war".<sup>230</sup> However, in April 2007, UNHCR hosted an international conference to raise funding for this crisis, eliciting the commitment of funds from both Iraq and all of the delegations present in light of their obligations of "burden sharing" to promote the protection of internally displaced persons and refugees in accordance with principles of international refugee and human rights law,<sup>231</sup> a principle later reaffirmed by the European Parliament.<sup>232</sup> The humanitarian assistance programs that followed faced multiple challenges, including perceptions of their compromised neutrality and the politicisation of aid, security environments that limited delivery of critical assistance, and the challenge of providing legal protection in an extra-legal space.

Perceptions of compromised neutrality, combined with insecurity and attacks against aid workers, severely hampered the ability of organisations to distribute aid. Although the US armed forces initially led the relief and reconstruction efforts in Iraq, many humanitarian aid agencies complained that this was affecting perceptions of their neutrality,<sup>233</sup> posing increased risks to aid workers who were seen as

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<sup>229</sup> Hansen, G. (2007). Iraqis defend humanitarianism. *Forced Migration Review: Iraq Special Issue*, June 2007, 31-34, p. 34.

<sup>230</sup> Quoted in Rosen, N. (*supra* note 211).

<sup>231</sup> UNHCR (2007, April 17-18) *Conference secretariat note, International conference on Addressing the humanitarian needs of refugees and internally displaced persons inside Iraq and in neighboring countries, Geneva, 17-18 April 2007*.

<sup>232</sup> European Parliament (2007, July 12). *European Parliament resolution on the humanitarian situation of Iraqi refugees*. (P6\_TA(2007)0056).

<sup>233</sup> Financial Times (2003, March 31). "Keep aid neutral", urges EU relief chief. *See also* Weiss, T.G. (1999). Principles, politics, and humanitarian action. *Ethics & International Affairs*, 13(1), 1-22, p. 4.

collaborators and supporters of the occupation,<sup>234</sup> as they were subjected to multiple attacks.<sup>235</sup> With the exception of the UN until 2009,<sup>236</sup> they therefore began to avoid reliance on the MNF for security as a result.<sup>237</sup> Some sectarian groups within Iraq capitalised upon these obstacles by providing for social welfare needs themselves, thus further politicising humanitarian space within the state.<sup>238</sup> Also, many political, religious, and military actors, including private companies and armed militias, cloaked their activities in the language of humanitarianism, blurring the line between military and civilian actors and compromising the perceived neutrality of humanitarian organisations.<sup>239</sup> As a result, a number of Iraqis, including some humanitarian aid workers, found it difficult to distinguish between them.<sup>240</sup>

After the 2003 bombing of the UN headquarters in Baghdad, most agencies decided to move their international staff out of Iraq for security reasons.<sup>241</sup> Therefore, most humanitarian assistance operations were actually carried out by local Iraqi partnering agencies and were remotely managed.<sup>242</sup> Expatriate staff members were sent to neighbouring countries, while local Iraqi staff members remained in the country to assume the risks of providing services. Risk assessments and remote management meant that humanitarian institutions relied upon those already relegated to bare life in Iraq to implement their activities, placing local lives

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<sup>234</sup> Prados, A. (*supra* note 70), p. 56; Qazi, A. (2007). UN's role in Iraq. *Forced Migration Review*, June 2007, 5-6, p. 6; Hansen, G. (*supra* note 229), p. 32.

<sup>235</sup> Riera, J. & Harper, A. (*supra* note 212), p. 12; Hansen, G., *ibid.*, pp. 31-34; Agence France-Presse (2003, April 14). UN aid workers standing by in Cyprus for return to Iraq.

<sup>236</sup> See Samra, D. (*supra* note 140), p. 38; UNSC (*supra* note 86), para. 13, Annex; UNSC (*supra* note 154).

<sup>237</sup> Hansen, G., (*supra* note 229), p. 32.

<sup>238</sup> Qazi, A., (*supra* note 234), p. 6; Kälin, W. (*supra* note 63), p. 14.

<sup>239</sup> Couldrey, M. & Morris, T. (*supra* note 207), p. 27; Samra, D. (*supra* note 140), p. 38. See also Morris, N. (2008). The evolution of humanitarian action. *Refugee Survey Quarterly* 27(1), 24-29, p. 25.

<sup>240</sup> Hansen, G. (*supra* note 229), p. 31.

<sup>241</sup> Kälin, W. (*supra* note 63), p. 14; Ladek, D. (2007). IOM – Building Iraqi capacity and Assisting IDPs. *Forced Migration Review*, June 2007, 50-51, p. 51.

<sup>242</sup> UNHCR (*supra* note 65), p. 5. UNHCR had eleven local partners in Iraq. Riera, J. & Harper, A. (*supra* note 212), p. 12. In 2008, the UNHCR posted international staff to Iraq, but they were restricted to operation in Baghdad and Erbil. UNHCR (2008) *Iraq situation supplementary appeal*, pp. 1, 3. See UNSC (2007). Resolution 1770. S/RES/1770; Fassin, D. (2007). Humanitarianism as a politics of life. *Public Culture* 19(3), 499-520, p. 514.

at risk in the project of implementing the mandates and ensuring the continuity of these institutions, and demonstrating the respective values placed on local lives.<sup>243</sup>

These highly politicised yet rightless spaces, in which the state of exception had become the norm, foreclosed the possibility of ensuring sustained law-based protection of rights, leaving only room for delivering emergency survival aid at best to the internally displaced Iraqis. Although UNHCR envisioned engaging in protection activities for IDPs within Iraq, returnee monitoring, and reintegration activities, in 2004 it stated that it was unlikely to be able to carry out these activities in light of the precarious security situation,<sup>244</sup> and noted that the humanitarian space within Iraq has narrowed to the point of placing the population in jeopardy as aid waned.<sup>245</sup>

UNHCR therefore prioritised humanitarian assistance for IDPs, including basic assistance, emergency shelter, rehabilitation of homes, and improvements to infrastructure and community services. But it also continued trying to engage in protection activities by monitoring the IDP situation, providing targeted protection interventions, expanding the capacity of local legal assistance centres, monitoring protection, and advocating for improved access to justice and essential services.<sup>246</sup> All of these activities were included in the anticipated Strategic Framework for Humanitarian Action in Iraq developed by the UN and its partners.<sup>247</sup> However, UNHCR stated that providing such protection assistance would only improve the protection of Iraqi IDPs if the Iraqi authorities were able simultaneously to promote respect for human rights and humanitarian law, reduce the imperatives to flee,

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<sup>243</sup> See Fassin, D., *ibid.*, pp. 515-516; Gilroy, P. (2012, February 6). Subject in the kettle: Notes on citizenship, dissent, and securitocracy. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>244</sup> UNHCR (*supra* note 58), p. 3. Similarly, UNAMI provided human rights capacity-building training to the Iraqi government and NGOs. UNAMI (*supra* note 63), pp. 25-27.

<sup>245</sup> Qazi, A. (*supra* note 234), p. 5.

<sup>246</sup> See Beucher, O. (2007). Vital role of legal assistance for displaced Iraqis. *Forced Migration Review*, June 2007, 49-50; UNHCR (2008) (*supra* note 242), pp. 4-5.

<sup>247</sup> UNHCR (*supra* note 65), pp. 7-8, 11; Riera, J. & Harper, A. (*supra* note 212), p. 13. See UNHCR (2008) (*supra* note 242), p. 6.

provide access to humanitarian assistance, ensure non-discrimination in access to public services, and recognise the right of refugees to return.<sup>248</sup>

Given the deteriorating security situation and the fragmented and sectarian control of the public sector, equal access to basic services and the guarantees of protection could hardly be realised, particularly prior to the surge in 2007 and the subsequent decrease in violent attacks. Therefore, by 2007, the legal aid centres established by UNHCR in Iraq to assist Iraqis with legal protection matters (including obtaining legal documentation necessary for accessing social services, food rations, health care, and accommodation) had increasingly become tasked with providing humanitarian aid in the way of emergency food and shelter as violence became a daily fact of Iraqis' lives.<sup>249</sup>

What were the effects of these technologies of power, as they resulted in the proliferation of the exercise of sovereign decisionism across the spaces of Iraqi territory and bodies? By the end of 2007, a US "surge" of additional troops to counter the insurgency and growing sectarian violence was claimed a victory by the Bush administration, as the levels of violence and civilian deaths began to decrease,<sup>250</sup> despite that they remained in the view of the UNSC Secretary-General "unacceptably high".<sup>251</sup> Sectarian violence between Sunni and Shi'ah insurgents also began to wane.

However, the reality of this victory was illusory given that other factors simultaneously and more effectively lessened the violence. First, the neighbourhoods most targeted by sectarian violence had by then been almost fully "cleansed" by militias,<sup>252</sup> and their once ethnically and religiously mixed composition had become homogenous,<sup>253</sup> thereby reducing the levels of violence,<sup>254</sup>

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<sup>248</sup> UNHCR (*supra* note 65), p. 8.

<sup>249</sup> UNHCR (*supra* note 220), p. 2.

<sup>250</sup> US Department of State (*supra* note 159). See Iraq Body Count (2008, December 28). *Post-surge violence: Its extent and nature*, <<http://www.iraqbodycount.org/analysis/numbers/surge-2008/>>; Iraq Body Count (2009, December 31). *Civilian deaths from violence in 2009*, <<http://www.iraqbodycount.org/analysis/numbers/surge-2008/>>; and UNSC (2008, January 21) 5823<sup>rd</sup> Meeting (UN Doc. S/PV.5823).

<sup>251</sup> UNSC (2008, July 28). *Report of the Secretary-General pursuant to paragraph 6 of Resolution 1770 (2007)*, p. 1.

<sup>252</sup> Al Ali, Z. (2009, September 4). *Presentation on Iraq*. UNHCR Beirut; Lindsay, J. (2008, September). Does the "surge" explain Iraq's improved security? MIT Center for International Studies, p. 3.

<sup>253</sup> UNHCR (*supra* note 65), p. 6; Riera, J. & Harper, A. (*supra* note 212), p. 10.

reconfiguring space in Iraq along sectarian lines.<sup>255</sup> And sectarian violence did continue in the remaining religiously mixed neighbourhoods of Baghdad,<sup>256</sup> Diyala,<sup>257</sup> Babel, and Wassit.<sup>258</sup> Second, in August 2007, Al-Sadr demobilised his militia and eliminated many of its "rogue" elements who were involved in the violence.<sup>259</sup> Third, the tribal Awakening Councils created in Anbar, comprised largely of Sunni Arab militias who had by then turned against Al Qaeda Iraq and were supported and trained by the US,<sup>260</sup> were effective in organising against extremists, becoming another armed force outside the control of the Iraqi state.<sup>261</sup> These intra-communal divisions within the Sunnis made possible their increased integration into the state apparatus,<sup>262</sup> although attacks against the state still continued long after the withdrawal of the majority of the US and UK forces from Iraq.<sup>263</sup>

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<sup>254</sup> National Intelligence Council (2007, August). *Prospects for Iraq's stability: Some security progress but political reconciliation elusive*, p. 3.

<sup>255</sup> Parker, N. (2007, November 1). Iraqi civilian deaths plunge. *Los Angeles Times*.

<sup>256</sup> National Intelligence Council (*supra* note 254), p. 1.

<sup>257</sup> UNHCR (*supra* note 117), p. 103.

<sup>258</sup> *Ibid.*, pp. 12-13.

<sup>259</sup> Raghavan, S. (2008, December 5). Sadr movement seeks its way as others gain power in Iraq, *The Washington Post*; BBC (2008, August 28). Iraq's Sadr extends militia truce; UNHCR (*supra* note 117), 12-13.

<sup>260</sup> UNHCR, *ibid.*, p. 86.

<sup>261</sup> Hashim, A. (*supra* note 74), p. 75; Zavis, A. (2007, November 17). \$5.2m buys security and loyalty for today. *Los Angeles Times*. See UNHCR (2007, December) (*supra* note 225), p. 13; Partlow, J. (2007, October 3). Shiite bloc condemns U.S. policy of recruiting Sunni tribesmen. *The Washington Post*.

<sup>262</sup> In 2008, the Justice and Accountability Law was passed, permitting the reinstatement of many former Ba'ath party members to government posts. Malley, R. (2008, April 9). *Iraq and the surge*, Testimony by Robert Malley, Middle East and North Africa Program Director, International Crisis Group, to the Senate Armed Services Committee. See US Department of Defense (2008, December) *Measuring security and stability in Iraq*. Report to Congress in Accordance with Department of Defense Supplemental Appropriations Act (Section 9204, Public Law 110-252), p. 2. Also, the Sunni Arab bloc, the Iraqi Accordance Front, rejoined the government. In 2009, Ayad al-Samarri of the Sunni Arab Alliance was elected as speaker of Parliament, and the Parliament approved an amendment to the new election law protecting the rights of minorities and Sunnis. BBC (*supra* note 31).

<sup>263</sup> A sustainable end to the violence could not be achieved until the issue of the disputed territories was resolved, the Constitution and federal power structure revised, wider political participation achieved, public services strengthened, reconstruction removed from control of local powers, and return and restitution of property for the forcibly displaced conducted in a manner that would not destabilise the security situation further. UNHCR (*supra* note 117), p. 16. See Oliker, O., et al (2010). *The impact of U.S. military drawdown in Iraq on displaced and other vulnerable populations: Analysis and recommendations*. RAND: National Defense Research Institute, pp. x-xii.

### III. Exegesis: Reflections on sovereignty in the Iraq war

The technologies of power that functioned as decisions on the exception and produced the spaces of the Iraqi IDP and refugee crisis included justifications for the use of force, the installation of neoliberal democracy, militarisation in states of emergency, ethno-sectarian normativity, and the politicisation of humanitarian aid. What were the implications of these technologies of power for the spatialisation and configuration of the logic of sovereignty in Iraq? What did they reveal about the connections between law, life, and violence in the formation of the new Iraqi state? This exegesis considers how these technologies both reified and challenged configurations of sovereignty in the international order, the state of Iraq, and the human body as the sites of sovereignty's materialisation.

#### A. Expanding sovereign reach within the international state system

The normative discourses, legal justifications for the use of force, and installation of neoliberal governance by the US-led Coalition Forces were all technologies of power employed by the US in its attempt to assert its sovereign authority and Great Power positionality at a global level.<sup>264</sup> They recalled earlier discourses of imperialism in their assertions of such sovereign power. Several scholars noted how the rhetoric demarcating Iraq as a "rogue" state and positioning it on an "axis of evil" indicated a retreat to an earlier state system dominated by discourses of "civilization" and "barbarism"<sup>265</sup> – "the (relative) prosperity and peace of the 'civilized' West [...] brought by exporting ruthless violence and destruction to this 'barbarian' Outside".<sup>266</sup> Žižek commented that the resurgence of the Cold War

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<sup>264</sup> See Connolly, W. (*supra* note 179), pp. 36-37.

<sup>265</sup> Ralph, J. (2009). Extraordinary rendition and the retreat of international society since 9/11. Presented in: *Detention and Rendition in the 'War on Terror' conference, May 6, 2009* London. LSE Department of International Relations. See Simpson, G. (*supra* note 60), p. 34; Pickering, S. (2005). Crimes of the state: The persecution and protection of refugees. *Critical Criminology*, 13, 141-163, p. 155; Stepputat, F. (2008). Forced migration, land, and sovereignty. *Government and Opposition*, 43 (2), 337-357, p. 340.

<sup>266</sup> Žižek, S. (*supra* note 36), p. 274.



term "free world" following the 9/11 attacks, which opposed "forces of darkness and terror", recalled the division between Western liberal democracies and all other forms of government.<sup>267</sup>

In a related vein, Simpson noted the emergence of legal norms that marked Iraq not only as a delinquent state in its failure to comply with international law, but also as no longer worthy of enjoying the full rights and benefits associated with its international legal personality.<sup>268</sup> He pointed to the continuity between the early Eurocentric system of "civilised states", which trained other states in the ways of civilisation towards the goal of eventual independence, and those "Great Power" states at the core of the UN system, which attempted to domesticate "outlaw" states into conforming to the international order and demands for liberal democratic governance.<sup>269</sup>

Within the discursive regime of the "rogue" and "outlaw" state, the juridical recognition and protection of Iraq's sovereignty was suspended unilaterally by the US and its allies in just such a project of protecting the international order, despite the UNSC's initial refusal to recognise the lawfulness of the invasion. Such designations marked the points at which both Iraq's territory and social body existed somewhere between uncivilised and civilised, abandoned and protected. Great Power states limited Iraq's rights of sovereignty associated with its legal personality and rendered bare the lives of the Iraqi population before the violence of an extended sovereign power.

Throughout its history, Iraq had been repeatedly positioned in such states of normalised inequality within the international state system, from its inception as British Mandate to the more recent sanctions and the first Gulf War. This continued in the second Gulf War, despite that the justifications espoused by the US and the UK and the legality of the invasion were treated to heavy debate.<sup>270</sup> From the

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<sup>267</sup> Ibid., p. 279.

<sup>268</sup> Simpson, G. (*supra* note 60), p. 342.

<sup>269</sup> Ibid., pp. 5, 21-22. See Charlesworth, H. & Chinkin, C. (2004). Regulatory frameworks in international law. In C. Parker, et al (Eds.) *Regulating law*, pp. 246-268. Oxford: Oxford University Press, p. 264.

<sup>270</sup> See Conte, A. (2005). *Security in the 21st century: The United Nations, Afghanistan and Iraq*. Aldershot: Ashgate, pp. 102, 112-113, 144-146; Shiner, P. (*supra* note 34); McLain, P. (2003). Settling the score with Saddam:

perspective of international law governing the relations between sovereign states, the invasion was largely viewed as an illegal war. However, from the perspective of the states who were positioning themselves as the "Great Powers" in the international state system, the invasion was framed more as a form of legalised exceptionalism. Such exceptionalism both legitimised and normalised the hierarchy within this system.

The legal arguments employed by state proponents of the invasion were used to justify the extension of their sovereign reach and the exception of Iraq from the guarantees of the international law on the use of force both in the name of emergency and in the interest of protecting global civil society from threats of terror. Scholars characterised such arguments as an inversion of legal standards governing the use of force and as the "exception now becoming the norm, the norm becoming the exception",<sup>271</sup> permitting systematic breaches of universal human rights in an amoral space,<sup>272</sup> and masking the rogue state that the US itself had become.<sup>273</sup> Despite the legal arguments employed to justify the invasion, punishment within the confines of international law in the international state system had evolved into banishment by a small coalition of sovereigns using justifications of both law and emergency to lift the legal guarantees accorded to Iraq as a sovereign state within the international state system altogether.

The neoconservative ideology of ensuring US hegemony through exporting liberal democracy in the Middle East was constructed and justified in biopolitical terms. It located sovereign power in the life of populations and argued that the security of populations in Iraq and the US and its allies would be maximised as a result of these interventions. Designating the Iraqi people as not fully politically qualified humans since they did not exist as democratic subjects, and the Iraqi state

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Resolution 1441 and parallel justifications for the use of force against Iraq. *Duke Journal of Comparative and International Law* 13, 233-291, p. 268; Bring, O. & Broström, P. (2005). The Iraq war and international law: from Hugo Grotius to George W. Bush. In J. Hallenberg and H. Karlsson (*supra* note 15).

<sup>271</sup> See Bartholemew, A. (Ed.) (2006). *Empire's law*. London: Pluto Press.

<sup>272</sup> Williams, A. (2008). The Iraq war and international law: By way of an introduction. In P. Shiner & A. Williams (*supra* note 34), pp. 8-9.

<sup>273</sup> Diken, B. & Laustsen, C. (2006). The camp. *Geographical Analysis*, 88 B (4), 443-452, p. 450.

as not fully qualified as a legal personality due to its authoritarian regime, the US and its allies found justification to assert their sovereign reach beyond their borders and for Iraq's sovereign boundaries to be compromised.

A new form of "legalised hegemony" was revealed in these justifications,<sup>274</sup> whose rationalities reflected previous incarnations of colonialism.<sup>275</sup> Similar to racism in the colonies, the social rationality underpinning this imperial project regulated how protecting life and putting to death were distributed and made acceptable.<sup>276</sup> It determined who would be allowed to benefit from the occupiers' goals.<sup>277</sup> This rationality was manifested in the designation of whole sectors of Iraqi society as inferior political subjects. Based on claims of the political immaturity of the Iraqi state,<sup>278</sup> biopower, the state of exception, and the state of siege<sup>279</sup> or occupation became inextricably linked.

The life of the Iraqi people in effect was treated as a form of only partially qualified animal life, the killing of whom through sanctions, invasion, and counter-insurgency was rarely recognised by states as murder.<sup>280</sup> Constructed as a state not organised in forms corresponding to the democratic civilised human world, Iraq was perceived as a threat to the coherence of the state system, enabling the creation of a space in which the protection and guarantees of the legal order could be suspended. Violence was allowed to operate in the service of "liberating" the other, reminiscent of previous projects of "civilisation".<sup>281</sup> Towards this end, the power to engage in warfare exceeded limitations imposed by the laws on the use of force, and the

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<sup>274</sup> Simpson, G. (*supra* note 60), pp. 322, 327, 334-337. See Barnett, M. (2001, Spring). Humanitarianism with a sovereign face: UNHCR in the global undertow. *IMR* 25 (1), 244-277, p. 249.

<sup>275</sup> See Eaglestone, R. (2002). On Giorgio Agamben's holocaust. *Paragraph: Journal of Modern Critical Theory*, 25 (2), 52-67.

<sup>276</sup> See Foucault, M. (1997). *Il faut défendre la société*. Cours au Collège de France, 1976, Paris: Gallimard, p. 228; Fitzpatrick, P. (2003). Gods would be needed...American empire and the rule of (international) law. *Leiden Journal of International Law*, 16, 429-466, p. 448.

<sup>277</sup> See De Larrinaga, M. (2008). Sovereign power and the biopolitics of human security. *Security Dialogue*, 39, 517-537, p. 520.

<sup>278</sup> See Goldberg, D.T. (2002). *The racial state*. Malden, Massachusetts: Blackwell.

<sup>279</sup> See Mbembe, A. (*supra* note 112), p. 22.

<sup>280</sup> Arendt, H. (1966). *The origins of totalitarianism*. New York: Harcourt, Brace, and World, p. 192.

<sup>281</sup> See Mbembe, A. (*supra* note 112), pp. 23-24.

occupation and resulting insurgency led to an increasing militarisation and violent targeting of Iraqi society.

Following the invasion, once Iraqis began to undergo the process of ostensible democratisation through the election of governments and the creation of state institutions, they were partially lifted from this animal existence. The exercise of violence without sanction in the initial invasion and destabilisation of the Iraqi state (constituting violence<sup>282</sup>) then became legally constrained through the installation of some vision of the rule of law (law-maintaining or constituted violence). But, as Agamben noted, these two forms of violence are hardly distinct, and it is often difficult to establish the point at which the violence that constitutes the state becomes the legalised violence that maintains the state.<sup>283</sup> This is particularly so, given that law-maintaining violence includes within itself its own exception, a form of constituting violence.<sup>284</sup> The sovereign in this sense is he who occupies this point of indistinction between constituting and constituted violence.<sup>285</sup> In the events following the invasion, these two forms of violence passed into one another, often becoming indistinguishable. Iraqis remained subject to violent incursions by the Coalition Forces, the Iraqi state, and non-state actors who were vying for control of the state formation process.

Therefore, the bodies-becoming-politically-qualified humans of Iraqi society undergoing the process of democratisation and neoliberal governance, but not fully arrived, were neither wholly protected nor wholly excluded by law. Under the goal of establishing eventual self-rule, Iraqi civil society existed in the zone where law's outside and inside merged, a zone also spatially expressed by both the designation of Iraq as an outlaw state and the UNSC's stated goal of its eventual re-inclusion (a

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<sup>282</sup> See Haverkamp, A. (2005). Anagrammatics of violence. In A. Norris (Ed.) *Politics, metaphysics, and death: essays on Giorgio Agamben's Homo Sacer* (pp. 135-144). Durham: Duke University Press, pp. 135, 139, citing Benjamin, W. (1978). Critique of violence. In Demetz, P. (Ed.) *Reflections* (pp. 277-301). New York: Schocken Books.

<sup>283</sup> Agamben, G. (1998). *Homo sacer: sovereign power and bare life* (D. Heller-Roazen., Trans.). California: Stanford University Press (Original work published 1995), p. 41.

<sup>284</sup> See de la Durantaye, L. (2009). *Giorgio Agamben: A Critical introduction*. Stanford: Stanford University Press, p. 339.

<sup>285</sup> Agamben, G. (*supra* note 283), pp. 32, 35.

territory-becoming-state with the full rights associated with its legal personality) in the ambit of international recognition. This blurring of the inside and outside in the formation of the new Iraqi state finds parallels to Agamben's conceptualisation of the normalised state of exception in which law and its outside become indistinguishable.<sup>286</sup> In such a zone of indistinction, it became possible to simultaneously envision Iraq as eventually promoting nationalism and participatory politics and to use authoritarian and violent forms of social control to realise these aims.<sup>287</sup>

The categorical designations of states and bodies as outlaws, terrorists,<sup>288</sup> or undemocratic, requiring domestication within the international state system, therefore not only served as justifications for the Coalition Forces' overreaching or extension of sovereignty in their decision to invade and occupy Iraq. They might also be characterised as technologies that facilitated decisions on the exception in the process of normalising the position of the Great Power states within the international state system. The relegation of citizens to bare life by their sovereign state was extended to whole state populations. Outlaw states could now also be relegated to spaces of exception, and the scope of the rights associated with their legal personalities truncated or altogether removed before the extended reach of Great Power states' combined sovereign powers.

Such normative trends legitimising a legalised hegemony occupied an uneasy place within the international legal order, however. Although not formally or expressly recognised in international law, they may have exemplified how the law attempted to encompass the exception within itself. Agamben pointed to the encompassing nature of law when it encounters human beings reduced to bare life in a state of emergency. Law attempts to embed spaces of exception or lawlessness within itself, often through rules of derogation (or as might be argued in the case of Iraq, through new norms legalising hierarchical orders). He theorised that the state

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<sup>286</sup> See *ibid.*, pp. 11, 41.

<sup>287</sup> Davis, E. (2005). *Memories of state: Politics, history, and collective identity in modern Iraq*. Berkeley: University of California Press, pp. 44-45.

<sup>288</sup> De Larrinaga, M. (*supra* note 277), pp. 530, 532-534.

of exception is actually a legal fiction used by the law to create those conditions of normalcy which it requires for its own validity. The sovereign creates the exception to produce the normal situation required for its legitimate exercise of power and the recognition of its law. Therefore, the law both creates and legalises its own suspension, producing a zone of indifference in which the Hobbesian state of nature on the outside of law appears in its interior as a state of exception.<sup>289</sup> Being neither fully internal nor external to the juridical order, the state of exception thus constitutes a zone of indifference in which the outside and inside merge and blur with one another. It is here that human beings remain abandoned by law's protection, yet subject to its power – the "force of law".<sup>290</sup>

The Coalition Forces in this respect then may have used the law to embed the exception within itself, legitimating their exceptional use of force against Iraq and its people through legal justifications and new norms of belonging and global citizenship. The conditions of exceptionality created by these new norms might also be considered the legal fictions necessary for the select few states who dominated the hierarchical order of the international state system to define their position within the hierarchy as the norm so that the extended reach of their power beyond their borders could be legitimate.

However, given the increasingly violent consequences of the invasion and escalating militarisation, the asserted hierarchy of the international order that the exception was intended to define and legitimise emerged as a highly contested space. Those civilians and militias who were relegated to the space of exception that Iraq became sought to assert their own norms and authority to define and control the state. Where the norm and the exception were repeatedly questioned, existing in a fraught relationship with one another, it became difficult to identify what constituted the norm and what was the exception. Perhaps, then, the use of legalised exceptionalism to promote the normativity of extended sovereign authority

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<sup>289</sup> Ibid., pp. 23, 36-37. See Schmitt, C. (2003). *Nomos of the earth in international law of the jus publicum Europaeum*. (G. Ulmen, Trans.). New York: Telos Press (Original work published 1950).

<sup>290</sup> De Larrinaga, M. (*supra* note 277), pp. 23, 36-37.

became the source of its own undoing, as it succeeded more in revealing those spaces where the juridical order and the state of exception began to blur to the point of indistinction – where the asserted normality of the hierarchical international state system was revealed as an ideology and fiction of power.

## **B. Contesting sites of sovereign power within the state**

Internally the sovereign power of the Coalition Forces and the Iraqi government was both contested and refracted throughout the state as it was appropriated and claimed by parties seeking to control the direction of the state formation process. This was realised through the increasing states of emergency and rise of ethno-sectarian normativity that were critical technologies of power defining the spaces of occupied Iraq. The demarcation of the parties to this contest was hardly clear, however, as some militias served as the armed wings of political parties represented in the new Iraqi government. This blurred the line between state and non-state actors and revealed both the multiple ways in which sovereignty was performed and how warfare was no longer the sole province of states.

Also, not simply acting illegally, the insurgents threatened to become laws unto themselves, commanding the compliance of their constituencies,<sup>291</sup> emerging as a source of civil society power in a political vacuum,<sup>292</sup> and undermining the US and its allies' visions of the new Iraqi state. They threatened to "overwhelm the law" by challenging the very grounds which it required for its foundation and adjudication, denying its legitimacy and reach.<sup>293</sup> This provided the justification used by the MNF and ISF to banish the insurgents from legal protection and increase the use of force in quashing their popular power.<sup>294</sup> The suspension of law and the use of force and banishment were attempts to restore and assert the US vision of political order

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<sup>291</sup> See DeCaroli, S. (*supra* note 167), pp. 57, 68; Laclau, E. (2007). Bare life or social indeterminacy? In M. Calarco & S. DeCaroli (*supra* note 157) (pp. 11-22).

<sup>292</sup> See Levy, G. & Kaplan, D. (2012, February 7). Between two squares citizenship unbound in (a new?) Middle East. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>293</sup> DeCaroli, *ibid.*, p. 69.

<sup>294</sup> See *ibid.*, p. 58.

when it became clear that its law could no longer check the "chaos" threatening its grounds, and there was a threat that a new alternative law could be established by its opponents.<sup>295</sup>

The insurgents abandoned by the law were therefore in no way passive, but responded with the production of new and competing norms and identities. Laclau suggested as much in his critique of Agamben's conception of law for its presentation as a unitary and sole force in determining the relationship of abandonment and his presentation of sovereignty as "control by an over-powerful state". Laclau argued that in many instances, the person abandoned by "the law of *the city*" is not necessarily abandoned by "*any law*" (his emphasis).<sup>296</sup> Rather, a position of exteriority within the space of exception from the city may provide the impetus to those abandoned to form a new collective identity in opposition to the law of the city or to the decision that excluded them. This produces two laws that do not recognise each other, rather than one law against lawlessness, and it facilitates the continuous "re-negotiating and re-grounding of the social bond within a particular social space".<sup>297</sup>

In such contexts, the politicisation of natural life does not automatically imply increasing control by an over-powerful state, but is rather the process of human life coming under various forms of human regulation.<sup>298</sup> DeCaroli similarly asserted that individuals who challenge the very grounds of the political order often experience banishment from law's protection precisely because they threaten to impose a new law in place of the old.<sup>299</sup> Therefore, relegation to bare life in one space of exception might give way to the emergence of a new form of qualified life through new forms of organisation that emerge in opposition to the political order that originally enacted the exception.

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<sup>295</sup> See *ibid.*, pp. 64, 67.

<sup>296</sup> Laclau, E. (*supra* note 291).

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.*, p. 18.

<sup>299</sup> DeCaroli, S. (*supra* note 167), pp. 57, 68.



This conception of multiple laws that do not read one another is critical for understanding how sovereignty is not a sole overarching force. It is rather a logic that is continuously asserted and contested through opposition, competing claims for political authority, and repeated attempts to ground the social bond within particularly defined territories. This may account for how the fragmentation of political authority in Iraq and the rise of the insurgency led to multiple assertions of sovereign power. However, rather than the possibilities for an emancipatory and oppositional politics that both Laclau and DeCaroli envisioned,<sup>300</sup> in the case of Iraq, these multiple laws arising from multiple assertions of the right to exercise sovereign power within the state produced different effects. They resulted not only in a contestation of the existing formal assertions of the sovereignty of the US or the new Iraqi government, but also in the multiplication of opportunities to decide upon the exception of individuals from their protection, thereby entrenching the logic of sovereignty even further. Iraqi citizens were excluded from law's protection, not only by the extended sovereign authority of the US and its allied states, but also by the parties who competed for sovereign control that developed with the rise of the insurgency and sectarian violence. As militias formed their own political and legal orders in opposition to those imposed by the US in Iraq, they defined their own normative biopolitical parameters of identity and belonging and enacted their own decisions on the exception through violence, forced displacement, and extermination.

### **C. The body as a site of territorialisation**

The violent contests for sovereign authority in Iraq were waged on the bodies of its population, demonstrating how human life became implicated in process of territorialisation and the state formation process.<sup>301</sup> As the transition to democracy

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<sup>300</sup> Ibid., pp. 20-22. See also Murray, A. (2010). *Giorgio Agamben*. London: Routledge, p. 134.

<sup>301</sup> See Holder, J. & Harrison, C. (Eds.) (2003). *Law and geography*. Oxford: Oxford University Press, *Current Legal Issues*, Vol. 5, p. 7.

failed to develop in accordance with US predictions, and insurgent militias and sectarian groups co-opted the fledgling democratic process to promote their own visions of Iraqi statehood and ethno-sectarian normativity, the violence of the logic of sovereignty was exposed. In the face of political opposition to its occupation of Iraq, the US rhetoric of maximising the life of citizen bodies through the imposition of neoliberal democracy devolved into a focus on strengthening the violent power of the new Iraqi state through the eradication of those "anti-democratic" elements within it.<sup>302</sup> Simultaneously, militias' visions for who should constitute the new Iraqi social body devolved increasingly into violence against those they believed should not. They created "death worlds" in their internecine struggles for sovereign power and nationhood through violence against categorically determined others in Iraq. The meaning of being human became intertwined with the meaning of the state, and concepts of justice began to hinge on the violent suppression of otherness.<sup>303</sup>

The biopolitical consequences of the encounter between these expanded and fractured bids for sovereign power multiplied as the management of the Iraqi population became predicated on violent practices that were appropriated, reflected, and reproduced in new forms by insurgent militias, sectarian state actors, and the Coalition Forces/MNF in this highly contested political space. It was thus not a far step for Iraq, an exceptional space subjected to violent military invasion and occupation with minimal justification, to become a space where violence emerged as the key vehicle for political expression and control.<sup>304</sup> The biopolitical stakes of the insurgency escalated over time as insurgent and counter-insurgency attacks caused more deaths after the declaration of the end of the war than occurred during the war itself.<sup>305</sup> The increasing use of aggressive-defensive violence by the occupying

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<sup>302</sup> See Herring & Rangwala (*supra* note 4), pp. 186, 262.

<sup>303</sup> See Rajaram, P.K. & Grundy-Warr, C. (2007). Introduction. In P.K. Rajaram & C. Grundy-Warr (Eds.). *Borderscapes: Hidden geographies and politics at territory's edge* (pp. ix-xl). Minneapolis, University of Minnesota Press, pp. xii-xiii.

<sup>304</sup> Diken, B. & Laustsen, C. (*supra* note 169), p. 13.

<sup>305</sup> O'Hanlon, M. & de Albuquerque, A.L. (2004, June 21). *Iraq index*. Washington: Brookings Institution, p. 3.

forces against the insurgents was appropriated by them as critical to realising their respective visions of law and political ordering.<sup>306</sup>

Violence in this respect derived directly from the logic of sovereignty. Rather than the result of criminal gangs and banditry that often arise in the context of conflict, this violence was primarily directed to enact decisions on the exception, materialising decisions on who would benefit from political or legal recognition and protection in accordance with competing visions of state and national identity. While enacted in the name of state formation and security, such normalised and escalating violence risked becoming an end in itself.

Foucault pointed to the critical role that violence plays constituting a population, producing a citizen body, and asserting its need for protection. The sovereign power over death serves as a counterpart to the power that administers, regulates, and optimises life.<sup>307</sup> This was revealed in the war on terror, for example, where life was reified into a material object that had to be protected from fears of danger posed to society by individuals deemed "terrorists" whose deaths were often the price of this security.<sup>308</sup> He argued that whereas war was once enacted to defend the sovereign, it is now increasingly justified as a means of defending the biological existence of the population. Violence is used against threatening bodies to defend the collective body's interests in managing and optimising its life, survival, and racial identities.<sup>309</sup> Police become politics as the protection of life becomes dependent upon violence towards the enemy.<sup>310</sup> As Foucault wrote, "The power to expose a whole population to death is the underside of the power to guarantee an

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<sup>306</sup> See Sylvester, C. (2006). Bare life as a development/postcolonial problematic. *The Geographical Journal* 172 (1), 66-77, p. 70.

<sup>307</sup> Foucault, M. (1978). *The history of sexuality: An introduction* (R. Hurley, Trans.) London: Penguin Books) (Original work published 1976), p. 137. See Dean, M. (2004). Four theses on the powers of life and death. *Contretemps*, 5, 16-29, p. 19.

<sup>308</sup> Dillon, M. & Reid, J. (2001). Global liberal governance: Biopolitics, security and war. *Millennium – Journal of International Studies*, 30, 41-66, pp. 52, 57, referencing Agamben, G. (*supra* note 283).

<sup>309</sup> Foucault, M. (*supra* note 307), p. 137. See Dean, M. (*supra* note 307), p. 18.

<sup>310</sup> Agamben, G. (*supra* note 283), p. 147.

individual's continued existence."<sup>311</sup> "For the first time in history [...], at once it becomes possible both to protect life and to authorise a holocaust."<sup>312</sup>

This possibility of simultaneously protecting life and authorising death also marks that point at which the state defines its conditions of exceptionality from the law and "enacts the human in biopolitical terms".<sup>313</sup> Along similar lines, Lefebvre noted that sovereignty implies a space constituted by violence, as states are born of violence, and their power can only endure through violence directed towards a particular space.<sup>314</sup> The violence that founds the state operates along new lines of deployment to ensure the state's continued existence.<sup>315</sup>

However, when violence deployed along these lines is transformed into the primary technique for managing a population, the state of exception can begin to coincide with the normal order. At this point of convergence between the exception and the normal political order, the dialectic between the violence that posits law and the violence that preserves it is broken. As the sovereign resorts increasingly to violence, bare life becomes the primary ordering principle of the state.<sup>316</sup>

This phenomenon was revealed in both the counter-insurgency operations and the battles between ethno-sectarian groups in Iraq. Violence was carried out with impunity in the name of emergency, becoming not only the key means of managing the population, but also an end in itself. However, the trajectories of this violence and the rationalities that undergirded its justification differed. In the case of the counter-insurgency operations, the intent was to eliminate the predominantly Sunni insurgency in order to promote a liberal democracy in which Sunni participation could be incorporated according to the rule of law. However, the many setbacks and compromises that occurred in these counter-insurgency operations provided the fuel

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<sup>311</sup> Foucault, M. (*supra* note 307), p. 137.

<sup>312</sup> Foucault, M. (1994). *Dits et écrits. Vols 3-4*. Paris: Gallimard, vol. 3, p. 719.

<sup>313</sup> De Larrinaga, M. (*supra* note 277), pp. 519, 524.

<sup>314</sup> Lefebvre, H. (1991). *The production of space* (D. Nicholson-Smith, Trans.). Oxford: Blackwell (Original work published 1974), p. 280.

<sup>315</sup> *Ibid.*

<sup>316</sup> Agamben, G. (2005). *State of exception* (K. Attell, Trans.). Chicago: University of Chicago Press (Original work published 2003), pp. 2-3, 6-7, 13-14; Agamben, G. (*supra* note 283), p. 64; Raulff, U. (2004). An interview with Giorgio Agamben. *German Law Journal* 5 (5), 609-614, p. 608.

for escalating violence and created spaces of ambiguity. For example, in the wide latitude given to US forces to kill "military-age males" in counter-insurgency operations, such as in Operation Triangle at Lake Thar-Thar in 2006,<sup>317</sup> the line between the combatant and the civilian was blurred, and an anomic space emerged in which decisions were enacted on the political values ascribed to life itself.

In the wake of this increasing militarisation in the state of emergency posed by the insurgency and counter-insurgency operations in Iraq, the extended power of the MNF operating in concert with the new Iraqi state was expressed in the exercise of a power external to the law. "Peace" became "more likely to take on the face of a 'war without end'",<sup>318</sup> and war became increasingly the foundation of the political itself.<sup>319</sup> In similar contexts, Agamben noted that when security emerges as the key criterion of political legitimacy, the state is at risk of being provoked by terror to become itself terroristic. When politics become reduced to the police, the difference between the state and the terrorist begins to blur. A system emerges in which security and terrorism became dependent upon one another, providing justification for each other's actions.<sup>320</sup> The decision on the exception is not only produced by, but also produces the state of emergency,<sup>321</sup> and the subject of the state becomes both perpetrator and victim.<sup>322</sup>

When the US employed heavy-handed violence to counter insurgents in Iraq, resulting in thousands of civilian deaths, it subverted its own programme of cracking down on terror,<sup>323</sup> by itself become terroristic, its biopolitical goals of security turning on practices of unmitigated violence. As Diken and Laustsen noted, this dynamic can open the space for tightened controls that foreclose politics and dissent. It can merge the logics of terror and state power and incite new forms of

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<sup>317</sup> Shanker, T. & Tavernise, S. (2006, June 20). The reach of war: Detainees; murder charges for 3 G.I.'s in Iraq. *New York Times*.

<sup>318</sup> See Mbembe, A. (*supra* note 112), p. 23.

<sup>319</sup> Hardt, M. & Negri A. (2004). *Multitude*. New York: Penguin Group, p. 334.

<sup>320</sup> Agamben, G. (2002). Security and terror. *Theory & Event*, 5 (4), p. 1. See De Larrinaga, M. (*supra* note 277), p. 524; Diken, B. & Laustsen, C. (*supra* note 169), pp. 12, 14.

<sup>321</sup> Agamben, G. (*supra* note 283), p. 170.

<sup>322</sup> See Nelson. D. (2004). Anthropologist discovers legendary two-faced Indian! Margins, the state, and duplicity in post-war Guatemala. In V. Das & D. Poole (*supra* note 145) (pp. 117-140).

<sup>323</sup> See Žižek, S. (*supra* note 130).

terror and violence.<sup>324</sup> Žižek similarly observed that through the suspension of state sovereign rights of control in counter-insurgency operations, the Coalition Forces avoided the real emergency or "chaos" of politicisation of the citizen body, particularly one prone to popular unrest.<sup>325</sup> This was nowhere more pronounced in Iraq than amongst many of the Sunni population who were marginalised after the fall of Saddam Hussein.

In the case of ethno-sectarian violence, the extermination of categorically determined others became part of a different project of state building in accordance with assertions of specific national identities. Violence in this context was performative of national identity, and national identity became premised on rationalities of extermination. In this sense, the ethno-sectarian violence was not only biopolitical, in which violence was implicated in the protection of the citizenry and production of the citizen body. It was also necropolitical,<sup>326</sup> in which the power to decide on the state of exception was transformed into the power to decide upon the value of life.<sup>327</sup>

More than two years after the invasion, faced with an overwhelming expansion of sovereign power beyond the state and the institutionalisation of a new political order in Iraq, many groups attempted to recover their autonomy and assert their authority through violent drives to integrate their definition of population and nation.<sup>328</sup> They asserted their ethnic and sectarian identities through expulsion and extermination of those designated as foreign to the territory or the nation.<sup>329</sup> They instrumentalised the four million persons forcibly displaced in the state-building process as objectives rather than by-products of the conflict – what Helton would call "displacement by design"<sup>330</sup> – demonstrating how imaginings of nation and state

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<sup>324</sup> Diken, B. & Laustsen, C. (*supra* note 169), 14.

<sup>325</sup> See Žižek, S. (*supra* note 130).

<sup>326</sup> Mbembe, A. (*supra* note 112).

<sup>327</sup> Agamben, G. (1999). *Remnants of Auschwitz: The witness and the archive* (D. Heller-Roazen, Trans.). New York: Zone Books, p. 55.

<sup>328</sup> See Connolly, W. (*supra* note 179), p. 37.

<sup>329</sup> DeCaroli, S. (*supra* note 167), pp. 68-69; Barth, F. (1969). Introduction. In *Ethnic groups and boundaries: The social organization of culture difference* (pp. 9-28). London: George Allen & Unwin, pp. 9-10, 15.

<sup>330</sup> See Helton, A. (2002). *The price of indifference*. Oxford: Oxford University Press, pp. 11, 36, 42.

were spatially realised.<sup>331</sup> They dialectically constructed their identities through "boundary maintenance" against other identities,<sup>332</sup> using forced displacement to demarcate territories and political communities as the reach of the state was limited by the fragmentation of its sovereign power. They acted as "ethnopolitical entrepreneurs", performing and invoking ethnic and sectarian identities in order to mobilise and justify them and to inform and legitimise their politics.<sup>333</sup>

Towards such ends, sectarian militias forged new normative orders based upon biopolitical categories of the population, such as Shi'ah, Sunnis, Christians, Yazidis, Sabeans, and Kurds.<sup>334</sup> They made the decision on bare life their primary political principle.<sup>335</sup> The biopolitical body displaced the political adversary as the threat against the political order.<sup>336</sup> It emerged as the new political subject and object, the site of the sovereign decision by those asserting and competing for sovereign control. It was also the site where fact and law merged, where the production of categorical others was both the application and the result of the rule premising specific sectarian identities over others.<sup>337</sup> It demonstrated the catastrophic consequences of attempting to force a particular political identity to coincide fully with human life.<sup>338</sup> Militias spatially determined these categories through immobilisation, elimination, and forcible displacement, and massacre emerged as the primary site of bodily and territorial control.<sup>339</sup>

Such violence resulted in a system of "overlapping and fragile sovereignties", in which sectarian militias appropriated property owned by the forcibly displaced for their own supporters. They legitimised their newly defined geographical and sectarian communities both through their bodily presence on the land and their

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<sup>331</sup> Tuitt, P. (2004). Refugees, national, laws and the territorialisation of violence. In P. Tuitt & P. Fitzpatrick (Eds.) *Critical beings: Law, nation and the global subject* (pp. 37-56). UK: Ashgate, p. 48.

<sup>332</sup> Barth, F. (*supra* note 329).

<sup>333</sup> See UNSC (2005, June 16). 5204<sup>th</sup> Meeting (UN Doc. S/PV.5204).

<sup>334</sup> UNHCR (2007, August). *Eligibility guidelines for assessing the international protection needs of Iraqi asylum-seekers*, p. 9; Hashim, A. (*supra* note 74), p. 56.

<sup>335</sup> See Agamben, G. (*supra* note 283), p. 10.

<sup>336</sup> Diken, B. & Laustsen, C. (*supra* note 273), p. 450.

<sup>337</sup> Agamben, G. (*supra* note 283), pp. 171, 174.

<sup>338</sup> See Agamben, G. (2001) *Das unheilige Leben: Ein Gespräch mit dem italienischen Philosophen Giorgio Agamben*. Interview with Hannah Leitgeb and Cornelia Vismann. *Literaturen* (Berlin), 2 (1), 16-21, p. 20.

<sup>339</sup> Mbembe, A. (*supra* note 112), pp. 30-34.

demonstrated capacity for violence,<sup>340</sup> a means of citizens exerting extra-legal control over territory.<sup>341</sup> This, combined with assertions of humanitarian management in spaces of displacement, created a "patchwork of overlapping and incomplete rights to rule".<sup>342</sup> They blurred distinctions between combatants and civilians, and between state and non-state actors. Some armed groups were linked in different ways to the state, while others were not, but maintained effective control over particular territories. The ongoing threat of collective violence was therefore a way of "performing community" – a strategy for promoting their partial sovereignty that allowed them to live on the land despite the illegality of their occupation. This reinforced both the psychological and geographical borders of territories within Iraq.<sup>343</sup>

The devastating consequences of this sectarian violence for the lives of many Iraqis were further exacerbated by the shifting meanings and uses of sectarianism. Sectarian violence was not an age-old violence between ethnic groups,<sup>344</sup> particularly as the scope and meaning of sectarian and ethnic groups in Iraq changed significantly over time and were used in politically opportunistic ways by its different governing regimes.<sup>345</sup> Rather, violence was instrumental in producing, crystallising, and polarising sectarian identities, and mobilising certain political aspirations. The violence was framed and constituted as sectarian by the perpetrators, victims, journalists, politicians, and international organisations.<sup>346</sup> It was undergirded by political pundits' earlier calls for the dissolution of Iraq along ethnic and sectarian lines.<sup>347</sup> The violence was centred on the competition amongst parties for power

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<sup>340</sup> See Stepputat, F. (*supra* note 265), pp. 340, 345, 355, 357.

<sup>341</sup> See Landau, L. & Monson, T. (2008). Displacement, estrangement and sovereignty: Reconfiguring state power in urban South Africa. *Government and Opposition*, 43 (2), 315-336, p. 321.

<sup>342</sup> Mbembe, A. (*supra* note 112), pp. 30-34.

<sup>343</sup> See Stepputat, F. (*supra* note 265), p. 356; Landau, L. & Monson, T. (*supra* note 341), pp. 322-323.

<sup>344</sup> See Brubaker, R. (*supra* note 99), p. 9.

<sup>345</sup> Tripp, C. (2007). *A history of Iraq*. Cambridge: Cambridge University Press, pp. 1-7.

<sup>346</sup> Brubaker, R. (*supra* note 99), pp. 9-11, 14, 16-17.

<sup>347</sup> UNSC (*supra* note 70).



and resources, often using and manipulating sectarianism and ethnic identity towards these ends.<sup>348</sup>

In several instances, this violence was presented as the logical outcome of the original schism over the succession to the Prophet Mohammed. Sectarian violence was often characterised as the continuation of an age-old conflict between Shi'ah and Sunni Muslims. It was detached from its roots in political manipulation by the US, new state actors within Iraq, and the rise of an insurgency by those marginalised in the state-building process. This imagination of sectarian violence was further entrenched by statements that it persisted *despite* government efforts at prioritising reconciliation,<sup>349</sup> rather than the recognition that it was largely produced by opposition politics to foreign occupation and governance projects that marginalised certain groups. This characterisation understated the exigencies, ambiguities, and ethically and legally questionable policies that both led to the invasion of Iraq and the post-war state-building process. It functioned to make war more palatable to the perpetrators both internally and externally. In this process, the body remained an unquestioned site of territorialisation, accepted as a space upon which historical contests for sovereign power have always been waged.

#### IV. Conclusion

Normative discourses and legal justifications for the war in Iraq, the instillation of neoliberal governance, militarisation in a state of emergency, ethno-sectarian normativities, and the politicisation of humanitarian aid were all practices of sovereign exceptionalism. They were violently realised and enacted on the bodies of the Iraqi population and resulted in one of the largest IDP and refugee crises the Middle East has ever known. Such practices facilitated the spatiotemporal manifestations of the states of exception that proliferated within Iraq, as the US and

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<sup>348</sup> ICG (2006, February 27). *The next Iraqi war? Sectarianism and civil conflict*. Crisis Group Middle East Report No. 52.

<sup>349</sup> See for example UNHCR (*supra* note 334), pp. 23, 47-54.

the UK unilaterally designated Iraq as the exception within the global order, and insurgent and sectarian militias reproduced the logic of sovereignty in their decisions upon life and death in their competition for control of the state. At the same time, these practices also enabled differing contestations of sovereign power. The sovereign power of the US and its allied Great Power states was both asserted beyond their borders and challenged by characterisations of their invasion of Iraq as illegal. The insurgent and sectarian militias challenged not only the sovereignty of the occupying forces, but also each other's claims for sovereign power.

Similar to Iraq's creation as a state under British tutelage, the events leading to the 2003 invasion were intended to preserve the global order through first its outlaw status and then its domestication (through military intervention, occupation, and neoliberal state-building). This was envisioned to enable Iraq's eventual re-inclusion in international society, despite the initial rejection of such rationalities and justifications as illegal. However, following the invasion, the US was compelled to engage in a long project of state-building and reconstruction, during which its expanded sovereign power expressed through occupation encountered a population divided by competing claims for authority in the new Iraqi state. Claims to sovereign power therefore were not limited to recognised state authorities, but were refracted throughout the population in the emergence of militia groups and the sectarian control and manipulation of different government sectors. Sovereignty, originally expressed in the nexus of citizen/state/territory became de-localised, internationally expanded and internally fractured, multiplying across geographic territories and populations in Iraq.

These assertions and contestations of sovereignty in Iraq intersected with often deadly consequences. They located and entrenched sovereignty ever more squarely within the realm of biopolitics, as the power to except bodies from legal protection was multiplied by those actors who struggled for control of the state. The justifications for invasion, the physical and structural violence that resulted, the sectarianisation of government apportioned according to ethno-sectarian identities,

and social categorisation and retributive violence were all practices that enabled the proliferation of new legal norms and political identities demarcating the new Iraqi state on the bodies of its population. These practices demonstrated how the violent underside of biopolitics became central to the assertion of such sovereign identities, as escalating violence and necropolitics emerged in a tenuous relationship with the biopolitical projects of democratic government.

Yet, as the logic of sovereignty, located in the power to the decide upon the exception, was revealed in the increase use of unconstrained brute force and contested and appropriated by insurgents and sectarian militias, the state began to lose its grounding in law necessary for its legitimacy. The normalisation of the exception began to undermine both the legitimacy of the MNF and the insurgents' respective assertions of sovereign control and their visions for the Iraqi state. This was evident in the final withdrawal of US combat forces in August 2010 in spite of the stalemate that continued between factions of the current Iraqi government and the ongoing insurgency that could potentially instigate new incarnations of civil war.

Therefore, all inhabitants of Iraq became subject to the violence of sovereign politics, not only reduced to fighting for survival in spaces unprotected by state law, but also asserting new legal norms and political orders to govern these spaces and to challenge the decisions that placed them there. These assertions of political authority and rights to sovereign control multiplied the production of spaces of exception, as exceptional spaces gave way to normative orders enacting further exceptions. In staking their claims for sovereign authority, private and state actors employed increasingly violent measures and rationalities for asserting their visions of who would constitute and control the new Iraqi state. While they did not contest the paradigm of sovereignty, they did contest each other's claims for sovereign control. They undermined and destabilised assertions of sovereignty at the state level, but reproduced the logic of sovereignty in their attempts to control the direction of the Iraqi state.

Hence the state of exception emerged as a dominant paradigm of governance in Iraq, turning ever more on the violent underside of biopolitics and producing continuous outflows of IDPs and refugees. As the exception increasingly became the norm, the violence that constituted the state began to merge with the violence that maintained it, disintegrating the distinctions between life and politics, fact and law. The normalcy that law required for its own validity was therefore rendered almost as meaningless as it had been under Saddam Hussein. Sovereignty was exposed and de-naturalised as an organising principle, as it was revealed as contingent and processual, de-localised and de-centred, in this highly contested social space.

## Chapter 3

### Humanitarianism and the displacement of sovereignty: Iraqi refugee protection in the Middle East

#### I. Introduction

Fleeing the ravages of the 2003 war in Iraq, the violence of insurgency and counter-insurgency operations, and ethno-sectarian “cleansing” campaigns, nearly two million Iraqis sought refuge in host states in the Middle East (see Figure 1).<sup>1</sup> Their arrivals in increasing numbers led to growing fears and restrictions imposed by these states struggling to accommodate them. They were construed as a burden threatening states’ internal security,<sup>2</sup> infrastructure, economic stability,<sup>3</sup> and political relationships in the region.<sup>4</sup> These states also largely lacked international or domestic legal protection frameworks for refugees on their territories. Hence, Iraqis were at some times permitted entry, yet provided with only a limited form of

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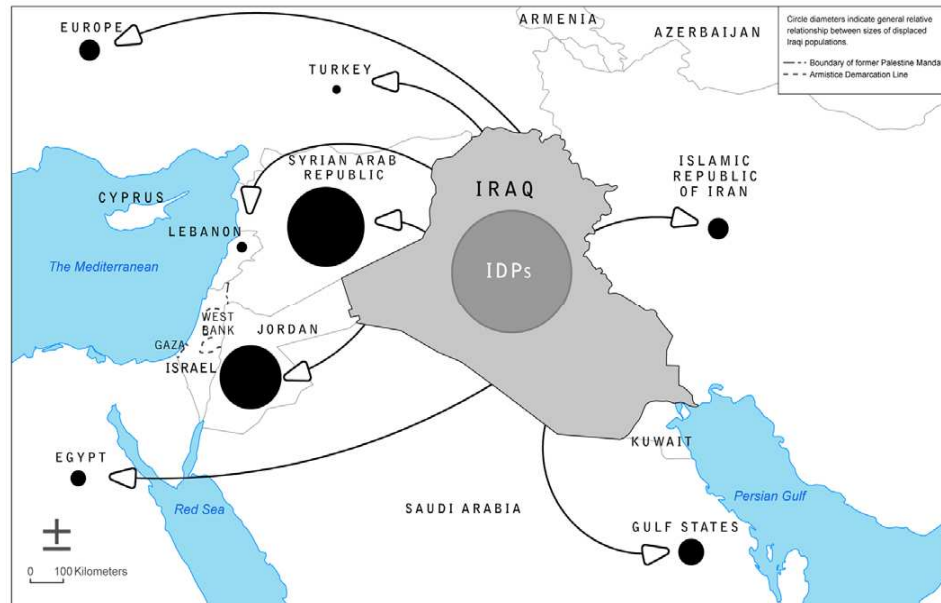
<sup>1</sup> UN High Commissioner for Refugees [hereinafter “UNHCR”] (2007, September). *Statistics on displaced Iraqis around the world*; International Crisis Group [hereinafter “ICG”] (2008, July 10). *Failed responsibility: Iraqi refugees in Syria, Jordan and Lebanon*, Crisis Group Middle East. Report No. 77.

<sup>2</sup> ICG, *ibid.*, pp. 11, 27. See Government of Lebanon, General Security, Visas – Entry of the Citizens of non-Gulf Arab Countries who are coming for purposes of Tourism; HRW [hereinafter “HRW”] (2007, November) *Rot here or die there: Bleak choices for Iraqi refugees in Lebanon*. Vol. 19, No. 8(E); Zaiotti, R. (2006). Dealing with non-Palestinian refugees in the Middle East: Policies and practices in an uncertain environment. *International Journal of Refugee Law*, 18 (2), 333-353, p. 343.

<sup>3</sup> See Government of the Syrian Arab Republic (2007, April 17). *Report to the International Conference on Addressing the Humanitarian Needs of Persons inside Iraq and in the Neighbouring Countries*. Geneva; IRIN (2007, August 23). Iraq pledge to Syria fails to assuage refugees; Kingdom of Jordan (2007, April 17). *Statement to the International Conference on Addressing the Humanitarian Needs of Persons inside Iraq and in the Neighbouring Countries*, Geneva; Weiss Fagan, P.W. (2007). *Iraqi refugees: Seeking stability in Syria and Jordan*. Institute for the Study of International Migration, Georgetown University and Center for International and Regional Studies, Georgetown University School of Foreign Service in Qatar, pp. 17-18.

<sup>4</sup> Zaiotti, R. (*supra* note 2), p. 344; Harper, A. (2008). Iraq’s refugees: Ignored and unwanted. *International Review of the Red Cross*, 90, 169-190, p. 177.

residence and economic and social rights, while at other times they were barred from entry or deported to face once again the violence they had fled in Iraq.



**Figure 1.** Iraqi refugees in the Middle East region<sup>5</sup>

UNHCR recognised that in the context of this crisis, consolidating refugee protection space solely through pressuring host states to abide by principles of international refugee law might prove counterproductive in the short-term and undermine the goodwill and positive political relationships it had forged with government authorities. However, as a purely pragmatic approach would also undermine its mandate to uphold international standards of refugee protection, UNHCR adopted a third approach that attempted to promote protection in the face of these states' asserted sovereign prerogatives to deny it. This strategy included combining diplomatic agreements, training and capacity building, and outreach and advocacy to civil society and refugees; expanding the definition of protection to

<sup>5</sup> Source: ICG (*supra* note 1). *Failed responsibility: Iraqi refugees in Syria, Jordan and Lebanon*, Crisis Group Middle East. Report No. 77: adapted from a map by the UN Office for the Coordination of Humanitarian Affairs [hereinafter "OCHA"], see map ID: T OIA\_T\_DISPLACED\_002\_A5, Version: 2.0, dated 17 March 2008.

address economic and social vulnerabilities; and mobilising international solidarity through resettlement, bilateral support, and humanitarian assistance.<sup>6</sup>

This chapter explores the tensions that emerged between host state and UNHCR responses to the Iraqi refugee crisis in the region and asks how they both produced and contested particular configurations of sovereignty. It maps the legal topographies of the protection spaces that resulted from these negotiations and considers their implications for the location and exercise of sovereign power and authority. Towards this end, it first traces the practices functioning as decisions on the exception that were enacted by Syria, Jordan, and Lebanon (which were hosting the largest numbers of Iraqis) to contain and manage the refugee population. It also delineates the strategies employed by UNHCR in its attempts to counter the devastating effects of many of these practices. It then theorises how the interactions between state and UNHCR responses revealed new configurations of political space and forms of de-localised and contingent sovereignty, contesting the reach of both the sovereign power of the state and the authority of UNHCR as an international organisation within the state system. It argues that although state sovereignty was mediated and partially displaced by UNHCR's structures of humanitarian governance, the location of sovereignty in decisions on the life of populations nonetheless persisted. However, this new configuration of sovereignty also suggested directions for the future of refugee protection beyond the sole parameters of state responsibility.

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<sup>6</sup> UNHCR (2009, July) *Surviving in the city: A review of UNHCR's operation for Iraqi refugees in urban areas of Jordan, Lebanon and Syria* (PDES/2009/03), pp. 18-19. See ICVA (2007, April). International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons Inside Iraq and in Neighbouring Countries, 17-18 April, Geneva; Department for International Development (2009). *UN consolidated appeal for Iraq – Pillar II UNHCR*.

## **II. Legal practices governing Iraqi refugees in the Middle East**

Host states' legal practices governing Iraqi refugees in the Middle East effectively restricted their access to protection in the name of emergency. At the same time, these practices were continuously countered by UNHCR in its efforts to expand protection space. The lack of state juridical structures for managing refugee populations constituted a *de facto* state of exception in which protection strategies were more a product of political discretion and good will than legal obligation. The kinds of protection regimes that resulted turned on decisions on inclusion or exclusion from legal recognition. As exclusion resulted in an Iraqi having no legal status at all, it functioned as a decision on the exception.

These regimes may be grouped into four broad categories which are addressed below: frameworks for the legal recognition and management of Iraqi refugees, border controls and shifting visa regimes, strategies for facilitating and managing access to economic and social rights, and re-emplacement/re-territorialisation through durable solutions (voluntary repatriation, local integration, or resettlement). The following sections outline the contours of each of these regimes by tracing the practices of states towards Iraqi refugees, UNHCR strategies to counter them, and the compromises and contests that emerged. This mapping exercise makes it possible to develop a more nuanced understanding of the interactions of refugee law and sovereign power as they were materialised in the spaces of Iraqi refugees' daily lives.

### **A. Frameworks for legal protection and management of Iraqi refugees**

The first regime for protecting and managing refugee populations included legal and diplomatic frameworks that were crafted to govern refugees on host state territories. In the Middle East, in the absence of state accessions to the 1951



Convention Relating to the Status of Refugees,<sup>7</sup> these frameworks were the product of negotiations between host states and UNHCR in which responsibilities for protection and assistance traditionally assumed by the state were shared between states and the agency. These frameworks offer insights into how sovereignty was reconstituted in the context of the Iraqi refugee crisis, making way for UNHCR to assume increasingly state-like roles and sovereign responsibilities in decision-making regarding the inclusion/exclusion, protection, and management of refugees on these territories.

The primary international legal instruments governing the protection of refugees are the 1951 Convention, the 1967 Protocol,<sup>8</sup> and guidance and interpretation provided by the UNHCR Executive Committee. Within the Middle East, the only countries that have acceded to the 1951 Convention include Turkey,<sup>9</sup> Yemen, and Egypt, each of which maintained certain reservations.<sup>10</sup> The remaining countries in the region hosting Iraqi refugees are not signatories to the 1951 Convention, although they do have the obligation not to *refoule* refugees to countries where they risk persecution.<sup>11</sup>

This reluctance to accede to the international refugee protection regime may be attributed to both political and ideological factors. States wished to avoid obligations for hosting refugees for protracted periods of time as happened with the Palestinians.<sup>12</sup> Also, notions of citizenship based upon affiliations with kin or religious groups limited immigration possibilities for foreigners primarily to

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<sup>7</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ("1951 Convention").

<sup>8</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606.

<sup>9</sup> Turkey is a signatory to the 1951 Convention and the 1967 Optional Protocol, but it retains a geographical limitation of recognising refugees only of European origin.

<sup>10</sup> See UN Treaty Collection Database (2011), at <http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=UNTS&no=V~2&chapter=5&Temp=mtdsg2&lang=en#Participants>.

<sup>11</sup> However, since they are members of the UN, they would still be bound under the 1950 Statute for the UNHCR. Statute of the Office of the United Nations High Commissioner for Refugees (3 December 1949) UN Doc. A/RES/428. Also, under the Convention Against Torture, the ICCPR, international customary law, they are still obligated to respect the principle of *non-refoulement*, meaning that they should not return persons to situations where they may face serious human rights violations, such as restricting entry at the border or deporting persons facing such abuses.

<sup>12</sup> Zaiotti, R. (*supra* note 2), p. 344.

sponsorship for work, such as the *kefala* system, rather than naturalisation.<sup>13</sup> In keeping with this reluctance, host states lacked domestic refugee legislation<sup>14</sup> in accordance with international instruments, mentioning asylum more as a matter of principle.<sup>15</sup> Instead, they enacted *ad hoc* measures towards refugees not grounded in principles of human rights, treating them more as illegal migrants and foreigners under each state's immigration law.<sup>16</sup>

In this environment, these governments tended to perceive UNHCR's role primarily as one of providing short-term humanitarian relief in times of emergency.<sup>17</sup> However, UNHCR attempted to secure limited protections for refugees within these otherwise exceptional spaces by negotiating alternative legal regimes for the protection and management of refugees on these territories. These regimes attempted to blend some key aspects of international refugee law, particularly *non-refoulement* by host states,<sup>18</sup> with political and diplomatic assurances by UNHCR, resulting in arrangements to share responsibilities for protection, although they remained contingent on states' consent. They included Memoranda of Understanding (MoU) with states, the Temporary Protection Regime for Iraqi refugees, the declaration of *prima facie* refugee status for Iraqis from the southern and central areas of Iraq, and mass registration campaigns for Iraqi refugees.

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<sup>13</sup> Kagan, M. (2011, February). 'We live in a country of UNHCR: The UN surrogate state and refugee policy in the Middle East (UNHCR, New Issues in Refugee Research, no. 201), pp. 9-10; Parolin, G.P. (2009). *Citizenship in the Arab world: Kin, religion and nation state*. Amsterdam: Amsterdam University Press, p. 115.

<sup>14</sup> UNHCR (*supra* note 6), p. 10.

<sup>15</sup> Chatelard, G. (2002, August). *Jordan as a transit country: Semi-protectionist immigration policies and their effects on Iraqi forced migrants*. (Working Paper No. 61). Florence, Italy: Robert Schuman Centre for Advanced Studies, European University Institute, p. 2. See Article 34 of the Constitution of the Syrian Arab Republic, adopted 13 March 1973; Article 21(i) of The Constitution of the Hashemite Kingdom of Jordan, adopted 1 January 1952; and Art. 26 of *Loi réglementant l'entrée et le séjour des étrangers au Liban ainsi que leur sortie de ce pays* (Law Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country (Law of Entry and Exit)), Bulletin de Législation Libanaise (Journal Officiel), No. 28-1962, entered into force July 10, 1962. In Lebanon, the 1962 Law Regulating the Entry and Stay of Foreigners does contain provisions for the protection persons seeking asylum, but this aspect of the law was never implemented in practice through the creation of asylum adjudication mechanisms or governmental regulations.

<sup>16</sup> HRW (2006, November 28). *The silent treatment: Fleeing Iraq, surviving in Jordan*. Vol. 18, No. 10(E), part II.

<sup>17</sup> Zaiotti, R. (*supra* note 2), p. 343.

<sup>18</sup> "UNHCR's protection efforts are focused on securing and improving protection space in the region, at a minimum protection from *refoulement*, non-penalization for illegal entry, and access to education, adequate housing, basic health care facilities and other basic services." UNHCR (2007, March 12). *Resettlement of Iraqi refugees*, p. 2.

The key legal frameworks forged between UNHCR and host states were MoU that codified a division of responsibilities for refugee protection between the agency and the state, referred to at times as a “shadow legal regime”.<sup>19</sup> Although in practice they have been treated more as “statements of cooperation”, in theory in some contexts, such as Egypt, they are legally binding and subject to judicial supervision.<sup>20</sup> MoU were developed with the Governments of Jordan,<sup>21</sup> Lebanon,<sup>22</sup> Egypt,<sup>23</sup> and Turkey,<sup>24</sup> and they contained provisions that host states would not *refoule* refugees recognised by UNHCR, on the condition that UNHCR would provide for the resettlement or repatriation of these refugees within a specified time frame. They also contained provisions obligating UNHCR to provide economic and social support for refugees on these territories.<sup>25</sup>

However, despite these diplomatic assurances, the durable solutions of voluntary repatriation and resettlement were nearly impossible to realise in the majority of cases.<sup>26</sup> UNHCR maintained a policy against refugee return to Iraq, and resettlement benefited less than five percent of the Iraqi refugee population. Failure to secure a solution in a timely manner translated into renewed threats of detention and deportation for illegal residence in these host states. This often constituted *refoulement* to persecution,<sup>27</sup> as refugees were returned to the violence that forced

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<sup>19</sup> See Kagan, M. (*supra* note 13), p. 15.

<sup>20</sup> See Badawy, T. (2010). The Memorandum of Understanding between Egypt and the Office of the United Nations High Commissioner for Refugees: Problems and recommendations. CARIM Analytic and Synthetic Notes 2010/07. Robert Schuman centre for Advanced Studies, European University Institute, pp. 4, 19.

<sup>21</sup> UNHCR (1998, April 5). Memorandum of Understanding between the Government of Jordan and UNHCR. See UNHCR (*supra* note 6), p. 24; HRW (*supra* note 16), part IV.

<sup>22</sup> UNHCR (2003, September 9). *Memorandum of Understanding between the Directorate General of General Security (Republic of Lebanon) and the Regional Office of the United Nations High Commissioner for Refugees concerning the processing of cases of asylum seekers applying for refugee status with the UNHCR Office*. See HRW (*supra* note 2), p. 4.

<sup>23</sup> UNHCR (1954, February 10). *Agreement between the Egyptian Government and the United Nations High Commissioner for Refugees*.

<sup>24</sup> HRW (2003, February 13). *Iraqi refugees, asylum seekers, and displaced persons: Current conditions and concerns in the event of war*.

<sup>25</sup> UNHCR (1998, April 5) (*supra* note 21), Art. 3.

<sup>26</sup> Kagan, M. (*supra* note 13), p. 16.

<sup>27</sup> *supra* note 11.

them to flee in the first place. As a result, they were often compelled to turn around and flee Iraq once more.<sup>28</sup>

In April 2003, UNHCR implemented its second strategy for increasing refugee protection in anticipation of a large exodus of Iraqis following the war. Having limited resources for refugee status determination and initially few options for Iraqi refugee resettlement,<sup>29</sup> the agency devised a Temporary Protection Regime (TPR), which was previously used as a practical means of addressing urgent protection issues in situations of “mass influx”.<sup>30</sup> Although not providing refugee status *per se*, the TPR provided for many similar protections accorded to recognised refugees: it stated that Iraqis did not require individual refugee status determination unless a particular protection problem warranted it, and it called upon Syria, Jordan, and Lebanon not to forcibly return any Iraqis to Iraq.<sup>31</sup>

The TPR remained in place until 2006,<sup>32</sup> and the majority of Iraqis during this time were issued with temporary protection letters by UNHCR, which were valid for six months and could be renewed.<sup>33</sup> But like other iterations of temporary protection regimes, it did little to lift refugees from positions of legal ambiguity.<sup>34</sup> The UNHCR letters were not widely recognised by host governments, particularly in Jordan, which argued that UNHCR had exceeded the scope of its undertakings in the MoU. Hence, Iraqi refugees continued to face arrest, detention, and sometimes

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<sup>28</sup> See for example Trad, S. & Frangieh, G. (2007, June). Iraqi refugees in Lebanon: Continuous lack of protection. *Forced Migration Review – Iraq Special Issue*, p. 36; UNHCR (2010, October 19). *UNHCR poll indicates Iraqi refugees regret returning home*.

<sup>29</sup> HRW (*supra* note 16), part V. The US had placed a moratorium on the resettlement of Iraqis to the US following the 9/11 attacks; this restriction was not lifted until 2005. US Department of State, Office of Admissions, Bureau of Population, Refugees, and Migration. (2005 April 13). “USG policy on resettlement of Iraqi refugees”. Program Announcement 2005-7.

<sup>30</sup> UNHCR (2001). *Note on protection of refugees in mass influx situations: Overall protection framework* (UN Doc. EC/GC/01/4), p. 3, para. 13.

<sup>31</sup> This was similar in theory to the 1992 TPR for asylum-seekers from Bosnia-Herzegovina, which existed outside of the 1951 Convention regime, conferring instead a more limited form of protection in the project of encouraging states to receive and host asylum seekers. See Helton, A. (1998). Legal dimensions of responses to complex humanitarian emergencies. *International Journal of Refugee Law*, 10(3), 533-546, p. 536.

<sup>32</sup> UNHCR (2006, September 1) *Country operations plan 2007: Iraq*; HRW (*supra* note 16), p. 43.

<sup>33</sup> Amnesty International [hereinafter “AI”] (2007, September) *Millions in flight: The Iraqi refugee crisis* (MDE 14/041/2007), p. 12.

<sup>34</sup> See Zetter, R. (2007). More labels, fewer refugees: Remaking the refugee label in an era of globalization. *Journal of Refugee Studies* 20(2), 172-192, p. 181.

deportation.<sup>35</sup> This strategy, borne more out of assertion than negotiation, revealed how state sovereignty was challenged by UNHCR.

Due to the escalations in violence that led to the increased flight of Iraqis to neighbouring states starting in 2006, UNHCR implemented its third strategy for legal protection – a strategy that, like the TPR, was more a product of the agency’s assertions that host states must recognise the growing need and obligation to protect Iraqi refugees. Starting in February 2007, UNHCR began recognising all Iraqis from the southern and central areas of Iraq as *prima facie* refugees.<sup>36</sup> *Prima facie* refugees are presumed to be recognised refugees “on the basis of the readily apparent, objective circumstances in the country of origin giving rise to the exodus”,<sup>37</sup> and therefore do not have to undergo a full refugee status determination procedure. However, this move was not welcomed by host states for reasons similar to their reluctance to recognise the earlier TPR.<sup>38</sup>

Partially to temper both these host states’ and resettlement states’ concerns, and also in order to prevent the recognition of Iraqis who may have committed acts that would render them excludable under Article 1F of the 1951 Convention, UNHCR simultaneously devised a regional exclusion policy. This included the early identification and direction of cases presenting such issues through channels where their exclusion could be formally assessed. The agency identified certain profiles of persons who might be excludable based upon past acts or particular affiliations with the previous Iraqi regime or military, reflecting to a large extent the inadmissibility criteria of major resettlement countries.<sup>39</sup> Around two to three percent of Iraqis registered with UNHCR had such profiles. These persons were issued asylum-seeker certificates, interviewed, and generally had their cases decided upon only where

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<sup>35</sup> See UNHCR, UNICEF, & WFP (2006, March). *Assessment of the situation of Iraqi refugees in Syria*, Forward, pp. 17, 20; UNHCR (2003, April 15). *Letter of Understanding between the Government of the Hashemite Kingdom of Jordan and the Office of the United Nations High Commissioner for Refugees*; HRW (*supra* note 16), part V.

<sup>36</sup> UNHCR (2007, January 1). *Revised strategy for the Iraq situation*; UNHCR (*supra* note 6), p. 21.

<sup>37</sup> Although this definition may be broader than that enshrined in the 1951 Convention. UNHCR (*supra* note 30), pp. 1-3, paras. 6, 11.

<sup>38</sup> ICG (*supra* note 1), p. 14; Badawy, T. (*supra* note 20), p. 18.

<sup>39</sup> UNHCR (*supra* note 6), pp. 24-25. See, for example, Citizenship and Immigration Canada (2002, June 18-19). Background note for the agenda item: Security concerns. Annual Tripartite Consultations on Resettlement, Geneva, p. 5.

there was an identified need for a protection intervention, such as release from detention or preventing deportation. UNHCR did later recommend augmenting this process with substantive reviews of such cases before determining that no action would be taken.<sup>40</sup> The result, however, was that very few decisions on exclusion were ever actually issued early on, and most of these cases remained on hold for a considerable period of time.

The fourth regime crafted by UNHCR to expand refugee protection space was a mass campaign to register Iraqi refugees – another responsibility typically attributed to the state, but assumed by UNHCR in order to fill in the gaps in state protection. UNHCR argued that registration served multiple purposes: to counteract the dehumanising experience of displacement by providing refugees with identity cards representing a recognition of their humanity; to provide a means for separated families to reunite; to allow the agency to develop demographic profiles of the refugee population; and to provide a system for identifying vulnerable persons in need of additional support.<sup>41</sup>

Registration was key not only to ensuring that refugees had some form of documentation and legal recognition, but also to the biopolitical management of service delivery. In Lebanon and Syria, only refugees who were registered with UNHCR and then categorised as having specific needs or vulnerabilities were prioritised for social welfare assistance. But in Jordan, certain types of assistance were available even for refugees who were not registered as they were considered *prima facie* refugees regardless of whether they were registered with UNHCR.<sup>42</sup>

However, in most host states, the numbers of Iraqis who registered with UNHCR were relatively low in comparison to the size of the overall Iraqi refugee population.<sup>43</sup> This was due to problems with UNHCR capacity prior to 2007,

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<sup>40</sup> Ibid.

<sup>41</sup> Martin, S. (2001, Spring). Forced migration and professionalism. *IMR*, 35(1), 226-243, pp. 233-234, referencing Ogata, S. (2000, July 4). Making a difference for refugees. Keynote address for Microsoft Tech-Ed 2000 Europe, Amsterdam; See UNHCR (*supra* note 6), pp. 22-23, 25-26; AI (2007, July 26) *Iraq: The situation of Iraqi refugees in Syria* (MDE 14/036/2007), p. 6.

<sup>42</sup> UNHCR (*supra* note 6), p.23.

<sup>43</sup> Although the overall size of the Iraqi refugee population was subject to debate. For registration statistics, see IRIN (2008, December 11) *Egypt: Lack of income main problem for Iraqi refugees*; Chatelard, G. & Misconi, H.

misinformation amongst refugees about the registration process, and fears by refugees that their registration might trigger the state's attention and lead to their eventual deportation.<sup>44</sup> In addition, amongst some refugees from the middle classes, there was a stigma attached to registration with a humanitarian organisation.<sup>45</sup> All of these factors hampered to varying degrees UNHCR's efforts to identify, classify, and manage the population.

## **B. Shifting border controls and visa regimes**

The legal techniques of border controls and restrictive visa regimes enacted by host states towards Iraqi refugees comprised the second set of practices used to manage, contain, and decide upon the lives of the Iraqi refugee population. The reasons for these restrictions were primarily economic,<sup>46</sup> religious,<sup>47</sup> and political.<sup>48</sup> The hardships imposed in obtaining and renewing visas resulted in many Iraqis opting to live illegally in their host states, placing them at risk of detention and sometimes even deportation, unless UNHCR was able to intervene. Increasingly draconian in nature, these practices were contested by UNHCR and human rights organisations in their attempts to prevent detentions and deportations, thereby contesting the sovereign power of states to except Iraqi refugees wholly from legal recognition or protection.

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(2009, November). "Regional perspectives on Iraqi displacement: a research report and discussion paper". In *Resolving Iraqi displacement: humanitarian and development perspectives*. pp. 9-26. Brookings-Bern Project on Internal Displacement, p. 14. See also UNHCR (*supra* note 6), p. 9. The numbers of Iraqi refugees in the region are estimated, and significant discrepancies exist. Ibid. pp. 9-26; ICG (*supra* note 1), pp. 3-4. See European Union: European Parliament (2007, July 12). *European Parliament resolution on the humanitarian situation of Iraqi refugees*. (P6\_TA(2007)0056), para. G; UNHCR (2008, April/May); FAFO (2007, November) *Iraqis in Jordan: Their number and characteristics*.

<sup>44</sup> Al (*supra* note 33), p. 28.

<sup>45</sup> See Arendt, H. (2007). We refugees. In J. Kohn (Ed.). *The Jewish writings / Hannah Arendt* (pp. 264-274). New York: Schocken Books, pp. 268-269.

<sup>46</sup> Zaiotti, R. (*supra* note 2), p. 344; Harper, A. (*supra* note 4), p. 177.

<sup>47</sup> UNHCR (*supra* note 6), pp. 10, 12; Al (*supra* note 33), p. 11; FAFO (*supra* note 43); ICG (*supra* note 1), pp. 6, 11, 20-21.

<sup>48</sup> Zaiotti, R. (*supra* note 2), p. 344; Harper, A. (*supra* note 4), p. 177; see Chatelard, G. & Misconi, H. (*supra* note 43), p. 13; UNHCR (*supra* note 6), pp. 10, 12; FAFO (*supra* note 43); ICG (*supra* note 1), pp. 11, 20-21.

In Syria, visas were initially available to Iraqis for three months, but by 2007, were limited to one month. After their visas expired, Iraqis were then required to leave. If they wished to re-enter Syria, they had to obtain a new visa. This resulted in Iraqis travelling every month to the Syrian border, obtaining an exit stamp in their passports, and then immediately turning around and re-entering the country.<sup>49</sup> In October 2007, visas were restricted further to include only Iraqis who were from certain professional categories, whose children were attending school in Syria, or who needed medical treatment.<sup>50</sup> Visas had to be obtained from the Syrian Embassy in Al Mansour area of Baghdad – a neighbourhood rife with sectarian violence,<sup>51</sup> but later, Iraqis were permitted also to obtain them at border posts.<sup>52</sup>

Due to the practical and security concerns involved in renewing visas, many Iraqi refugees overstayed their visas in Syria. The Syrian authorities largely tolerated their presence, although they were reported on occasion to demand bribes to prevent their deportation.<sup>53</sup> In cases where Iraqis were detained or threatened with deportation, UNHCR would try to intervene with the authorities to prevent their passports from being stamped in red, which would prohibit their re-entry to Syria for five years.<sup>54</sup>

In Jordan, most Iraqi refugees were treated as any other foreigners. However, under the *Law No. 24 of 1973 on Residence and Foreigners' Affairs* [Jordan] of 1 January 1973, the Minister of Interior was empowered to waive immigration requirements in cases “connected with international or humanitarian courtesy or of the right to political asylum”.<sup>55</sup> Iraqis could extend their visas to a three-month residency permit, but were not permitted to engage in paid work.<sup>56</sup> They could also

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<sup>49</sup> AI (*supra* note 33), p. 11; AI (2008, June) *Rhetoric and reality: The Iraq refugee crisis* (MDE 14/011/2008), p. 9; AI (*supra* note 41), p. 4.

<sup>50</sup> Syrian Arab Republic, Regulation Number 2260/K, October 2007; UNHCR (2007, September 11) *New Syrian visa requirement halts most Iraqi arrivals*; UNHCR (2007, September 11), *Briefing note: UNHCR fears for safety of fleeing Iraqis as Syrian visa restrictions bite*; AI (2008, June) (*supra* note 49), p. 10.

<sup>51</sup> UNHCR, *ibid.*

<sup>52</sup> ICG (*supra* note 1), p. 23.

<sup>53</sup> AI (*supra* note 33), p. 11.

<sup>54</sup> AI (2008, June) (*supra* note 49), p. 7.

<sup>55</sup> Government of Jordan (1973). *Law No. 24 of 1973 on Residence and Foreigners' Affairs*, as amended by Law No. 23 of 1987, Art. 29(h).

<sup>56</sup> *Ibid.*



obtain longer permits upon the recommendation of the Director of Public Security, through the deposit of USD 150,000 in a Jordanian bank account, by securing employment contracts certified by the Ministry of Labour,<sup>57</sup> or as children either enrolled in Jordanian schools or whose only caregiver resided legally in Jordan.<sup>58</sup>

However, following the 2005 bombings in Jordan by Al-Qaeda-Iraq,<sup>59</sup> Jordan introduced emergency measures restricting the entry of Iraqi refugees, including closing the border to males between the ages of 17 and 35, deporting refugees,<sup>60</sup> issuing visas valid for only two days,<sup>61</sup> asking Iraqis at the border whether they were Sunni or Shi'ah, involving the Ministry of Interior and Secret Service in decision-making related to Iraqi immigration applications,<sup>62</sup> and arresting Iraqis who were working without a permit.<sup>63</sup> Refugees were also required to carry the new G-series passports, which were difficult and expensive to obtain in Baghdad due to the security situation.<sup>64</sup> Entry was further restricted in 2007 to those who had residency permits or invitations for medical treatment, education, or to attend conferences.<sup>65</sup>

Given these difficulties, most Iraqis resided and worked in Jordan illegally and thus lived in fear of arrest, detention, and deportation. In one concession, in February 2008, the Jordanian authorities announced a two-month amnesty for Iraqis without legal status, requiring that they either regularise their status by paying 50 percent of their visa overstay fines (USD 761/year) or leave the country.<sup>66</sup> Iraqis who were detained were required to pay fines of JD 1.5 per day for each day of their visa overstay or be deported and banned from re-entering the country for five years.<sup>67</sup> In such cases, UNHCR would intervene by providing the authorities with a letter

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<sup>57</sup> HRW (*supra* note 16), part V.

<sup>58</sup> Government of Jordan (*supra* note 55), art. 26.

<sup>59</sup> HRW (*supra* note 16), part II.

<sup>60</sup> Government of Jordan (2008, February 13). "Cost of hosting Iraqis estimated at JD1.6 billion"; ICG (*supra* note 1), p. 12; HRW, *ibid.*, part IV.

<sup>61</sup> Spinner, J. (2006 January 17). Iraqis find travel to Jordan increasingly frustrating. *Washington Post*

<sup>62</sup> ICG (*supra* note 1), p. 11.

<sup>63</sup> HRW (*supra* note 16), part II.

<sup>64</sup> ICG (*supra* note 1), p. 9.

<sup>65</sup> AI (*supra* note 33), pp. 6, 19.

<sup>66</sup> UNHCR (2008, March) *Iraq situation update*. This deadline was extended by one month. BBC (2008, April 17). *Jordan extends deadline for exempting Iraqis from residency fines*.

<sup>67</sup> HRW (*supra* note 16), part II.

certifying the detainee's refugee status.<sup>68</sup> If the detainee was an asylum-seeker, UNHCR would conduct refugee status determination. If rejected, the detainee often would be deported, despite letters from UNHCR requesting that the detainee be permitted to remain given the security situation in Iraq. Such letters, while sometimes preventing immediate deportation, were also often used by the Jordanian authorities to pressure UNHCR to resettle the detainee as a condition of her or his release.<sup>69</sup>

In order to enter Lebanon,<sup>70</sup> Iraqis were required to obtain tourist visas at the Lebanese embassy in Iraq or at the Beirut airport.<sup>71</sup> Those who were unable to enter the country legally often resorted to paying smugglers up to USD 6,000<sup>72</sup> to assist them to cross the border.<sup>73</sup> Lebanon's 1962 Law of Entry and Exit, Articles 32-26, provided that foreigners who illegally entered the country could be detained for one to three months, fined, and deported.<sup>74</sup> Therefore, Iraqi refugees faced increasing rates of detention and deportation on account of their illegal residency or employment without a work permit.<sup>75</sup> As of January 2008, there were 600 Iraqi refugees in detention in Lebanon, 323 of whom were registered with UNHCR.<sup>76</sup> They were usually fined and sentenced to at least one month in prison. Often unable to pay the fines, they would agree to remain in detention for one day for each LL 10,000 they owed.<sup>77</sup> Although Lebanon's Directorate General of General Security did not regularly enforce deportation orders against Iraqi detainees, as this would constitute *refoulement*, he usually instead detained Iraqi refugees indefinitely.<sup>78</sup> He

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<sup>68</sup> Iraqis who were previously rejected by UNHCR or who had never registered with UNHCR were reported to be subject to deportation without UNHCR intervention. *Ibid.*, part IV.

<sup>69</sup> HRW (*supra* note 16), part IV.

<sup>70</sup> Government of Lebanon General Security, "Entrance of Investors, Business, Bankers, Managers, Employers, Traders, Patients and their Families, and Everyone who Has Lebanese Roots, and Touristic Delegations," at [www.generalsecurity.gov.lb/English/Visas/visa7/](http://www.generalsecurity.gov.lb/English/Visas/visa7/); Government of Lebanon, General Security, Visas – Entry of the Citizens of non-Gulf Arab Countries who are coming for purposes of Tourism", at [www.generalsecurity.gov.lb/English/Visas/Arab+countries/](http://www.generalsecurity.gov.lb/English/Visas/Arab+countries/).

<sup>71</sup> *Ibid.*, Visas.

<sup>72</sup> ICG (*supra* note 1), p. 26.

<sup>73</sup> HRW (*supra* note 2), p. 21.

<sup>74</sup> *Ibid.*, p. 28.

<sup>75</sup> UNHCR (*supra* note 6), p. 13.

<sup>76</sup> UNHCR (2008, January 23) *Iraq situation update*; HRW (*supra* note 2), p. 29.

<sup>77</sup> HRW, *ibid.*, p. 28.

<sup>78</sup> See HRW (2010, March 25). *Impossible choices for Iraqi refugees in Lebanon*.

refused to release them after their prison sentence had been served, citing Article 18 of the 1962 Law on Entry and Exit, which permits their continued detention until their deportation procedures are finalised.<sup>79</sup> These refugees were released when they either obtained a work permit through the sponsorship of an employer, or they signed a statement agreeing “voluntarily” to be deported to Iraq<sup>80</sup> – a measure that Human Rights Watch referred to as constituting *refoulement* in light of the poor prison conditions and indefinite detention that were their main alternatives to repatriation.<sup>81</sup>

A concession was made for Iraqi refugees in February 2008, when they were given three months to regularise their status by paying a fee of LL 950,000, finding a sponsor who would make a USD 1,000 deposit for them as a guarantee, and obtaining a residency or work permit.<sup>82</sup> However, Iraqis who entered Lebanon legally using tourist visas, but then overstayed, were not permitted to regularise their status.<sup>83</sup> Under this scheme, UNHCR negotiated with the Lebanese authorities to release between 460 and 480 of the 600 Iraqi refugees in detention,<sup>84</sup> by agreeing to have their fines paid through UNHCR’s partners, provided that upon their release, they would obtain a sponsor and a work or residence permit within three months. However, arrests and detentions of Iraqis also continued during this time.<sup>85</sup> In this respect, Kagan observed that UNHCR was *de facto* acting as a third-party “sponsor” for refugees in ways similar to the work sponsorship systems for foreigners common in Arab states.<sup>86</sup>

UNHCR also established agreements with the NGO Caritas and the Lebanese Bar Association’s Legal Aid Commission to provide legal aid to Iraqi refugees in detention. Lawyers advocated that prosecutors not file charges, refugees not be

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<sup>79</sup> Ibid.

<sup>80</sup> HRW (*supra* note 2), pp. 2-3, 31, 37.

<sup>81</sup> Ibid.

<sup>82</sup> AI (2008, June) (*supra* note 49), p. 21.

<sup>83</sup> HRW (*supra* note 2), p. 24.

<sup>84</sup> UNHCR (*supra* note 6).

<sup>85</sup> AI (2008, June) (*supra* note 49), p. 21. By 2010, the number of Iraqis in detention had decreased to 100. HRW (*supra* note 78).

<sup>86</sup> Kagan, M. (*supra* note 13), p. 14.

sentenced to detention or deportation, and refugees be released from detention.<sup>87</sup> They brought a test case on the grounds of Article 14 of the Universal Declaration of Human Rights,<sup>88</sup> but the judge postponed the hearing and ordered the refugees' release on the condition that UNHCR agree to resettle them. However, the General Security did not permit their release.<sup>89</sup> Two other test cases, argued as violations of Article 9 of the International Covenant on Civil and Political Rights,<sup>90</sup> were also declined by the judges and referred to General Security.<sup>91</sup>

States in the Gulf hosted significantly smaller populations of Iraqi refugees, but nonetheless also implemented restrictive legal regimes to govern them. Kuwait and Saudi Arabia limited Iraqis' access to meet the needs of the labour market, while providing some financial assistance to Iraq as a means of containing the problem.<sup>92</sup> In 2003, Kuwait announced that it would not permit any Iraqis to enter the country, but would instead create a 15-kilometre-wide demilitarised zone on the Iraqi side of its border where it would provide humanitarian assistance.<sup>93</sup> In 2007, the Saudi Arabian government refused admittance to Iraqi refugees and announced that it was building a wall along its border for security reasons.<sup>94</sup>

Although Egypt, Yemen, Iran, and Turkey are all parties to the 1951 Convention, Iraqi refugees faced difficulties in these host states similar to those in Syria, Jordan, and Lebanon. In Egypt, Iraqis were often prevented from accessing the country, lacked legal status,<sup>95</sup> were prohibited from employment<sup>96</sup> and access to public

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<sup>87</sup> HRW (*supra* note 2), p. 41.

<sup>88</sup> Universal Declaration of Human Rights (1948) G.A. Res. 217A (III), U.N. Doc A/810 at 71

<sup>89</sup> HRW (*supra* note 2), p. 42.

<sup>90</sup> International Covenant on Civil and Political Rights (16 December 1966) G.A. Res. 2200A [XXI].

<sup>91</sup> HRW (*supra* note 2), p. 42.

<sup>92</sup> Alborzi, M. (2006). *Evaluating the effectiveness of international refugee law: The protection of Iraqi refugees*. The Netherlands: Martinus Nijhoff Publishers, Koninklijke Brill NV, p. 86.

<sup>93</sup> Elias, D. (2003, March 10). Kuwait says it will help Iraqi refugees, but on Iraqi soil. *Associated Press*.

<sup>94</sup> Burger, T. (2006, August 28). The Great Wall of Arabia. *Time Magazine*; Al (*supra* note 33), p. 5.

<sup>95</sup> Refugees International [hereinafter "RI"] (2007, December 4). *Egypt: Respond to the needs of Iraqi refugees*.

<sup>96</sup> Egypt entered a reservation to Article 24(1)a of the 1951 Convention, which has created ambiguity in determining whether refugees were to be fully excluded from the right to work or only from certain provisions such as social security. See Kagan, M. (2011, September). Shared responsibility in a new Egypt: A strategy for refugee protection (Center for Migration and Refugee Studies, School of Global Affairs and Public Policy, The American University in Cairo), pp. 16-20, also referencing Umlas, E. (2011, May). Cash in hand: Urban refugees, the right to work and UNHCR's advocacy activities (UN Doc. PDES/2011/05), para. 15.

schools,<sup>97</sup> and had only limited access to public health care.<sup>98</sup> In 2004, Yemen began requiring visas for Iraqis ostensibly as a measure to combat trafficking in women.<sup>99</sup> Iraqis wishing to enter Turkey were required to obtain a visa from a Turkish consulate abroad or at an airport in Turkey.<sup>100</sup> And Iran, one of the most hospitable countries towards refugees in the region, expressed its frustration at the failure of the international community to share its burden in supporting some of the largest refugee populations in the region prior to 2003. Faced with a new influx of Iraqi refugees, the Iranian government stopped recognising newly arriving Iraqis as refugees, leaving most unregistered and at risk of deportation.<sup>101</sup>

### **C. Facilitating and managing access to economic and social rights**

Refugee access to economic and social rights in the Middle East was in continuous flux, as at the same time that states imposed legal restrictions on such rights, UNHCR attempted to secure these rights for refugees in practice if not in law. As such, these measures functioned as decisions on whether to include refugees in those systems critical to their survival. The 1951 Convention's attention to the economic and social rights of refugees physically present on state territories does not address their access to food, water, health care, and shelter, instead focusing more on the rights to social security,<sup>102</sup> fair taxation,<sup>103</sup> education,<sup>104</sup> and intellectual property.<sup>105</sup> However, the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>106</sup> to which Syria, Jordan, and Lebanon have all acceded, provides for

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<sup>97</sup> Refugees were permitted to attend schools provided by non-profit organisations and funded by UNHCR, but these were not accredited by the Egyptian Ministry of Education. Ibid.

<sup>98</sup> AI (2008, June) (*supra* note 49), p. 23.

<sup>99</sup> HRW (*supra* note 16), part VIII.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid. See UNHCR (2008, June). *Global Report 2007*, pp. 335, 350.

<sup>102</sup> Convention Relating to the Status of Refugees (*supra* note 7), Art. 24.

<sup>103</sup> Ibid., Art. 29.

<sup>104</sup> Ibid., Art. 22.

<sup>105</sup> Ibid., Art. 14.

<sup>106</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), UNGA Res. 2200A(XI), United Nations, Treaty Series, vol. 993, p. 3 [hereinafter "ICESCR"].

the protection of rights to food, clothing, and housing in Article 11, and healthcare in Article 12. Such rights inhere in “everyone”<sup>107</sup> and must be applied without discrimination to national origin or other status,<sup>108</sup> including citizenship or refugee status.<sup>109</sup> This protection is arguably constrained by Article 2(3) of the ICESCR, which permits “developing countries” some discretion in determining the extent to which they will guarantee economic rights for non-nationals, without providing a definition of the economic rights to which it is referring, thereby opening a possible loophole for some poorer states to argue their exemption from requirements to protect such rights for refugees. In response, the Committee on Economic, Social and Cultural Rights stated that this exemption does not apply to “core rights” (food, water, clothing, shelter, and health care).<sup>110</sup>

Despite having such obligations under the ICESCR, host states in the Middle East were reluctant to accord refugees even these core rights. Economic reasons were commonly cited, as the large numbers of refugees placed stresses on overburdened state infrastructures, social services, housing, and labour markets.<sup>111</sup> The costs cited by host governments for supporting Iraqi refugees ranged from USD 1 billion in Syria,<sup>112</sup> to USD 2.2 billion in Jordan.<sup>113</sup> In addition, increases in fuel and food prices due to economic liberalisation and deregulation coincided with the large-scale influx of Iraqi refugees who were then often mistakenly blamed for causing inflation and unemployment in their host societies.<sup>114</sup>

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<sup>107</sup> See UN Committee on Economic, Social and Cultural Rights, “General Comment No. 4: The right to adequate housing” (1991), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, p. 19, para. 6; UN Committee on Economic, Social and Cultural Rights, “General Comment No. 12: The right to adequate food” (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, p. 63, para. 1.

<sup>108</sup> ICESCR (*supra* note 106), Art. 2(2).

<sup>109</sup> Craven, M. (1995). *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development*. Oxford: Clarendon Press, pp. 169-170.

<sup>110</sup> UN Committee on Economic, Social and Cultural Rights, “General Comment No. 3: The nature of states parties’ obligation” (1990), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, p. 15, para. 10; Hathaway, J. (2005). *The rights of refugees under international law*. New York: Cambridge University Press, pp. 499-500.

<sup>111</sup> Chatelard, G. & Misconi, H. (*supra* note 43), p. 13.

<sup>112</sup> IRIN (2007, August 23). Iraq pledge to Syria fails to assuage refugees.

<sup>113</sup> UPI.com (2008, February 13). Jordan says Iraqi refugees cost \$2.2B

<sup>114</sup> UNHCR (*supra* note 6), p. 13; HRW (*supra* note 16), part III; ICG (*supra* note 1), pp. 19-20. See Saif, I. & DeBartolo, D.M. (2007). *The Iraq war’s impact on growth and inflation in Jordan*. Centre for Strategic Studies, University of Jordan.

The protection of Iraqi refugees' economic and social rights was also shaped by their status as an urban refugee population.<sup>115</sup> This forced UNHCR to re-focus its efforts from providing assistance within the discrete and contained spaces of traditional refugee camps to dispersed locations throughout urban centres, where refugees often faced difficulties accessing UNHCR's offices due to distance, health issues, economic limitations, or family or work commitments.<sup>116</sup> UNHCR's Assistant High Commissioner (Operations) further noted that in urban centres, the agency also needed to consider "the full challenge of operating in cities, where displaced populations are intermingled with other urban residents and where the activities of humanitarian agencies must evidently be supportive of – rather than separate from – those of the authorities and development actors".<sup>117</sup>

Operationally, UNHCR made efforts to decentralise its services,<sup>118</sup> employing strategies for achieving more substantial economic and social rights protections in practice for Iraqi refugees. This involved financial and in-kind assistance for refugees, development funding directed to public education and health care; reframing aid in the language of rights, and strategically promoting durable solutions. In these respects, UNHCR began to bridge what Beyani termed the "unhealthy chasm" that has grown between human rights protection and the protections in the 1951 Convention, which have been narrowly construed by states as merely being commensurate with the rights accorded to nationals or foreign nationals.<sup>119</sup>

UNHCR's provision of financial or in-kind assistance to refugees was a key means of attempting to alleviate some of the burdens and risks associated with state prohibitions on formal employment. The right to employment and livelihoods is recognised in international human rights conventions. Article 11(1) of the ICESCR

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<sup>115</sup> Chatelard, G. & Misconi, H. (*supra* note 43), p. 13.

<sup>116</sup> UNHCR, (*supra* note 6), p. 27.

<sup>117</sup> Assistant High Commissioner (Operations) (2009, January), Presentation to Cities Alliance.

<sup>118</sup> UNHCR (*supra* note 6), pp. 29-31, 33.

<sup>119</sup> See Beyani, C. (2006). The role of human rights bodies in protecting refugees. In A. Bayefsky (Ed.) *Human rights and refugee, internally displaced persons, and migrant workers: Essays in memory of Joan Fitzpatrick and Arthur Helton* (269-281). Leiden: Martinus Nijhoff Publishers, pp. 271, 280.

recognises the right of “everyone to an adequate standard of living”, which implies the entitlement of refugees to support either in the form of the right to work or alternative assistance.<sup>120</sup> Article 17(1) of the 1951 Convention states that refugees lawfully staying on a state territory should be accorded the most favourable treatment accorded to foreign nationals on the territory with regards to wage-earning employment. Article 6(1) of the ICESCR recognises the right of everyone to the opportunity to earn a living through voluntary employment. However, most human rights bodies and states have been reluctant to critique any exclusions based on non-citizenship.<sup>121</sup>

Given this general reluctance, it is unsurprising that in host states throughout the Middle East, Iraqis faced significant restrictions and limitations on employment in the formal sector, from outright prohibition to requirements of employer sponsorship.<sup>122</sup> This led many to work illegally for minimal pay,<sup>123</sup> risk exploitation, detention, and deportation,<sup>124</sup> live off of rapidly dwindling savings and money transfers from Iraq,<sup>125</sup> or return to Iraq to sell immovable property or find work in order to support their families.<sup>126</sup> In Syria, some Iraqi women and girls also engaged in survival sex work.<sup>127</sup> Unable to legally counter such restrictions on formal employment, UNHCR devised strategies for providing in-kind, food, or financial assistance and informal job training programmes.<sup>128</sup> UNHCR’s provision of cash through ATM cards in particular was regarded as more empowering than other forms of assistance. It gave refugees the autonomy to determine and prioritise their own financial needs and expenditures and was perceived as less stigmatising than receiving items such as food.<sup>129</sup>

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<sup>120</sup> Hathaway, J. (*supra* note 110), p. 496.

<sup>121</sup> Craven, M. (*supra* note 109), p. 173.

<sup>122</sup> AI (*supra* note 33), p. 13; AI (*supra* note 49), p. 11; UNHCR (*supra* note 6), p. 11.

<sup>123</sup> AI, *ibid*.

<sup>124</sup> HRW (*supra* note 16), part. VI; Danish Refugee Council (2005, July). *Iraqi population in Lebanon: Survey report*, p. 35.

<sup>125</sup> FAFO (*supra* note 43); AI (*supra* note 33), p. 21; AI (2008, June) (*supra* note 49), p. 11; IRIN (*supra* note 43); ICG (*supra* note 1), pp. 4-5.

<sup>126</sup> UNHCR (*supra* note 6), p. 11.

<sup>127</sup> ICG (*supra* note 1), p. 25; AI (*supra* note 41), p. 11; AI (*supra* note 33), p. 13.

<sup>128</sup> UNHCR (*supra* note 6), p. 36.

<sup>129</sup> *Ibid*.



UNHCR also employed strategies of providing funding for education and health care that would support both refugees and local populations wherever possible, which demonstrated how the agency tried to connect refugee concerns with the material interests of states in order to expand refugee protection space in urban centres.<sup>130</sup> Regarding the right to education, the right of refugees to the same elementary education afforded to nationals is recognised in Article 22(1) of the 1951 Convention. The right to free primary education is set out in Article 13(1)(a) of the ICESCR, and although it recognised as a “core” entitlement, states may seek to justify any breach of the obligation by demonstrating a true lack of resources.<sup>131</sup> Secondary education for refugees should not be of a lesser standard than that available for “aliens generally in the same circumstances” under Article 22(2) of the 1951 Convention, and it should be made “generally available and accessible to all” under Article 13(1)(b) of the ICESCR, in accordance with the principle of non-discrimination.<sup>132</sup>

Iraqi refugee children’s rights to primary education were generally recognised in host states’ law, although they were difficult to realise in practice. As the refugee crisis grew, some host states began implementing restrictions in breach of their obligations under the ICESCR. UNHCR responded by helping to strengthen state educational infrastructures. In Syria, due to overcrowding in the schools,<sup>133</sup> UNHCR began building six schools that year,<sup>134</sup> and contributed USD 3.8 million towards the education of 33,000 Iraqi children.<sup>135</sup> In Jordan, access to education was initially restricted to persons who were legally resident in the country,<sup>136</sup> but by 2007, non-legally resident Iraqi children could also attend public schools.<sup>137</sup> UNHCR signed an agreement with the Jordanian government to provide USD 10 million to improve

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<sup>130</sup> See Loescher, G. (2003). *The UNHCR and world politics: A perilous path*. Oxford: Oxford University Press, p. 6.

<sup>131</sup> UN Committee on Economic, Social and Cultural Rights (*supra* note 110), p. 15, paras. 10-11.

<sup>132</sup> UN Committee on Economic, Social and Cultural Rights, “General Comment No. 13: The right to education” (1999), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, p. 71, para. 6(b).

<sup>133</sup> See AI (*supra* note 49), pp. 7-8.

<sup>134</sup> AI (*supra* note 33), p. 15; UNHCR (2007, September 7), *Iraq situation update*.

<sup>135</sup> AI (*supra* note 49), p. 8.

<sup>136</sup> Letter from UNICEF, UNHCR & UNESCO representatives in Jordan to the Minister of Interior (2005, June 19).

<sup>137</sup> UNHCR (2007, August 20). *UNHCR hails decision to let Iraqi children attend school in Jordan*; UNHCR (*supra* note 66); ICG (*supra* note 1), p. 10.

schools, and in cooperation with UNICEF designated another USD 40 million for education in Jordan.<sup>138</sup> In 2008, the Lebanese authorities issued a circular to all private and public schools encouraging them to register refugee children. UNHCR supported this measure by providing the children with uniforms, school fees, and supplies.<sup>139</sup>

Access to health care was also critical for Iraqi refugees who had disproportionate rates of stress-related illnesses, heart disease, diabetes, congenital defects, sight and hearing impairments, psychological trauma, and injuries received in Iraq.<sup>140</sup> The right to health is recognised in international law: Article 12(1) of the ICESCR provides for “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.<sup>141</sup> As the right to essential primary health care is one of the four core rights, regardless of a state’s status as a developing country,<sup>142</sup> states are obligated to give immediate effect to this right by taking steps towards its “full realization” and ensuring that it is “exercised without discrimination of any kind”, including for “asylum-seekers and illegal immigrants”.<sup>143</sup>

In the Middle East, refugee access to essential primary health care was generally recognised in law, but also subject to legal restrictions and practical obstacles that constituted derogations from these state obligations under the ICESCR. In 2005, Syrian authorities tightened restrictions on access to health care for Iraqis, limiting it to emergency cases and requiring payment for certain kinds of treatment.<sup>144</sup> In response, UNHCR provided USD one million in funding to the Syrian Ministry of Health, which purchased nine ambulances for health centres located in neighbourhoods with high concentrations of Iraqi refugees.<sup>145</sup> Also, in concert with

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<sup>138</sup> Al (*supra* note 33), p. 23; UNHCR & UNICEF (2007, July). Joint appeal: Providing education opportunities to Iraqi children in host countries: A regional perspective.

<sup>139</sup> UNHCR (*supra* note 6), p. 40; HRW (*supra* note 2), pp. 55-56; International Organization for Migration (2008, February). *Assessment of psychosocial needs of Iraqis displaced in Jordan and Lebanon*. [hereinafter “IOM”].

<sup>140</sup> IRIN (2008, February 27). *Egypt: High rates of trauma, sickness among Iraqi refugees*.

<sup>141</sup> ICESCR (*supra* note 106).

<sup>142</sup> UN Committee on Economic, Social and Cultural Rights, “General Comment No. 14: The right to the highest attainable standard of health” (2000), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004, p. 86, paras. 43, 47.

<sup>143</sup> *Ibid.*, paras. 30, 34.

<sup>144</sup> Al (*supra* note 33), p. 16.

<sup>145</sup> UNHCR (*supra* note 6), p. 39.

the Italian Red Crescent Society, the agency also provided funding for the Syrian Arab Red Crescent Society health clinics.<sup>146</sup> In Jordan, Iraqi refugees had access only to emergency health care,<sup>147</sup> and they were required to have legal residency to receive any additional treatment.<sup>148</sup> As an alternative, UNHCR funded partnering NGOs to provide refugees access to free care in private clinics and mobile health clinics.<sup>149</sup> The UNHCR also negotiated with the Jordanian Red Crescent to provide limited health care to Iraqis not registered with UNHCR.<sup>150</sup> In Lebanon, although permitted access to public health services, Iraqi refugees were often compelled to seek expensive private health care due to greater availability. UNHCR and its implementing partners, such as Caritas,<sup>151</sup> funded full medical assistance costs for 24 percent of Iraqi refugees having acute health care needs.<sup>152</sup>

#### **D. Re-emplacement through durable solutions**

In keeping with UNHCR's mandate to secure durable solutions for refugees,<sup>153</sup> and as a part of its MoU with host states in the Middle East, the agency also employed strategies of re-emplacement/re-territorialisation in state territories, primarily in the form of resettlement. However, given that the other durable solutions of local integration and voluntary repatriation were not viable in most cases, and resettlement was available to less than five percent of the refugee population, decisions on access to durable solutions were also decisions on the exception as the majority of Iraqi refugees were left living in conditions of bare life and protracted legal liminality with no solution on the horizon. In this respect, the traditional three durable solutions were largely untenable in the face of the

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<sup>146</sup> Ibid., p. 39.

<sup>147</sup> International Rescue Committee (2008, March). *Five years later: A hidden crisis*.

<sup>148</sup> Al (*supra* note 33), p. 23.

<sup>149</sup> UNHCR (*supra* note 6), p. 39.

<sup>150</sup> Al (*supra* note 33), p. 23.

<sup>151</sup> HRW (*supra* note 2), p. 57.

<sup>152</sup> IOM (*supra* note 139).

<sup>153</sup> See Statute of the Office of the United Nations High Commissioner for Refugees (*supra* note 11), Annex, Ch. 1, paras. 1, 8(c), 9.

increasingly protracted nature of the refugee crisis.<sup>154</sup> UNHCR therefore attempted to navigate the vagaries of these exceptional spaces by promoting these durable solutions more strategically in an attempt to secure a wider impact for the whole of the Iraqi refugee population. Strategic resettlement and the concepts of safety and voluntariness in repatriation were used to push sovereign boundaries – pressing host states to increase their inclusiveness of those refugees who remained within their borders. In this respect, UNHCR not only shored up the sovereign state system through re-territorialisation of refugees, but also used the system’s own tools to contest their exclusion.

When UNHCR appealed to donor states to increase their resettlement quotas in the spirit of “burden-sharing” and widening “protection space” for Iraqi refugees, states responded positively, facilitating the resettlement of more than 100,000 Iraqi refugees from the Middle East to the US, Canada, Australia, and states in Europe by 2010.<sup>155</sup> As a demonstration of international solidarity,<sup>156</sup> resettlement was intended to alleviate burdens on host states and to encourage them to increase protections afforded to the refugees remaining on their territories,<sup>157</sup> a project which met with varying degrees of success.

However, the identification of 100,000 Iraqi refugees according to categories of vulnerability for resettlement to some extent also functioned as a decision on the exception of 1.9 million who were either not registered or not prioritised in the process. The heavy emphasis on resettlement and the significant funding allocated to the programme,<sup>158</sup> led to some concerns voiced by UNHCR staff members that the amount of resources allocated to resettlement was disproportionate to the numbers of refugees who directly benefited: they argued that while resettlement may have had some strategic effect in increasing protection space, it may also have diverted

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<sup>154</sup> See Zetter, R. (2011). Unlocking the protracted displacement of refugees and internally displaced persons: An overview. *Refugee Survey Quarterly* 30 (4), 1-13, pp. 3, 7-8.

<sup>155</sup> UNHCR (*supra* note 6), p. 49.

<sup>156</sup> See Loescher, G. (*supra* note 130).

<sup>157</sup> UNHCR Excom (2004, October 8). Conclusion 100 LV. *Conclusion on international cooperation and burden and responsibility sharing in mass influx situations*, preamble and para. (m)(iii).

<sup>158</sup> UNHCR (2007, June). *Projected global resettlement needs 2008*. Annual Tripartite Consultations on Resettlement, Geneva.

focus from the economic and social assistance required to support the vast majority of refugees remaining in the Middle East.<sup>159</sup>

UNHCR also advocated for safe and voluntary repatriation to Iraq. Iraqis faced considerable uncertainties in returning to Iraq, particularly in relation to their property: they had to contend with the ethnic cleansing of their neighbourhoods,<sup>160</sup> the destruction, looting, and occupation of their homes,<sup>161</sup> the sale of their property in Iraq, and the lack of effective restitution mechanisms.<sup>162</sup> Limited employment opportunities, distrust of government institutions, loss of public services such as electricity and potable water,<sup>163</sup> unequal access to public assistance,<sup>164</sup> and profound psychological trauma also posed challenges to the sustainability of their return. This placed them at risk of further displacement to squatter settlements inside Iraq, where, as of 2011, they would join the nation's 1.3 million internally displaced persons living in destitution, lacking access to basic services, and fearing eviction.<sup>165</sup>

UNHCR therefore called upon host states to refrain from forcibly returning Iraqi refugees to situations in Iraq where they might face threats to their human rights and safety or overburden and destabilise the country's fragile infrastructure. The agency strove to increase its presence and activities within Iraq to promote safe conditions of return.<sup>166</sup> It also provided Iraqi refugees who wished to return with counselling, assistance packages of USD 500, and follow-up calls to monitor the

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<sup>159</sup> UNHCR (*supra* note 6), p. 51.

<sup>160</sup> ICG (*supra* note 1), p. 8.

<sup>161</sup> UNHCR (2007, December 7). *Briefing note: Iraq returns latest*.

<sup>162</sup> See Isser, D. & Van der Auweraert, P. (2009, April). *Land, property, and the challenge of return for Iraq's displaced*. US Institute of Peace, p. 7; Van der Auweraert, P. (2009, November). "Land and property issues in Iraq: present challenges and future solutions discussion points". In *Resolving Iraqi displacement: Humanitarian and development perspectives*. pp. 27-38. Brookings-Bern Project on Internal Displacement; Chatelard, G. & Misconi, H. (*supra* note 43), p. 20; HRW (2008, September 22). *From exile to peril at home*; ICG (*supra* note 1), p. 2. See also UN Economic and Social Council (2002, June 12). *Economic, social, and cultural rights: The return of refugees' or displaced persons' property* (E/CN.4/Sub.2/2002/17), para. 63.

<sup>163</sup> IOM (2009, November 3). *Assessment of return to Iraq*, pp. 9-10; OCHA (2008, October). *Iraq humanitarian update*, no. 2, p. 1.

<sup>164</sup> Ferris, E. (2009, July 2). *Going home? Prospects and pitfalls for large-scale return of Iraqis*. Brookings-Bern Project on Internal Displacement, p. 13.

<sup>165</sup> IRC (2011, Dec 14). Major displacement crisis continues as U.S. troops leave Iraq.

<sup>166</sup> For a discussion of conditions of safe return, see Chatelard, G. & Misconi, H. (*supra* note 43), pp. 18-19, 23; see also International Compact with Iraq – A Shared Vision, A Mutual Commitment (signed 3 May 2007). UN and the Government of Iraq; Iraq Ministry of Displacement and Migration (2008, July). "National Policy on Displacement".

safety and dignity of the repatriation process.<sup>167</sup> The Iraqi government likewise initiated a voluntary repatriation programme.<sup>168</sup>

Iraqis were slow to take advantage of the repatriation programme, primarily only doing so when facing severe economic hardship or having expired visas in their countries of asylum.<sup>169</sup> Many were also reluctant to repatriate with UNHCR's assistance because this required that they de-register, which they feared could pose problems should they need to flee Iraq again and gain access to UNHCR in the future. They therefore largely chose to repatriate independently; nearly 220,000 returned to Iraq in 2008<sup>170</sup> and 29,000 in 2009.<sup>171</sup> However, such figures were complicated by the fact that rather than returning permanently, the majority of Iraqi refugees in Syria and Jordan travelled back and forth from Iraq, sometimes voluntarily and other times due to repeated forcible displacements, engaging in what Zetter referred to as "twin-tracking to explore the grey area between the two poles of displacement and durable solutions".<sup>172</sup> Reasons for these temporary returns included going to assess the security situation, see elderly parents, attend funerals, collect pensions, borrow money, or sell property.<sup>173</sup> A 2010 UNHCR survey revealed that the majority of Iraqis who did attempt to repatriate permanently reported having insufficient resources to meet their needs in Iraq and being subjected to bomb explosions, kidnappings, and harassment in the areas to which they had returned.<sup>174</sup>

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<sup>167</sup> UNHCR (*supra* note 6), pp. 52-53.

<sup>168</sup> *Ibid.*, p. 53.

<sup>169</sup> *Ibid.*; UNHCR/IPSOS (2007). *Second IPSOS survey on Iraqi refugees (31 October-25 November 2007)*. See Chatelard, G. & Misconi, H. (*supra* note 43), pp. 12, 17; HRW (*supra* note 162); UNHCR/IPSOS (2008, April). *Assessment on returns to Iraq amongst the Iraqi refugee population in Syria*.

<sup>170</sup> UN Security Council (2009, February 26) 6087<sup>th</sup> Meeting (UN Doc. S/PV.6087).

<sup>171</sup> United States Department of State (2010), United States Department of Homeland Security, and United States Department of Health and Human Services, *Proposed refugee admissions for fiscal year 2011: Report to the Congress* Submitted on behalf of the President of the United States to the Committees on Judiciary, United States Senate and United States House of Representatives, at < <http://www.state.gov/documents/organization/148671.pdf>>, p. 49.

<sup>172</sup> IOM (2009, May). *Monitoring and needs assessments – Assessments of Iraqi return*, p. 7; Zetter, R. (*supra* note 154), pp. 10-11.

<sup>173</sup> UNHCR (*supra* note 6), p. 54; AI (2008, June) (*supra* note 49), pp. 27-28.

<sup>174</sup> UN News Service (2010, October 19). *Iraqi refugees regret returning home, UN agency finds*.

### III. Exegesis: Sovereignty and the production of refugee protection space in the Middle East

#### A. Introduction

The exclusion of Iraqi refugees from the full protections of international refugee and human rights law, arbitrary and shifting regimes of border control, restrictions on economic and social rights, and limited available durable solutions reduced many to struggling to survive with limited or no legal status. They lived to varying degrees in a state of exception where, under the auspices of emergency rooted in political, economic, and security concerns, host states often prevented their full access to fundamental forms of protection. They were subjected to state laws which excluded them, but existed nonetheless on state territories where they enjoyed limited, if any, legal recognition and were subject to the exigencies and violence of sovereign power.<sup>175</sup> They lived the bare life of the exile rather than the qualified political life of the citizen, where uncertainty functioned as another technology of sovereign power.<sup>176</sup> Although not living in the ubiquitous refugee camps that symbolise the persistence of bare life in modernity,<sup>177</sup> their existence within the city suggested that Agamben's camp-like spaces assumed new forms as they became imbricated in the contours of the *polis* itself. They exemplified his contention that "the camp, which is now securely lodged within the city's interior, is the new biopolitical nomos of the planet".<sup>178</sup>

At the same time, the extent to which state decisions relegated Iraqi refugees to bare life was mediated and mitigated by the intercession of UNHCR as it shared not only in decision-making on their lives, but also assumed state-like roles in their governance. The topography of refugee protection in the Middle East suggested

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<sup>175</sup> See Agamben, G. (1998). *Homo sacer: Sovereign power and bare life* (D. Heller-Roazen., Trans.). California: Stanford University Press (Original work published 1995).

<sup>176</sup> See Gilroy, P. (2012, February 6). Subject in the kettle: Notes on citizenship, dissent, and securitocracy. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>177</sup> Sparke, M. (2006). A neoliberal nexus: Economy, security and the biopolitics of citizenship on the border. *Political Geography*, 25, 151-180, p. 172.

<sup>178</sup> Agamben, G. (*supra* note 175), p. 176.

that complex and contested state and organisational practices produced spaces that, while not wholly resistant to sovereign exceptionalism, did enable greater and more variegated forms of *de facto* inclusion than would be recognised by a purely state or law-centric theory of sovereignty. At the same time, the normalisation of shadow regimes, such as the MoU, while intended to provide some provisional forms of protection, also indicated that the exception has always been the norm in these spaces. Nonetheless, the *de facto* forms of protection actually achieved suggested that there was not a wholesale failure of refugee protection simply because host states refused to accede to international protection instruments or to recognise Iraqis as refugees. Rather, the protection space that was forged was enabled by political compromise, a degree of tolerance or neglect by host states, and the crafting of alternative legal regimes and regulatory systems by host states and UNHCR.

The following sections reflect upon the legal topography of refugee protection in the urban centres of the Middle East outlined above by examining their implications for how one might conceptualise the exercise of sovereign power. They first consider how state sovereignty was mediated and displaced by UNHCR's humanitarian governance in its efforts to expand protection space. They next question the extent to which the logic of sovereignty, located at the intersection of biopolitics and decisions on the exception, was altered by this new configuration of sovereign power. They finally consider the possibilities for global governance created by this reconfiguration of sovereignty, as emerging shared governance structures suggested new ways of conceptualising responsibility for refugee protection beyond the confines of the state.



## **B. Delocalising sovereignty through humanitarian management**

State-centric critiques of the failure of refugee law<sup>179</sup> have treated UNHCR's quasi-governmental role as an anomaly and an example of the incompatible tension between state sovereignty and international law,<sup>180</sup> or as international law's direct challenge to a state's "national security and good governance".<sup>181</sup> As a consequence, they have on occasion overlooked the actual topography of the protection space that has resulted from UNHCR's negotiations with host states to allocate responsibilities for governing refugee populations. UNHCR's strategies for increasing protection space in the Iraqi refugee context in different respects de-localised, contested, and appropriated the sovereign powers of the state.

### **1. The allocation of sovereign responsibilities**

How did humanitarian governance come to partially displace state sovereignty in the Iraqi refugee crisis? The legitimisation of responsibility-sharing arrangements in the Iraqi refugee context was rooted in UNHCR's initial discursive construction of Iraqi displacement as an emergency requiring donor funding and UNHCR intervention. In this respect, the agency inverted the use of emergency usually used to justify exceptional treatment by instead employing emergency to invoke the need for increased protection of rights. Although UNHCR does emphasise the primacy of state responsibility for refugees,<sup>182</sup> humanitarian crises are assumed to be better managed by UNHCR, to be temporally limited, to have donor state support, and to permit states in the region to resume governance functions upon their cessation or resolution.<sup>183</sup> Despite the political factors implicated in producing this crisis,<sup>184</sup> this

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<sup>179</sup> See for example Zaiotti, R. (*supra* note 2).

<sup>180</sup> Kagan, M. (*supra* note 13), p. 22. See Loescher, G. (*supra* note 130), p. 2.

<sup>181</sup> Pickering, S. (2005). Crimes of the state: The persecution and protection of refugees. *Critical Criminology*, 13, 141-163, p. 155.

<sup>182</sup> UNHCR (2009, September). *Policy on refugee protection and solutions in urban areas*, para. 6.

<sup>183</sup> *Ibid.*

<sup>184</sup> See Zetter, R. (*supra* note 154), p. 9.

construction of the crisis as humanitarian, in combination with UNHCR's mandate to monitor state compliance with international standards of refugee protection,<sup>185</sup> positioned UNHCR as a political actor,<sup>186</sup> enabled its entry as a humanitarian organisation to govern the refugee population, and legitimised the increasingly state-like functions that it assumed. Some critics argued that UNHCR also may have been motivated by a desire for institutional survival,<sup>187</sup> blackmail by host governments, or the interests of its funders.<sup>188</sup> However, this obscures the assertion by UNHCR that if host states refuse to provide protection, refugees would be abandoned unless the agency steps in and plays a quasi-governmental function in ensuring their protection.<sup>189</sup> This contention is in keeping with continuity theorists' arguments that the agency is more autonomous, pragmatically responding to the pressures of the environments in which it operates.<sup>190</sup>

While responsibility-sharing arrangements did challenge state sovereignty, host states in the Middle East may have acquiesced to UNHCR's governance roles on their territories for several reasons. Kagan noted that although states are often reluctant to relinquish sovereignty or state decision-making to "first UN" bodies, such as the Security Council, they may be less so in regards to "second UN" agencies, such as UNHCR. In so doing, a balance may be struck between interests of state sovereignty and those of global governance through cooperation with international organisations,<sup>191</sup> promoting a shared set of human rights norms that can legitimate the international order.<sup>192</sup>

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<sup>185</sup> Loescher, G. (*supra* note 130), p. 5.

<sup>186</sup> *Ibid.*, p. 6.

<sup>187</sup> See, for example, Stevens, J. (2006, November-December). Prisons of the stateless: The derelictions of UNHCR. *New Left Review*, 42; Lomo, Z. (2000). The struggle for protection of the rights of refugees and IDPs in Africa: Making the existing international legal regime work. *Berkeley Journal of International law*, 18, 264; Verdirame, G. & Harrell-Bond, B. (2005). *Rights in exile: Janus-faced humanitarianism*. Oxford: Berghahn Books; Barnett, M. & Finnemore, M. (1999). The politics, power, and pathologies of international organizations. *International Organization*, 53(4), 699-732.

<sup>188</sup> Adelman, H. (2001, Spring). From refugees to forced migration: The UNHCR and human security. *IMR*, 35(1), 7-32, p. 10.

<sup>189</sup> Badawy, T. (*supra* note 20), p. 12.

<sup>190</sup> Adelman, H. (*supra* note 188).

<sup>191</sup> Kagan, M. (*supra* note 13), pp. 5-7, 23. See Weiss, T. (2009). *What's wrong with the United Nations and how to fix it*. Cambridge: Polity Press, p. 8.

<sup>192</sup> Loescher, G. (*supra* note 130), p. 374; Pickering, S. (*supra* note 181), p. 155. For example, in shifting responsibility for Palestinian refugees to UNRWA, Arab host states were able to accommodate the realities of a

This balance may be facilitated by the express reference to UNHCR's "non-political" character in its Statute,<sup>193</sup> permitting it to carry out its protection activities as a form of humanitarianism rather than as a direct or overt threat to host state sovereignty, despite the governmental functions that the agency has on many occasions assumed. It also enables what Cuellar called global refugee policy's "grand compromise",<sup>194</sup> in which states in the global north can channel aid aimed at containing refugee crises in the global south.<sup>195</sup> As the US, Japan, and countries in the EU provide some of the most significant funding for UNHCR,<sup>196</sup> they are able to exercise considerable influence towards this end.

Kagan argued that this balance also enables states in the global south, which host more than 80 percent of the world's refugees,<sup>197</sup> to contend with this "burden" by deflecting responsibility for persons on their territories onto an international organisation. In this way, they can pressure the international community to funnel aid towards their support in the absence of any formal burden-sharing mechanisms, permit long-term residence of refugees without local integration, and avoid political sensitivities arising from finding neighbouring states to be persecutors when directly conducting refugee status determination.<sup>198</sup> This legitimises state actions on both domestic and international fronts.<sup>199</sup>

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protracted refugee situation whilst still insisting upon the right of return. Kagan, M. (*supra* note 13), p. 11, citing Hussein, J. (2007). The Arab states and the refugee issue: A retrospective view. In E. Benvenisti, C. Gans, & S. Hanafi (Eds.). *Israel and the Palestinian refugees* (pp. 435-563). Berlin: Springer, p. 441.

<sup>193</sup> Statute of the Office of the United Nations High Commissioner for Refugees (*supra* note 11), Annex, Ch. 1, para. 2.

<sup>194</sup> Cuellar, M.F. (2006). Refugee security and the organizational logic of legal mandates. *Georgetown Journal of International Law* 37(4), 583, p. 622.

<sup>195</sup> Slaughter, A. & Crisp, J. (2009, January). A surrogate state? The role of UNHCR in protracted refugee situations, *New Issues in Refugee Research*, No. 168, p. 4; Kagan, M. (*supra* note 13), p. 3. See Martin, S. (*supra* note 41), p. 231.

<sup>196</sup> Loescher, G. (*supra* note 130), p. 349.

<sup>197</sup> UNHCR (2009, June 16). *UNHCR annual report shows 42 million people uprooted worldwide*.

<sup>198</sup> Kagan, M. (*supra* note 13), pp. 3, 6, 12-13, 24; Slaughter, A. & Crisp, J. (*supra* note 195), pp. 4, 7. See Loescher, G., *ibid.*, p. 12; Pickering, S. (*supra* note 181), p. 142, noting that when a state applies the refugee definition, it recognises the criminality of another state against its own citizens; Betts, A. (2009). *Protection by persuasion: International cooperation in the refugee regime*. Ithaca: Cornell University Press. UNHCR conducts refugee status determination (RSD) as a part of its protection mandate. UNHCR (1982). Conclusion No. 28; Turk, V. (2002). UNHCR's supervisory responsibility (New Issues in Refugee research, Working Paper No. 67, October 2002), p. 14. However, UNHCR is not legally required to conduct RSD. Kagan, M. (2006, March). The beleaguered gatekeeper: Protection challenges posed by UNHCR refugee status determination. *IJRL* 18 (1), 1-29, p. 16. UNHCR currently conducts RSD in more than sixty states. *Ibid.*, p. 3.

<sup>199</sup> Loescher, G., *ibid.*, p. 349.

This balance was evident in the Iraqi refugee crisis, when it proved politically advantageous for states to permit UNHCR, in the process of refugee status determination or even in designating Iraqis as *prima facie* refugees, to make decisions on whether the Iraqi state was unable or unwilling to protect its citizens from persecution. This allocation of responsibility removed states in the region from having to assume a direct position on Iraq, thereby playing to pan-Arabist sentiments, and perhaps also explaining why host states did not object to the *prima facie* recognition of Iraqis as strongly as might have been expected in the context of how this designation stretched the meaning and limitations of the MoU.

Kagan observed that this grand compromise usually follows the pattern of states protecting negative liberties, such as the right not to be *refouled*, and UNHCR protecting positive liberties, such as the rights to health and education, thus enabling host governments to “protect” refugees by “literally doing nothing” and maintaining “a policy of benign neglect”.<sup>200</sup> The MoU signed between host states and UNHCR were indicative of this pattern, as they made the protection of negative liberties by the state (refraining from *refoulement*) contingent on the promotion of positive liberties by UNHCR (securing a durable solution and providing support for economic and social services). Although UNHCR was not always able to secure resettlement places for refugees under the MoU within the agreed-upon timeframes, these refugees were not routinely deported from Syria or Lebanon. Rather more frequently, as in the case of Lebanon, they remained in indefinite detention while UNHCR attempted to secure a solution.

The marginal tolerance of refugees in this liminal situation permitted states to retain the impression of sovereign authority through threatened deportation, while largely allowing refugees to remain on their territories in practice. Even in Jordan, where deportation was more frequent, the MoU allowed UNHCR to intervene while ensuring that Jordan retained its sovereign authority by having the final say regarding the release of detainees recognised as refugees. This general tolerance of

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<sup>200</sup> See Kagan, M. (*supra* note 13), pp. 3, 14. See also Slaughter, A. & Crisp, J. (*supra* note 195), pp. 1-2.

long-term, albeit illegal, residence of Iraqi refugees without permitting their full local integration demonstrated a “benign neglect”<sup>201</sup> that occupied the grey area between full protection and outright exclusion. While not relegated fully to Agamben’s state of exception, Iraqi refugees were in fact subject to the many exigencies of life in exile.

As Iraqis became increasingly reliant upon UNHCR for their survival in such spaces, they also acknowledged the role of UNHCR in protecting their positive liberties in the forms of social support and durable solutions. The state-like roles that UNHCR has assumed were previously alluded to by other refugee populations when they spoke of “the country of UNHCR”.<sup>202</sup> They demonstrated the shifting role of the UN more widely from that of an intergovernmental organisation to a supra-governmental one in cases where it assumes direct responsibilities for governance, thereby altering the shape of its mandate.<sup>203</sup> These arrangements demonstrated that the space of exception of the Iraqi refugee crisis was neither anomic nor void, but a place where new forms of life and law<sup>204</sup> emerged.

However, as UNHCR’s mandate to promote protection and durable solutions for refugees was not always in keeping with state interests, these responsibility-sharing arrangements were also politicised and contested. Although appropriating certain forms of sovereign responsibility, UNHCR could not fully displace the sovereign state.<sup>205</sup> UNHCR could not in whole play a substitute role for the state, or act entirely as a “surrogate state”,<sup>206</sup> as its power to govern was constrained by the

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<sup>201</sup> Kagan, M. (*supra* note 13), p. 3.

<sup>202</sup> See Grabska, K. (2008). Brothers or poor cousins? Rights, policies and the well-being of refugees in Egypt. In K. Grabska & L. Mehta (Eds.). *Forced displacement: Why rights matter*. (pp. 71-92). Houndsmills: Palgrave MacMillan, p. 87; Kagan, M., *ibid.*, p. 4. Such “sovereign-like functions” have also been observed in the UN’s peace operations and administration of territories. Mégrét, F. & Hoffman, F. (2003, May). The UN as a human rights violator? Some reflections on the United Nations changing human rights responsibilities. *Human Rights Quarterly* 25(2), 314-342, pp. 314, 328.

<sup>203</sup> Mégrét, F. & Hoffman, F., *ibid.*, p. 315.

<sup>204</sup> See Laclau, E. (2007). Bare life or social indeterminacy? In M. Calarco & S. DeCaroli (2007). *Giorgio Agamben: Sovereignty and life* (pp. 219-242) (Stanford: Stanford University Press) (pp. 11-22).

<sup>205</sup> Salomon, M., Tostensen, A. & Vandenhoe, W. (2007). Human rights, development, and new duty-bearers. In M. Salomon, A. Tostensen, & W. Vandenhoe (Eds.) *Castling the net wider: Human rights, development, and the new duty-bearers* (pp. 3-24). Oxford: Intersentia, p. 7.

<sup>206</sup> Slaughter, A. & Crisp, J. (*supra* note 195).

political will and consent of host governments.<sup>207</sup> The agency's TPR and *prima facie* recognition policies were not the result of political compromise. While promoting protection in keeping with UNHCR's mandate, they also sparked the ire of some host governments which felt that the agency had exceeded the scope of its responsibilities under the MoU, leading them to tolerate more than respect these declarations. Also, under the MoU, UNHCR's decisions on refugee status were constrained by sovereign state interests: recognition implied a temporally limited form of protection – a right to remain for a short period of time until a durable solution could be found.

Sovereign power was no longer confined to states, but was contingent and de-localised as UNHCR began playing quasi-state roles,<sup>208</sup> at times in concert with, in challenge to, or in parallel with host states. UNHCR not only negotiated with states, but overlapped with them in providing services and protection. At the same time, however, states continued to assert their sovereign authority by constraining the scope of UNHCR's actions.

## **2. Expanding legal protection through the deployment of space**

The topography of Iraqi refugee protection revealed not only the existence of *de facto* forms of protection secured through allocations of responsibility between UNHCR and states, but also a significant expansion in the scope of protection. This was enabled by UNHCR deploying spatial concepts of protection, vulnerable bodies, urban refugees, and the strategic use of resettlement to expand both the meaning and location of protection beyond their traditional purview within the state. Law was made material through space, as expanded principles of protection were realised in the bodies and territories of refugees.

UNHCR first did this discursively in its policy of increasing “protection space” for Iraqi refugees in their host states. “Protection space” was conceptualised as an

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<sup>207</sup> Kagan, M. (*supra* note 13), p. 19. See Loescher, G. (*supra* note 130), 349.

<sup>208</sup> See Kagan, M., *ibid.*, p. 1.

environment that enabled the optimal provision of internationally recognised rights protection for refugees.<sup>209</sup> Protection evolved from a focus on its linkage to the legal asylum process and security of states to include the larger paradigm of the security of refugees and UNHCR operations – what Adelman suggested was not a departure, but built into the agency’s potential functions from its inception.<sup>210</sup> Benchmarks for measuring protection space for Iraqi refugees included:

- (a) access to safety and *non-refoulement*;
- (b) non-penalisation for illegal entry;
- (c) permission for temporary stay under acceptable conditions;
- (d) registration and the identification of protection vulnerabilities;
- (e) access to durable solutions including resettlement;
- (f) availability of humanitarian assistance to persons with specific needs; and
- (g) access to essential services and opportunities for self-reliance.<sup>211</sup>

Economic and social rights were not explicitly mentioned, but effectively subsumed within the references to more traditional terms of humanitarian assistance and essential services mapped in the preceding section of this chapter. Although there were few changes in law that resulted,<sup>212</sup> UNHCR concluded that its activities had increased protection space in practice.<sup>213</sup> This expanded the focus of protection from an obligation for *non-refoulement* to persecution in Iraq to recognising that it encompasses the heightened security of refugees in their host states.

Second, UNHCR’s legal classification of refugee bodies as spaces of vulnerability was also a means deploying space to expand notions of protection. Vulnerability of

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<sup>209</sup> Barnes, A. (2009, January) *Realizing protection space for Iraqi refugees: UNHCR in Syria, Jordan, and Lebanon* (Research Paper No. 167, New Issues in Refugee Research). UNHCR, p. 12; UNHCR (*supra* note 6), p. 14.

<sup>210</sup> Adelman, H. (*supra* note 188), pp. 7, 13, 30.

<sup>211</sup> UNHCR (*supra* note 6), pp. 14-15, referencing a UNHCR paper prepared for the International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons inside Iraq and in Neighbouring Countries in April 2007.

<sup>212</sup> *Ibid.*, p. 17.

<sup>213</sup> *Ibid.*, p. 15. See also Chatelard, G. & Misconi, H. (*supra* note 43), p. 21.

the body became a key marker for determining the legal treatment of each refugee – whether to recognise them as refugees, to provide them with assistance, or to prioritise them for resettlement to a third state. The body was the space that determined both the extent and application of the law; it served as the site of both regulation and decisions on life.

Third, UNHCR's approach to Iraqis as urban refugees also expanded their protection space through new forms of humanitarian management. Traditionally in refugee camps, UNHCR was recognised by state authorities as the leader and coordinator of the camp's management, described as a "surrogate state, complete with its own territory (refugee camps), citizens (refugees), public services (education, health care, water, sanitation), and even ideology (community participation, gender equality)".<sup>214</sup> However, in the context of the Iraqi refugee crisis, host states in the Middle East decided that refugees would be treated as guests and provided with access to public services, rather than being provided with services dedicated only to refugees that could engender local hostility or competition.<sup>215</sup> Jordan, for example, stated that it would not tolerate a parallel system of social service provision to refugees that did not also serve Jordanian citizens.<sup>216</sup> UNHCR's 1997 urban refugee policy had already noted the preference of providing assistance to national service structures in order to increase their capacity to serve refugees as well as their own nationals rather than creating parallel services only for refugees.<sup>217</sup>

Therefore, rather than acting as a surrogate state, UNHCR engaged more intensively with state structures to increase their capacities to accommodate refugees and citizens alike. It provided funding for development of schools and health care that would benefit the local population and Iraqi refugees. Also, the provision of assistance was often tied to requirements that Iraqi refugees be registered, making the agency a *de facto* quasi-governmental institution that

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<sup>214</sup> Slaughter, A. & Crisp, J. (*supra* note 195), p. 8.

<sup>215</sup> UNHCR (*supra* note 6), p. 45.

<sup>216</sup> ICG (*supra* note 1), p. 14.

<sup>217</sup> UNHCR (1997). *UNHCR policy on refugee protection and solutions in urban areas*. See also Zetter, R. (1995). Incorporation and exclusion: The life cycle of Malawi's refugee assistance program. *World Development* 23(10), 1653–1667.



managed and coordinated refugee access to certain services. In addition, UNHCR's traditional engagement with non-governmental organisations (NGOs) acting as the agency's "partners" in the provision of social services, shifted as a part of this strategy. Three NGOs in Syria<sup>218</sup> and 16 in Jordan<sup>219</sup> were contracted with UNHCR to provide direct social, health, and economic support for Iraqi refugees. These NGOs began to functionally overlap with governmental agencies responsible for particular aspects of social service provision as they often worked to provide services to citizens and refugees alike, which located them in a grey area between civil society and state government.

UNHCR therefore moved from governing separately from the state (in camps)<sup>220</sup> to governing in concert with the state.<sup>221</sup> Although the dictates of these host states still limited the refugees' possibilities for protection, UNHCR's strategies pushed against these constraints, providing greater possibilities for social acceptance and inclusivity within refugees' host societies.

Also, by focusing its funding for refugee protection on structures created by host states to carry out their responsibilities to their citizens, UNHCR moved humanitarian assistance from the *ad hoc* and provisional spaces of the refugee camp to a formal system dictated by notions of state responsibility and citizens' rights. This material shift in resources was accompanied by a discursive shift as humanitarian assistance became imbricated in discussions about protection space, and economic and social rights were implicated in the expanding definitions of refugee protection space articulated by the agency.

Finally, UNHCR's resettlement of Iraqi refugees to states in the global north, although a discretionary form of aid, was also framed in the language of rights as a protection tool and was used strategically to contest state practices of exceptionalism and expand the availability of protection. The "strategic use of

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<sup>218</sup> UNHCR (*supra* note 6), p. 47.

<sup>219</sup> *Ibid.*, p. 47.

<sup>220</sup> Slaughter, A. & Crisp, J. (*supra* note 195).

<sup>221</sup> The UNHCR 1997 urban refugee policy specifically noted the preference of providing assistance to national service structures in order to increase their capacity to serve refugees as well as their own nationals rather than creating parallel services only for refugees. UNHCR (*supra* note 217).

resettlement” policy produced a conceptual shift in the spaces of rights protection for Iraqi refugees. Rather than posing refugee protection as a solution to be obtained only upon the refugees’ departure from the region, refugee departures to resettlement states now became critical factors in strengthening protection within the region. The policy also revealed a shift in the role of UNHCR as it employed resettlement more forcefully as a bargaining chip in its advocacy with host states to increase refugee protection space.

While the heavy emphasis, support, and funding for the resettlement programme may have served the political interests of resettlement states in utilising UNHCR to manage Iraqi migration out of the region, the transformation of large-scale resettlement operations as a strategic tool for protection for those remaining within the region was a nonetheless significant factor in the spatialisation and materialisation of expanded concepts of refugee protection. This shift was instrumental in conceptually moving resettlement from the realm of purely humanitarian and *ad hoc* discretionary assistance for a fortunate few to an arena in which it was conceptualised as critical in negotiating and crafting greater human rights protections for the many in the Middle East. In this respect, UNHCR was able to move from its role as simply a mediator between host states in the region and resettlement states further abroad to that of a strengthened advocate for refugee protection.

### C. The persistence of sovereign decisionism

UNHCR assumed state-like roles<sup>222</sup> and adopted governance strategies that both enabled the expansion of Iraqi refugees’ protection space and contested, appropriated, and de-localised sovereign power as it began to migrate from the state to international actors. But was this de-localisation accompanied by any shifts in the paradigm of sovereignty itself as located in the intersection of biopolitics and the

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<sup>222</sup> Slaughter, A. & Crisp, J. (*supra* note 195), p. 2.

power to decide upon the exception? Or was the logic of sovereignty reproduced in new forms?

UNHCR did forge greater protection space for Iraqi refugees in their host states through alternative legal and assistance regimes that provided variegated forms of protection. But Iraqis obtained neither the full protections enshrined in the 1951 Convention nor recognition by their host states. Instead, they moved from being treated with indifference and some degree of tolerance as foreigners on these territories, to having some level of protection from *refoulement* through UNHCR registration and intervention, and some social security through UNHCR's provision of funding aimed at realising their economic and social rights.

In this ambiguous environment, the move towards increased protection was accompanied by complex regulatory regimes in which UNHCR assumed the role of decision-maker, identifying who would be included within the ambit of its concern. Decisions normally enacted by sovereign states as to who qualifies as a refugee, who is permitted to remain on state territory, and who may benefit from state protection largely fell to UNHCR. UNHCR's decision-making on refugee status was a system for international legal protection in the absence of domestic mechanisms. The agency already had long history of assuming such responsibilities.<sup>223</sup> In the Iraqi refugee context, this was no different, as UNHCR assumed governmental functions of reception, registration, and asylum adjudication in the absence of state laws and asylum procedures.<sup>224</sup>

Also, as a part of its agreement with both host and resettlement states, UNHCR forged greater protection space for the many by promising to exclude the few who did not meet the legal criteria of the refugee definition. The use of exclusion categories to determine who was or was not a "legitimate victim", whether the individual or the state was the "deviant",<sup>225</sup> helped sustain UNHCR's *prima facie* recognition policy in the face of opposition from host states. Although protection

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<sup>223</sup> See Alexander, M. (1999). Refugee status determination conducted by UNHCR. *International Journal of Refugee Law* 11(2).

<sup>224</sup> UNHCR (*supra* note 6), p. 21.

<sup>225</sup> Pickering, S. (*supra* note 181), p. 156.

space was increased by *prima facie* recognition, the policy still turned on decisions on exclusion, and as such was a new expression of the logic of sovereignty.

Additionally, the selection and submission of five percent of Iraqis for resettlement according to criteria based upon specific needs and vulnerabilities resulted in the designation of the majority as a lower priority, in effect functioning as an exclusion based upon limited available resettlement country quotas and established hierarchies of need. The assumption of such decision-making roles was largely pragmatic – the result of both political compromise and the need to identify who from amongst the large refugee population would be prioritised for protection and assistance, given the limited available resources.

These roles remained tied to the decision on inclusion of refugees that constitutes and maintains the state system<sup>226</sup> and functions as a bordering practice. In assuming such roles, UNHCR had the power to decide upon life – whether one would have access to legal recognition or would remain in a state of “bare life”, living at the political margins of the state, unprotected by its law, but subject to the violence of its power.<sup>227</sup> The power to decide upon life implicit in these processes therefore reproduced the logic of sovereignty.

This turn, from promoting the protection of refugees to deciding upon whether they would receive protection, institutionalised the move of UNHCR from a position of advocating for a sovereign state to make decisions commensurate with international refugee law to a position of making such decisions itself. In this respect, UNHCR functioning according to the logic of sovereignty may have created conflicts with its own mandate to promote refugee protection. The agency was compelled to serve as both judge (on refugee status or vulnerability) and advocate (for refugee protection or assistance), posing a potential conflict of interest in assuming both roles within its institutional context.

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<sup>226</sup> See Rajaram, P. & Grundy-Warr, C. (2004). The irregular migrant as Homo Sacer: Migration and detention in Australia, Malaysia, and Thailand. *International Migration*, 42 (1), 33-64, p. 39.

<sup>227</sup> Agamben, G. (*supra* note 175), p. 183; Dean, M. (2004). Four theses on the powers of life and death. *Contretemps*, 5, 16-29, p. 24.

This conflict was further evident in UNHCR's apparent hesitance to issue any decisions on exclusion from refugee status at the outset, despite the agency's agreement to do so. Instead, UNHCR identified categories of potentially excludable persons who would require further interviewing. Many of these persons' files were put on hold, deprioritised in the refugee status determination queue, or deemed "not eligible for resettlement", rather than being finalised with an actual decision on their exclusion. This development of excessive proceduralism around the exclusion of refugees enabled UNHCR to initially avoid in the majority of cases having to make a decision on the exception, confront the dangers of deportation to persecution, risk the anger of persons excluded, and face the uncertainty that such decisions entail.

Such practices are reminiscent of the increasing regulatory mechanisms at Guantanamo Bay discussed by Johns. She argued that the proliferation of procedures and governance structures "in excess" in what would otherwise be an exceptional space indicated a desire to domesticate, eviscerate, and avoid the experience of actually making a decision on the exception, thereby removing room for doubt, possibilities, or responsibility. Such liberal proceduralism actually had a norm-producing effect, undermining any "sovereign or non-sovereign forms of political agency under radical doubt". These normative processes had the effect of reproducing rather than contesting governmental violence.<sup>228</sup>

Similar to Guantanamo Bay, the creation of excessive administrative procedures that resulted in avoidance of legal decision-making on the exclusion of Iraqi refugees created spaces where these refugees existed in a protracted state of legal liminality – not quite relegated to a state of exception, but prevented from inclusion in the *polis*. The violence of this system was normalised as it worked to negate the exception by cloaking it in legal formalism and administrative bureaucracy. The proliferation of procedures that resulted in initially making few or no decisions on exclusion at all foreclosed other possibilities for action and accountability. It masked

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<sup>228</sup> Johns, F. (2005). Guantanamo Bay and the annihilation of the exception. *European Journal of International Law*, 16 (4), 613-635, pp. 613-615, 627.

the “danger and difference”<sup>229</sup> associated with making such decisions and removed the responsibility for the overt violence of exclusion from the decision-makers, as placing cases on hold or at the back of the queue was perceived as lesser form of violence preferable to outright exclusion and possible deportation.

The logic of sovereignty was also reproduced in UNHCR’s development of vulnerability categories to enable the allocation of limited resources to those deemed most in need. These categories of vulnerability were pragmatic devices that regulated access to limited resources for health care, livelihood assistance, education, and resettlement. However, the mobilisation of funds by UNHCR to support the most vulnerable refugees also risked providing incentives to host states to maintain the very conditions that contributed to these refugees’ vulnerability.<sup>230</sup>

As such, Iraqi refugee bodies were subject to a form of decisionism that determined whether they would be included within certain service programmes. But similar to the procedures used to avoid issuing a decision on exclusion from refugee status, Iraqi refugees were rarely rejected outright for assistance by UNHCR. They were rather deprioritised on the basis of lack of sufficient resources (another form of *de facto* emergency) or need, thereby allowing the agency to avoid the potential responsibility for their destitution by leaving open the possibility for their future inclusion – again the normalising the lesser violence of potential or threatened poverty chosen in lieu of outright impoverishment.

Linked to this biopolitical project of locating decisions on assistance squarely within the bodies of refugees was also the initial requirement that Iraqi refugees be registered with UNHCR in order to access certain forms of assistance. They had to be made visible to the law – marked and measured by legal classificatory processes – before being permitted access to economic and social rights. However, this shifted somewhat as some UNHCR staff argued that Iraqis’ mere presence as *prima facie* refugees in their host states should be sufficient for them to access services.

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<sup>229</sup> Ibid., p. 635.

<sup>230</sup> Kagan, M. (*supra* note 13), p. 20.

Yet Iraqi refugees did not always reproduce the logic of sovereignty in their interactions with either their host states or UNHCR. Kagan observed that refugees in some cases may find an “extra-legal existence”, in which they are ignored or merely tolerated by the state,<sup>231</sup> preferable to the restrictive immigration laws in place in many host states.<sup>232</sup> In this regard, some Iraqis feared registration with UNHCR based upon the erroneous belief that they then would be forced to resettle to a third country and also due to the reality that UNHCR documents were not consistently respected by state authorities. They further feared that registration would alert the state authorities to their presence and thus set in motion the timeframe within which they could remain on the state territory under the MoU.

Such fears led many Iraqis to choose not to register with UNHCR and become visible to the disciplinary state. They instead opted either for the limited migration options that were available or to live in a state of prolonged extralegality. This reluctance generated concerns by UNHCR, as registration was a key tool for initiating refugee protection procedures. However, it may have had the productive effect of also confronting both host states and UNHCR with the fallibility and contingency of their own governance structures – exposing the potential violence that such decision-making powers may unwittingly entail.

In reproducing the logic of sovereignty in adopting these decision-making roles, UNHCR operated in concert with host states to shore up the state system, as the inclusion or exclusion of refugees was a means of drawing boundaries between the nation and the other continuously throughout the state and at the border.<sup>233</sup> However, UNHCR’s adoption of such roles was also fraught as they often conflicted with the agency’s own mandate. While UNHCR did negotiate greater forms of protection, its pragmatism in the face of limited resources also reproduced forms of exile and extralegality through its decisions in spaces that were already characterised

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<sup>231</sup> See UNHCR Regional Office-Cairo (2003). *Refugee self-reliance in Cairo: Obstacles and prospects*, p. 18.

<sup>232</sup> Kagan, M. (*supra* note 13), p. 11.

<sup>233</sup> See Kaplan, A. (2003). Homeland insecurities: Reflections on language and space. *Radical History Review*, 85, 82-93, p. 87.

by exceptionalism. UNHCR acted as kind of “quasi-sovereign”,<sup>234</sup> as it was empowered through the MoU to make decisions on refugees’ relative escape or relegation to these territories and spaces of exception. In most cases under the MoU, with the exception of Turkey, UNHCR was the final arbiter of this decision as it lacked an external appellate system.<sup>235</sup> Both the decisions to exclude from refugee status or assistance and the legal proceduralism that often resulted in avoiding making such decisions left many Iraqi refugees in states of legal liminality and fearing destitution, thereby placing UNHCR at risk of reproducing state violence. Unless UNHCR finds a way to disentangle its mandate to promote protection from its decision-making and regulatory structure, the violence of sovereign exceptionalism always risks being built into any state responsibility-sharing system.

#### **D. Legitimising and formalising global governance**

While UNHCR’s strategies to assume some state decision-making roles shored up the logic of sovereignty that undergirds the state system, in other ways they also may have contested and pressed the boundaries of this logic. The agency’s interventions with host governments in the form of alternative legal arrangements, assumptions of certain responsibilities, development funding, and reframing of aid in the language of rights both countered the totalising experience of exceptionalism and provided openings for critiquing state practice and considering the legitimacy of other forms of shared governance.

As sovereignty emerges from the interactions between individuals and groups that produce boundaries between them, it is possible to imagine how such interactions might also produce possibilities for their transgression. New actors may contemplate the possibility of state responsibilities, and not simply state powers. The concept of state responsibility makes it possible to question the legitimacy of

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<sup>234</sup> Sparke, M. (*supra* note 177), p. 170.

<sup>235</sup> See letter: Eleven groups call on Guterres to change RSD policies, warn that errors go undetected, at <[http://www.rsdwatch.org/index\\_files/Page4616.htm](http://www.rsdwatch.org/index_files/Page4616.htm)>.



sovereign state actions. No longer legitimate simply on account of sovereign authority, such actions may be deemed unlawful, thereby opening the space for both new meanings of legitimate sovereign power and for international human rights law and its rejection of absolute sovereign state power.<sup>236</sup>

In this respect, UNHCR's responsibility-sharing arrangements, emerging from the agency's interactions with state and civil society actors, did increase *de facto* protection space for Iraqi refugees by testing the definitions and limits of state sovereignty, envisioning alternative forms of shared governance, and making way for the entrance of international human rights and refugee protection norms. But these arrangements were nonetheless criticised for their failure to secure more formal protections for Iraqi refugees, as they were more heavily reliant on politics than on law. Yet perhaps these initial arrangements provided the groundwork for considering how law could re-enter the picture, moving refugee protection further from the realm of political compromise and closer to that of legal obligation.

Many scholars have called for responsibility-sharing in refugee and human rights protection, suggesting ways that this might be accomplished by formalising and institutionalising certain systems of shared responsibility that may already exist in practice. They predominantly have approached the question from one of two perspectives: either shifting certain state responsibilities onto international organisations or extending the concept of responsibility beyond states to include international organisations. Within both of these approaches, while the state still serves as the starting point for finding responsibility, other actors such as UNHCR assume more formal obligations and duties. However, whether the allocation of fragmented responsibilities translates into accountability and sustainability remains another question. There are also implications for whether refugee protection will continue to be grounded in state responsibility and whether such expanded roles will compromise or strengthen UNHCR's mandate.

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<sup>236</sup> See Pickering, S. (*supra* note 181), pp. 159-160.

Proponents of the shifting responsibility approach argue that responsibility should turn upon whether there exists effective, not just theoretical, control over persons and territories.<sup>237</sup> Mégrét and Hoffman called for the test of “control”, which is manifested through “functional sovereignty” or the UN’s “interstitial management of state shortfalls” as a means of determining when the UN is bound to promote or respect human rights.<sup>238</sup> Wilde called for a formal recognition that UNHCR’s mandate also contains human rights governance functions in cases where the organisation is exercising *de facto* control, in order to hold the agency more accountable for its actions and to prevent it from deflecting responsibility for violations onto the host state.<sup>239</sup> Kagan suggested that while states should retain ultimate responsibility for refugee protection, the *de facto* practice of governance-sharing should be more formalised *de jure* and acknowledged as a legitimate tool of refugee protection that can simultaneously address sovereign interests and ensure protection space. Duties could be assigned to the actor (state or UNHCR) best equipped to carry them out, reconciling sovereignty with the “demands of human survival and decency”.<sup>240</sup>

Other scholars have approached the question of shared responsibility from the perspective of extending rather than shifting responsibility to new actors. Such conceptions of responsibility recognise the duties born not just by states, but by other actors such as intergovernmental organisations in the context of the globalisation of the political economy and the emergence of political arrangements that exceed the boundaries of traditional territorial sovereign states.<sup>241</sup> Salomon, et al, argued that a complementary obligation of organisations beyond the state to protect human rights might be found in cases where the state is unable to protect human rights, particularly given that the international economic order may

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<sup>237</sup> See Mégrét, F. & Hoffman, F. (*supra* note 202), p. 342.

<sup>238</sup> *Ibid.*, pp. 339, 341-342.

<sup>239</sup> Wilde, R. (1998). Quis custodiet ipsos custodies? Why and how UNHCR governance of “development” refugee camps should be subject to international human rights law. *Yale Human Rights & Development Law Journal* 107(1), 107-128, pp. 112-113.

<sup>240</sup> Kagan, M. (*supra* note 13), p. 22, citing Urqhart, B. (2010, May 27). Finding the hidden UN. *The New York Review of Books* 26, p. 28.

<sup>241</sup> See Salomon, M., et al (*supra* note 205), pp. 3-5.

undermine a state's ability or willingness to protect human rights.<sup>242</sup> This would extend responsibility to international organisations, rather than substitute state obligations under international law,<sup>243</sup> and it would address fears that UNHCR may have about formalising its responsibility-sharing arrangements beyond what has already occurred.

Rajaram and Grundy-Warr suggested the need to de-link protection from territory, making the protection of humans, rather than citizens, the goal of refugee policy. They argued that as long as states retain the ultimate responsibility for implementing and respecting human rights, human rights will always be limited by sovereign interests; hence the need for a re-definition of human rights protection that does not rest solely within the state.<sup>244</sup> In the refugee context, it would be necessary both to de-link state responsibility from the moral obligations of international law and the duties of other actors in the system, and to de-territorialise notions of refugee rights protection. Where the state is no longer the sole arbiter and enforcer of protection, and rights are no longer contingent on territory, human rights can be revived, and responsibilities for protection may be found in international organisations or other actors. Finding complementary responsibilities of UNHCR and host states might provide an avenue for separating the concept of protection from that of state responsibility and would not ground refugee protection exclusively within the ambit of the state.

Refugee protection efforts in this sense could be strengthened by moving them beyond the concept of ultimate state responsibility and locating them more squarely within the realm of global governance or a transnational law of refugee protection. Complementary responsibilities provide an avenue for formalising such global governance without undermining UNHCR's capacity to advocate for state responsibility for refugees. They also provide the agency with greater leverage in representing refugees before host states. This may point to the need to recognise

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<sup>242</sup> Ibid., p. 15; Hazelzet, H., Salomon, M., Tostensen, A., & Vandenhoe, W. (2007). Conclusions new human rights duty-bearers: A conversation on policy implications. In M. Salomon, et al (*supra* note 205), (pp. 395-415), p. 397.

<sup>243</sup> Hazelzet, H. et al, *ibid.*, p. 399.

<sup>244</sup> Rajaram, P. & Grundy-Warr, C. (*supra* note 226), pp. 58-59. See also Salomon, M., et al (*supra* note 205), p. 12.

more formally the responsibility and obligation of UNHCR to step in where states fail, not to take the place of the state, but to promote refugee protection. In the process, more protections for refugees may be secured,<sup>245</sup> although their sustainability is subject to debate. Such formalisation of responsibilities may also give rise to apportioning greater accountability to UNHCR, which has long been involved in governing refugees in practice, but has always been able to deflect responsibility for protection failures or consequences of exclusion to the state.<sup>246</sup> The normative result of such a move could be an increasing recognition internationally of UNHCR's responsibility towards refugees – and not just the states that host them.

Otherwise, the formalisation of responsibility-sharing arrangements, whether apportioned or complementary, could be fraught with pitfalls. Refugees might secure protection from UNHCR, but could continue to remain in an ambiguous space in terms of their legal status and access to public services on state territories. Reliant upon UNHCR protection and assistance, they could comprise a vast underclass within host states and be forced to navigate the vagaries of state violence and UNHCR intervention, should states choose not to respect UNHCR decisions or representations.

Responsibility-sharing arrangements could also compromise the UNHCR's mandate, which could be undermined or further expanded beyond the agency's capacity. Assuming state-like decision-making roles, the agency may have fewer resources to dedicate to monitoring and advocacy. UNHCR could also risk becoming complicit in practices of state violence, particularly through decision-making structures that produce legal exclusion and political exceptionalism in territories where human rights are not respected. In recognition of this possibility, the agency may work to develop systems of greater institutional accountability to refugees, but such moves towards legal closure, if they fail to address the violence inherent in the

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<sup>245</sup> See Kagan, M. (*supra* note 13), p. 14.

<sup>246</sup> See Wilde, R. (*supra* note 239); Mégrét, F. & Hoffman, F. (*supra* note 202), pp. 320, 333.

constitution and maintenance of regulatory orders,<sup>247</sup> also risk depoliticising refugee spaces and institutionalising the logic of sovereignty even further.

Also, should UNHCR assume apportioned rather than complementary roles, state responsibility could be inverted, placing a higher or ultimate responsibility upon the agency, as happened in its designation as the “first authority” charged with refugee protection in the MoU between Egypt and UNHCR,<sup>248</sup> for example. The danger that results lies in fears that states will draw upon such formalised obligations to deflect their responsibilities for persons on their territories onto UNHCR, undermining any leverage or negotiating room that the agency currently has in pressuring states to assume greater responsibilities for refugee protection. Perhaps maintaining such arrangements in more *ad hoc*, *de facto*, and less formalised ways has provided UNHCR with the room to call for state responsibility in accordance with its mandate, while at the same time trying to prevent refugee lives from becoming further compromised in the process.

In light of these considerations, although UNCHR was unable to supersede state sovereign authority in its quest for maximising refugee protection space in the Iraqi context, the agency’s strategy to develop responsibility-sharing arrangements may have been a first step towards formalising frameworks of global governance and transnational law. Within the Iraqi refugee crisis, UNHCR attempted to overcome the commonly perceived incommensurability between state sovereignty and international law,<sup>249</sup> through its strategies to assume some of the positive legal obligations associated with sovereignty; to provide support for state services for Iraqi refugees; to draw selectively upon human rights and refugee law to craft alternative legal frameworks; and to acknowledge sovereign state interests<sup>250</sup> in containing refugee problems in the global south and regulating refugee entry to the

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<sup>247</sup> See Hanafin, P. (2004). Constitutional (u) topology: The (dis) appearance of Ireland. In P. Tuitt & P. Fitzpatrick (Eds.). *Critical beings: Law, nation and the global subject* (pp. 101-118). UK: Ashgate, for a discussion of law’s ability to address the violence constitutive of society.

<sup>248</sup> See Badawy, T. (*supra* note 20), p. 9.

<sup>249</sup> Kagan, M. (*supra* note 13), p. 22.

<sup>250</sup> See Barnett, M. (2001, Spring). Humanitarianism with a sovereign face: UNHCR in the global undertow. *IMR* 25(1), 244-277, p. 269.

global north. This delicate balancing act raises ethical questions about the agency's perceived neutrality. At the same time, it may allow for the entry of new international norms and governance structures for refugee protection.

Also, UNHCR in effect assumed some sovereign roles in the interest of alleviating the suffering of the vast majority of Iraqi refugees remaining in spaces of exception in their host states. Not only mediating between states and refugees in spaces of exception, UNHCR was also instrumental in shaping these spaces, lifting them from the threat of pure exception and exile to something more variegated, and trying to create law in the very spaces where law had been lifted. As an international organisation, it far exceeded the scope of its interstate responsibilities. The violence of state power over refugees, whether expressed through expulsion or indifference, or tempered by compassion and pity, was both reproduced and mitigated to some extent by UNHCR's interventions to reformulate this power in terms of legal obligation.

#### **IV. Conclusion**

The strategies employed by UNHCR in its negotiations with host states in the Middle East suggested new ways of securing Iraqi refugee protection that contested the traditional grounding of sovereign power solely within the state. Critical forms of *de facto* protection were achieved in the absence of formal legal protections or institutional change. At the same time, in assuming a quasi-sovereign role in securing such protections, UNHCR shifted from a paradigm of rights promotion to that of rights protection based upon its regulatory systems and biopolitical categorisations of vulnerability and decisions on inclusion and exclusion. In so doing, although reconfiguring the space of sovereignty, the agency continued to reproduce the logic of sovereignty as it at once both governed refugee spaces and tacitly

supported sovereign interests, placing the agency at risk of reproducing structures of state violence.

At the same time, the expanding and increasingly state-like roles of UNHCR may also have revealed possibilities for imagining new forms of transnational governance that, while not contesting the logic of sovereignty, might at least provide some ways for recognising and protecting not just the citizen, but the “human” in human rights. In using funding, resettlement, and diplomacy strategically to counter state restrictions imposed on refugees on their territories, UNHCR’s new powers of governance may also have created opportunities for contesting and influencing the exercise of state sovereignty, making way for conceptions of sovereign responsibility and not just sovereign power, as it encouraged greater inclusivity and flexibility and attempted to counter the normalcy of sovereign state exceptionalism towards refugees in the region.

## Chapter 4

### Refugees in the 'No-Man's Land': The spatial politics of displacement in Iraq's border zones

*"I would like to be resettled somewhere that recognises us as citizens. I was born in one country, I grew up in another country, and now I live between two countries. I am nobody – a zero in the Arab nation."*

*– Palestinian refugee in Al Tanf camp<sup>1</sup>*

#### I. Introduction

Forty-thousand Palestinian, Iranian, Kurdish, Syrian, and Sudanese refugees in Iraq were forcibly displaced by militias who filled the power vacuum in the aftermath of the 2003 war.<sup>2</sup> Resented for favourable treatment they received under the former regime and targeted with violence, they attempted to flee to neighbouring states, but were often construed as threats and denied permission to cross the borders.<sup>3</sup> As a result, they were compelled to reside in *ad hoc* camps in or near the

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<sup>1</sup> Institute for War and Peace Reporting (2009, June 29). Palestinian "survivors" in No-Man's Land. (ICR No. 294).

<sup>2</sup> Al-Khalidi, A. & Tanner, V. (2006, October). Sectarian violence: Radical groups drive internal displacement in Iraq. (An Occasional Paper). Brookings-Bern Project on Internal Displacement; UNHCR (2008, November 30). *Iraq operation at a glance*, p. 2; UNHCR (2008, March 18). *UNHCR concerned about situation of Palestinians on Iraq border*. As of 2010, there were 35,000 refugees and 3,800 asylum-seekers within Iraq. United States Department of State (2010), United States Department of Homeland Security, and United States Department of Health and Human Services, *Proposed Refugee Admissions For Fiscal Year 2011: Report to the Congress* Submitted on behalf of the President of the United States to the Committees on Judiciary, United States Senate and United States House of Representatives, at <<http://www.state.gov/documents/organization/148671.pdf>>, p. 45.

<sup>3</sup> Access to territory of the prospective country of asylum is a critical element of the right to seek and enjoy asylum. Beyani, C. (2006). The role of human rights bodies in protecting refugees. In A. Bayefsky (Ed.) *Human*



“no-man’s lands” along Iraq’s borders with Syria, Jordan, and Iran. These camps were not sustainable, however; often as soon as the refugees settled in one, they would be displaced and settled in another. Caught up in a cycle of displacement and re-emplacement, exclusion and inclusion, their movements along the borderlands themselves became bordering practices. They not only traced the spatial divisions between states, but also marked the geopolitical definitions of who belonged within them.

This chapter examines the operations of sovereignty and refugee protection in Iraq’s border zones. It first maps their topography by tracing the legal and normative practices that turned on the decision on the exception and the biopolitical management of the refugee population, bringing into relief the operations of sovereignty at the sites of its greatest contestation – the borderlands of states. It argues that these practices functioned as technologies of power, facilitating the materialisation of the state of exception,<sup>4</sup> and transforming it into a geographical, political, and social space. They instrumentalised the border in the project of producing specific forms of spatiality, time, and agency.<sup>5</sup> The spaces which the refugees occupied in turn served to further except, alienate, and isolate, shaping processes of state-making and discourses of citizenship within the region,<sup>6</sup> and materially affecting the refugee population<sup>7</sup> – what Pettman termed “devastating combinations” of “bodies, boundaries, violence, and power”.<sup>8</sup> Yet in the translation of the state of exception to a lived social space, something happened to the operations of sovereignty. Positioned along the borders, the disciplinary spaces

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*rights and refugee, internally displaced persons, and migrant workers: Essays in memory of Joan Fitzpatrick and Arthur Helton* (pp. 269-281). Leiden: Martinus Nijhoff Publishers, p. 273.

<sup>4</sup> See Agamben, G. (1998). *Homo Sacer: Sovereign power and bare life* (D. Heller-Roazen. Trans.). Stanford, California: Stanford University Press (Original work published 1995); Agamben (2005), *State of exception* (K. Attell, Trans.). Chicago: The University of Chicago Press (Original work published 2003).

<sup>5</sup> See Rajaram, P.K. & Grundy-Warr, C. (2007). Introduction. In P.K. Rajaram & C. Grundy-Warr (Eds.). *Borderscapes: Hidden Geographies and Politics at Territory’s Edge* (pp. ix-xi). Minneapolis, University of Minnesota Press, pp. x-xi.

<sup>6</sup> See Baud, M. & van Shendel, W. (1997). Toward a comparative history of borderlands. *Journal of World History*, 8(2), p. 212.

<sup>7</sup> See *ibid.*, p. 212; Hastings, D. & Wilson, T.M. (1999). *Borders: Frontiers of identity, nation and state*. Oxford: Berg, p. 40.

<sup>8</sup> Pettman, J.J. (1996). *Worlding women: A feminist international politics*. New York: Routledge, p. 101.

produced by practices of exceptionalism also may have become the sources of sovereignty’s own undoing. In the slippages that occurred in the production of these spaces, refugees, humanitarian organisations, and resettlement states also mobilised them to contest both the legitimacy of their exclusion and the reach of state power.

## **II. Bordering practices and the creation of abject space**

The practices exercised towards refugees in Iraq after 2003 that functioned as technologies of power in producing and contesting the logic of sovereignty may be grouped into three broad categories: violence and expulsion, displacement and re-emplacement, and humanitarian management and resettlement. The following sections map the spaces created by these practices for the three major groups of refugees in Iraq: refugees recognised by UNHCR, former members of the People’s Mujahadeen of Iran (PMOI), and Palestinians. The PMOI and Palestinians are treated separately because these groups faced unique legal and political challenges in that one was a formerly listed terrorist organisation, and the other was stateless.

### **A. Technologies of violence and expulsion**

Technologies of violence and expulsion were the first set of legal practices that displaced refugees in Iraq and drove them to the country’s borders. Emerging norms that legitimised the exception of these refugees from state protection gained increasing legal significance as the Iraqi government enacted proclamations and administrative orders discriminating against and excluding them, and acquiesced to the perpetration of violence against them.

### 1. Recognised refugees

Prior to the 2003 war in Iraq, Iraq was not a signatory to the 1951 Convention Relating to the Status of Refugees<sup>9</sup> or the 1967 Optional Protocol.<sup>10</sup> However, it did generally protect refugees recognised by UNHCR from *refoulement*,<sup>11</sup> and Saddam Hussein provided support particularly to those whose political interests were aligned with his own. For example, Iranian refugees of Arab ethnicity (Ahwazis), who were opposed to the government of Iran, received land, houses, and farms in Iraq.<sup>12</sup> Syrian refugees were granted refugee status due to their membership in dissident factions of the Syrian Ba’ath Party, and were provided with protection and assistance.<sup>13</sup>

Following the 2003 war, the Coalition Provisional Authority placed responsibility for refugees under Iraq’s Ministry of Displacement and Migration. The Permanent Committee for Refugee Affairs, established under Iraq’s 1971 Refugee Act, was reactivated in 2005, but lacked the capacity to conduct refugee status determination, leaving this responsibility to UNHCR.<sup>14</sup> Despite such measures, the protection space refugees had previously enjoyed became constricted by bureaucratic obstacles to obtaining and renewing their residency, travel, and identity documents.<sup>15</sup> They were also targeted by militias with exploitation, violence,<sup>16</sup> and expulsions for perceived preferential treatment under the former regime and in the violent demarcations of community in the new Iraq. For example, some Ahwazis fled to Syria, but eight were arrested there in May 2006, and five were deported to Iran, thus discouraging them from seeking asylum outside of Iraq again. Syrian refugees

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<sup>9</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (“1951 Convention”).

<sup>10</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>11</sup> US Department of State (2009, February 25). *2008 Country reports on human rights practices – Iraq*, s. d.

<sup>12</sup> US Committee for Refugees and Immigrants (USCRI) (2008, June 19) *World refugee survey 2008 – Iraq*; UNHCR (2006) *Country operations plan 2007: Iraq*, p. 8.

<sup>13</sup> UNHCR (2007, July). Locations of groups refugees and asylum-seekers in Iraq.

<sup>14</sup> This Committee also disputed the refugee status of the Syrian refugees. USCRI (*supra* note 12).

<sup>15</sup> See for example, IRIN (2007, January 14). Iraq: Violence against Syrian refugees increasing.

<sup>16</sup> US Department of State (*supra* note 11).

faced abductions, harassment, murder, arbitrary arrest, and accusations of involvement in terrorism.<sup>17</sup> Having no place to flee from Iraq, the majority were displaced to camps along its borders.

## **2. Former PMOI/MEK**

Bordering practices towards former members of the PMOI or the *sāzmān-e mojāhedīn-e khalq-e irān* (Mujahedin-e Khalq Organization – the “MEK”) vacillated between inclusion under the Geneva Conventions and the 1951 Convention and exclusion as members of listed terrorist organisations, reflecting the political ambitions of both the Coalition Forces and the newly emerging Iraqi state. These practices were realised in the emplacement and displacement of the former PMOI in Camp Ashraf (now “Camp New Iraq”). As such, both the practices of violence and expulsion and of emplacement and displacement are addressed together in this section.

The PMOI were members of the military wing of the National Council of Resistance of Iran, which began as an Islamist leftist opposition group against the Shah of Iran, but then clashed with Shi'ah clerics who assumed power following the 1979 revolution.<sup>18</sup> They were harboured under Saddam Hussein’s regime starting in 1986 during the Iran-Iraq war and launched an attack against Iran from this base in 1988.<sup>19</sup> Numbering nearly 4,000, they were housed in Camp Ashraf, 120 kilometres from the Iranian border<sup>20</sup> for more than 25 years.<sup>21</sup>

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<sup>17</sup> Amnesty International (AI) (2006, November 30). *Iran/Syria: Further information on forcible return/fear of torture and ill-treatment* (MDE 24/070/2006); Syrian Human Rights Committee (2006, November 19). *Further deportations to Iran*. See UK Home Office (2007, October 10). *Country of origin information report: Syria*, s. 27.04; US Department of State (2007, March 6) *2006 Country reports on human rights practices – Syria*, s. 1d, 2d; IRIN (2006, December 11). Syria: Ahwazis in fear after news of deportation and deaths; USCRI (*supra* note 12).

<sup>18</sup> Radio Free Europe/Radio Liberty (2009, August 6). Iraq denies blocking food to Iranian exile camp.

<sup>19</sup> AI (2009, August 11) *Concerns grow for detained Iranian residents of Iraq's Camp Ashraf*.

<sup>20</sup> Hughes, J. (2008, September 18). America’s tough decision on Iran’s dissidents: The People’s Mujahideen of Iran is caught between Iraq and a hard place. *Christian Science Monitor*; Reporters Without Borders (2009, August 5) Journalists detained for trying to cover army operations in Camp Ashraf.

<sup>21</sup> AI (2009, December 11) *Iranian opposition group supporters in Iraq must not be forcibly evicted*.

Following the 2003 war, under a series of protocols signed with the US forces, the PMOI were recognised as “protected persons” under Article 27 of the Fourth Geneva Convention, were disarmed and renounced the use of violence,<sup>22</sup> and were protected by the Multi-National Forces (MNF). Despite this, they feared human rights violations in Iran,<sup>23</sup> as Iran requested they be either extradited to Iran to stand trial for terrorism or turned over to the Iraqi government, which was expected to comply with Iranian desires.<sup>24</sup>

Many members of the Shi’ah-dominated Iraqi government, who had suffered under Saddam Hussein, had been granted exile in Iran and maintained close ties there. Hence they were unsympathetic to the anti-Iranian regime position of the PMOI,<sup>25</sup> and threatened to cut off their access to fuel and drinking water, expel them, and close the camp.<sup>26</sup> On 17 June 2008, the Iraqi Council of Ministers adopted a directive to expel the PMOI from Iraq.<sup>27</sup> Several Iraqi officials also demanded their expulsion within six months.<sup>28</sup> On 21 December 2008, the Iraqi government announced that Camp Ashraf would be closed.<sup>29</sup>

These demands raised fears that any PMOI returned to Iran would be subjected to detention, torture, and possible execution, as they would be unlikely to receive a fair trial.<sup>30</sup> The International Federation for Human Rights argued that this would constitute *refoulement* to torture, in violation of international customary law, and since the US remained in *de facto* control of the camp, it was obligated to protect them.<sup>31</sup> On 15 October 2008, the UN High Commissioner for Human Rights urged the Iraqi government to protect the PMOI from forced deportation and refrain from

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<sup>22</sup> OMCT World Organization Against Torture (2009, July 29). Iraq/USA: New concerns for the 3,500 PMOI members living in Camp Ashraf.

<sup>23</sup> AI (*supra* note 19).

<sup>24</sup> Radio Free Europe/Radio Liberty (2009, March 16). Iraqi army besieges Iranian exile camp.

<sup>25</sup> Radio Free Europe/Radio Liberty (*supra* note 18).

<sup>26</sup> European Parliament (2007, July 12). *European Parliament resolution on the humanitarian situation of Iraqi refugees*. (P6\_TA(2007)0056), para. 7.

<sup>27</sup> International Federation for Human Rights (IFHR) (2009, July 31) *Iraq must protect the rights of Camp Ashraf residents*.

<sup>28</sup> Hughes, J. (*supra* note 20); IFHR (2008, September 9) *Call on the Iraqi authorities and the USA*.

<sup>29</sup> IFHR (*supra* note 27).

<sup>30</sup> Hughes, J. (*supra* note 20); IFHR, *ibid*.

<sup>31</sup> IFHR, *ibid*.

actions that would endanger their life or security,<sup>32</sup> a position reiterated by the European Parliament in April 2009.<sup>33</sup>

The US found itself in a tricky position, as extraditing the PMOI to Iran could provide some leverage in its influence over Iran’s nuclear weapons programme, yet protecting them would acknowledge the role they played in turning over information about this same programme to the US. Also, despite being “protected persons”, the PMOI were listed as a terrorist organisation by the US State Department due to their alleged support for the 1979 takeover of the US Embassy in Iran. Both British and European courts called for their de-listing,<sup>34</sup> and although they were removed from the EU list in January 2009,<sup>35</sup> they remained on the US list<sup>36</sup> until 2012.

In addition, the US feared that turning the camp over to the Iraqi authorities before they were able to guarantee the protection of the PMOI would place the residents in jeopardy.<sup>37</sup> Responsibility for the protection of Camp Ashraf was only transferred to the Iraqi government on 1 January 2009,<sup>38</sup> upon the conclusion of the Status of Forces Agreement between Iraq and the US,<sup>39</sup> in which Iraq assumed greater authority over its internal affairs. Although no explicit mention was made of either the PMOI or their “protected persons” status, the US withdrew its forces protecting the camp.<sup>40</sup>

On 12 March 2009, fighting broke out when the camp residents blocked access of the Iraqi Security Forces (ISF) to one of the camp buildings.<sup>41</sup> The ISF surrounded

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<sup>32</sup> European Parliament (2009, April 24). *European Parliament resolution on the humanitarian situation of Camp Ashraf residents*. (P6\_TA(2009)0311), para. C.

<sup>33</sup> Ibid., paras. 1-3.

<sup>34</sup> Hughes, J. (*supra* note 20).

<sup>35</sup> Radio Free Europe/Radio Liberty (*supra* note 24). See Council of the European Union (2009, January 26). Council Common Position 2009/67/CFSP of 26 January 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2008/586/CFSP, 27.1.2009 *Official Journal of the European Union* L 23/37.

<sup>36</sup> US Department of State (2010, November 24). Foreign Terrorist Organizations, <<http://www.state.gov/s/ct/rls/other/des/123085.htm>> (accessed 4 March 2011).

<sup>37</sup> OMCT World Organization Against Torture (*supra* note 22).

<sup>38</sup> Ibid.

<sup>39</sup> Agreement between the United States of America and the Republic of Iraq on the Withdrawal of the United States Forces from Iraq and the Organization of their Activities During Their Temporary Presence in Iraq (1 January 2009).

<sup>40</sup> AI (*supra* note 19).

<sup>41</sup> Radio Free Europe/Radio Liberty (*supra* note 24).

the camp to prevent residents from entering or exiting,<sup>42</sup> and to prevent the entry of supplies. They threatened and beat some residents before US forces intervened. This was ostensibly ordered by the Iraqi National Security Advisor Mowaffak al-Rubaie, although he denied it. In January, he had stated that Camp Ashraf would be made “part of history within two months”, and then the day after the raid, he announced that the camp would be closed, and its residents would have to return to Iran or relocate to another country.<sup>43</sup>

In April 2009, the Iraqi and Iranian governments called for the expulsion of the PMOI and closure of the camp.<sup>44</sup> These threats were realised on 28-29 July 2009 when clashes again broke out within the camp as the ISF entered to establish a police station.<sup>45</sup> The ISF used bulldozers, grenades, tear gas, pepper spray, batons, and water cannons against the residents.<sup>46</sup> Thirteen residents were killed, 450 injured, and 50 arrested in the raid.<sup>47</sup> Those in detention were beaten and tortured, and none initially were granted access to counsel.<sup>48</sup> However, the Iraqi Governor of Diyala did announce they would be tried in an Iraqi court and not returned to Iran.<sup>49</sup> When eight journalists attempted to cover the story on 1 August 2009, they were denied entry, and some were detained and their equipment confiscated.<sup>50</sup>

The raid raised fears that many PMOI would be expelled to Iran. The Iraqi State Security Minister stated on 4 August 2009 that none of the PMOI in Camp Ashraf would be granted political asylum. That same month, the Iraqi authorities denied allegations by UN expert Jean Ziegler that they were blocking the camp’s access to food, water, and medical supplies, stating that they were only blocking building

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<sup>42</sup> Ibid.; OMCT World Organization Against Torture (*supra* note 22).

<sup>43</sup> IFHR (*supra* note 27); Radio Free Europe/Radio Liberty (*supra* note 24); European Parliament (*supra* note 32), para. E.

<sup>44</sup> AI (2009, July 29) *Eight reported killed as Iraqi forces attack Iranian residents of Camp Ashraf*.

<sup>45</sup> Reporters Without Borders (*supra* note 20).

<sup>46</sup> AI (*supra* note 44); OMCT World Organization Against Torture (*supra* note 22).

<sup>47</sup> AI, *ibid.*; IFHR (*supra* note 27). See Radio Free Europe/Radio Liberty (*supra* note 18); Radio Free Europe/Radio Liberty (2009, August 3). *Iraqi governor says 36 Iranian exiles detained*; Human Rights Watch (HRW) (2010, January 20) *World Report 2010 – Iraq*.

<sup>48</sup> AI (*supra* note 19).

<sup>49</sup> Radio Free Europe/Radio Liberty (2009, August 3) (*supra* note 47).

<sup>50</sup> Ibid.

materials.<sup>51</sup> Advocacy organisations called upon the Iraqi government to avoid expulsions, arguing that *refoulement* would constitute a violation of customary international law.<sup>52</sup> On 11 December 2009, the remaining residents in camp Ashraf were given an ultimatum by the Iraqi authorities to either leave the camp or be forcibly removed and possibly subject to expulsion from Iraq, and Prime Minister Nuri Al-Maliki stated that plans were underway to relocate most of the PMOI to the southern province of Muthana in Iraq, which Amnesty International argued would place them at risk of detention, torture, and death.<sup>53</sup>

### 3. Palestinians

*"They lived off our blood under Saddam. We were hungry with no food and [they were] comfortable with full bellies. They should leave now, or they will have to pay."*

— Sheikh Mahmoud El Hassani, spokesman for the Mahdi Army<sup>54</sup>

Palestinians have sought refuge continuously in Iraq since their first displacement from Palestine in 1948.<sup>55</sup> Although they were never recognised as refugees or granted citizenship, as this was argued to undermine their right of return to the Occupied Palestinian Territories,<sup>56</sup> they received protection from successive Iraqi governments due to resolutions made by the League of Arab States and the 1965 Casablanca Protocol.<sup>57</sup> They were generally treated well, given residence

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<sup>51</sup> Radio Free Europe/Radio Liberty (*supra* note 18).

<sup>52</sup> AI (*supra* note 21); IFHR (*supra* note 27).

<sup>53</sup> AI, *ibid.*

<sup>54</sup> Hussein, A. & Chamberlain, G. (2007, January 21). Shias order Palestinians to leave Iraq or "prepare to die". *Sunday Telegraph*.

<sup>55</sup> Canadian Council for Refugees, et al (CCR) (2008, November 20). *From fast death to slow death: Palestinian refugees from Iraq trapped on the Syria-Iraq border: summary report of an international NGO delegation*, p. 1; AI (2007, October) *Iraq: Human rights abuses against Palestinian refugees* (MDE 14/030/2007), p. 3; UNHCR (2006, December). *Aide-mémoire: Protecting Palestinians in Iraq and seeking humanitarian solutions for those who fled the country*, para. 1; HRW (2006, September 10) *Nowhere to flee: The perilous situation of Palestinians in Iraq* (E1804), part III.

<sup>56</sup> AI, *ibid.*, p. 4.

<sup>57</sup> Protocol for the Treatment of Palestinians in Arab States (11 September 1965) League of Arab States ("Casablanca Protocol").



permits, the right to work, access to social and health services, and housing.<sup>58</sup> They were politically useful to the Ba'ath Party in its projects of pan-Arabism, were exempted from military service, and were allowed more freedom to travel than the average Iraqi citizen.<sup>59</sup> They were entitled to apply for Iraqi travel documents called "Republic of Iraq: Palestinian Travel Document[s]", but not full Iraqi passports.<sup>60</sup> Saddam Hussein called upon Palestinians to migrate in the thousands to Iraq, promising to provide them with jobs and special treatment.<sup>61</sup> He conscripted Iraqis (but not Palestinians) into the Jerusalem Army fighting for the liberation of Palestine. He offered USD 10,000-25,000 to the families of Palestinian martyrs and USD one billion to assist Palestinians in the Middle East.<sup>62</sup>

However, the absence of human rights frameworks and the exclusive provision of aid in governing the Palestinians exacerbated their social exclusion, providing the foundations for later iterations of discrimination and violence against them. Having no rights to speak of, they had few options but to accept the assistance offered, but this was at the expense of the Iraqi population during an era when Saddam Hussein was committing atrocities against the Kurds and Shi'ah in Iraq,<sup>63</sup> and the country was crippled by sanctions.

Therefore, much of the violence targeting Palestinians post-2003 was motivated by resentments toward the preferential treatment that they had received. Being Sunni,<sup>64</sup> and perceived as allied with Saddam Hussein, some were also suspected of

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<sup>58</sup> Al (*supra* note 55), p. 5.

<sup>59</sup> Chapman, C. & Taneja, P. (2009). *Uncertain refuge, dangerous return: Iraq's uprooted minorities*. Minority Rights Group International, p. 7.

<sup>60</sup> Palestine Liberation Organisation, Department of Refugee Affairs (1999) *Palestinian refugees in Iraq*; Immigration and Refugee Board of Canada (1992, November 1). *Iraq: Information on whether a Palestinian born on the West bank who immigrated to Iraq in 1969 with his family and has resided there along with his immediate family (who still lives in Iraq) since 1969 has a right to return to Iraq and on whether this person is entitled to apply for any type of Iraqi travel document* (IRQ12279).

<sup>61</sup> Kareem, A. (2009, September 9). Iraqi Palestinians yearn to belong (Institute for War and Peace Reporting, ICR No. 304).

<sup>62</sup> HRW (*supra* note 55); Agence France-Presse (2001, January 16). Saddam says Palestinian solution must include refugee right to return. However, until 2000, they could not own land, and until 2003, they could not register homes, telephones, or cars in their own names. HRW, *ibid*.

<sup>63</sup> Rosen, N. (2007, May 13). The flight from Iraq. *The New York Times*; Refugees International (RI) (2006, November 13) *Syria: An urgent appeal for Palestinians fleeing Iraq*, p. 1; CCR (*supra* note 55); HRW (*supra* note 55), part I; Al (2008, June) *Rhetoric and reality: The Iraq refugee crisis* (MDE 14/011/2008), p. 60.

<sup>64</sup> Chapman, C. & Taneja, P. (*supra* note 59), p. 7.

terrorism committed by the Sunni-dominated insurgency.<sup>65</sup> In 2005, the Iraqi Minister of Displacement and Migration called for the Palestinians’ expulsion to Gaza, claiming they supported terrorism.<sup>66</sup> And both Kurdish and Shi’ah groups (e.g. SCIRI’s Badr Organisation and Al-Sadr’s Mahdi Army) increased their threats against Palestinians, assuming that they were allied with the Sunni insurgency.<sup>67</sup>

Also, landlords harboured resentments for having had to house Palestinians at artificially low rents under the former regime when many were paying less than USD one per month in rent, resulting in the effective deprivation of the landlords of their property.<sup>68</sup> No longer receiving even minimal government subsidies for renting to Palestinians,<sup>69</sup> they demanded higher rents,<sup>70</sup> and began to evict them.

In this climate of resentment, Palestinians faced arduous bureaucratic processes for renewing their residency.<sup>71</sup> They were re-classified as “non-resident foreigners” and were required to approach the Ministry of Interior’s Department of Residency to obtain or renew their residency permits, or risk deportation.<sup>72</sup> They reported poor treatment by the authorities, long waiting periods, fines for expired residencies, confiscation of identity documents, deportation orders, and forced bribery.<sup>73</sup>

Palestinians were also targeted with violence in the form of arbitrary arrests, detentions, kidnappings, torture, and extra-judicial killings, which intensified with the rise in sectarian violence.<sup>74</sup> Several militias issued death sentences against them,<sup>75</sup> and abducted and killed them even when a ransom was paid.<sup>76</sup> Palestinians

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<sup>65</sup> Rosen, N. (*supra* note 63); RI (*supra* note 63), p. 1; CCR (*supra* note 55); HRW (*supra* note 55), part I.

<sup>66</sup> HRW, *ibid*; Hussein, A. & Chamberlain, G. (*supra* note 54).

<sup>67</sup> IRIN (2009, January 18). Iraq-Syria: Slow resettlement for Palestinian-Iraqi refugees; AI (*supra* note 55), pp. 2, 5.

<sup>68</sup> HRW (*supra* note 55), Parts III-IV.

<sup>69</sup> PLO, Department of Refugee Affairs (*supra* note 60).

<sup>70</sup> *NA Iraq v Secretary of State for the Home Department* (2005, January 7). JA Iraq CG [2005] UKIAT 00045, para. 11; HRW (*supra* note 55), Part I.

<sup>71</sup> IRIN (2006, December 17). Iraq: Palestinian refugees fear for their lives after recent attack; HRW (*supra* note 55), Part VII.

<sup>72</sup> HRW, *ibid.*, Part VII; Wengert, G. & Alfaro, M. (2006). Can Palestinian refugees in Iraq find protection? *Forced Migration Review*, 26, 19-21, p. 19; CCR (*supra* note 55).

<sup>73</sup> *Ibid.*; UNHCR (*supra* note 55), paras. 3, 5; AI (*supra* note 55), p. 6.

<sup>74</sup> UN General Assembly (2010, February 8-19). 7<sup>th</sup> Session. Human Rights Council Working Group on the Universal Periodic Review. *Summary prepared by the office of the High Commissioner for Human Rights, in accordance with paragraph 15(C) of the annex to the Human Rights Council resolution 5/1: Iraq*, para. 51; IRIN (2007, January 25). Iraq: UN concerned for persecuted Palestinians; UNHCR (*supra* note 55), paras. 5, 8; HRW (*supra* note 55), parts IV, VI; AI (*supra* note 63), pp. 60-61.

<sup>75</sup> RI (*supra* note 63), p. 1.

were found dead on the streets or in morgues, mutilated and bearing marks of torture, including drill holes, their teeth removed with pliers, electric shocks, cigarette burns, and beatings – visceral assertions of new national identities on bodies now deemed outlaws to the state. They were arbitrarily detained by the MNF or the ISF,<sup>77</sup> and forced under duress and torture by beatings and electric shocks to their genitals to confess to terrorist acts in which most were not complicit. Some family members paid bribes to the ISF to prevent their torture or secure their release. Their neighbourhoods were raided and alleged terrorist suspects rounded up, most of whom were held without charge or trial or disappeared in custody. They were threatened by both ISF and sectarian militias to leave their homes or face death.<sup>78</sup> They also fled their homes on threat of violence by militias, armed Shi'ah landlords, or Iraqi civilians seeking to appropriate their homes for themselves.<sup>79</sup> In March 2006, the "Judgment Day Brigades" militia distributed leaflets in Palestinian neighbourhoods, warning the residents that if they did not evacuate within ten days, they would be "eliminated".<sup>80</sup> Nearly 500 were killed from 2003 to 2007.<sup>81</sup>

In April 2006, the Grand Ayatollah Ali Al-Sistani issued an order forbidding attacks on Palestinians, a move welcomed by UNHCR,<sup>82</sup> and one similarly undertaken by a few other Shi'ah clerics.<sup>83</sup> However, attacks by the more militant armed militias, particularly those associated with Muqtada Al-Sadr, continued unabated.<sup>84</sup> In October 2006, militias threatened the Palestinian families in Al Hurriya district of Baghdad, causing nearly 300 to flee.<sup>85</sup> Militias attacked the Palestinian neighbourhood of Al Baladiyat in Baghdad with mortars that killed four and wounded dozens more. Following this attack, more than half of the 8,000

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<sup>76</sup> HRW (*supra* note 55), Part VII.

<sup>77</sup> *Ibid.*, Part VII.

<sup>78</sup> *Ibid.*, Parts I, VI-VII; AI (*supra* note 55), pp. 2, 5, 7-13.

<sup>79</sup> HRW (*supra* note 55), Part IV.

<sup>80</sup> *Ibid.*, Part I.

<sup>81</sup> AI, *ibid.*, p. 7.

<sup>82</sup> See <http://www.sistani.org/local.php?modules=extra&eid=2&sid=124>; UNHCR (*supra* note 55), para. 9.

<sup>83</sup> BBC Monitoring (2006, May 4). Iraqi Shi'a cleric urges unity, rejects sectarianism, praises "resistance".

<sup>84</sup> AI (*supra* note 55), p. 7; HRW (*supra* note 55), Part VI.

<sup>85</sup> IRIN (*supra* note 71).

Palestinians living there fled.<sup>86</sup> Some reported that the ISF participated in the violence, throwing out the residents’ furniture and telling them to leave within two days.<sup>87</sup> As of 2008, there were 237 families displaced from Baghdad, and 600 deaths of Palestinians in this area. In the absence of government services, the NGO “Haifa Club” provided basic assistance.<sup>88</sup>

Although the targeted attacks against Palestinians began to wane by the end of 2007, there were still reports of ongoing violence by militias and criminal gangs. The Iraqi authorities and the MNF were either unable or unwilling to protect the Palestinians,<sup>89</sup> particularly in light of the allegations that members of the ISF tolerated, encouraged, and participated in some of the violence.<sup>90</sup> Many Palestinians fled as a result of the violence; of the 34,000 Palestinians who had lived in Iraq immediately prior to 2003,<sup>91</sup> less than 12,000 remained by 2009.<sup>92</sup>

In this climate, Palestinians tried to find ways to survive, recoding their bodies in ways that rendered them invisible,<sup>93</sup> as their bodies became “mobile checkpoints” and sites of state control.<sup>94</sup> One young man, arrested on suspicion of insurgency, avoided carrying his Iraqi identity card which noted his Palestinian ethnicity; he also tried to hide his identity by speaking in the Iraqi dialect.<sup>95</sup> Another was advised to always say he was Christian when asked his religion, and to change his name in order

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<sup>86</sup> UNHCR (*supra* note 55), para. 7; see CCR (*supra* note 55).

<sup>87</sup> USCRI (*supra* note 12).

<sup>88</sup> Younes, K. & Rosen, N. (2008, April). *Uprooted and unstable: meeting urgent humanitarian needs in Iraq*. Refugees International, p. 5.

<sup>89</sup> AI (*supra* note 55), p. 19; IRIN (*supra* note 71).

<sup>90</sup> IRIN (*supra* note 74); UNHCR (*supra* note 55), para. 6; USCRI (*supra* note 12); US Department of State (*supra* note 11), s. d.

<sup>91</sup> HRW (*supra* note 55), Part III. See CCR (*supra* note 55); AI (*supra* note 55), p. 3; Internal Displacement Monitoring Center (IDMC) (2007, March 30). *Iraq: a displacement crisis*. (Norwegian Refugee Council), p. 157.

<sup>92</sup> US Department of State (2010, March 11) *2009 Country reports on human rights practices – Iraq*.

<sup>93</sup> See Hepworth, K. (2012, February 7). Encounters with citizenship: the emplaced and embodied negotiation of political belonging. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>94</sup> See Guenif-Souliamas, N. (2012, February 7). Blurred citizens. An *orientalist* mapping of other beings, belongings and becomings. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>95</sup> IRIN (2009, April 7) Iraq: Whither the Palestinian minority?

to avoid being targeted.<sup>96</sup> Another obtained a fake Iraqi identity card and name for himself and his family to avoid being singled out for violence.<sup>97</sup>

## **B. Practices of displacement and re-emplacement**

Forcible displacement and re-emplacement of refugees within Iraq were practices that excepted them from state protection. Despite the violence that drove them to flee, they were unable to cross international borders to seek asylum.<sup>98</sup> They therefore found themselves trapped in camps along Iraq’s borders. Within these spaces, they rarely enjoyed physical protection, remained dependent upon humanitarian aid, lived in situations of legal liminality, and were subjected to further violence and displacement. Their emplacements in these border zones became visceral markers of sovereign exceptionalism, as bare life was spatially realised within the confines of the camps.

### **1. Recognised refugees**

Recognised refugees in Iraq included Sudanese, Ahwazis, Kurds, and Syrians. In 2005, 150 Sudanese fled Iraq for Jordan,<sup>99</sup> but their entry was prevented by the Jordanian authorities. Stranded at the border, they were relocated by the Iraqi Red Crescent to Camp K70 near the military Camp Korean Village in Iraq’s Al Anbar desert.<sup>100</sup> Living and security conditions in the camp were rife with problems due to

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<sup>96</sup> Kareem, A. (*supra* note 61).

<sup>97</sup> IRIN (2008, March 19) *Iraq: Palestinian refugees renew appeal for protection*.

<sup>98</sup> UNHCR (2008) *Iraq situation supplementary appeal*, p. 2; HRW (*supra* note 55), Part I.

<sup>99</sup> RI (2007, February). *Iraq & Egypt*; Cohen, R. (2007, March 21). *Iraq: The human cost of war*. (Panel held at Georgetown University) Brookings Institution; UNHCR (2008, December 16). *Sudanese refugees depart Iraq for resettlement*. (UNHCR Briefing Notes); UN News Service (2008, December 16). *Stranded Sudanese refugees leave Iraq for Romania, reports UN agency*; Between December 2004 and February 2005, seventeen Sudanese were reported killed in Iraq. *Ibid*.

<sup>100</sup> UN News Service, *ibid.*; Darfur Australia Network (2007, April). *Darfuri refugees stranded in Iraq*. (Briefing Paper); Mercy Hands Humanitarian Aid (2007, February 28). *Sudanese refugees update*. See UNHCR (*supra* note 13).

nearby insurgent activity. Two Sudanese were murdered by insurgents, three died, and two attempted suicide.<sup>101</sup>

Fear of violence also led 80 Ahwazi families to flee to UNHCR transit centres on the outskirts of Basrah. They were then relocated by the Iraqi authorities to areas throughout the southern governorates. In 2007, four were assassinated by Iranian agents, leading 100 to flee to the Trebil border camp.<sup>102</sup> The number living in Iraq decreased from 2,500 in 2006,<sup>103</sup> to 1,700 by 2008.<sup>104</sup> Several attempted to return to Iran, but were met with hostility, harassment, and sometimes detention; they also faced difficulties in reintegrating after more than two decades in exile.<sup>105</sup> In Iran, some were accused of being members of the Ahwazi Liberation Organization and faced imprisonment, torture, and even execution.<sup>106</sup> As a result, the number of Ahwazis at the border grew, reaching 105 in Al Waleed camp by 2010.<sup>107</sup>

Approximately 12,000 Iranian Kurds were housed in Al Tash camp in the governorate of Al Anbar prior to the 2003 war. During the invasion, due to insecurity caused by ongoing fighting, several thousand fled north, but 1,200 were blocked in the “no-man’s land” on the Iraqi border.<sup>108</sup> After Al Tash camp closed, they resided in the Kawa settlement in Erbil established in 2006 by the Kurdistan Regional Government.<sup>109</sup> They were also placed in the Barika settlement in Sulymaniyah,<sup>110</sup> where they were provided with housing.<sup>111</sup>

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<sup>101</sup> Darfur Australia Network, *ibid.*; Mercy Hands Humanitarian Aid, *ibid.*

<sup>102</sup> USCRI (*supra* note 12).

<sup>103</sup> UNHCR (*supra* note 12).

<sup>104</sup> USCRI (*supra* note 12).

<sup>105</sup> UNHCR (2008, November 30) (*supra* note 2).

<sup>106</sup> UNHCR (2006, December 22). *UNHCR extremely concerned for Ahwazi refugees extradited from Syria to Iran.*

<sup>107</sup> See UNHCR-Iraq (2010, November). *Fact Sheet*, <[http://www.iauiraq.org/documents/1248/1\\_A%20Report\\_Fact%20sheet%20November%202010%20draft.pdf](http://www.iauiraq.org/documents/1248/1_A%20Report_Fact%20sheet%20November%202010%20draft.pdf)> (accessed 4 March 2011).

<sup>108</sup> UNHCR (2003, July 8). *Iranian refugees flee Al Tash camp.*

<sup>109</sup> UN News Service (2009, July 8). *Iranian Kurd refugees in Iraq relocated from no-man’s land to camp.*

<sup>110</sup> UNHCR-Iraq (*supra* note 107).

<sup>111</sup> USCRI (*supra* note 12).

## 2. Palestinians

On 20 April 2003, UNHCR and ICRC established the Al Awda refugee camp in Baghdad for displaced Palestinians, but it provided inadequate shelter from extreme temperatures, and an unexploded bomb remained buried in the centre of the camp.<sup>112</sup> In November 2003, 1,500 evictees were also forced to live in tents in the Haifa Sports Club.<sup>113</sup> Escalations in violence subsequently led to the flight of Palestinians towards Syria and Jordan, but these states refused their entry, claiming to be already overburdened,<sup>114</sup> and attempting to balance their political and economic priorities with those of the Palestinian National Authority (PNA).

The Palestinians were also prevented entry due to the lack of documentation recognised by neighbouring states,<sup>115</sup> many of which refused to issue them visas.<sup>116</sup> The Jordanian authorities denied them entry, stating that having only Palestinian travel documents from Iraq, stamped by the Iraqi authorities with “right to exit, no right to return”, they would be unable to return to Iraq in the future, a position reaffirmed by the Iraqi Minister of Interior.<sup>117</sup> Syria denied them entry, claiming it already hosted more than 450,000 Palestinians,<sup>118</sup> despite that 1.4 million Iraqis were permitted to enter.<sup>119</sup> The European Parliament admonished Iraq’s neighbours for keeping their borders closed to Palestinians and condemned the Iraqi Minister of Displacement and Migration for calling for their expulsion.<sup>120</sup> Many fled using forged Iraqi passports, with some even fleeing to Asia.<sup>121</sup>

Hence, the protracted encampment of Palestinians in the border zones of Iraq began, resulting in a long series of emplacements in *ad hoc* camps, displacements from these camps, and re-emplacements in new camps (see Figure 1 below):

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<sup>112</sup> *NA Iraq v Secretary of State for the Home Department* (*supra* note 70), paras. 11, 13.

<sup>113</sup> Smallman, L. (2003, November 9). Baghdad's Palestinian refugees. *Al Jazeera*.

<sup>114</sup> See HRW, (*supra* note 55), Part VIII.

<sup>115</sup> IDMC (*supra* note 91), p. 157.

<sup>116</sup> UNHCR (*supra* note 55), para. 10.

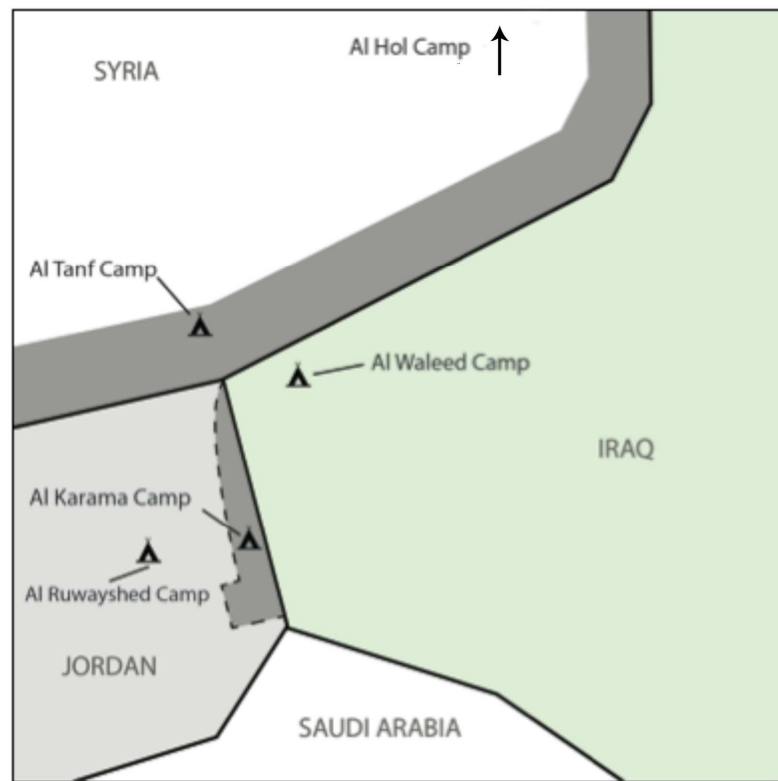
<sup>117</sup> HRW (*supra* note 55), Part VIII; USCRI (*supra* note 12).

<sup>118</sup> RI (*supra* note 63), p. 1; USCRI (2007, July 11) *World refugee survey 2007 – Syria*.

<sup>119</sup> UNHCR (2007, September) *Statistics on displaced Iraqis around the world*. See AI (*supra* note 55), p. 13.

<sup>120</sup> European Parliament (*supra* note 26), para. 5.

<sup>121</sup> AI (*supra* note 55), p. 6.



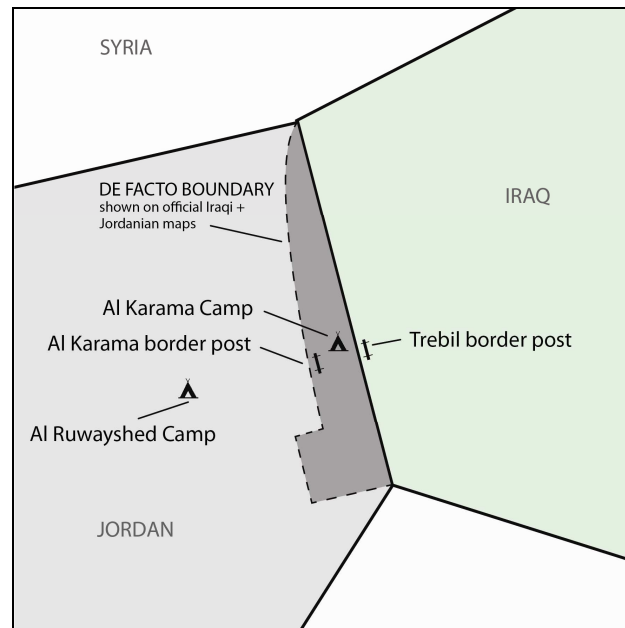
**Figure 1.** Palestinian camps in Iraq’s borderlands (not to scale):  
“No Man’s Lands” are areas shaded in dark grey.

In 2003, Palestinians and Iranian Kurds from Al Tash camp near Ramadi attempted to flee to Jordan, but were refused entry and left stuck in the two-kilometre-wide “no-man’s-land” between the Trebil and Al Karama border posts,<sup>122</sup> many in the makeshift Al Karama camp. This “no-man’s land” was a transit zone between the Iraqi border post they exited and the Jordanian border post they tried to enter (see Figure 2 below).

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<sup>122</sup> “The NML [No-Man’s Land] is ordinarily used to provide physical space for the large number of cars and trucks that are awaiting processing at either border post. Although Jordanian, Iraqi, and U.S. forces operate inside the NML, neither Jordan nor Iraq currently claims sovereignty or exercises jurisdiction over it, although both parties have a presence in their respective half of the NML. Visits to the NML require coordination among Jordanian, Iraqi, and U.S. military officials”. HRW (*supra* note 55), Part V.





**Figure 2.** Detail of Al Ruwayshed and Al Karama camps (not to scale)

Later that year, the Palestinians were permitted to enter Jordan on a one-time basis, but they were placed in Al Ruwayshed refugee camp 85 kilometres inside the Jordanian border. Al Ruwayshed had been established by the Jordanian authorities and UNHCR on 15 April 2003 in anticipation of the forced displacement of Iraqis following the war.<sup>123</sup> Palestinians had very limited freedom of movement outside of the camp. Some were prevented re-entry to the camp after going to the border to meet relatives. Those requiring hospital treatment needed permission from the Minister of the Interior to have any relatives visit them. Based upon marriages with Jordanians, 386 were admitted into Jordan in August 2003 under a Royal Order, but they were prohibited from employment.<sup>124</sup>

Due to the difficult living conditions in the camp, 250 Palestinians elected to return to Baghdad,<sup>125</sup> hoping that the security situation had improved. However, on 19 March 2004, 89 were compelled to flee again. When they reached the border, they were prevented from crossing until authorised by the Iraqi Minister of Interior.

<sup>123</sup> Ibid., Parts I, V; UNHCR (2003, April 15). *Letter of Understanding between the Government of the Hashemite Kingdom of Jordan and the Office of the United Nations High Commissioner for Refugees*; UNHCR (*supra* note 55), para. 11.

<sup>124</sup> Pagonis, J. (2004, December 10). Iraq: No Man's Land refugees. *UNHCR Briefing Notes*.

<sup>125</sup> Ibid.

As soon as they tried to enter the Jordanian border post, the Jordanian authorities closed it for four days, refusing to reopen it until they returned to Iraq. They had to sleep on a bus next to Al Karama camp and later to return at the order of Iraqi soldiers to the Iraqi side of the border. They were housed in an abandoned horse stable and provided with humanitarian assistance by UNHCR and the Iraqi Red Crescent Society (IRCS). As more fled central Iraq, they joined this group, increasing its size to over 200. On 23 April, Iraqi soldiers refused any more persons entry and ordered 54 new arrivals to return to Baghdad. However, given a sandstorm, the women and children were allowed inside, and the men were forced to sleep in an abandoned trailer nearby.<sup>126</sup>

The Palestinian Liberation Organization (PLO) initially supported such restrictions as they opposed the resettlement of Palestinians to other Arab states, on the ground that this would undermine their right of return to Palestine. Until 2006, the PLO's position remained that the Palestinians either be transferred to the PNA territories (a move blocked by Israel), remain at Iraq's borders, or return to Baghdad.<sup>127</sup> This position, combined with Syria and Jordan's reluctance to host any more Palestinians, exacerbated the plight of the Palestinians at the borders. It demonstrated Barkan's contention that privileging of right of return as a utopian ideal over Palestinian refugees' immediate welfare furthered their suffering.<sup>128</sup>

However, in 2006, following negotiations between Syria and the new Hamas-led PNA, the PNA reversed its earlier position and called for Arab states to accommodate Palestinian refugees from Iraq.<sup>129</sup> On 22 April 2006, the Syrian authorities, in cooperation with UNHCR and the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA), agreed to receive the refugees who were in the border camps in Jordan. They housed them in Al Hol camp near Hasaka in Syria's north-eastern border zone, which was originally constructed for Iraqi

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<sup>126</sup> HRW (*supra* note 55), Parts V, VIII.

<sup>127</sup> *Ibid.*, Part VIII.

<sup>128</sup> Barkan, E. (2004). The mirage of rights – response. *Hastings International & Comparative Law Review* 28(3), 411-420, pp. 418-419.

<sup>129</sup> Aji, A. (2006, April 20). Syria extends support to Palestinians' Hamas government. *Associated Press*.

refugees fleeing the first Gulf War.<sup>130</sup> The refugees’ numbers had grown to 305,<sup>131</sup> and the next day, an additional 37 arrived from Baghdad and were also permitted entry.<sup>132</sup> The refugees in Al Hol depended upon humanitarian assistance, and their legal status and prospects for integration remained unclear, particularly for those having relatives already residing in Syria.<sup>133</sup> They were restricted from work and travel outside of the city, and their travel documents were confiscated by the Syrian government.<sup>134</sup>

In May 2006, more Palestinians arrived at the Syrian border, but were denied entry.<sup>135</sup> They then began self-settling in the *ad hoc* Al Tanf camp in the seven-kilometre stretch of “no-man’s land” between the border posts in Iraq and Syria (see Figure 3 below). Although part of Syrian territory, this was a legally liminal zone where the Syrian authorities exercised jurisdiction only when they deemed it politically expedient to do so. At times they exercised state authority by preventing new arrivals from residing there. The camp accommodated 389 persons when it was established,<sup>136</sup> and by August 2009, its population had reached 900.<sup>137</sup>

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<sup>130</sup> Palestine Monitor (2006, May 9). Palestinians allowed into Syria after two months on the Iraq-Jordan border.

<sup>131</sup> CCR (*supra* note 55), p. 2.

<sup>132</sup> UNHCR (*supra* note 55), para. 11.

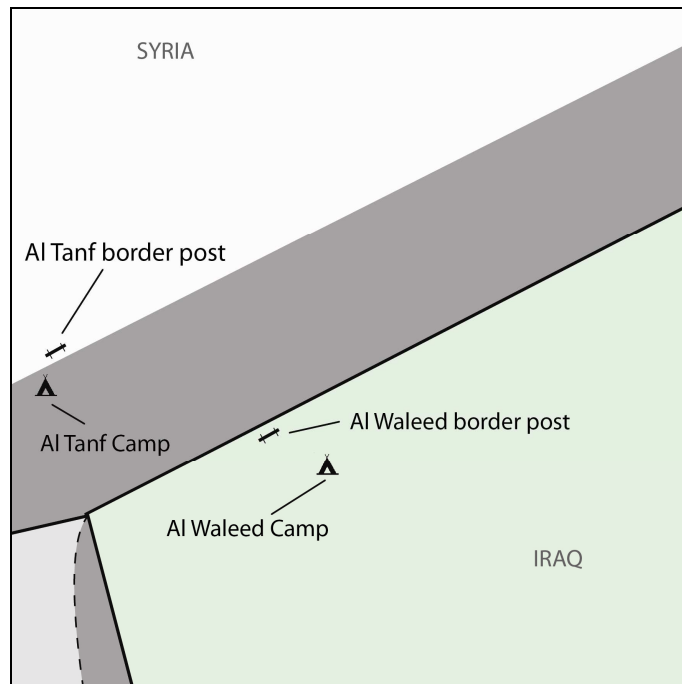
<sup>133</sup> *Ibid.*

<sup>134</sup> CCR (*supra* note 55), p. 2.

<sup>135</sup> UNHCR (*supra* note 55), para. 11; RI (*supra* note 63), p. 1; AI (2007, July 26) *Iraq: The situation of Iraqi refugees in Syria* (MDE 14/036/2007), p. 12; HRW (*supra* note 55), Parts V, VIII; IRIN (2006, May 18). Syria: more Palestinian refugees from Iraq arrive at border; USCRI (*supra* note 118).

<sup>136</sup> RI (*supra* note 63), p. 1; AI (*supra* note 55), p. 14.

<sup>137</sup> UN News Service (2008, August 5). Palestinians stranded on Iraq-Syria border to resettle in Iceland - UN agency.



**Figure 3.** Detail of Al Tanf and Al Waleed Camps (not to scale)

Due to Palestinians’ insecurity, threats of violence they faced in Iraq, deportations from Syria, and hopes for resettlement, they continued to flee to Al Tanf.<sup>138</sup> However, starting in December 2006, new arrivals were blocked access to the camp or prevented by the Iraqi authorities from leaving Iraq. They therefore self-settled in a new *ad hoc* camp, Al Waleed, three kilometres inside Iraq near its border post (see Figure 3 above), bordered on one side by a highway and located in close proximity to a MNF military base.<sup>139</sup> By 2007, Al Waleed’s population was 1,550,<sup>140</sup> rising to 1,750 people in 2008.<sup>141</sup> In July 2009, a group of 186 Iranian Kurdish refugees who were stranded in the no-man’s land on the Jordanian-Iraqi border also were relocated to Al Waleed,<sup>142</sup> pushing the total population to 2,000.<sup>143</sup>

<sup>138</sup> CCR (*supra* note 55), p. 2. See IRIN (*supra* note 67).

<sup>139</sup> CCR, *ibid.*, p. 2.

<sup>140</sup> Al (*supra* note 55), p. 6.

<sup>141</sup> See CCR (*supra* note 55), p. 2; UN News Service (*supra* note 137).

<sup>142</sup> UN News Service, *ibid.*

<sup>143</sup> UN News Service (2010, February 2). UN closes Palestinian refugee camp straddling Iraqi-Syrian border.

The living conditions in these camps were extremely harsh, as they did not have adequate infrastructure to support such large numbers.<sup>144</sup> Residents contended with strong winds, sandstorms, extreme temperatures, flooding,<sup>145</sup> snakes and scorpions,<sup>146</sup> accidents on nearby highways,<sup>147</sup> lack of water,<sup>148</sup> and inadequate and expired food supplies.<sup>149</sup> Fires were amongst the worst problems in the camps,<sup>150</sup> as the tents could burn completely within 20 seconds, forcing families to sleep with knives under their pillows to cut holes to escape.<sup>151</sup> UNHCR provided education assistance,<sup>152</sup> and the Iraqi government sent some food and other necessities.<sup>153</sup>

Due to the security situation in Al Waleed, for the first two years, UNHCR and the International Committee of the Red Cross (ICRC) maintained a limited and sporadic presence there, and only the Italian Consortium of Solidarity was able to distribute humanitarian relief regularly.<sup>154</sup> Al Waleed also lacked adequate health care facilities, and many refugees had serious health problems, including diabetes, birth defects, kidney disease, cancer, and psychological trauma.<sup>155</sup> The closest medical facility, Al Qa'im, was 400 kilometres away, and patients had to risk traveling this distance on one of the most dangerous highways in Iraq.<sup>156</sup> Also, Syria restricted entry for Palestinians with urgent medical needs,<sup>157</sup> allowing in only four in 2007,<sup>158</sup> and as a result three had died of treatable illnesses by May of that year.<sup>159</sup>

On 24 May 2007, the Iraqi government offered to facilitate the return of the Palestinians to Baghdad and to create a camp for them in Al Baladiyat. Most

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<sup>144</sup> UNHCR (*supra* note 55), para. 11.

<sup>145</sup> CCR (*supra* note 55), p. 2.

<sup>146</sup> *Ibid.*; IRIN (*supra* note 67); UN News Service (*supra* note 143); AI (*supra* note 63), p. 62.

<sup>147</sup> CCR, *ibid.*, p. 2; IRIN; *ibid.*

<sup>148</sup> AI (*supra* note 63), p. 62.

<sup>149</sup> *Ibid.*, p. 61; AI (*supra* note 55), pp. 15-16.

<sup>150</sup> AI (*supra* note 55), p. 14; UNHCR (*supra* note 98), p. 3; IRIN (2008, February 19). *Iraq: No solution in sight for Palestinian refugees stranded at border.*

<sup>151</sup> Institute for War and Peace Reporting (*supra* note 1).

<sup>152</sup> USCRI (*supra* note 12).

<sup>153</sup> Kareem, A. (*supra* note 61).

<sup>154</sup> AI (*supra* note 55), p. 15; USCRI (*supra* note 12).

<sup>155</sup> AI (*supra* note 135), p. 12.

<sup>156</sup> UN News Service (*supra* note 137); AI, *ibid.*, p. 16; UN News Service (2008, March 18). *UN expresses concern over plight of Palestinians living on Iraqi-Syrian border.*

<sup>157</sup> UN News Service (*supra* note 137).

<sup>158</sup> Reuters (2007 August 3). Syria lets in four sick Palestinians from Iraq.

<sup>159</sup> UNHCR (2007, May 15). *UNHCR concerned about conditions for Palestinians at border camp.*

rejected this offer, fearing that the government would not ensure their protection.<sup>160</sup> Their security within the camps, however, also was compromised as women were sexually harassed, and violent confrontations occurred between the MNF and insurgents nearby.<sup>161</sup> And in 2006, three men and two minors in Al Tanf were abducted and tortured by the ISF for ten days.<sup>162</sup>

Thus Palestinians fled to the border camps in increasing numbers as they were either displaced from one camp to another, or as they occupied new *ad hoc* settlements when previous ones were closed to them. In these camps, existing in the border zones where legal and physical protection were negligible or impossible, they remained dependent upon humanitarian aid, living in harsh desert conditions and a climate of insecurity, and waiting for durable solutions to unfold, primarily in the form of resettlement.<sup>163</sup> In 2007, a combined total of 2,100 refugees occupied these camps,<sup>164</sup> a number which grew to nearly 3,000 by 2008.<sup>165</sup>

### C. Humanitarian management and resettlement

The reluctance of states to assume full responsibility for the protection of refugees in these border camps led UNHCR and aid agencies to step in to fill in the gaps. In the process, these agencies assumed governance functions in the camps that were more in keeping with their traditional approaches to governing refugees separately, unlike their approach towards Iraqi refugees in urban areas. Governance included UNHCR’s provision of humanitarian aid and securing durable solutions – primarily resettlement. These practices turned on decisions on life, and in re/presenting the refugees’ vulnerability, both reified and mobilised it, not only reproducing but also contesting the logic of sovereignty.

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<sup>160</sup> Al (*supra* note 55), p. 15; USCRI (*supra* note 12).

<sup>161</sup> Al, *ibid.*, p. 16.

<sup>162</sup> USCRI (*supra* note 118).

<sup>163</sup> IRIN (2007, June 27). Iraq-Syria: plight of Palestinian refugees in border camps worsens.

<sup>164</sup> Al (*supra* note 55), p. 4.

<sup>165</sup> CCR (*supra* note 55), p. 2. See Southwick, K. & Lynch, M. (2009, March) *Nationality rights for all: A progress report and global survey on statelessness*. Refugees International, p. 51.

### 1. *Recognised refugees*

UNHCR facilitated the repatriation or resettlement of Sudanese, Turkish Kurds, and Syrian refugees from Iraq. The ability of the Sudanese Darfurian refugees to access humanitarian aid was hindered by the ongoing fighting between the MNF and insurgent groups near the camp and the arrest of a Mercy Hands team by the ISF.<sup>166</sup> Having no prospects for safe and voluntary repatriation to Sudan or local integration within Iraq, they were finally relocated by UNHCR to a new Emergency Transit Centre in Timisoara, Romania, starting in December 2008, where their applications were processed for onward resettlement to another country.<sup>167</sup> By January 2009, 138 were evacuated.<sup>168</sup> Many Turkish Kurdish refugees wished to return to Turkey, provided they were guaranteed protection and granted amnesty.<sup>169</sup> As of 2008, the UNHCR, Turkey, and Iraq were negotiating a Tripartite Voluntary Repatriation Agreement and a Local Settlement/Resettlement Protocol to repatriate and integrate Turkish Kurds.<sup>170</sup> By 2010, many resided in Makhmour Camp in Ninewa.<sup>171</sup> In 2006, Syrian refugees expressed the wish to return to Syria, provided that they also would be given amnesty and guarantees of protection. Noting that their affiliation with the former Ba’ath Party hampered their prospects for local integration, UNHCR also recommended their resettlement,<sup>172</sup> resettling 18 by 2010.<sup>173</sup>

### 2. *Former PMOI/MEK*

Having left Iran for political reasons, the PMOI were already entitled to protection from *refoulement* to conditions where they had serious reasons for

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<sup>166</sup> Mercy Hands Humanitarian Aid (*supra* note 100).

<sup>167</sup> UNHCR (*supra* note 99); US Department of State (*supra* note 11); UN News Service (*supra* note 99).

<sup>168</sup> US Department of State (*supra* note 92), s. d.

<sup>169</sup> UNHCR (*supra* note 12).

<sup>170</sup> *ibid.*; US Department of State (*supra* note 11).

<sup>171</sup> UNHCR-Iraq (*supra* note 107).

<sup>172</sup> UNHCR (*supra* note 12), p. 7.

<sup>173</sup> UNHCR-Iraq (*supra* note 107).

believing they would face torture. UNHCR also recognised those who renounced violence as refugees and argued for their continued protection.<sup>174</sup> Finding them not to be excludable from refugee status enabled UNHCR to advocate for states to protect them.<sup>175</sup> However, the PMOI’s renunciation of violence in hopes of obtaining a durable solution largely fell on deaf ears. The possibility of providing them with refuge in the US required de-listing them as a terrorist organisation, a decision which Hughes noted, pitted “principle, humanitarianism, and national self-interest against one another”.<sup>176</sup> Also, despite UNHCR’s recognition of their refugee status, they were characterised by many states as security threats or inadmissible based on past activities. Hence, states showed reluctance to extend any form of sustainable protection outside of Iraq in the form of resettlement or to provide for their humanitarian assistance within the country.<sup>177</sup>

### 3. *Palestinians*

UNHCR and NGOs’ humanitarian governance of the Palestinians in the camps and their resettlement to states outside of the Middle East were practices that reproduced the Palestinians’ refugee status. But they also worked in concert with Palestinians’ own contestations of their status to problematise and expose the protracted nature of their displacement and to call for their inclusion in the international state system.

Palestinians who do not fall within geographical scope of UNRWA,<sup>178</sup> fall within the mandate of UNHCR,<sup>179</sup> under Article 1D, paragraph 2 of the 1951 Convention.<sup>180</sup>

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<sup>174</sup> See UNHCR (2009, January). *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case Abdolkhani and Karimnia v. Turkey* (Application No. 30471/08), para. 3.4.

<sup>175</sup> OMCT World Organization Against Torture (*supra* note 22).

<sup>176</sup> Hughes, J. (*supra* note 20).

<sup>177</sup> See Sridharan, S. (2008, January). *Material support to terrorism — Consequences for refugees and asylum seekers in the United States*. Migration Information Source for discussion of security concerns related to the ex-PMOI; European Parliament (*supra* note 32).

<sup>178</sup> Jordan, Lebanon, Syria, the Gaza Strip, and the West Bank. See UNRWA website, <<http://www.unrwa.org/etemplate.php?id=87>>.

<sup>179</sup> Al (*supra* note 55), p. 4. See UNRWA & UNHCR (2007, January) *The United Nations and Palestinian refugees*, pp. 9-11.



Although Jordan and Syria were within UNRWA’s areas of operation, most Palestinians in Iraq had never been registered with UNRWA. It was also unclear whether those housed in the camps, which were technically under Syrian or Jordanian jurisdiction, but located in the “no-man’s lands”, were entitled to registration by UNRWA.<sup>181</sup> Therefore, in practice, promoting legal protection and providing humanitarian assistance to refugees in these camps fell to UNHCR.<sup>182</sup> The Palestinian Hamas, the Syrian Red Crescent Commission, and the World Food Program also provided essential aid and food rations.<sup>183</sup> Syria permitted UNHCR to bring some Palestinians temporarily across the border for emergency medical treatment.<sup>184</sup> UNRWA also provided health and social services,<sup>185</sup> and established with UNICEF a primary school and kindergarten.<sup>186</sup>

The lack of a clear legal status, ongoing resentments towards Palestinians in Iraq, absence of a viable internal relocation alternative, politics surrounding the right of return, and interests of states in the region, however, hampered prospects for solutions beyond the provision of aid.<sup>187</sup> Therefore, UNHCR stated that in light of the extreme security threats to the Palestinians’ lives, it was critical that their humanitarian and legal protection be de-linked from the larger question of Palestinians in the Middle East, and that new refugee flows should be prevented that might further complicate this question.<sup>188</sup>

In light of this, UNHCR maintained that the responsibility for the protection of refugees inside Iraq was that of the Iraqi government.<sup>189</sup> It recommended that the Iraqi authorities clarify the legal status of Palestinian refugees in the country, issue

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<sup>180</sup> See UNHCR (2002, October) *Note on the applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian refugees*, para. 7.

<sup>181</sup> UNHCR (*supra* note 55), Conclusion.

<sup>182</sup> *Ibid.*, para. 12. Under Article 1D of the 1951 Convention, refugees receiving protection for other organisations, such as UNRWA are often interpreted not fall within UNHCR’s mandate, although see Akram, S.M. (2002). Palestinian refugees and their legal status: Rights, politics, and implications for a just solution. *Journal of Palestine Studies*, 31(3).

<sup>183</sup> Institute for War and Peace Reporting (*supra* note 1); Al (*supra* note 55), 14.

<sup>184</sup> UNHCR (*supra* note 55), para. 11; Al (*supra* note 63), p. 62.

<sup>185</sup> Al, *ibid.*

<sup>186</sup> Al (*supra* note 55), p. 14.

<sup>187</sup> UNHCR (*supra* note 55), para. 15.

<sup>188</sup> *Ibid.*, Conclusion.

<sup>189</sup> *Ibid.*, para. 9.

and renew their residency and travel documents, and make clear and consistent statements that they are lawful residents whose rights under international law should be protected. UNHCR called upon Iraq to ensure their physical security, restore law and order to their neighbourhoods, and ensure they are entitled to leave and be readmitted to Iraq as their country of habitual residence.<sup>190</sup> In 2008, the Palestinian *chargé d'affaires* in Baghdad noted that there were discussions between the Iraqi government and Palestinian authorities regarding how to assist Palestinians with repatriation to their homes or relocation to other safe areas within Iraq, and to arrange for their protection and assistance.<sup>191</sup>

UNHCR also called for greater regional coordination to protect Palestinians stranded at Iraq’s borders,<sup>192</sup> through increasing their temporary local integration possibilities,<sup>193</sup> or facilitating their relocation<sup>194</sup> – a position reiterated by some NGOs.<sup>195</sup> It proposed cross-border relief for refugees in the border regions, enhanced resettlement, and temporary relocation outside Iraq as an exceptional measure.<sup>196</sup> It recommended that Palestinians be provided with temporary legal residence in neighbouring states, opportunities to work and access basic services, and assurances that they would not be *refouled* to Iraq. The agency also called upon Arab states, which previously issued Palestinians travel documents, to re-admit them in accordance with the 1965 Casablanca Protocol and resolutions of the League of Arab States.<sup>197</sup> It further appealed to Israel to facilitate the return of Palestinians having direct ties to the West Bank and Gaza.<sup>198</sup> Although Israel previously rejected such appeals,<sup>199</sup> it finally agreed in July 2007 to admit 41 Palestinians originally from

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<sup>190</sup> Ibid.

<sup>191</sup> IRIN (2008, July 30). Iraq: Fresh hope for 3,000 stranded Palestinian refugees.

<sup>192</sup> UNHCR (*supra* note 12), p. 7.

<sup>193</sup> Ibid.

<sup>194</sup> UNHCR (2007, January 1) *Revised strategy for the Iraq situation*, para. 7; UNHCR (*supra* note 98), p. 5.

<sup>195</sup> UNHCR (2007, September 26-28). *Report on UNHCR’s annual consultations with non-governmental organizations*. (58<sup>th</sup> session of the UNHCR Executive Committee, Geneva, Switzerland), p. 58.

<sup>196</sup> UNHCR (2007, March 30) *Humanitarian needs of persons displaced within Iraq and across the country’s borders: An international response* (HCR/ICI/2007/2), pp. 8-9.

<sup>197</sup> UNHCR (*supra* note 55), para. 15.

<sup>198</sup> Ibid.

<sup>199</sup> HRW (*supra* note 55), Part VIII.

northern Israel, but now stranded in the border camps along Iraq, to be reunited with relatives in the West Bank.<sup>200</sup>

UNHCR initially also noted resettlement to third states as a possibility for the Palestinians, but called it "an option of last resort".<sup>201</sup> However, given the considerable obstacles to realising its other recommendations, resettlement to countries outside of the Middle East, rather than relocation to countries within the region, soon emerged as the only solution for most refugees in the border camps – an option to which Palestinians, through generations of multiple displacements, had become well accustomed.

Many Palestinians also appealed to the public for assistance, using their vulnerabilities in the camps to emphasise the need to recognise their rights. One woman spoke of the frailty of the elderly in the harsh winters, the mental health problems developing amongst the children, and her inability to meet her children's basic needs. After asking why the international community was not more alert to their situation, she argued, "We have suffered enough. We have been rejected wherever we go. People don't realise that we are educated and will fit in anywhere given the chance."<sup>202</sup> Another woman stated, "'My son is especially suffering serious psychological problems after seeing his father killed in front of his eyes."<sup>203</sup> Another said, "We ask international organisations to save the people of this camp from the desert [...] Believe me; these words come from our hearts. Here even men cry, I swear by God, I swear by God. It is as if we died every hour and every minute."<sup>204</sup> The Palestinians further noted that if each country in Europe accepted 10 families, then the border camps could be closed.<sup>205</sup> Advocacy groups also called

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<sup>200</sup> Eldar, A. (2007, July 3). Israel to grant West Bank entry to Iraqi Palestinians. *Ha'aretz*.

<sup>201</sup> UNHCR (*supra* note 55), para. 15.

<sup>202</sup> IRIN (*supra* note 67).

<sup>203</sup> UN News Service (*supra* note 137).

<sup>204</sup> Al (*supra* note 63), p. 60.

<sup>205</sup> IRIN (*supra* note 67).

for resettlement,<sup>206</sup> highlighting the Palestinians’ vulnerability as a minority ethnic group and stateless population.<sup>207</sup>

In 2008, UNHCR aimed to resettle 2,500 Palestinians from Iraq and 900 from Syria to third countries,<sup>208</sup> where they would be entitled eventually to apply for citizenship, despite the objections by some states that this would undermine their right of return.<sup>209</sup> UNHCR argued that resettlement would in no way hamper any Palestinian’s right to return,<sup>210</sup> a position by then endorsed officially by both Syria and the PNA who agreed that resettlement should be promoted on a voluntary basis for individual refugees.<sup>211</sup>

In response to this growing advocacy for resettlement, both traditional resettlement countries such as Sweden, Norway, the US, Canada, Australia, and New Zealand, and new resettlement countries such as Chile, Brazil, and Iceland, offered places for the Palestinians in these camps.<sup>212</sup> On 10 May 2008,<sup>213</sup> in cooperation with the PNA, Sudan also offered to take 2,000, and the Palestinian *chargé d'affaires* in Iraq requested USD 30 million for this project.<sup>214</sup> However, Palestinian camp residents largely resisted the offer, fearing the security situation there,<sup>215</sup> a proposal which Refugees International also criticised as simply shifting the refugees “from one marginalized situation to another”.<sup>216</sup> Al Ruwayshed was closed after all of the refugees were resettled to Canada, New Zealand, or Brazil or were transferred to Al Hol.<sup>217</sup> In February 2010, UNHCR announced it had also closed Al-Tanf Camp. Of the 1,300 persons who had lived there at different periods in the four years of its

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<sup>206</sup> UNHCR (*supra* note 195), p. 73; RI (2009, April 7). *Iraq: Preventing the point of no return*, p. 4; Al (*supra* note 63), p. 60; Chapman, C. & Taneja, P. (*supra* note 59), pp. 3, 36.

<sup>207</sup> Chapman, C. & Taneja, P., *ibid.*, p. 23; Younes, K. & Rosen, N. (*supra* note 88), p. 8.

<sup>208</sup> UNHCR (*supra* note 98), p. 11.

<sup>209</sup> RI (*supra* note 63), p. 2. See Akram, S.M. (*supra* note 182).

<sup>210</sup> UNHCR (2008, September 5). *Resettlement of Palestinians to Iceland. Briefing Notes*.

<sup>211</sup> CCR (*supra* note 55), pp. 1-2.

<sup>212</sup> See *ibid.*, p. 2; Chapman, C. & Taneja, P. (*supra* note 59), p. 21; CCR, *ibid.*, p. 2. See IRIN (*supra* note 67); UN News Service (*supra* note 137); UN News Service (2008, September 5). *Palestinians stranded on Iraq-Syria border to depart for Iceland*.

<sup>213</sup> Al (*supra* note 63), p. 61.

<sup>214</sup> IRIN (*supra* note 67); IRIN (*supra* note 191); IRIN (*supra* note 150); UN News Service (*supra* note 156).

<sup>215</sup> IRIN (*supra* note 67); IRIN (*supra* note 191).

<sup>216</sup> RI (2008, July 14). *Release: Relocation of Palestinians to Sudan is not a lasting solution*.

<sup>217</sup> RI (*supra* note 63), p. 2; Al (*supra* note 55), p. 5; UN News Service (*supra* note 156); Al (*supra* note 63), p. 62.

operation, over 1,000 were finally resettled to third countries.<sup>218</sup> By November 2010, 2,044 Palestinians were referred for resettlement, reducing their numbers in Al Waleed to 264.<sup>219</sup> The resettlement of such a large percentage of Palestinians was a significant feat in light of the fact that only five percent of the nearly two million Iraqi refugees were able to benefit from resettlement.<sup>220</sup>

Concomitant with these resettlement operations, UNHCR advocated for the increased registration and protection of Palestinians within Iraq. In 2008, the Iraqi Ministry of Displacement and Migration’s Humanitarian Directorate agreed to register Palestinians who entered Iraq between 1948 and 1967 (and their descendants) to ensure they would be able to access government benefits. It registered 10,500 by August, and continued registration in Nineva, Basra, and Al Waleed.<sup>221</sup> Palestinian President Mahmoud Abbas in 2009 requested that Iraq issue Palestinians with passports rather than travel documents; however, the Palestinian *chargé d'affaires* in Baghdad noted they were already entitled to either an Iraqi passport, an Iraqi passport noting their Palestinian origin, or a PNA-issued passport.<sup>222</sup>

As of 2009, there were a total of 11,000 Palestinians living in Baghdad, Mosul, and Basra,<sup>223</sup> a marked increase from previous years. With the establishment of an Iraqi military base nearby providing some modicum of security, 5,000 lived in Baladiyat. However, they contended with poor infrastructure and governmental neglect. In response, the Iraqi Immigration Minister noted this was similar in Iraqi neighbourhoods and stated that financial assistance was now available to Palestinian families who had lost their head of household.<sup>224</sup> In this sense, although resettlement and enhanced protection space in Iraq were not overtly linked, resettlement may have had the effect of widening protection space for the

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<sup>218</sup> UN News Service (*supra* note 143).

<sup>219</sup> See UNHCR-Iraq (*supra* note 107).

<sup>220</sup> See UNHCR (2010, June 18). UN chief announces 100,000 landmark in resettlement of Iraqi refugees.

<sup>221</sup> IRIN (2008, August 27) Iraq: Some Palestinian refugees to get special IDs.

<sup>222</sup> IRIN (*supra* note 95).

<sup>223</sup> Ibid.

<sup>224</sup> Kareem, A. (*supra* note 61).

Palestinians remaining within Iraq in keeping with UNHCR’s larger goal of using resettlement strategically to increase “protection dividends” for refugees remaining in their host countries.

### III. Exegesis: Sovereignty, law, and space in Iraq’s borderlands

#### A. Introduction

The positioning of refugees in the border regions of Iraq through practices of violence and expulsion, displacement and re-emplacement, and humanitarian management and resettlement raises questions regarding the kinds of spaces that emerged. What happened when the space produced by the sovereign state was not one of social closure, but rather, one of ambiguity, exclusion, and exile? How did law and geography function at the margins of the political territory between Iraq and its neighbouring states? Such questions devolve upon the mutually constitutive nature of law and space,<sup>225</sup> in the process of ongoing state formation.

This section considers how the practices towards refugees outlined above were implicated in the state formation process as they spatialised both the production and contestation of sovereignty. First, it theorises that the refugees became outlaw bodies whose exclusion became the object of sovereign decisionism. The spaces to which they were relegated were the materialisation of the state of exception – that space of anomie against which the state defines its law as legitimate and its authority as the norm.<sup>226</sup> These practices shaped the refugees’ geographical spaces and “bodies as space”.<sup>227</sup> Law functioned as a spatialising agent through the creation of camps and asserting the boundaries of states on the bodies of refugees,

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<sup>225</sup> Delaney, D., Ford, R.T., & Blomley, N. (2001). Preface: Where is law? In D. Delaney, et al (Eds.) *The Legal geographies reader: Law, power, and space* (pp. xiii-xxi). USA: Blackwell, pp. xv-xvi.

<sup>226</sup> See Agamben, G. (*supra* note 4).

<sup>227</sup> See Holder, J. & Harrison, C. (2003). Connecting law and geography. In J. Holder & C. Harrison (Eds.). *Law and geography*, Current Legal Issues 2002, Vol. 5, (3-16). Oxford: Oxford University Press, p. 7.

and space in turn acted as a kind of law used to confine, displace, regiment, and exclude. The logic of sovereignty persisted as refugees used their abject status and mobilised the spaces of their containment to negotiate state-centric solutions, and UNHCR both governed and engaged these spaces in its calls for their re-inclusion in the state system. The exception became the normalised mode of governance in the borderlands, where bare life was managed through the provision of humanitarian aid, and law was understood as a series of arbitrary decrees and decisions on entry. In the process, however, the logic of sovereignty and the violence of state decisions to except refugees from protection were both de-naturalised and exposed.

## **B. Spatialising the state of exception in the borderlands**

The practices of violence, expulsion, and denial of entry to refugees in Iraq functioned as decisions on the exception, which were spatialised in the encampments along Iraq’s borders. They were critical to the constitution of the citizen body within, tying identity to territory in the process of legitimating state power. Law and norms produce both boundaries and connections between geographical spaces and social groups.<sup>228</sup> In maintaining the tie between a social group and a defined territory, law ensures that citizenship is something beyond being simply human, but is imbricated in processes of territorialisation and state-making and legitimation. Questions of political order frame legal questions within a particular imaginary of space.<sup>229</sup> In this sense, the legal categories of citizen or refugee can have no meaning without the concomitant spatial categories of “state” or “territory”.<sup>230</sup> Hence, non-citizens are often deemed “out-of-place”, or in the case of refugees, “displaced”, demonstrating how spatial orderings are also legal

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<sup>228</sup> See Freeman, M. (2003). Law and geography: Only connect? In J. Holder & C. Harrison (Eds.) (ibid.) (pp. 369-382).

<sup>229</sup> Delaney, D. et al (*supra* note 225), p. xvii.

<sup>230</sup> Blomley, N. (2003). Law and geography in retrospect. In J. Holder & C. Harrison (Eds.) (*supra* note 228) (17-33). Oxford: Oxford University Press, p. 29.

orderings. Refugees then pose a problem for states<sup>231</sup> – one of “disorder” (political order) caused by “displacement”.<sup>232</sup>

Law produces such boundaries and ties through signifying and differentiating the “other”, which unifies the community inside. The identity of the group included in the state – the citizen – is therefore contingent upon those excluded, i.e. those who cannot be captured within the categories of belonging. The excluded are the bodies both threatening, but necessary to the logic of the polity, against whom citizens perceive themselves as autonomous and self-determining,<sup>233</sup> and from whom the state protects them. Towards a statist project of social closure, legal practices at the borders work not only to decide upon inclusion in the polity,<sup>234</sup> but also to shape social space by removing competing meanings that might reveal the relationship between the exclusion of certain bodies in the production of the citizen body<sup>235</sup> – the human remainder in the constitution of the citizen.

In the process, justice emerges as a set of legal norms intended to preserve the borders of the group<sup>236</sup> and the myth of the group’s determinacy, freedom, and unity.<sup>237</sup> Such social relations between groups, when ascribed to a particular territorial space through law, assume legal meanings that can institutionalise relations of power, such as when the refugee is constructed as the crisis against which the state may assert its necessity. Rather than static phenomena, states must continuously make themselves felt – shoring up their borders and asserting their legitimacy through the continuous exercise of making bodies legible within the logic of statism. Therefore, states use the problematisation of bodies and regimentation and policing to continue to assert their political legitimacy. When humans are displaced in the process of creating new state orders, they become problems to

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<sup>231</sup> See Soguk, N. (1999). *States and strangers: Refugees and displacement of statecraft*. Minneapolis: University of Minnesota Press, pp. 189, 191.

<sup>232</sup> Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), p. xxvii.

<sup>233</sup> See Milanovic, D. (1992, Autumn). Rethinking subjectivity in law and ideology: A semiotic perspective. *The Journal of Human Justice*, 4 (1), p. 51.

<sup>234</sup> Landau, L. & Monson, T. (2008). Displacement, estrangement and sovereignty: Reconfiguring state power in urban South Africa. *Government and Opposition*, 43 (2), 315-336, p. 323.

<sup>235</sup> Agamben, G. (*supra* note 4).

<sup>236</sup> Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), pp. xxviii, xxxi.

<sup>237</sup> *Ibid.*, pp. xvi, xvii. See Milanovic, D. (*supra* note 233), p. 51.



those states where they seek refuge; the disorder that they represent is signified through the label of “refugee”, and they are brought to heel, corralled, governed, and policed through regimentations such as encampment.

The exclusion and encampment of the refugees once harboured in Iraq in this way became central to the new state-building process and constitution of the Iraqi citizen body, as emerging Shi’ah and Kurdish actors began to define Iraqi state identity in opposition to those who were favoured by Saddam Hussein. The re-classification of Palestinians as “non-resident foreigners”, for example, referenced both space and citizenship, signifying them as outside the new political order – as the counterpoint to emerging concepts of citizenship and belonging in Iraq.

However, the refugees marked not only the “others” against which the Iraqi citizen body began to define itself, but also a status against which it had to protect itself from becoming. In the process of moving from being simply human to becoming a full citizen, the citizen emerges as a contingent legal status, whose rights can be lifted in times of emergency – a “state of exception”<sup>238</sup> – in which the citizen may be stripped of legal protection, expelled, and relegated to “bare life”. This is often the case of persons who become refugees – those former citizens who are relegated to the status of being human without protection of state law, but subject as human beings to the violence of state power.<sup>239</sup> Practices critical to the constitution and expression of state identities are also necessary to the concealment of the radical relationship between the refugee and the citizen, the human and the political being. In this sense, exclusion functions as a limit concept, demarcating the social space of the normal political community and concealing not only the possibility of bare life, but also the irregularity and processuality of the excluded others who continue to remain in the border zones.<sup>240</sup>

In order for a state to preserve its legitimacy in the face of the possibility of this raw power to exclude any person from its protection, it attempts to deploy law in

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<sup>238</sup> See Agamben, G. (*supra* note 4).

<sup>239</sup> See *ibid.*

<sup>240</sup> See Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), pp. xv, xxxvii; Holder, J. & Harrison, C. (*supra* note 227), p. 5.

ways that mask the point at which law may devolve into an exercise of unconstrained power. It may create bureaucracies of migration control aimed at the continuous differentiation and protection of the citizen from the threat of the refugee or terrorist, such as the arduous bureaucratic procedures that prevented many Palestinians and Ahwazis from renewing their residency documents, and the listing of the PMOI as a terrorist organisation that prevented their admission to third state territories. Such bureaucracies drawing on rationalities of “otherness” conceal the state’s sovereign power to except all bodies from political protection. In the guise of law they promote the myth that there is no “defenceless” human remainder to which the citizen is always at risk of being relegated.

The border zones were the areas where practices of distinction were most frequently exercised and visible, as these spaces were populated by illegible bodies whose relationship to the state had to be determined at the moment of physical crossing.<sup>241</sup> States problematise borderlands and make them the objects of governmental and legal regimentation and control through activities of border demarcation,<sup>242</sup> and techniques which register and categorise life, recognising humans as signs, numbers, and “words without bodies”, blurring the space between subjects and objects.<sup>243</sup> At the borders of both identity and territory, bodies become sites of discipline as they are subjected to practices to distinguish and ascertain their legitimacy and place in the social hierarchy – in the “territorial ordering of humanity”.<sup>244</sup> Procedures of examination, inclusion, and exclusion at the border are forms of this discipline, controlling and targeting what must remain outside of state protection, thereby performing the spatial and legal fictions of sovereign territoriality and sovereign subjectivity.<sup>245</sup>

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<sup>241</sup> See Das, V. & Poole, D. (2004). State and its margins: Comparative ethnographies. In V. Das & D. Poole (Eds.) *Anthropology in the margins of the state* (pp. 3-34). Santa Fe: School of American Research Press, p. 6.

<sup>242</sup> Baud, M. & van Shendel, W. (*supra* note 6), p. 222.

<sup>243</sup> Diken, B. & Laustsen, C. (2006). The camp. *Geographical Analysis*, 88 B (4), 443-452, p. 450.

<sup>244</sup> Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), pp. xiv-xv.

<sup>245</sup> Salter, M. (2008). When the exception becomes the rule: Borders, sovereignty, and citizenship. *Citizenship Studies* 12 (4), 365-380, p. 365.

Both immigration inspectors and agents at the border posts who refused admittance to Palestinian refugees, and resettlement states who refused admission of former PMOI members, performed such disciplinary practices,<sup>246</sup> making the illegible legible within the rationality of statism. The refugees' subjection to inspection, border checkpoint screenings, and often arbitrary decrees regarding their entry was a submission of their bodies to the processes of territorialisation.

Such legal ambiguity led to creation of outlaw bodies and dangerous spaces,<sup>247</sup> facilitating the emergence of the rightless spaces of exception to which refugees were repeatedly relegated – the camps where they were isolated from access to the centres of power, subject to state and military surveillance, left dependent upon humanitarian organisations, rendered vulnerable to continued attacks, and compelled to struggle with extreme environmental conditions and lack of resources for their survival. Refugees denied the rights of free movement in a world defined by sovereign territorial states, are often forced to live in camps.<sup>248</sup> And in the zones of undecideability that characterised the spaces of Iraq's border zones, emplacement in camps also functioned as a bordering practice. Because the power of the state in borderlands is often contingent on the actual presence of the state in the borderlands,<sup>249</sup> the camps, like checkpoints, played a structural role in both control and surveillance by the state.<sup>250</sup> They contained illegible bodies that could not be accommodated within any state, asserted the sovereign identities of Iraq and its neighbouring states, and re-produced refugees in new configurations of displacement, transforming states of exception into spaces of exception.<sup>251</sup> They revealed the state of exception at its extreme – a spatial expression of the violence of inclusion and exclusion,<sup>252</sup> and unification and separation.<sup>253</sup>

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<sup>246</sup> Landau, L. & Monson, T. (*supra* note 234), p. 323.

<sup>247</sup> See Blomley, N. (*supra* note 230), p. 31.

<sup>248</sup> Soguk, N. (*supra* note 231), p. 161.

<sup>249</sup> Baud, M. & van Shendel, W. (*supra* note 6), p. 217.

<sup>250</sup> Perera, S. (2002). What is a camp...? *Borderlands* 1(1), para. 22.

<sup>251</sup> Agamben, G. (*supra* note 4).

<sup>252</sup> See Stevenson, L. (2004). *Anthropology in the margins of the state* (book review). *PoLAR* 30(1), pp. 140-141.

<sup>253</sup> See Flynn, D. (1997, May). "We are the border": Identity, exchange, and the state along the Bénin-Nigeria border. *American Ethnologist* 24(2), 311-330, p. 327.

The border camps and the refugee bodies subjected to legal exceptionalism hence became geographical and physical spaces of exception that enabled the operations of sovereign power of the Iraqi state and its neighbours. The use of law, regulation, and norms of violence to except refugees from admittance, recognition, or protection provided the fiction against which the nascent Iraqi state could define its emerging political condition and national identity as legitimate and the norm.

### **C. Contesting the exception through space: Sovereign power at the margins of the state**

Yet, as these encampments both created and contained bare life at the margins of the state, they also exposed the reach of sovereign power that often remains hidden beneath bureaucratic regulations and state law. The normalisation of the exception that resulted from these encampments along the borders of Iraq exposed the logic of sovereign power, providing the foundation for its later contestation, appropriation, and de-legitimation by refugees, resettlement states, and humanitarian organisations.

#### **1. *Normalising the state of exception through space***

The exception of the refugees through extreme violence and expulsion, discriminatory bureaucratic processes, exclusion from refugee status, rejection at the borders, and encampment were ways of asserting raw state power when confronted by persons whose identities threatened state order and imaginaries of nation. However, such operations of law to produce the refugee in counterpoint to the citizen in the ambiguous spaces of the “no-man’s lands” were not always able to maintain this clear distinction or insistence upon the myth of social closure. The practices aimed at recouping the forms of statism that the refugees’ very presence called into question, were decisions exercised in spaces where state control and

jurisdiction were subject to debate. While cloaked in a veneer of immigration regulation, these practices were also continuously and arbitrarily shifting, revealing the point of indistinction between law and political power as the refugees were provided with protection only when it was politically expedient to do so.

The irrationality and illegibility of the masses of these refugees worked to destabilise the idea of the state as legible, rational, and orderly.<sup>254</sup> The border was not so much a solid line delineating the division between geographical territories or between discrete categories of population, but more a zone of undecideability where discretion and law were simultaneously exercised upon bodies in the projection of state power. Thus at the checkpoints along the borders of Iraq, attempts at legibility revealed more often than not how the law was constantly under negotiation,<sup>255</sup> as the checkpoint produced a demand that was illegible and illegal,<sup>256</sup> where decisions, their objects, and their rationalities were never entirely clear.<sup>257</sup> As border inspections were conducted by state agents who exercised discretion, refugees were subjected to those unspoken laws of the state that operate between written law and its application. Within such spaces, doubt or suspicion became operative and were expressed in such policing as the state's attempt to "incorporate margins of uncertainty".<sup>258</sup> Decisions at checkpoints oscillated between threats and guarantees.<sup>259</sup> Violence in this unclear space underlined the arbitrariness of the political practices that occurred there, be they interrogation, body searching, detention, permission to cross the border,<sup>260</sup> expulsion from the camps, or deportation amounting to *refoulement*.

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<sup>254</sup> See Cohen, L. (2004). Operability: Surgery at the margin of the state. In V. Das & D. Poole (*supra* note 241) (pp. 165-190).

<sup>255</sup> See Asad, T. (2004). Where are the margins of the state? In V. Das & D. Poole (*supra* note 241) (pp. 279-288).

<sup>256</sup> See Jeganathan, P. (2004). Checkpoint: Anthropology, identity, and the state. In V. Das & D. Poole (Eds.) *ibid.* (pp. 67-80), p. 75.

<sup>257</sup> See Stevenson, L. (*supra* note 252), p. 143.

<sup>258</sup> See Asad, T. (*supra* note 255), p. 285.

<sup>259</sup> See Poole, D. (2004). State and its margins: Comparative ethnographies. In V. Das & D. Poole (*supra* note 241) (pp. 35-66).

<sup>260</sup> See Bornstein, A. (2002). *Crossing the Green Line between the West Bank and Israel*. Philadelphia: University of Pennsylvania Press, p. 16.

It was at this very moment of crossing from one polity to another that the zone of indistinction was most evident; it was the site where the decision was yet to occur, where processes of inclusion and exclusion were dependent upon one another, and where the limits of the application of state law could devolve into an exercise of pure sovereign power.<sup>261</sup> The borderlands were zones of undecideability that blurred the categories of disinterested and corrupt, just and coercive,<sup>262</sup> as sovereign decisionism was hidden within legalised discretion and bureaucratic regimes governing the refugees' attempted crossings.<sup>263</sup> At the moment of border-crossing, all persons became potentially refugees, as they waited in the zone between citizen and non-citizen for their legal identities to be authenticated.<sup>264</sup> This was the space in which all persons became objects of sovereign decisionism, and which, as Salter suggested, also may have provided an opportunity for solidarity with those for whom liminality had become a permanent feature of everyday life.<sup>265</sup>

The refugees' limited and vacillating access to justice and physical presence in the borderlands contested the mythology of closure in the state system. The border camps and legal categorisations could only partially provide the spatial fiction against which each state could define the identity of its population as the norm and the legal order and boundaries of its territory as legitimate. The refugees in the border camps of Iraq existed at the territory's edge, neither fully included and protected nor wholly excluded and expelled by the state. States were confronted with the presence of these outlaw bodies, who either having no place within any state or rejected outright by most, shattered the myth of the all-encompassing utopic spaces of unity and justice envisioned within the state system. The abject border camps to which the vast majority were relegated disrupted the myth that state borders, their authority, and the protection they provide to those deemed to

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<sup>261</sup> See Das, V. & Poole, D. (*supra* note 241), p. 6.

<sup>262</sup> See Stevenson, L. (*supra* note 252), pp. 140-141.

<sup>263</sup> See Salter, M. (*supra* note 245), p. 377.

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid.*, p. 378.

belong within, represented the full scope of justice and were capable of exhausting all manifestations of human need.<sup>266</sup>

Rather, they resided in the grey zones between and along borders, where law and state power began to blur, and their bodies, targeted with violence through expulsion, emplacement, depravation, and legal regimentation, became quite literally the sites of this indistinction. Existing in the borderlands of Iraq, they came to embody the exceptional spaces to which they were relegated, but over which states exercised a contested form of control.

Also, the positioning of Al Waleed and the K70 camps near MNF military bases highlighted in an ironic form the very powerlessness that collectively was ascribed to the refugees. The camps reflected in inverted form the violence of the militarised practices that were viewed as the proximate cause of the refugees’ displacement,<sup>267</sup> thereby interrupting the routinised violence of militarisation.<sup>268</sup> The landscape that resulted was an effect of the tension created by this spatial arrangement, as the refugees’ bodies and the physical positioning of the camps next to military bases unmasked the workings of their own de facto “incarceration”.<sup>269</sup>

Subjected to the operations of sovereign decisionism, the borders and the camps therefore also marked its limits – the points at which the raw power of the state to supersede the limits of its law was unmasked and revealed. Existing at the intersection of law and politics, where refugees could as easily enjoy legal protection as they could be subject to the whims of sovereign power, the borderlands became the zones of indistinction between bare life and juridical rule<sup>270</sup> that emerge when the state of exception becomes the norm. The checkpoints and the camps, as spatial markers of this point of indistinction between law and the power to decide upon the exception, brought into relief the operations of a sovereign power unmasked and

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<sup>266</sup> See Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), p. ix.

<sup>267</sup> See Rua Wall, I. & Olarte, C. (2010). Spatial resistance to internal displacement in Colombia. Presentation at the Critical Legal Conference, Utrecht University, the Netherlands, 10-12 September 2010, referencing IDP camps taking over public parks near military sites in Colombia.

<sup>268</sup> Butler, J. (2012, February 7). Self-determination, Palestinian statehood, and the anarchist impasse. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>269</sup> See Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), pp. xxix, xxvii.

<sup>270</sup> Agamben, G. (*supra* note 4), pp. 123, 174.

unleashed from the constraints imposed by law and regulation intended to domesticate and contain it. The ambiguous legal status and treatment of refugees in the border zones exemplified how the decision on the exception became not only spatialised and normalised, but also an expression of a political power unconstrained by law.

Not belonging to any state, Palestinian refugees in Iraq were illegible within the state system. They were first protected and included under Saddam Hussein, but no longer serving the anti-Israeli cause or useful in deflecting attention from the internal brutalities of Saddam Hussein's dictatorship,<sup>271</sup> they evolved from political resources to political threats as they represented the arbitrariness of the former Iraqi regime, engendering rivalry, hostility, and resentment amongst many of the Iraqi populace. Through "discourses of disposal"<sup>272</sup> and legal ambiguities in their residency rights, Palestinians were recast as exceptional bodies and forced into these exceptional spaces. When fleeing to the border, they were permitted neither entry nor return to any state and were compelled to live in the grey zones of changing politico-legal categorisations.

Also positioned as threats to neighbouring states who perceived their presence as a burden and potential security crisis, the Palestinians were relegated to the margins, where sympathy and not law was their only resource for survival. They demonstrated Hanafi's contention that for as long as they have been displaced, they have been caught in the interstices between the extremes of humanitarianism (sheltered and fed as bodies without protected rights) and the politics of the right of return (arguing that legal status or local integration would undermine this cause). In this space, he argued, their voices, rights-based approaches to their protection, and their "rights to the city" have been lost.<sup>273</sup>

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<sup>271</sup> See Hanafi, S. (2008, November 15). Palestinian refugees in the Arab world: The right to have a right. *The Daily Star*.

<sup>272</sup> See Blomley, N. (*supra* note 230), p. 31, citing Pitman, B. (2001). Re-mediating the spaces of reality television: 'America's Most Wanted' and the case of Vancouver's missing women (unpublished working paper).

<sup>273</sup> Hanafi, S. (*supra* note 271).



The practices of exceptionalism exercised against the PMOI included not only their physical encampment, but also their categorisation as either threats or allies. Such practices were first evident in their listing as a terrorist organisation, preventing their access to international protection. They were then subjected to control and monitoring through physical and geographical containment in camps – a form of emplacement that excepted them from the protections of the polity. Although they were provided with an initial modicum of protection by the MNF which secured their camp, their original exclusion was re/performed in the removal of MNF protection and threats of their expulsion by the Iraqi authorities. Such threats were spatialised in the ISF violently surrounding, targeting, and attacking their camp, and blocking their freedom of movement. Once a form of protection, their encampment became the source of their displacement, as many fled through smuggling channels to different parts of Europe in search of asylum and safe harbours.

Therefore, the PMOI, no longer serving the cause of destabilising the Iranian regime, seen as enemies of the new Shi'ah and Kurdish-dominated Iraq, and desired for prosecution by the Iranian authorities, were first abandoned by the MNF, then targeted by the Iraqi state, then protected by the UNHCR, and finally rejected by most resettlement states. They were trapped in a protracted space of legal uncertainty with no durable solutions on the horizon.

As they see-sawed between these degrees of legal and political inclusion and exclusion, they embodied in many ways the political process of Iraqi state formation, as law was used to produce shifting orderings of social and political space. Their initial protection by the MNF reflected the extended sovereign reach and interests of the occupying forces which also supported their opposition to the current Iranian regime. The withdrawal of MNF protection, however, was an expression of the political aim of handing over sovereign authority to a newly democratic Iraq, and proved to be a convenient resolution to the quandary faced by the US in protecting an organisation listed as terrorist for reasons of foreign policy. Their subsequent

targeting with violence and expulsion by the ISF was an assertion of the new Shi'ah-Kurdish political alliance's power and voice in the state-building process.

The policies of inclusion of the PMOI exercised by the MNF and later by UNHCR were aimed at making them legible to the state and finding a way to bring them back within the ambit of the state system. However, the failures in doing so, indicated by their outright rejection by nearly every resettlement state, threats of expulsion by Iraq, and fears of detention and execution by Iran, revealed the continually contested space in which states fashioned their identities and asserted their authority. In the end, the rejection of the vast majority of these refugees for resettlement, despite their delisting as a terrorist organisation, placed sovereign decisionism again at the foreground of political power. They were thus left to their own devices and subject to the political exigencies of Iraqi state formation.

These iterations of law and violence and their spatialisation in encampments came to normalise the exception of the refugees from state recognition and protection in the borderlands. Therefore, the refugees' presence, while subject to legal practices aimed at including or excluding them within the logic of statism, also became the source of this logic's own undoing. Admitted by no state, and emplaced in camps along the border, their physical presence exemplified the paradigm of sovereignty taken to one extreme. Instead of being made legible within the black and white world of inclusion and exclusion, they remained illegible bodies at the borders where inclusion and exclusion existed in a radical and dependent relationship to one another. Here the exception was revealed as the normal mode of governance in the borderlands, and the hidden workings of the logic of sovereignty were exposed, as law and regulation could no longer mask the brute force of state power.

## 2. Exposing and contesting the violence of the decision on the exception

In the slippages that occur as a part of the state formation process at the border, where refugees' lives are contingent and complex,<sup>274</sup> and technologies of power produce their own "accidents and failures",<sup>275</sup> possibilities emerge for other assertions of power, subjectivity, and resistance. They are the unintended consequences of exceptionalism that emerge when the space of violence becomes productive in ways that materially expose the hidden mechanisms of sovereignty and reconstitute the camp as a symbolic and iconic space. For some scholars, this has signified a decline in the trenchancy of sovereignty, while for others, it has suggested the possibility of an emancipatory politics<sup>276</sup> – a subjectivity unconstrained by strictures of citizenship. But this risks disavowing, denying, and downplaying the political realities of the concrete forms of power that do violence to refugees in their everyday lives.<sup>277</sup> Given the multiplying sites of exception and the deepening entrenchment of statist rationalities in the treatment of the refugees in Iraq, perhaps, as Salter asserts, rather than romanticising zones of indifference at the border as a means of imagining the decline of state power in interstitial zones, one must take the spaces between sovereign states seriously.<sup>278</sup>

In keeping with this imperative, it is necessary to examine how sovereign power was configured in the face of challenges lodged to its legal and political reach by investigating how refugees relegated to spaces of exception in the borderlands negotiated their relationship to the state and its exclusionary practices.<sup>279</sup> Although refugees may be violently displaced, objectified, and silenced, they do negotiate the

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<sup>274</sup> Soguk, N. (*supra* note 231), p. 8.

<sup>275</sup> Fortier, A-M. (2012, February 6). And then we were straight: Naturalisation and the politics of desire. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>276</sup> See DeCaroli, S. (2007). Boundary stones: Giorgio Agamben and the field of sovereignty. In M. Calarco & S. DeCaroli, *Giorgio Agamben: Sovereignty and life* (pp. 43-69). Stanford: Stanford University Press, p. 63.

<sup>277</sup> Butler, J. (*supra* note 268).

<sup>278</sup> Salter, M. (*supra* note 245), p. 377.

<sup>279</sup> See Das, V. & Poole, D. (*supra* note 241), p. 4; Pickering, S. (2005). Crimes of the state: The persecution and protection of refugees. *Critical Criminology*, 13, 141-163, p. 157; Nyers, P. (1999). Emergency or emerging identities? Refugees and transformations in world order. *Millennium – Journal of International Studies*, 28, 1-26, p. 26.

quality of their lives in displacement,<sup>280</sup> and the camps they inhabit are spaces performed and invigorated by new forms of sociality, hierarchy, and relations of exchange.<sup>281</sup> Peteet similarly observed that while camps do confine, they also provide space for the formation of new identities and politics.<sup>282</sup> In the process, they both intersect with configurations of state sovereignty and counter particular regimentations of statism.<sup>283</sup>

The state of exception to which the refugees in Iraq had been relegated, when translated into a material space of exception in the border camps, in this respect not only became an abject space of exile and dispossession – a space of bare life – but also opened up the possibility for new forms of life and political subjectivity. The refugees problematised their status resulting from sovereign exceptionalism and interacted with strategies of regimentation and statisation, using their self-emplacement in camps as a source of exposure, critique, and contestation. In so doing, they were asserting a kind of “insurgent citizenship” in the effort to make themselves visible through claim-making and mobilising their spaces and bodies.<sup>284</sup>

The spaces of exception of the camps were subject to state power, but given their position in the borderlands, they were also spaces that continuously evaded and challenged it, particularly when the refugees negotiated and countered its reach.<sup>285</sup> The refugees’ refusal to return to the almost certain dangers they faced in central Iraq forced the border authorities to engage with them to varying degrees that defied their pure relegation to a state of exception – whether to facilitate their encampment, provide a modicum of physical protection to the most vulnerable, or permit their access to minimal humanitarian assistance. However, despite such resistance, they were continuously displaced, expelled from one encampment to

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<sup>280</sup> Soguk, N. (*supra* note 231), pp. 5-6, 243.

<sup>281</sup> Rygiel, K. (2012, February 7). Camp cartographies: Forging transgressive citizenship in transit. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>282</sup> Peteet, J. (2007). Unsettling the categories of displacement. *Middle East Research and Information Project*, 244.

<sup>283</sup> Rygiel, K. (*supra* note 281), p. 245.

<sup>284</sup> See Bendixsen, S. & Jacobsen, C. (2012, February 6). Becoming worthy citizens: The destabilization and re-inscription of citizenship boundaries. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>285</sup> See Baud, M. & van Shendel, W. (*supra* note 6), p. 235.

another. In defiance of such measures, they participated in strategies of re-emplacement, self-settling in *ad hoc* camps along the border and drawing ever greater numbers from the central regions of Iraq into their fold.

In this way, they also exposed and countered the forms of sovereign violence that both expelled and contained them. In other contexts, Rua Wall and Olarte observed that “displaced persons create camps, and camps create displaced persons”, noting that when a camp is demobilised, it can spread symbolically, generating a collectivity with other displaced groups in the state. Such *ad hoc* camps can rupture the forms of emplacement normally enacted by state policing practices.<sup>286</sup>

The refugees in the border camps similarly used self-emplacement and re/performed their displacement<sup>287</sup> in a bid for inclusion in the state system. Their efforts often worked together with the regimentation and re-statisation practices of UNHCR to secure solutions and a way out of the exception which, in the case of the Palestinians in particular, had been a fact of life since birth. These emplacements in a bid for entry into the state system took many forms, from human smuggling, to encampment, to resettlement. As the former PMOI found themselves with little recourse for state protection through formal channels, they began to dissipate, seeking escape through smuggling routes into Europe. The Ahwazis, while initially submitting to repatriation to Iran, then refused these attempts at repatriation after facing imprisonment and death sentences, and they began self-settling in Al Waleed camp in hopes of gaining protection or resettlement. In this way, the Ahwazis’ continuing arrivals at the camp undermined UNHCR and Iraq’s goal to eventually close Al Waleed, as the Palestinian refugees residing there were resettled to third states. Al Waleed began to assume an increasingly permanent character – a space of constant reminder and exposure of the failures of state protection and the liminality of the border regions.

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<sup>286</sup> Rua Wall, I. & Olarte, C. (*supra* note 267).

<sup>287</sup> See *ibid.*

In the case of Palestinians, the cycle of multiple displacements from one camp to another along the border zones was an ironic reflection of the kinds of camps to which they had been forcibly relegated for generations since their initial displacement in the 1948 war. Having no immediate prospects for repatriation to the OPT, they were caught in the grey zones both between states and between the mandates of UNHCR and UNRWA. By drawing increasing numbers to the camps, they exposed the violence of the state practices that led not only to their most recent expulsions, but also to their increasingly permanent status as stateless persons. The border camps were thus shaped by a temporality that reached far beyond the incarnations of violence that led to the Palestinians' most recent displacement.

The testimonies Palestinians made to the public also demonstrated how they portrayed their emplacement in harsh and isolated conditions as a material manifestation of both their statelessness and refugee status in search of a more permanent solution. They highlighted the uniqueness of their suffering,<sup>288</sup> by drawing attention to the long cycles of displacement that characterised the history of their community and drew upon their dual identities as stateless persons, yet with a right of return, in calling for their resettlement for purposes of acquiring citizenship. They challenged the states of exception to which they were relegated as stateless persons, while at the same time supporting state-centric forms of power by pleading for solutions in the form of resettlement and eventual citizenship. Using discourses of suffering and rights shaped by the particular spaces they occupied in the border zones and the increasing permanence of their statelessness that this demonstrated, they used spectacularisation to disrupt state politics.<sup>289</sup> They engaged in a kind of self-fetishisation as a means of talking back to the state, re/performing the "fantasies"<sup>290</sup> of the centrality of citizenship. In doing so, they

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<sup>288</sup> See Bendixsen, S. & Jacobsen, C. (*supra* note 284), for how they have done so in other contexts.

<sup>289</sup> See Hepworth, K. (*supra* note 93).

<sup>290</sup> See Cubero, C. (2012, July 12). De-fetishising EU immigrant integration: Transnationalism as integration. *Uncertainty and Disquiet*. European Association of Social Anthropologists 12<sup>th</sup> Biennial Conference. 11-13 July 2012. Paris: University of Paris Ouest Nanterre La Défense, noting that fetishisation is the process of attributing

strained against the legal categories that confined them, engaging in a kind of “re-splicing” as they mobilised the slippage that occurs in the process of producing such disciplinary spaces that are never stable. They inverted and extended their refugee identity in ways that revealed the contradictions in their relationship to the state system.<sup>291</sup>

Hanafi noted that as the others against whom citizenship is performed in the Middle East, Palestinian refugees in reluctant and sometimes hostile societies often face prolonged displacement, and their hosts tend to respond more in terms of humanitarianism and security than rights and integration. Refugees in these contexts more often than not develop double identities of alienation and nationality.<sup>292</sup> In Iraq, they enacted identities of both nationality and refugee-ness to advance their cause of survival, mobilising their own abject spaces to call for their entry into the state system and access to the rights of citizenship. In this sense, they came to represent what Arendt referred to in other contexts as “the vanguard of their peoples”.<sup>293</sup> They used emplacement and self-settlement in subsequent camps to both assert their marginality within and right to entry into the international state system and used their marginalised space to produce a discourse of legal rights. Their displacement and self-emplacement became productive of a broader subjectivity that they were able to mobilise in their calls for a solution to their plight.

The refugees’ strategies for survival exposed the violence of sovereign exceptionalism and de-normalised its operation as a mode of governance, though they did not contest state power to make the decision on the exception itself. They were both governed in their collaborations with the state, yet ungovernable, as they refused state hegemony.<sup>294</sup> They called attention to their spaces of encampment to

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an object with agency, and self-fetishisation is a means of reperforming this process normally enacted by the state back to the state, thereby denaturalising the construction of the citizen.

<sup>291</sup> See Blomley, N. (*supra* note 230), p. 32.

<sup>292</sup> See Hanafi, S. (*supra* note 271).

<sup>293</sup> Arendt, H. (2007). We refugees. In J. Kohn (Ed.). *The Jewish writings / Hannah Arendt* (pp. 264-274). New York: Schocken Books, p. 274.

<sup>294</sup> See Hosein, G. (2012, February 6). Transnational spirituality, invented ethnicity and performances of citizenship in Trinidad. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

highlight their illegibility within them. In politicising the spaces they occupied by cutting across the boundaries and borders of the cartographic logic of territorialisation,<sup>295</sup> they negotiated borders, self-settled between and across them, and sought ways to manipulate these spaces towards their own survival.<sup>296</sup> They also challenged state practices by claiming spaces through self-settlement to which they were not legally entitled, and in the process functioned alongside or intersected with state-centric forms of sovereignty.<sup>297</sup> Their transgression of state boundaries challenged the spatial logic of the state system, calling into question the exclusionary and violent state practices of boundary inscription.<sup>298</sup> In so doing, the political “spoke back” to politics and provided for the entry of new forms of belonging.<sup>299</sup> They also exposed the violence that led to their displacement and generated a certain language of rights which, for Palestinians in particular, had hitherto been silenced in concert with their diminishing prospects for return.

### **3. Migrating sovereignty**

Humanitarian organisations also shaped the forms of political agency that emerged in the spaces of exception of the camps, intersecting with the interests of both refugees and states in their projects to promote refugee protection. Similar to the entry of UNHCR in the Iraqi refugee context, the crisis posed by the lack of state protection for the refugees’ lives in the borderlands and the crisis that these “illegible” refugees posed to the state system, enabled the entry of humanitarian organisations to manage operations to resolve them, primarily through encampment and durable solutions aimed at re-statisation. Encampment was the initial response to state claims that their capacities were dangerously exceeded and economies disrupted. The presence and ubiquity of these camps also spoke to the increasing

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<sup>295</sup> Soguk, N. (*supra* note 231), p. 54.

<sup>296</sup> See Landau, L. & Monson, T. (*supra* note 234), pp. 315-316.

<sup>297</sup> See *ibid.*

<sup>298</sup> Pickering, S. (*supra* note 279), p. 160.

<sup>299</sup> See Hosein, G. (*supra* note 294).



restriction of durable solutions of repatriation, integration, and resettlement.<sup>300</sup> In the wake of the inability to recoup statism through these solutions, containment in camps and restrictions from entry became the primary mechanisms for regimenting and controlling this refugee crisis.<sup>301</sup>

These camps were exceptional spaces where humanitarianism, not legal protection, was the sole arbiter of survival.<sup>302</sup> UNHCR’s entry into and management of the camps exemplified how the agency has been increasingly compelled to operate within the gap between its ever-expanding scope of responsibilities<sup>303</sup> and states’ restrictive policies towards refugees on their territories. In order to reconcile this untenable position, UNHCR, UNRWA, and humanitarian NGOs responded to the crisis not only by creating some camps, but also by co-opting others to promote and strengthen the refugees’ protection. They built upon the refugees’ techniques of self-emplacement and self-governance with institutional and legal regimentation. This regimentation subsumed to a certain extent the refugees’ self-governance. At the same time, it challenged the restrictions imposed by states. They also mobilised the camps in their appeals to states for solutions via entry or re-entry of these refugees into the state system, primarily through resettlement to third countries.

UNHCR therefore harnessed the political subjectivities that emerged in the refugees’ use of self-emplacement and appeals to the international community in the project of both humanitarian governance and protection through re-statisation. Statecraft in this sense was redeemed, yet the refugees, rather than becoming estranged in the process,<sup>304</sup> also appealed to the international community by

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<sup>300</sup> See Soguk, N. (*supra* note 231), pp. 223, 232.

<sup>301</sup> See Helton, A. (2002). *The price of indifference*. Oxford: Oxford University Press pp. 2, 10; Soguk, N., *ibid.*, pp. 177, 222.

<sup>302</sup> Kennedy, D. (2004). *The dark sides of virtue: Reassessing international humanitarianism*. Oxfordshire: Princeton University Press.

<sup>303</sup> UN General Assembly (1994). Resolution 48/116; (1961) Resolution 1671 (XVI); 1672 (XVI); and Resolution 1673 (XVI); UN General Assembly (1971). Resolution 2816 (XXVI); and Resolution 2863 (XXVI) – need full cite; (1994). *Recommendations of the OAU/UNHCR commemorative symposium on refugees and forced population displacements in Africa*. (Executive Committee Conclusion No. 76). Executive Committee of the UNHCR Programme; UNHCR (1994). *Internally displaced persons*. (Executive Committee Conclusion No. 75). Executive Committee of the UNHCR Programme.

<sup>304</sup> See Soguk, N. (*supra* note 231), p. 257.

highlighting their abjection and vulnerability in the camps, thereby intersecting with UNHCR’s strategies and participating in their own re-statisation.

The appropriation and regimentation of the *ad hoc* border camps in Iraq by humanitarian organisations and UNHCR also demonstrated how humanitarian and international organisations operate as a transnational regime of governance – a form of “migrant sovereignty” that acts in parallel to territorialised state governments, migrating to sites of crisis and disaster.<sup>305</sup> The paradox of humanitarianism is that it both shores up state sovereignty and erodes it at the same time, often attempting to legitimise its role through the temporality of emergency.<sup>306</sup> Therefore, rather than the purported neutrality of humanitarian aid organisations, humanitarian government spearheaded by UNHCR has begun to merge with politics as it is mobilised in camps for displaced persons.<sup>307</sup>

Even assuming such new assemblages of “migrant sovereignty” beyond and within the state were not fully realised, the governance structures enacted by UNHCR in its management and mobilisation of solutions to this refugee crisis nonetheless presented opportunities to reshape the exercise of state sovereignty in various sites, infusing them with more flexibility and inclusivity in their governance of refugees. While recognising the continued prominence of the territorial state, these practices also countered drives and retreats to ideas of territorial nations.<sup>308</sup>

For example, one may consider UNHCR’s response as the border performed a kind of violence in the daily lives of the Palestinian refugees, re-producing their psychological and physical trauma,<sup>309</sup> as the state of exception that had been the norm for more than sixty years, became an ever more permanent spatial arrangement. Such permanence, known in UNHCR parlance as “protractedness”,<sup>310</sup>

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<sup>305</sup> Pandolfi, M. (2003). Governance and the humanitarian apparatus. *Indiana Journal of Global Legal Studies*, 10, 369-381, pp. 369-370.

<sup>306</sup> Ibid., pp. 372-373.

<sup>307</sup> Fassin, D. (2007). Humanitarianism as a politics of life. *Public Culture* 19(3), 499-520, p. 508.

<sup>308</sup> Connolly, W. (2007). The complexities of sovereignty. In M. Calarco & S. DeCaroli (Eds.) (*supra* note 276) (pp. 23-42), p. 42.

<sup>309</sup> Bornstein, A. (*supra* note 260), pp. 7-8.

<sup>310</sup> See also Zetter, R. (2011). Unlocking the protracted displacement of refugees and internally displaced persons: An overview. *Refugee Survey Quarterly* 30 (4), 1-13, p. 1, noting that protractedness is increasingly becoming the norm, rather than the exception.

was countered in the agency's attempts to premise Palestinians' human rights over the interests of states in the region, particularly those states and the PNA committed to the right of return. Maintaining that resettlement would not undermine the right of return, the agency not only participated in re-statification, but also disrupted the myth of social closure that this typically implies, as throughout the process, Palestinians retained an excess or a remainder – that Palestinian national identity, reframing the temporality of their solution as at once both durable and temporary. The international community resettled the vast majority, providing a statist solution to their refugee-ness, while recognising that they retained their national identities and right of return to Palestine. UNHCR was also able to promote resettlement as an expanded and strategic tool of protection across states. In encouraging resettlement states to "burden-share" by accepting almost all of the Palestinians in the camps, and Iraq to register those remaining in the cities, UNHCR may have contributed to opening up greater protection space for Palestinians in Iraq.

In the case of the PMOI, when confronted with the "problem" of their exclusion from all legal orders, UNHCR used the international legal definition of the refugee itself to argue for the inclusion of those who had renounced the use of violence in order to be able to submit them for resettlement to third countries. This strategy, while largely unsuccessful to date, nonetheless indicated that in the absence of viable alternatives for ensuring the protection of the PMOI, resettlement to third states was the only possible durable solution. This reinforced the rationality that the proper political subject could only be the citizen.<sup>311</sup> However, UNHCR's attempt to assert the law in this now purely political space perhaps also challenged the sovereign decisionism exercised by the Iraqi authorities, making way for international law to counter state decisions taken in times of emergency.

The refugees' lives in the borderlands therefore demonstrated how the state is contingent, the border a social construct, and the distinction between the norm and

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<sup>311</sup> Hyndman, J. (2000). *Managing displacement: Refugees and the politics of humanitarianism*. Minnesota: University of Minnesota Press.

exception ever-shifting.<sup>312</sup> Space shapes law in the borderlands, and it can be mobilised to make way for international principles of refugee protection to enter a realm traditionally accorded to states. But given the persistence of the logic of sovereignty and the ideology of statism, strategies for resistance, contestation, and protection were primarily in the form of calls for resettlement and citizenship which were grounded in the state system. This demonstrated how sovereignty continues to circumscribe the capacity of subjects to contest the terms of their existence, limiting possibilities for resistance and shaping oppositional politics into quests for re/signification or re/territorialisation within the rationality of state power.<sup>313</sup> As such, it may indeed be romanticising possibilities for emancipation to envision or treat resistance in the border zones as a form of new political formation. However, understanding sovereignty as a process that emerges from ongoing negotiation and contestation at state borders, in forms of both complicity and resistance, opens up the possibility for understanding how political agency and anomic space can work together to produce, reinforce, and stretch the limits of the law and the reach of state power in interstitial zones.

#### IV. Conclusion

The practices of legal exceptionalism towards the refugees in Iraq's border zones were also spatial practices, instrumentalising the border in the project of asserting sovereign state authority, producing spaces of exception and isolation, shaping processes of citizenship and territorialisation, and engendering resistance and subversion. In the translation of the state of the exception to a lived space of exception in Iraq, something happened to the operations of sovereignty within the international system, as state power encountered contestations of its legitimacy and

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<sup>312</sup> See Rajaram, P.K. & Grundy-Warr, C. (*supra* note 5), p. xxiv.

<sup>313</sup> McRobbie, A. (2006). Vulnerability, violence and (cosmopolitan) ethics: Butler's *Precarious life*. *The British Journal of Sociology*, 57 (1), 69-86, p. 76.

reach. In the liminal spaces that characterised the borders, the refugees were relegated to no state at all, their very presence contesting the myth of social closure that undergirds the rationality of statism. As the refugees mobilised their vulnerabilities and encampments to call for their entry as full citizens into the state system, and humanitarian organisations assumed greater powers of governance in the border zones, sovereignty was revealed as both contingent and processual.

Therefore, in unanticipated ways, the refugees' multiple emplacements and assertions of new political subjectivities, while still premising the citizen as the proper legal subject, also un-worked the violence of the sovereign decisions that produced them as refugees in these abject spaces at the margins of the state. And UNHCR's use of the border regions to legally circumscribe and recapture outlaw bodies, to justify regimentation, and to then re-instate refugees within the protection of third states was productive of a particular relationship of power. These strategies functioned according to the logic of the state system, positioning and making legible bodies within the ambit and reach of the state. But they also challenged social and geographical closure by forcing the hand of the state, de-localising definitions of sovereignty and citizenship, and negotiating a wider definition of identity and belonging.

## Chapter 5

### Sovereignty and the ideology of vulnerability in the Iraqi refugee resettlement programme

#### I. Introduction

Resettlement has always been a part of the UNHCR's mandate,<sup>1</sup> requiring that the agency seek durable solutions for refugees recognised under the 1951 Convention Relating to the Status of Refugees.<sup>2</sup> These solutions are aimed at re-establishing refugees within the ambit of the state system through repatriation,<sup>3</sup> local integration, or resettlement.<sup>4</sup> UNHCR has defined resettlement as:

[...] the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status. The status provided ensures protection against

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<sup>1</sup> Statute of the Office of the United Nations High Commissioner for Refugees (3 December 1949) UN Doc. A/RES/428, Chapter 2, Section 8.

<sup>2</sup> A refugee is any person who is outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion. Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ("1951 Convention"), Article 1A, paragraph 1, read together with Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

<sup>3</sup> UN General Assembly (1986). 41<sup>st</sup> Session. Special Political Committee. *International co-operation to avert new flows of refugees*. 9 October (A/SPC/41/L.5).

<sup>4</sup> UNHCR (2011). *Resettlement handbook*. Geneva: Department of International Protection, Chapter 1, Section 1.3.

*refoulement* and provides a resettled refugee and his/her family or dependents with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country.<sup>5</sup>

The absence of viable possibilities for Iraqi refugees to integrate in their host states in the Middle East or to return safely to Iraq led UNHCR to appeal to resettlement states to increase their resettlement quotas in the spirit of “burden-sharing” and widening “protection space” for Iraqi refugees in the Middle East.<sup>6</sup> Donor states responded positively to UNHCR’s appeals, funding the resettlement of more than 100,000 Iraqi refugees from the Middle East to Europe, the Americas, and Australia by 2010.<sup>7</sup>

However, the number of Iraqis resettled constituted less than five percent of the total Iraqi refugee population, and around one-fourth of the total number of Iraqis registered with UNHCR,<sup>8</sup> and their resettlement required a significant amount of funding compared to the resources allocated towards the protection of the remaining Iraqi refugees in the region.<sup>9</sup> Faced with such limited quotas in the face of great need, for both protection and pragmatic reasons, UNHCR and resettlement

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<sup>5</sup> Ibid., Preface.

<sup>6</sup> UNHCR (2007, March 12). *Resettlement of Iraqi refugees*, pp. 1-2.

<sup>7</sup> UNHCR (2010, June 18). *UN chief announces 100,000 landmark in resettlement of Iraqi refugees*.

<sup>8</sup> By 2009, there were an estimated 450,000-500,000 Iraqi refugees in Jordan (55,000 registered with UNHCR), 50,000 in Lebanon (10,200 registered with UNHCR), 1-1.2 million in Syria (230,000 registered with UNHCR), up to 40,000 in Egypt (11,000 registered with UNHCR), 10,000 in Turkey (6,000 registered with UNHCR), 150,000 in the GCC countries (2,100 with UNHCR), and 11,000 in Yemen (3,000 registered with UNHCR). Chatelard, G. & Misconi, H. (2009, November). “Regional perspectives on Iraqi displacement: A research report and discussion paper”. In *Resolving Iraqi displacement: humanitarian and development perspectives* (pp. 9-26). Brookings-Bern Project on Internal Displacement, p. 14. See also UNHCR (*supra* note 6), p. 9. The numbers of Iraqi refugees in the region are estimated, and significant discrepancies exist between these estimates. Chatelard, G. & Misconi, H., *ibid.*, p. 13, Table 1; ICG (2008, July 10). *Failed responsibility: Iraqi refugees in Syria, Jordan and Lebanon*, Crisis Group Middle East. Report No. 77, pp. 3-4; European Union: European Parliament (2007, July 12). *European Parliament resolution on the humanitarian situation of Iraqi refugees*. (P6\_TA(2007)0056), para. G. In 2008, the Syrian government claimed that 1.6 million Iraqis were in Syria, while UNHCR estimated that there were 1.2-1.5 million, and the Iraqi Embassy in Syrian estimated that the numbers ranged from 800,000 to 1 million. See UNHCR (2008, April/May) *Iraq situation update*. According to a survey commissioned by the Government of Jordan, between 450,000 and 500,000 Iraqi refugees were living in Jordan in 2007. FAFO (2007, November) *Iraqis in Jordan: Their number and characteristics*.

<sup>9</sup> See UNHCR (2007). *Projected global resettlement needs 2008*. Annual Tripartite Consultations on Resettlement, Geneva.

states systematically prioritised for resettlement Iraqi refugees who were deemed to be the most legally and physically vulnerable and deprioritised those considered to be potential security threats, inadmissible, or potentially excludable. Between these two poles existed the vast majority of Iraqi refugees with no durable solutions on the horizon. They remained within their host states in the Middle East where they were able to secure some access to basic social, health, and education services, but to a large extent were trapped in tenuous legal positions, either overstaying their limited visas or existing on the verge of illegality, and having few rights to employment.

This chapter considers the implications of this resettlement prioritisation process for the operations of sovereignty in refugee protection. It argues that UNHCR's Iraqi resettlement programme was a set of legal and administrative practices that generated a fourth contested space of sovereignty – where UNHCR identification of refugees for resettlement referral and donor state decisions on resettlement based on ideologies of vulnerability and threat functioned as sovereign decisions on the lives of refugees.

The first section of this chapter maps the legal practices and rationalities that undergirded the resettlement policies, functioned as sovereign decisions, and produced the spaces in which Iraqi refugees were re/emplaced. These practices included classifications based on the ideology of vulnerability in the selection of refugees for resettlement, and also legal measures enacted by resettlement states to deny particular refugees admission to their territories.

The second section of this chapter is an exegesis, theorising how such practices were also spatial practices of sovereignty as they were biopolitically enacted on refugee bodies through classifications of vulnerability, suffering, rights, and threat. It argues that such classifications were embodied legal practices – an exercise of sovereign decisionism by states in reproducing refugee bodies and in turn constituting the ideal citizen. Vulnerability functioned as an ideology that premised the bodily vulnerability and suffering of a select few over the rights implicit in the recognition of the many as refugees under international law, rendering some



individuals hypervisible and others invisible. And the label of vulnerability itself was fractured as states began assessing refugees' levels of vulnerability in terms of whether they could be accommodated within states' neoliberal paradigms of self-sufficiency.

However, at the same time, such practices also contested states' sovereign power, as tensions emerged between UNHCR and resettlement states' use of resettlement as a form of humanitarian aid and its promotion as a means of human rights protection. Also, refugees mobilised their own bodies in appropriating ideologies of vulnerability towards their protection interests and continuously evaded and contested the constraints imposed by such designations. These practices and tensions, while reproducing the logic of sovereignty as the normative mode of politics, also may have created possibilities for it to be contested and exposed in the promotion of strengthened refugee protection.

## **II. Mapping legal practices and rationalities in the Iraqi refugee resettlement programme**

### **A. Introduction**

Until 2007, resettlement states demonstrated little interest in resettling Iraqi refugees, and few were identified as needing resettlement.<sup>10</sup> The fact that the number of refugees fleeing Iraq was relatively low prior to the Samarra bombing in 2006 may have accounted for this to some extent. However, Weiss Fegan noted a number of additional reasons: It was a reflection of both the unpopularity of the US decision to invade Iraq and the view that the US should assume leadership in responding to the crisis that it instigated. In addition, many Iraqis, having been members of the former regime, were perceived to be perpetrators as much as

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<sup>10</sup> See UNHCR (2005, June). *Projected global resettlement needs 2006*. Annual Tripartite Consultations on Resettlement, 14-15 June 2005, Geneva, p. 138, estimating the total number of Iraqis in need of resettlement in 2006 to be 3,429.

victims of human rights violations. Also, having never conducted large-scale resettlement programmes in the Middle East before, resettlement states and UNHCR faced the prospect of having to build such a programme.<sup>11</sup> The US was further concerned that acknowledging the enormity of the crisis would send the message that the invasion was “a losing cause”.<sup>12</sup>

However, given the lack of other durable solutions of repatriation to Iraq and long-term local integration in host states within the Middle East,<sup>13</sup> by 2007 at the height of the displacement, UNHCR, in cooperation with host countries in the Middle East and donor states, was finally able to mobilise resources for Iraqi refugee protection.<sup>14</sup> During this period, alongside registration and humanitarian assistance, resettlement emerged as one of UNHCR’s identified core activities,<sup>15</sup> and the agency’s internal procedures were modified to expedite resettlement processing in anticipation of large numbers of referrals.<sup>16</sup>

Resettlement was therefore a critical durable solution – one which the UNHCR acknowledged became a significant driver of the Iraqi refugee operation and which was heavily resourced.<sup>17</sup> UNHCR appealed to donor states to increase resettlement opportunities for Iraqi refugees,<sup>18</sup> and to introduce more flexible criteria as a tool of

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<sup>11</sup> Weiss Fagen, P. (2007). *Iraqi refugees: Seeking stability in Syria and Jordan*. Georgetown University, p. 24.

<sup>12</sup> Statement by former US Assistant Secretary of State Arthur E. Dewey, quoted in Kranish M. (2006, December 11). Iraqi exodus could test Bush policy: Total expected to exceed quota for refugees. *Boston Globe*, A1.

<sup>13</sup> See UNHCR (*supra* note 6), p. 3.

<sup>14</sup> UNHCR (2007, January 8). *Supplementary appeal, Iraq situation response: Protection and assistance to Iraqi refugees in neighbouring states and to IDPs and non-Iraqi refugees in Iraq*. Protection under UNHCR’s mandate requires preventing *refoulement* (expulsion to a country where a refugee will face persecution, other ill-treatment, or torture); ensuring access to an asylum determination procedures, release from detention, and issuance travel and identity documents; facilitating voluntary repatriation, family reunification, and naturalisation; and promoting access to educational institutions, the rights to work, and access to medical treatment. See Statute of the Office of the United Nations High Commissioner for Refugees (*supra* note 1); Goodwin-Gill, G. & McAdam, J. (2007). *The refugee in international law*. New York: Oxford University Press, pp. 201, 447; Kelley, N. (Ed.). (2006). *Protection gaps: Framework for analysis, enhancing protection of refugees*. (Strengthening Protection Capacity Project 2006). European Commission and UNHCR; UNHCR (2009, July) *Surviving in the city: A review of UNHCR’s operation for Iraqi refugees in urban areas of Jordan, Lebanon and Syria* (PDES/2009/03), p. 3.

<sup>15</sup> UNHCR (*supra* note 6) p. 2. See also UNHCR (1991, July 9). *Resettlement as an instrument of protection: Traditional problems in achieving this durable solution and new directions in the 1990s*. (UN doc. EC/SCP/65); UNHCR (2002, April 25). *Strengthening and expanding resettlement today: Challenges and opportunities*. (Global Consultations on International Protection, 4th Meeting, UN doc. EC/GC/02/7).

<sup>16</sup> UNHCR (*supra* note 6), p. 7.

<sup>17</sup> UNHCR (*supra* note 9).

<sup>18</sup> UNHCR (*supra* note 6), p. 3.

burden-sharing<sup>19</sup> and protection for the most vulnerable. UNHCR also called for states to adopt an inclusive approach to requests from Iraqis for family reunification, to consider other humanitarian visas, and to “look favourably at UNHCR requests” for resettlement. Possibly appealing to state interests in managing migration, the agency further argued that resettlement would discourage secondary migration “within and outside the sub-region” to other countries;<sup>20</sup> it would provide legal routes of travel for those accepted for resettlement.

The Iraqi resettlement programme was further envisioned as an opportunity to promote the “strategic use of resettlement”.<sup>21</sup> As a demonstration of international solidarity and burden-sharing,<sup>22</sup> resettlement could alleviate burdens on host states, thus enabling them to increase the protections afforded to the refugees who were not resettled, but remained on their territories.<sup>23</sup> Resettlement was included in the larger package of economic and social incentives offered to host states to increase their capacity to host Iraqi refugees.

In 2007, UNHCR estimated that of the nearly 2 million Iraqi refugees, there were 95,458 who were very vulnerable and in need of resettlement.<sup>24</sup> Most of the refugees were resettled to the US, which had by 2007 begun to admit Iraqis in far

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<sup>19</sup> The importance of burden-sharing by the international community for refugees whom states faced difficulties in granting asylum was affirmed in UN General Assembly (1967, December 14). Resolution 2312 (XXII). *Declaration on Territorial Asylum*, Article 2.

<sup>20</sup> UNHCR (*supra* note 6), p. 4.

<sup>21</sup> *ibid*, p. 2. This discourse was reflected in US government statements regarding the foreign policy implications of maintaining a refugee resettlement programme. See Schwartz, E.P., US Assistant Secretary of State for Population, Refugees, and Migration (2010, March 16). *Advancing protection in the 21<sup>st</sup> century: Reflections on the 30<sup>th</sup> anniversary of the US Refugees Act*. Speech delivered to Georgetown University Law Center, Washington, D.C.

<sup>22</sup> Loescher, G. (2003). *The UNHCR and world politics: A perilous path*. Oxford: Oxford University Press, p. 6.

<sup>23</sup> UNHCR Excom (2004, October 8). Conclusion 100 LV. *Conclusion on international cooperation and burden and responsibility sharing in mass influx situations*, preamble and para. (m)(iii). Expanded protection space was indicated by “continuous access to the territory, respect for non-*refoulement*, access to refugees in detention, access to basic services/rights such as primary education, health care, adequate housing, access to informal and gradually the formal labor market”. UNHCR (*supra* note 6), p. 3. However, the heavy emphasis on resettlement and the significant funding allocated to the programme, also led to some concerns voiced by UNHCR staff members that the amount of resources allocated to resettlement activities was disproportionate to the numbers of refugees who directly benefited. They were concerned that while resettlement may have had some strategic effect in increasing existing protection space, it may also have diverted focus away from the economic and social assistance required to support the vast majority of the Iraqi refugee population remaining in host states in the Middle East. UNHCR (*supra* note 14), p. 51.

<sup>24</sup> UNHCR (*supra* note 9), p. 28.

greater numbers than previously,<sup>25</sup> with the remaining numbers resettled to sixteen other countries.<sup>26</sup>

## **B. Vulnerable bodies: Prioritising refugees through resettlement criteria**

While resettlement often provides a sustainable form of protection to refugees, the level of need almost always outnumbers the availability of resettlement places offered each year, and exceeds the processing capacity of UNHCR.<sup>27</sup> Less than one percent of the world's refugees benefit from the limited resettlement places made available by Europe, the Americas, and Australia.<sup>28</sup> Therefore, it is instructive to consider how the 100,000 Iraqis referred for resettlement were selected from amongst the 2 million in the Middle East, and to ask why less than five percent of this population was identified as having the greatest need for resettlement, despite that the vast majority had no other prospects for solutions such as local integration in their host states or repatriation to Iraq.

Due to limited available resettlement places and protection considerations, UNHCR and resettlement states systematically identified refugees most in need of resettlement on the basis of their relative legal or physical vulnerability.<sup>29</sup> However, as vulnerability is inherent to the refugee definition and characterises the

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<sup>25</sup> In 2006, the US admitted only 43 Iraqi refugees for resettlement. Human Rights Watch (HRW) (2006, November 28). *The Silent Treatment: Fleeing Iraq, Surviving in Jordan*. Vol. 18, No. 10(E), p. 99. Despite the increases in resettlement of Iraqi refugees facilitated by the US State Department, Iraqi asylum-seekers continued to face serious obstacles to recognition of their refugee status due to restrictive interpretations of the doctrine of changed circumstances and the doctrine of individualised persecution and limitations on Iraqi admissions post September 11, 2001. See Travis, H. (2009). After regime change: United States law and policy regarding Iraqi refugees, 2003-2008. *The Wayne Law Review* 55, 1007-1059.

<sup>26</sup> UNHCR (*supra* note 14), p. 49.

<sup>27</sup> See UNHCR (*supra* note 9); UNHCR (2008, June). *Refugee resettlement: Performance outcomes 2007 and global projections 2009*. 14<sup>th</sup> Annual Tripartite Consultations on Resettlement, 30 June-2 July 2008, Geneva, p. 39, noting that the projected needs for resettlement from the Middle East and North Africa region was 104,995 persons, while UNHCR's processing capacity was limited to 27,576 persons.

<sup>28</sup> At the end of 2010, there were 10.55 million refugees receiving assistance from UNHCR, and 98,800 refugees were resettled, comprising less than one percent of the total refugee population. UNHCR (2011). *UNHCR global trends 2010*.

<sup>29</sup> UNHCR (*supra* note 4), p. 37; UNHCR (*supra* note 9), p. 17; Brick, K., et al (2010). *Refugee resettlement in the United States: An examination of challenges and proposed solutions*. New York: Columbia University School of International and Public Affairs, p. 7.

exclusionary treatment of refugees more generally, the concept of vulnerability had to be parsed into gradations of need, so that only those refugees who exhibited the greatest degrees of vulnerability would be prioritised for resettlement. As Kagan argued, the need for resettlement was narrowed artificially to more or less conform to the limited available places for resettlement.<sup>30</sup>

Vulnerability has been defined in multiple ways, but at the core of each of these definitions lies a recognition that it is produced as a consequence of unequal power relations:<sup>31</sup> UNHCR equated vulnerability with being “at risk”, and connected it to unequal power relations based upon personal status such as age or gender.<sup>32</sup> UNHCR incorporated this concept of vulnerability into an administrative classification system by developing a set of resettlement criteria modelled on various forms of vulnerability, many of which were also reflected in receiving countries’ resettlement policies and priorities. These criteria included individuals who were most at risk of human rights violations, social exclusion, and trauma on account of their marginalised social status in their host states. In 2007, when Iraqi refugee resettlement was initiated on a large scale, UNHCR’s traditional resettlement criteria included women and girls at risk of protection problems on account of their gender,<sup>33</sup> children and adolescents unaccompanied by or separated from their legal guardians,<sup>34</sup> survivors of violence or torture,<sup>35</sup> persons with life-threatening medical

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<sup>30</sup> Kagan, M. (2011, September). Shared responsibility in a new Egypt: A strategy for refugee protection (Center for Migration and Refugee Studies, School of Global Affairs and Public Policy, The American University in Cairo), p. 26.

<sup>31</sup> Bustamante, J. (2002). Immigrants’ vulnerability as subjects of human rights. *International Migration Review*, 36 (2), 333-354, pp. 340-341, 343, 352; Becker, H.S. (1968). *Outsiders: Studies in the sociology of deviance*. New York: The Free Press of Glencoe; Arán, M. & Peixoto Júnior, C. (2007). Vulnerability and bare life: Bioethics and biopolitics today. *Rev Saúde Pública*, 41 (5), 849-857, p. 850, referencing Macklin, R. (2003). Bioética, vulnerabilidade e proteção. In Garrafa, V. & Pessini, L., (Eds.). *Bioética: poder e injustice* (pp. 59-70). São Paulo: Loyola, p. 61.

<sup>32</sup> See UNHCR (*supra* note 4), p. 38, 174; UNHCR (2010, June). *The heightened risk identification tool*, Second Edition.

<sup>33</sup> UNHCR (2004, November) *Resettlement handbook*. Geneva: Department of International Protection, section 4.5. See UNHCR (*supra* note 4), section 6.5; UNHCR Executive Committee of the High Commissioner’s Programme, Standing Committee (2006, October 6). Conclusion 105 LVII. *Conclusion on women and girls at risk*; UNHCR (2008, January). *UNHCR handbook for the protection of women and girls*; UNHCR (2005, October). *Ensuring gender sensitivity in the context of refugee status determination and resettlement*.

<sup>34</sup> UNHCR (2004, November) (*supra* note 33), section 4.7. See UNHCR (*supra* note 4), section 6.7; UNHCR Executive Committee of the High Commissioner’s Programme, Standing Committee (2007, October 5). *Conclusion on children at risk*, No. 107 (LVIII); UNHCR (2010, May 31). *International protection of children of concern*. (UN Doc. EC/61/ SC/CRP.13).

needs that could be successfully treated upon resettlement,<sup>36</sup> elderly persons,<sup>37</sup> persons who require reunification with immediate family members living in a resettlement country,<sup>38</sup> persons with legal or physical protection needs,<sup>39</sup> and persons who lack prospects for local integration in their current host societies.<sup>40</sup>

These criteria served as the key markers for determining which refugees would be prioritised for submission to resettlement states.<sup>41</sup> As such, these criteria also functioned as sovereign decisions, as those prioritised had the possibility for achieving re-entry to the state system and eventual citizenship, while most of those not prioritised were in practice effectively left in often legally liminal situations in their host states.

These criteria were applied somewhat differently in the Iraqi refugee context, however. UNHCR's approach to Iraqi resettlement, while still operating according to the rationale of protecting the most vulnerable persons, particularly those who experienced gross violations of human rights in Iraq,<sup>42</sup> was also part of a trend in new ways of thinking about how best to protect the largest numbers of refugees hosted in restrictive environments. First, in cooperation primarily with the US,<sup>43</sup>

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<sup>35</sup> UNHCR (2004, November) (*supra* note 33), section 4.3. See UNHCR (*supra* note 4), section 6.3; UN General Assembly (1984, December 10). *Convention against torture and other cruel, inhuman or degrading treatment or punishment*. United Nations, Treaty Series, vol. 1465, p. 85, Art. 1.

<sup>36</sup> UNHCR (2004, November) (*supra* note 33), section 4.4. See UNHCR (*supra* note 4), section 6.4; UNHCR (2009, December). *UNHCR's principles and guidance for referral health care for refugees and other persons of concern*.

<sup>37</sup> UNHCR (2004, November) (*supra* note 33), section 4.8. See UNHCR Executive Committee of the High Commissioner's Programme, Standing Committee (2000, February 7). *Older refugees: Looking beyond the international year of older persons*, 17th mtg. (UN Doc. EC/50/SC/CRP.8).

<sup>38</sup> UNHCR (2004, November) (*supra* note 33), section 4.6. See UNHCR (*supra* note 4), section 6.6; UNHCR (2003, June). *Summary conclusions: Family unity*. Adopted at Global Consultation on International Protection, Geneva Expert Roundtable, Nov. 2001. In E. Feller, V. Türk, and F. Nicholson (Eds.) (2003). *Refugee protection in international law: UNHCR's global consultations on international protection*. Cambridge: Cambridge University Press, pp. 604-608.

<sup>39</sup> UNHCR (2004, November) (*supra* note 33), section 4.2. See UNHCR (*supra* note 4), section 6.2; UNHCR (2006, December 15). *Self-study module 5: Human rights and refugee protection*, Vol. 1.

<sup>40</sup> UNHCR (2004, November) (*supra* note 33), section 4.9. See, UNHCR (*supra* note 4), section 6.8; UNHCR Executive Committee of the High Commissioner's Programme, Standing Committee (2004, June 10). *Protracted refugee situations*, 30<sup>th</sup> meeting, (UN Doc. EC/54/SC/CRP.14).

<sup>41</sup> Although the criteria "lack of local integration prospects" was used primarily for groups of refugees in protracted refugee situations, given that the vast majority of the world's refugees do not have long-term prospects for integration into their host communities.

<sup>42</sup> UNHCR (*supra* note 6), pp. 2-3.

<sup>43</sup> The US had also developed a separate "special non-immigrant visa" (US National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1243, 122 Stat. 390, 391, Section 5) and a Direct Access programme in collaboration with the International Organization for Migration for resettling Iraqis who assisted or worked with the US in Iraq; US Department of State (2011). *Iraqi refugee resettlement*. The US also exceptionally allowed for

which by then claimed that resettlement of Iraqis was a “moral” obligation,<sup>44</sup> UNHCR crafted an Iraqi resettlement policy in 2007 that identified eleven profiles of Iraqis having “specific vulnerabilities”<sup>45</sup> who would be prioritised for resettlement.<sup>46</sup> They included, for example, persons who were targeted on account of their religious or ethnic background in Iraq and persons who had cooperated with the Multinational Forces (MNF) in Iraq.<sup>47</sup> UNHCR attempted to match these profiles with its traditional resettlement criteria, explaining that persons who were associated with the MNF may have specific legal and physical protection needs, or persons who are religious minorities may be women-at-risk, for example<sup>48</sup> (see Figure 1 below):

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some Iraqi refugee claims to be processed in-country, meaning while Iraqis were still within the borders of Iraq. United States Department of State (2010). United States Department of Homeland Security, and United States Department of Health and Human Services, *Proposed refugee admissions for fiscal year 2011: Report to the Congress* Submitted on behalf of the President of the United States to the Committees on Judiciary, United States Senate and United States House of Representatives, at <<http://www.state.gov/documents/organization/148671.pdf>>, p. 6.

<sup>44</sup> Associated Press (2007, September 19). More Iraqi refugees to enter U.S. *USA Today*. See also, Younes, K. (2007, January 16). *Iraqi refugees: Resettle the most vulnerable*. Refugees International.

<sup>45</sup> See UNHCR (*supra* note 9), p. 17.

<sup>46</sup> These categories incorporated, but also exceeded the scope of the priorities for admission identified in the US “Refugee Crisis in Iraq Act of 2007”. See National Defense Authorization Act for Fiscal Year 2008 (*supra* note 43), Section 4. The Act identified the following priority profiles for admission: Iraqis (and their immediate family members) who were employed in Iraq by the U.S. government, a U.S. media company, NGO, or any other entity that received official U.S. funding; Iraqis persecuted religious or minority communities with “close family members” in the United States.

<sup>47</sup> While these new profiles identified specific religious and political profiles, UNHCR emphasised that resettlement selection would not be conducted in a discriminatory manner. UNHCR (*supra* note 6), p. 4.

<sup>48</sup> UNHCR (*supra* note 6); UNHCR Executive Committee of the High Commissioner’s Programme, Standing Committee (*supra* note 33).

Priority Profiles	UNHCR Resettlement Handbook – Applicable Resettlement Criteria
1. Persons who have been the victims of severe trauma (including SGBV), detention, abduction or torture by State or non-State entities in Country of Origin.	Survivors of violence and torture
2. Members of minority groups and/or individuals which are/ have been targeted in Country of Origin owing to their religious/ethnic background.	Legal and physical protection needs / Women-at-risk
3. Women-at-Risk in Country of Asylum	Women-at-risk (This includes women at risk of “honor killing”)
4. Unaccompanied or separated children & children as principal applicants	Children and adolescent
5. Dependents of refugees living in resettlement countries	Family reunification
6. Older Persons-at-Risk	Older Refugees
7. Medical cases and refugees with disabilities with no effective treatment available in COA	Medical needs
8. High profile cases and/or their family members	Legal and physical Protection needs
9. Iraqis who fled as a result of their association in COO with the MNF10[7], CPA11 UN, foreign countries, international and foreign institutions or companies and members of the press	Legal and physical protection needs
10. Stateless persons from Iraq	Legal and physical protection needs / WAR/ SVT / medical needs / CH
11. Iraqis at immediate risk of <i>refoulement</i>	Legal and physical protection needs (This may include refugees in detention, but not necessarily all of them)

**Figure 1.** Iraqi refugee resettlement profiles<sup>49</sup>

<sup>49</sup> UNHCR (*supra* note 6), pp. 4-5.



However, while largely successful in securing the resettlement of 100,000 Iraqi refugees, these expanded criteria did not always produce the intended results. For example, as Iraqi refugees became aware of the resettlement criteria that were being used to define them as vulnerable and prioritise certain individuals amongst them for resettlement, UNHCR and resettlement states grew concerned that there was an increase in the number of Iraqi women presenting themselves as “women-at-risk” because they had lost their husbands. Similarly, more children presented themselves as “unaccompanied minors” because they had lost their guardians. And more persons claimed to have life-threatening medical needs or family links in resettlement countries. There were suspicions raised that some of these women might not have lost their husbands, particularly as some husbands sometimes reappeared following resettlement of their wives; that some of the minors were not actually legal minors or did actually have family members accompanying them; that some persons were not as ill as they claimed to be; and that some family relationships with relatives in resettlement countries may not have been genuine.<sup>50</sup> The very juridical and administrative framework of vulnerability used to identify the most vulnerable refugees was in this sense appropriated by refugees who used these criteria to draw attention to their protection needs in the only language available.

Also, resettlement countries increasingly focused upon the “integration potential” of refugees in their decisions on resettlement, which undermined the policy of resettling the most vulnerable. Many advocacy groups grew concerned that refugees who were less vulnerable, more skilled, younger, and educated, and therefore better equipped to become self-sufficient, were quietly being prioritised by some resettlement countries at the expense of those who were most in need.<sup>51</sup>

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<sup>50</sup> These issues were the subject of frequent internal meetings within UNHCR during the height of the Iraqi resettlement operation, as procedures were put in place within different offices in the region in an attempt to confirm the credibility of these representations. However, misrepresentations by refugees in an attempt to fit within resettlement prioritisation criteria have long been an issue in resettlement programming. *See for example*, Martin, D. (2005). Migration and refuge in the twenty-first century: A symposium in memory of Arthur Helton: A new era for U.S. refugee resettlement. *Columbia Human Rights Law Review*, 36, 299.

<sup>51</sup> Banki, S. & Lang, H. (2008). Difficult to remain: The impact of mass resettlement. *Forced Migration Review*, 30, 42-44, p. 43; Coelho, P. (2007, June 28). ECRE presentation on resettlement and integration potential measures. UNHCR Annual Tripartite Consultations on Resettlement, Geneva, pp. 1-2; UNHCR (2008, October). *Remarks by*

The focus on integration potential was presented as part of a larger project of using resettlement to promote self-reliance or self-sufficiency, but it sent a mixed message to refugees about how much vulnerability was acceptable to the state.

Within the US context, for example, there were tensions between the core focus and goals of various government programmes. The Bureau of Population, Refugees, and Migration focused upon resettling refugees who were the most vulnerable,<sup>52</sup> while the Office of Refugee Resettlement, through its Matching Grant programme<sup>53</sup> (which was not unlike various welfare-to-work programmes in the US in the 1990s),<sup>54</sup> sought to “promote self-sufficiency and integration”.<sup>55</sup>

Also, the goal of using resettlement of vulnerable refugees to help them attain self-sufficiency within resettlement states was sometimes undermined by economic and social conditions within these states themselves. For example, some Iraqis were reluctant to resettle to the US where they perceived that the benefits and support available for their integration would be insufficient to ensure their survival in a sustainable way. Also, the vulnerability classifications that facilitated their selection for resettlement often were not addressed sufficiently upon their arrival in the US. A study conducted by Georgetown University noted a number of gaps in effectively addressing vulnerabilities of resettled refugees in the US: There was not always clear communication between organisations involved in the resettlement process as to the specific needs of refugees, and this resulted in refugees being placed in communities that did not have the resources or facilities to address their needs. These gaps also included underfunded employment services, inadequate financial support, insufficient English language training, inadequate transportation, inability to

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Sean Henderson, *Senior Resettlement Officer*. European Council of Refugees and Exiles, Biannual General Meeting, 30-31 October 2008, Paris, p. 3.

<sup>52</sup> Brick, K., et al (*supra* note 29), p. 7.

<sup>53</sup> See Kerwin, D. (2011 May). The faltering US refugee protection system: Legal and policy responses to refugees, asylum seekers, and others in need of protection. Washington, D.C.: Migration Policy Institute, p. 9; International Rescue Committee (2009). Iraqi refugees in the United States: In dire straits. New York, p. 7.

<sup>54</sup> See for example Morgan, S. (2001, September). The agency of welfare workers: Negotiating devolution, privatization, and the meaning of self-sufficiency. *American Anthropologist*, 103 (3), 747-761.

<sup>55</sup> U.S. DOS, DSS, HHS (2009). *Proposed refugee admissions for fiscal year 2010: Report to Congress*, pp. 7-13.

obtain professional recertification, and difficulties in accessing medical and mental health treatment.<sup>56</sup>

Similarly, in Australia, Iraqi refugees faced considerable obstacles to integration on account of policies of dispersal which often settled them in economically depressed regions outside of urban centres, where specialised medical and social services were very limited, and racism was fuelled by competition for scarce employment and resources. In these regions, refugee access to the labour market was restricted by limited English language skills and training, the non-transferability of their professional qualifications, few job opportunities, the potential for exploitation, and discriminatory attitudes of employers.<sup>57</sup> Hence, the idea that resettlement would rectify the causes and consequences of vulnerability was not always realised in practice.

### **C. Vulnerable states: Classifications of exclusion and inadmissibility in resettlement**

The concept of vulnerability was mobilised not only to protect certain refugee bodies, but also to address insecurities within states. These insecurities both produced and reinforced the rationality undergirding states' increasingly restrictive legal regimes governing refugee admittance. Refugees found to be potentially excludable and inadmissible occupied the opposite end of the spectrum from those deemed to be "deserving" and vulnerable. Such categorisations were administrative tools for deciding upon and demarcating not only who was a refugee, but which refugees would be able to access resettlement to the global north. These regimes were often justified as necessary for maintaining the credibility, reputation, and

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<sup>56</sup> Georgetown Law (2009). *Refugee crisis in America: Iraqis and their resettlement experience*. Georgetown University, pp. 2, 19-40.

<sup>57</sup> Johnston, V., Vasey, K., & Markovic, M. (2009). Social policies and refugee resettlement: Iraqis in Australia. *Critical Social Policy*, 29 (2), 191-215, pp. 200-202, 208.

integrity of the resettlement programme as a tool for refugee protection.<sup>58</sup> For example, during the 2002 Annual Tripartite Consultations on Resettlement in Geneva, Canada noted the challenge it faced in maintaining its leadership in refugee resettlement while ensuring that refugees who may be excludable or inadmissible did not gain entry.<sup>59</sup>

As a part of the Iraqi resettlement policy,<sup>60</sup> UNHCR therefore identified profiles and backgrounds that would trigger the need for a full refugee status determination and exclusion assessment, and not just direct and expedited referral as a *prima facie* refugee for resettlement processing.<sup>61</sup> For example, to determine whether there were any foreseeable exclusion issues, UNHCR and resettlement states screened senior members of the Ba'ath Party or persons who had served in the military when crimes against humanity were perpetrated by Saddam Hussein's regime.<sup>62</sup>

A number of resettlement states also legislatively implemented bars to admission of refugees suspected of providing support for terrorism. Absent a recognised definition of terrorism, these bars to admission were not identical, but reflected individual state definitions and interpretations of what constituted terrorism. In North America, for example, domestic legislation was enacted to prevent entry of persons who were deemed to be security threats, terrorists, and criminals from infiltrating the refugee resettlement system.<sup>63</sup> In Canada, the Immigration Act contained provisions on inadmissibility based on security concerns,<sup>64</sup> and courts interpreted the Exclusion Clause Article 1F(a) of the 1951 Convention to include members of terrorist organisations; Article 1F(b) to treat acts of terrorism as non-political crimes; and Article 1F(c) to apply to persons who committed acts of terrorism either inside or outside the country of refuge, including

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<sup>58</sup> For example, see Citizenship and Immigration Canada (2002, June 18-19). Background note for the agenda item: Security concerns. Annual Tripartite Consultations on Resettlement, Geneva, p. 3; United States Department of State (*supra* note 43), p. 52.

<sup>59</sup> Citizenship and Immigration Canada, *ibid.*, p. 1.

<sup>60</sup> And also partly in acquiescence to host state concerns. See Chapter 3 of this thesis, note 36.

<sup>61</sup> UNHCR (*supra* note 6), p. 6.

<sup>62</sup> See Fernandez, K. (2008, December). *The gendering of vulnerability and protection needs: Iraqi male refugees*. M.A. thesis, Center for Migration and Refugee Studies, American University of Cairo, p. 21.

<sup>63</sup> See Kerwin, D. (*supra* note 53), p. 2.

<sup>64</sup> Government of Canada, Immigration and Refugee Protection Act (2002, June 28).

not only state officials, but also lower level operatives and persons having no connection with the state.<sup>65</sup> Senior officials of regimes designated by the Minister of Citizenship and Immigration to have participated in terrorism, war crimes, crimes against humanity, or gross or systematic human rights violations were also inadmissible under Canadian law, including senior officials from Saddam Hussein's regime from 1968 onwards,<sup>66</sup> regardless of their individual knowledge or intent.

In the US, the USA PATRIOT Act of 2001 and REAL ID Act of 2005 amended the US Immigration and Nationality Act by broadening the grounds for denying resettlement or asylum to refugees who provided "material support" for "terror groups", with some discretionary waivers available for refugees who had provided material support under "duress".<sup>67</sup> Material support included, for example, providing arms, funds, a safe house, transportation, communications, false documentation, food, or services for terror groups; and terrorism included any support for armed struggle against an internationally recognised government,<sup>68</sup> regardless of the US' foreign policy towards that government.<sup>69</sup>

Ironically, many of the Iraqi refugees who were subjected to the US' material support bar were amongst those who were the most vulnerable or who had the strongest protection claims under the 1951 Convention. For a period of time before duress waivers were issued with more regularity, Iraqis were also barred from admission to the US if they had paid a ransom to a US-designated or non-designated foreign terrorist organisation (FTO) in order to secure the release of a kidnapped

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<sup>65</sup> Citizenship and Immigration Canada (*supra* note 58), p. 5.

<sup>66</sup> *Ibid.*, p. 6.

<sup>67</sup> In 2009, for example, duress waivers were issued for individuals associated with the Iraqi National Congress, the Kurdistan Democratic Party, and the Patriotic Union of Kurdistan. U.S. Citizenship and Immigration Services (2009, October 19). Fact sheet: Secretaries Napolitano and Clinton exercise authority under the Immigration and Nationality Act (INA) to exempt individuals affiliated with certain Iraqi groups from certain inadmissibility provisions.

<sup>68</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56 (Oct. 12, 2001); REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, enacted May 11, 2005; and US Immigration and Nationality Act (8 U.S.C. 1182 (d)(3)(B)(i)), Amendment 691(a) to Section 212 (d)(3)(B)(i)).

<sup>69</sup> See *In re S-K-*, 23 I&N Dec. 936 (BIA 2006), 941, 950: "Congress intentionally drafted the terrorist bars to relief very broadly, to include even those people described as 'freedom fighters,' and it did not intend to give us discretion to create exceptions for members of organizations to which our Government might be sympathetic."

family member.<sup>70</sup> Iraqi women who were kidnapped and forced to provide services for members of FTOs, which included any militia armed and fighting the government, were also barred for providing “material support”.<sup>71</sup> Also the People’s Mujahedin of Iran (PMOI) was designated as an FTO by the US Department of State, and PMOI members who were living as refugees in Iraq were thus barred from admission to the US for resettlement, despite the declaration by the US Department of Defense that they were “protected persons” under the Fourth Geneva Convention, and despite that they were housed in Camp Ashraf which was protected by the US military.<sup>72</sup> In such cases, the basis of claims for refugee recognition ironically constituted the basis for denying refugees admission for resettlement in the US.

Refugees referred by UNCHR for resettlement to the US were further vetted through security screenings, including the Consular Lookout and Support System which ran a name-check, and in some cases Security Advisory Opinion reviews, which were triggered by certain combinations of biodata (such as nationality, age, and gender) and other categories identified by the Bureau of Consular Affairs on the basis of US foreign policy or security interests.<sup>73</sup> These procedures caused extensive processing delays, leaving some Iraqis waiting for up to four years in dangerous conditions before being permitted to finally travel,<sup>74</sup> and preventing others from entering the US even where there was no evidence that they posed any security risks.<sup>75</sup>

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<sup>70</sup> Walsh, K. (2008). Victims of a growing crisis: A call for reform of the United States immigration law and policy pertaining to refugees of the Iraq War. *Villanova Law Review*. 53 (421), pp. 4-5; Human Rights First (HRF) (2009). *Denial and delay: The impact of the immigration law’s “terrorism bars” on asylum seekers and refugees in the United States*. New York, pp. 19-20.

<sup>71</sup> See Walsh, K., *ibid.*, p. 5.

<sup>72</sup> Stock, M.D. (2006). Providing material support to a foreign terrorist organization: The Pentagon, the Department of State, the People’s Mujahedin of Iran, & The global war on terrorism. *Bender’s Immigration Bulletin*, pp. 1-26; Sridharan, S. (2008, January). Material support to terrorism — Consequences for refugees and asylum seekers in the United States. *Migration Information Source*.

<sup>73</sup> Kerwin, D. (*supra* note 53), p. 5.

<sup>74</sup> HRF (2010, December 15). *U.S. processing delays leave thousands of Iraqi refugees in limbo*; HRF (2010, December). *Living in limbo: Iraqi refugees and U.S. resettlement*; Bernstein, J. & Epstein, R. (2010, May 21). *Security clearances identified as an impediment to timely resettlement of Iraqi refugees, including U.S. affiliated Iraqis*. HRF.

<sup>75</sup> Kerwin, D. (*supra* note 53), pp. 1, 5.

Similarly, in Europe, the asylum and refugee admissions system was increasingly perceived as vulnerable to abuse by persons who had participated in terrorist activities.<sup>76</sup> The European Commission (EC) did adopt UNHCR's view that there was no need to institute major changes to the refugee regime,<sup>77</sup> but only to apply carefully the exclusion clauses in the 1951 Convention – a measure that raised some criticism, given the broad definition of terrorism that the EC intended the Exclusion Clauses to cover.<sup>78</sup> However, subsequent restrictions were nonetheless enacted: The Qualification Directive removed the “personal and knowing conduct” requirement from the exclusion analysis for persons who had committed serious non-political crimes.<sup>79</sup> At a national level, Germany, for example, implemented the Anti-Terrorism Act 2002 and the Residence Act 2004, both of which placed restrictions on entry of asylum-seekers who had provided support for international terrorism. However, without clear definitions of either “support” or “terrorism”, German authorities had significant discretion in the interpretation and application of this legislation.<sup>80</sup>

In the United Kingdom, the 2001 Anti-Terrorism, Crime and Security Act permitted the Home Secretary to deny entry to any non-citizen suspected of being an “international terrorist”.<sup>81</sup> The UK's 2006 Immigration, Asylum and Nationality Act, Section 55, similarly permitted the Secretary of State to certify that an appellant

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<sup>76</sup> See Coleman, N. (2007). From Gulf War to Gulf War—Years of security concern in immigration and asylum policies at European level. In A. Baldaccini & E. Guild (Eds.). *Terrorism and the foreigner: A decade of tension around the rule of law in Europe*. The Netherlands: Martinus Nijhoff Publishers, p. 57; Schoenholtz, A.I. & Hojaiban, J. (2008, February). *International migration and anti-terrorism laws and policies: Balancing security and refugee protection*. Institute for the Study of International Migration, Walsh School of Foreign Service, Georgetown University, Policy Brief No. 4.

<sup>77</sup> European Commission (2001). Working Document: *The relationship between safeguarding internal security and complying with international protection obligations and instruments*. Brussels, 05.12.2001, COM (2001) 743 final.

<sup>78</sup> See European Council on Refugees and Exiles (ECRE) (2002, May). Comments from the European Council on Refugees and Exiles on the Commission working document, “The relationship between safeguarding internal security and complying with international protection obligations and instruments”; ECRE (2004, March). *Position on exclusion from refugee status*, pp. 5-6.

<sup>79</sup> European Union: Council of the European Union (2004, April 29). Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“Qualification Directive”), OJb2004 L 304/12, Article 12(2)(b).

<sup>80</sup> See Davy, U. (2007). Immigration, asylum, and terrorism: How are they inter-related in Germany? In A. Baldaccini & E. Guild (Eds.). *Terrorism and the foreigner: A decade of tension around the rule of law in Europe*. The Netherlands: Martinus Nijhoff Publishers, 206, 218.

<sup>81</sup> United Kingdom (2001). Anti-Terrorism, Crime and Security Act 2001, Chapter 24.

was not entitled to the protections of the 1951 Convention on the grounds of national security,<sup>82</sup> despite previous concerns raised by UNHCR about potentially overly broad interpretations of the 1951 Convention's exclusion clauses,<sup>83</sup> and later concerns that this might exclude persons involved in opposition movements against governments.<sup>84</sup>

In this environment, the indeterminate and varying definitions of terrorism gave way to further iterations of threat, applying to increasing numbers of persons fleeing the conflict. And as the project of identifying and distinguishing supporters of terrorism grew in complexity and scope, the vulnerability that drove many Iraqis to flee their country was often recast as a threat to resettlement states. Hence, the concept of vulnerability began to refer as much to state territories as it did to refugee bodies.

### **III. Exegesis: Sovereignty and vulnerability in refugee resettlement**

#### **A. Introduction**

The following sections theorise that in the classifications of vulnerability and threat in the Iraqi resettlement programme, vulnerability functioned as an ideology intimately bound up in the workings and production of sovereignty. As much as vulnerable bodies were recouped into the state system, these bodies also became the sites for the materialisation and expression of sovereign power, marking the boundaries between inclusion and exclusion. And vulnerability referred not only to refugee bodies, but also to state borders, as states deployed policies aimed at classifying particular persons or acts as excludable or inadmissible.

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<sup>82</sup> United Kingdom (2006). Immigration, Asylum and Nationality Act 2006, Chapter 13, Section 55

<sup>83</sup> UNHCR London (2005). UNHCR comments on clause 52 of the Immigration Asylum and Nationality bill 2005, at <[http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments\\_dec-2005clause52.htm](http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_dec-2005clause52.htm)>.

<sup>84</sup> Refugee Council et al (2006, January). Parliamentary briefing: Immigration, asylum & nationality bill counter terror clauses, 3.



Given the paucity of resettlement places available for refugees globally and the crisis or emergency this engendered, vulnerability was deployed as a concept to select those refugees deemed most at risk of further human rights violations. In this respect, refugee bodies were instrumentalised in delimiting the parameters of the problem, circumscribing the definition of need to a select few, and rendering the majority invisible and contained in states of legal uncertainty in the Middle East.

This exegesis also considers how the concept of vulnerability was deployed in another sense – as an ill to be cured through the self-sufficiency or self-reliance that is supposed to be enabled by resettlement. Working in concert with the ideology of self-sufficiency, vulnerability was a useful concept to some resettlement states only to the extent that it did not challenge these states in their processes of vetting refugees and selecting those who would be most amenable to incorporation in their neoliberal economic systems. Such systems distanced states from any responsibilities for the protection of those individuals most marginalised in the economic order, and these states resisted accommodating those individuals who might be the most dependent on state assistance due to severe trauma or disability.

As such, the ideologies of vulnerability, self-sufficiency, and threat became critical in constructing refugee bodies in terms of their relationship to resettlement states and the constitution of the citizen as the ideal political subject. At the same time, however, UNHCR attempted to revive the link between human rights and human vulnerabilities, and refugees often appropriated the resettlement criteria to make their protection needs visible and to obtain re-entry into the state system. In so doing, they also created opportunities for contesting and exposing the hidden violence of decisions on refugee lives, in subtle ways pressing for protection measures exceeding the strict purview of sovereign state interests.

## B. Vulnerability as ideology

The resettlement criteria developed by UNHCR were partially a pragmatic response to the problem of restricted quotas. These criteria were also developed to redress certain forms of invisibility experienced by persons who did not always fit within the strict juridical definitions of the 1951 Convention, such as women and children.<sup>85</sup> They were further intended to ensure the protection of persons least able to survive in the exceptional spaces in which the majority of the world's refugees reside.

However, the creation of such systems, while attempting to maintain UNHCR's procedural integrity in the face of constraints imposed by donor states, also produced other kinds of truth effects, delimiting the most "deserving",<sup>86</sup> the most "vulnerable", and the most "threatening" refugees. Described in the following sections, these truths or "labels" revealed the "political in the apolitical",<sup>87</sup> as they served state interests,<sup>88</sup> asserted national identities, at some times promoted and at other times undermined UNHCR's mandate, and justified allocations of responsibility for alleviating human suffering.

The morality or intentions of UNHCR or resettlement states in constructing vulnerability as the rationality behind their resettlement systems are therefore not the focus of this inquiry. Rather, this section focuses upon the possible unstated and indirect effects of power and truth that the institutionalisation of vulnerability as an ideology had for Iraqi refugees who were defined and prioritised in these terms.

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<sup>85</sup> See Tuitt, P. (1997). Human rights and refugees. *The International Journal of Human Rights*, 1 (2), 66-80, p. 69.

<sup>86</sup> See for example, UNHCR (2004, November) (*supra* note 33), section 10.4, although section 4.1 does note that resettlement should not be considered only for rewarding a "deserving" individual; UNHCR (*supra* note 4), p. 229, but at p. 246, making the same qualification that resettlement should not be solely a reward for a "deserving" refugee. See Citizenship and Immigration Canada (*supra* note 58), p. 2.

<sup>87</sup> See Zetter, R. (2007). "More labels, fewer refugees: Remaking the refugee label in an era of globalization" *Journal of Refugee Studies* Vol. 20, No. 2, 172-192, p. 188.

<sup>88</sup> See *ibid.*, p. 180.

### 1. *Vulnerable and invisible bodies*

What does it mean for vulnerability to function as an ideology? Althusser theorised that ideology (the “ideological state apparatus”) functions by “interpellating”, or recognising individuals in accordance with specific social and juridical identities. In responding to this call or interpellation, individuals are constituted and enter a particular discourse as subjects.<sup>89</sup> They become both visible and subject to the power of the law,<sup>90</sup> and positioned as legal subjects who participate in reproducing relations of domination and justifying sovereign power.<sup>91</sup> For example, Bassel examined citizenship as a form of interpellation which legitimises and delegitimises certain meanings of belonging and legitimacy, as the “citizen” is presented as “natural and necessary” rather than the product of coercion. Interpellation facilitates relationships of power that determine which aspects of identity claims are considered important and deserving of support.<sup>92</sup> In so doing, Butler observed, there is an inherent violence in the process – being addressed, given a name, subjected to impositions, and forced to respond.<sup>93</sup>

By functioning as an ideology,<sup>94</sup> vulnerability was deployed in the creation, naturalisation, and normalisation of a “hierarchy of needs” in the resettlement criteria. The implicit message was that only certain forms of violence “matter”, and only certain claims are rational.<sup>95</sup> Claim-making was therefore restricted,<sup>96</sup> as vulnerability worked to interpellate only certain refugees as subjects in need

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<sup>89</sup> Althusser, L. (1971). Ideology and ideological state apparatuses (Notes towards an investigation). In L. Althusser, *Lenin and philosophy and other essays*. Surrey: Gresham Press, 121-173, pp. 160, 174.

<sup>90</sup> See Butler, J. (1993). *Bodies that matter. On the discursive limits of ‘sex’*. London: Routledge, p. 122.

<sup>91</sup> See Milanovic, D. (1992, Autumn). Rethinking subjectivity in law and ideology: A semiotic perspective. *The Journal of Human Justice*, 4 (1), p. 50.

<sup>92</sup> Bassel, L. (2008). Citizenship as interpellation: Refugee women and the state. *Government and Opposition*, 43 (2), 293-314, pp. 295, 305.

<sup>93</sup> Butler, J. (2004). *Precarious life: The powers of mourning and violence*. London: Verso, p. 139.

<sup>94</sup> See Freeden, M. (2003). *Ideology: A very short introduction*. Oxford: Oxford University Press, p. 54; Bassel, L. (*supra* note 92).

<sup>95</sup> See Gilroy, P. (6 Feb 2012). Subject in the kettle: Notes on citizenship, dissent, and securitocracy. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>96</sup> See Bassel, L. (*supra* note 92), p. 306.

according to the resettlement criteria, rendering them “hypervisible”<sup>97</sup> to resettlement states. These interpellations of vulnerability left less visible the vast majority of refugees in spaces where law had little or no application. The failure to recognise their claims and needs by securing a durable solution for them was in turn normalised and rationalised.<sup>98</sup>

The deployment of vulnerability therefore not only rectified previous inequalities in the juridical recognition of refugees, but also created new ones, demonstrating how interpellation as a means of constituting legitimate subjects is always at the same time exclusionary – both of other refugee bodies and identities. The process of increasing classification and juridification of resettlement criteria could never solve the problem of exclusion that resulted from interpellation. For example, Fernandez demonstrated how restricted and gendered constructions of “vulnerability” in the Iraqi refugee operation tended to minimise and underreport the high levels of physical, psychological, and sexual violence experienced by Iraqi refugee men, which resulted in their having the highest death rates,<sup>99</sup> but the lowest levels of access to social services and protection in host states. This compromised their safety, security, and survival, and reinforced notions of Iraqi men as embodying security threats and women as traditional victims.<sup>100</sup>

As such, rather than focusing on the rights of all persons recognised as refugees on account of their vulnerability to persecution, the ideology of vulnerability permitted the prioritisation of the needs of a few who were most at risk. In this way, state responsibility towards refugees and responsibilities for “burden-sharing” became focused more on a small group of refugees in need of urgent assistance and downplayed the needs and rights of the many who remained in tenuous and unstable conditions of bare life on state territories.

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<sup>97</sup> See Thomson, R.G. (2003). Making freaks: Visual rhetorics and the spectacle of Julia Pastrana. In Cohen, J.J. & Weiss, G. (Eds.). *Thinking the limits of the body* (pp. 129-143). New York: State University of New York Press.

<sup>98</sup> See Zetter, R., (*supra* note 87), p. 176.

<sup>99</sup> Burnham, G., Lafta, R., Doocy, S. & Roberts, L. (2006, October 11). Mortality after the 2003 invasion of Iraq: A cross-sectional cluster sample survey. *The Lancet*.

<sup>100</sup> Fernandez, K. (*supra* note 62).

While resettlement states did contribute financial assistance towards the support and protection of Iraqi refugees in the Middle East, such assistance did not secure their legal protection in terms of their rights to non-*refoulement*, residency, and work, and was often restricted to those refugees deemed to be the most vulnerable.<sup>101</sup> The refugees primarily remained in protracted states of legal liminality, as such measures not only assisted with their survival in such exceptional spaces, but also effectively contained them there.

The normalisation of the criteria of vulnerability also masked the international state system's failure to accommodate the majority of refugees other than in spaces of exile, exclusion, and exception. Those refugee bodies not recognised in terms of vulnerability were not prioritised in protection operations, as their needs and rights were placed lower in the hierarchy of need. The restriction of aid, assistance, and resettlement to a few refugees was rationalised in this context as both logical and necessary, as the best alternative available, given the political and economic realities and constraints. However, this masked both the inherent violence in the process of prioritisation and also the critical lack of resources and political will for protecting all persons who were recognised as refugees. It made states appear that they were "doing something" and compelled UNHCR to underscore that resettlement needs far exceeded available places,<sup>102</sup> in its quest to pressure states to shoulder more of the responsibility for refugee protection.

Also towards the project of protecting state borders, managing migration,<sup>103</sup> and containing refugees, vulnerability as an ideology, or label,<sup>104</sup> identified as "legitimate" those refugees who came through legalised resettlement programmes rather than those who sought irregular means of entering state territories in search of protection. This message was implicit in statements posing resettlement as the answer to the problem of irregular migration, as UNHCR stated that resettlement was a key means of preventing irregular and secondary migration of refugees

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<sup>101</sup> See for example, UNHCR (2009, July) (*supra* note 14), pp. 22-23, 36.

<sup>102</sup> UNHCR (*supra* note 4), p. 69.

<sup>103</sup> See Zetter, R. (*supra* note 87), pp. 174, 184.

<sup>104</sup> See *ibid.*, p. 174.

through other routes.<sup>105</sup> Refugees referred through the resettlement programme, both identified by UNHCR, and then vetted by resettlement states, were in many cases provided with better benefits upon resettlement than asylum-seekers already seeking recognition in resettlement countries.<sup>106</sup>

Such distinctions between refugees who may have entered the territories of resettlement countries through irregular means and refugees who entered through legal routes provided by resettlement processing had the effect of interpellating refugees who went through the resettlement system as deserving subjects – the “real” refugees, and condemning those who entered irregularly – the potential “illegal”<sup>107</sup> migrants who must be discouraged and contained. The tying of vulnerability to resettlement programming, and therefore “legitimacy” and “legality”, rendered invisible and delegitimised the vulnerabilities that led many refugees to face the dangers of traveling irregularly or with human smugglers to escape persecution in Iraq.

The refugees left invisible by the discourse and ideology of vulnerability became what Enns called in other contexts “occupied bodies”, or what Agamben would term forms of “bare life”<sup>108</sup> through which sovereign power makes itself felt. The development of vulnerability as a juridical category for prioritising refugees for resettlement or assistance masked the political moment when all refugees could have been recognised as vulnerable and living in conditions of bare life,<sup>109</sup> particularly given that their very status as refugees implied vulnerability to the abuse of state power. Vulnerability as an ideology recognised and recouped into the ambit of state protection only certain variegated forms of bare life. In the process, it left intact other forms of bare life that remained excluded from political or legal

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<sup>105</sup> UNHCR (*supra* note 6), p. 4.

<sup>106</sup> For example, in Australia, refugees who had Temporary Protection Visas (TPVs) had fewer benefits and access to social, economic, and education support than refugees who arrived via the resettlement stream through the offshore humanitarian programme. Johnston, V., et al (*supra* note 57), p. 198. In 2008, the Labour government moved to abolish the TPV regime. *Ibid.*, p. 209.

<sup>107</sup> See Johnston, V., et al (*supra* note 57), pp. 203, 208.

<sup>108</sup> Enns, D. (2004). Bare life and the occupied body. *Theory and Event*, 7 (3), paras. 26, 28.

<sup>109</sup> Butler, J. (*supra* note 93), p. 29. See Glynos, J. (2001). The grip of ideology: A Lacanian approach to the theory of ideology. *Journal of Political Ideologies*, 6 (2), 191–214.

recognition in the maintenance and production of sovereign power. The space of the sovereign decision in which such interpellation took place was treated as a given. The identification of a select few refugees as legitimate subjects for resettlement, while ensuring their protection, therefore also masked and normalised the violence of containment and exclusion of the many within repressive state systems of migration control.

Vulnerability was also part of a larger discourse of security. In the context of the securitisation of the refugee regime, securing the protection of vulnerable persons became caught up with securing the resettlement programme from the infiltration of individuals posing threats to states.<sup>110</sup> Redressing human vulnerability and insecurity became contingent on securing the vulnerable state.<sup>111</sup> Rather than a shift in security discourse from a focus on states to a focus on individuals,<sup>112</sup> the two were dialectically connected, and the shifting emphasis was more a matter of political expediency in the deployment of particular kinds of governance. The integrity of the system for securing vulnerable bodies required measures aimed at also securing state borders.

Towards the project of shoring up vulnerable states, the exclusion and inadmissibility procedures implemented in the Iraqi resettlement programme were also forms of interpellation as they de-contested spaces of sovereignty that exceeded the scope and boundaries of what was permissible in international law. The indeterminacy of terms such as “terrorist” permitted the expansion of the term to include increasingly larger numbers of persons. The lack of a definition for such terms enabled ever greater discretion by state agents in their interpretation and more easily gave way to political decisions made under the cover of legislation and regulation. Interpellation of refugees as excludable or inadmissible legitimised the

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<sup>110</sup> See Zetter, R. (*supra* note 87), p. 189.

<sup>111</sup> See Noll, G. (2003). Securitizing sovereignty? States, refugees, and the regionalization of international law. In Newman, E. & van Selm, J. (Eds.) *Refugees and forced displacement: International security, human vulnerability, and the state* (pp. 277-305). Tokyo: United Nations University Press, p. 282.

<sup>112</sup> See, for example, Paris, R. (2001). Human security: Paradigm shift or hot air? *International Security*, 26, 87-102; Suhrke, A. (2003). Human security and the protection of refugees. In Newman, E. & van Selm, J. (Eds.) *Refugees and forced displacement: International security, human vulnerability, and the state* (pp. 93-108). Tokyo: United Nations University Press, p. 104.

restrictive interpretations of international refugee law and naturalised the sovereign decisions that premised domestic security concerns over international legal obligations. In the process, interpellation reinforced which law mattered, which violence counted, and which individuals would be welcomed.

The implicit violence in the processes of interpellation, labelling, and categorisation suggested that the creation of new categories of inadmissibility could never rectify the vulnerabilities created in the production of state borders and refugee bodies. Rather these categories' expansion and multiplication as markers of both vulnerability and threat, which were facilitated by juridical classifications, definitions, and hierarchies of subjectivities, violence, and law, represented the increasing normalisation of the exception in the face of emergency.

The truth effects produced by the juridical constructions of both vulnerability and threat for purposes of resettlement identification therefore demonstrated Butler's contention that "although we need norms in order to live, and to live well, and to know what direction to transform our world, we are also constrained by norms in ways that sometimes do violence to us".<sup>113</sup> They affirmed the "Nietzschean insight that the origins or generative conditions of laws do not determine their subsequent use or value".<sup>114</sup>

## **2. Producing the neoliberal subject**

Vulnerability as an ideology within the resettlement criteria not only delimited and circumscribed refugee bodies, but also reinforced sovereign identities rooted in neo-imperial and neoliberal rationalities of resettlement states. Following Jarman's reading of disability, the essentialised vulnerabilities implicit in the refugee resettlement criteria were also tropes marking and continually reproducing the artificial border between the opportunities available within resettlement states of

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<sup>113</sup> Butler, J. (2004). *Undoing gender*. New York: Routledge, p. 206.

<sup>114</sup> Mills, C. (2007). Normative violence, vulnerability, and responsibility. *Differences: A Journal of Feminist Cultural Studies*, 18 (2), 133-156, p. 151.



the global north and the limited possibilities and implicit suffering within the host states of the global south. Such vulnerability was operative in constituting resettlement states as spaces of greater advancement – in power, knowledge, and compassion – where vulnerability could be eradicated or purified.<sup>115</sup> The vulnerable refugee body became the discursive site upon which anxieties about citizenship and identity were projected – it became an object for both consumption<sup>116</sup> and redemption by resettlement states.

Resettlement criteria in this sense became a project of first naming and then eliminating the difference posed by vulnerability of the individual body and its associated “weaknesses”, thereby masking the economic inequality, nationalism, racism, and warfare that both created refugees and perpetuated their vulnerable status. Through ostensibly compassionate and benevolent practices to stop suffering, the citizen body could claim the security of its “self-possessed” individual identity which was dependent upon the exclusion of bodily vulnerability.<sup>117</sup>

Also, through the ideology of vulnerability, refugee bodies were produced as objects of intervention by states in the global north to protect refugees from their own “less civilised” communities in the global south.<sup>118</sup> For example, such sentiments were mobilised the specific citation of “women at risk of honour killings”, in the Iraqi resettlement profiles.<sup>119</sup> While such specifications may indeed be used to secure the protection of individual women from threats of such harm, they also tended to overshadow the reality that many women at risk of human rights violations may also be found in resettlement state communities.

The primary project towards eliminating the “weaknesses” – or “threats” posed by human vulnerability to the myth of the self-possessed sovereign subject – was

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<sup>115</sup> Jarman, M. (2005, June). Resisting ‘good imperialism’: Reading disability as radical vulnerability. *Atenea*, Special issue on the Discourse of Disability, 107-116, pp. 108, 111, 113.

<sup>116</sup> Ibid., p. 115.

<sup>117</sup> Ibid., pp. 108-109, discussing Shildrick, M. (2000). Becoming vulnerable: Contagious encounters and the ethics of risk. *Journal of Medical Humanities*, 21 (4), 215-227, and Wendell, S. (1996). *The rejected body: Feminist philosophical reflections on disability*. London: Routledge, p. 156.

<sup>118</sup> See Spivak, G. (1988). Can the subaltern speak? In Nelson, C. & Grossberg, L. (Eds.). *Marxism and the interpretation of culture* (pp. 271-313). Chicago: University of Illinois Press, for her discussion of imperialism and the establishment of the “good society”.

<sup>119</sup> UNHCR (*supra* note 6), p. 4.

termed “self-sufficiency” (or in UNHCR parlance, “self-reliance”). The resettlement of vulnerable individuals would enable them to decrease their vulnerability and dependence upon public assistance and therefore become self-sufficient and remade into the model citizen.

The ideology of self-sufficiency has long been a part of neoliberal rationality, which assigns primacy to a market deregulated through privatisation and devolution, limits the provision of social services, and aims to reform vulnerable subjects into autonomous and employed individuals.<sup>120</sup> Morgan observed how neoliberalism reframes the systematic economic and social problems of poverty resulting from deregulation as one of individual responsibility rooted in individual psychological or moral problems – problems of dependency and the lack of individual responsibility. It privatises not only the market, but also responsibility, by presenting self-sufficiency through employment as a moral obligation and individual choice in order to ameliorate the problem of dependency. It downplays any emphasis on the structural causes of human need and delegitimises the role of interdependency, reciprocity, and shared responsibility for social welfare.<sup>121</sup> The focus is on individual accountability for welfare, rather than state accountability to individuals.

UNHCR’s focus on promoting self-reliance, while recognising the need for a permissive legal and economic environment, also became bound up in the rationality of neoliberalism. Achieving self-reliance is one of the stated goals of UNHCR’s resettlement programme:

Self-reliance can be defined as the “*social and economic ability of an individual, a household or a community to meet essential needs (including protection, food, water, shelter, personal safety, health and education) in a sustainable manner and with dignity*”. As a programme approach, self-reliance refers to developing and strengthening livelihoods of persons of concern in an effort to reduce their vulnerability and long-term reliance on humanitarian and external assistance.

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<sup>120</sup> Morgan, S. (*supra* note 54), p. 747.

<sup>121</sup> Morgan, S. (*supra* note 54), pp. 750-751.

Self-reliance among refugees thus: reduces the burden on the country of asylum by decreasing refugees' dependence on its assistance; boosts refugees' dignity and confidence by giving them more control over their daily lives and hope for the future; and helps make any long-term solution more sustainable as refugees who actively support themselves are better equipped to take on the challenges of voluntary repatriation, resettlement, or local integration.<sup>122</sup>

UNHCR stated that it promotes self-reliance as a means of restoring rights and dignity and addressing the economic needs of refugees, particularly persons living in often inhumane situations in camps. Self-reliance is envisioned as a means of empowering refugees to participate in their own protection as active agents rather than as passive recipients of aid.<sup>123</sup> Ultimately it is manifested in the economically independent individual able to sustain a livelihood largely independent of humanitarian assistance.<sup>124</sup>

Promoting self-reliance is a goal for all UNHCR operational contexts,<sup>125</sup> and it increasingly has become a focus of the resettlement programme, as well. However, it shares some aspects of the neoliberal rationality undergirding "self-sufficiency". It became imbricated in neoliberal discourse when self-reliance through resettlement was presented by UNHCR as a goal that not only would empower refugees, but would also reduce their dependence on state services, hence making resettlement states more amenable to receiving them. Towards this end, in the early 2000s, resettlement states participating in UNHCR Annual Tripartite Consultations on Resettlement initiated programmes to improve refugee integration (and hence, self-reliance) following resettlement.<sup>126</sup>

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<sup>122</sup> UNHCR (*supra* note 4), p. 29.

<sup>123</sup> See UNHCR (2006, July 20). *Handbook for self-reliance*. Operational Publications, Geneva, Book 1, p. 1; UNHCR (2011, June 14). UNHCR flags self-reliance as key to solutions for refugees. UNHCR-Malta.

<sup>124</sup> See UNHCR (2006, July 20), *ibid.*, p. 15, Toolkit, Figure 13.1.

<sup>125</sup> *Ibid.*, p. 2.

<sup>126</sup> See, for example, Canadian Council for Refugees (2004, June 15). Interim project report to the Annual Tripartite Consultations on Resettlement, Geneva. Next steps in supporting integration initiatives project, employing the term "Building bridges to self-sufficiency".

Recognising that individual empowerment requires a restoration of human rights and a permissive economic and social environment (i.e. structural changes to law and economic policy), UNHCR's definition of self-reliance is far broader than the narrow terms of individual moral responsibility employed by states in their self-sufficiency agendas and discourses. This may be due to the protection lens through which UNHCR analyses and identifies ways to remedy refugee problems. However, this strategy is problematic for several reasons. First, it has been criticised by scholars as also being self-serving – a means for the agency to reduce material assistance in keeping with budgetary limitations rather than based upon actual refugee needs.<sup>127</sup> Such critiques were bolstered by frequent references in UNHCR literature to self-reliance easing budget constraints.<sup>128</sup>

Second, it is questionable whether self-reliance is the logical answer to addressing the significant structural inequalities that lead to refugee “passivity” (non-participation), extreme traumatising, disempowerment, and dependence on humanitarian aid. How can a tool aimed at individual empowerment and responsibility become the key to addressing structural inequalities and injuries resulting from violence, discrimination, and severe violations of human rights at a state, institutional, and communal level? The focus on individual empowerment and livelihoods as a key goal for Iraqi refugee resettlement programming may have had the unintended consequence of focusing solutions on individuals rather than on critical structural, economic, or political changes, thereby flattening and de-politicising the larger context that produced the refugee crisis, and displacing state responsibility for its prevention and response. The use of the term “self-reliance” itself, relying as it did on questions of the individual, personal responsibility, and dependency, therefore not only risked reproducing neoliberal discourses of self-sufficiency, but also risked being co-opted by states towards those ends. Regardless of the intended consequences, the terminology was either a product of or subsumed within the larger discursive frame of neoliberalism.

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<sup>127</sup> See Hunter, M. (2009, Winter). The failure of self-reliance in refugee settlements. *POLIS*, 2, p. 1.

<sup>128</sup> See, for example, UNHCR (*supra* note 123), p. 7.

Third, self-reliance risks reproducing discourses of neoliberalism and individual responsibility at the expense of refugee protection. Projects aimed at increasing self-reliance and “alleviating refugee situations” tend to focus on increasing individual capacities that will enable refugees to “lift themselves out of poverty” as obstacles are removed from increasing individual “productivity”.<sup>129</sup> Employment and self-sufficiency are equated with dignity, self-respect, and hope,<sup>130</sup> implying that the dependent individual is somehow less than human, stagnating,<sup>131</sup> undignified, hopeless, disempowered, and degraded. Yet the most extreme forms of bodily vulnerability may not easily lend themselves to becoming self-sufficient<sup>132</sup> (having the language, education, and skills necessary for gainful employment).<sup>133</sup> When goals of self-sufficiency become infused and co-mingled with the concept of vulnerability, the programmatic focus can shift from protecting individuals from state harm to the production of the neoliberal subject.

The link between vulnerability and self-sufficiency in the Iraqi refugee resettlement programme suggested that refugees could be resettled if their lives were bad enough, but not so bad that they could not save themselves and become self-sufficient upon resettlement. This message was implicit in some resettlement states’ increasing emphasis on “integration potential”. “Integration” became focused on how to shape refugees into independent citizens upon resettlement, who would be acceptable and amenable to the social and cultural mores of the resettlement society, and who would not be overly dependent upon state assistance.

Integration potential has also been evaluated on the basis of refugees’ ability to replicate the values and norms<sup>134</sup> of the resettlement society. For example, in the

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<sup>129</sup> See UNHCR Executive Committee of the High Commissioner’s Programme, Standing Committee (2008). NGO statement on protracted situations. UNHCR Excom Standing Committee 42<sup>nd</sup> meeting, 24-26 June 2008, p. 2.

<sup>130</sup> UNHCR (*supra* note 4), p. 29; UNHCR (*supra* note 123), p. 3. See also Morgan, S. (*supra* note 54), p. 750.

<sup>131</sup> See UNHCR Excom Standing Committee (*supra* note 129), p. 2.

<sup>132</sup> Kerwin, D. (*supra* note 53), p. 7.

<sup>133</sup> Lugar, R., US Senator (2010, July 21). *Abandoned upon arrival: Implications for refugees and local communities burned by a US resettlement system that is not working*. Report to the members of the US Senate Committee on Foreign Relations, 111<sup>th</sup> Cong., 2d sess.

<sup>134</sup> See Zetter, R., Griffiths, D. & Sigona, N. (2006). *Immigration, social cohesion and social capital: What are the links?* A concept paper. York: Joseph Rowntree Foundation, p. 5.

context of refugees in Bangladesh, resettlement was used as a means of modifying behaviours and attitudes by rewarding persons who practiced certain norms (avoiding early marriage and teenage pregnancy, and seeking education for girls) with resettlement opportunities. As the UNHCR representative in Bangladesh stated, "The refugees now see and understand the type of people that are being considered for resettlement and want to replicate their behaviour. They understand it goes beyond just the protection issue now, and this allows more people to benefit."<sup>135</sup> Ideology, then, is always "positioned" and "political";<sup>136</sup> as Tuitt noted, "alien" identity is constructed in terms of the inability to replicate the dominant national identity's values, norms, and behaviours.<sup>137</sup>

Resettlement was intended to increase the protection of vulnerable persons through this form of social engineering, but by tying protection to the promotion of behavioural change, it also reinvigorated the neo-imperial paternalism implicit in projects of saving refugees from their own communities. It further risked producing a situation in which the agency might use resettlement as a protection tool for a refugee only when s/he was willing to adopt particular norms and values, thereby making rights protection contingent on acquiescence to a particular kind of politics.

While many resettlement states did not overtly select Iraqi refugees for admission on this basis, discussions regarding integration potential were on the rise, sparking concern about the motivations of some states for accepting or rejecting certain particularly vulnerable refugees. UNHCR and NGOs attempted to respond to this slippage both internally and within states where vulnerability was increasingly circumscribed by the parameters and demands of self-sufficiency and the ability to integrate. They reiterated that the "integration potential" of individual refugees is not a resettlement criteria and should not be used as such to the detriment of the

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<sup>135</sup> IRIN (2010, March 24). Bangladesh: Self-reliant refugees win resettlement.

<sup>136</sup> Tuitt, P. (*supra* note 85), p. 75.

<sup>137</sup> *Ibid.*, p. 76, referencing Cheyney, D. (1993). 'Valued judgments? A re-reading of immigration cases. In Bottomley & Conaghan (Eds.). *Feminist theory and legal strategy*. Oxford: Basil Blackwell.

most vulnerable refugees; rather, the “integration capacity of resettlement states” to accommodate refugees should be the focus of state intervention.<sup>138</sup>

However, this contention was seriously undermined by the very discourse of self-reliance employed by UNHCR itself in its efforts to present resettlement as a means for protecting individuals by eliminating their vulnerabilities and remaking them into productive citizens.<sup>139</sup> The supposed tensions between vulnerability and self-sufficiency, although decried by both UNHCR and NGOs as undermining refugee protection, were increasingly revealed as an intimate pact in which the two ideologies were contingent on one another in both their legitimation and deployment: Vulnerability was produced and then ameliorated through remaking the refugee into the neoliberal subject, but only a variegated form of vulnerability could achieve this. More severe forms of bare life could not be recouped into this state and citizen-making project, and as such resettlement became contingent on a parsing of vulnerability, in which the human remainder implicit in the constitution of the citizen was rendered invisible, and the human rights framework for protecting the most vulnerable humans risked losing trenchancy in the process.

Also, despite the rhetoric of self-sufficiency and integration potential as a means of redressing or eliminating vulnerabilities, the resettlement of refugees in some cases in the US and Australia, for example, produced new forms of vulnerability. Vulnerability was reproduced not only as a necessary condition of the resettlement process,<sup>140</sup> but also as a means of positioning refugees upon resettlement – whether as sources of cheap labour, as targets of scapegoating, or as objects of intervention – all critical to the ideological power of the sovereign state and the economics of neoliberalism.

The co-mingled and interdependent ideologies of vulnerability and self-sufficiency were therefore critical to the constitution of the citizen and the

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<sup>138</sup> See UNHCR (*supra* note 51), p. 2; UNHCR (2008, June 25). *UNHCR-NGO joint European advocacy statement on resettlement*. Geneva; UNHCR (2008). *NGO statement*. Annual Tripartite Consultations on Resettlement, 30 June 2008, Geneva.

<sup>139</sup> See UNHCR (*supra* note 4), p. 29.

<sup>140</sup> See for example, Bustamante, J. (*supra* note 31), 333-354, p. 352.

production of sovereign power. Self-sufficiency, posed as the result of ameliorating vulnerability, refocused responsibility for protection on the individual away from the larger socio-political context that produced the conditions of vulnerability. Self-sufficiency was equated with the full person or citizen and could be juxtaposed against the vulnerable, abject, or less-than-human non-citizen who needed to be brought back within the ambit of state protection, thereby legitimating and producing the “need” for the state system.

The production of the fully empowered and independent neoliberal citizen therefore became contingent on the production of vulnerability or bare life of the refugee. Discourses of vulnerability continuously reproduced refugee bodies as vulnerable in order to produce the citizen as the proper and ideal subject of politics. Rather than recognising the vulnerability of all human beings within the deployments of sovereign power and using such dependency as an opportunity for greater sociability and contestation, or what Butler would term a “politics of humility”,<sup>141</sup> vulnerability of the non-citizen refugee was constructed in counterpoint to the category of the citizen. The discursive coupling of vulnerability and self-sufficiency naturalised both the category of the “citizen” and the logic of sovereignty as the normal foundation of political ordering.

### C. Exposing the fragility and contingency of sovereignty

Although resettlement certainly provides protections for those who benefit from it, it is neither a legal right of refugees nor an obligation of states.<sup>142</sup> The resettlement criteria are not enshrined in international refugee or human rights law,

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<sup>141</sup> See, for example, Butler, J. (*supra* note 93), p. 45; McRobbie, A. (2006). Vulnerability, violence and (cosmopolitan) ethics: Butler’s *Precarious life*. *The British Journal of Sociology*, 57 (1), 69-86, pp. 84-85; Mills, C. (*supra* note 114), p. 145. In most conceptualisations of vulnerability is the common element that it is produced through unequal power relations that need to be rectified. This is quite a different concept from the vulnerability envisioned by Butler in her assertion that vulnerability is a common human condition that could open the possibilities for a moral responsibility towards one another. See Butler, J. (1997). *The psychic life of power*. Stanford: Stanford University Press, pp. 21-25.

<sup>142</sup> Goodwin-Gill, G. & McAdam, J. (*supra* note 14), p. 489.



other than implicitly in the concept of non-discrimination<sup>143</sup> and the protection of civilians during armed conflict.<sup>144</sup> Rather, they serve as more of an administrative framework for identifying, classifying, and managing refugee bodies, and are vulnerable to arbitrary deployment and political manipulation.

Consequently, despite its goal of securing legal long-term rights protections for the most vulnerable refugees, resettlement also functions as a form of charitable humanitarian aid, as it is available only on a discretionary basis at the behest of resettlement states. Rights and vulnerabilities are best understood in terms of one another, but when they are separated, the kinds of discourses that emerge around them differ, focusing more on legal protection when speaking of rights, and more on humanitarian assistance when speaking of vulnerabilities. The construction of refugees as “suffering bodies” with specific needs and vulnerabilities is often premised over refugees constructed as “threatened bodies” with specific rights in accordance with the 1951 Convention.<sup>145</sup> The suffering body requires compassionate humanitarian assistance, while the threatened body requires the protection of rights. The construction of the Iraqi refugee crisis as a humanitarian emergency in this way enabled host state governments to treat UNHCR as primarily an agency providing emergency relief.<sup>146</sup>

What happens when the “suffering body”, recognised for its pathology, is privileged over the “threatened body” in refugee contexts? It can depoliticise political questions by constructing them as humanitarian problems, as was the case for Palestinian refugees in Iraq.<sup>147</sup> Fassin noted how humanitarian rationales can become continuously prioritised, and political asylum rendered a secondary concern,

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<sup>143</sup> See 1951 Convention (*supra* note 2), Article 3; Universal Declaration of Human Rights (1948) G.A. Res. 217A (III), U.N. Doc A/810 at 71, Article 2; International Covenant on Civil and Political Rights (16 December 1966) G.A. Res. 2200A [XXI], Article 2; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), UNGA Res. 2200A(XXI), 993 UNTS, p. 3, Article 2.

<sup>144</sup> Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 973 UNTS 75 (*see also* Article 4.2 re: non-discrimination).

<sup>145</sup> See Fassin, D. (2001). The biopolitics of otherness: Undocumented foreigners and racial discrimination in French public debate. *Anthropology Today*, 17 (1), 3-7, p. 3 for a discussion of constructing “suffering bodies”.

<sup>146</sup> Zaiotti, R. (2006). Dealing with non-Palestinian refugees in the Middle East: Policies and practices in an uncertain environment. *International Journal of Refugee Law*, 18 (2), 333-353, p. 343.

<sup>147</sup> Peteet, J. (2007). Unsettling the categories of displacement. *Middle East Research and Information Project*, 244.

moving the right to life from a political to a humanitarian arena.<sup>148</sup> The political increasingly integrates the humanitarian, which in turn redefines it: Fassin argued that “policies of order and a politics of suffering” are interlinked as humanitarian aid, rather than human rights protection, both ensures security of the citizen and the compassionate treatment of those non-citizens on state territories.<sup>149</sup> In this way, the construction of refugees as in need of assistance rather than rights protection reproduces relations of domination.

The suffering body also may be used to conflate humanitarian assistance with refugee rights, setting the stage for rights to be subsumed within a discourse of aid. The realm of humanitarian aid is the space of exception where bare life becomes most manifest – where refugees depend upon the discretionary good will of governments in securing resources for survival. As legal exceptionalism towards refugees becomes the norm, legal arguments for rights-based approaches to protection are undermined, paving the way for humanitarianism as a form of charitable compassion to emerge as the dominant moral paradigm governing the space of exception. It reproduces the refugee continuously through the provision of survival aid and re-entrenches the borders between inclusion within the *polis* and exclusion from law’s protection. No longer simply a temporary measure reserved for a time of emergency, humanitarian assistance becomes the primary means of mediating between the state and the refugee.

State discourses premising humanitarian aid over human rights in their responses to refugee crises exemplify the tensions that emerge as the UNHCR attempts to navigate the dialectic between what Fassin termed in other migration contexts the “politics of pity and policies of control”.<sup>150</sup> UNHCR’s mandate to promote state responsibility for refugee rights protection exists in a tenuous relationship with the agency’s heavy emphasis on the coordination and provision of

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<sup>148</sup> Fassin, D. (*supra* note 145), pp. 4-5.

<sup>149</sup> Fassin, D. (2005). Compassion and repression: The moral economy of immigration policies in France. *Cultural Anthropology*, 20 (3), 362-387, p. 382.

<sup>150</sup> *Ibid.*, p. 366.

aid. This reflects tensions between the UNHCR's ever-broadening mandate and host and donor states' narrowing interests.

However, in the context of the Iraqi resettlement programme, such shifts and tensions were also productive as they countered the use of vulnerability to premise humanitarian assistance over human rights. While the ideology of vulnerability reproduced refugees as either suffering, invisible, or threatening bodies in the constitution of the state and the citizen, the process was revealed as neither fixed nor totalising. Rather, at the moments of interpellation of vulnerability, fissures and slippages occurred, which exposed the contingency of sovereign power, contested the sovereign decision, and created the space to re-think the relationship between human vulnerability and refugee protection. Vulnerability in this sense produced a form of abjection – that which Kristeva theorised is produced by disturbances to order, systems, and identities that reveal spaces of ambiguity which do not correspond to boundaries, borders, or rules and the “fragility” of the law.<sup>151</sup>

Three examples will be considered here: first, the discursive shift in UNHCR's Iraqi resettlement policy linking vulnerability with human rights protection; second, the ways that Iraqi refugees constructed their narratives of suffering that challenged particular interpellations of vulnerability; and third, the difficulties encountered by UNHCR and resettlement states in identifying persons who conformed to the specific conceptions of vulnerability enshrined in the resettlement criteria.

### **1. *Linking vulnerability to human rights protection***

As UNHCR both deployed the new resettlement profiles for Iraqi refugees that focused on rights protection and promoted the strategic use of resettlement, sovereign state interests and identities produced through the idioms of vulnerability, self-sufficiency, and threat were not entirely successful. To some extent, while these ideologies did reproduce and affirm state power, possibilities also presented

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<sup>151</sup> Kristeva, J. (1982). *Powers of horror: An essay on abjection*. (L.S. Roudiez, Trans.). New York, Columbia University Press, p. 4.

themselves for envisioning how resettlement programming could be moved from a strictly humanitarian assistance paradigm to a more human rights-based protection arena, which many resettlement states also came to embrace.

UNHCR's Iraqi resettlement policy demonstrated a subtle shift in the conceptualisation of resettlement, challenging its traditional seating in the realm of humanitarian assistance. The policy went beyond the purview of resettling vulnerable persons as part of a humanitarian programme to protecting refugees as part of a human rights strategy in two critical ways. First, the Iraqi resettlement policy revealed a shift in UNHCR institutional discourse of the strategic use of resettlement, as resettlement became increasingly highlighted as a means of protecting both refugee rights and vulnerabilities, not only for the small percentage of refugees who obtained resettlement, but also for the majority who remained within host states in the Middle East.

Second, the Iraqi resettlement policy expanded the scope of vulnerability to include profiles of political, religious, and ethnic persecution (e.g. persons perceived to be affiliated with the MNF in Iraq, targeted for their religious affiliation such as Christians, or targeted for their ethnicity such as Kurds living in central Iraq). Whether intentional or not, these new profiles and criteria spoke more to the reasons for flight from the country of origin than to vulnerabilities exacerbated in the country of asylum. As such, they were more akin to the definition of a refugee enshrined in the 1951 Convention, where persons may be recognised as refugees if they fear persecution on account of their race, nationality, religion, political opinion, or membership of a particular social group.<sup>152</sup> As such, they inadvertently recognised the vulnerability inherent in the refugee definition.

Therefore, the strategic use of resettlement and the introduction of more rights-based resettlement profiles in the Iraqi resettlement policy suggested an increasing institutional emphasis on the intrinsic connection between human rights protection and social and bodily vulnerability. Rather than posing protection as a solution to be

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<sup>152</sup> 1951 Convention (*supra* note 2), Art. 1A.

obtained only upon the refugees' departure from the region, refugee departures to resettlement states now became important factors in strengthening protection within the region. And the resettlement profiles themselves became a means for facilitating the resettlement of refugees whose vulnerabilities were connected more directly to their refugee status claims. Also, as previously noted in the Palestinian context, there was a growing willingness to recognise that the protection of individual rights need not undermine communal rights of return.<sup>153</sup> Hence, while resettlement may have continued to serve the political interests of host and resettlement states in managing the migration of Iraqi refugees from the region, a significant discursive shift nonetheless occurred in refugee protection strategies that emphasised the importance of rights protection in resettlement programming.

In the face of this shift in institutional discourse, host states generally resisted rights language by limiting recognition of refugee rights within their legal codes, preferring to construct refugee needs in terms of humanitarian assistance. Yet at the same time, in practice, host states increasingly tolerated the promotion of rights protection through both resettlement and limited integration of refugees in their public welfare sectors. Perhaps the disjunctures produced in UNHCR's increasing focus on the connections between rights and vulnerabilities in the face of host state reluctance to assume legal responsibility for refugee protection provided the openings for this sort of compromise to emerge – where refugees could secure greater rights in practice through UNHCR's systems of indirect governance, while states could retain the appearance of sovereign control. This shift was instrumental in moving resettlement from the realm of primarily humanitarian and *ad hoc* discretionary assistance for a fortunate few to an arena in which it could be critical in negotiating greater human rights protections for the many in the Middle East.

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<sup>153</sup> See Chapter 4 of this thesis, Section II.C.3.

## **2. Refugee testimonies and narrations of vulnerability**

The ideology of vulnerability risked de-politicising refugees, constructing them as passive victims of human rights violations and suffering, rather than active agents in negotiating their survival. Despite deploying the ideology of vulnerability, UNHCR nonetheless stressed the importance of recognising refugee agency, stating:

Furthermore, as active participants in their own quest for solutions, refugees must be seen as persons with specific needs and rights, rather than simply as members of 'vulnerable groups'. Seeing only the vulnerabilities can lead to insufficient analysis of the protection risks faced by individuals, and, in particular, disregard for their capacities.<sup>154</sup>

Exemplifying their active agency in searching for their own protection solutions, Iraqi refugees harnessed the discourse of vulnerability towards their own protection goals, employing narratives of suffering in relation to themselves in order to secure their human rights protection in a resettlement or host state. In the process of subjectivisation, the refugees used this discourse to make themselves legible and visible to UNHCR and resettlement states. Being recognised before the law requires the refugee to situate herself within particular bounded signifying practices, to translate herself into a legal problem that then can be juridically debated and resolved, and to submit to the symbolic violence of juridical definitions that suppress other potentially oppositional definitions or narratives.<sup>155</sup> In so doing, refugee testimonies in a Foucauldian sense become technologies of the self – in which they define and attach their identities to an external authority such as the state.<sup>156</sup>

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<sup>154</sup> UNHCR (*supra* note 4), p. 182.

<sup>155</sup> Milanovic, D. (*supra* note 91), pp. 33, 41; Bordieu, P. (1987). The force of law: Toward a sociology of the juridical field. *The Hastings Law Journal*, 38, 814-853, pp. 831-832, 850.

<sup>156</sup> See Foucault, M. (1997). The ethics of the concern for self as a practice of freedom. In P. Rabinow (Ed.) *Essential works of Foucault: ethics, subjectivity, and truth, vol. 1* (pp. 281-301). New York: The New Press, p. 299.

Refugees may construct their bodies and identities to the public through narratives of suffering, as they are continuously compelled to justify themselves to state authorities. Where the suffering body is the only legible body within the refugee protection system, refugees may find it more expedient to construct themselves as victims who must solicit compassion, rather than argue for their rights. Visible to the state only in terms of vulnerability, they may appeal to the very interpellations of vulnerability that constitute them as deserving subjects as this may be their only viable option for exercising personal agency<sup>157</sup> and securing legal recognition and protection.

The ascription of extraordinary characteristics to vulnerability in a context where all refugees by definition are vulnerable is a political technique for narrowing state responsibility. Given the need for recognition in terms of the resettlement criteria in order to secure legal protection through resettlement, refugees are likely to be asked and to speak about the aspects of their experiences that are commensurate with the definitions and narratives of vulnerability – sometimes accentuating or exaggerating what may be an experience common to many refugees<sup>158</sup> in order to frame it with the realm of the urgent and extraordinary, and to ensure that it will be amenable to intervention through resettlement.

The ways in which Iraqi refugees narrated themselves to the state and UNHCR suggested that they were employing UNHCR and resettlement states' own juridical tools in their attempt to secure protection. Refugees learned to speak in the language of vulnerability in order to gain recognition and protection. They adapted their testimonies to conform to this discourse, positioned their specific needs around

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<sup>157</sup> See Bannerji, H. (2000). The paradox of diversity: The construction of a multicultural Canada and "women of colour". *Women's Studies International Forum*, 23 (5), 537–560 for a similar discussion of how multiculturalism in Canada functioned as a kind of ideology and became the only possibility for migrants to express their political agency.

<sup>158</sup> See, for example, IOM (2008, February). *Assessment of psychosocial needs of Iraqis displaced in Jordan and Lebanon*; FAFO (2007, November) *Iraqis in Jordan: their number and characteristics*; ICG (*supra* note 8), documenting the widespread nature of the vulnerability and traumatising of the Iraqi refugee population.

it, and attempted to “make common sense”<sup>159</sup> of their protection concerns in terms of extraordinary suffering.

Hence, the frequency with which Iraqis “misrepresented” themselves as women-at-risk, unaccompanied minors, or survivors of torture, against the scepticism and disbelief of their adjudicators, suggested that they were attempting to use the resettlement criteria as a means for gaining recognition and protection where their specific concerns may not have fallen clearly within the established and normalised hierarchies of need. Both resettlement states and UNHCR expressed concerns that some refugees were not presenting credible testimonies, but instead were committing “fraud”<sup>160</sup> in an attempt to enter the resettlement stream.<sup>161</sup>

The agency ironically employed the term “vulnerability” to refer to itself, as well,<sup>162</sup> and launched a series of initiatives to combat fraud in the resettlement system.<sup>163</sup> These procedures, while intended to maintain the integrity of the resettlement system, also became another iteration of the “duty of suspicion” that already undergirded many state practices aimed at identifying and excluding any migrants who sought illegitimate means to obtain residence – a duty that also functioned to protect nationals.<sup>164</sup> In this sense, the concerns about credibility and fraud in the resettlement system were products of the discursive system itself, which provided a limited definition of need to which many refugees, whose needs did not fit such categories, attempted to conform for the sake of their own survival.

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<sup>159</sup> Bassel, L. (*supra* note 92), pp. 297-298. See also MacCabe, C. (1985). *Tracking the signifier*. Minneapolis: University of Minnesota Press, p. 108, discussing how subject positions produced through interpellation are continuously undermined by language and the eruption of desire.

<sup>160</sup> Fraud has been a major concern in UNHCR resettlement programming, primarily that committed by persons claiming to guarantee refugees resettlement in exchange for payment, refugees presenting false documents, and refugees misrepresenting their claims to UNHCR. See for example, IRIN (2007, December 6). Jordan: Iraqi asylum-seekers fall victim to resettlement scams; Refugee Resettlement Watch (2008, September 22). Lots of fraud among Iraqi refugee applications. This was further evidenced by anti-fraud initiatives in recent years and acknowledgements of concerns about “fraud” by resettlement countries. See for example, UNHCR (2007, June). *Information note: Resettlement anti-fraud plan of action*. Annual Tripartite Consultations on Resettlement, 28-30 June 2007, Geneva; UNHCR (2008, March). *Policy and procedural guidelines: Addressing resettlement fraud perpetrated by refugees*. Resettlement Service, Division of International Protection Services; Citizenship and Immigration Canada (*supra* note 58), pp. 1, 3.

<sup>161</sup> UNHCR, p. 130.

<sup>162</sup> See for example, UNHCR (*supra* note 4), pp. 131, 133, 149.

<sup>163</sup> UNHCR (2007, June) and (2008, March) (*supra* note 160).

<sup>164</sup> See Lavanchy, A. (6 Feb 2012). Hybrid unions, citizenship and foreignness production in Switzerland. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.



Therefore, it may be more useful to ask why refugees felt compelled to “misrepresent” themselves, particularly where they perceived that their specific protection needs were neither recognised nor prioritised in the resettlement programme. In this respect, they were indirectly contesting the interpellation of vulnerability both by appropriating it, and by positioning and couching their protection needs within the only means perceived to be available<sup>165</sup> – the language of the resettlement criteria. In a Lacanian sense, having no oppositional legal language available with which to either express their desires and needs or to critique or contest the resettlement hierarchy, they expressed their needs using the criteria that were known to them<sup>166</sup> and intelligible to the resettlement programme.

However, in their appropriation and subversion of these resettlement criteria, the refugees also exposed their inherent symbolic violence. They exemplified Bassel’s contention that ideology may not be the totalising experience suggested by Althusser, as individuals may not fully internalise such categorisations, but may work to contest and position themselves around them. They exposed the processes and power relations at work in restricting “claim-making” by juxtaposing or adapting their defined needs and subjectivities with those interpellated by the state.<sup>167</sup> They demonstrated Butler’s contention that through performativity, the human body can occupy, exceed, or rework the norm, not only reinforcing hierarchies, but also exposing the structures we assume to confine us as fragile and open to subversion, transformation, or being rendered unintelligible.<sup>168</sup> Hence, the refugees exposed the violence of the categories and labels that circumscribed their lives, thereby subverting their dehumanising power.

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<sup>165</sup> See for example, Enns, D. (*supra* note 108), para. 28, considering whether the appropriation of sovereign violence is the only available means of resistance; Zetter, R. (*supra* note 87), pp. 183, 186-187.

<sup>166</sup> See Milanovic, D. (1994). The postmodernist turn: Lacan, psychoanalytic semiotics, and the construction of subjectivity in law. *Emory International Law Review*, 8, 67-98, p. 83.

<sup>167</sup> See Bassel, L. (*supra* note 92), pp. 297-298; MacCabe, C. (*supra* note 159), p. 108.

<sup>168</sup> Butler, J. (*supra* note 113), p. 217.

### 3. *The elusive vulnerable body*

Ironically, one inadvertent effect of implementing the resettlement policy with Iraqi refugees was the difficulty that UNHCR faced in actually identifying individuals who met the resettlement criteria related to vulnerability, particularly where they lived dispersed in urban settings.<sup>169</sup> This could lead to persons with less vulnerability but with greater access to the agency benefitting from resettlement at the expense of more vulnerable persons. As assistance resources were allocated in terms of level of vulnerability, projects to identify the less visible vulnerable individuals were therefore initiated by UNHCR and its partners.<sup>170</sup>

The difficulty in identifying vulnerable persons, however, may have unworked some of the truth effects of vulnerability as an ideology. The persons who actually met the resettlement criteria were often the most difficult to identify – whether it was due to lack of access, their invisibility, their non-existence, or their reluctance to be identified. However, the difficulties may also have lain more in the categories themselves; as empty signifiers, they could not fully capture, contain, or illustrate the breadth and scope of the human needs of the Iraqi refugees. As the vulnerable bodies defined and required by states were continually evading identification and interpellation, persons having other forms of vulnerability may have been able to secure recognition in the pressure upon UNHCR to fill resettlement quotas and deadlines in accordance with resettlement state demands.

Not only were refugee bodies continuously eluding the forms of legal closure enacted through the ideology of vulnerability, but the resettlement criteria themselves were far from determinate. In the repeated application of these criteria, they could never be applied in exactly the same way, but were continuously remade and questioned. There were ongoing debates both within UNHCR and between the agency and resettlement states regarding the precise definitions and limits of the

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<sup>169</sup> UNHCR (2009, July) (*supra* note 14), p. 2.

<sup>170</sup> *Ibid.*, pp. 29-31, 33; Amnesty International (AI) (2008, June) *Rhetoric and reality: The Iraqi refugee crisis* (MDE 14/011/2008), p. 18.

resettlement criteria. Could a person who witnessed torture of a close family member also be considered a survivor of torture? Could a woman with an adult or older teenaged son living with her be considered a woman-at-risk? Could an illness such as cancer with an unconfirmed prognosis be classified as a medical need within the meaning of the criteria? Such questions pointed to the indeterminacy of these legal categories, as refugees, UNHCR, and resettlement states all worked to position themselves within and around them. This indeterminacy hence not only provided opportunities for exposing and de-naturalising the boundaries of these criteria, but also for contesting them in the project of securing wider inclusion of Iraqi refugees in the resettlement programme.

#### IV. Conclusion

The concept of vulnerability in the Iraqi refugee resettlement criteria was a means of identifying those refugees with the greatest protection needs and of responding to previous criticisms of the failure of the refugee protection regime to address adequately marginalised populations.<sup>171</sup> It could be characterised in this respect as a kind of bioethics of protection, in which it was intended to protect against the threat of bare life.<sup>172</sup> Vulnerability in the resettlement programme, however, was also a “prelude to action”, a “problem to be solved” rather than an inherent condition of existence,<sup>173</sup> in keeping with the ideology of the proper, self-realised political subject that is the citizen. This raised the question of whether

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<sup>171</sup> See for example, Tuitt, P. (1996). *False images: law's construction of the refugee*. London: Pluto Press; Tuitt, P. (*supra* note 85), p. 72, discussing the gendered nature of the legal concept of alienage in refugee law, and pp. 74-75, discussing the construction of sexual and gender-based violence within the refugee definition.

<sup>172</sup> See Arán, M. and Peixoto Júnior, C. (2007). Vulnerability and bare life: Bioethics and biopolitics today. *Rev Saúde Pública*, 41 (5), 849-857, p. 856, referencing Schramm, F.R. (2005). A moralidade da biotecnociência: A bioética da proteção pode dar conta do impacto real e potencial das biotecnologias sobre a vida e/ou a qualidade de vida das pessoas humanas? In Schramm, F.R., Rego, S., Braz, M., & Palácios, M. (Eds.), *Bioética, riscos e proteção* (pp. 15-28). Rio de Janeiro: UFRJ/ Fiocruz, p. 24.

<sup>173</sup> Harrison, P. (2008). Corporeal remains: Vulnerability, proximity, and living on after the end of the world. *Environment and Planning A*, 40, 423-445, pp. 424, 426.

vulnerability could ever be fully disentangled from the logic, discourse, and violence of sovereignty.

And how was one to define and apply the concept of vulnerability in the context of a population defined by its very vulnerability? Refugee status is a direct consequence of vulnerability to abuse of state power. Hence, despite the ethical and normative intentions of employing vulnerability as a discursive frame, selecting the most vulnerable is always at once a pragmatic, principled, and political decision – an act of sovereignty that determines which individuals will benefit from inclusion in resettlement countries and opportunities to gain citizenship, and which individuals will be part of the vast majority who remain behind in countries of asylum that do not respect refugee law, placing refugees in continuous and variegated states of legal liminality, exclusion, and isolation.

Vulnerability then functioned as an ideological tool, rendering certain refugees hyper-visible and those deemed not to fit within the resettlement criteria less visible. Vulnerability also became coupled with the ideology of self-sufficiency, restricting access to resettlement to primarily those who would not be dependent on state assistance. This blocked the access of those living with the most extreme forms of social, physical, and psychological trauma – those who could not be easily “rehabilitated” into the neoliberal economic orders of resettlement states. Vulnerability was thus an ideology that worked to reproduce refugees as suffering bodies as much as bearers of rights. Their subjectivisation as such was critical to the constitution of the self-contained, secure citizen, the normalisation of sovereignty, and the neo-imperial self-imaginings of resettlement states.

However, vulnerability as an ideology could never be totalising in its interpellation of refugee bodies and deployment of suffering for purposes of asserting the logic of sovereignty. In the production of resettlement criteria in the Iraqi resettlement policy, slippages occurred which allowed for both the exposure of the workings of sovereignty undergirding the ideology of vulnerability and for imagining new ways to contest sovereign decisions on life. In different ways, the

discourse of rights assumed greater prominence of place in resettlement programming. First, through the strategic use of resettlement, resettlement became highlighted as a means of protecting refugee rights for both the vulnerable refugees who were relocated and the refugees who remained on host state territories. Protection for those within the state became more intrinsically tied to the protection of those who were resettled beyond state borders. Second, the new resettlement criteria suggested an increasing emphasis on the interconnectedness of rights protection and vulnerability. Third, some Iraqi refugees' appropriation of the vulnerability-based resettlement criteria in constructing narratives of suffering in ways that would be legible to the state was a contentious project that exposed the political projects at play in constructing criteria that limited and circumscribed the recognised scope of their human needs. They employed narratives of suffering, changed their testimonies to conform to particular criteria, or eluded such categorisations altogether.

Vulnerability thus remained an ideology critical to preserving the sovereign power to decide upon the exception, reproducing the logic of sovereignty as the normative mode of politics, and premising the citizen as the proper political subject. Yet it also became possible to harness the discourse of vulnerability to expose and contest such operations of power – in the project of not only seeking recognition within the state system, but also linking compassion more securely to obligation in the protection of refugee rights.

## Chapter 6

### Conclusion

This thesis set out to examine the paradox that international refugee law is not simply a set of rules for states to follow in the protection of certain non-nationals, but is also a social and political phenomenon that produces state power through the regulation of individual bodies, as was demonstrated in the context of the refugee crisis following the 2003 war in Iraq.

With regard to the first limb of this paradox, the Iraqi refugee crisis was frequently constructed by human rights advocates as a failure of protection, as states did not rise to meet their moral duties or obligations under international law. This was first evident in the debates over the legality of the invasion of Iraq and the severe violations of human rights that occurred during the subsequent occupation and rise of the insurgency, forcibly displacing nearly four million people. As two million refugees crossed Iraq's borders into neighbouring states, they were subjected to harsh and arbitrary measures governing their rights of entry and residency, often in contravention of international human rights law and the principle of *non-refoulement*. Those refugees who remained trapped in the camps along Iraq's borders were held up as symbols of the failure of the international community not only to protect them, but also to find a resolution to the larger political questions related to the Palestinian right of return and the protected status of the PMOI. And even in the resettlement programme, which boasted the resettlement of more than 100,000 refugees, there were concerns raised about the conditions in which resettlement states were hosting their new arrivals and whether they were doing

enough to share the “burden” of protecting the vast majority of Iraqi refugees remaining in situations of legal uncertainty in the Middle East.

But what exactly failed? This question implicates the second limb of the paradox in that the kinds of closure, determinacy, and certainty that were envisioned in promoting human rights and refugee law were hardly achieved. Instead, in the gaps, indeterminacy, and liminal spaces of exception where law had no force in the Iraqi refugee crisis, appeared the spectre of sovereignty – the raw power to decide upon the exception that is usually hidden within state bureaucracies, regulation, and the biopolitical management of populations. The failures of law to protect refugees might therefore also be characterised as assertions of sovereignty, as states fought to revive their power, shore up their borders, and reproduce their fictions of nation in the face of crisis.

Yet law did not entirely lose its force, as it was mobilised by both UNHCR and refugees to contest the reach and legitimacy of state power. UNHCR continued to reproduce the logic of sovereignty by seeking opportunities for refugee protection through re-entry into the state system and by facilitating possibilities for the shared governance of refugee spaces. And refugees often sought solutions in state-centric terms. At the same time, however, as the logic of sovereignty migrated from state to non-state actors and was materialised in geographical and bodily space, slippages occurred in the repetition of this logic that provided openings for also countering and exposing the normalisation of sovereign exceptionalism towards refugees. The consequences of this contestation set the stage for imagining new kinds of political formation and identity rooted in a responsibility exceeding the strict purview of the sovereign state.

## **I. The persistence of sovereignty**

In concluding this thesis, it is important to reflect on whether and how sovereignty was reconfigured in the face of efforts by UNHCR to promote

frameworks of international human rights and refugee law. As critics of Agamben's theory of sovereignty have suggested, his paradigm is totalising, failing to account for the contingency of the state and possibilities for resistance.<sup>1</sup> Contrary to academic critiques of state sovereignty as a fetish that is reproduced through academic scholarship on the state,<sup>2</sup> this thesis found that while sovereignty may be fragile and subject to continual challenge and evasion, its consequences are nonetheless real and material. As demonstrated in the Iraqi refugee crisis, the logic of sovereignty persisted in reconfigured and de-territorialised forms and had significant ramifications for the lives of the refugees.

The logic of sovereignty in the Iraqi refugee crisis was realised through new configurations and conceptions of territory. Sovereignty was extended into fields beyond states' geographically delimited borders through new configurations and assemblages of states asserting their own authority, non-state actors seeking to control the state by producing specific national or sectarian identities, and international institutions assuming certain sovereign responsibilities and their implicit power to decide upon the exception. The populations governed according to the logic of sovereignty were no longer confined to those included in the nation-state, but now also reached new categories of bodies (refugees, stateless persons, terrorists, insurgents, rogue states) who cut across geographic and national borders.

The logic of sovereignty proliferated as these new formations of actors deployed international law, state legislation, organisational and institutional norms, and forms of micropower to produce and govern refugees. These practices functioned as technologies of power as they established and normalised hierarchies and rules that depended upon the existence of an exception in the stabilisation and normalisation of emerging political orders. They continuously reproduced and recouped refugee bodies and shaped the spaces of their survival, at some times normalising their

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<sup>1</sup> Laclau, E. (2007). Bare Life or Social Indeterminacy? In Calarcom, M. & DeCaroli, S. (eds) (2007). *Giorgio Agamben: Sovereignty and Life* (pp. 11-22) (Stanford: Stanford University Press).

<sup>2</sup> Jennings, R. (2011). Sovereignty and political modernity: A genealogy of Agamben's critique of sovereignty. *Anthropological Theory* 11 (23), 23-61, p. 51.



exceptional treatment and at other times exposing the violence of such exceptionalism.

Hence, in the space of exception that produced the Iraqi refugee crisis, the invasion, sectarianisation of government, rise of the insurgency and sectarian militias, deployment of counter-insurgency operations in Iraq, and remote provision of humanitarian aid were all technologies of power that functioned according to the logic of sovereignty. They each constituted decisions on the exception in which whole sectors of the Iraqi population, based upon their biopolitical, ethnic, or sectarian categorisation, were denied legal protection and targeted with violence and displacement under the auspices of emergency, security, and threat they posed to competing visions of political order.

In the refugee spaces in urban centres in the Middle East, in the name of emergency due to claims of overburdened economic, security, and social infrastructures, UNHCR and host states developed techniques for managing the Iraqi refugee population – from shadow legal regimes for governing refugees, to shifting border controls and visa regimes, controlled access to economic and social rights, and strategies for re-emplacement. These techniques enabled decisions upon the refugees' relative inclusion or exclusion from their host societies and facilitated or denied their access to fundamental forms of protection. They demonstrated how international human rights and refugee law is intimately bound up in the practice and discourse of protection.

The grey zones of the border camps in practice did not always fall within the clear jurisdiction of particular states, as states invoked security and economic emergency as a reason to deny refugees admittance to their territories. These refugees were subjected to technologies of violence and expulsion, multiple displacements and re-emplacements, and humanitarian governance by UNHCR and aid organisations, all of which functioned as decisions on their lives. The camps became visceral and material markers of the spaces where law devolved into an exercise of pure sovereign power.

In the space of the resettlement programme, the ideology of vulnerability – both of the refugee body and the state border – enabled the development of an administrative regime that decided upon refugees' access to resettlement. The emergency posed by threats of terror served as the justification for ever-broadening categories of exclusion and inadmissibility. And the emergency posed by the overwhelming need for a durable solution served as the justification for parsing vulnerability into gradations of need in order to determine who would have access to the limited resettlement places actually made available for refugees.

The materialisation of the logic of sovereignty in the spaces of refugee bodies, border zones, and state territories therefore had critical consequences for the forms of life available to Iraqi refugees. Functioning as decisions on the exception, the technologies of power that produced these spaces enabled both proliferations of violence and discourses of protection, exclusion from citizenship and inclusion within the *polis*, and survival in bare life and securing livelihoods in the city.

The rise of necropolitical sectarian violence, the deaths of nearly 700,000 Iraqis following the invasion and emergence of the insurgency, the forced displacement of four million people, and the protracted states of legal ambiguity in which the refugees survived were all evidence of the ways in which the logic of sovereignty and the decision on the exception were materialised in the forms of life and death to which Iraqis were relegated. The drastic consequences of decisions that determined whether they would be treated within the framework of emergency and exception, or would be recouped within the ambit of state recognition and legal protection, demonstrated that sovereignty must be taken seriously in any discussion of the efficacy or purposes of refugee protection.

## **II. Exposing the normalisation of sovereign exceptionalism**

The persistence of the logic of sovereignty and the insistence of states on the exception of refugees from full legal or political protection in each of the spaces of

the Iraqi refugee crisis also suggested that, as Benjamin<sup>3</sup> and Agamben<sup>4</sup> predicted, the exception increasingly became the norm. The legal exceptionalism that led to the invasion of Iraq, the forced displacement of Iraqis to situations of prolonged legal insecurity in the Middle East, the creation of border camps, and the ideology of vulnerability in the resettlement programme were all practices that normalised and continuously reproduced particular relations of power within the international state system – between states, citizens, refugees, and UNHCR. However, where sovereign authority was expressed in terms of brute force, and fact merged with law in increasingly permanent spatial arrangements, the sovereign power of exception also became the source of its own undoing and delegitimacy. In the attempt to produce law, sovereignty was increasingly asserted through a violence unconstrained by law.

When the exception coincides with the norm, the state can no longer employ the exception as the legal fiction against which to ground the state's legitimacy, authority, and law. This begs the question whether in the wake of ever deepening exclusions, the state will be able continue to revive and produce its authority, as it did in the birth of the refugee regime in the early 20<sup>th</sup> century. Or has the process of sovereignty's own undoing been set in motion as the distinction between the refugee and the citizen has begun to blur in the permanent state of emergency that characterises so many current expressions of forced displacement? When all citizens become subjects of political exceptionalism, who can be constituted as the norm against which the refugee is continually reproduced?

The exception may also be delegitimised through acts of profanation and exposure. The performance of such actions might re-inscribe sovereignty in ways that highlight its factitiousness or constructedness, rather than its facticity and normalisation, as a means of using law to subvert itself.<sup>5</sup> While such acts may not contest the logic of sovereignty, they do challenge the normalisation of sovereign

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<sup>3</sup> Benjamin, W. (2003). On the concept of history (H. Zohn, Trans.). In H. Eiland & M.W. Jennings (Eds.). *Walter Benjamin: Selected writings*, Vol. 4 (1938/1940). Cambridge: Harvard University Press, p. 392.

<sup>4</sup> Agamben, G. (2005). *State of exception* (K. Attell, Trans.). Chicago: The University of Chicago Press (Original work published 2003), p. 5.

<sup>5</sup> See Butler, J. (1993). *Bodies that matter. On the discursive limits of 'sex'*. London: Routledge.

exceptionalism. As such, the challenges lodged by refugees and UNHCR to state sovereign decisions in the Iraqi refugee crisis were attempts to gain protection, admittance, and recognition within the state system, but they did so by inadvertently calling attention to how the normalisation of the violence of sovereign exceptionalism threatened to undo the logic of sovereignty itself.

Following the invasion and occupation of Iraq, contrary to the expectations of the MNF, the rise of the insurgency not only contested the violence of the invasion, but also gave way to new iterations and cycles of deepening violence. Insurgents fought the MNF and new Iraqi government for control over the direction of the Iraqi state. Attempting to gain a voice in the political process, the insurgent and sectarian militias appropriated the violence used against them in their own quests to define their national community through the expulsion of biopolitically determined “others”. This led to the increasingly violent counter-insurgency efforts that exposed the raw power of the state, no longer able to hide behind the cloak of law and regulation.

Additionally, UNHCR’s assumption of state-like roles in the governance of the Iraqi refugee population in host states in the Middle East, while reproducing the logic of sovereignty and structures of decisionism, at the same time facilitated the introduction of human rights protection norms in the process. In so doing, the violence of arbitrary state decisions on Iraqi refugees’ admittance, residence, and access to rights on these territories, was exposed and contested. This paved the way for concepts of shared responsibility to gain greater trenchancy in the face of sovereign prerogatives of exclusion. Such moves towards global governance, while perhaps not yet formalised in law, further interrupted the increasing normalisation of exceptionalism towards refugees in the region.

The emplacements of refugees in the border camps also revealed the violence of sovereign exceptionalism. Their presence in these liminal zones and UNHCR’s assumption of governance in these spaces materially contested the myth of social closure implicit in statist rationalities. Also, the refugees and UNHCR used the

encampments and conditions of bare life that they engendered to call attention to the violence of sovereign exceptionalism and its increasingly permanent manifestation at the borders. They mobilised these spaces to call for refugees' admittance or re-entry into the state system, a way out of the exception that had come to define so much of their existence in situations of protracted displacement.

The Iraqi refugee resettlement programme further produced opportunities for exposing and unworking the normalisation of the exception where the ideology and parsing of vulnerability had long rendered certain refugees hyper-visible and others invisible and illegible to resettlement states. In the Iraqi context, discourses of rights protection emerged in concert with human vulnerability, and gained increasing traction in the resettlement programme. The strategic use of resettlement policy, the introduction of more rights-based profiles for prioritising refugees for resettlement, the reproduction of vulnerability in resettlement states where rights were ostensibly protected, and the appropriation of resettlement criteria by refugees themselves all exposed the inherent violence in decisions based on ideologies of vulnerability.

### **III. Profaning sovereign borders**

Hence the materialisation of the logic of sovereignty through space demonstrated that the logic of sovereignty could migrate amongst the actors who performed it. But in the production of normalised hierarchies that quickly assumed the character of law, the power of the law multiplied with every iteration of its interpretation and application. This sometimes occurred in unexpected ways, not only exposing the violence of the logic of sovereignty, but at the same time often also reproducing it. Perhaps in this regard, as Butler contended, it is not possible to escape from discourse, and resistance to the violence of a particular discourse can

only occur in terms of that discourse itself.<sup>6</sup> Or as deBenoist noted, sovereignty from a Schmittian perspective is an inherent condition of human social organisation – not only an instance of the state but also of hegemony; the elimination of one sovereign instance will therefore always give way to the rise of another.<sup>7</sup> Foucault also theorised that resistance is intimately bound up in power and therefore can never exist in a position of exteriority to it,<sup>8</sup> thereby producing what Jennings called “the irresolvable Gordian object” in current critical scholarship on the problem of sovereignty.<sup>9</sup>

Such contentions, however, risk feeding the kind of capitalist realism and fetishisation of sovereignty that holds that there is no real alternative – that resistance can only end in resignation, accommodation, or “the melancholy of confinement”.<sup>10</sup> In order to resist such a trivialisation of politics,<sup>11</sup> it is therefore as important to take both refugees and UNHCR’s efforts as seriously as one might take the actions of sovereign states. But given how such efforts continuously reproduced the logic of sovereignty in new forms, the normative question then would be the one posed by Foucault when he asked, “What forms of power do we want to live with and which forms do we wish to limit or prevent?”<sup>12</sup> Or as Cubero asked, how can one embrace the state, but at the same time disarticulate its homogeneity and lay bare the structures of its power?<sup>13</sup> More specifically, in order not to participate in the fetishisation of sovereignty, one must investigate whether it is possible to both engage with the logic of sovereignty and yet also subvert the forms of violence that it enacts. Can one enact new forms of governance or political ordering without

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<sup>6</sup> Ibid., p. 122-123.

<sup>7</sup> de Benoist, A. (1999) What is sovereignty? (J. Kostova, Trans. from “Qu’est-ce que la souveraineté?” *Éléments*, No. 96, 24-35), p. 111.

<sup>8</sup> Foucault, M. (1978). *The history of sexuality: An introduction*, vol. 1 (R. Hurley, Trans.) London: Penguin Books) (Original work published 1976), p. 95.

<sup>9</sup> Jennings, R. (*supra* note 2).

<sup>10</sup> Gilroy, P. (6 Feb 2012). Subject in the kettle: Notes on citizenship, dissent, and securitocracy. Oecumene *Opening the Boundaries of Citizenship* Conference, 6-7 February 2012. UK: The Open University.

<sup>11</sup> Ibid.

<sup>12</sup> See Thorpe, S. (2012, February 7). In defense of Foucault: The incessancy of resistance. *Critical Legal Thinking: Law and the Political*, at <<http://www.criticallegalthinking.com/?p=4873#more-4873>>.

<sup>13</sup> Cubero, C. (2012, July 12). De-fetishising EU immigrant integration: Transnationalism as integration. *Uncertainty and Disquiet*. European Association of Social Anthropologists 12<sup>th</sup> Biennial Conference. 11-13 July 2012. Paris: University of Paris Ouest Nanterre La Défense.

creating new forms of violence and exclusion? And does the denaturalisation of sovereignty open up these kinds of possibilities for ethically reconceptualising the nation-state?<sup>14</sup>

Some of the forms of de-territorialised sovereignty and possibilities for global governance that emerged in the Iraqi refugee crisis, while certainly reproducing the logic of sovereignty on many occasions, and serving as regulatory cover for governing spaces of exception, might also have opened up avenues for thinking through such questions. Most prominently, the forms of refugee protection that did emerge in these otherwise rightless spaces demonstrated how it might be possible to at least expose the violence of sovereign decisionism and to contest the grounding of sovereign power as solely within the state. In this sense, refugees became “critical beings”,<sup>15</sup> both central to and disruptive of the processes that created and governed them.

UNCHR’s attempts to meet the demands of its expanding mandate and to promote protection beyond the interests of sovereign states demonstrated how international norms of refugee protection might find greater purchase. Through power-sharing arrangements with states, UNHCR was able to apply principles of international refugee law, promote *de facto* access to economic and social rights, and secure states’ quiet acquiescence to refugee residence on their territories. Such forms of shared responsibility denaturalised the exceptional treatment of refugees and contested the many forms of state violence that circumscribed their lives.

However, the possibilities and promise of such moves towards global governance and complementary responsibilities for refugees in the future must always be tempered by a clear recognition of the violence inherent in such forms of governance. The bureaucracies developed to enable humanitarian protection and governance also contained the seeds of sovereignty as they enacted decisions on

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<sup>14</sup> See Stauffer, J. (2004). The fiction of the state of nature in real time: The social contract, international human rights and the refugee. In P. Tuitt & P. Fitzpatrick (Eds.). *Critical beings: Law, nation and the global subject* (pp. 3-18). UK: Ashgate.

<sup>15</sup> Tuitt, P. & Fitzpatrick, P. (2004). Introduction. In P. Tuitt & P. Fitzpatrick (Eds.). *Critical beings: Law, nation and the global subject* (pp. xi-xix). UK: Ashgate, p. xi.

inclusion and recognition, and therefore also exclusion and lack of status. It will be critical for UNHCR to acknowledge and contend with this reality, foremost by assuming responsibility for its decisions and creating mechanisms for greater institutional accountability to refugees. Yet it must find ways to do so that do not further de-politicise refugee spaces in the quest for legal closure and determinacy.

The spaces of the Iraqi refugee crisis therefore revealed that in the face of the persistence of sovereignty, it was nonetheless possible to envision possibilities for finding responsibility for refugee protection beyond the sovereign state. It became conceivable that the “human” in human rights could be revived, as new forms of refugee identity emerged that exposed and contested the status of the citizen as the privileged bearer of rights.<sup>16</sup> However, in securing greater protections within the frame of sovereignty, in limiting certain forms of power and increasing institutional accountability through law, there is always an inherent risk that such projects aimed at legal closure also depoliticise refugee spaces, enabling the continued normalisation of the logic of sovereignty. The question remains therefore whether it is possible to find new ways of political ordering and securing human protection that do not reproduce the violence of sovereignty. Perhaps such possibilities may be found in the slippages, fractures, and contingent spaces of sovereignty that are revealed as it is materialised in the spaces of refugee lives. The sites of contestation that result might provide the kinds of ruptures necessary for envisioning this kind of future.

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<sup>16</sup> Perera, S. (2002). What is a camp...? *Borderlands* 1(1), para. 61.



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