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Orientalism and International Law: The Middle East as the Underclass of the International Legal Order

JEAN ALLAIN*

Abstract
Taking Edward Said's 'orientalist' thesis as a starting point, this piece considers the manner in which the 'Orient' has been transformed by the West into a zone wherein the dictates of international law need not hold. By giving voice to a number of cases – the regime of the Suez Canal, the creation of the state of Israel, aggression during the Lebanese and two gulf wars, UN-imposed Iraqi sanctions, and states of emergency in Syria and Egypt – it becomes evident that international law has been utilized in an instrumental manner. The outcome is a region which has been treated as the underclass of the international community, wherein international law has been, in fundamental instances, interpreted arbitrarily, applied selectively, and enforced punitively.

Key words
international legal theory; Middle East; orientalism; post-colonialism; third-world approach

No other publication has had as much impact on area studies in the last 25 years as that of the late Edward Said's *Orientalism*. In his 1978 work, Said sought to demonstrate how European cultural imperialism of the late eighteenth and nineteenth centuries paved the way for what would follow: the European colonization after the First World War of 85 per cent of the globe.[1] What Said demonstrated is the manner in which the orientalist – those individuals who wrote about the Orient (i.e. Africa, Asia, and the Middle East), such as travellers and scholars – determined and, hence, established Western 'knowledge' regarding these areas. If we take Said's thesis seriously and ask ourselves the extent to which there is interplay between the discipline of international law and manifestations of 'orientalism', I believe that a much clearer understanding emerges of the manner in which the stage was set to allow international law to be utilized in an instrumental manner so as to achieve the continuing subjugation of various regions of the world. What follows is a *tour d'horizon* which seeks to demonstrate the qualitatively different manner in which

* Assistant Professor of Public International Law, American University in Cairo. The following is an amplification of the orientalist theme which underlies, in part, the thesis of my monograph, *International Law in the Middle East: Closer to Power than Justice* (2004). I wish to thank, with appreciation, Steven Blockmans, who approached me after I presented a lecture on the issue at the Asser Institute in August 2002, for inviting me to submit a piece to the *Leiden Journal of International Law* on my understanding of the manner in which international law is perceived in the Middle East.

1. E. Said, *Orientalism: Western Conceptions of the Orient* (1995), 122.

international law has been applied and interpreted in one such region – the Middle East – as a result of the effects of orientalism. What emerges is a sense that much as the underclass in a domestic legal system feels the punitive, repressive, and selective nature of law, so, too, the local population of the Middle East experiences international law not as a shield but as a sword. As a result, international law in the Middle East lacks legitimacy.

When this lack of legitimacy in superimposed on one of the most highly militarized regions of the world, the result is a powder keg with an extremely short fuse. As the various undertakings of international law are the only future-orientated limitations to which sovereign states have consented in their interaction on the international plane, the de-legitimization of international law means that few constraints exist on state action in the Middle East. As a result, the history of the modern Middle East is one fraught with bloodshed brought on by an unwillingness to accept the fundamental tenets of international law: the peaceful settlement of international disputes and the prohibition on unilateral use of force. While international law may be perceived in the Western world as neutral and benign, as a legitimate means of regulating and maintaining international order, in the Middle East it is understood to be little more than a tool of the powerful, used to coerce and oppress. This short piece seeks, by examining international law through the lens of the Middle East, to understand the qualitatively different manner in which international law continues to be applied and interpreted in the region: not in the interest of the local inhabitants, but in line with the wishes and/or dictates of the West.

1. Orientalism and international law

To what extent has international law played its part in the 'long and slow process of appropriation by which Europe, or European awareness of the Orient, transformed itself from being textual and contemplative into being administrative, economic, and even military'?[2] While Edward Said is interested in the front-end of the European imperialist venture – the writings of the 'orientalists' of the late eighteenth and nineteenth centuries whose studies and writings projected the East as backward, degenerate, and uncivilized, thus giving justification to European colonial and imperial ventures – the role of international law is to be manifest in the outcome of that process: the actual, physical, taking of the Orient. International law, in the guise of capitulation agreements, the League of Nations mandate system, and even in the UN Security Council sanctions regime, has been a major factor in turning the Orient 'from alien into colonial space'.[3] Where a nexus exists between the orientalist thesis and international law it is to be found in the use of 'facts' propagated by orientalists which allowed for the great divide to emerge in international law between 'civilized nations' and 'backward territories'.[4] Such justifications lent weight to the

2. *Ibid.*, at 210.
3. *Ibid.*, at 211.
4. For instance, less than eighty years ago, M. F. Lindley could explain that such backward territories were understood to extend, at the extreme, to those that were 'entirely uninhabited; and it clearly includes

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development of an arsenal of legal justifications for, what in polite company might be called, 'appropriation': including *terra nullius*, protectorates, mandates, and trusteeships. As such, the orientalist project laid the groundwork by demeaning those foreign to the West – the 'other' – so that imperial ventures could persist unimpeded. That realpolitik should manifest itself in actual terms in this region more than elsewhere is testament to the manner in which orientalism has paved the way for a calculus of state action devoid of any consideration of the interests and aspirations of the people who actually live in the Middle East.

Edward Said's thesis emphasizes the Gramscian concept of 'hegemony' wherein ideas are not enforced through coercion, but through consent. 'In any society not totalitarian', Said explains, 'certain cultural forms predominate over others, just as certain ideas are more influential than others.'[5] Orientalist writings of past centuries have thus built a twofold consensus which persists to this day: one, 'the ideal of European identity as a superior one in comparison with all the non-European peoples and cultures', and two, that European knowledge about the Orient overrides 'the possibility that a more independent, or more sceptical, thinker might have had different views on the matter'.[6] Beyond the intellectual debt owed to Antonio Gramsci, Said also pointed to the work of Michel Foucault, and especially to his concept of 'discourse', to show how the orientalist venture was established as the West's 'corporate institution for dealing with the Orient'. Said elucidates: 'dealing with it [the Orient] by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, *Orientalism as a Western style for dominating, restructuring, and having authority over the Orient*'.[7]

The impact of Edward Said's orientalist thesis, it has been noted, is that it 'singlehandedly inaugurates a new area of academic inquiry: colonial discourse',[8] while acting as a catalyst for the development of postcolonial theory.[9] Postcolonial theory, for its part, as Leela Gandhi notes, 'is a form of resistance to the mystifying amnesia of the colonial aftermath. It is a disciplinary project devoted to the academic task of revisiting, remembering and, crucially, interrogating the colonial past'.[10] Fundamentally, orientalism forces one to go back and re-evaluate those things which appear benign and neutral and to consider them critically so as to flush out any

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territory inhabited by natives as low in the scale of civilization as those of Central Africa'. See M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926), v.

5. Said, *supra* note 1, at 7.
6. *Ibid.*
7. *Ibid.*, at 3 (emphasis added). To make this clear, Said later writes:

> Now because Britain, France and recently the United States are imperial powers, their political societies impart to their civil societies a sense of urgency, a direct political infusion as it were, where and whenever matters pertaining to their imperial interest abroad are concerned. I doubt that it is controversial, for example, to say that an Englishman in India or Egypt in the later nineteenth century took an interest in those countries that was never far from their status in his mind as British colonies. To say this may seem quite different from saying that all academic knowledge about India and Egypt is somehow tinged and impressed with, violated by, the gross political fact – and yet *that is what I am saying* in this study of Orientalism. (*Ibid.*, at 11 (emphasis in original)).

8. P. Williams and L. Chrisman (eds.), *Colonial Discourse and Post-Colonial Theory: A Reader* (1994), at 5.
9. See L. Gandhi, *Postcolonial Theory: A Critical Introduction* (1998), 64.
10. *Ibid.*, at 4.

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institutional bias. Whereas critical legal scholarship at the municipal level has sought to change and, in many ways, has been successful in changing laws which were demonstrably biased against, for instance, racial groups or women, a critical examination regarding issues of international law appears to be at a more primitive stage, where, before strategies of change can be considered and given effect, first what needs to transpire is a simple exposition of institutional bias. To that end, the 'third-world approach' to international law has been instrumental in seeking to bring to the fore, very much in line with the postcolonial project, previously suppressed narratives of history to allow for an expanded space in which international law can be considered and critiqued. Thus the value of the third-world approach, and of the insights of Said's *Orientalism*, is that they seek to expand the limits of the discipline of international law so as to incorporate voices and understanding that go beyond the eurocentric origins of public international law, thus making the discipline truly 'international'. With the third-world approach, new historical veins are mined, and those facts are placed against the international legal standards of the day to seek to challenge the dominant discourse and to demonstrate the manner in which international law has been used and abused. Karin Mickelson explains:

> identifying a Third World approach as a theoretical position within international legal discourse means reclaiming a voice that has long been there, but to which very little serious attention has been paid. It is essential to bear in mind that the Third World approach to international law must be seen as lying at the intersection of two different discourses. One is the discourse of traditional international law and international legal scholarship. Here it is part of the story of the development of international law. The other discourse is that of decolonization: the full, broad panoramic view of a history of oppression and transformation. Here it can be seen as part of the story of anti-colonial and post-colonial struggle. In some ways, a Third World approach to international law is the untold part of both these stories. That which has remained somewhat marginal, while not entirely overlooked.[11]

Where the Middle East is concerned, this task of focusing on suppressed narratives has been easier of late, for instance, with regard to the creation of the state of Israel and the plight of Palestinian refugees. The 'New Historiography' movement in Israel has fundamentally rewritten the history of both the 1948 war and the forced transfer and expulsion of Palestinians during the consolidation of the state of Israel during the period of 1947–9.[12] In other instances, it has meant piecing together from various

11. K. Mickleson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', (1998) 16 *Wisconsin International Law Journal* 361–2. Writings within this stream include: C. Weeramantry and N. Berman, 'The Grotius Lecture Series', (1999) 14 *American University International Law Review* 1516–69; and A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth-Century International Law', (1999) 40 *Harvard International Law Journal* 1–80. On the Middle East, see G. Bisharat, 'The Legal Foundations of Peace and Prosperity in the Middle East: Peace and the Political Imperative of Legal Reform in Palestine', (1999) 31 *Case Western Reserve Journal of International Law* 253–89; and A. Shalakany, 'Privatizing Jerusalem: Or of Law, Religion and Garbage Collection', (2002) 14 *Leiden Journal of International Law* 431–44. Finally, see T. Ruskola, 'Legal Orientalism', (2002) 101 *Michigan Law Review* 179–234.

12. See the chapter entitled 'The New Historiography: Israel and its Past', in B. Morris, *1948 and After: Israel and the Palestinians* (1994); and more generally E. Rogan and A. Shalim (eds.), *The War for Palestine: Rewriting the History of 1948* (2001).

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sources threads which, when brought together, form a coherent narrative to which legal standards of the day can be applied. When these two streams converge – the subjugation of 'other' through the orientalist project and the raising of suppressed narratives – what emerges is a sense that, as a result of the establishment of an orientalist substructure, international law in the Middle East has been applied and interpreted in a qualitatively different manner. Even if one were to apply a pure positivist interpretation of the law – that international law is simply what states say it is – the application of international law in the Middle East fails. As a result of the lack of consistent and uniform application and interpretation of international law in the Middle East, in essence de-legitimatizing its fundamental, normative, tenets, the law has failed to gain a semblance of regulating the region. This lack of uniformity which contributes to seeing a qualitatively different manner of application and interpretation of international law in the region is manifest in the following examples which have made of the region the underclass of the international legal order. First, consideration is given to the selective manner in which the Suez Canal was governed under tutelage of the United Kingdom from 1888 to 1956, as well as to that state's disregard for international law in imposing its Zionist policy in the 'special' case of Palestine. In these two cases, vestiges of orientalist language lingered and provided justification for the projection of the British will on to the region. Orientalism, having laid the groundwork, allowed the Middle East to develop into an underclass of the international community wherein the laws can be enforced in a selective manner, imposed punitively, and, where 'oriental despots' are concerned, passed over in silence. Examination thus turns to a number of issues: to the selective enforcement of international law by the UN Security Council as against the prohibition regarding aggression; to the punitive nature of the UN sanctions regime imposed on Iraq; and, finally, to the ability of Egypt and Syria to maintain perpetual states of emergency and to torture with impunity is also considered to demonstrate how, as with the other items noted, the law in the books dictates one outcome, while the reality – and realism – of a Middle East variety, in effect, creates another.

2. The development of the underclass

The ramifications of this lack of uniform application of international law in the Middle East means that law is to be considered instrumental in nature and simply another political tool of statecraft used by the strong against the weak. This alignment of international law in the Middle East closer to power than justice means that law loses much of its independence from international politics. No longer can one clearly identify, in this region, a set of principles which should be acted on – a normative framework. Instead of there being applied overriding legal principles – acting in good faith, the exclusion of the unilateral projection of uses of force, the peaceful settlement of disputes, and so on – the region is left, instead, to its own devices, to the whims of each state's perceived interest. In an anecdotal manner, this is best exemplified by the reaction to the claim by Boutros Boutros-Ghali, when he was acting as the Egyptian Minister of State for Foreign Affairs in 1978, that

the forcing down of a Kenyan civilian airliner, in retaliation for the storming of an Egyptian aircraft in Nairobi, was tantamount to piracy. The Egyptian Prime Minister at the time, Mahduh Salim, rebuked him: 'Dr. Boutros, forget that you were a professor; international problems are not handled by international law'![13] And yet such instinctive reactions to the problem of international relations appear to be the bedrock of actions in the region. This should come as little surprise if one considers the evolution in the region of the disregard for fundamental principles of international law.

2.1. Selective application and interpretation

When legal scholars today consider the regime of the Suez Canal as manifested in the 1888 Constantinople Convention, little do they realize that it only truly gains effective legal footing more than 90 years after its signing. Although the maritime powers of the late 1800s were prepared to ratify an international agreement regulating transit through the Suez Canal, Britain effectively suspended the coming into force of the 1888 Constantinople Convention by attaching a reservation, to which France objected, meant to allow for the compatibility of provisions of the Convention with its occupation of Egypt. The 'exceptionalism' of the application of international law, which is a hallmark of events which take place in the Middle East, is manifest in the fact that it took the Entente Cordiale of 1904 between France and Britain – wherein they agreed to settle *their* outstanding claims with regard to Morocco and Egypt – to allow the coming into force of the Constantinople Convention. Yet the 1904 agreement simply allowed Britain to consolidate its control over Suez and to treat the canal as an imperial asset, having been in military occupation of Egypt since 1882. In this manner, Britain did not feel compelled to follow the dictates of the Convention; instead it governed the canal in line not with the 1888 Convention but with its imperial interest. Thus it allowed Italy to use the Canal in pursuit of its invasion of Abyssinia, despite Italy having been branded the aggressor by the League of Nations. Britain would then about-turn and exclude Italy from transiting the Isthmus of Suez, as it would the Central, and later Axis, Powers during the two world wars, effectively opening the Suez Canal to enemy attack. Despite the introduction of prohibitions against the use of force found in the Charter of the United Nations, Britain would maintain an imperial attitude towards 'its' Canal in the wake of Egyptian independence, as it masterminded with France and Israel an act of tripartite aggression against Egypt. Despite Egypt being well within its legal right in nationalizing the Suez Canal Company in 1956, the United Kingdom was prepared to forgo the fundamental building block of the international system – the prohibition against aggression – so as to attempt to re-establish its privileged position in the Middle East.[14]

13. B. Boutros-Ghali, *Egypt's Road to Jerusalem: A Diplomat's Story of the Struggle for Peace in the Middle East* (1997), 64.
14. Ultimately, it was not until the coming into force of the 1979 peace treaty between Egypt and Israel that the 1888 Constantinople Convention truly became operational, that is as per its Article 1: 'free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag'.

The extent to which the orientalist project denigrated the local inhabitants in the eye of the British can be seen, for example, as the basis for policy decisions by Anthony Eden's administration during the Suez crisis. The Orient, as Said noted, is something which remains 'fixed in time and place for the West',[15] and as such the binary opposition which has developed through Western projections of the East, of the 'European' and the 'other', allowed the British to disregard Egypt's right of nationalization, and instead seek to justify its actions on the basis of Egyptian incompetence and lack of a civilized demeanour. The day after the nationalization of the Suez Canal Company by the Egyptian president, Gamal Abdel Nasser, the British Cabinet met. The minutes of that meeting reflect that the Cabinet understood that Nasser had been acting legally, that from 'a narrow legal point of view his action amounted to no more than a decision to buy out the shareholders'. The minutes of the Cabinet meeting continue:

> Our case must be presented on wider international grounds: our argument must be that the canal was an important international asset and facility and that Egypt could not be allowed to exploit it for a purely internal purpose. The Egyptians had not the technical ability to manage it effectively; and their recent behaviour gave no confidence that they would recognize their international obligations in respect of it.[16]

This being the case, the British sought to establish various justifications for military intervention, including the initiation of 'Operation Pile-up', which sought to demonstrate that Egyptians were incapable of managing the Suez Canal. On 16 November 1956, the British sent 50 ships to the Mediterranean terminus 'in an attempt to swamp the piloting system' of the Canal. British historians relate, however, that the operation 'was a failure as the Egyptian pilots proved capable of clearing this increased Canal traffic in a day'.[17]

The orientalist project having for more than two hundred years established the 'other' as inferior, whose 'behaviour gave no confidence', meant that Britain could consider the Canal as its – imperial – asset and manage it in its interest, regardless of the dictates of international law. In situations where the Canal functioned in line with the Constantinople Convention, it was due to the Convention being in line with British colonial policy, not the other way around. The groundwork of the orientalist project, having been set down for centuries, allowed Eden and his Cabinet to continue to project the orient as backward and open to appropriation. But in the case of Britain's masterminding of the 'tripartite aggression' (the term, quite correctly, given in the Middle East to the UK, French, and Israeli invasion which, in the West, is given the benign designation of 'the Suez Crisis') aimed at the Suez Canal in 1956, the use of force proved to be at its peril.

15. Said, *supra* note 1, at 108.
16. See Document 3.1, Cabinet Discussion of Initial Reactions to the Nationalization of the Suez Canal, 27 July 1956, in A. Gorst and L. Johman, *The Suez Crisis* (1997), 58.
17. *Ibid.*, at 84; see also D. A. Farnie, *East and West of Suez: The Suez Canal in History, 1854–1956* (1969), 719, 743.

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2.2. Blatant disregard

The British attitude during the evolution of the legal regime of the Suez Canal is indicative of the qualitative exceptionalism of the application and interpretation of international law as it relates to the Middle East. That is to say, where the interests of European powers, such as those of Britain, collided with their obligations under international law, more often than not they did not let those obligations limit their action; instead such powers were willing to forgo the standards of behaviour established by international law. This willingness to forgo legal obligations is brought home to us again when consideration is given to the manifest disregard for international law demonstrated by Britain in support of a Zionist policy in Palestine as part of its larger imperial aims in the region. With the acquiescence of the leading states during the interwar period, Britain imposed its Zionist policies in Palestine in clear disregard of the dictates of international law. Britain's willingness to give voice to the Balfour Declaration in 1920–3, despite not having settled the peace with Turkey, meant that, in Palestine, Britain was in violation of the laws of occupation. From the 1920 San Remo Conference – which determined that Britain would gain a League of Nations' mandate for the region – onwards, Britain no longer felt compelled to heed the dictates of the laws of occupation, instead treating Palestine as territory under its control. It was only after the ratification of the 1923 Treaty of Lausanne by Turkey that Britain received the seal of approval of the League of Nations to continue its Zionist policies, as it was officially granted the mandate for Palestine which incorporated the Balfour Declaration in its preamble.

The orientalist undertones of the mandate system itself were manifest in the description of the system as seeking to assist those 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world' by providing them with the tutelage of 'advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility'. Yet where the mandate for Palestine was concerned, the British did not feel that they had even to respect the obligations of Article 22 of the Covenant of the League of Nations, which required that Britain ensure the 'well-being and development' of the people of Palestine, thus forming 'a sacred trust of civilization' between itself and the local inhabitants. In the case of Palestine, Britain forwent the interests of the vast majority of the local population in order to accommodate the wishes and aspirations of European Jewry to establish a national home in the shadow of the biblical Mount Zion. The imposition of Britain's Zionist policy meant that by the end of the Palestine mandate and the proclamation of the state of Israel in 1948, a critical mass of Jewish immigrants had established themselves in Palestine. The ability of Israelis to fight off the challenge by Arab states in 1948, coupled with recognition by key states of the international community, meant that Israel had constituted itself as an independent state. While the establishment of the state of Israel as a member of the international community of states took place well within the boundaries of international law, the alignment of international law with the wishes of the Western states meant that Britain's Zionist policies could be undertaken in clear disregard for the principles and the wording of various international instruments. This realization was evident to those formulating British foreign policy, as is made plain by the following letter

from Arthur Balfour to his Foreign Secretary, George Curzon, in August 1919:

> The contradiction between the letters of the Covenant and the policy of the Allies is even more flagrant in the case of the 'independent nation' of Palestine than in that of the 'independent nation' of Syria. For in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country, though the American [King-Crane] Commission has been going through the form of asking what they are.
>
> The Four Great Powers are committed to Zionism, and Zionism, be it right or wrong, good or bad, is rooted in age-long traditions, in present needs, in future hopes, of far profounder importance than the desire and prejudices of 700,000 Arabs who now inhabit that ancient land.
>
> In my opinion that is right . . .
>
> I do not think that Zionism will hurt the Arabs, but they will never say they want it. Whatever the future of Palestine it is not now an 'independent nation', nor is it yet on the way to become one. Whatever deference should be paid to the views of those living there, the Powers in their selection of a mandatory do not propose, as I understand the matter, to consult them. *In short, so far as Palestine is concerned, the Powers have made no statement of fact which is not admittedly wrong, and no declaration of policy which, at least in the letter, they have not always intended to violate.*[18]

The seeds of orientalism found in the mandate system itself point to Western projection of the other as uncivilized, but particularly with respect to British foreign policy. In Palestine, Balfour speaks for the 'Arabs', professing to know what is best for 'them', which means going 'against the desire and prejudices of 700,000 Arabs', since Britain's wishes (and those of the 'civilized' world) are of a 'far profounder importance'. If this means blatantly disregarding the dictates of international law, so be it, as the civilizing process must proceed unhampered.

2.3. Selective enforcement

The manifestations of the orientalist project linger to this day, as it allows for a special form of realism to be acted upon, one which, having established a distinction between West and East, civilized and uncivilized, and so on, frees states to act, more often than not, in pure self-interest. Yet for those living in the Middle East the question remains: what normative framework holds: the exceptionalism made possible by an orientalist substructure or the dictates of international law? One need not look too far, since the fundamental underpinning of the international legal order – the prohibition against aggression – has been selectively dealt with in the Middle East. Consider the ten-year period between the start in 1980 of the first Gulf War, that between Iran and Iraq, and the lead-up to the UN-approved campaign of the US-led coalition against Iraq in the second Gulf War. The differing responses of the UN Security Council in reaction to invasions and occupation demonstrate the extent to which the application of international law in this region is subservient to the geopolitical interests of Western states, above all, those of the United States (which replaced Britain as the dominant external actor in the region after the Suez debacle of 1956). During the first Gulf War – the Iran–Iraq War (1980–8) – the Iraqi

18. See D. Ingrams, *Palestine Papers, 1917–1922: Seeds of Conflict* (1972), 73 (emphasis added).

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invasion of Iran was met with a muted response by the international community, which, for the longest time, was unwilling to act to restore international peace and security. Despite the war having started in 1980, the Security Council only acted under the rubric of Chapter VII of the UN Charter, which authorized the use of any means to restore international peace and security, by passing Resolution 589 in 1988. Although this resolution ultimately led to the cease-fire which ended the conflict, during the interim eight years of inaction more than a million people died and major violations of both *jus ad bellum* and *jus in bello* transpired.

In contrast to the passive neglect of the Security Council during the Iran–Iraq War, its neglect during the 1982 Israeli invasion and subsequent occupation of Lebanon was active, as the United States blocked, through recourse to its veto power on nine separate occasions, any move by the Council to seek to restore international peace.[19] In this situation, where Israel's aggression continued, through its occupation of southern Lebanon, until 2000, the region witnessed the UN Security Council being forced to forfeit its collective security obligations through the active policy of the United States seeking to exclude Lebanon from the UN agenda. By contrast, Iraq's invasion of Kuwait in 1990 marked a watershed in the ability of the Security Council to deal with issues of international peace and security. Not only did a Security Council resolution authorize a US-led multinational force to evict Iraqi forces from Kuwait in 1991, it also imposed various measures such as an economic embargo, a disarmament regime, and the establishment of the Iraq–Kuwait border, in a bid to restore international peace and security. The irony was that throughout the subsequent decade, when the Security Council was asserting itself in an overwhelming manner against Iraq for its occupation of Kuwait, Israel remained in occupation of southern Lebanon. Such selectivity in enforcement reinforces the perception regarding the qualitative exceptionalism of the Middle East, whereby the dictates of the powerful (given self-legitimacy through the orientalist project) are to override agreed norms of behaviour as established by international law.

2.4. Punitive nature

The punitive nature of international law is to be seen in the UN sanctions regime imposed on Iraq as a result of its invasion of Kuwait in 1990. While law may be a coercive tool meant to modify the behaviour of states, the cumulative effects of the UN sanctions regime imposed on Iraq went beyond what could be considered as justifiable punishment, as the effects of the sanctions regime appeared to transgress the *jus cogens* imperative prohibiting crimes against humanity. The comprehensive sanctions regime imposed by the UN Security Council via Resolution 661 had originally been maintained to force Iraq out of Kuwait; when that was achieved in 1991 by force of arms, the sanctions were seen as a part of the attempt by the Security Council to restore international peace and security in the region. By 1997, the regime had been held hostage by the United States, which indicated that the sanctions would remain in place until the Iraqi president, Saddam Hussein, was

19. See A. Patil, *The UN Veto in World Affairs, 1946–1990: A Complete Record and Case Histories of the Security Council's Veto* (1992).

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replaced as the head of state. The sanctions imposed on Iraq in 1990 were in the guise of a comprehensive embargo that originally allowed only for an exception for medical supplies. After the Second Gulf War, as a result of a UN report that found that the coalition bombing had relegated Iraq 'to a pre-industrial age', the Security Council modified its regime to allow for the import of food, agricultural equipment, and items related to water purification and sanitation.[20] Further, the Security Council introduced the 'oil-for-food' programme in an attempt to mitigate the effects of the sanctions on the general populace. Although this programme, which allowed for the selling of oil to assist Iraq in purchasing items which were exempt from the embargo, was established in 1991, it only became operational in 1996. Despite these modifications to the sanctions regime, the UN Secretary-General noted in a March 2000 report that even if the oil-for-food programme was 'implemented perfectly, it is possible that the efforts will prove insufficient to satisfy the population's needs'.[21]

While the needs of the population had been dire, as it became clear that hundreds of thousands, if not millions, of Iraqi deaths were a direct result of the sanctions regime, the modifications to the sanctions under the oil-for-food programme simply ended the free fall of the population from affluence to poverty and, to a large extent, stabilized the effect of sanctions at their 1996 level. This did not preclude what amounted to a children's holocaust whereby between 1991 and 1998 it was estimated that the death of at least 100,000, but more probably 227,000, children under five took place, of which three-quarters could be attributed to the consequences of UN sanctions.[22] Although the ability to impose sanctions is well within the rights of the UN Security Council as the principal agent for ensuring international peace and security, by their cumulative effect the sanctions went beyond being punitive to being criminal. This is so since the effects of sanctions transgressed the *jus cogens* prohibition regarding the committing of crimes against humanity. It appears that the effects of the sanctions regime were of such magnitude that they most resembled the crime against humanity known as 'extermination', as elaborated in the Statute of the International Criminal Court. A 'crime against humanity', as spelled out at Article 7 of the Statute, is to be considered an act which is 'committed as part of a widespread or systematic attack directed against any civilian population'; while the concept of 'extermination' includes the 'intentional infliction of conditions of life ... calculated to bring about the destruction of part of a population'. Although the Security Council attempted to mitigate the worst elements of the humanitarian catastrophe which the sanctions regime had brought about, its own studies made it clear that these modifications did not reverse what has been the humanitarian plight of the Iraqis for more than a

20. UN Security Council, Report to the Secretary-General on Humanitarian Needs in Kuwait and Iraq in the Immediate Post-crisis Environment by a Mission to the Area Led by Mr. Martti Ahtisaari, Under-Secretary-General for Administration and Management, dated 20 March 1991, annexed to a letter from the Secretary-General addressed to the President of the Security Council, UN Doc. S/22366, dated 20 March 1991, para. 8.

21. As quoted in Commission on Human Rights, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights: Working Paper Prepared by Mr Marc Bossuyt, UN Doc. E/CN.4/Sub.2/2000/33, 21 June 2000, para. 62.

22. D. Cortright and G. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (2000), 46.

decade. When the definition of extermination as 'intentional infliction of conditions of life ... calculated to bring about the destruction of part of a population' is considered, it is clear that, after more than a decade of sanctions which killed anywhere from hundreds of thousands to nearly two million people, the regime imposed on Iraq went beyond simply being punitive to being what can rightly be considered a crime against humanity.

That the international community was actively complicit in this crime and that the United Nations was the medium by which Anglo-American coercion was imposed speaks volumes as to the manner in which the orientalist project denigrated, and to an extent dehumanized, the Iraqi people. The projections of the Orient as being 'out there', as being alien, meant that these Western states could carry out with little discomfort a near-genocidal campaign against a community which was seen as being in direct opposition to themselves. As such, the normative values even of a non-derogable nature could be sidestepped in order to teach – as a parent does a child – Saddam Hussein a lesson.

2.5. Internalization of the precepts of international law

Having examined the way in which international law has been used in an instrumental manner by states outside the Middle East, consideration now turns to how states in the region have internalized the lessons learnt regarding the application and interpretation of international law. To consider the human rights records of two Middle East states which have maintained near-permanent states of emergency in violation of their international obligations is to reinforce the notion that, to use Karl Marx's term, 'oriental despots' live in a world apart – the uncivilized world – where respect for human rights need be of no consequence to the West.[23] Thus, without a serious attempt to hold Middle East states accountable, the human rights situation in the region is lamentable. In the same manner in which power trumps the dictates of international law on the international plane, it is clear that the same lack of respect for the rule of law exists when one examines the record of various administrations in the region. The situations in Egypt and Syria, for instance, highlight the extent to which the governing elite suppresses individual human rights so as to ensure the maintenance of their rule, in their case by reference to a perpetual state of emergency. By considering the standards which the UN Human Rights Committee has established in its General Comment 29 regarding derogation from human rights in states of emergency,[24] it is clear that both Egypt and Syria maintain states of emergency in violation of their obligations under the International Covenant on Civil and Political Rights, and yet are perpetually allowed to do so.

Such perpetual states of emergency have allowed for the growth, in both Egypt and Syria, of an extra-constitutional security apparatus which is immune from judicial oversight. As a result, mass and systematic violations of the non-derogable

23. See Said, *supra* note 1, at 153.
24. See Human Rights Committee, General Comment No. 29 – States of Emergency (Article 4), UN. Doc. CCPR/C/21/Rev.1/Add.11, 31 Aug. 2001.

rights enshrined in Article 4(2) of the International Covenant on Civil and Political Rights take place with growing sophistication. In both Egypt and Syria the imposition of states of emergency has allowed the Assad and Mubarak administrations to consolidate and maintain power by closing off peaceful means of political change. Using the threat of 'Islamists' as a basis, both Egypt and Syria have sought to criminalize dissent and to subject those who oppose their administrations to the worst types of human rights abuses. Under perpetual states of emergency, there has been a transformation of the institution of government in both states whereby power is vested disproportionately in the executive organ at the expense of the judiciary. As a result judges have a diminished ability to oversee the work of the 'security forces' – that arm of the executive branch which, in effect, acts to ensure the survival of the status quo. The result of this limited judicial oversight in both Egypt and Syria has lead to systematic and widespread violations of non-derogable rights including the right to life and the prohibition against torture. The work of the various actors within the UN system of human rights protection when combined with reports from non-governmental organizations documents, in no uncertain terms, the manner in which Egypt and Syria have perpetuated long-term states of emergency and have killed and tortured with impunity, all in violation of the most fundamental, non-derogable, human rights established.[25] Yet such actions have been allowed to persist despite the dictates of international law, since international standards need not apply to the administrations of these oriental despots.

3. Conclusion

While this *tour d'horizon* cannot truly do justice to the issues concerned, I believe that an overall framework exists to make the argument that the Middle East has developed as the underclass of the international legal order wherein international law has been, with respect to formative events, selectively applied and enforced, blatantly disregarded, or used in a punitive manner. Much in the same manner as the inability to predict the implosion of the Soviet Union forced those in international relations to move beyond the simply theoretical paradigm of realism/liberalism, the events of 11 September 2001 require international jurists to take the Middle East seriously and to move beyond self-delusion. The fact that, on balance, international law has been outweighed by the interests of the powerful during the evolution of the modern Middle East has been translated into a legacy of war, dispossession, and repression, whereby the people of the region feel frustrated by the abuse and have been willing, at their most extreme, to take the type of drastic measures which were visited upon New York and Washington in order to change the tide of affairs. Law can

25. See, e.g., Commission on Human Rights, Civil and Political Rights Including the Question of Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, Submitted Pursuant to Commission on Human Rights Resolution 2000/43, UN Doc. E/CN.4/2001/66, 25 Jan. 2001; or Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Second Periodic Report States Parties Due in 1984: Syrian Arab Republic, UN Doc. CCPR/C/SYR/2000/2, 25 Aug. 2000. As for non-governmental reports, see annual country reports from both Amnesty International and Human Rights Watch.

never be divorced from politics. This is especially true of international law, which, because of its decentralized nature, lacks a central determination, application, or enforcement system. Yet for any system of justice to prevail, law must show itself to be insulated as much as possible from the dictates of power. Where the Middle East is concerned, international law has failed to dissociate itself from the worst excesses of those dictates, in effect creating of the region an underclass of international legal society. It should thus come as little wonder, as Thucydides wrote two thousand years ago, in his *History of the Peloponnesian War*, that 'having destroyed a principle that is to the general good of all men' should result in repercussions that have been felt beyond the region. The legacy of the manner in which international law has been applied in the region is not a pretty one, but it is one worth recounting, as it makes clear that the issues which remain unsettled to this day – in Iraq or in Palestine – did not emerge in a vacuum, but were the result of political machinations which managed to impose the current realities of the Middle East on its people at the expense of transgressing the common standards of behaviour agreed to by all states: international law.