Networks, International Law and Violence: a history of a *'dialogical interplay'*

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ABSTRACT

I examine international law in this thesis as a *dialogical interplay* between its jurisprudential use and its operation as a network. I define networks as a set of actors who are connected through a common purpose, be it secular, religious, commercial, political or economic. Rather than placing networks as something new and antithetical to our conventional understandings of international legal concepts such as territorial sovereignty, or understandings of the international as only a network of actors, an understanding of international law as a *dialogical interplay* highlights its nature as a relational process between webs of social actors and its static, territorially centered jurisprudence. This approach demonstrates that networks of social actors deploy, develop and benefit from conventional international legal jurisprudence as much as international law develops, and foregrounds itself, through the operation of networks.

My formulation of international law is grounded in sociology of knowledge production with a leaning towards critical history to understand the context in which social actors operate. From the sociologically grounded analysis that I advance in this thesis, it becomes clear how the *interplay* between international law as network and as a particular body of territorially centered jurisprudence produces a kind of invisibility which hides the effect of the network operation. This effect of the network operating in tandem and through conventional jurisprudence takes violent forms through hegemonic governance over particularly human (economic, political, social and intellectual) life. This undercurrent of violence is characteristically silent and constantly evolving to direct and control individual and community lives, often taking both physical and non-physical forms.

I explore the *dialogical interplay* and this violence through key historical moments in the development of doctrines of sovereignty and the separation between war and peace. I start my examination with the colonization of the New World by the Spanish Empire. Here we see the genesis of the *dialogical interplay* through the missionaries of the Holy Roman Church and the Spanish Empire. This is followed by the expansion of merchant networks of the Dutch East India Company and the British East India Company. In this era mercantile networks evolved into the imperial British State as a supra-national organization with a network of imperial state administrators. This evolution laid the ground for the League of Nations international expert networks. In the post-1945 era, this continued through

international financial institutions and the universal acceptance of the knowledge, for example, of the World Bank's development discourse. Here, the expertise of international development came from within the state through local experts trained in the development discourse of international financial institutions. Finally, in the post-9/11 era, when network organization and technology have reached an unprecedented level, I show how the US Joint Special Operation Forces Network operates across territorial boundaries reminiscent of earlier network structures yet ushering a new era of imperialism. Its novelty is characterized by its contingency on technology to erase any spatio-temporal limitation – a feat not possible in previous forms of networks – so that it becomes an omnipresent techno- hegemony.

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LIST OF ABBREVIATIONS

AMSH	Association for Moral and Social Hygiene
CMA	Compina Minera Antnima
DOD	Department of Defence
EFO	Economic and Financial Organization
EIC	British East India Company
GATT	General Agreement on Trade and Tariff
GWOT	Global War on Terror
HTS	Human Terrain System
IBFR	International Bank for Reconstruction
IBRD	International Bank for Reconstruction and Development
ICSID	International Centre for Settlements of Investment Disputes
IDA	International Development Association
ILO	International Labour Organization
IMF	International Monetary Fund
JSOC	Joint Special Operation Command
MIGA	Multilateral Investment Guarantee Agency
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
RAND	Research and Development

TWAIL	Third World Approaches to International Law
UN	United Nations
UNDP	United Nations Development Program
UNESCO	United Nations Economic Social and Cultural Organization
UNGA	United Nations General Assembly
UNIDO	United Nations International Development Office
UNRRA	United Nation Relief and Rehabilitation Administration
USAID	United States Agency for International Development
USSOF	United States Special Operation Forces
USSR	Union of Soviet Socialist Republics
VOC	Dutch East India Company
VSO	Village Stability Operations
WTO	World Trade Organization

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‘Shams’ – I just hope I do not go burning a library in ecstatic revelation (or perhaps we have).

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Last but not the least, to those that inspire us – help us be better, do better – thank you for all you do through all the violence and oppression.

Chapter 1. Introduction: networks in international law and the problem of sovereignty

> So the first thing we did when I took over in late 2003 was realize that we needed to understand the problem much better. To do that, we had to become a network ourselves – to be connected across all parts of the battlefield, so that every time something occurred and we gathered intelligence or experience from it, information flowed very, very quickly…
>
> General McChrystal[1]

In an interview with Foreign Policy, US General McChrystal gave a triumphant explanation of why the Iraq Invasion was the perfect laboratory to hone a new kind of warfare i.e. Network Warfare.

In 2003 the Joint Special Operation Forces was utilized for the first time to 'counter' the guerrilla tactics of Baathist insurgents within Iraq. In the broader context of the War on Terror, however, General McChrystal's reference to the battlefield was not just Iraq – but wherever the 'terrorist networks' were located. As he explains in this interview,

> The network had a tremendous amount of geographical spread. At one point, we were in 27 countries simultaneously. Inside Iraq, we were in 20 and 30 places simultaneously – all connected using modern technology but also personal relationships.[2]

[1] Gideon Rose, 'Generation Kill: A Conversation with Stanley McChrystal' (2013) 92 Foreign Affairs 2.

[2] ibid 2. More literature on the Special Operation Forces has emerged since, mostly within the context of situating it as a new military 'solution' to terrorist networks see: Steven P Bucci 'The Importance of Special Operations Forces Today and Going Forward' in Heritage Foundation, *2016 Index of US Military Strength* (Washington D.C, Heritage Foundation 2016). There are different numbers as to the number of countries where the Special Operation Forces Network is operating. The official number stands at 75 countries as of 2015. Investigative journalist Nick Turse, however, revealed a higher number at 134. Nick Turse cited in Jon Moran, 'Time to Move out of the Shadows: Special Operations Forces and Accountability in Counter-Terrorism and Counter-Insurgency Operations' (2016) 39 University of New South Wales Law Journal 1239; Michael McAndrew, 'Wrangling in the Shadows: The Use of United States Special Forces in Covert Military Operations in the War on Terror' (2006) 29 Boston College International & Comparative Law Review 153.

Considering its nature as a trans-boundary organization cutting across borders, connected socially and technologically, conducting military operations, Steve Niva astutely questions how 'Network Warfare' stands in relation to the principle of territorial sovereignty.[3]

While the question in the context of the War on Terror is not a new one,[4] taking principally the utilization of network organization as a form of military, covert operation force which bases its idea of 'war' as an ever-present, present everywhere, has not been looked at in as much detail. This becomes even less so, particularly when one considers the jurisprudential basis of territorial sovereignty, that every country has a right to its territorial integrity under the United Nations (UN) Charter, Article 2(4).[5]

Yet General McChrystal also hints to something else in his interview with Foreign Policy, which points to phenomena broader than the Joint Special Operation Network. Specifically, the inspiration for Network Warfare comes from multinational companies and their approach to global supply chains as a way to increase efficiency, reduce costs and streamline the production process.[6]

This is important to this thesis precisely because the question, or problem of network organizations, and their relation to fundamental principles of international law, in particular the idea of territorial sovereignty, is also not a new one entirely. In this thesis, my approach to the problem of networks and international law is to uncover and deconstruct how our fundamental, or static understanding of a territory-centric international law has co-existed alongside network forms of organization.

My central argument is that international law as a body of knowledge has been produced and facilitated by trans-boundary social actors and institutions that I refer to as networks.[7] I

[3] Steve Niva, 'Disappearing Violence: JSOC and the Pentagon's New Cartography of Networked Warfare' (2013) 44(3) Security Dialogue 185.

[4] See for example, Derek Gregory, 'The Everywhere War' (2011) 177(3) The Geographical Journal 238; Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43 Osgoode Hall Law Journal 45.

[5] The only exception being of course Art 51 self-defence, hence within the context of War on Terror. These two articles and their development in relation to a 'war without borders' has been met with critical reception. See for example; Michael Byers, 'Terrorism, the Use of Force and International Law after 11 September' (2002) 16 International Relations 155.

[6] Rose (n 1).

[7] Networks here are defined conceptually as a web of actors with a common aim whose organization is demarcated through clear 'membership' or inclusion/exclusion and who have goals (political, economic, religious) to which they are all committed, subject to those outside of the network. I expand the conceptual

define the relationship between the two, networks and international legal jurisprudence, as the *dialogical interplay*. As I show in this thesis, networks are not new or antithetical to international law but have historically operated relationally with a static and territorially centered understanding of international law.

This understanding of international law's operation demonstrates that networks of social actors deploy, develop and benefit from conventional jurisprudence. At the same time, the network of social actors grounds their operation both through the use of conventional jurisprudence and by actively facilitating the development of the doctrines. Thus, we can see international law's development, specifically the doctrine of territorial sovereignty, inextricably linked to the social process of a network using, deploying and benefiting from jurisprudence. My thesis thus unveils the sociology of international legal knowledge production through the modality of the network. Here, international legal norms, i.e. specifically their foundational aspect of territorial sovereignty, are historically produced and developed by a social network of actors.

I advance these ideas through an exploration of different forms of networks, i.e. religious (Holy Roman Church's missionaries in chapter 2), secular (the Dutch and British East India Company merchant networks in chapter 3 and 4), bureaucratic (the British imperial officers in chapter 4), international administrative (the League of Nations Mandate officials in chapter 5), and local technocratic, economic expert networks (the World Bank trained local experts in chapter 6). Throughout the history of international law, these networks I identify reproduce a particular kind of violence. This particular kind of violence which is part of the dialogical interplay is not encompassed within violence as understood within orthodox legal regimes of international law, such as international human rights law and international humanitarian law.

This violence takes the form of hegemonic governance over individual and community life and its various aspects i.e. political, social, economic, intellectual. It is exhibited in different ways – both physical forceful harm and non-physical i.e. through the erasure of social, intellectual, spiritual life and economic pressure. A distinct feature of this violence is

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basis of my definition later in this chapter under the section conceptual framework and methodology. Throughout this thesis I generally use the plural, networks, as a descriptive phrase for the various forms of historical networks and singular network as a concept to describe the social process of actors using, deploying and benefitting from international law.

that it is constant, ever-present and experienced by those who are experiencing it in a totalizing power over their life and being. Thus it remains characteristically silent to direct and control individual and community lives.

This approach to violence helps us to understand and disentangle how we imagine the violence of an everywhere war conducted by the US Special Operation Forces Network over the last 20 years. It also helps us conceptualize the violence of international law's *dialogical interplay* in the sites, which I have identified above, that unveil the nature of violence as an undercurrent of power over human life. Violence, in this case, is understood in ways which are not 'measurable' i.e. an epistemicide which is intellectual and spiritual. In my concluding chapter, I return to this notion of violence of the dialogical interplay as a way in which we must also understand the plane at which we must find possibilities despite this violence of ordering humanity. I turn particularly to possibilities of decolonial knowledge but also an understanding of decolonality which would bring us to critically examine counter-hegemonic networks of knowledge.

This chapter proceeds to explain the main question I answer in my thesis i.e. understanding the relationship between state sovereignty and networks. Primarily the following section looks at sociological approaches to answering this question present in current and past literature. I proceed then to explain my answer to the question of networks and state sovereignty within international law in the second section where I introduce in more detail the concept of the *'dialogical interplay'*. After explaining my main hypothesis, I give an overview of conceptual understanding of network in this thesis, as well as my understanding of the violence of international law. Finally, I end the chapter with a short chapter outline of the thesis.

I. State sovereignty and networks collide

a. A sociological approach to international law

In the orthodox analysis of the history of international law, what has been considered 'international' and what is considered trans-boundary has been answered by differentiating the 'international' as distinct in jurisprudential terms from 'trans-boundary' forms of interaction. I am referring here to the difference drawn between matters of nation states representing a territorial 'jurisdiction' i.e. 'public international' as a legal subject as opposed to 'private international',[8] which is relegated to commerce, trade, and transnational matters

beyond the territorial boundaries of one state. This distinction draws jurisdictional boundaries between matters of the state within its territory, and thus sovereignty, and matters which are of a 'trans-boundary' nature, i.e. those that are about interconnected issues such as commerce. Despite these neat jurisdictional and jurisprudential lines between 'public' and 'private', the distinction between public and private is often blurred either through the 'actors' themselves or the coalescing of public actions/private actions making this boundary between both unclear.[9]

For instance, this can be seen through different international legal regimes which have complicated the difference between what is considered 'public' and 'private'. Regimes which are in the orthodox sense understood within the purview of public international law are not limited to what would be considered a 'public international' jurisdictional boundary i.e. nation states. For example scholarship on international criminal law,[10] international human rights,[11] the common heritage of mankind principle[12] and international humanitarian

[8] For two orthodox accounts of this distinction particularly in relation to transnational regimes see: Antonio Cassese, 'Remarks on Scelle's Theory of Role Splitting (Dedoublement Fonctionnel) in International Law' (1990) 1 European Journal International Law 210; Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Palgrave Macmillan 2012). For a critical account of this distinction as part of imperialism of state system through civilizational discourse see: Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (CUP 2002).

[9] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 University of Toronto Law Journal 1. For specifically a perspective of private corporate and commercial law and its intersection with public see: Dan Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance', (2005) 46 Harvard International Law Journal 411; Dan Danielsen, 'Corporate Power and Global Order' in Anne Orford (eds), *International Law and its Others* (CUP 2006).

[10] Fausto Pocar, 'The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community' (2004) 2 Journal of International Criminal Justice 304; David Kaye and Kal Raustiala, 'The Council and the Court: Law and Politics in the Rise of the International Criminal Court' (2016) 94 Texas Law Review 713.

[11] Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights: Tracking Law between the Global and the Local* (CUP 2007). See also: Yves Dezalay and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (University of Chicago Press 2013); Steven LB Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (CUP 2016); Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (Edward Edgar Publishing 2018).

[12] For a critical examination of this principle in the context of deep sea bed global regulation see specifically, Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30(2) European Journal of International Law 573; Surabhi Ranganathan, 'Global Commons' (2016) 27(3) European Journal of International Law 693.

law[13] demonstrate the influence and development of jurisprudence through and intersections with private actors, organizations, civil societies, corporations and interests. Additionally, literature within 'private international law' regimes – such as international commercial arbitration and investment law,[14] intellectual property,[15] international corporate governance and regulation[16] – have also attempted to explore how the jurisprudence of these disciplines cuts across a state-centric approach which limits itself to 'public/private' distinctions.

Another approach to answering the question of trans-boundary relations beyond the nation state-centered framework of international law has been through a focus on the public/private distinction and its blurring in the context of the crystallization of the nation state, from the interwar period to the new global order in the 1950s. Since the theorization on how to understand this moment was a mix of public/private administration at an international level, the emergence of trans-boundary social function of international organizations became an important idea to encapsulate interactions beyond nation states. Emerging both from the interwar period[17] and after it,[18] conversations with regards to trans- boundary regulations within these sets of literature are confined mostly to international

[13] David P Forsythe, *The Humanitarians: The International Committee of the Red Cross* (CUP 2005), David M Rosen, 'Child Soldiers, International Humanitarian Law, and the Globalization of Childhood' (2007) 109 (2) American Anthropologist 296; Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"', in Anne Orford (ed), *International Law and its Others* (CUP 2006). In the field of International Relations see the seminal work of Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011).

[14] For an examination of transnational lawyers as knowledge producers see for example, Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996), for the politics of arbitrator networks see; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 (2) European Journal of International Law 387; Moshe Hirsch, 'The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System' (2008) 19(2) European Journal of International Law 277.

[15] Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (New Press 2007).

[16] See for example, John Braithwaite and Peter Drahos, *Global Business Regulation* (CUP 2000).

[17] Cassese (n 8); Martin David Dubin, 'Transgovernmental Processes in the League of Nations' (1983) 37 International Organization 469; Susan Pedersen, 'Back to the League of Nations' (2007) 112 The American Historical Review 1091.

[18] Philip Caryl Jessup, *Transnational Law* (Yale University Press 1956). For a development of transnational law into the separate discipline of transnational criminal law as a response to organized crime, trafficking and its legal regulations see for example; Neil Boister, 'Transnational Criminal Law?' (2003) 14(5) European Journal of International Law 953.

organizations[19] or those that sought to give closed theoretical answers to transnational legal orders as a separate discipline in its entirety to public/private international law.[20]

The question for my thesis to answer – the issue of how trans-boundary, networked organizations operate in the long-standing and continuing understanding of international legal regimes as state-centered – is then not just a regime-centered approach. Thus I have not limited this thesis within a realm of any one of these sub-disciplines mentioned above, whether public or private. The breath of the kinds of networks I am exploring in the following chapters attests to the primary aim of my thesis which emphasises a longer trajectory of understanding international law and networks regardless of the nature of the networks. At the same time, it also points to my broader aim with this thesis, which is understanding the operation of international law as a socially grounded discipline that takes form through different modalities of knowledge production and action, that adopts different forms through time and space. Therefore, what I attempt to answer more consciously here is a question about the operation of international law at a meta-register i.e. how a different understanding of the relationship between a sociological concept of network and a jurisprudential doctrine of territorial sovereignty can change our perception of the discipline itself and its history.

Existing sociological theories of international law have attempted to understand the discipline through social contexts at the macro-level, i.e. the world organized through an inter-state relationship where the global system for international order is mediated at only the level of nation states interacting with each other,[21] and the micro-level, i.e. driven by the agency of social actors at the ground level.[22] However, the ways in which different forms of micro-level social actors such as networks throughout history both shape and influence the ideological frames and rules concerning macro-structures of state/organizations have remained largely unexamined.

The sociological question, in more critical traditions, has been cognizant and conscious of law being a descriptive tool rather than a normative answer to social contexts. Thus, while

[19] Guy Fiti Sinclair, 'Towards a Postcolonial Genealogy of International Organizations Law' (2018) 31(4) Leiden Journal of International Law 841; Jan Klabbers, 'Theorizing International Organizations' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016)

[20] For this see the seminal work by Terrance Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (CUP 2015).

[21] Moshe Hirsch, 'The Sociology of International Law: Invitation to Study International Rules in their Social Context' (2005) 55(4) The University of Toronto Law Journal 891.

[22] ibid 895.

being situated within legal regimes, the emerging body of literature in more critical traditions is closer to a sociological approach to understanding the 'why' of law i.e. its power and politics.[23] Specifically, sociological inquiry of international law goes beyond doctrinal prescriptions of the law as a solution to sociological issues but is attentive to how the law itself can be coded to reproduce global socio-economic inequalities instead of resolving them. This attention to descriptive question underpinning sociological analysis makes it particularly valuable for building on a critical approach to understand the sociology of jurisprudential knowledge production and thus it is important for this thesis to distinguish– as well as squarely highlight – the contribution of my thesis.

Within this emerging literature, two key seminal texts have been most influential for recent literature on the sociology of international law which explain the issue of networks/trans-boundary relation and international law's state-centric understanding: Anne Marie Slaughter's *A New World Order*[24] and Braithwaite and Drahos' work on 'network governance'.[25]

Slaughter's intervention and answer to understanding state sovereignty and trans-boundary forms of interaction or network of actors have focused on the study of transnational regulatory networks such as institutional cooperation between judicial bodies, banking and the financial sector as a new form of cooperation between state and non-state actors.[26] Slaughter suggests that government and state functions are moving to greater independence and transnational cooperation with institutional counterparts in other nation states. She further argues that this transnational cooperation is ushering in a new era of dissipated sovereignty i.e. sovereign state-like functions exercised by government officials and departments independently which reflect what Slaughter refers to as a disaggregated state. For Slaughter, as well, international legal doctrines need to evolve and are not equipped to deal with new forms of trans-boundary interactions. This argument assumes a normative, linear and

[23] Notably, David Kennedy has time and again raised this sociological problem when international legal academics from various backgrounds seek to understand the problems of globalization and international regulation. For his most seminal work to date on this, see for example, David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018).

[24] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2009).

[25] Braithwaite and Drahos (n 15).

[26] Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) 43 Virginia Journal of International Law 1. In addition to Slaughter, Raustialia also understanding networks/transboundary relation as synonymous to each other. Kal Raustiala proposes that the present and past understanding of international legal doctrine has been rendered obsolete due to changes brought about by globalization.

progress narrative of international law's key doctrines, specifically state-centric understanding. It also presents law as a normative solution to global issues without problematizing the role of politics and power within trans-boundary networks.[27]

Counter to Slaughter's approach, Peter Drahos and John Braithwaite understand network governance as more than just normative observations of networks but an empirical study of how non-hierarchal organization is a space of power and politics.[28] This is primarily informed by Peter Drahos and John Braithwaites' work which examines the role of pharmaceutical companies in the United States, Europe and Japan in influencing state actors to push policies for the monopoly over the intellectual property of medicines. Further, Braithwaite revisits this concept of network governance in his work with Hillary Charlesworth and Aderito Soares on peacebuilding in East Timor.[29]

Building on these concerns, a collected body of work on 'Experts, Networks and International Law' edited by Cullen, Harrington and Renshaw has attempted to tackle the concern that questions of power and politics of such bodies are not considered by Slaughter.[30] This edited collected builds its examination of networks and their politics closer to Braithwaite and Drahos.

Although valuable regarding empirical and theoretical inquiries into politics and power of networks within different international legal regimes, this edited collection still leaves a fundamental problem I have raised unanswered. Specifically, how do we reconcile our understanding foundational territory-centered, static approaches to international law to the concept of network.

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[27] Kenneth Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks' (2005) 118 Harvard Law Review 1255.

[28] This understanding particularly within transnational business regulation within and outside the discipline of law can also be seen in other literature particularly those relying on Marxist/neoMarxist ways of approaching sociology of global political, economic and legal order. For instance, Luc Boltanski and Eve Chiapello, *The New Spirit of Capitalism* (Verso Books 2017); Jonathan S Davies, *Challenging Governance Theory: From Networks to Hegemony* (Policy Press 2011). For a closer international law attempt to understand transnational capitalist network see for example; Bhupinder S Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2018) 15(1) Globalization and International Organizations 1.

[29] John Braithwaite, Hilary Charlesworth and Adérito Soares, *Networked Governance of Freedom and Tyranny : Peace in Timor-Leste* (ANU Press 2012).

[30] Holly Cullen, Joanna Harrington and Catherine Renshaw (eds), *Experts, Networks and International Law* (CUP 2017).

Additionally, recent literature, particularly critical legal scholarship, particularly that which focuses on a sociologically grounded approach to knowledge production within international law, notably on the politics of experts,[31] organizations, and legal networks[32] is also dealing with a similar issue of a static territory-centered approach with networks. This critical work, particularly by David Kennedy, has tried to position both through empirical and theoretical study the politics of knowledge production in global legal policymaking across economic and military domains.

Most recently, the Research Handbook on the Sociology of International Law, edited by Mosche Hirsch and Andrew Lang, has attempted to map a primer for sociological approaches to international law relying mostly on categorizing them through three main streams of sociological thinking: structural-functionalism, symbolic interactionism and social conflict perspectives.[33] While attempting to give a broad brush view of a sociological perspective on international law, the edited collection attempts to create an overview rather than give descriptive or even normative answers to how sociology can contribute to our understanding of international law. Nonetheless, it still manages to center European sociological traditions, specifically Pierre Bourdieu, within primarily international economic law. This editorial effort leaves for another moment to tackle head on, however, historical sociology attentive to imperialism as part of international legal knowledge production particularly through networks. The edited collection at the same time hints at critical scholarship within international law as I have mentioned, particularly within the fields of global governance and knowledge production, leaving open the possibility of a concerted attempt to explore these questions further through its interlinking with imperialism.

The aforementioned collections that follow from key contributions to sociological approaches to international law, i.e. by Hersche and Lang as well as Cullen, Harrington and Renshaw, do not go far enough in critically examining the historical relationship between the network and international law. This results in an examination of the network that bases its understanding of the international legal order and its history as one of linear progression. Scholarship that does consider the role of power and politics i.e. Braithwaite and Drahos, also works on the assumption of linearity of international legal jurisprudence progressing

[31] Kennedy (n 23).

[32] Cullen, Harrington and Renshaw (n 30); Slaughter (n 23).

[33] Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Edgar Publishing 2020).

through time along with new forms of political actors and spaces such as networks of NGOs(Non-Governmental Organization), counter-hegemonic movements, etc.

Even within critical works that I have identified, notably Kennedy,[34] scholarship within Law and Development,[35] and literature which connects conversations within science and technology studies to understand global governance, there is a lack of emphases of how our fundamental understanding of international law through its state-centric, territory-centered approach has developed alongside networks. Additionally, they also assume network and its relationship to international law is a novel occurrence even when they are aware of conversations on the historical basis on which law is inscribed as a form of change to policy while reiterating similar logics of power.

The role, power and politics of network organizations throughout the history of international law remains, therefore, unexplored. My aim in this thesis is to show how we can see the role of networks as an integral part of the development of international law's foundational principle i.e. territorial sovereignty. My thesis gives a different analytical, critical way of theoretically positioning how we engage with the question of networks and international law. I do this by considering not just a critical view of sovereignty which pays attention to its hegemonic basis throughout history but also understanding networks as a sociological phenomenon which is not 'new' in its entirety.

This intervention to mapping different forms of networks, not meant to be exhaustive or the only ones, also builds on the sociological challenge David Kennedy has raised concerning more contemporary forms of knowledge production by expert networks – beyond lawyers[36] and policymakers – which calls for a broader 'mapping of modes of power and levers of influence'.[37] While Kennedy's invitation is for an empirical study of

[34] Kennedy (n 23).

[35] For this see in general the seminal work of, Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012); Richard Rottenburg and others, *The World of Indicators: The Making of Governmental Knowledge through Quantification* (CUP 2015).

[36] As focused on by Dezalay and Garth in n (13), as well as their work; Yves Dezalay and Bryant G Garth, *Asian Legal Revivals Lawyers in the Shadow of Empire* (University of Chicago Press 2010). For another seminal works exploring legal networks as actors see also: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001); Benjamin Allen Coates, *Legalist Empire: International Law and the American Foreign Relations in the Early Twentieth Century* (OUP 2016); Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (OUP 2017).

[37] David Kennedy, 'The Mystery of Global Governance' (2008) 34(3) Ohio Nothern University Law Review 827.

sociological nodes of power, which I do not do in this thesis, my contribution here focuses on sketching the outlines of how the relationship between networks and international law can be theoretically understood in the first place. I propose that the framework I provide to understand this relationality can help empirically focused studies of networks within international legal regulation throughout history.

b. State, networks, imperialism and international law

The key literature that my intervention relies on critically questions the nature of 'progress' in international law or the formation/function of state sovereignty and understanding international law itself as a form of network operation. In relation to the former, literature which has framed its hypothesis to answer the question of how we can understand networks and a static territory-centered conception of international law presumes a particular understanding of not just international law but also the nature of state sovereignty itself. Specifically, this presumption is based on linear, progressive notions of international law i.e. international law as a discipline has come into its form as a result of transformations after formal colonialism as a way to mediate a world order of separate independent nation states.

Here particularly relevant are sociological discussions on international legal structures which are attentive to their hegemonic and imperial reproduction through different eras. Notably, Bryan Garth contends that description of international law's linear progression sidelines the ways in which international law and its foundational principles, specifically state sovereignty, are themselves mired in hegemony.[38]

Within the critical tradition of Third World Approaches to International Law (TWAIL) itself, Anthony Anghie has, notably, already provoked the conversation on how the principle of sovereignty and a state-centric approach is part of an imperial reproduction of the international legal global order through its history.[39] Both Anghie and Garth's hypotheses

[38] Bryant G Garth, 'Issues of Empire, Contestation, and Hierarchy in the Globalization of Law', in Moshe Hirsch and Andrew Lang (eds), *Research Handbook on the Sociology of International Law* (Edward Edgar Publishing 2020).

[39] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007). For a critical understanding of the concept of sovereignty within international relations see also: Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55(2) International Organization 251; Benno Teschke, '*The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations*' (Verso Books 2003).

are not accounted for by 'linear progress narratives' that is assumed by literature on state and networks – particularly Slaughter and Rastualia.[40]

The other aspect which is not paid attention by most of the literature I have mentioned is the intervention that Annelise Riles has made in our understanding of the operation of international law, explored further below.

II. International law operation as the *dialogical interplay*

Annelise Riles' suggestion has been, explicitly, to understand international law *as* networks.[41] Here, my thesis takes Annelise Riles' suggestion that we understand the international as 'network'[42] further. I do so by understanding knowledge production of international law itself as inherently tending towards hegemony due to the way in which the social, political and economic is inscribed through its network nature. By bringing together the idea that hegemony is inscribed within jurisprudence through and for the social, economic, political benefit of networks, this thesis adds to recent critical international legal literature,[43] to show that international legal jurisprudence and its network of actors have historically worked together.

a. International law as networks and jurisprudence

I contend that both Garth Dezalay and Annelise Riles' hypotheses on how international law operates can be understood together. Specifically, that international law itself is a network but also a network inscribing itself through a 'legalized hegemony' of jurisprudential norms, such as territorial sovereignty. My contribution sits squarely with how Garth, Dezalay and

[40] Slaughter (n 24); Rastulia (n 26)

[41] Specifically in Annelise Riles, 'Global Designs: The Aesthetics of International Legal Practice' (1999) 93 Proceedings of the American Society of International Law Annual Meeting 28. See this formulation by Annelise Riles in relation to understanding private international law, regulation as knowledge practices of actors in: Annelise Riles, *The Network Inside Out* (University of Michigan Press 2016); Annelise Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State', (2008) 56(3) American Journal of Comparative Law 605.

[42] ibid in Riles 'Global Designs' 28.

[43] Particularly Kennedy (n 23).

Annelise Riles are imagining a sociological approach to international law's operation, which is aware of its political, hegemonic and imperial underpinnings. If we understand international law as network as well as its structure inscribing a form of 'legalized hegemony', then we can also see how the social, economic and political capital of networks of actors operate through and based on jurisprudence i.e. sovereignty in this case. Here we can also see how the jurisprudence, which is informed by and facilitates the advancement of the aims of networks, itself evolves through time in a constant, continued dialogue with the network itself. At the same time, however, conventional jurisprudence is restricted to being understood through a static territory-centered outlook where territorial boundaries have no room to conceptualize trans-boundary network actors. I describe this relation between international legal jurisprudence – or its static, territorially centered understanding – and its networks of knowledge producing towards a common aim[44] as the '*dialogical interplay*'.

b. 'Invisibilisation' and the violence of the *dialogical interplay*

The working together of networks of actors and international law's jurisprudence, specifically through the doctrine of sovereignty, produces an invisibility which hides the effects of its operation. The jurisprudential aspect of international law foregrounds itself continuously in a way that hides and renders invisible the process and effects of its web of actors who operate for their benefit.

In particular, this effect of invisibilisation takes the form of hegemonic governance over human life,[45] which is inherently violent, for the network to achieve its objectives/aims. This

[44] See my description of a network in (n 7).

[45] My focus here is on human life due to the limitations and aims of the project exploring sociological relations between 'humans' and thus the violence experienced by and through social relations. This does not however preclude or is meant to exclude, ontologically, violence on 'life' as is indicated by scholarship which refers to environment, nature and life in more fluid senses beyond an anthropocentric understanding of life. See for example, Usha Natarajan and Julia Dehm, 'Where Is the Environment? Locating Nature in International Law' (*TWAILR*, Aug 30th, 2019) <https://twailr.com/where-is-the-environment-locating-nature-in-international-law/>, accessed June, 2020; Julia Dehm, 'International Law, Temporalities and Narratives of the Climate Crisis' (2016) 4(1) London Review of International Law 1659; Davor Vidas and others, 'International Law for the Anthropocene? Shifting Perspectives in Regulation of the Oceans, Environment and Genetic Resources' (2015) 9 Anthropocene 1. For indigenous perspective on law and land see; Christina Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge 2010). Nonetheless the thesis does and is meant to open up the possibility of understanding violence of international law more broadly through networks and its jurisprudence (as I return to this question in the conclusion chapter of the thesis) particularly through literature connecting/disrupting our understanding between the relationship of the human/nonhuman. See for example: Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge 2004).

undercurrent of violence is characteristically absent from a jurisprudential perspective, unless it is identified and categorized into regimes such as human rights and humanitarian law, and can take physical and non-physical manifestations.

My thesis draws attention to this violence and its inextricable link to international law's operation as the *dialogical interplay* between networks and international law's static territory-centered formulation. This violence is not bound to categorical forms of 'legality' and 'illegality' but is experienced by those governed by the network. Thus it can take different forms, i.e. economic, physical, symbolic, epistemological, depending on the aims of the network in question. It is essentially violence that is constantly evolving to direct and control individual and community lives. As the underlying intentional consequence of this violence is to assert a hegemonic view of the world in accordance to the network, it is imperial in its effects i.e. it dictates not just economic and/or territorial control and domination, but intellectual and spiritual.[46]

III. Conceptual framework and methodology

a. 'Network': a socio-historical perspective

In the context of my thesis, 'network' is understood more widely than it is often understood in existing literature in international law. As I briefly mentioned above on the existing conceptualization of a network of actors as norm makers, in mainstream international law literature, as well as in international relations literature, governance through networks refers specifically to intergovernmental and trans-regulatory bodies working on specific policy

[46] This understanding of violence is specific to an understanding of colonial/imperial governance and its violence in a way explained by decolonial/postcolonial scholars, primarily in Achille Mbembe, *Necropolitics* (Duke University Press 2019). Walter D Mignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26(7-8) Theory, Culture & Society 159; Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Routledge 2015). Quijano's concept of colonial matrix of power in; Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America (English Translation)' (2000) 15(2) International Sociology 215, as well as other radical scholarship from Islamic epistemology such as Allama Iqbal's understanding of colonialism in; Iqbal Singh Sevea, *The Political Philosophy of Muhammad Iqbal: Islam and Nationalism in Late Colonial India* (CUP 2014), and black radical thought, such as Franz Fanon in: Frantz Fanon, *Black Skin, White Masks* (first published 1952, Grov Press 2008).

matters.[47] This literature limits itself to understanding governance through networks as a recent innovation facilitated by globalized economic and social activity.[48] This understanding limits the study of a 'network' as a social and historical phenomenon as it relies on an understanding of network restricted only to contemporary technological and social formations.

My use of the concept of networks here is similar to global historians, in what has been termed the 'global turn' towards the history of networks. The defining feature of this 'global' turn is how exploring the imperial configuration and interconnections can unearth the importance of networks as a component of imperial governance, not just as a social phenomenon. Following this concern, then, networks are used to describe effects, relations and connections beyond the state or local paradigms. For global historians, as David Bell explains, networks describe the political interconnections of the world. The deployment of the term, though seemingly anarchic, is close in its approximation to what is normally considered to be 'controlling metaphor in the digital age'[49] to understand the sociology of trans-boundary actors.[50] The term networks throughout my thesis describes, however, not a new 'digital age' or 'information age' but rather it refers to social organizations that have taken place across history, formed through loose connections between actors who share a common aim or purpose.

To elaborate this definition further, I utilize descriptive elements of theories of 'network' as they have been explained by contemporary sociology and communications theory. Manuel Castells' thinking on networks explains networks as an organization structure of links or nodes.[51] Nodes could refer to individuals, organizations, states or actors that form a

[47] Rastulia (n 26) and Slaughter (n 24), Anne Marie Slaughter argues these transgovernmental and regulatory bodies have their own forums that work toward policy objectives with considerable independence. Slaughter refers to informal judicial networks, transnational banking forums while Kal Rastualia refers to transgovernmental economic regulations as forms of networked governance.

[48] Mette Eilstrup-Sangiovanni, 'Varieties of Cooperation' in Miles Kahler (ed), *Networked Politics: Agency, Power, and Governance* (Cornell University Press 2015). Sangiovanni focuses on the need for government security networks due to increased globalization resulting in illicit networks from a normative perspective of their benefits and disadvantages.

[49] David A Bell, 'This is what happens when historians overuse the word networks' (*The New Republic*, 26 October 2013) <https://newrepublic.com/article/114709/world-connecting-reviewed-historians-overuse-network-metaphor,> accessed 12/3/2019.

[50] For the global turn in history that pays attention to networks see for example, Emily S Rosenberg (ed), *A World Connecting 1870-1945* (Harvard University Press 2017).

[51] Manuel Castells, 'Network Theory| A Network Theory of Power' (2011) 5 International Journal of Communication 773.

chain of connections – a nodal chain – to achieve a common objective.[52] Power over the framing of objectives is the central component of Castellian network thinking.[53] Power then, as a form of influence, determines exclusion or inclusion into the network.[54] Castells' idea of power is meant to explain why a nodal chain of the network has no central actor responsible for framing the objectives of the network. A network-actor perspective, by Latour, instead focuses on the role of a central actor responsible for shaping the aims of a network.[55] Through an actor-network perspective, a central actor within the nodal chain of the network is one who shapes the common objective of the network.[56] So the inclusion and exclusion in a network depend on a single powerful actor.[57] Despite a geographical distance between links in a network, its conduct is guided by common norms.

I draw on this understanding of the central powerful actor in my understanding of networks in this thesis.[58] This allows me to reflect on different forms of networks throughout the history of international law. This ranges from religious networks such as the Holy Roman Church of the 16th Century, with the Catholic Church as the powerful actor shaping the aims and objectives carried out by a network of missionaries and churches, to the merchant networks of Chartered Companies in the 17th–18th Century whose life was directed by officers, soldiers and the state.

My understanding of networks helps me place different forms of networks within the historical, social, political and economic contexts through which international law has developed in time. This then allows me to show how the *dialogical interplay* between these social actors and international legal jurisprudence has developed in tandem with each of them.

As I have explored, my approach to presenting an understanding of international law as the *dialogical interplay* between networks and conventional static jurisprudence of international law is a sociologically grounded one which, as sociologist Gurminder Bhambra

[52] ibid 773.
[53] ibid 773-774.
[54] ibid 774-775.
[55] Bruno Latour, '*Reassembling the Social: An Introduction to Actor-Network*-Theory' (OUP 2007).
[56] ibid 256.
[57] ibid.
[58] This understanding of networks as actors is also explained in International Relations literature particularly in relation to network politics of International NGO's, see for example, Miles Kahler, 'Networked Politics: Agency, Power, and Governance', in Miles Kahler (ed), *Networked Politics: Agency, Power and Governance* (Cornell University Press 2017).

explains, is rooted in 'histories of colonialism'.[59] Thus, my broader understanding of networks adds a historical approach to my sociological frame. In this respect, I argue that international law's history must be grounded within the field's colonial and imperial past. My study of the relationship between networks and international law is inspired by critical historical methodology. Hence, I am providing a sociology of international legal knowledge production with a historical bent which allows me to explore historical contexts of doctrinal sources. This then also results in a re-imagination what we may even consider as sources of international legal doctrines in order to inform the development of international legal thinking and its understanding to present times.

Thus, in doing a sociological analysis of a history of international law, I rely on critical and Third World Approaches to International Law scholarship. Critical histories which take into account how colonialism and imperialism are embedded in the making of international law, such as those notably by Anthony Anghie,[60] Gerry Simpson,[61] Sundhya Pahuja,[62] Martti Koskenniemi,[63] approach international law's development through paying attention to how the law has moved in time – and how it has been reiterated for continuities of politics, power and imperialism while having discontinuities in the form it takes and resistance against its imperialism.

My understanding of how different forms of networks have played a key role, at key moments, in the development of international law is informed by these critical historical works. My project, as a historical sketching of networks in international law, advances, in this sense, a critical history of international law in a similar vein to the work of Anghie. These scholars conduct critical legal histories which deviate from and contest progress narrative histories of legal concepts in international law that are characteristic of its orthodox reading.[64] Antony Anghie's work, in particular, has focused on the colonial basis of international

[59] Gurminder K Bhambra, 'The Possibilities of, and for, Global Sociology: A Postcolonial Perspective' in Julien Go (ed), *Postcolonial Sociology* (Emerald Publishing Group 2013).
[60] Anghie (n 39).
[61] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP 2004).
[62] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011).
[63] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001).
[64] Pahuja (n 62); Simpson (n 61).

law.[65] Anghie's thesis traces the origins of territorial sovereignty in canonical literature from the 17th Century. Through a contextual and historiographical approach to reading texts,[66] Anghie argues that differential treatment is present within foundational principles of international law.[67] Moreover, he argues that this continuity of colonial differentiation exists in a different form through present day international financial institutions.[68]

My purpose for conceptualizing networks through a socio-historic lens is to frame it in a particular sociological way i.e. web of actors working towards a common aim, which finds itself repeated in different forms through the history of international law. Thus, throughout this thesis, different forms of networks can be seen to implement, benefit and legitimise their role in the production of knowledge that shapes international legal rules, through imperial governance and violence.

By understanding these continuities – and discontinuities – of networks and their violence, we can see their operation in the present day networks and their interaction with international legal regimes.

b. 'Violence': coloniality and governance of human life

The effect of these networks operating in tandem with the conventional static territory- centred jurisprudence unleashes a particular kind of violence which is inherent to international law's

[65] Anghie (n 39).

[66] Contextual historians have contested the use of history by TWAIL scholars in this manner. The argument against such a reading of canon is that they need to be read in their contained historical contexts, any reading that applies or implies a meaning in a historical text to a present day situation distorts the actual meaning of text within a certain time and context. Anne Orford, however, argues that TWAIL scholars do contextualize historical texts but they also trace how the meaning of a text moves through time. This moving of meaning through different historical periods and its significance is how TWAIL scholars use history to reflect on the present day operation of law. Anne Orford refers to this as the juridical movement in international law. Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (September 9, 2011). Institute of International Law & Justice Working Paper 2012/2 University of Melbourne Legal Studies Research Paper No. 600<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2090434> accessed June 2020; Alexandra Kemmerer, '"We do not need to always look to Westphalia…" A Conversation with Martti Koskenniemi and Anne Orford' (2015) 17 Journal of the History of International Law 1.

[67] Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46 Harvard International Law Journal 459; Brett Bowden, 'In the Name of Progress and Peace: The "Standard of Civilization" and the Universalising Project' (2004) 29(1) Alternatives: Global, Local, Political 43.

[68] Anghie (n 39). Imperialism for Anghie can be forms of control that may or may not include conquest or occupation by great powers that resemble colonial influence in history.

dialogical interplay. In conceptualizing this violence, I aim to show that within the discipline of international law a specific understanding of what counts as violence, or physical, state violence, is not only limited but is a Eurocentric framework of understanding violence. Violence is, within an orthodox understanding of international law and its legal regimes, juridified for it to be accounted for – whether in the form of rights, international crime or transnational crime. These forms of juridified 'violence' rely on transposing acts of violence recognized by the 'law' to create descriptions of what counts as violence which can be accounted for by the law within its frameworks i.e. inter-state violence, terrorist acts, crimes against humanity to mention a few. The frameworks within which these are imagined are underpinned by assumptions of legal categories within the discipline of international law created mostly within a Eurocentric understanding of violence. Not only is this orthodox understanding of violence in international law Eurocentric, but it also renders other forms of violence invisible despite facilitating the trans-boundary network organization that manifests other modalities of violence. These modalities of violence fall outside its frameworks or do not fit so neatly within legal categories as to be taken account of as part of its jurisprudential process.

Following what decolonial political philosopher de Sousa Santos has called examining the other side of the abyssal line,[69] that is developing understandings of concepts by questioning how it can be perceived from outside a Eurocentric framework, I aim to deconstruct the concept of violence in international law by focusing on the forms of violence that are rendered invisible by an orthodox understanding of international law. Specifically, I do not adhere to a 'typology' approach to define violence of network governance due to its limitations in capturing a consistent application of the definition across different forms of network. Instead, I emphasise violence as experienced by those governed by and through the formations of the network of actors.

The experience of violence by those governed through and by formations of networks of actors can be explained through postcolonial political philosopher Achille Membe's explanation of 'violence in a borderless world'.[70] Membe attributes violence centred on control over constructing spaces or 'territorialisation' to the policing, surveillance and controlling of bodies i.e. governance of populations within these spaces. The construction of

[69] Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide*. (Routledge 2015).
[70] Achille Mbembe, 'Necropolitics' in Stephen Bygrave and Stephen Morton (eds), *Foucault in the Age of Terror: Essays in Biopolitics and the Defense of Society* (Palgrave MacMillan 2008).

spaces as specific forms of territories, Membe explains, is sustained through 'roads, tunnels, bridges..to maintain reciprocal exclusivity'.[71] The violence of this 'borderless' world is exercised, importantly, by those who create and control these spaces in the first place, to decide who to police, control and survey through networks they create and are part of.[72]

This understanding of violence is centered on the role of networks to govern populations and is broader in its understandings of physical and non-physical forms of violence. Violence in this context is the operation of, actions taken by and knowledge produced by the networks to create spaces of governing according to a set of norms that create inclusion and exclusion. This makes the understanding of violence through and by the governance of a network fluid in that as I demonstrate in the thesis different forms of violence are part of different forms of networks through the history of international law.

Through this idea of violence, I aim to show how international law's operation is also part of its imperial process – in this case, its *dialogical interplay* between its static jurisprudence and networks of actors. It does not just assume a juridified form in the way scholarship has already critiqued within critical traditions such as TWAIL[73] and beyond,[74] but tells us of the violence of international law as a silent, but totalizing, form of imperial governance over human life. Through this understanding of violence we understand violence of coloniality more broadly encompassing various aspects of those that are governed through international law, in particular those who experience violence of the network.

This totalizing, silent and ever evolving violence which manifests in different forms is characterized by control/domination of various aspects or constructions of the 'human life' i.e. in Anibal Quijano's words it is a matrix of power encompassing economy, authority, knowledge, gender/sexuality.[75] This broader understanding of the violence, beyond the juridical, economic, territorial sense and as totalizing ever-present processes of imperialism at different levels is also put forward by Walter Mignolo's understanding of global

[71] ibid 28.
[72] ibid.
[73] Merget (n 13).
[74] Chris AF Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harvard International Law Journal 49; Markus Gunneflo, *Targeted Killing: A Legal and Political History* (CUP 2016).
[75] Mignolo (n 46).

knowledge production,[76] de Sousa Santos' idea of epistimicide[77] or Islamic philosopher Allama Iqbal's formulation of colonial violence of the mind and soul.[78]

Our understanding of the imperialism of international law and its violence, revealed particularly through the relationality between networks and international legal jurisprudence working in tandem, needs to consider coloniality as hegemonic governance beyond juridical forms and practices. This understanding of the violence of international law then shows us the extent to which issues of accountability, regimes of international humanitarian law, international criminal law and human rights in different contexts – while attempting to stand up to the challenge of contemporary issues – are limited due to the framework they adhere to. My claim is that international legal regimes cannot capture the core of violence in the operation of international law as the dialogical interplay between networks and international law. Particularly as violence, in this case, is a material sociological experience of those that are governed by the network. Any attempts to transpose or juridify the violence experienced by communities through the totalizing control over their life would end up being framed in isolated categories to explain violence within the frameworks of a static territory-centered conception of international law. This transcription of violence in a juridified form is not reflective of the material and social reality of those that experience violence of international law and networks operating in tandem.

IV. Chapter outline

The start of my story of networks and international law begins by tracing the origin of the *dialogical interplay* to the 16th Century theologian Francis de Vitoria. I argue, Vitoria's reflections on the Law of Nations, considered to be one of the earliest conceptions of the principle of sovereignty, was grounded in a legal architecture for the missionary network of the Holy Roman Church (also referred to generally as the Roman Catholic Church)[79] to operate and expand in the New Indies. The foundational legal concept of 'public/common access to territory' was territorial land which included riverways, shores, ports that I

[76] Santos (n 46).
[77] Quijano (n 46).
[78] Sevea (n 46).
[79] My use of the term of Holy Roman Church is meant to refer to the Roman Catholic Church as a transnational network, see for example, Ivan Vallier, 'The Roman Catholic Church: A Transnational Actor' (1971) 25(3) International Organization 479.

collectively refer to as ‘quasi-public enclaves’. These enclaves were integral in securing territorial access and occupation for the governance of the Holy Roman Church in the New Indies. These quasi-public enclaves did not just become the means for the Holy Roman Church to establish territorial control but also allowed the Church to manifest violence in the form of economic, administrative policing and forced conversions through en masse baptisms. This governance of the Holy Roman Church and its missionary network I argue is the first formulation of what we can recognize in present times as network governance and its violence.

In chapter 3, the next stage of the relationship between international legal development and commercial network, I explore how the secular shift in international legal thinking was a necessary transformation in commercial enterprise at the turn of 17th Century. I show that the international legal reasoning proposed by Hugo Grotius concerning sovereignty was designed to expand the commercial network of the Dutch East India Company in the Indonesian archipelago. This commercial network, I argue, developed into a governing political body that owned and controlled the Indonesian archipelago. Grotius’ discourses on private property, partial sovereignty and private violence were influenced by Vitoria’s concept of quasi-public enclaves. However, in the case of Grotius, the secular turn to international law shifted the focus of the international legal order from religion to mercantile trade. The nature of the mercantile network in the form of the joint stock company allowed for a more expansive set of relations that have at their core an imperial ambition. Its corporate nature allowed it to raise finance while minimizing risk and to locate itself as a separate legal entity capable of having its own jurisdictional – including economic, territorial – claims about the state. By this logic, the commercial company acted as a governing body with its private army and punitive sanctions all in the name of treaty enforcement.

I show in chapter 4 that the secularisation of the dialogical interplay during the 17th Century laid the foundations for the bureaucratic network of imperial administrators of the British Empire. Within this long period from the 18th to the19th Century, I show how the British legal scholars of the early British imperial ideology and later philosophers of British liberalism brought conceived state sovereignty which informed, in turn, how they governed – through and along with native elites – indirectly. Existing models influenced by Grotian discourses and the Dutch commercial network’s success in the Indonesian archipelago influenced the case of the British East India Company following its imperial territorial ambitions in the Indian subcontinent. In this period, I argue, conceptual developments around the doctrine of sovereignty, notably through ideas of pluralism, moral universality and free

trade, were developed by the British as a result of mutually beneficial cooperation between the imperial administrator and their native elite networks. The pragmatic, conscious and inevitable consequence of this cooperation translated into indirect governance in the form of an imperial state network, where the colonies of the British Empire were administered as a loosely managed network of colonial administrators with chosen native elite leaders. This particular form of network shifted the relationship of international law from commercial imperialism to a supra-state network which informed the dialogical interplay in the next chapter.

In chapter 5, I show how the groundwork for the modern, which is the 21st Century, understanding of the dialogical interplay was set up in the form of international organizations in the 20th Century. I argue that the intellectual legal thought in the 19th Century, the idea of colonies as 'trust', the rise of imperial internationalism and the competition between European imperial state networks over expansion in Africa became the foundation for the global legal order in the form of the first international organization i.e. the League of Nations. The League system can be seen as the first instance of a network through an international organization. At this point, the model of a network of administrators came to be adopted in the form of the network of experts of the League of Nations. The League's international legal discourse through its mandates system (Art 22) and international cooperation (Art 23) both supported and was driven by economic, administrative, humanitarian experts who would formulate policies on how to best govern the 'colonies'. Within orthodox literature and political history, there is still, however, an assumption about the separation between international cooperation and the colonial logic underpinning international law within the interwar period. This separation masks the practice of the League as a network institution and the different forms of violence that were legitimised by the policies and actions of its departmental experts. Most noticeably, within the continent of Africa, the International Labour Organization (ILO), a subsidiary body of the League, imposed policies in conjunction with criminal and policing actions that were based on the exploitation of the native population. This particular stage in the history of the dialogical interplay became the basis for the violence inherent in international governance through international organizations in the 21st Century.

In chapter 6, I focus on how the 'rule by expert' mode of the network was transformed to accommodate the universalization of state sovereignty. Part of this process, where state sovereignty became the central element for the international order, further entrenched the 'formal' separation between transnational forces and the international realm. The state, now conceived as an independent unit of the global order could, through its sovereignty, engage in transnational legal orders such as the cross-regional work of international organizations and their trans-governmental policy networks. The period of decolonisation has been told as a particular historical point where state-based relations attained a relatively more 'equal' claim to political participation in the global legal order. However, I argue that the construction of the modern state itself, and thus ideas of state sovereignty, was informed by 'development experts' of the World Bank. In this period, expert networks did not just directly or indirectly implement their norms, they internalised the norms by including state technocrats as part of their functioning. Distinctively, in this particular phase of the interplay between networks and international law, development experts created a relation between 'sovereignty' and 'human security'. As part of a modern nation state, sovereignty itself was thus graded in accordance to the level of human security; specifically, 'under-developed' and 'low-income' states were likely to have more insecurity and thus be less 'sovereign' than the developed states. This categorization became the basis for intervention within the states to modernise the 'under-developed', often resulting in a further entrenchment of structural violence in the form of displacement, dislocation and dispossession of land, socio- economic deprivation and the creation of greater inequality. The violence that came as a consequence of these 'local experts', from within the new states, was long lasting and structural.

In chapter 7, I explain how the US Special Operation Forces (USSOF) operates as a network organization and is a novel form of imperialism through a networked transnational policing force or what has been termed 'Network Warfare'. I show how Network Warfare is both similar to and different from historical forms of networks. The Special Operation Forces Network's presence in foreign territories is based on its classification of 'governed' and 'ungoverned' territories which was developed throughout 20th Century international organization networks. Furthermore, it utilizes assumptions of transnationalism as part of its policy for countering terrorist networks, as well as advancing the economic and political interests of the United States through its presence. The violence that is conducted through the network's presence then assumes both physical violence (targeted killings) and non-

physical invisible form of violence through policing, surveillance, 'softer' indirect governance through nation-building programmes, desecration and reconstruction of villages, and interference with governmental economic policymaking in foreign territories. The imperial policing of Network Warfare is in this way both like colonial and postcolonial forms of network governance. Additionally, as part of a hegemon – the United States – the Special Operation Forces can be imagined as the new imperial state network. Unlike the network of colonial administrators of the 19th-Century British imperial state, whose failure in sustaining direct state control was a result of a technological inability to sustain the network, the Special Operation Forces through its advanced technology can sustain a state- controlled network without spatial or temporal limitations.

In my conclusion to this thesis, I reflect on what we learn from a new sociological approach to international law based on linking the sociology of knowledge production through a web of social actors in different forms throughout the history of the discipline. This sociological approach to international law, as I show in the chapters, shows how international law jurisprudence is inextricably linked to social actors who create knowledge to influence and benefit from orthodox deployment of international legal thinking. The thesis argues that colonial forms of social networks and social networks following formal colonialism have been instrumental in producing and benefiting from orthodox conceptualizations of international law in various forms.

This influence is more important in the making and shaping of international legal, specifically territorial, sovereignty. Each network that I have identified has contributed to international legal thought on sovereignty within its context to benefit from it. The influence also lies in the way that social actors of each network build on juristic scholarship advanced by key political, theological, economic and legal figures for the benefit of the network they were part of. By only focusing on these specific networks I do not intend to suggest there are no other forms of networks in international legal history that can be analysed in the same way.

My thesis gives these specific examples to establish a framework to re-examine how we look at networks as a modality of power within the discipline of international law. This framework than can be used to study, for example, treaties as a form of network, other forms of transnational governance within international economic law, multinational corporations, security governance, international organizations, and epistemic communities as forms of

networks. At the same time, while my project is meant to provide a critique of how networks operate as a modality of power within the discipline of international law and the violence that goes unchecked, I am not suggesting an ontological perspective of networks as only imperialistic.

As I suggest in chapter 6, networks as social formation can be – and have been – used as a mode of resisting hegemonic power within international law. I hope that this project helps us to re-examine these counter-hegemonic networks.[80] More importantly, in our attempts to explore counter-hegemonic networks, we must remember not just how knowledge can be colonial but how the structures through which it operates reaffirms coloniality. While this thesis explores, and complicates, how knowledge is produced through social actors and deployed in jurisprudential form, it also cautions how we understand what becomes legitimate knowledge – whether colonial or anti-colonial. Our turn to exploring counter- hegemonic networks thus would also be critical in defining what forms of knowledge are inherently colonial, regardless of whether they are coming from a resistant 'network' from below or above. Here, then, the concluding chapter of this thesis opens up a provocation – and a call – to scholars to think about both knowledge and networks more critically with its inherent potential for counter-hegemony. This provocation is a call for thinking critically about 'decoloniality', or plural forms of knowledge, and its production through social actors or networks and, most importantly, its place within international legal jurisprudence.

[80] Some literature already has suggested this, see for example, Braithwaite, Charles and Soares (n 29), but more importantly: Adom Getachew, *Worldmaking after Empire* (Princeton University Press 2019); Balakrishnan Rajagopal, *International Law from below: Development, Social Movements and Third World Resistance* (CUP 2003); Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 2011); Arturo Escobar, 'Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements' (2004) 25(1) Third World Quarterly 207; Andrew Zimmerman, *Alabama in Africa: Booker T. Washington, the German Empire, and the Globalization of the New South* (Princeton University Press 2010).

Chapter 2. The ecclesial genesis of the dialogical interplay: Francis de Vitoria, quasi-public enclaves and the missionaries of the Holy Roman Church

I. Introduction

At the turn of the 16th Century, a particular kind of 'international legal thinking' was developed through the writings of Francis de Vitoria's (1492–1546) lectures during the Spanish Conquest of the New Indies.[1] Vitoria was a Spanish theologian, Friar of the Dominican Order, the founder of the Salamanca School of Christian theology. Considered at the time and later in history as the humanitarian voice of Spanish Conquest and progenitor of modern conceptions of sovereignty in international law, Vitoria's discourses presented a novel articulation of the policies of the Spanish Empire towards the operation of the Church and its missionaries. In this chapter, I argue for a new interpretation – and thus a new understanding of the operation of international law – of his work on sovereignty, specifically universal dominium and public/private property.

By revisiting Vitoria's writings, we can see the creation of a legal architecture for the Church and its network of missionaries in the New Indian territories through the concept of public territorial enclaves. I define enclaves as territorial lands that are surrounded by either water or foreign territory. This may include ports, land attached to riverways or territorial land that is occupied but surrounded by foreign territory. While Vitoria does not term them enclaves, all the spaces he identifies as 'public/common territories for access' in his writing are those I identify as public territorial enclaves. The concept of public territorial enclaves did not just ensure that the Holy Roman Church and its missionaries remained important actors in the conquest of the New Indies; public territorial enclaves also became part of the Spanish Empire's colonial policy in the New Indies. The idea of public territorial enclaves allowed for Vitoria's formulation of the Law of Nations to be applied in conjunction with the Church's evangelizing mission. The Church, through its missionary network, approached the indigenous rulers and native population with the aim of 'pacification

[1] Francisco De Vitoria, *Political Writings* (Anthony Pagden and Jeremy Lawrence eds, CUP 1991).

through conversion'. I argue that the Church's forcible conversion of the population through its missionary network was purposefully supported through Vitoria's discourses on the justified public war for both the benefit of the Spanish Empire and the Holy Roman Church.

The Holy Roman Church's operation and expansion as a religious organization can be seen as consciously and inextricably linked with the development of Vitoria's international legal thinking and vice versa. Considering the relationship between the Church's trans-boundary operation and international law, we can see international law conceived not only as sovereign relation at its earliest history, but inextricably linked to a trans-boundary form of governance i.e. through and as a network. In this chapter, I understand networks as trans-boundary forms of organization of interconnected actors directed and driven by a powerful central actor – in this case, the Holy Roman Church – which forms the objectives/aims of the organization.[2]

In this case, as I will argue, adopting this conceptualization of networks through the example of the Holy Roman Church and Vitoria's international legal discourses on sovereignty gives us a novel understanding of the operation of international law. By presenting the operation and development of its foundational doctrine of sovereignty as and through networks, this chapter challenges orthodox histories of international law and its relationship to trans-boundary/network forms of organization.

Through this intervention, I present the operation of international law beyond just its 'static' state- and territory-centered approach, which is seen as opposite to trans-boundary and network forms of organization, to an understanding of international law as the *dialogical interplay* between the two – that is international law developed as and through a network of actors and its static, territory-based operation. Understanding international law as a process of the *dialogical interplay* shows that networks of social actors benefit, deploy and develop conventional jurisprudence of international law as much as international law develops, and foregrounds itself through the operation of networks. The effect of this foregrounding of a static understanding of international law's operation is that the violence of networks is rendered invisible. This violence is also not categorized or recognized within the static understanding of international law. It appears then to be more 'discreet', assumes

[2] This understanding of the Holy Roman Church as a transnational network is also conceptualized by Ivan Vallier, 'The Roman Catholic Church: A Transnational Actor' (1971) 25(3) International Organization 479.

different modalities but is part of the operation of international law understood as the *dialogical interplay.*[3]

In the second section of the chapter, I trace traditional and contemporary interpretations of Vitoria's scholarly writings to situate my reading of his text about the history of international law. My reading of Vitoria's discourses builds on both Anthony Anghie's explanation of Vitoria as a key figure that helps us to explain the doctrine of sovereignty as a question associated with the 'dynamic of difference',[4] and Martti Koskenniemi's thesis on the real contribution of Vitoria in introducing the vocabulary of public/private property as the foundation for informal imperial relations with colonial territories.[5] In the third section, I argue for a reinterpretation based on placing the Holy Roman Church and its operation as a trans-boundary form of an institution at the center of reading Vitoria's political writings. In the fourth section, I show that when the significance of the Holy Roman Church as an organization within the development of international legal doctrines is considered, the concept of territorial enclaves becomes integral to the expansion and access to New Indies territories. Territorial enclaves were not only doctrinally justified through the vocabulary of property but further entrenched within an imperialistic 'dynamic of difference' necessitating the expansion of the Spanish Empire. Underlying concepts of public war ensured that the forces of the Spanish Empire built forts in these enclaves to provide access and security to the Church's missionaries. In this context, the missionaries and the empire could be seen as co-imperialist in their colonization of the New Indies.

Finally, in the last section, I look at how then we can reframe our understanding of the violence of international law through viewing the violence, supported by Vitoria's writing specifically 'on the evangelization of the unbelievers',[6] of the Church's missionaries over the native population as part of their governance. I argue how, as a result of this legal architecture, the Church was not only able to maintain its presence through the protection of Spanish forces but was also able to create conditions for indigenous communities that led to conversions, specifically through enforcing taxes, destroying the heritage of the native

[3] Beyond Vitoria and the missionary network, in a broader sense, this reinterpretation opens up avenues to re-examine how we may understand the relationship between international legal doctrines and networks of different forms throughout the history of international law which I explore in the next chapters of this thesis.
[4] Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5(3) Social & Legal Studies 321.
[5] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61(1) University of Toronto Law Journal 1.
[6] Vitoria (n 1).

population, which Vitoria referred to as smashing 'idols', and en masse baptisms. This eradication of the indigenous culture, life and knowledge also became a part of the colonial policy of the Spanish Empire, particularly in how the 'native' was constructed in the eyes of the colonizers, as mired in 'sin' and 'sexually perverse', particularly by the missionaries of the Holy Roman Church. In this chapter, I understand this as a violence which is the lived reality of those on whom it is perpetrated and thus appears in different modalities i.e. structural through living conditions, symbolic forms of destruction and erasure of native ways of knowing[7] and is characterized by being made invisible through the state understanding of international legal thinking. These modalities of violence are not understood as legitimate acts of violence by state actors or in state of war as explained in orthodox international legal thinking.[8] However, they are an integral part of international law understood through the *dialogical interplay* between networks and static understanding of international law. In the context of this chapter, these forms of violence were part of the Holy Roman Church's evangelizing mission. However, they were not envisioned or held legally accountable by Vitorian discourses on public violence in international legal doctrine.

Vitoria's legal discourses did not just advance a vocabulary for informal empire through private and public rights as Koskenniemi has suggested or a discursive basis for an imperial 'dynamic of difference' as Anghie suggests, but they also enabled trans-boundary governance and violence of the Holy Roman Church. Vitoria's contribution to international legal thinking resides, therefore, on its germinal contribution to the understanding of international law as trans-boundary governance and its violence. This interpretation argues for a revision in our understanding of international law as a separate domain from trans- boundary forms of governance in its history. In a closer approximation to the historical period studied in this chapter, it is also possible then to look at other forms of trans- boundary organizations which closely followed the colonization of the New Indies, their governance and their violence facilitated by international law in the years after the Spanish

[7] Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America (English Translation)' (2000) 15(2) International Sociology 215. Including what Santos refers to as epistemicide in Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Routledge 2015).

[8] For a more critical view on deconstructing the concept of war see for example, Tarak Barkawi, 'Decolonising War' (2016) 1(2) European Journal of International Security 199. Within international law, see for example Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"', in Anne Orford (ed), *International Law and its Others* (CUP 2006); Chris AF Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harvard International Law Journal 49.

Conquest. Most notably of which was the rise of imperialism through commercial companies of the 17 th–18th Century, which I explore in the next chapter in more detail.

II. Francis de Vitoria in international legal history

Francis de Vitoria (1483–1546), a 16th-Century Dominican theological scholar, was one of the founders of the Salamancan school. Within the colonial and ecclesial history of both the Holy Roman Church and the colonial Spanish Empire of the 16th Century, Vitoria has been put forward as one of the earliest humanist Christian philosophers. In the historical context, the Holy Roman Church's part in colonial conquests in the 16th Century through slavery and forced labour was met with resistance by Vitoria as he attempted to 'humanize' and defend the rights of indigenous communities in the New Indies.[9] At the time, this attempt prefigured humanitarian discourses that later spoke to a 'progressive' view of both law and religion in the early and the mid-20th Century.

Within the literature of international legal history, Vitoria's discourses have been marked as one of the earliest formulations of modern international law. His writings, particularly on the universal dominium or right to sovereignty of the indigenous population of the New Indies, have influenced orthodox narratives of the development of international law. Vitoria's take on the idea of the universal right to sovereignty is said to promote a humanitarian and universal vision of the international legal order that is characteristic of the modern international legal order. James Brown Scott (1866–1943), a 20th-Century jurist of international law, emphasised this progressive dimension of Vitoria's international legal doctrines.[10] According to Scott, Vitoria's discourses embodied visions of global justice, equality and humanitarianism that were characteristic of modern international law.[11]

[9] Alfred P Rubin, 'International Law in the Age of Columbus' (1992) 39(01) Netherlands International Law Review 5.

[10] James Brown Scott, *The Spanish Origin of International Law Francisco de Vitoria and his Law of Nations* (Lawbook Exchange 2000). This projection of Vitoria as a progressive and humanitarian thinker of the time can also been seen in recent literature for example in; Pablo Zapatero Miguel, 'Francisco de Vitoria and the Postmodern Grand Critique of International Law', in Jose Maria Beneyto and Justo Corti Varela (eds), *At the Origins of Modernity: Francisco de Vitoria and the Discovery of International Law* (Springer 2017).

[11] ibid Scott 95-99.

However, Fernando Gomez, among others, have criticized Scott's use of Vitoria as part of a progressive account of the history of international law.[12] According to Gomez, Scott used Vitoria to advance a particular kind of 20th-Century capitalist liberalism.[13] The focus on Vitoria as a central figure of early humanitarianism is based on notions of civilization that reflect the global vision of American and European powers in the early 20th Century.[14] The use of Vitoria in traditional international legal historiography has been thus deliberately selective and does not delve into problematic notions that reside in the texts and the historical context in which they were written.[15]

Recent critical scholarship in international legal history has tackled, therefore, Vitoria's discourses and their relevance to the development and contemporary practice of international law more substantively.[16] Among these, Antony Anghie has not only challenged the notions of humanitarianism attached to Vitoria's writings but has also demonstrated how Vitoria provided the discursive foundations for imperialism in the application of international law.[17] Anghie suggests that Vitoria's discourses gave a legal justification for colonizing the New Indies based on a cultural differentiation between Spanish Christians and the new Indian 'infidels'.[18] He argues that Vitoria embedded the idea of 'standard of civilization' as a continuing discursive logic that became part of past and contemporary practices of international law.[19]

[12] Fernando Gómez, 'Francisco de Vitoria in 1934, Before and After' (2002) 117(2) Modern Language Notes 365; Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (September 9, 2011) Institute of International Law & Justice Working Paper 2012/2 University of Melbourne Legal Studies Research Paper No.600<https://papers.ssrn.com/sol3/papers.cfm abstract_id=2090434> accessed June 2020.
[13] ibid Gomez 369.
[14] ibid 366.
[15] ibid 367.
[16] Ignacio de la Rasilla del Moral, 'Francisco de Vitoria's Unexpected Transformations and Reinterpretations for International Law' (2013) 15(3) International Community Law Review 287; Andreas Wagner, 'Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth' (2011) 31 (3) Oxford Journal of Legal Studies 562; Pierre-Alexandre Cardinal and Frédéric Mégret, 'The Other "Other": Moors, International Law and the Origin of the Colonial Matrix', in Ignacio De La Rasilla and Ayesha Shahid (eds), *International Law and Islam* (Brill 2019).
[17] Anghie (n 4). For Anghie's broader thesis on the continuing foundations of imperialism in international law based on his thesis, see: Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).
[18] ibid 322.
[19] ibid.

Martti Koskenniemi has argued that another contribution of Vitoria to international legal thinking and its imperial function was the introduction of the vocabulary of private and public rights.[20] Koskenniemi argues that private and public rights vocabulary became the technique of governing peripheral colonies particularly in the acquisition and ownership of territories.[21] This vocabulary was integral to the informal expansion of imperial relations, a process that continues to be relevant in present day international global relations.[22]

In both critical interpretations of Vitoria's place in international legal history, however, little attention has been paid to the existing historical role of the Holy Roman Church as actively involved in the colonization of the New Indies. Anghie draws on Vitoria's discursive method of differentiating Christianity as superior to native beliefs and fulfilment of full human potential as a justification for colonization,[23] while Koskenniemi focuses on the evangelization mission as a historical backdrop for the real contribution of Vitoria. This contribution in his analysis is the introduction of the public/private vocabulary in the colonies for the attainment of economic objectives.[24] Both Anghie and Koskenniemi consider the Holy Roman Church's role in the colonization and the making of international law as a background actor.

The Holy Roman Church was, however, already an imperial institution on its own in the 16th Century, particularly when we recognize that, beyond the 'nation-centred' discussion of Vitoria's writings, the Holy Roman Church was already operating in the New Indies as a powerful and influential institution in complicity with the Spanish Crown. I argue that, in reinterpreting Vitoria's discourses, the practice and governance of the Holy Roman Church as an imperial institution are also relevant to international legal history beyond its contextual importance to the legal thinking of the jurists of the time. In the next section, I discuss not only the historical context of Vitoria's discourses – that is the Church and its relation with the Crown – but more specifically how the Holy Roman Church operated as an imperial institution with a trans-boundary network of missionaries being part of its governance within the New Indies.

[20] Koskenniemi (n 5).
[21] ibid 11-12.
[22] ibid.
[23] Anghie (n 8).
[24] Koskenniemi (n 5).

III. The Church in the New World

a. The Church and its missionary network

John Schwaller observes that the Holy Roman Church was the most important institution in the colonization of the New Indies specifically in terms of its structure and internal governance.[25] Structurally the Church was divided into two main orders with different evangelical views on spreading the religion: the Franciscans and the Dominicans.[26] The clergy were divided into secular and regular clergy, the former being local parish priests under the supervision of local bishops while the latter consisted of members from both religious orders.[27] Despite these divisions, the hierarchy of authority led eventually to the Pope.

The networks of missionaries, part of the regular clergy, were the leading members of the Church whose mission was to convert the population of the New Indies.[28] At the same time, the local bishops were responsible for maintaining homogeneity through the colonized territories with respect to Christian values.[29] Both the missionary network with its evangelization and the clergy system in settlements systematically subverted indigenous culture and identity by imposing 'civilizing Christian values'.[30] Furthermore, the Holy Roman Church became the single largest landowner in the colonies of the Spanish Empire.[31] This control also made it responsible for subverting every aspect of native life into Christian values and norms.[32] Moreover, systematically, the Holy Roman Church's involvement in

[25] For the historical role and operation of the Church in Latin America see generally: John Frederick Schwaller, *The History of the Catholic Church in Latin America: From Conquest to Revolution and Beyond*. (NYU Press 2011).

[26] ibid. See specifically 55–95 for the expansion of Spanish Empire through the missionaries and the differences between the work of the Dominican and Franciscan orders of the Church in New Indies territories.

[27] Schwaller (n 25) 55–95. Schwaller observes that once missionaries of both orders had converts they provincialized the territories in accordance with their respective orders and would then venture out on their own further into native territories not yet under Spanish control. See also generally: William Eugene Shiels, *King and Church: The Rise and Fall of the Patronato Real* (Loyola University Press 1961). The Crown's interest in controlling the secular clergy intensified as the importance of the Holy Roman Church in the governance of native life grew in the New Indies. Shiels observes that between the early and mid-16th Century the Crown attempted to have greater administrative control and patronage over the Church.

[28] Schwaller (n 25).

[29] ibid 55-95.

[30] ibid 60.

[31] ibid 146.

[32] ibid 62-63.

agricultural and commercial activities to support its evangelizing mission in the New Indies made its organization self-sustainable.[33]

In this respect, the Holy Roman Church's governance over the New Indies could be understood as a 'political form'.[34] Carl Schmitt writing in the 20th Century argued that the Church and Crown were effectively both political forms of governing communities.[35] The Holy Roman Church, as an institution, was fixated on normative uniformity that was based on the universal truth of Christianity as the highest form of ideal. Its institution and ideological structure were designed to accommodate this uniformity.[36] Hence, through its evangelizing mission, the Holy Roman Church considered every native convert a member of the Church.[37] Missionaries and clergies within settlements taken over by the Spanish were considered components of its governance structure. Regardless of the distance and a lack of direct control by the Holy Roman Church or the Pope himself, all the components of the institution, that is the missionaries, the parishes, the converts, were all part of a unified Holy Roman Church. In this sense, the Holy Roman Church as an institution particularly through its missionary network and local parishes in settlements could be seen as a trans-border networked organization.[38]

b. Co-imperialism: the Crown and the missionary network

Given how the Holy Roman Church's governance relied on networks of missionaries and clergy within settlements, its role in the colonization of the New Indies could be seen as important as the mercantile and military ventures by the Spanish Crown. From the perspective of the missionaries of the Church as well, the New Indies colonization was seen as an 'endeavour of both the cross and the crown'.[39] The evangelizing mission of the Holy Roman Church was not just a moral and political justification for the Empire, the missionary

[33] ibid 79.
[34] Carl Schmitt, *Roman Catholicism and Political Form* (G L Ulmen tr, originally published 1923, Greenwood Publishing Group 1996).
[35] ibid 13. Carl Schmitt describes the Church as a form hierarchical entity with subsidiary institutions.
[36] ibid 14-15.
[37] Schwaller (n 25).
[38] Jeff Haynes, 'Transnational Religious Actors and International Politics' (2001) 22(2) Third World Quarterly 143; Vallier (n 2).
[39] Luis N Rivera, 'A Prophetic Challenge to the Church: The Last Word of Bartolomé de Las Casas' (2003) 24(2) Princeton Seminary Bulletin 216.

network was also instrumental in the colonization process.[40] From the inception of the conquest, the missionaries were at the vanguard of the colonization process.[41] As the following discussion will demonstrate, the relationship between the Holy Roman Church and the Spanish Crown was one of mutual benefit. However, as co-imperialists, they were also rife with internal disagreements. What I argue in this section is that, despite the disagreements between the Holy Roman Church and the Spanish Crown, the role of the Holy Roman Church in directing and shaping the colonial policy was an extremely important one due to its position in the period and historical context. This powerful influence over the Spanish colonial policy for the New Indies was even more pronounced due to the nature of its institutional structure – which I have discussed in the previous section.

The first and foremost question in regards to the conquest of the New Indies was one of territorial rights. Initially, this was resolved through acquisition as a right by discovery and legal instruments were used to justify the conquests; they were legitimised through the support of the Holy Roman Church.[42] The Holy Roman Church, in 1493, issued papal bulls, as a form of legal authority given to the Spanish Crown to propagate the Christian faith in the New Indies territory.[43] Following the papal bulls, the Holy Roman Church's role within colonial policy also intensified, as missionaries travelled along with colonial administrators to the New Indies. Among the orders of the Church, the Dominican friars held a strong position not just within the Holy Roman Church but also as advisors to the Crown.[44] It was the Dominican missionaries, to which Vitoria belonged, who opposed how colonial policy in the New Indies was being carried out by colonial administrators.[45] One of the main points of contention was the first colonial law in the New Indies, the Law of the Burgos introduced in 1512. The Law of the Burgos was based on the economic exploitation of labour in the New Indies.

[40] Luis N Rivera, *A Violent Evangelism: The Political and Religious Conquest of the Americas* (Westminster John Knox Press 1992) see in particular 201–210.

[41] Charles Ralph Boxer, *The Church Militant and Iberian Expansion, 1440-1770* (JHU Press 2001) 71–77,113. Charles Boxer notes that missionaries of both orders were at the frontier of the spiritual conquest of the New Indies; their effectiveness in expanding into the territories could be measured as less than a thousand missionary-friars ministering to several million native converts.

[42] Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (OUP 1992)74–81.

[43] ibid.

[44] ibid 94.

[45] ibid 94–95. Prior to Vitoria's lectures, Bartolome del las Casas, among other Dominican missionaries held a radical view of the Spanish Crown's colonial policy and interpretation of the catholic faith in relation to the New Indies.

The Law of Burgos justified forced slavery of indigenous people both politically and morally as part of the spread of Christianity and civilization, which also included forcible conversions into Christianity.[46]

In the initial period of the conquest, papal bulls that justified the territorial acquisition of lands in the New Indies for the Spanish Crown were negotiated as part of the papal legitimacy with the Holy Roman Church.[47] The Crown did not just negotiate the claim to the territory for evangelization but also controlled the license to missionaries to travel from Castellian territory to enter into the New Indies.[48] Even though the Spanish Crown's expansionist interests were motivated by the economic and political benefits of the conquests, it was imperative that the Holy Roman Church's interests in the conquest were taken into account for the Spanish Crown. This was because the Holy Roman Church was a powerful institution whose ideological influence within the time was significant. It thus weighed strongly on the Spanish Crown's colonial policy of the conquest of the New Indies.

Although the papal bulls and adoption of different instruments of moral and political legitimacy applied in succession,[49] the question of title to lands remained a crucial problem for the Spanish Crown. This is important, particularly as the Spanish Crown officially shifted the narrative of the colonization from military conquest to a missionary enterprise.[50] Theologians from the Dominican order thought the Crown's treatment of natives was unchristian, perverse and tyrannical.[51] The Dominican missionaries in the New Indies were Thomist-humanist moral philosophers who contested the treatment of the indigenous community by colonial administrators. Most notable reformers included Bartolome De Las Casas (1484–1566) and Francis de Vitoria. The problem of territorial control as far as the right to evangelize was never in dispute by these figures. Instead, for the Dominican order of the Holy Roman Church, the primary question was whether a case could be made for the

[46] Robert William Jr (n 42).
[47] Victoria Hennessey Cummins, 'Imperial Policy and Church Income: The Sixteenth Century Mexican Church' (1986) 43(1) The Americas 87. Cummins observes that the relationship between the Spanish Crown and Catholic Church was one of mutual benefit, where the Crown would financially support the missionary ventures in lieu of the support of the Holy Roman Church for its overseas expansion.
[48] ibid.
[49] That includes the Law of Burgos, the requerimiento which were a conjoined effort of Church clergy to adopt Christianising natives as well as exploiting them as labour for the Spanish Crown.
[50] Robert Williams Jr (n 42) 94–95.
[51] ibid.

rights of the native people to be equal to those of the Spanish Crown.[52] For Las Casas in particular, the answer to the rights of the natives and approach towards evangelization came from theological roots.[53] He thought questions of political legitimacy or the socio-economic interests of the Spanish Crown were secondary.[54]

The Spanish Crown's concern was still one of juridical explanation for the territorial control in a broader sense, that is, how could the Crown react when natives resisted and what if the conversion was not accepted.[55] As much as these questions related to theological or ecclesial concerns, there were socio-economic interests of the Crown tied into the colonial venture in the New Indies. Growing contradictions and reports as to how the natives were being treated by the colonial administrators and the missionaries further complicated the matter[56] and resulted in the Spanish Crown allowing 'experimenting' with the native population with regard to conversion into Christianity.[57] Nonetheless, the territorial claims over the lands taken over by the Spanish Crown were never reduced,[58] and the Holy Roman Church not only enjoyed a greater say in the colonial policy of the Spanish Empire but it also played an active part in the colonization of the New Indies, specifically through its missionary network whose evangelization mission in the New Indies was instrumental in the Spanish Crown's expansion into the New Indies.

The Spanish Crown's recognition of the importance of the missionary network can be deduced from the monopoly it sought over the communications between the missionaries with the Holy Roman Church and giving them license to travel to the New Indies.[59] Luis Rivera observes that the Spanish Crown's initial response to Vitoria's lectures on the rights of the native people having 'dominium' over the New Indies territory was one of caution.[60] For the Spanish Crown, the contentions against the methods of evangelization or the rights

[52] ibid.
[53] Rivera (n 40) 64–86.
[54] ibid.
[55] Tzvetan Todorov, *The Conquest of America: The Question of the Other* (University of Oklahoma Press 1984) 147.
[56] Justus M Van der Kroef, 'Francisco de Vitoria and the Nature of Colonial Policy' (1949) 35(2) The Catholic Historical Review 129.
[57] Robert Williams Jr (n 42). Las Casas took the lead in these experiments as his outrage in the Old World raised concerns over the 'humanity' in the colonial ventures of the Crown.
[58] ibid.
[59] Cummins (n 47).
[60] Rivera (n 40) 84–85. Rivera makes reference to a letter from the King to Vitoria urging him to cease any talk of native rights until consultation with the Crown.

of native people were not as important as the monopoly over such methods.[61] More specifically, in the context of imperial rivalry and competing socio-economic interests of European empires, the Spanish Crown was more interested in juridical reasoning that allowed for both a socio-economic and a theological basis for the continuing exploitation of native labour and resources.

This 'co-imperialism' of the political form and aims of the 'Crown' and the political form and aims of the Holy Roman Church is emblematic of how we can understand international legal discourse emerging at this moment in history. Particularly, by understanding international law as a *dialogical interplay* between networks and international legal discourse we can also see how different forms of imperialism can operate in tandem, in this case, the ecclesial (i.e. the Church's missionary network) and the monarchical (i.e. the Crown).

IV. Vitoria re-visited: *dialogical interplay* and 'Law of Nations'

Thus, it is in the context of the role of the Holy Roman Church as a colonizing institution along with the Crown that we can better understand Francis de Vitoria's lectures on the New Indies. As I have discussed above, the Holy Roman Church was not only a powerful governing institution at the time. In the case of the conquest of New Indies, it also operated through networks of missionaries who governed through structures of local parishes and individual evangelization efforts. The network of missionaries was able to operate in this fragmented manner because of how the Holy Roman Church was both ideologically and institutionally defined. In the context of the time, it can be surmised as a universal true religion for all mankind that ought to be spread across space and time. With the support of a network of missionaries and local parishes in indigenous communities, it could ensure that every aspect of native life was in line with the precepts of the Holy Roman Church.

a. 'Quasi-public territorial enclaves' and missionaries

[61] Rivera (n 40) 82–85.

The importance of the Church's operation within Vitoria is not just limited to its importance as a normative authority. What was unique about Vitoria's conception of the Spanish Empire, as Philpott points out, was how he also presented a natural law reasoning for relations between nation states.[62] In this sense, Koskenniemi has also pointed out that Vitoria provided a framework for the global relations between the European and Non- European world through the vocabulary of public/private rights. Vitoria's explanation of 'ius gentum' included a natural right of people with dominium to trade and move freely.[63] Underpinning the freedom to trade and move to other territories was the concept of the distinction between public and private property. Dominium not only meant ownership of property by those occupying such property, it meant a right to own territory as property. This right to own territory as property alluded to the bounded nature of territorial sovereignty. However, as 'ius gentum' necessitates trade or any kind of relations between nation states, the ability to access territory must be categorized as 'public' so that all nation states may be able to trade and move freely. Vitoria describes this specifically as 'natural partnership' that is part of 'ius gentum' common to all mankind.[64] This natural partnership meant that territorial areas such as 'riverways, open sea' and, to access the territory of the New Indies, 'ports' were public or common property.[65] That is, territorial water on the land of natives, for Vitoria, is public property for the ships of the Spanish Empire that carry traders, soldiers and missionaries of the Holy Roman Church. These public ports and riverways are essentially 'territorial enclaves' that Vitoria claims are the exclusive property of the Spanish Crown to help the missionaries with their evangelization.

This idea of public property was not only useful for developing a framework for conducting relations but in Vitoria's discourses, as far as the New Indies was concerned, it became a way to monopolize the territorial enclaves in the New Indies as their own. Vitoria's conception of the superiority of the Spanish republic and its 'mission' to educate the 'barbarians' was also qualified by his reasoning that the Spanish Empire alone should not only benefit from the trade but was also the only one responsible for the evangelizing

[62] Daniel Philpott, 'The Religious Roots of Modern International Relations' (2000) 52 World Politics 206.
[63] Koskenniemi (n 5).
[64] Vitoria (n 1) 278.
[65] ibid 280.

mission. This exclusivity of the Spanish Empire in owning, what I describe as, territorial enclaves is how Spanish ships would bring missionaries to the New Indies territory.[66]

Given the importance he gave to the 'dual sword' of the Pope and the Holy Roman Church as a normative authority, for Vitoria, the travelling of missionaries was the most important function that the Spanish ships could serve. He describes this exclusivity and priority of enabling access for missionaries by stating: 'since they (the Spanish) have the right to travel and trade among them … then they must also be able to teach them the truth especially about matters having to do with salvation and beatitude'.[67] Further, on the duty of the Spanish Crown to support the evangelizing mission exclusively in the New Indies, Vitoria states: 'Princes of Spain are in a between a position to see the reaching of the gospel
… the pope may entrust it to them and deny it to all others'.[68]

The territorial enclaves were not just a means of monopolizing trade, but a means for the access of the Holy Roman Church to expand its missionaries and clergies. In practice, the public ports and territorial waters became the exclusive territorial enclaves of the Spanish Empire that allowed access to the Holy Roman Church for its evangelizing mission.

In this manner, Vitoria's contribution to international legal thinking was not only to provide for a colonial basis for international legal thinking,[69] or juridical thinking on public and private property.[70] He also put forward a framework that allowed the continuing expansion and influence of the Holy Roman Church through access to territorial enclaves by its missionaries. As I have mentioned previously, the Holy Roman Church and its network of missionaries were already operating as a governing imperial institution. Its structure of leading missionary networks, clergies in local settlements, operated as a fragmented organization or network like structure with the singular objective of normative control and homogenization of the native way of life. What Vitoria managed to provide was a legal framework that came to support public enclaves exclusively for Church missionaries who were the 'educators', while presenting ius gentum as a Law of Nations between nation states.

[66] Cummins (n 47).
[67] Vitoria (n 1) 284.
[68] ibid.
[69] Anghie (n 4).
[70] Koskenniemi (n 5).

b. The Spanish Empire and 'just' war

Vitoria's lectures delivered at the School of Salamanca between 1528 and 1540 were from his position as a Professor of Theology, following in the tradition of Thomist-humanist philosophy that was characteristic of the Dominicans. While the basis for his rejection of papal bulls and any authority of the Holy Roman Church to legitimise a conquest derived from Thomist-humanist roots, his discourses on the rights of natives instead are based on Roman conceptions derived from the Law of Nations. As Daniel Philpott observes, part of Vitoria's novelty was in the direction his analysis alluded to a broader theory of international relations.[71] Essentially, Vitoria combined theological humanist traditions and socio-political conceptions of global relations to legitimise the Spanish Empire's conquests of the New Indies. Vitoria's arguments regarding the rights of the natives were thus neither completely nationalistic nor purely based on moral reasoning characteristic of contemporary theologians or missionaries.[72] This is what has led historians like Rivera and Robert William Jr. to conclude that what Vitoria was suggesting in regards to the Spanish Crown's identity as a colonial empire may be described as a *'Catholic'* Spanish Empire.[73]

Vitoria's conception of a Spanish Empire which he described through the idea of 'ius gentum' was, therefore, an important part of the legitimization of conquest. In essence, ius gentum meant that the universal idea of 'natural dominium', that is sovereignty, belonged to the natives regardless of their denial or acceptance of the Christian faith. Nonetheless, he suggested that the Spanish Empire, as a benevolent republic, occupied a higher purpose and position of guidance towards the otherwise 'free' world including the 'barbaric natives.'[74] This meant, as Rivera observes, that James Brown's interpretation regarding Vitoria's conception of sovereignty being similar to today's conceptions of equal sovereigns (despite religious and/or cultural difference) was incorrect.[75] For Vitoria, having the 'divine grace' to preach exclusively made the Spanish Empire culturally superior to the rest of the world. This is precisely what Anghie's assessment is with regards to the link between colonialism

[71] Daniel Philpott, 'The Religious Roots of Modern International Relations' (2000) 52(2) World Politics 206.
[72] Rivera (n 40). Rivera for instance, distinguishes Las Casas' approach towards the rights of the New Indies to that of Vitoria's. Referring to Isaaco Perez Fernandez's comparative study of Las Casas and Vitoria, he argues that Las Casas rejected Vitoria's reasoning for legitimate titles for conquest over the New Indies in particular.
[73] Rivera (n 40); Robert Williams Jr (n 42).
[74] ibid Rivera 85–86.
[75] ibid.

and international law. He points out how Vitoria's discourses presented the idea of universal sovereignty embedded with a standard of civilization that must be reached by 'independent' and 'free nations'.[76] In the case of the New Indies conquest, the universal standard was one of Christian faith. Thus, only when the unbelievers accept it can they reach the potential of a superior sovereign state.

The evangelizing mission for Vitoria was both a condition to conquests and an important aspect to his discussion on the affairs of the New Indies. Part of his discourses delivered at the Salamancan school focused on the Holy Roman Church and its clergies. Even though Vitoria maintains that there is a distinction between ecclesial or spiritual affairs thereby rejecting the idea that universal authority to deny dominium belongs to the Pope, Vitoria placed the Church, specifically the Holy Roman Church and its seat in the Spanish Empire, as an important normative authority.[77] In his lecture 'On the Power of the Church', Vitoria states:

> The pope has temporal power only as far as it concerns spiritual matters, that is, as far as is necessary for the administration of spiritual matters. As the purpose of spiritual power is ultimate happiness whereas the purpose of civil power is social happiness therefore temporal or political power is subordinate to spiritual power.[78]

The spiritual administrative affairs Vitoria refers to here are concerning the spreading of Christian faith through missionaries who would teach the 'barbarians the truth concerning matters of salvation and beatitude'.[79] Vitoria further explained this as a 'responsibility for using temporal things for spiritual ends',[80] and more specifically, to 'use temporal means such as the material sword of the temporal authority to guard, administer spiritual things'.[81]

Rivera observes that in reality a strict separation never translated effectively,[82] as both the Holy Roman Church and the Crown involved themselves with ecclesial and administrative matters.[83] This observation is also consistent with Victoria Cummin's

[76] Anghie (n 4).
[77] Daniel Castro, *Another Face of Empire: Bartolome de Las Casas, Indigenous Rights, and Ecclesiastical Imperialism* (Duke University Press 2007) 29.
[78] Vitoria (n 1) 92.
[79] Vitoria (n 1) 284.
[80] ibid.
[81] ibid.
[82] Rivera (n 40) 210–11.
[83] ibid.

analysis, that the Church required the material support – in terms of economic and military protection – as much as the Crown found spiritual affairs, especially missionaries, useful to the expansion in the New Indies.[84] In light of the above analysis, Vitoria attempts to maintain the strict separation between the spiritual and temporal affairs by describing the role of the Holy Roman Church as 'holding two swords'.[85] As Luis Rivera points out, this can also be understood as a way to justify the continued operation of the Church as a governing institution that both supports the Crown's conquest while benefiting from the conquest for its evangelizing mission.[86] His lectures on American Indies for example show how the protection of the Holy Roman Church missionaries was embedded within his idea of the Law of Nations. In the lectures on American Indies he states that:

> … if the business of religion cannot otherwise be forwarded, the Spaniards may lawfully conquer the territories of these people deposing their old masters and setting up new ones, carrying out all things that are lawfully permitted in other just wards by the law of war.[87]

And:

> … if the barbarians obstruct the Spaniards in their free propagation of the gospel, the Spaniards, may preach and work for the conversion of that people even against their will, and may if necessary take up arms and declare war on them, in so far as this provides safety and opportunity to preach the gospel.[88]

As much as these statements are presented as part of orthodox international legal thinking, that is, the relation between the European and Non-European world, they also emphasise the protection and safety of missionaries by the Spanish armies. Anthony Anghie refers to this as part of international law's colonial legitimization of violence.[89]

V. The violence of the Holy Roman Church

[84] Cummins (n 47).
[85] Vitoria (n 1) 96.
[86] Rivera (n 40).
[87] Vitoria (n 1) 284.
[88] ibid.
[89] Anghie (n 4).

However, I argue that, in formulating a lawful conception of what the state may resort to as part of war, Vitoria's thesis on just war hides other forms of violence inflicted on the natives as part of the co-imperialism of the missionaries and the Crown. These forms of violence fall beyond the orthodox framework he has provided in his writings and were an integral part of the Holy Roman Church's operation in the New Indies. Here we not only see the colonial legitimization of violence within the orthodox framework of laws of war but other modes of violence that are not recognized despite being a consequence of the legal architecture provided through international legal discourse for the functioning of the Holy Roman Church or its support of the evangelizing mission. Violence here, as the sections below will show, is not just a 'legally legitimised' form of violence, such as 'just war', but specifically understood as the violence of 'coloniality'[90] enacted and perpetrated on a community through governing and controlling, specifically by and through a trans-boundary network of actors that are part of a powerful governing institution.

a. Ecclesial imperialism: forced conversions, taxes and native 'epistemicide'

In his lectures 'On the evangelization of unbeliever', Vitoria states that:

> … it seems that it is lawful, to smash down the idols of these barbarians, because it does them no harm or wrong … nor is it evil per se to do so, being against neither the honour of God nor the good of a neighbour, since it does not harm them.[91]

In the same lecture, he goes on to say, on the matter of indirect coercion into Christianity through taxes or levies that may encourage natives to become converts:

> …in this regard, it should be noted that taxes (tributum) and levies are of two kinds. One kind may justly be imposed on unbelievers such as tributes appropriate at the time and place raised at the outbreak of war. Indeed they may be required to pay tributes from which Christians are exempted.[92]

[90] Here I refer specifically to my description of violence influenced from Anibal Quijano (n 7).
[91] Vitoria (n 1) 347.
[92] ibid 348.

As Rivera observes, these methods of evangelizing were common practice in the way the Holy Roman Church and its missionaries were able to subvert native life and culture.[93] Rivera argues that Vitoria's discourses on the evangelization of unbelievers gave an implicit license to coerce conversion indirectly through these means, translated into missionaries practising baptisms en masse.[94] Baptisms, Rivera argues, became the culmination of psychological pressures exerted over the natives through strenuous conditions imposed by the Spanish presence.[95]

The conditions that the natives were put in, through financial tributes, destroying of their idols and en masse baptisms, within my argument here, constitute a different kind of violence. Carried out as part of the Holy Roman Church's evangelizing mission, through its clergies and the soldiers that protected them, they were part of the Church's governance over the New Indies. The Holy Roman Church's approach towards conversion, both direct and indirect, I argue, can be viewed as colonial violence that was part of its governance.

b. Colonial Expansion: natives as 'citizens' of empire

The Holy Roman Church's approach towards evangelization has been described by Daniel Castro as 'ecclesial imperialism'.[96] The different kinds of violence inflicted on the indigenous communities become connected to ideas of 'just war' and conquest only when protecting the converts is taken into account. Thus, in Vitoria's commentary on the affairs of the New Indies he states:

> if a good portion of the barbarians have been converted to faith in Christ … the pope with reasonable cause, could give them a Christian prince and remove the other infidel lords.[97]

This particular claim of legitimate title to the territory of the New Indies argued by Vitoria is directly linked to the violence of the Holy Roman Church missionary network. However, in both international legal thinking and Vitoria's writings, these forms of violations on native life, spirituality, ways of living and living conditions were seen in isolation from and separate to lawful/unlawful force. Additionally, as Luis Rivera points out,

[93] Rivera (n 40) 229–31.
[94] ibid.
[95] ibid.
[96] Castro (n 77).
[97] Vitoria (n 1).

native converts were deemed to owe fidelity to the Crown once they were Christians.[98] Hence, it also became how the missionaries served the expansion and legitimacy of the Spanish Empire, as baptism meant serving the Holy Roman Church meant being part of the Spanish Empire.[99]

The missionary network, through these confluences between the Crown and itself, thus consciously and actively facilitated the socio-economic territorial expansion of the empire. As the territories were taken, the Church established 'dioceses' in the colonized territories taken over by the Spanish military.[100] These were the administrative center points for the colonial settlements of the Crown as well as the Church.[101] Thus the international legal architecture worked as part of both the Crown's and the Church's aims as the 'multiplication of "diocese" meant the proliferation of colonizing enterprise of the Crown'.[102]

These settlements, particularly economically resource-rich areas where mining was being done, relied on and made use of the Crown's network of West and Central African slaves brought in for mining work.[103] The frontier of New Indies territories became the frontiers of the empire building itself, replicating, reiterating and embedding forms of violence it perpetrated in its other imperial ventures, particularly in its 'otherisation' of Muslim Empire.[104]

Rivera argues that Vitoria's discourses specifically on the conversion of natives were linked to the expansion of political legitimacy of Spanish dominium over native land. In

[98] Rivera (n 40) 231.
[99] ibid.
[100] Josep M Barnadas, 'The Catholic Church in Colonial Spanish America', in Leslie Bethell (ed), *The Cambridge History of Latin America Vol 1: Colonial Latin America* (OUP 2008).
[101] ibid. On a local level these were structured as parishes with clergy keeping watch over the 'Spanish' community so that they don't lose the Christian way of life. See; Schwaller (n 25).
[102] ibid.
[103] Patrick Manning, 'African Connections with American Colonization', in Victor Bulmer-Thomas, John H. Coatsworth and Roberto Cortes Conde (eds), in *The Cambridge Economic History of Latin America: The Colonial Era and the Short Nineteenth Century* (CUP 2005).This was particularly so in colonial Peru and Colonial Brazil from 1570 onwards as the need for mining increased with expansion of Spanish Empire into the New Indies. Between 1450 and 1650 the colonial Spanish America brought in 123,000 slaves from West and Central Africa.
[104] Here I am referring to black Muslims enslaved by the Spanish and transported to the New Indies. Sylviane A Diouf, *Servants of Allah: African Muslims Enslaved in the Americas* (NYU Press 2013); Michael A Gomez, *Black Crescent: The Experience and Legacy of African Muslims in the Americas* (CUP 2005). This also refers to the continuing colonial projections of 'other' enemy by the Spanish Empire i.e. how the Muslim empire and communities were seen by missionaries, colonial administrators, soldiers and their perceptions of the New Indies based on their experiences with Muslims, see for example; Cardinal and Merget (n 16); Sophia Rose Arjana, *Muslims in the Western Imagination* (OUP 2014).

turn, what this meant was that the work of the missionary network and the Holy Roman Church provided for the expansion of the application of international legal standards as understood by Vitoria and the Spanish Crown. In conjunction with other methods of supporting the conversion of natives, through destroying their idols, imposing levies, and 'educating' them, pacification through conversion became not just an ecclesial endeavour, but a political approach to expansion and application of the Law of Nations as understood by Vitoria.

Ecclesial imperialism was inherently linked to the social construction of the native – as an 'infidel', as 'converts', and as 'cannibals' and practising 'sodomy'.[105] Vitoria when speaking of conversation, for example, refers to 'sins which are harmful to our neighbours, such as cannibalism'.[106] For Vitoria,

> any prince can compel them not to do these things. By this title alone the emperor is empowered to coerce the Caribbean Indians.[107]

Coercive conversions of these kinds were linked directly to the understanding of the native as 'sexually perverse'.[108] Andrea Smith elaborates, the very idea of the native as 'sexually perverse' was a personification of sexual sin for the missionaries.[109] In this context, the violence of the Spanish missionaries – which is echoed in Vitoria's discourses on evangelization in particular – was the social construction of the natives used by the Spanish Empire to justify their violence on the native population, particularly sexual violence.[110]

In this way, we see the missionary networks' knowledge of natives, acts of conversion, creation of conditions for conversion through the breaking of 'idols', taxation, and justifying

[105] Vitoria (n 1) 205–09.
[106] ibid.
[107] ibid 347.
[108] Andrea Smith, 'Sexual Violence and American Indian Genocide' (1999) 1(2) Journal of Religion and Abuse 31; María Lugones, 'Toward a Decolonial Feminism' (2014) 25(4) Hypatia 742.
[109] ibid Smith 33.
[110] This point is particularly made by Andrea Smith in her work on explaining native colonial genocide as ultimately also embedded within sexual violence. Andrea Smith, 'Not an Indian Tradition: The Sexual Colonization of Native Peoples' (2003) 18(2) Hypatia 70.

and perpetrating epistemological spiritual,[111] intellectual violence, which de Sousa Santos refers to as 'epistemicide',[112] as well as sexual violence.[113]

The social construction of the native was produced by the missionary network and then used as a means to carry out baptisms, forced conversions and creating conditions for baptisms as a way to reiterate and embed further the territorial expansion of the empire – as through the missionary network the native became subsumed and consumed by the empire as 'citizens'. Thus, the missionary network acted both as a proxy and a knowledge producer for the empire's colonial endeavour.

VI. Conclusion

This violence of the missionary network, I have covered above, effectively can be understood as the undercurrent of colonial governance over the New Indies through the relationship between the Spanish Empire and the Holy Roman Church. More importantly, I have shown in this chapter how this was specifically and consciously supported by international legal doctrines in Vitoria's discourses. It is because of the formal doctrines, as presented by Vitoria, that the operation of the missionaries and the Church is facilitated by ensuring exclusive access. Furthermore, by separating violent evangelism of the Church from public violence between states, the former becomes unaccountable under the Law of Nations. It is precisely the unaccountable modes of violence, through the Holy Roman Church, that then facilitate the expansion of the Spanish Empire's territory in the New Indies.

In the formulation of my thesis, this particular chapter stands as the first instance of international law as a relational interplay between international law's static territory-centred approach i.e. Vitoria's idea of access to territory or what I refer to as public enclaves, and a network of actors, i.e. missionary network of the Holy Roman Church. Vitoria's writing is

[111] Winona LaDuke, *What Is Sacred? Recovering the Sacred: The Power of Naming and Claiming* (Haymarket Books 2016); Steve Talbot, 'Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934' (2006) 21(2) Wicazo Sa Review 7.

[112] Santos (n 7).

[113] This can (and does) extend to other forms of violence understood beyond violence on human life in particular as I have mentioned in my introduction chapter. Indigenous scholarship has pointed this out as well through their own epistemological frames; see for example, Winona Laduke, *All Our Relations: Native Struggles for Land and Life* (South End Press 2012).

usually interpreted as one of the origin points of the international legal framework as we now understand it – particularly concerning the doctrine of sovereignty. In this chapter, as I have shown, his discourses on access to territory and evangelization of the unbeliever, i.e. conversion/baptisms, reveal to us how he was speaking to a more specific relationship between the Church's operations in the colonization of the Americas and the Spanish Empire. His writings represent a turn in developing a framework or legal architecture for public 'access to territory' for both the network and the colonial expansion of the Crown.

The germination of a network and a juridical principle of territory-centric formulation of international law has been an ecclesial one in the first place – i.e. it started with the Holy Roman Church's missionary network. This process of how the juridical principle of 'access to territory' or public enclaves and missionary network sought to expand both the network's reach and thereby the empire's frontiers reveals to us the violence of international legal discourse beyond simply its static territory-centered nature. Vitoria's specific mention of 'just war' in the chapter on 'new indies' has been interpreted as his formulation of legal legitimization of war and thus the only way in which we can assess the violence of international legal relations. This renders the violence experienced by the indigenous population, the native and the colonial 'citizens' of the empire completely invisible in the paradigm of international law.

In the next chapter, I move on to how Vitoria's conception of 'access to territory' translated into the legal capital for another network of actors i.e. the merchant network, specifically the Dutch East India Company.

Chapter 3. The secularisation of the *dialogical interplay*: Hugo Grotius, private property and the merchant networks of the Dutch East India Company

I. Introduction

In the previous chapter, I showed how Vitoria provided the basis for the *dialogical interplay* between the network of missionaries and international legal discourse on access to a territory as part of his understanding of 'sovereignty'. In this chapter, I explore how Vitoria's understanding of public territory or access to territories was then utilized by Hugo Grotius, who is thought to be one of the 'founding' fathers of contemporary international law,[1] for the benefit of commercial expansion and governance of the Dutch East India Company Merchants. Central to this aspect of the history of *dialogical interplay* between merchant network and international legal discourse is the underlying imperialism of the birth of the 'corporation' as an association of life which had a colonial accumulative character as well as a trans-boundary expansionist logic of property ownership.

I discuss how Grotian discourses moved international legal thought from a strictly theological basis towards a secular mercantile oriented approach. However, this movement, while relying on the Vitorian emphasis on universal dominium, advanced a more detailed idea of ownership of property. I argue, in the third section, how Grotius provided, in this way, a legal basis for merchants to not just access territory but to enjoy full authority and control of parts of territories and surrounding areas, particularly in the Indonesian

[1] David J Bederman, 'Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis' (1995) 16(1) Grotiana 16. According to David Bederman, the earliest claim of Grotius as the 'father of international law' is made by Maurice Bourquin in: Maurice Bourquin, 'Grotius est-il le père du droit des gens?' in *Grandes Figures et Grandes Ouveres Jurideque* (Faculte du droit Geneva 1948), who describes Grotius as a progenitor of modern international law and international relations. However, in regards to this question of whether Grotius can be termed the father of international law in; Benedict Kingsbury and Adam Roberts, 'Grotian Thought in International Relations' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (OUP 1990) , Kingsbury and Roberts observe that it is not possible to accord that paternal title as originator to any one figure as international legal thinking in the mid-20th Century was understood as a culmination of scholarly work in the past.

archipelagos.[2] Grotius redefined sovereignty by introducing the idea of the occupation of public property by merchants for a longer period so that they could become owners of the said 'public property' and may claim sovereignty. Like Vitoria, Grotius' reference was to public territories that constitute shores and ports and territories closer to or attached to rivers and oceans. In Grotius' case, these happened in ports and shores of islands occupied by indigenous communities in the East Indies, specifically Java, Ambon, Banda and the Moluccas. The Grotian discourses on sovereignty and war allowed, at the same time, for aggressive expansion and appropriation of territories and jurisdictions surrounding the territories acquired through exclusive treaties. The Dutch East India Company as a 'Company-State' then monopolized trade with the indigenous people of the islands in the East Indies, specifically Java, Banda and Ambon, often forcing exclusive trade on the indigenous people.

In the last section of this chapter, I turn to the question of violence that this merchant network perpetrated as part of its ownership, control and governance over the Indonesian archipelago. I show how the development in the legal doctrine of sovereignty became the main instrument through which the Dutch Empire's colonial agent, the Dutch East India Company (VOC), maintained control over colonial territories during the early 17th Century. Part of the way territorial control was exercised during this time was based on treaties between indigenous rulers in the East Indies and the Dutch East India Company - treaties in which the balance of power remained with latter.

Focusing on the experiences of natives from the islands of Java, Ambon, Banda and the Moluccas, I explore how the VOC enforced these treaties through the use of force against the communities it traded with. The Dutch East India Company maintained this uniform policy of ownership and unequal exclusive treaties with the East Indies island communities which also gave the VOC means to secure trade routes and access to islands. This created a commercial-military network of mercantile monopoly through ownership over the chain of islands in the East Indies.[3] The Grotian conceptualization of war depended, as a result, on the securitization of trade routes and territories owned through treaties between the VOC

[2] John T Parry, 'What is the Grotian Tradition in International Law?' (2014) 35 University of Pennsylvania Journal of International Law 299. While Vitoria's writings were revisited in the early 1900s by legal jurists for their humanitarian vision, Grotius' arguments instead resonated with positivist thought of the 19th and 20th Century.

[3] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (CUP 2009).

and indigenous peoples. War for Grotius was an integral part of global relations and was meant to be regulated as far as inter-imperial rivalry was concerned. However, the Dutch East India Company's violence and forced unequal treaties were excluded from the Grotian concept of public violence even though these were a result of Grotian principles of ownership of property.

Furthermore, I argue below that this idea and use of sovereignty through ownership of property by occupation allowed the Dutch East India Company to establish a chain of islands from which it conducted such relations – using force when necessary to maintain its presence. The coercive force used by the company over indigenous communities is described here as violence of economic coloniality which resembles hegemonic political form and control.[4] The Company was a form of a 'state' in the way it governed its relationship to the natives of the Indonesian archipelago. Grotian discourses on the separation between war and peace, and specifically on the distinction between public and private use of force, enabled the Dutch East India Company to exercise force without accountability.

Grotius' redefining of sovereignty in terms of ownership of property coupled with divisible property and war and public violence gave the Dutch East India Company's mercantile network both a juridical basis for its governance over islands of indigenous people and it allowed for the indirect governance of the Dutch Empire over these territories. Having a network of merchants owning territory of a chain of islands allowed for the Dutch Empire to expand its hold over trade routes and ports and created a monopoly through force. This governance by the Dutch East India Company became an integral part of the Dutch Empire and allowed for the application of the Grotian vision of international legal order in an age of commercial oceanic imperial rivalry. The rise of the joint stock company/the Company-State as a commercial entity in the form it took was central to how the merchant network was different to the missionary network in its deployment, development and benefit of the international legal discourse it utilized.

II. Grotius and the secular foundations of international law

a. The secular turn in international law

[4] See my definition of violence in this thesis in the introduction, which encompasses this form of economic, territorial violence exercised by the VOC against the natives of the Indonesian archipelago.

Hugo Grotius (1583–1645), the Dutch lawyer to VOC or the Dutch East India Company, is remembered in the disciplines of law and philosophy as a jurist.[5] His scholarship in his own days earned him the reputation of a humanist philosopher.[6] He wrote broadly on matters of theology, law and politics relevant in the time of commercial and colonial expansion of the European world in the 16th Century.[7] As a young lawyer, Grotius was hired by the Directors of the Dutch East India Company in 1604 to advise them on legal matters.[8] The Dutch East India Company (VOC) was a joint stock company chartered by the Dutch state on the foundations of other mercantile companies and the United Amsterdam Company in 1603.[9] Grotius was commissioned to write a defence of the Company's confiscation of the Portuguese vessel, caught in Malaccan straits, *Santa Catarina*.[10] The text produced as a result of this defence by Grotius was *Dejure Pardae*, or *The Law of Prize and Booty*.[11] This text itself remained a manuscript until 1864; however, the 12th chapter of the text, *Mare Liberum* or *The Free Sea*, was published in 1609.[12]

A few years after the publication of *Mare Liberum*, Grotius reflected that the purpose of the text was to address issues of war and trade in the Indies, as these matters would determine the future of the United Provinces in his opinion.[13] Grotius' background was tied to mercantile ventures of the Company as his own family owned shares in the United Dutch East India Company.[14] Hence, as John Haskell among other scholars such as Martine Julia van Ittersum argues, his interest in the mercantile endeavour of the Company was driven by personal rather than intellectual reasons.[15]

[5] Peter Haggenmacher, 'Hugo Grotius (1583–1645)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012).
[6] ibid 1100.
[7] ibid 1098.
[8] Koen Stapelbroek, 'Trade, Chartered Companies, and Mercantile Associations', in Bardo Fassbender and Anne Peters(eds), *The Oxford Handbook of the History of International Law* (OUP 2012).
[9] ibid 339.
[10] ibid.
[11] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Martine Julia Van Ittersum ed, originally published 1864, Liberty fund 2012).
[12] Hugo Grotius, *The Free Sea* (David Armitage ed, originally published 1609, Liberty fund 2012).
[13] Stapelbroek (n 8).
[14] John D Haskell, 'Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial', in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (T.M.C. Asser Press 2012).
[15] Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies*, 1595-1615 (Brill 2006).

Moreover, it was clear earlier on in his career that he was connected quite well with the Dutch state. Before being approached by the Dutch East India Company, he was commissioned to write a history of the Dutch revolt against Spain by the Estates of Holland. Later on, in 1607, he was appointed as the Solicitor General of Holland.[16] The influence of his writings on the Dutch colonial policy, especially with regards to its overseas mercantile endeavours, can be appraised from these governmental positions as well as Grotius' professional role as the lawyer for the Dutch East India Company at the time.

However, it was his later work, *De jure Belli ac pacci* or *On the Rights of War and Peace*,[17] published in 1625 that became influential with the 19th and early 20th Century international law jurists.[18] David Bederman considers that this book 'has been one of the most systematic treatments of international law in history'.[19] Bederman, citing Adam Smith, observes that Grotius was the first to present a natural law jurisprudence on the conduct between nations.[20] For some authors, such as Arthur Nausbam and Hersch Lauterpacht, Grotius was thus a revolutionary thinker whose ideas on the rights of war and peace presented a secular turn in formulating an international legal order based on sovereign equality.[21] Hersch Lauterpacht, in particular, considered Grotian legal thought as a precursor to what he considered as modern international legal thought.[22] Referring to what he saw as the post-World War II challenges to international law, Lauterpacht observed that Grotius' writing was tackling 'fundamental problems of international law… in nearly all of them the teaching of Grotius has become identified with the progression of international law to a true system of law both in its legal and in its ethical content'.[23] Lauterpacht argued that Grotius' thesis on the rights of war and peace had principle characteristics that needed to be revived

[16] ibid van Ittersum 105-188.
[17] Hugo Grotius, *The Rights of War and Peace, in Three Books: Wherein are Explained, the Law of Nature and Nations, and the Principal Points Relating to Government* (Jean Barbeyrac tr, originally published 1625, The Lawbook Exchange Ltd. 2004).
[18] Parry (n 2).
[19] Bederman (n 1).
[20] Bederman (n 1) citing Adam Smith, *Lectures on Justice, Police, Revenue and Arms: Delivered in the University of Glasgow* (Clarendon Press 1896).
[21] Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 British Year Book of International Law 1; Arthur Nussbaum, *A Concise History of the Law of Nations* (The Macmillan Company 1947).
[22] ibid 17.
[23] ibid 19.

as they were not only appropriate for/to the post-World War II context but represented a secular turn in international legal history.[24]

For Lauterpacht, Grotius presented a novel progression of natural law philosophy as a way of looking at the international legal order between states in a way that was not done by his peers,[25] by 'emancipating the law of nature from the shackles of theology'.[26] In this way, Lauterpacht interprets Grotius' *On the Rights of War and Peace* as a law of nature that fulfils a 'humanizing function in the cause of alleviation of suffering and progress'.[27] This secularisation of the law of nature informs, according to Lauterpacht, the way Grotius conceives the international legal order.[28] It promotes toleration for religious and cultural differences to build a world community of nations mutually benefiting from cooperation and trade.[29] Hedley Bull, and more recently Mary O'Connel,[30] echoes these interpretations of Grotius as putting forward a model of a functional international legal order that is representative of the purpose of and power of international law.[31] Mary O'Connell in particular argues that Grotius gave a normative force to international legal rules.[32] O'Connel argues that Grotian tradition embodies the characteristics of international law that are part of its history and development.[33] Comparing it to the contemporary practice of international law and international relations, Mary O'Connel suggests that Grotius is relevant now more than ever as his concerns are similar to present issues around how to respond to 'leaders willing to use violence and cruelty' to achieve their ambitions

This view of Grotius as the inaugurator of a turn to secularism in international legal thinking to create a functional international legal order purely as a matter of progress and

[24] ibid 8.
[25] ibid 24-35. Lauterpacht draws a stark difference between Hobbes, who he considers a realist, and Machiavelli, who he describes as an atheist. Grotius, on the other hand, according to Lauterpatch was not just a great thinker but gave a 'humanist' and 'progressive' vision of the law of nature and the place of the state/states within the international legal order.
[26] ibid.
[27] ibid 8.
[28] ibid.
[29] Bull, Kingsbury and Roberts (n 1).
[30] Mary Ellen O'Connell, *The Power & Purpose of International Law: Insights from the Theory & Practice of Enforcement* (OUP 2008).
[31] ibid 12-13.
[32] ibid.
[33] ibid 16.

humanitarianism has been questioned by critical international law and international relations scholars. International relations historian Mark Samos, in his article on Grotius' use of bible sources to present a natural law theory, looks at the idea of secular turn in international law and international relations within Grotian discourses on rights of war and peace among other related writings.[34]

Samos argues that Grotius' interpretation of natural law sources, that is theological philosophy and scripture, can be termed 'secularizing but not secular'.[35] Within the context of the Dutch/Iberian conflict, Grotius benefited from using the conceptual tools of the Leiden school of thought at the time to separate the arguments about trade and war from religion. As Samos observes, 'the neutralization of religious component from this (Dutch/Iberian) conflict would have made it much easier to come to a viable arrangement in the East Indies'.[36]

This understanding of Grotius as 'secularizing' international legal discourse makes more sense given the context, place and reasons for his writings i.e. the commercial ventures of the VOC. It is also for this reason I understand this particular part of history as 'secularisation' of the *dialogical interplay* between international law and network of actors as it specifically relates to commercial/merchant networks.

It is for this reason again the focus on Grotius as a progression figure in international law and international relations[37] has been contested.[38] Most notably, Martine Julia van

[34] Mark Somos, 'Secularization in De Iure Praedae: From Bible Criticism to International Law', in Hans Blom (ed), *Property, Piracy and Punishment: Hugo Grotius on War and Booty in De Iure Praedae, Concepts and Context* (Brill 2009). Thus, the biblical interpretations by Grotius were not entirely different from Humanist scholars that he mentioned in his own work such as Vitoria among others. However, primarily, his insistence on trade as a way to peace and his removing the theological from the secular, Samos argues, was motivated by his Leiden University education and the Dutch-Iberian Conflict. Particularly on the latter, Samos argues that even if the immediate context of Grotian writing on trade, war and possession of prize-booty was the Capture of Cathirna by the Dutch East India Company, the broader context was his influence from the Leiden school of thought in the era which was moving towards separating political legitimacy from theological influence.

[35] ibid 150.

[36] ibid 155.

[37] Bull, Kingsbury and Roberts (n 1).

[38] Antony Anghie, 'International Law in a Time of Change: Should International Law Lead or Follow' (2010) 26 Amherst University International Law Review 1315. Anghie for example explains that what has been known as Grotian moment relates to a turning point in juristic international legal thought signifying how orthodox international legal historians viewed Grotius within the narrative of the canonical development of international law.

Iterrsum[39] explains how Grotius' discourses on rules of war and peace, in particular, served primarily the commercial interests of the Dutch East India Company. Keene suggests, similarly, that the Grotian tradition of international law maintained a distinction between relations with the European world and non-European world.[40] This Grotian vision of world order continued and expanded, therefore, the Eurocentric view of colonial relations based on both toleration and a standard of civilization.[41] My argument here on Grotian principles adds, in this sense, to Keene's and Van Ittersum's analyses by considering the relationship between the development of international legal doctrine and the expansion of the Dutch East India Company as not just a commercial one but also as a governing political body.

While the commercial enterprise of the Dutch was led primarily by the Dutch East India Company, The Dutch East India Company was not just a commercial organization. It was a political institution with its force supported by the Dutch Empire.[42] To understand Grotian discourses and revisit them, taking into account the contemporary critical accounts as well as the traditional ones, we must also consider how exactly the Dutch East India Company operated as a governing body across the Indonesian archipelago. To do so, we must first understand the rise of the transnational commercial/merchant network within Europe.

b. Dutch East India Company: the transnational Company-State

As overseas trade and merchant guilds rose in Europe, particularly the Spanish, Portuguese and the English trading ventures towards the Indian subcontinent and the Indonesian archipelago, the Dutch merchants found themselves unsuccessful in creating trading outposts.[43] In 1598, five consorting merchants ventured towards the Malaccan straits in an attempt to establish trade in Indonesia where, for the most part, the Portuguese had already established their presence.[44] The Dutch merchants, as a new competitor to the English and Portuguese, were successful in bringing stocks of spice from the island of Java,

[39] van Ittersum (n 15); see also Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (NUS Press 2011).
[40] Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (CUP 2002).
[41] ibid 97-119.
[42] Arthur Weststeijn, 'The VOC as a Company-State: Debating Seventeenth-Century Dutch Colonial Expansion' (2014) 38(1) Itinerario 13; Andrew Fitzmaurice, 'The Dutch Empire in Intellectual History' (2017) 132(2) BMGN-Low Countries Historical Review 97.
[43] Jan de Vries and Ad van der Woude, *The First Modern Economy: Success, Failure, and Perseverance of the Dutch Economy, 1500–1815* (CUP 1997).
[44] ibid 384.

consequently plummeting the price of spices in Europe.[45] This resulted in the English merchants forming the English East India Company in 1600.[46] As this presented the Dutch with a competitor to the spice trade in the East Indies, the Grand Pensionary of the Dutch Republic Government Johan van Oldenbarnnevelt proposed forming a chartered joint stock company called the United East India Company or, as I have referred to it, the Dutch East India Company.[47] de Vries and van Woude have observed that the political leaders of the Dutch Republic realized at this moment that a 'single "united" Dutch presence in Asia could pursue a military objective against Spain and Portugal, something that competing merchants from both states could never contemplate'.[48]

The Dutch East India Company, formed in 1603 with 76 sole administrative directors and with 17 selected as active directors, was given its charter by the States General to be the only Dutch merchant company to 'trade, build forts, maintain armies and conclude treaties with rulers of non-European territories'.[49] The Dutch East India Company was structured to be decentralized from its home state, that is the Dutch Republic, for it to be autonomous and maintain an oceanic military-based presence in the Asian ocean, in particular in terms of trading routes and trading outposts.[50] From the outset, the purpose of the Dutch East India Company was an aggressive expansion of the overseas trade that could compete for control over the spice trade with the Portuguese, Spanish and British. For the Dutch, the archipelago of Indonesia was an extremely important geographical point for establishing settlements.[51] These islands on the Malaccan straits, particularly the islands of Java and Banda, could help further ventures into and around important trading ports in Japan, China, India, Malaysia and Ceylon.[52]

The nature of the merchants' guild in the form of a chartered joint stock company had an inherent legal advantage as well. Within the European context, particularly property rights emerging from Roman catholic law, the corporation's earliest forms were commercial guilds

[45] ibid 384.
[46] ibid.
[47] ibid.
[48] ibid 385.
[49] ibid 384.
[50] Dianne Lewis, *Jan Compagnie in the Straits of Malacca, 1641-1795* (Ohio University Press 1995).
[51] David William Davies, *A Primer of Dutch Seventeenth Century Overseas Trade* (Springer Science & Business Media 2013).
[52] ibid 50.

of merchants, education institutions and religious bodies like the Church.[53] The purpose of this collective to be recognized as 'legal persons' was to create an agency to own property, make contracts and be referred to as a legal person in all legal matters of ownership and succession.[54] Previously, in the 15th and 16th Century, the medieval corporate form primarily referred to institutionalized religion.[55] In the 17th and 18th Century the largest corporations were merchant guilds; a collective of merchants that shared responsibility for debt.[56] Apart from sharing the risk of liability, there were other advantages of merchants forming guilds.[57] This form of cooperation allowed different shareholders of the company to pool in their resources and avoid legal fees and taxes normally reserved for single merchant companies and individuals.[58] The corporate joint stock company status also led to the pursuit of profit for shareholders rather than being tied to interest of the regulatory state.[59]

The corporate form as a 'legal person' that emerged in this time was unique in this particular way that it diluted risks and created an opportunity to gain capital through investment without actual physical presence and/or labour. The Amsterdam Stock Exchange, founded by the Dutch East India Company, was also in this time the first body to regulate the buying and selling of shares of public mercantile associations.[60] Grietja Baars, for example, describes the Dutch East India Company's creation within the context of the emergence of the joint stock company where both the empire, as well as the company derived benefit from its nature which allowed raising finance for larger ventures, externalizing risks and also providing 'royal charters'.[61]

Thus, the advantage this form of cooperation enjoyed as a legal person, in terms of ownership of property and ability to grow for profit, led to its evolution as a chartered company. In the era of inter-imperial rivalry for colonial conquests, the formation of the Dutch East India Company as a chartered joint stock company opened up possibilities for

[53] Erika A George, 'Incorporating Rights: Empire, Global Enterprise, and Global Justice' (2012) 10 University of St Thomas Law Journal 917.
[54] ibid 934-35.
[55] ibid 933.
[56] ibid 935-939.
[57] ibid.
[58] ibid 940.
[59] ibid.
[60] Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019) 59.
[61] ibid.

what the corporation would be capable of achieving in its overseas trade.[62] While the merchants guild as joint stock corporations operated purely for profit and economic advantages for doing so, the chartered cooperation did not, as Koel Stapelbroek observes, necessarily come into being for purely profit purposes.[63] He goes on to observe that these chartered companies were often, at the time, looked at as profit making overseas trading companies.[64] However, in reality, they were recorded as not making enough profit.[65] Hence an alternate explanation for their continued support by the State, specifically in the case of the Dutch Empire, was how they could operate as a political institution through territorial occupation in trading settlements.[66]

Stapelbroek also argues that the initial experiences of the 'pre-companies', that is the trading companies that later joined to make the Dutch East India Company, led to an interest in how territorial occupation could be used to deny trading rival rights to trade in a particular non-European territory.[67] Stapelbroek argues that this 'presented the Dutch empire a unique opportunity for the sea-borne population of the Dutch Empire to exert pressure onto its enemy'.[68] In a sense, then, the idea of a chartered company, which received state monopoly over trade by carrying out sovereign-like functions, was as much of a political move as an economic move. As Stapelbroek states, it reflected a combination of 'governmental and entrepreneurial interests'.[69] This confluence between the military or empire's elite classes with the mercantile class is described by Baars as 'military- mercantilist complex'.[70]

Charters as a form of legal technology for the corporate form enabled this combination between the state and the corporation. Charters granted to joint stock companies allowed 'politics to absorb commerce'.[71] As Janet McLean has observed, the charters as legal documents seated power within the 'public sovereign' i.e. the King granting this sovereignty

[62] Stapelbroek (n 8).
[63] ibid 342-343.
[64] ibid 341.
[65] ibid 342-343.
[66] ibid 346-347.
[67] ibid.
[68] ibid 342.
[69] ibid 346.
[70] Baars (n 60).
[71] ibid 60.

or imperium to a joint stock company.[72] Mclean describes this as a blurring of, what can be considered in present times as, public and private spaces.[73] Chartered joint stock companies like the Dutch East India Company would carry out duties normally considered under the ambit of a state.[74] The nature of a charter as a prerogative from the monarch, which derogated sovereignty into the company to carry out public duties, also allowed for armed commercial ventures.[75] The company could also carry out certain duties reserved normally for governance by a state such as being a source for public finance by raising revenues for the monarch and further foreign policy through the company's earnings by bearing the costs of embassies, overseas representatives and fortifications of settlements.[76]

Following this analysis, Janet McLean, amongst others including notably Baars[77] and Mieville,[78] concludes that the idea of a chartered joint stock company was for it to be an 'instrument of colonization'.[79] Baars notices how this relationship between the empire and the commercial company 'represented legal and organization form through which colonial powers annexed/appropriated territory'.[80] The organizational form here is what in this thesis is important for understanding how the chartered company operated in colonial frontiers.

Keeping this in mind, I place my understanding of the VOC in the way described by Arthur Weststeijn who states that it is more than just a commercial company serving as an instrument of colonization.[81] He argues that the fact that it operated as a commercial enterprise, with sovereign powers which exercised state-like powers over people within its territories, makes it a governing political body.[82] He concludes that the Dutch East India Company can be seen not just as a corporation but as a Company-State.[83] Following Phillip Stern's analysis of the British East India Company, that formed after the Dutch East India

[72] Janet McLean, 'The Transnational Corporation in History: Lessons for Today' (2004) 79 Indiana Law Journal 363.
[73] ibid 372.
[74] ibid 366.
[75] ibid 364.
[76] ibid 365.
[77] Baars (n 60) 60.
[78] China Miéville, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17 Leiden Journal of International Law 271.
[79] Weststiejn (n 42), see also Andrew Fitzmaurice, 'The Dutch Empire in Intellectual History' (2017) 132(2) BMGN-Low Countries Historical Review 97.
[80] Baars (n 60) 60.
[81] Weststiejn (n 42).
[82] This has also been referred to as 'Corporate Sovereignty' by Eric Wilson, see specifically Eric Wilson, *The Savage Republic: De Indis of Hugo Grotius, Republicanism, and Dutch Hegemony within the Early Modern World System c. 1600-1619* (Brill 2008).
[83] Weststiejn (n 42).

Company, this particular understanding of the Dutch East India Company also shows how its corporate form is not unlike a governing political body.[84] This conceptualization is important here for the next section, and the thesis in particular, as it does not do away with ways in which the corporation is looked at as an inherently colonial commercial enterprise for the accumulation of capital using law as its instrument,[85] but pays specific attention to how exactly the legal and organizational form of the chartered company imitates political control and hegemony like that of an empire or state. More specifically, how this form is itself a network form of operation which is facilitated by international legal discourse.

III. The merchant network and the doctrine of partial sovereignty

a. Partial sovereignty and ownership of property

Keeping the above analysis in mind about the nature of the Dutch East India Company, I turn to the conceptual work of Hugo Grotius and the context in which he entered into service of the Dutch East India Company. As I have mentioned earlier, Grotius was employed by the Dutch East India Company to write a defence for the capture of the Portuguese vessel *Santa Caterina* by the Dutch East India Company at the straits of Singapore in 1603. This particular incident was part of the initial formation and expeditions of the Dutch East India Company in Asia with the intent of removing the Portuguese presence in the Malaccan straits, specifically the town of Johor in Malaysia and Bantem in the island of Java. The political mind behind the formation of the Company, Van Oldenbarnevelt, was also a patron to the young Hugo Grotius at the time and was responsible for employing him to represent the Dutch East India Company.[86]

[84] Weststiejn follows the conceptual framework of understanding chartered stock company in the 17th and 18th Century as explained by Philip Stern in Philip J Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (OUP 2011). See also for example how Pahuja describes the early chartered companies as older forms of multinational corporations of the current era, in; Sundhya Pahuja, 'Public Debt, the Peace of Utrecht, and the Rivalry between Company and State' in Alfred Soons (ed), *The 1713 Peace of Utrecht and its Enduring Effects* (Brill 2019); Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspective in the Decolonization Era* (OUP 2019).

[85] Mieville (n 78); Baars (n 60).

[86] de Vries and van Woude (n 43).

The incident itself involved the battle and eventual capture of the Portuguese vessel *Santa Catarina*.[87] Some members of the Company opposed the idea that goods captured could be declared as prize in the Dutch Admiralty court.[88] Representing the Company's interest, Grotius' defence for the capture and declaration of goods as the prize of the East India Company rested on propositions mostly set out in the document *Mare Liberum*. In this document, which was a smaller part of his whole defence *De jure Pardae*, he developed his main thesis on the concept of property rights within the discourse of sovereignty and the right to war became central to his later works.

One of the more significant issues in the case was whether the Portuguese had exclusive rights to trade with the Indonesian islands or even the sea routes between Europe and the East Indies. The main concept that allowed him to make his defence was proprietorship, which was also a central concept to Grotius' understanding of sovereignty in the Law of Nations. Within the context of this conflict and consistent with his scholastic training, his most important source to support his argument on the freedom to trade and access ports and to explore sea routes was the humanistic writings of Spanish theologian Francis de Vitoria.

On the point of exclusivity to trade by occupation in the Indonesian island of Java, Ceylon and the Moluccas[89] Grotius cites Vitoria as a scholarly source for the concept of universal sovereignty and for the freedom to trade under the Law of Nations as result of this universal sovereignty. He argues that 'discovery per se gives no real legal rights over things unless before the alleged discovery they were res nullius (that is unoccupied)'.[90] If it is occupied by non-Europeans, Grotius relies on arguments of universal sovereignty as espoused by Vitoria in the context of the Spanish experience in the New Indies observing that,

> [n]ow these Indians of the east, on the arrival of the Portuguese, although some of them were idolators … therefore sunk in grievous sin, had none the less perfect public and private ownership of their goods and possessions, from which could not be dispossessed without just cause. The Spanish writer Vitoria has the most certain warrant for his

[87] ibid 399, de Vries and van Woude state that retaining the goods of the vessel captured would be an extremely profitable opportunity for the Dutch East India Company as it would increase the capital of the Company by 50%.

[88] Charles Henry Alexandrowicz, 'Freitas versus Grotius' (1959) 35 British Year Book of International Law 162.

[89] Grotius (n 11). In *Mare Liberum*, Grotius specifically mentions these three islands as ports where the Portuguese had established trade at the time.

[90] ibid 13.

> conclusion that Christians cannot deprive infidels of their civil power and sovereignty merely on the grounds that they are infidels.[91]

Grotius comes to the same conclusion as Vitoria in this context on the idea that 'religious belief cannot do away with either natural or human law from which sovereignty is derived'.[92] Further relying on Vitoria, Grotius then moves on to the second part of his defence against the exclusivity of the Portuguese over trade with the rulers of the Indonesian islands, that is freedom of access and trade under the Law of Nations. Grotius, referring to Vitoria, argues once again,

> [t]he subjects of United Netherlands have the right to sail to the East Indies and to engage with the trade with people there … I Shall base my argument on the unimpeachable axiom of Law of Nations called a primary rule or first principle: that every nation is free to travel to every other nation and to trade with it.[93]

While this reliance seems to suggest similarity to Vitoria's ideas on Law of Nations, in the context of this case and particularly the aims of the Dutch East India Company, Grotius' use of these ideas develop into a more extensive understanding of property and ownership through occupation.

When discussing Vitoria in my previous chapter, I had emphasised both these concepts, particularly the idea of freedom to and access to trade and the duty of spreading the Christian faith. In the case of Vitoria, however, there was a specific focus in how these concepts were deployed to support the network of missionaries and the evangelizing endeavour in the New Indies. Public territorial enclaves for Vitoria had a very specific purpose in facilitating the Church's governance in the New Indies. In the case of Grotius, however, both these ideas – of sovereignty and of freedom to and access to the territory for trade – are specifically developed to support the Dutch East India Company's purpose in expanding into the East Indies, particularly in the way in which Grotius had qualified how certain common public property can become private property if certain conditions are fulfilled. In the context of this overseas trade competition between the Dutch and other imperial rivals, ownership of common property through territorial occupation justified the

[91] ibid.
[92] ibid 7.
[93] ibid.

policy of the Dutch East India Company aggressively pushing out the Portuguese from the Indonesian archipelago.

Grotius' explanation of the common public property and private property in *Mare Liberum* is derived from a more detailed explanation of property as a part of natural law. According to Grotius, the origins of property suggest that 'common property and sovereignty had different meanings'.[94] Sovereignty as understood by Grotius was a 'particular kind of proprietorship that excludes possession by anyone else'[95] while common property meant 'ownership or possession held between many people by mutual understanding'.[96] However, Grotius goes on to say, the idea of sovereignty and common property was different at the time of primitive law of nations as 'nature knows no sovereigns'[97] and there was no such right as 'private property'.[98] In the primitive law of nations, there were 'no boundary lines'[99] and 'no commercial intercourse'.[100] He goes on to say that according to this reasoning 'there was a kind of sovereignty, it was universal and unlimited'.[101]

The transition to sovereignty and ownership, as we now know them, was, according to Grotius, one that was dictated by nature itself. Grotius stated that natural things could be divided between movable and immovable property.[102] These natural things according to Grotius then started to be divided among states. Further, as the 'states began to be established so two categories were of the things which were wrested away from early ownership'.[103] These two categories were public and private. The public is the property of people and private is the property of individuals. Ownership, for Grotius in either public or private categories, occurs in the same way. States would then begin occupying anything that by nature is 'susceptible of occupation, would then become the private property of the one

[94] ibid 22.
[95] ibid.
[96] ibid 23.
[97] ibid.
[98] ibid.
[99] ibid.
[100] ibid.
[101] ibid 24.
[102] ibid.
[103] ibid 25.

who occupies it'.[104] To make something occupied, however, it must be contained through 'building' or 'boundary'.[105]

It is also this nature of the property that, he argues, is what makes the seas free to all nations. Since the sea 'cannot be enclosed nor be built upon', by nature it is meant to be 'common property to be enjoyed by all'.[106] It cannot be 'physically appropriated by any nation or person'.[107] However, there is a certain common property attached to the sea that can be owned. Grotius states that 'if any part of the coast, shore, or portion adjoining the sea is susceptible to the occupation, it may become the property of the one who occupies it only so far as such occupation does not affect its common use'.[108] Further exploring this idea of ownership of a property through occupation Grotius qualifies this by suggesting that occupation can be possible only by 'erection of boundaries, some determination of boundaries such as fencing in'.[109]

This form of occupation or definition of occupation is the only way in which these shores, pieces of land adjoining the sea can be owned as property. Later on, in his later works, he develops the idea of occupation further by suggesting that, as part of a transition from primitive law of nations to Law of Nations in his own time, private property was a natural means of progression.[110]

This is where Grotius' concept of proprietorship in understanding sovereignty leads to supporting the territorially expansionist policy of the Dutch East India Company. The idea that the shores or adjoining lands to the sea can be occupied and thus owned is part of how Grotius supported the Dutch Empire's drive to push and monopolize trade with the natives of the Indonesian archipelago. The distinction between Portuguese as 'only foreigners, not

[104] ibid 30.
[105] ibid.
[106] ibid 31.
[107] ibid.
[108] ibid 30.
[109] ibid 25.
[110] Grotius (n 17) 143.

occupants'[111] was derived for the Dutch Empire and the VOC by Grotius to facilitate a claim of ownership over shores to build ports, bases and settlements. The second aspect of what made the VOC merchant network's colonization successful was their use of treaties as a means to both build and expand their ports and settlements. Here again, we see Grotius' legal discourse providing the legal architecture for this governance over natives for the merchant network to expand.

b. Unequal treaties and monopolization of trade through force

The first base that the Dutch merchants established was through a treaty in North Ambon in 1600 with the Hitu Muslim community as part of a treaty to provide military support against the Portuguese.[112] As part of this treaty, the natives were to exclusively trade with the Dutch on a set price. As Weststeijn notes, this agreement was a common model to develop a military-commercial alliance against particularly the Portuguese at the time with the caveat they would not interfere in each other's religious affairs.[113] As Borschberg observes, the VOC's agreement with the Kingdom of Johor was seen through Grotius' conception as an alliance between the VOC and the natives against the Portuguese.[114] Thus soon enough, in 1608, with the help of locals, the Dutch East India Company managed to establish a settlement and government in the island of Java making the port city of Batavia their centre of operation in the Indonesian archipelago.[115]

While the legal conception of partial sovereignty through ownership of shores to build ports was an integral step for the Dutch Company's colonial expansion, it is effectively a Grotian conception of treaty making as a result of this ownership which reflects the 'secularizing' process of a dialogical interplay between international legal discourse and network of merchants. Grotius, for example, maintained and developed a sanctity to trade when he said, that 'which is done by two parties cannot be undone by one' in response to the British using his arguments in *Freedom of Seas* (*Mare Liberum*) to trade with the natives of

[111] Grotius (n 11) 15.
[112] Arthur Weststeijn, 'Love Alone Is Not Enough: Treaties in Seventeenth-Century Dutch Colonial Expansion', in Saliha Belmessous, *Empire by Treaty: Negotiating European Expansion, 1600-1900* (OUP 2015).
[113] ibid 28.
[114] Peter Borschberg, 'The Johor-VOC Alliance and the Twelve Years Truce: Factionalism, Intrigue and International Diplomacy C.1606-1613' [2009] 8 International Law and Justice Working Paper < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526382>, accessed June 2020.
[115] Davies (n 51).

Java islands.[116] The agreements which VOC made with the natives in the Indonesian archipelago were exclusive trade agreements and while they could not stop other foreigners coming to trade,[117] they could enforce their contract on the natives they had an agreement with along with driving off the Portuguese as part of the agreement.

As part of their treaty 'agreements', The Dutch East India Company attacked the Portuguese port in Malacca in 1606 assisted by forces in the town of Johor,[118] Malay as well as the island of Ambon in 1605.[119] The Dutch East India Company's aim in all these initial excursions into port cities of these islands was not only to drive the Portuguese out of the Indonesian archipelago but to establish settlements and forts to occupy the shores under the ownership of the Company. This particular ownership meant reinforcing the terms of exclusive trade with the natives as well as its enforcement. Thus, while, under Grotius' thesis, the Portuguese and any other could roam the sea routes in the Malaccan straits, they could not have monopoly or access to trade with the island native merchants and their rulers as they would have to go first through ports owned by the Dutch but the natives themselves would be forced only to trade with the Dutch should they try to trade with anyone else.[120] It was also consistent with the aims of the Dutch East India Company, along with its charter, to build forts and settlements in port towns and shores of the islands in Indonesia to drive the Portuguese away.

The territorial ownership of the shores through occupation by way of fortifications did not just restrict access to these ports for other European merchants but was integral in creating a network of port cities that could control traffic and governance of trade within these islands.[121] Grotius' concept of private ownership and private agreements/treaties enforcing economic governance in this way facilitated the operation and expansion of the Dutch East India Company and its territorial occupation which created a 'chain of islands'[122] in the straits of Malacca. In contrast to Vitoria, whose claim to exclusivity of access to quasi-public territorial enclaves was contingent on the religious precedence and authority of

[116] Grotius cited in van Ittersum (n 15) 447.
[117] ibid.
[118] Davies (n 51).
[119] ibid 53.
[120] Lewis (n 50).
[121] Davies (n 51).
[122] Benton (n 3). While I use this terminology to describe the territorial ownership of port cities in the East Indies by the Dutch East India Company specifically, it has also been used in a similar way by Lauren Benton to describe the island colonies used to transport criminals by different empires in the 17th and 18th Century.

the Pope, Grotius claimed this exclusivity through a secularised notion of ownership over the property. In the case of Grotius, moreover, private ownership of shores applied to the chartered joint stock company, like the Dutch East India Company, which complemented and enhanced the way it could justify its governance and operation in a transnational manner.

As I have mentioned before, by nature the chartered joint stock company could not only own property but was decentralized from its place of origin, the Dutch Republic. It was a legal entity that could own property as a private owner and with a military force to build forts and make treaties with native local rulers. Separated from any religious difference, network in the form of a commercial network in this manner was far more expansive within the Law of Nations than religious networks could have ever been. A private company acting like a state, owning property in colonial frontiers, making treaties in its name and enforcing them all across its interconnecting island ports was not possible in this manner by either the empire or the Church.

By 1609 the Dutch East India Company managed to establish a governance system like a state government with its central operations in Batavia.[123] Ruled by a Governor General appointed by the directors of the Company, permanent factories were established in the port city of Batavia.[124] Poor communication with the Dutch Republic and the directors of the Company meant that the Governor General had greater autonomy and flexibility in his decisions.[125] The Governor General of Batavia was Jan Pieterzsoon Coen (1587–1629), who had envisioned the Dutch East India Company's network in Asia as a series of strong points connected by sea power. The island of Java and the Moluccas were important trading ports as they were integral to the trading system in the Indonesian archipelago and routes that led further eastwards into China and Japan.[126] For Coen, establishing strong military occupation and control over the governance of trade in these islands and the Malaccan straits meant that it could break the Portuguese and possibly English monopoly over the spice trade to replace it with its own.

IV. The Violence of the Company-State in the Indonesian archipelago

[123] Lewis (n 50).
[124] ibid 14.
[125] ibid.
[126] ibid 7.

a. ‘Private’ war and enforcement of treaties

Partial ownership, unequal treaty enforcement became a way for the Dutch East India Company (VOC) to establish control and governance over the Indonesian archipelago. Using the idea of occupation to claim ownership, it developed ports while it used its alliance building by unequal treaties to create monopolies, both forms of juridical tools being used to reassert its governance like that of a ‘state’ in the Indonesian archipelago. The sharp end of its colonization of Java islands was specifically how its military presence, through the occupation and ownership over ports to build forts, was used in conjunction with treaty enforcement on the natives in particular. Grotius, while providing a framework for ‘free trade’, and giving a distinction between ‘public’ and ‘private’, gave a framework for a ‘private’ company to act like a state. This particularly justified form of violence not considered ‘public’ or by a ‘state’ was an ‘absolute’ and ‘just’ right to ‘punish’ to enforce treaties.

Grotius’ approach towards just violence as a form of punishment to preserve and protect common property as much as private property made no distinction between a public and private war. In his own words:

> war is righteously undertaken in defence of individual property, so no less righteously undertaken on behalf of the use of those things which by natural law ought to be common property. Therefore he who closes up roads, hinders the export of merchandise ought to be prevented from so doing even without waiting for any public authority.[127]

This particular paragraph from *Mare Liberum* does not just the make case for war being waged between nation states on just grounds for preserving and protecting the use of common property like the free sea but also emphasises the individual right to violence under natural law. This individual right to violence for protection of private as well as common property for Grotius extends not only to the sea but also to common property that is susceptible to becoming private property such as shores and ports occupied by the Dutch East India Company.

[127] Grotius (n 11) 75.

Grotius' insistence that war, whether public or by private individuals, can be waged justly hinges upon the protection of property. As he states: 'Let no one seize possession of that which has been taken into possession of another'.[128] Grotius argues further that the right to wage war as a collective in the form of a state is inherently linked to the individual's right to seek punishment. He observes that 'the right of chastisement was held by a private person before it was held by the state'.[129] His description of just war in this sense explains it as a form of punishment. Parry notes that from these passages in *Mare Liberum* and Commentary *on the Law of Prize and Booty,* it could be said that Grotius was equating the rights of an individual to that of the rights of a state in resorting to violence to redress wrongs.[130]

Beyond the fact that this concept of war puts the Dutch East India Company in a position where it can both take by force and defend its owns ports and shores, it gives a justifiable framework of violence for a private legal person to use force. This was not only important to drive the Portuguese away from the ports and shores that the Dutch East India deemed important to establish strong links for trade but also in governing over the East Indies native rulers.

Here, Grotius' idea of sovereignty became useful in a specific way to rulers of these particular islands in the Indonesian archipelago where the Dutch East India Company established its naval and military ports. Ed Keene observes,[131] and as I have also shown above, that while Grotius understood sovereignty as universal even for the non-Christians, his understanding of how to conduct relations with them is entirely different to his understanding of how to conduct relations with Europeans. At the center of this difference lies Grotius' ideas of civilization, which for him can only be reflected in the Europeans due to the way they have occupied property. Grotius explains the difference between 'simple tribes living in America' who 'lack ambition' and 'industry' and their European counterparts who chose a 'refined mode of living'.[132] This 'refined mode of living' was a sign of progress for Grotius as the civilized Europeans chose to make use of the land provided by God as,

[128] Grotius (n 12) 27.
[129] ibid 137.
[130] Parry (n 2).
[131] Keene (n 40).
[132] Grotius (n 17) 143.

> we are commended not to throw it into the sea not leave it unproductive nor to waste it but to use it to meet the needs of other men by giving it away or lending it to those who ask as is appropriate of not those who are owners but stewards or representative of God, the Father.[133]

Grotius' understanding of difference between the civilized and uncivilized also hinged on how property can be or must be occupied and it also ties into how the Dutch East India as a private legal entity could make treaties with non-Christians in a manner which would lead to governance over them. The idea of treaty obligations, even unequal treaties, became a legal instrument whereby the Dutch East India Company could gain governance over native people with whom the treaties were made. He maintained that even non-Christians under the Law of Nations must adhere to obligations of a treaty.[134] Natural law dictated, according to Grotius, that treaties with infidels could be lawful instruments as they were 'common to all mankind',[135] regardless of the fact that these would, in some conditions, be done forcefully.[136] Grotius also emphasised that private war, particularly in the case of treaties with rulers of native islands in the East Indies, was a legitimate form of violence. He states, 'in the absence of independent and effective judge – of which none were available in the East Indies – each private person resumed his sovereign powers and executed judgment in his own cause'.[137]

The primary form of violence was due to the economic governance which often led either to famine or violent push back from the Company forces when natives resisted trading constraints imposed on them. The treaties put restrictive trading practices on the native rulers and merchants of the East Indies. An example of how much control over traffic of trade the Dutch required from the East Indies natives is the case of the policing of trade around the islands of Banda and Ambonia.[138] The Dutch East India Company's policy within the East Indies was always to monopolize the spice trade. The elimination of competition has been described in DW Davies' reference to the Company directors' instruction to the Governor General of the Company in Batavia, Java, Jan Coen: 'as far as possible he should see to it that the trade of Amboina, Banda and the Molloucas should

[133] ibid.
[134] ibid 325.
[135] ibid.
[136] ibid.
[137] ibid 241.
[138] Davies (n 51).

remain firmly in the hands of the Company, so that no nation in the world should have a share in it but ourselves'.[139]

This insistence on controlling and monopolizing spice trade was so aggressive that the Company forces began to police trade routes and ports at strategic points surrounding Ambonia and Banda.[140] The main consequence of this was first felt in the Island of Solor where the local natives depended on food commodities coming from China and Timor.[141] The Dutch Company officers were told to apprehend rice coming from these places as prizes which happened to be a staple food that the natives of Solor were dependant on.[142] This led to hunger and famine on the Island of Solor.[143] As the Dutch tried to sell these confiscated food commodities as their own they set higher prices since they lacked the manpower of the independent traders they had replaced.[144] The Island of Banda had a similar scenario where rice trade was prohibited with any other merchant than the Dutch East India Company.[145] The Company threatened to cut down the native islands' palm trees depriving them of their principal food stuff.[146] When the local merchants did not follow instruction, Jan Coen led a military expedition to massacre about 15,000 Banadense natives in 1627.[147]

As Weststeijn observes, the VOC essentially led 'monopolization by force' campaigns against the natives due to their 'faithlessness' to the treaties eventually leading to the signing of the new treaty after Jan Coen's Campaigns in 1627, which stipulated that the VOC were to be 'Sovereign ruling Lords' in the Banda Islands.[148] Not only was this idea of enforcing treaties through private war, even if they were unequal, justified, but it was also linked then to the difference in civilization in the 'refined mode of living' of the Europeans. Grotius argues that through the treaties, 'natives of the Spice Islands were fortunate that they might have lost their self-determination in economic affairs, but not in any other sense'.[149] The transfer of sovereign rights through the treaties the Dutch signed with the native rulers of the

[139] ibid 54.
[140] ibid.
[141] ibid 54-55.
[142] ibid.
[143] ibid.
[144] ibid.
[145] ibid 56-57.
[146] ibid.
[147] ibid.
[148] Weststeijn (n 112) 36.
[149] Grotius (n 17) 334.

East Indies islands was implicit in the Grotian understanding of sovereignty,[150] as stated, that 'Of the different kinds of unequal treaties, those that allowed the "building of garrisons" without any protest would lead to a transfer of "rights to ruling"'.[151]

The result was that those towns or ports in the East Indies islands that were virtually occupied by the Dutch East India Company's forces and were built upon would effectively come under the company's control.[152] Of course if this transfer of 'rights of ruling' was contested or resisted, the Dutch East India Company could, according to Grotius, use violence to enforce the terms and the implications of the treaty signed. Grotius maintained that in these cases 'patronage of the state does not take away independence, as independence without sovereignty is inconceivable'.[153] The 'rights of ruling' for Grotius were only partial rights.[154] Inge Van Hulle observes that this constitutes a kind of benevolent guidance and help granted by the protector rather than the establishment of dominion.[155]

b. Island chains of the company and political banishment

Moreover, the Company itself was not just a maritime or commercial imperial entity but, as I mentioned above, it was also a territorial governing political body. This can be surmised from Kerry Ward's argument that beyond controlling access and traffic of trade, the Company used its network for the forced migration of workforce and political banishment.[156] Kerry Ward argues that the Company's rule within the East Indies island, particularly in those islands where it became a governing ruling force such as Batavia and Banda Island policing, bonded labour on plantations and political banishments were used beyond economic exploitation and domination.[157]

[150] See Inge van Hulle, 'Grotius, Informal Empire and the Conclusion of Unequal Treaties' (2016) 37(1) Grotiana 43 for an in-depth analysis of unequal treaties as an instrument of usurpation of sovereignty in the East Indies.
[151] van hulle (n 150).
[152] ibid.
[153] Grotius (n 17) 74.
[154] van hulle (n 150).
[155] ibid.
[156] Kerry Ward, *Networks of Empire: Forced Migration in the Dutch East India Company* (CUP 2009).
[157] ibid 85.

Soon after the Banda Island massacre against the natives led by Jan Coen in 1627, the VOC introduced slave labour in parts of its controlled Indonesian territories.[158] The 'rights of ruling' that gave partial sovereignty over East Indies islands to the Company or rather allowed for a usurpation of sovereignty of, what Grotius considered, weaker states made up the nexus of forced migration networks for the Company.[159] The Company used its existing 'chain of islands' connected through shipping networks for political banishment of dissenters in native islands;[160] this included Ambonese and Javenese Muslims that resisted the Company's governance over the islands of Java and Batavia. According to Ward, the island of Batavia was central to the nexus of forced migration network of the Company.[161] Dissenters from the islands were transported to the Company's territory in the Cape of Good Hope. Kerry Ward understands, therefore, the Dutch East India Company's operation more as a form of a Company-State that operated through 'cultural, military, migration, economic, transportation and exchange networks that amalgamated over time into an imperial web whose sovereignty was created and maintained but always partial'.[162]

Kerry Ward's explanation of the political governing practices of the Dutch East India Company further embeds the argument I have presented above in terms of how the VOC acted as a merchant network with state-like governing powers spanning across sea and land through port cities. My argument situates the importance of legal architecture given by Grotius as part of the Dutch East India Company's expansion. The legal architecture that Grotius provided became a foundation on which the Dutch East India Company established its forms of penal, political and bonded labour migration networks as part of its governance after 1627. As I have argued above, Grotius did not just support the imperial policy of the Dutch East India Company as a trading mercantile corporation; his ideas of property ownership, private war and treaty enforcement also helped the Company to expand as a transnational governing political body.

Along with Grotian understanding of sovereignty, the ownership of a property through occupation and private violence and the obligation to treaties signed became the legal building blocks for the Dutch East India Company to turn ownership over shores and ports into governing over the islands of Java, the Moluccas, Ambon and, later on, Banda. This

[158] ibid 5.
[159] ibid 11.
[160] ibid.
[161] ibid 12.
[162] ibid 6.

form of governance is inherently violent in the operation of the Dutch East India Company as a Company-State as well as its governance over the 'chain of islands' it owned in the Indonesian archipelago. This violence was perpetrated through Grotius' ideas on partial ownership through occupation and enforcement of treaties by private individuals. By emphasising on partial ownership through occupation, which was contingent on the building of forts and military presence, the enforcement of treaties to consolidate their position as 'sovereign' rulers in the Indonesian archipelago, Grotius gave the legal architecture for the VOC to commit atrocities against the natives in the Indonesian archipelago.

V. Conclusion

In the previous chapter I argued that Vitoria's contribution in setting up an architecture for dialogical interplay between a territory-centric notion of international law and the missionary network of the Holy Roman Church can be seen as the ecclesial genesis of network governance in international law. Grotius' explanation of property ownership, private war and treaty making led to very specific support for the transnational expansion of the Dutch East India Company. This was markedly different, however, from Vitoria not only because of a shift from the religious missionary network to the secular mercantile network but also in the way in which Grotius set up a ground for the expansion of the Dutch East India Company's governance as secular state-like formation.

It was not just concerned with economic affairs, but its ownership and governance over a chain of islands facilitated political and military motives. This independence of governance over this chain of islands in this manner was also possible because of the autonomy that the Dutch Republic allowed the Dutch East India Company. While, theoretically, the company's prizes and possessions could be held for the Dutch Republic, in reality, the Dutch Republic did not ask for any share in the profits of the Company.[163] This too, along with its military naval force, was one of the reasons for the Dutch East India Company's success in its expansion.[164]

[163] de Vrier and van Woude (n 43).
[164] ibid 387-388.

In the context of the overall argument that I am advancing in this thesis, this stage of the relationship between international legal doctrine, particularly on understanding sovereignty through property ownership, represents the secularisation of dialogical interplay centering private actors i.e. merchant networks through a Company-State formation. This secularisation of the dialogical interplay through the Dutch East India Company merchant network shows colonization through interaction with the native population through unequal legal forms such as treaties which then are also used as a justification for violence. In the next chapter, I show how the Company-State of the British was influenced by the VOC and yet pioneered a different form of colonial rule in the 17th Century due to the existing social structure of the subcontinent of India. This colonial governance then also evolved into an imperial 'state form' emerging as an imperial trans-boundary network of administrators from the 19th Century British colonial rule in Indian subcontinent, which I term the bureaucratisation of the dialogical interplay.

Chapter 4. The bureaucratisation of the *dialogical interplay*: British Empire, property as trust and network of state administrators

I. Introduction

In this chapter, I show that the British contribution to the development of international legal discourses throughout the 17th to mid-19th Century relied on a Grotian concept of sovereignty – specifically the concepts of property and jurisdiction – to advance imperial governance in the form of networks. This chapter maps how the evolution of the principle of sovereignty to a 'trust' for civilization was informed by the merchant networks of British East India Company and later the British imperial administrators building a mutually beneficial and cooperative relationship with native elite dominant caste communities in the Indian subcontinent. This cooperation led to a shift from rule by company merchants to the indirect governance by a network of colonial administrators between the 17th and 19th Century.

I argue that the British East India Company's rule, while influenced by the VOC, assumed a different approach to the colonial interaction with the colonized in the subcontinent. Thus, even as unequal treaties remained important, and in fact increased as a practise in the early part of 19th Century, the British approach to interacting with the natives responded to existing socio-cultural and religious imperial elite formations existing within the subcontinent. These existing social-cultural, political and religious formations included particularly dominant caste Brahmin, Kshatriya and Ashraf/Mughal leaders/communities, to rule through interlocking interests and maintain British imperialism through dominant caste hierarchies. In this part of the history of the *dialogical interplay* in international law, we also see the development of the property as 'trust', 'moral universalism' and 'pluralism' as aspects of sovereignty in the imperial liberal legal order emerging from the cooperation between the imperial administrators as well as the native elite caste networks. An important aspect of these developments on the ideas of property as 'trust', moral universalism and pluralism was the

inherent violence of colonial governance by merchant networks, imperial administrative networks and their patronage of native caste elite communities. This violence of these networks could be seen through the juridification/codification of laws for the benefit of existing imperial hierarchies and interlocking interests of both the British imperial administrators and the dominant caste communities in the subcontinent's rule. This juridification process was violence in and of itself as it cemented legal and political hierarchies of the caste elites while also entrenching civilizational hierarchy of the British Empire to rule over the subcontinent. The codification as a confluence between the imperial administrators and their elite caste networks also led to physical violence through criminalization and policing of particularly peasant, marginalized caste-led movements against both the British and the native elite dominant caste leaders. This interlocking set of interests and mutual benefit also laid the foundations of 'indirect rule', which was the imperial method of rule within the international legal order later on in the 20th Century.

I explain how the international legal discourse on sovereignty in Vitoria and Grotius was influential to the British East India Company's colonial expansion in the subcontinent. In the years spanning between the 17th and 18th Century, the British Crown's support for establishing the British East India Company and giving it a monopoly became part of its imperial policy. The relationship between the State and the British East India Company in comparison to the previous instances of networks, that is, the Holy Roman Church in the 16th Century and the Dutch East India Company, was rife with conflicting interests. The Company, understood as a kind of separate governing networked institution, was able to grow its influence through the British State's engagement with international legal discourses by Grotius. As a form of networked imperial governance, its government over territories in India, however, assumed a different form than the VOC i.e. it relied on native elite dominant caste networks to maintain control of its ports through policing and military force.

I show how, as the conflicting interests between the Company and the British State intensified, the idea of property and jurisdiction began to be engaged with through the concept of 'trusteeship', which shifted to the state the responsibility of governing colonial territories. The late 18th Century saw the emergence, as a result, of the early foundations of imperial liberalism, which coupled with changing conceptions of Grotian perceptions of sovereignty placed the state as a form of government at the center of the discussion. From 1813 to 1833, the British State's growing interference in the Company's jurisdictions through legislative and juridical reform resulted in a slow administrative takeover of the territories of the Company.

This juridical and legislative control turned into a devolved governmental structure over the colonies, where a network of colonial administrators governed with relative autonomy and discretion.

At the same time, this particular shift from the Company merchants' governance to imperial administrators' colonial officers understood their position in the governance of subcontinent through the underlying notions of 'moral universalism' and 'cultural pluralism' which became central to how a liberal imperial legal order, and international law, was to be understood. I argue that these elements of sovereignty were the result not only of the changing British perception on sovereignty but also of their encounter and cooperation with the native elite dominant caste network whose continuing position within the socio- economic hierarchy of caste was maintained due to these aspects of sovereignty i.e. 'cultural pluralism' and 'moral universality'. These political and juridical developments along with the rise of the liberal political philosophy of free trade allowed the British State to gain more control over the jurisdictional authority of the Company in India.

In the last section, I explore how this network of colonial administrators not only took over important judicial and administrative positions that were previously taken by Company appointed individuals, but it also exercised a similar kind of administrative violence through the cementing of the dominant caste mythos and position through a codification of law in an Anglophonic form – which also reiterated a British civilizational hierarchy. In the garb of 'cultural pluralism' and 'moral universalism', codification became also a way for the British to extend and control the resistance against their position in the subcontinent specifically through acts such as the Criminal Tribes Act 1871, Forest Act 1876, using 'trust' over the property to build infrastructure displacing and criminalizing indigenous (adivasi) communities in the subcontinent and confluence with land care-takers (zamindars) from dominant caste communities to quash marginalized caste peasant and indigenous rebellions.

This shift towards imperial networks – from commercial to colonial administrators – was envisioned by 18th Century British and Scottish scholars as a turn to direct rule. However, due to the geographic expanse of the British Empire, the 'Commonwealth' could not practically be governed directly in a uniform and structured manner. Instead, the Empire in the 19th Century could be described as devolved colonial governmental structures led by

administrators with and through native elite dominant caste networks. In this sense, it is possible to see the 19th Century network of colonial administrators ruling under the British State in name, but acting with relative autonomy in practice relying on governance through selected patronage networks of caste elites in the subcontinent. The difference between this form of imperial governance and the commercial network of the British East India Company and those before it, that is the Holy Roman Church and Dutch East India Company, was the cooperation with internal native elite networks of the colonial administrators whose patronage was owed to the British imperial State. The British Empire's indirect governance in this period can be seen therefore as indirect governance over its colonies through the networks of administrators in confluence with native elite caste networks.

II. British East India Company and the British Empire

a. The Company and Law of Nations

In the initial period of the Company's establishment between 1600 and 1757, the British Empire's ideological basis was rooted in Protestantism, commerce, freedom and maritime navigation.[1] In part, these ideas arose out of the British Crown's rivalry with the Spanish Empire's excursions to colonize native lands in the East Indies by conquest.[2] For reasons of imperial commercial rivalry and religious rhetoric, such as trade as a right of all civilized nations, the English attitude towards encounters with non-European natives assumed a different form. The Spanish Empire's colonial expansion was based on the acquisition of territory from natives. This forceful acquisition by conquest was justified on the basis that the natives, as infidels, did not possess sovereignty.[3] English thinker Samuel Purchas (1575–1626) questioned the justification given by the Spanish Catholic Empire for their conquests by relying on the writings of Spanish jurist Francis de Vitoria (1492–1546).[4] As David Armitage points out, Purchas used Vitoria's writings on the limited authority of the Pope in the temporal affairs of the world to argue that acquisition of dominium based on papal bulls

[1] David Armitage, *The Ideological Origins of the British Empire* (CUP 2000).
[2] ibid 69–100.
[3] ibid.
[4] Samuel Purchas, *His Pilgrimage or Relations of the World and the Religions Observed in All Ages and Places Discovered from the Creation unto this Present* (originally published 1614, Kessinger Publishing 2003).

was illegitimate.[5] In his first book, *Pilgrimage* published in 1614, Purchas also relies on Vitoria's emphasis on the importance of cooperation between nation states, even non-European infidels, for trade as part of the natural Law of Nations that cannot be prohibited.[6]

Within the context of inter-imperial rivalry at the time, another jurisprudential question that has an important role in formulating the ideological basis of British commercial empire was sovereignty over the seas. As the idea of *Mare Liberum* (the free sea) opposed Spanish and Portuguese claims over trade routes, the British Empire relied on Hugo Grotius' (1583–1645) conception of the free sea as a means to oppose Portuguese dominance in the East Indies.[7] This was marked by, as Lauren Benton has noted, a time when the ocean was imagined as space through which flows of exchange occurred throughout the globe.[8] Central to this understanding of the ocean is how the law was instrumental in conceptualizing the ocean space.[9] On the one hand, as a backdrop for trade and travel, the ocean is described as being incapable of occupation and thus a lawless expanse.[10] Yet, there remained a possibility of legal regulation even within the domain of the ocean. Imagining trade routes and jurisdictional corridors in the ocean for sovereign states was common, as captains believed they carried the authority of the sovereign through the ocean routes they took.[11]

As much as these discussions were pertinent to the development of international legal argument over ocean disputes, their necessity came about due to inter-imperial trade competition. In this context, Benton's work has focused on how imperial knowledge on geographical imagination was codified in and through law.[12] Thus she shows how and why geography and sovereignty were imagined for imperial ambitions in maintaining trade corridors, networks of ports, fortresses and islands.[13]

[5] Armitage (n 1), citing Purchas' use of Vitoria's De Indies to argue against the Papal bulls. Samuel Purchas himself came from a theological background; thus his intellectual inclination toward Francis De Vitoria's writings to criticise the Spanish colonisation of the New Indies on the basis of papal authority.
[6] Purchas (n 6).
[7] Armitage (n 1).
[8] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (CUP 2009).
[9] ibid 104.
[10] ibid 105.
[11] ibid 113.
[12] ibid.
[13] ibid 162.

Paying attention to Grotius and international legal discourse within this period it is also possible to appreciate the operation of the networked institutions themselves; i.e. how through international legal discourse powerful states supported network institutions' monopoly over trade routes and trade ports in peripheral colonies. In taking into account this line of thought against the historical background of 16th-Century conflicts over trade routes and rights over territories 'discovered', Hugo Grotius' *Mare Liberum*, published in 1609, is an illustrative interpretation of sovereignty.[14] I have explored this in the previous chapter, where I discussed how the Grotian conception of sovereignty justified the idea of 'freedom of seas' by thinking about sovereignty through the idea of property. Not only did Grotius' distinction between jurisdiction and ownership allowed him to justify the capture of the Portuguese vessel *Saint Catherine*, but it also gave an infrastructure for the territorial control over shores for trading ports.[15] In its expansion to establish a/the monopoly of trade in the Spice Islands, the Dutch East India Company relied on its jurisdictional control over the shores by fortifying ports.[16] These fortified ports were integral to the East India Company's virtual control over trade in these islands.[17] These chains of fortified ports allowed the Dutch East India Company to exert influence over both natives and trading companies attempting to trade with the natives.[18] This influence manifested in violence and coercion against the natives to reject any agreement with other trading companies or forcing the trading companies to leave voluntarily.[19] Nonetheless, it is particularly the success and model of the Dutch East India Company and its approach to the conflict with the Portuguese in the *Saint Catherine* case that influenced the British to follow suit.

[14] The conflict over the Portuguese vessel *Saint Catherine* came to happen before the actual publication of *Mare Liberum* as a textbook in 1609, as it was primarily where Grotius developed initial arguments for his two-part volume on the Law of War and Peace.

[15] Both Grotius and Vitoria advanced different thinking on sovereignty to facilitate the operation of commerce and, particularly in Vitoria's case, religious networks in the Native territories. While in Vitoria's writings this assumed a form of natural law thinking surrounding debates on Thomist theology on jurisdiction and sovereignty, Grotius relied on the idea of private property as a jurisprudential component of sovereignty. Nonetheless, in engaging with ideas of sovereignty in relation to non-European 'savages', Grotius relied on Vitoria in both *Mare Liberum* and later on the possession of prize and booty in his commentaries on sovereignty. In the previous chapter I have discussed despite having different contexts and different juristic roots, the intellectual movement of legal thought by Grotius in his usage of Vitoria allowed him to make a case for interactions through treaty making with the non-European as an integral component of sovereignty.

[16] Tripta Desai, *The East India Company: A Brief Survey from 1599 [to] 1857* (Kanak Publications 1984).

[17] ibid 11.

[18] ibid.

[19] ibid.

Along with Purchas' reference to Vitoria for cooperation with 'infidels' as part of the Law of Nations, Grotius' *Mare Liberum* also became an important juridical concept for inter-imperial rivalry. While Purchas' interest in Vitoria was underpinned by broader concerns about Protestantism, his interest in advancing British colonial ventures was reflected in his support for the explorations of the Virginia Trading Company.[20] Before Purchas, Richard Hayklut (1553–1616), a philosopher, was among the chief propagators of British commercial imperialism during this period. His interest in the area of sea sovereignty also led him to translate Hugo Grotius' *Mare Liberum*.[21] Hakluyt's writings, before he translated *Mare Liberum*, largely propagated British commercial supremacy and the right to navigate.[22] Despite Purchas' theological background and approach, his interest in advancing British commercial interest led him to collect the works of Hakluyt on the *Principles of Navigations in the Sea*.[23]

Hakluyt's translation provided the English thinkers with an opportunity to engage with the Dutch East India Company's arguments founded on Grotius' thesis on the free seas. These translations were to be utilized in the series of conferences between the British and Dutch from 1613–1618 concerning primarily two questions; one of British access to 'spice islands' or the Indonesian archipelago[24] and the other of fishing in the coastal region north of England bordering the coast of the Dutch Empire. Firstly, in the Anglo-Dutch conflict over access, Grotius, who was himself present at the commission for the resolution of the conflict, replied by suggesting that a right to jurisdiction can also become legitimate when consent is given by its occupants.[25] In the second conference, British lawyers used Grotius' text on the difference between property and occupation to argue its right over the coastal region.[26] Later on, this idea of consent from those occupying the inland of the shore was then cited by John Selden (1584–1654), a Scottish jurist, to develop a reply to Grotius' *Mare Liberum* principle. John Selden had initially written a reply to Grotius' text on the freedom of seas in the form of

[20] Loren Pennington, *Hakluytus Posthumous: Samuel Purchas and the Promotion of English Overseas Expansion* (originally published 1966, The Emporia State Research Studies 2012).
[21] Armitage (n 1).
[22] Pennington (n 20).
[23] ibid.
[24] Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Right theories and the Rise of Dutch Power in the East Indies 1595-1615* (Brill 2006). The conference was also a diplomatic attempt to negotiate with the restrictions on fishing without licence off the northern British coast as well an Anglo-Dutch alliance against the Spanish merchants as part of a condition to allow access to trade in the Indonesian Archipelago.
[25] See in chapter 3 on Grotius' response to this as part of his conception of exclusivity of trade with the natives of Kingdom of Johor.
[26] Armitage (n 1).

Mare Clausum.[27] The purpose of this text, *Mare Clausum*, was to justify the English Crown's right to shores of surrounding islands.

After Selden, Sir Phillip Meadows (1626–1718), a British diplomat, reiterated the same principle of jurisdiction over property by the Crown or private individuals.[28] This particular idea of private individuals gaining jurisdictional control through consent became the underlying logic of commercial activity in Britain.[29] Coupled with Vitoria's ideas on dealing with dominium of 'infidels' and the natural condition of Christian people to exchange and trade around the globe, British commercial policy was imbued with a very similar logic as the Dutch East India Company.[30] A hallmark of this was how jurisdictional control over shores could be had through dealing with 'infidels' as well, which became a necessity and asset for establishing commercial networks. Despite different debates surrounding jurisdiction over coastal shores, the underlying purpose remained the imperialistic appropriation over resources. Nonetheless, Grotian conceptions about the control over shores remained an important aspect of British imperial concerns about global trade. Thus, as Edward Keene observes, British imperialism through commerce and trade was similar to the Grotian conception of the international legal order; in which a hierarchal view of civilization was entwined with toleration for exchange and cooperation with the native population.[31]

Thus, after an initial voyage in 1591 to the Spice Islands with a failed attempt to establish trade with the East Indies, it was not until 1600 that the British East India Company was formed.[32] Influenced by the success of the Dutch East India Company trade monopoly in the Spice Islands, the British East India Company sought a royal charter that would allow it to model itself similar to its Dutch counterpart.[33] Historian Tripta Desai notes that it was

[27] ibid 69-100.
[28] ibid.
[29] ibid.
[30] The British legal thought in this period developed through different juristic schools, primarily relying on Hobbesian and Bodinian discourses of absolute sovereignty. Relying on these conceptions of sovereignty allowed for the supremacy of the British Crown and the power of the State. However, in attempting to compete with Spanish and Portuguese empires, as well as conflict with the Dutch, English thought engaged with Grotian conceptions the most, especially with respect to trade settlements with non-Europeans. Thus, later writings of John Selden and then Sir Phillip Meadows derived their approach towards gaining jurisdiction over non- European territories by private individuals through Grotius' writings.
[31] Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (CUP 2002) 79.
[32] Desai (n 16).
[33] ibid 11-12.

particularly the commercial competition with the Dutch East India Company that motivated London Merchants to form the British East India Company.[34] Richard Hakluyt, the translator of Grotius' *Mare Liberum*, had made an argument for the establishment of the English East India Company by relying on the Dutch practice of establishing trade settlements through the maintenance, occupation, use, possession and improvement of the jurisdiction in question.[35] In the same year, Queen Elizabeth granted the British East India Company a royal charter for the monopoly over trade in the East; 'for the honour of our nation, the welfare of the people, the increase of our navigation and the advancement of lawful traffic to the benefit of the commonwealth'.[36]

Taking into account the influence of both Grotius and Vitoria on British thinkers during this era, this turn to rejecting papal authority, coupled with Freedom of Seas as a principle derived from thinking about sovereignty through the property, gave the British Empire the basis for competing with the Spanish and Portuguese dominion on trade.[37] As a result, the English Empire's approach to its expansion was based on trade settlements in new found territories rather than right by conquest. Thomas Poole thus observes that the East India Company, modelled on the Dutch East India Company, was rooted in a trade policy that was directed towards 'administrative repertoire of delegation and government by license'.[38] Regardless of the initial difficulty of the Company in establishing trading relations with the native rulers in the Indian subcontinent, the British State had effectively given the Company sovereign agency in the form of the royal charter based on the concept of divisible sovereignty.[39] This was again inspired by the Grotian conception of thinking about sovereignty through the concept of property.[40] This required both consents from native occupants and license from the State to enable a private person – such as the Company – to exercise government over such territory. Through the royal charter, the Company retained elements of a sovereign in establishing a government in the settlements.[41]

b. Rule and violence in the subcontinent

[34] ibid.
[35] Armitage (n 1).
[36] Desai (n 16) 11.
[37] Armitage (n 1).
[38] Thomas Poole, 'Reason of State: Whose Reason? Which Reason?' (2013) LSE Legal Studies Working Paper 1/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204587> accessed June 2020.
[39] ibid 9.
[40] ibid 10.
[41] ibid.

Regardless of the Company's exclusive license and sovereign-like attributes dependent upon the renewal of the royal charter after its first one granted in 1600,[42] it is important at this point to understand it as a networked governing institution in and of itself. That the Company operated as a separate, autonomous, governing body is a significant factor in its opposing interests with the State. Phillip Stern, in particular, has argued for the importance of looking at the British East India Company as a governing political body.[43] He demonstrates that even before the mid-18th Century, the British East India Company was operating as a self-governing political and executive institution.[44] Stern goes on to state that, before its dominance over Indian territories, the British East India Company had a political and social character that laid the foundations for its future transformation into a governing networked institution.[45] This is based on the fact that, even in the initial charter, the Company was recognized as a 'corporate body politick'.[46]

As the idea of corporate body traces back to Roman conceptions of associations in society, its purpose and intent were characterized in an early digest of corporate laws as 'for better government'.[47] The Company, in the light of Stern's analysis, is a form of a group bound together through common sets of rules, laws and purpose.[48] The Company as an association, beyond trade, had governing attributes in that it could ensure its mercantile purpose functioned smoothly.[49] Thus it could tax, police, fortify its settlements and administer day to day functioning of them.[50]

On its own thus it is possible to see the Company as a separate self-governing political entity. As Sundhya Pahuja observes, the existence of both private and public company duties was part of the reason that a jurisdictional conflict persisted between the State and the Company in the exercise of public authority.[51] Elaborating her argument on the

[42] Desai (n 16) 11.
[43] Philip J. Stern, *The company-state: corporate sovereignty and the early modern foundations of the British empire in India* (OUP 2011).
[44] ibid 19.
[45] ibid.
[46] ibid 8.
[47] ibid 6.
[48] ibid.
[49] ibid.
[50] ibid 14.
[51] Sundhya Pahuja, 'Public Debt, the Peace of Utrecht and the Rivalry between Company and State' in Alferd Soons (ed), *The 1713 Peace of Utrecht and its Enduring Effects* (Brill 2019).

jurisdictional conflict, Sundhya Pahuja, notes how in this period when the idea of the State was not well formed, other forms of associational life with their jurisdictional authority existed.[52] These forms of associational life included Companies of Merchants, Church, City states, and Communities of Belief.[53] Furthermore, far from being part of the State, companies/corporations of various kinds predated the State.[54] As forms of associational life, they were commercial, political and personal; overlapping with other self-governing communities.[55] Thus a royal charter in the initial period of the Company did not mean that the Company was an extension of the State, but merely that it had been provided special rights and powers by the State.[56] In return, the Company had to provide financial support in forms of loans to the State. This is what leads Stern to observe that the Company itself, especially due to its exclusive rights to trade in the Indian territories, can more aptly be described as a Company-State.[57]

The Company's exclusive rights through the charter allowed it to exert and maintain jurisdictional control over the entry and exit into the Indian territory as well as the routes leading to land. Broadly the charter had given license to the Company to 'explore and navigate all ways, passages, islands, ports, havens, cities, creeks, towns and places of Asia, Africa and America, or any of them wherever trade was to be discovered, established or had'.[58] Thus the charter prohibited any other English subject to 'visit, haunt, frequent, or trade, traffic or adventure into Asia without the Company's permission and license'.[59] These permissions or licenses were in the form of passes or passports that the Company granted for a fee to any private individual, even native settlers, for sea lanes under the Company's jurisdiction.[60] The implementation of these passes came in the form of criminalization, labelling anyone rejecting or opposing Company 'passes' as interlopers against the Company and the Kingdom.[61] Whether these interlopers were English traders or native

[52] ibid 6.
[53] ibid.
[54] ibid.
[55] ibid 7-8.
[56] Stern (n 43).
[57] ibid 14.
[58] ibid 42.
[59] ibid.
[60] ibid 49.
[61] ibid.

settlers, they were deemed, according to Company officials, 'worse than pirates and deserved to be hanged'.[62]

It is important here to note that already the subcontinent could be understood as a large territory of multiple loci of power and governance.[63] The encounter in the early period of the British East India Company had to be one of cooperation and within the socio-economic configuration of the territory they had entered, which was ruled by the Mughals. The subcontinent, regardless of its historical or spatial temporality, already existed within a socio-economic hierarchy, slowly encoded in primarily Vedic scripts (later homogenized in the 'Hindu' religion) created and collated between 1500 and 1000 BC, through a caste structure.[64] What were identified as 'religious' communities, later on, were clan-like endogamous groups maintaining socio-political, spiritual hierarchies (based on purity/pollution), passed through paternal hereditary lineage to gain material benefit and claim superiority.[65] While centered primarily at 'Brahminism', the priestly caste, as well as in some context through the 'Kshatriyas', warrior-king caste, caste-like structures have also permeated other pre-colonial communities such as those who claimed ancestry from a warrior-clan or Brahmins as a way to reassert their positions in the Mughal courts and to gain social and material capital.[66] More importantly, in either case, of both Mughals and Brahmin or Kshatriya kingdoms, those deemed 'lower' i.e. 'sudra and atisudra' have often maintained labour or servicing to upper caste communities while the most shunned were

[62] ibid.

[63] Susan Bayly, *The New Cambridge History of India Caste, Society and Politics in India from the Eighteenth Century to the Modern Age (*CUP 1999).

[64] See also explanation of caste formation by BR Ambedkar in Bhimrao Ramji Ambedkar, *Castes In India: Their Mechanism, Genesis and Development* (originally published 1916, Createspace Independent Publishing Platform 2016).

[65] ibid, Particularly Ambedkar's explanation of caste formation is understanding it as a socio-political reality of the subcontinent rather than simply a religious source. Specifically, he explains it as an 'artificial chopping off of the population into fixed and definite units, with each prevented from fusing in the other through the custom of endogamy', thus endogamy or paternal lineage of carrying 'name' as identification of fixed social position in a hierarchy of 'labourers' is how the structure of caste is explained by Ambedkar. While caste structure has historically evolved and taken different forms, and political meanings, it is agreed by historians that it remains at the heart of a social and political fabric of the subcontinent. See also: Mysore Srinivas, 'A Note on Sanskritization and Westernization' (1956) 15 The Far Eastern Quarterly 481, for conceptualization of caste mobility, fluidity in the history of subcontinent. See also: Kalpana Kannabiran, 'Sociology of Caste and the Crooked Mirror: Recovering B R Ambedkar's Legacy' (2009) 44(4) Economic and Political Weekly 35. For Caste as a social political reality of Muslim communities in subcontinent see: Julien Levesque, 'Debates on Muslim Caste in North India and Pakistan: from colonial ethnography to Pasmanda mobilization' (2020), hal-02697381 <https://hal.archives-ouvertes.fr/hal-02697381/> Accessed June-2020.

[66] Bayly (n 63) 25.

outside the caste hierarchy i.e. the indigenous communities pre-Brahmin, termed Avarna, who were mostly the Adivasi or Dravidians.[67]

During the high ruling period of Mughals, i.e. in the early 17th Century, those claiming to be descendants of Kshatriyas or Brahmins negotiated their place as royal guards, intermediaries between the peasant caste/labourers and the royal courts of Mughals, designated themselves as 'Rajput' or 'Nayara' or in Punjab as 'Jutt'.[68] The logic of caste structure thus was present and facilitated through the Mughal rulers, more so by Akbar, Shah Jahan and Aurangzeb, to the extent that the 'Rajput' assumed positions of land ownership, i.e. zamindars, for revenue collection from labourers and peasantry.[69] Mughal Rule, therefore, as historian Bandyopadhyay argues, was dependent and contingent on caste formations, i.e. through the intermediary caste of Rajputs, Jatts, or Nayaras, to function militaristically, economically and administratively.[70] Putting aside the 'orthodox' Brahmin rule in South India, particularly Maratha, this complex and fluid rule established by the Mughal became the foundation on which the British could expand, build alliances, give and gain military support and claim territory. These included communities claiming caste positionalities of Brahmin, Kshatriya and Vaishya, which included merchants, record keepers, those claiming scholarly literacy and land revenue collectors, most of whom they were dealing with on a commercial/administrative level.[71]

Amidst this slow decline of Mughal rule with rising regional powers, including the Brahmin-Kshatriya rulers of the South, the consolidation of merchant caste, Rajput soldiers, land revenue collectors, record keepers as elite native caste in Mughal India, The East India Company had its juridical logic of territorial control and commercial and administrative alliance with the native elite caste leaders and communities. For the Company, having concessions given by the Mughal and facilitation by the native elite caste to build factories

[67] ibid 8-9.
[68] Christopher Bayly, *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770- 1870* (CUP 1988).
[69] Bayly (n 63) 25-26.
[70] Śekhar Bandyophadyaya, *From Plassey to Partition: A History of Modern India* (Orient Blackswan 2004) 31-32.
[71] ibid.

where peasantry, i.e. Sudra caste[72] who were mostly weavers and labourers, worked for the benefit of both the native elites and them was just as important as their juridical justification for creating territorial and juridical control over the settlements they built and established in the subcontinent. As Arasatnam points out, the relationship between weaver caste communities as labourers only strengthened as the Company's governance over the trading ports got stronger, hence by 1770, the Company itself gained an economic stranglehold over the weaver caste communities through bonded labour in their cotton plantations.[73]

Trade settlements were understood as, under the complete authority of the Company administration, they were secured and fortified to ensure 'security for trade'.[74] In this instance as well, even the native elite traders living in the settlements were taxed for the security provided by the Company.[75] Even though native elite leaders maintained that the fortifications were neither necessary nor required, the justification the Company gave was that security infrastructure was necessary for the protection of commercial trade from interlopers. By arguing that the Company was always inclined towards 'peaceful cooperation of trade' with the native subjects, the Company policy explicitly distinguished between 'territorial conquest' and 'security of the trade settlement'.[76]

This securitization was part of its alliance building, cooperation with native elite caste leaders and communities. As Stern and Roy observe, the Rajput caste was employed as soldiers as well;[77] replicating a similar caste-based alliance logic that the Mughal employed, the British East India Company relied on 'native' soldiers claiming 'warrior/Kshatriya' ancestry – some already having been guards for the Mughals – to create their forces in the settlements.[78] This interaction with the existing caste structure into the socio-economic and administrative life of the merchant network also revealed another violence brought about by the confluence of Company and the native elites, that of separating an inherently political, exploitative structure in a naturalized 'social', 'religious' and 'cultural' reality of the

[72] Sinnappah Arasaratnam, 'Indian Commercial Groups and European Traders, 1600-1800: Changing Relationships in Southeastern India' (1978) 1(2) South Asia: Journal of South Asia Studies 42; Sinnappah Arasaratnam, 'Weavers, Merchants and Company: The Handloom Industry in Southeastern India 1750-1790' (1980) 17(3) Indian Economic and Social History Review 257.

[73] ibid Arasaratnam 'Indian Commercial Groups and European Traders, 1600-1800' 44.

[74] ibid.

[75] Lucy Sutherland, *The East India Company in Eighteenth-century Politics* (Clarendon Press 1962).

[76] ibid 3.

[77] Philip J Stern, 'Soldier and Citizen in the Seventeenth-Century English East India Company' (2011) 15(1-2) Journal of Early Modern History 83; Kaushik Roy, 'The Hybrid Military Establishment of the East India Company in South Asia: 1750-1849' (2011) 6(2) Journal of Global History 195.

[78] Roy (n 77) 197.

subcontinent.[79] As Anupama Rao, amongst others, has pointed out, this violence was part of knowledge production around the 'caste structure' produced by those occupying local positions of power i.e. dominant caste leaders and communities.[80]

In comparison to Dutch VOC merchant network, in the case of the British East India Company, there was a cooperation between a certain minority elite-caste community of natives with the pre-existing structure of hierarchical power and the Company. Thus, while treaties remained a significant instrument of relationship between the native population and the merchant company, the approach of the English was facilitated more squarely by and alongside native elite caste communities, instead of a more violent private war justified through enforcement of 'law' through unequal treaties. It also is a different modality of colonialism due to the difference in the specific political, imperial configuration existing within the subcontinent which became crucial to the British to develop their patronage networks with native elite caste communities and leaders later on in the 18th–19th Century. At the same time, this kind of policing, securitization and administrative control were characteristic of jurisdictional control over the territories controlled by the Company. Furthermore, it is also this control of territory through fortification and control over travel routes, fortifications and securitization that allowed the Company to expand its networks to build more alliances with Brahmin/Kshatirya caste leaders later on in the 18th Century when it solidified its rule over the subcontinent.[81]

The violence that the Company bought to the subcontinent was both new, in that it militarized the ports heavily, and contingent on existing forms of caste violence in the subcontinent as they gave more capital to the merchant caste to exploit the marginalized caste peasantry and labour. As historian Susan Bayly rightly observes, it wasn't so much that the British 'invented' the existing social caste stratifications and system, their presence intensified the already existing violence.[82] This particular confluence is what makes the

[79] Nicholas B Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton University Press 2011). Dirks, who argues how this separation of political reality of marginalised caste, and caste structure, from the social as well as the creation of a separate religious and cultural life of the land of the 'Hindu' religion was part of a long interaction, cooperation and confluence between the native caste elites and the British.

[80] Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (UC Press 2009); Bayly (n 68); Dirks (n 79).

[81] Bayly for example notes how providing security and consistent trade was central to the relationship developed between the merchant caste and British merchant company. See for this Bayly (n 68).

[82] This is particularly true in the later part of 18th and 19th Century as the British Empire took over the territorial and juridical control over the subcontinent from the Company.

merchant network of British East India's encounter in the subcontinent particularly different from the Dutch VOC, who only justified violence through 'cooperation' based on unequal treaties. Whereas in the subcontinent, already existing pre-Mughal social stratification facilitated by the Mughal rulers further had provided an opportunity of mutual benefit which later translated to indirect rule over the subcontinent.

The dialogical interplay between international legal discourse and merchant network in this case also became grounded in more militaristic policing and securitization in confluence *with* a small native elite group (specifically dominant caste communities and their networks) rather than complete domination/control based on enforcement of commercial treaties.[83] Thus the violence of the merchant company, and later on the British Empire, can be understood through this encounter between the native caste elites and Company merchants as a confluence of 'multiple, overlapping, forms of colonialism',[84] both internal and external, for mutual benefit.

III. British Empire's network of imperial administrator

a. The state/company conflict

Following the emergence of political parties in England in the 1670s, the 'Tories' and the 'Whigs', the King and the Company's interests aligned far more than they had before.[85] King James II shared the 'Tory' vision and thinking of imperial British expansion in territorial terms.[86] Sir Josiah Childs, a Company man who had significant control over its direction, also became the economic advisor to the King.[87] King James II also provided an expansive new charter to the Company; giving it rights to set up admiralty courts in the West Coast of India, to coin money and to set up Martial law.[88] This new charter also granted territorial rights and the power of declaring and waging war against all non-

[83] This has also been referred to by historians of the subcontinent as 'overlapping practices of power rather than one unitary object', see for example: Rao (n 80).
[84] See for example the Dutch East India colonization of the Indonesian archipelago as I have detailed in chapter 3.
[85] Pahuja (n 51).
[86] Poole (n 38).
[87] ibid 10.
[88] Sutherland (n 75) 4.

Christian people.[89] Despite a confluence of interest and support from the Crown, the Company faced, however, opposition from the Parliament.[90]

This shift in the late 17th Century saw intensified support of the Crown for the Company's jurisdictional control and policing over its trade settlements. As a result of opposition by merchants who were supported by the Parliament against the Company's monopoly in Indian territories, in 1682, the Company brought proceedings against Thomas Sandys for an unauthorized voyage to the East Indies. This case, *the East India Company v. Sandys*, was brought in front of the Court of Kings Bench as a constitutional matter by the Company and raised discussions about the monopoly and trade in territories of the New Indies.[91] However, the decision and arguments raised in the case were significant in terms of the international legal discourse on sovereignty and jurisdiction on overseas trade with the 'infidels'. Sandys' argument relied on the simple reasoning that monopolies were illegal.[92] Specifically concerning international legal discourse, Sandys argued on the basis of Grotius' thesis on the *Freedom of Seas* that a 'King cannot take away man's goods that he has got by his trade, much less can he take away his whole trade'.[93] This case replayed, in many ways, arguments based on the Grotian conception of sovereignty, used by the British State against the Dutch East India Company during the Anglo-Dutch Fisheries conflict during the early 1600s. However, in this instance, it was a conflict concerning a commercial network – the British East India Company – whose expansion had benefited the state as much as the commercial network had benefited from the state.

In replying to Sandys' argument, the Company produced an argument that relied less on countering the *Freedom of Seas*, and more on emphasising an exception to the blanket application of the principle of free seas. The Company argued that it was not a monopoly since it did not outright restrict trade, only gave licenses to other merchants because of its special position given by the King.[94] Elaborating this point regarding its special position, it was pointed out that as the Company maintained trade, built infrastructure, administered territory and maintained relations with the native leaders, it had obtained a status that other

[89] ibid 4-5.
[90] ibid.
[91] Stern (n 43).
[92] Poole (n 38).
[93] ibid 11.
[94] ibid 12-13.

smaller traders would not have by themselves.[95] Adding to this argument, it was said that the nature of 'infidels', their alien culture and the dangerousness of distance were significant factors to only allow those with 'knowledge of how to trade with natives' to be in control of trade traffic.[96] Taking this reasoning further, the Company reiterated their policy on maintaining security as opposed to conquest and war in more relatable terms to its special position. Christendom, the Company stated, is in a natural and perpetual state of war with infidels.[97] In dealing with the 'infidels', its policy of maintaining government over them through trade settlements was a way of avoiding warfare.[98] This echoed its policy over fortifying ports on the basis that there was a difference between war and peaceful cooperation based on maintaining security for better conditions of trade. Such a temporary peace could not happen through individuals, but through the prerogative of a Christian prince and from a 'subject' on his behalf.[99]

The court's decision inclined towards the Company's argument and extended it to reflect how close the Company's policies were to British engagement with international legal discourse. Judge Jeffery argued that since the Company had been exclusively given rights by the Crown and that it worked for the public good, it was an exception to the illegality of monopolies.[100] More specifically, Jeffrey referred to John Selden's use of Grotian principles to argue that the world being in its original state was common to all mankind, except when common consent necessitates administration over 'private property' which was given by a government.[101] For this reason, the King was responsible for governing foreign trade and could even claim sovereignty over plantations discovered and occupied by private individuals.[102] Hence, if *Mare Liberum* was meant to apply at all, it was relevant only to nation states and not to private individuals.[103]

While the Kings Bench decision ruled in favour of the Company, it put forward a third side in the argument; that of the Crown. Stern argues that Jeffrey's reasoning for siding with the Company was motivated only by asserting the Crown's legal and prerogative power to

[95] ibid 12-13.
[96] ibid.
[97] ibid.
[98] ibid.
[99] ibid.
[100] Stern (n 43) 50.
[101] ibid 51-52.
[102] ibid.
[103] ibid 53.

control trade traffic, authority over settlements and possessions held by private persons.[104] Jeffrey further emphasised that the Company was only an extension of the State[105] and its arm of enforcement in the world.[106] Dismissing the Company's claims to trade with infidels, Jeffery argued that even if the Asian continent was Christian, the King would have the prerogative to restrict trade traffic.[107] Explaining the relation of the Crown and Company more specifically, Jeffrey stated that the Company was according to the Kings charter 'Embassadours of the King to concert peace', thus it was the King's duty to maintain peace through the Company's settlements in the East Indies.[108] Despite this assertion by the King's Bench, Poole observes that the decision gave the Company the green light to operate as the exclusive controlling authority of trade in the East Indies.[109] This argument of the Company as an extension of the State did not change how the Company functioned as a separate political body in the East Indies. As Pahuja, Stern and Poole note, the Company's jurisdictional practices intensified;[110] relying on prohibiting and taking to trial 'interlopers' within its admiralty courts in the East Indies,[111] and not in the land where they 'were under another Law'.[112]

Within the context of my argument, the *Sandys* decision nods to how an imperial state explicitly uses international legal discourse to support a merchant network's growth in a peripheral non-European territory while also being informed by the network's particular interaction with the peripheral non-European territories. The Company's response in this case also alludes to this particular building towards the international legal discourse on 'governing' as an indirect form for the Crown and its religious mandate. Jeffrey's insistence on the Crown's prerogative over territory despite the occupation, control and jurisdiction of a private individual shows an attempt to maintain imperial governance over a settlement, even if this comes in the indirect form of a commercial 'emissary of peace'; i.e. the Company. Moreover, by reiterating how the Company maintains peace, on behalf of the Crown, the Kings Bench decision entrenches the view that settlements of trade through the administration of the Company signify avoidance of public warfare with the 'infidels'.

[104] ibid 57-58.
[105] ibid.
[106] Poole (n 34) 12-13.
[107] Stern (n 43).
[108] ibid 58.
[109] Poole (n 34) 12-13.
[110] Pahuja (n 51) 7.
[111] Stern (n 43) 49.
[112] Poole (n 34) 13.

Thus, the King's Bench, only in a different way, reiterates the Company's policy on how administrative control and security are part of peaceful cooperation with the 'infidels'. This understanding of the administration of trade settlements implies a distinction between violence as exclusively imagined through public war and violence in the form of the Company's administrative control, policing and criminalization of 'interlopers'.

This use of discourses on sovereignty and the avoidance of war through peaceful cooperation by the King's Bench gave impetus to the Company's growing territorial ambitions. Thus, following the *Sandys* case, the Company's policing over settlements to maintain jurisdictional control intensified. Particularly in Bombay, following a mutiny against the rising influence over the territory by Company men, the Company increased its military presence and maintenance of armament stores.[113] Due to both the support received by the Company and King James II's orientation towards territorial expansion, the Company expanded its jurisdictional control to Siam.[114] This was both an attempt to solidify the Company's governance in the region as well as to increase its strength through establishing a network of enclaves.[115] Benton notes how this chain of forts and enclaves allowed the Company to maintain a military presence over the trade routes to East Indies.[116]

After the revolution of 1689, the overthrowing of King James II and the ascension of William III and Mary II, the British parliament's renewed interest in competing with the Company's monopoly led to the creation of a new company. Only after a decade of competition with the new company, conflicts with the French Company in Siam, and an increasing reliance on the public finance given by the Company through its trade settlements did the parliament reach a peaceful conclusion, however temporary, with the Company. The merger of the two companies came out of the necessity of preserving the financial interests of all the stakeholders of trade in the East Indies, particularly to sustain the military presence of the Company in the East Indies.

[113] Sutherland (n 75).
[114] ibid 4-5.
[115] Stern (n 43) 79.
[116] Benton (n 8) 162.

Hence, in the mid-18th Century, the government left the Company unhampered in its management; the only controls sought were financial. In 1754, the Company was allowed to raise an army in India. It was also allowed to wage war, sign peace treaties, and appropriate booty and plunder in the course of war undertaken for its defence.

It was not until after the Company's political control over Bengal, after the Battle of Plassey (1757), that the Parliament renewed interests in the Company's affairs once more. The late 18th Century also marked growing discussions among jurists and economists within the British State who laid the foundations for the shift in imperial attitude during the mid- and late 19th Century. The Company's rule over Bengal after the Battle of Plassey in 1757 gave it control over the flow of trade to and from Bengal.[117] As the richest state in India, Bengal produced revenue for the British East India Company through its trade flows.[118] These revenues facilitated military excursions further north in India and later against the Marathans in the south.[119] As Bayly notes the Company's dealings with the native merchant networks, particularly the dominant caste elites, had been highly beneficial to its accruement of revenues as well the native merchant caste's increase in economic capital.[120] After the 1764 battle for the city of Buxor against the Mughal Emperor, Shah Alam II, the Company gained effective territorial control over the province of Bengal.[121]

The Company's territorial expansion throughout the 1760s gained the attention of the Parliament and King George III. Desai notes that it was the shifting attitude of the British Crown, in particular, that first brought attention to the Company's growing territorial claims in India.[122] King George III, who ascended to the throne in 1760, was more concerned with rule over the Empire as he believed the Indian territories belonged to him.[123] He maintained a general hostility towards the Company's rights,[124] to the extent that he broke the general

[117] Desai (n 16).
[118] ibid 173.
[119] Ranjit Kumar Ray, 'Indian Society and the Establishment of British Supremacy 1765-1818' in Andrew Porter (ed), *The Oxford History of the British Empire Vol 2: The Eighteenth Century* (OUP 1998).
[120] Bayly (n 63).
[121] Huw Bowen, 'British India, 1765-1813: The Metropolitan Context' in Andrew Porter (ed) *The Oxford History of the British Empire Vol 2: The Eighteenth Century* (OUP 1998).
[122] Desai (n 16).
[123] ibid 188-189.
[124] ibid.

approach of the British State in maintaining its relations with the native rulers through accepting the Company as its emissary. Instead, King George III sent an ambassador to Nawab of Carnatic pledging English friendship.[125]

b. Private property and indirect rule

The British government's attention towards the Company was primarily drawn through the criticism by English thinkers and ministers in the Parliament. The general concern drew from the advantage in the form of revenue generated by the Company.[126] Historian Michael Duffy notes how this concern for greater revenue was expressed by the British parliament because of the need to develop its naval and military strength against France in the Napoleonic War.[127] The revenue from Bengal was demanded by the British State not as a territorial claim or right but as a matter of expediency. This expediency, according to the critics of the Company's rule in Bengal, was because the Company could not handle the territories it had acquired now in India.[128] It was argued that governing the acquired territories needed ministerial control from the State, as a commercial entity could not be trusted to control vast territories.[129]

The Company's response to these claims relied on arguments the British State gave to French claims in 1762 regarding the seizure of the French Company's possessions by the British East India Company.[130] The English government had replied that 'every dispute thereto must be settled by the English Company, the Crown of England having no right to interfere in what is allowed to be the legal and exclusive property of a body corporate, belonging to the English State'.[131] Citing this reply of the British Crown to the French in 1762, the Company argued that demand for territorial revenue was like confiscating private property.[132]

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[125] ibid.
[126] Michael Duffy, 'World-Wide War and British Expansion, 1793–1815' in Andrew Porter (ed), *The Oxford History of the British Empire Volume 2: The Eighteenth Century* (OUP 1998).
[127] ibid 184.
[128] Desai (n 16).
[129] ibid 173-175.
[130] ibid.
[131] ibid.
[132] ibid.

This idea of the private property remained a legal argument for the Company to fall back on, particularly as the argument was derived from the Company's initial settlement and jurisdictional control over ports in India. As discussed in the previous section, in the earlier period of the British expansion into Indian territories, this was also supported by the Crown and intellectual figures in the early 17th Century as it allowed the British to compete with its imperial rivals at the time. This conception of private property was influenced by the Dutch East India Company's adoption of Grotian discourses on sovereignty. For the British East India Company, the Dutch East India Company was again an example to argue how no annual payment was asked by the Dutch government.[133] The Dutch East India Company's territorial acquisitions, it was argued, were treated as possessions of private individuals.[134]

It was also this idea of private property that had allowed the networked growth of the Company in India in conjunction with its encounter with, and active facilitation from, the native elite-caste communities in establishing a system of indirect governance in the subcontinent. In this renewed conflict between the British State and the Company, financial advantages of the expanded territory in the Indian territories, specifically the control of trade networks and flows that the Company had gained, were central to the State's insistence of greater share in the commercial profits of the Company.

To gain some ministerial control over the Company's territories the British parliament, under the direction of Lord North, passed the Regulating Act of 1772.[135] The purpose of the Act was to reconfigure the relationship between the State and the Company. Clauses that were part of the Regulating Act included control over appointments within the Company's administration, specifically within the Supreme Court of Bengal and nominations for members of the Bengal council by the Crown.[136] Parliamentary discussion on the Act raised concerns about how these provisions possibly contravened the jurisdictional authority of the Company in Bengal by giving the Crown 'full and absolute power over the possessions of the Company'.[137] Lord North, arguing in favour of the Act, replied that 'I have a direct,

[133] ibid.
[134] ibid.
[135] Bowen (n 121); Desai (n 16). This act only contained provisions of oversight of the Company's financial reports by the Secretary of State of the British government. In addition to making available loans to the company contingent on payment being made to the State by the company of revenues collected in its territories. The recommendations of the Regulating Act were made possible only through an opportunity created by the Company's need for a loan.
[136] Desai (n 16) 190.
[137] Bowen (n 121).

declared open purpose of conveying the whole power and management of East India Company directly or indirectly to the Crown'.[138] Having this supervision and Crown involvement in the Company's administration was, as Lord North later put, to bring a form of legal regulation and systematic legislative uniformity over the Company's jurisdiction in Indian territories.[139] In this sense, Lord North aimed to gain greater control to govern over the territories managed by the East India Company – particularly as any overt interference of the Crown to take over possessions of the Company was met by the legal defence of private property.

The Hastings proceedings raised broader concerns of imperial attitude towards rule over India. Edmund Burke, a statesman and a political thinker of the late 18th Century, was a leading critic of the Company's governance over Indian territories. His thinking on the native governance and British values at the turn of the 19th Century were instrumental in imperial thinking of the 18th and 19th Century.[140] He promoted a paternalistic liberalist perspective on colonial rule, emphasising the rule of law and the tutelage of natives to progress to stages of civilization.[141]

Burke's opposition to the Company's rule in India followed similar oppositions to parliamentary ministers in the 1760's, that the Company did not adhere to British laws in their dealings with the native population.[142] A system of bribery, nepotism and private profiteering was justified by the Company based on a 'geographic morality'.[143] 'Geographic morality' as a policy of the Company rule over Bengal was explained by Hastings as a reason for differential treatment of natives to people and laws of civilized nations. Considerations such as longitude, latitude and temperature justified a harsher approach to governing the native population of Bengal.[144] It was for these reasons, Hastings argued, the law of Britain did not extend to Indian territories. Regardless of this explanation, the Company's practice had

[138] ibid 538.
[139] ibid 539.
[140] ibid.
[141] Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117(1) The American Historical Review 92.
[142] Jennifer Pitts, 'Boundaries of Victorian International Law' in Duncan Bell (ed), *Victorian Vision of Global Order: Empire and International Relations in the 19th Century* (CUP 2007).
[143] Pitts (n 141).
[144] ibid 112.

always been, as Stern and Pahuja have observed, one of its policy and jurisdictional authority.[145]

However, the Company policy and encounter, as I have argued above, was not in isolation simply because it was a state-like authority in the subcontinent. It was specific to the existing structure of the native elites which the British both took advantage of and justified for its gain through building patronage with elite caste networks. Hastings' 'geographic morality' was thus specifically about the indirect governance that the Company had built with the existing information and orientalised notions of marginalized caste communities created and actively pushed by caste elite communities in the subcontinent. In this case, the network of merchants had learnt from native caste elites and, through this mutually beneficial relationship, informed – as I will argue – a development in the international legal discourse in the 20th Century.

Of particular consequence to this development is this conflict over jurisdiction between the State and the Company – and the response to Hastings provided by Edmund Burke. Burke argued that this idea of 'geographic morality' was contrary to a 'universally' accepted conception of the Law of Nations.[146] For Burke, the positive obligations of a legal system and normative order were integral to any society. The rule of law, he argued, was present even in the Indian society albeit in a different normative order.[147] Any government over Indian rule should not then dispose of ideas of the 'rule of law' and positive obligations regarding the adherence of legal principle based on 'geographic morality'.[148] Burke's suggestion seemed to be a form of pluralism, which has a singular moral 'universal' basis common to all nations, concerning the governance of a colony. As Jennifer Pitts aptly observes, however, although this approach towards the Law of Nations based on legal universalism and pluralism seemed inclusive, it was not at all anti-imperial.[149] The inclusiveness of Burke's legal universalism, that all nations have some form of legal normative order, was nonetheless subject to his

[145] Stern (n 35); Pahuja (n 51).
[146] Pitts (n 141).
[147] ibid 113-115.
[148] ibid.
[149] ibid.

perspective on the civilized nature of British values.[150]

A significant element of Burke's discourses on the trust of government over Indian colonies was how he characterized native people of India as part of the imperial British society. Referring to natives as 'distressed fellow citizens of India', Burke's legal universalism and cultural pluralism were underpinned by notions of a British commonwealth as a global whole.[151] Pagden observes how this co-option of native identity as part of the British Commonwealth, yet culturally pluralistic, was the governmental mentality of state interference in colonial peripheries.[152] Especially concerning India, Burke maintained that trust over governing territories requires barter and compromise.[153] For Burke, it was important to 'sacrifice some civil liberties for the advantages to be derived from the communion and fellowship of a great empire'.[154] In keeping with the moral obligation to civilize as a social right, governing over native Indians following British moral values was a part of keeping the trust.[155] For Burke, British values when applied to the administration of natives to help them achieve a civilized status could maintain a state of peace and progress for the natives.

This view as the underlying reason for cooperation and administration of native territories was different from the reason given by Judge Jeffreys in the *Sandys* case as we saw above. In the case, natural law precepts on the duty of commercial enterprises to be emissaries of peace were integral to cooperation and administration of non-Christian native territories. Burke's thinking marked a shift from natural law reasoning to a social right thinking that, as Boisen puts it, justified imperialism on the 'basis of an obligation to ensure a moral community that facilitated native prosperity'.[156] More importantly, as Mithi Mukherjee has argued, Burke's inclusion of natives as 'citizens' of the empire was a unique contribution to British imperial policy.[157] Burke's discourses provided an argument for a

[150] ibid.
[151] Anthony Pagden, 'Imperialism, Liberalism & The Quest for Perpetual Peace' (2005) 134(2) Daedalus 46.
[152] ibid 48.
[153] Camilla Boisen, 'Triumphing over Evil: Edmund Burke and the Idea of Humanitarian Intervention' (2016) 12 Journal of International Political Theory 276.
[154] Camilla Boisen, The Changing Moral Justification of Empire: From Right to Colonise to Obligation to Civilise' (2013) 39(3) History of European Ideas 335.
[155] ibid.
[156] ibid 349.
[157] Mithi Mukherjee 'Justice, War, and the Imperium: India and Britain in Edmund Burkes Prosecutorial Speeches in the Impeachment Trial of Warren Hastings' (2005) 23(03) Law and History Review 589.

'de-territorialized juridical-imperial sovereignty' which was meant to serve the native interest as part of the greater Empire.[158] What Burke had effectively argued for was a juridical-legislative control over Indian colonies through oversight by Parliament and judges in the Indian courts, criticizing the arbitrary administrative policing of the Company rule.[159] Mukherjee notes that Burke's original contribution was to suggest a kind of 'supra-national' imperial overseeing of native interest based on 'universal' values of morality and rule of law.[160]

Furthermore, notions of pluralism and the civilized nature of British values were contingent on a hierarchy, i.e. one could be a 'loyal citizen' of Britain given they adhere to 'British values'. This inclusion, contingent on British values, was consistent with the oriental imagination and encounter with the native elite caste communities and leaders in the subcontinent. This encounter with native caste elites was based on active cooperation for mutual benefit and indirect rule rather than simply an orientalist imagination on its own.[161] From the experience of colonial officers of the Company and later the British State administrators, the imagination of subcontinent would increasingly take on this pluralism and moral universalism as a way for native caste elites to maintain their positions of power under British rule which they positioned during their interaction and cooperation with the East India Company.

Thus, Burke's suggestions also became a perfect fit for the indirect governance over the subcontinent and, in one way, were not that different from Hastings' suggestion of differing 'geographic morality', except that it evolved the discourse around private property ownership to the 'social obligation of the state'.[162] What Burke moved towards in his opposition to Hastings – and effectively the Company's rule – was a notion of government

[158] ibid 591.
[159] ibid 593.
[160] ibid.
[161] On this see for example Rao (n 80); Gajendran Ayyathurai, 'Foundations of Anti-Caste Consciousness: Pandit Iyothee Thass, Tamil Buddhism, and the Marginalized in South India' (Doctoral Dissertation, Colombia University 2011); Buddha Rashmi Mani, *Debrahmanising History: Dominance and Resistance in Indian Society* (Manohar Publishers & Distributors 2007).
[162] Pitts (n 141) 106. His writing, Pitts observes, on the North Indian Natives of America were derogatory and crude. Pitts, however, mentions some of the writings on Native North American tribes were co-authored and it may not be entirely accurate to associate specifically to Burke.

over Indian territory as a trust and benefit for all mankind.[163] In his famous speech on Fox's East India Bill of 1783, he surmised this as:

> political power which is set over men, ought to be some way or the other exercised ultimately for their benefit. If this is true, none of the privilege which can be original, self-derived rights, or grants for the mere private benefit of the holders, then such rights, are all in the strictest sense a trust: and it is the very essence of every trust to be rendered accountable.[164]

Camille Boisen notes how this denotes a shift to governing over the colony as a social right from jurisdiction over colonies as the private property of an individual. This led Burke to understand government over the colonial territory of India as a trust to be upheld.[165] This trust to govern was given to the British Empire as an 'incomprehensible dispensation of divine providence in our hands'.[166] To abuse it, he argued, as Hastings had, was not just morally offensive but threatened the very existence of both the 'British Constitution' and 'the civilization of Europe'.[167] For Burke, then, the idea of trusteeship was a way to refute strict claims of private ownership by the Company. At the same time this conception of 'trust', as we shall see in the later section, also informed who were to be trusted within the native elites – which were, for the most part, the caste elite leaders and communities - or rather what was closer to the universal 'values' of British morality and acceptability in terms of pluralism.

In a sense, this attempt was similar to Parliament's aims to gain some kind of regulatory control over the administration of Bengal through the nomination of council members and the Supreme Court of Bengal. While Lord North's efforts in the 1760s attempted to separate the idea of commerce from governmental administration through some parliamentary oversight, it was Burke's legal arguments which provided a rebuttal to the Company's claim of government through ownership of private property.

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[163] Boisen (n 154) 289.
[164] Burke cited in Boisen (n 153) 289.
[165] ibid, This idea of government as a trust resonated more clearly in his writings on the French Revolution.
[166] ibid.
[167] ibid.

Despite the failings of the initial measure for regulation and control over the local administration of India by the British State and the acquittal of Warren Hastings, the events at the turn of the 18th Century provided the foundations for the State's eventual control over Indian territories. There was a growing consensus within intellectuals and British political circles about 'good government' of Indian territories. Even as Burke and Lord North's efforts did not result in as effective control of the State as envisioned by these figures, the idea of State as the only just governmental institutions for colonies grew within Scottish enlightenment scholars.

James Mackintosh was, as observed by Oni Gust, one of the earlier Scottish enlightenment scholars whose writings influenced British political identity in the 19th Century.[168] His discourses on the Law of Nations were reflective of his experiences through the era of Scottish enlightenment as well as his time as a Judge in Bombay, India.[169] In thinking about the Law of Nations as part of the common nature of man, his writings were influenced by Grotius' natural law thinking about the idea of private property as part of the nature of man.[170] He emphasised the importance of the cultivation and labour of 'private property' as an ethic of intercourse between men.[171] More importantly, Mackintosh emphasised this ethic of intercourse as a means to an end for the progress of man.[172] Gust argues how this idea of progress for Mackintosh was specifically drawn from the context of Scottish enlightenment specifically in the Highlands,[173] where ideas of the civilization of the Highlands were accompanied by a notion of progress based on 'enabling agricultural improvement through enclosures, building churches, schools, prisons'.[174] The concept of property, Mackintosh argued, is the central subject that marks the progress or stage of civilization as property needs to exist for the wellbeing of mankind.[175] As a marker of civilization, it needs to be developed from the 'transient occupancy of a savage' to the 'comprehensive minute code of property which is the result of the most refined

[168] Oni Gust, 'Remembering and Forgetting the Scottish Highlands: Sir James Mackintosh and the Forging of a British Imperial Identity' (2013) 52(3) Journal of British Studies 615.
[169] ibid 617.
[170] ibid.
[171] James Mackintosh, *A Discourse on the Study of the Law of Nature and Nations* (JG Marvin ed, originally published 1799, Pratt 1843).
[172] ibid 14.
[173] Gust (n 168) 617.
[174] ibid 12.
[175] Mackintosh (n 171) 42.

civilization'.[176] Additionally, this progress can only be made by the institution of the State and its ancillary administrative functions of legislation, judiciary and police.[177]

State control of property and its development was central to Mackintosh's conception of the Law of Nations which he explained as an ethic of intercourse between men who need the best of government. The best of government, and civilization, is one where the progress is measured through the development of the property.[178] This can only be done justly by the state institutions as any other form of government that places powers in a single authority such as a commercial body, religious institutions or an autocratic rule would lead to despotic government.[179] In this sense, Mackintosh's argument made a direct link to state government control over property, its development through legislation and policing with the civilizing mission. William Christian argues that it is particularly this difference drawn between State government and other forms of government, in addition to meeting with Burke, which influenced Mackintosh's approach to the Law of Nations.[180]

This thought process which drew from existing 'racialized' perceptions of Scottish highlanders as 'savages' in need of civilizing also fit within the corollary of the orientalized construction of the marginalized caste as the 'other' by the native elite caste leaders and communities readily accepted by the British colonial officers.[181] As historians have observed, both the British and other European traders understood caste-based slavery and hierarchy as a corollary to racializing forms of servitude and slavery already practised by the European civilization.[182] This commonality also became exceptionalized specifically

[176] ibid.
[177] ibid 44.
[178] ibid.
[179] ibid 48.
[180] William Christian, 'James Mackintosh, Burke and the Cause of Reform' (1973) 7(2) Eighteenth-Century Studies 193. Another factor to which the British East India Company connection to Mackintosh and Burke is instructive is that Mackintosh was appointed Recorder at the Bombay Supreme Court in India after his meeting with Burke. During which time he wrote law of nations and nature. His influence of the Scottish enlightenment thinking, along with his engagement with Grotius and Burke, resonated in his time in colonial India. More so because he was also surrounded by intellectual thinkers who were moving towards an argument for greater State control of Company territories.
[181] This can be surmised by the Company's hiring of soldiers based on a 'racial/caste' basis as having 'fighting spirit' in the subcontinent with comparison to Scottish Highlanders as noted by Gavin Rand and Kim Wagner, 'Recruiting the "Martial Races": Identities and Military Service in Colonial India' (2012) 46(3-4) Patterns of Prejudice 232.
[182] Dirks (n 79); Rao (n 80).

concerning ‘caste’ by the colonial state, as well as native elite caste itself later on when the British Empire took complete administrative control after 1857.[183]

As the Company started to claim control, jurisdictional and administrative, it also brought with it the ‘civilising’ socio-cultural changes with the building of English schools, court systems and administration for its governance to run smoothly.[184] As was pragmatic and convenient in its own experience as a mercantile network, the company relied on native elite dominant caste communities to fill these positions in its bureaucratic and administrative offices as they also had the most exposure to English through their previous interactions with them as ‘literate’ natives of the land.[185]

It is also in this ascendancy and control of the East India Company, particularly after the takeover of Maratha in 1818 defeating the then ruler Peshwa Bajirao II, that the colonial modernity came to be both accepted, and furthered, through the ruling elite caste of Maratha.[186] As Rao observes, the secularisation of caste through the making and description of ‘Hindu’ religion started to transform into an orientalised discourse.[187]

As I have mentioned in the last section, the initial encounter of the East India Company was with the merchant and priestly/scholarly caste, most of whom retained positions of land control, revenue collection, book keeping and trade with the British merchant networks.[188] In its increasing territorial control, these were the same native elite caste leaders and communities with whom the alliances were built to claim jurisdictional control over territories.[189]

IV. The violence of British imperial administrators

a. Imperial liberalism and juridification as violence

[183] ibid.
[184] Mani (n 161), Rosalind O’Hanlon, *Caste, Conflict and Ideology: Mahatma Jotirao Phule and Low Caste Protest in Nineteenth-Century Western India* (CUP 2002).
[185] Bayly (n 63) 26.
[186] Bandyophadyaya (n 70).
[187] Rao (n 80) 43.
[188] Bayly, (n 68); Bayly (n 63).
[189] ibid Bayly (n 63) 25.

In the late 18th Century and the early 19th Century, imperial thinking about governance of British India began to shift towards political and economic liberalist philosophy. This new attitude argued for increased governance over the Company's settlements in India and a move towards 'cooperation' with native people that would be beneficial to the Crown and the colonies. This new kind of cooperation based on international liberalism became the foundation of paternalistic imperial thought in the mid-19th Century. Underlying this paternalistic liberalism was the idea of stages of civilization leading to better government that the natives could reach through the British Empire's tutelage. The Company's idea of 'geographic morality' through its merchant network's interaction with the existing native elite caste leaders and communities was replaced by Burke's conception of 'trust' over the property mediated best by the state as espoused by Mackintosh.

The idea of British paternalism in guiding the colonies, which was part of Burke's and Mackintosh's discourses, became the shifting imperial policy for the control of trade in the Indian territories. More importantly, the intellectual movement towards free trade liberalism became part of thinking about colonies as a 'trust'.[190] This intellectual inclination of the State/Commercial network relationship became associated with 'free trade' ideology in the early 19th Century. Free trade was particularly understood as an idea that could be implemented by State control over property as a civilizing mission for the progress of peripheral colonies.[191] This was not just like an imperial ideal but was a form of rhetoric for peace movements in the early 19th Century that argued for free trade as a way to end warfare.[192] Cooperation regulated by the British State's control over free trade in the globe would lead to peace.[193]

Parliamentary ministers, intellectuals and private English merchants drew influence from Adam Smith's seminal piece 'Wealth of Nations' in 1776 on the role of free trade as a liberal political ideology that was attached to civilization progress in colonial peripheries.[194] The logic of political and economic liberalism of the empire, especially Mackintosh, argued

[190] Anthony Howe, 'Free Trade and Global Order: The Rise and Fall of a Victorian Vision' in Duncan Bell (ed), *Victorian visions of Global Order: Empire and International Relations Nineteenth Century Political Thought* (CUP 2007).
[191] ibid 26.
[192] ibid.
[193] ibid 27-28.
[194] ibid.

that peace would be achieved through progress governed by the State leading to liberty.[195] Through the 19th Century, there was continuing rhetoric of governmental control of the State to control social chaos as well as to mitigate warfare. The basis of security and governmental control that would lead to eventual peace shifted from the Company's despotic and arbitrary government to the State's responsible government. However, the administrative, juridical and colonial policing over natives were now justified through a 'trust' and legal uniformity implemented by the Crown. Similar to the 17th to mid-18th Century Company government, the presence and control over the native population were distinguished from a need to avoid violence through public war.

As the logic of imperial presence changed from Company monopoly to free trade, the Charter Act in 1813 opened up trade for other British Merchants.[196] The Charter Act of 1813 essentially weakened the power of the Board of Directors of the Company significantly.[197] Apart from opening up trade in the Indian territories to other private commercial enterprises, the Charter Act 1813 only allowed re-export of Indian goods to Europe by the British East India Company on the condition that commerce and territorial accounts would be kept separate.[198] Additionally, a clause was inserted for the missionaries to proceed to India under a licence.[199] The Crown also had the right to veto any nominations the Company directors put forward for posts in Indian territories,[200] even though this was, as Bowen states, a 'regulated monopoly' in terms of the control over the access to the properties of the commercial activity in India.[201] The additional clauses regarding access to missionaries and vetoes over nominations of posts in Indian territories were a step towards the 19th-Century approach of imperial administration of the British Crown over colonial territories.

With the Charter Act of 1833, when the Crown assumed full commercial control of Indian territories, the power to govern indirectly through juridical-legislative means was solidified. Moreover, the territorial possessions of the Company were now 'held in trust by

[195] ibid.
[196] Desai (n 16).
[197] ibid 251.
[198] ibid.
[199] ibid.
[200] ibid.
[201] Bowen (n 121) 548.

her Majesty'.[202] This Act also centralized all administrative powers under the post of Governor General of India. The Governor General could repeal or alter any laws or regulations; however, the power to veto the laws remained with the Board appointed by the Crown.[203] The British parliament itself could now pass any law for Indian territories. The Act essentially established what Burke had envisioned as a juridical imperial sovereignty over Indian territories. Furthermore, with the establishment of a commission to codify Indian laws, the Crown took steps to follow intellectual thought on the codification and writing of laws advanced by Scottish enlightenment scholars, specifically Mackintosh, at the end of the 18th Century.

At the time of the 1833 Charter Act, as a witness to a Select Committee, Mills reserved a more practical approach than his radical view on the codification of law in India.[204] He argued that what was needed was an approach to codifying customs that did not necessarily modify customs so much as put them in principles or maxims that can be passed as legislation.[205] This more reserved approach to codification is arguably closer to what Burke imagined as respect for 'native sensitivities'.

As Den Otter argues, Mills' change of thought could also be attributed to his time in India.[206] The commission, headed by TB Macaulay, was what led to the Charter Act 1833, following a similar opinion on the codification of laws in India.[207] Macaulay argued against the British commission in England as they would not fully understand the language, customs and situation of native people.[208] Instead, he favoured a small commission of four people in England and India who would take the lead to draft a legal system in Indian territories.[209] Macaulay argued that the codification did not mean complete assimilation of native customs, but that he would remain sensitive to existing rules and customs by maintaining an understanding of difference.[210] This sensitivity to 'existing' rules was of course the ones provided by the native elite dominant caste leaders and communities. The goal for Macaulay

202 ibid.

203 ibid.

204 Sandra Den Otter, 'The Legislating Empire: Victorian Political Theorist, Codes of Law and Empire' in Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-century Political Thought,* (CUP 2007).

205 ibid 91.

206 ibid 81.

207 ibid 91.

208 ibid.

209 ibid.

210 ibid 94.

was a uniformity in law that would lead to greater regulation and government over the native population by the British Crown, even if it was indirectly through the Governor General, Judges and codified legislation in India.[211]

Even though with the 1833 Act a more institutional structure for parliamentary control was established, administrators still had to deal with problems of enforcement and observation.[212] Burroughs argues that Mills and McCauley's aims for the codification of law to govern were not entirely a direct rule by the Parliament.[213] It instead took form in a partially devolved administrative and juridical system that depended on establishing relationships with natives,[214] and by natives they meant elite dominant caste natives who held their power of position and patronage with their British sovereigns. Macauley describes the native dominant caste elites as 'Indian in colour and blood, British in taste, in attitude and intellect'.[215] In another instance, he also describes these elites as 'persons fit to serve the state in the highest function, and in no ways inferior to the most accomplished men who adorn the best circles in Paris and London'.[216] In the imperial orientalist imagination of Macauley, thus the native elite dominant caste leaders were part of the British civilization ladder, which was underpinned by liberal imperialism as part of the discourse of international legal development making them part of the British imperial administrative network.

These relationships based on loyalty to the British administration in India were exploited for specific knowledge creation of the social fabric of the subcontinent's culture, rules and history to classify and label it in a way that could work to the benefit of the British colonial officers and the native elite dominant caste leaders and communities.[217]

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[211] ibid 100.

[212] Peter Burroughs, 'Imperial Institutions and the Government of Empire' in Andrew Porter (ed), *The Oxford History of the British Empire Vol 3: The Nineteenth Century*, (OUP 1999).

[213] ibid 185.

[214] ibid.

[215] Cited in Mani (n 161) 199; Gauri Viswanathan, *Outside the Fold: Conversion, Modernity, and Belief* (Princeton University Press 1998) 9.Viswanathan in particular states how English education was a broader colonial objective of making non Hindu, Hindus and non Muslim, Muslims. Although Mani (161); Rao (437); Bayly (n 63); O'Hanlon (n 184); Ayyathurai (n 161) place this education policy as being deliberately welcomed by dominant caste, both Brahmin and Ashraf (Muslim) dominant caste communities in order to secure better positions in the colonial government.

[216] Cited in Viswanathan (n 215) 9.

[217] Mani (n 161); Bayly; (n 63); Rao (80). This is particularly true of a particular caste leadership within West Bengal who mixed Victorian ideals and values of civilization with Brahminical superiority to claim proximity to British colonizers– one of the first ones being Raja Rammohan. ,see for example in Ruth Watts, 'Breaking the Boundaries of Victorian Imperialism or Extending a Reformed "Paternalism"? Mary Carpenter and India' (2000) 29(5) History of Education 443.

Specifically, however, the roles of creating 'Hindu law' and rituals, and the social colonial imagination of the 'Raj', were built by the chosen native elite dominant caste leaders.[218] This organization of colonial knowledge was central to the maintenance of authority and legitimization of administrative and juridical codification of laws in India.[219] As Otter observes, even when judges sought to rely on colonial knowledge to take into account sensitivities of Indian natives, they ended up interpreting the laws according to the classification, labelling and ordering of native customs according to an Anglophonic perspective of civilization.[220]

Additionally, the British colonial policy of education and acceptance of dominant caste elites as 'English in taste, intellect and culture' was in line with their internal push by the Tories to develop ideas of 'citizenship' to enfranchise the Jewish population within Britain.[221] Viswanathan notes how this particular call for change in the idea of citizenship, led specifically by Macauley, had underlying motives of bringing the Jewish population closer in proximity to the British evangelicals as well as building a justification for broader imperial liberalism to justify the British involvement in colonial governance oversees by the conservative Tories.[222]

This codification of 'pluralistic' laws that served the interest of both the British and the native elite caste communities was consistent with how the idea of property was conceptualized as a 'trust' which extended concepts of 'imperial citizenship', 'loyalty' and proximity to 'British values' to the governance of the subcontinent, within the politics of Britain as well as to other colonies.[223] Macaulay's emphasis on juridification, education and

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[218] Mani (n 161). Mani goes on to say that within the political structure of the colonial state, information on what is considered 'native' put by particularly Brahmin and allied upper caste leaders and communities created what is now known as 'Hinduism'. This also seeped its way in the codification of rituals, and textual cementing of Brahminical texts which naturalized the caste system into a social, cultural 'aspect' of the subcontinent, as part of the Anglophonic legal form.

[219] Balmurli Natrajan and Radhika Parameswaran, 'Contesting the Politics of Ethnography: Towards an Alternative Knowledge Production' (1997) 21(1) Journal of Communication Inquiry 27, where they note how the inscription of Gita made its way into Hindu Law.

[220] Otter (n 202).

[221] Viswanathan (n 215).

[222] ibid 6-7.

[223] Here, I am also referring specifically to interaction with north African natives with the British and the creation of 'tribe' as an anthropological category to create indirect governance. For more of this see chapter 5.

the institutionalization of the subcontinent were consistent with Burke and Mackintosh's intellectual visions of the changing role of the British Empire's relationship to its colonies as a 'trust'.

Imperial liberalism served also to juridify the conception of state ownership, control over land, governing of populations through 'public' and 'private' spaces, defining of 'religion' and systematizing indirect governance over the subcontinent through categorization of the population. The logic of 'loyal citizenship' and 'civilizing hierarchy' as a way to justify trust over land translated into targeting particularly indigenous 'Adivasi' communities, other caste marginalized communities and even trans-communities in the subcontinent through the Criminal Tribes Acts in 1871.[224]

The Criminal Tribes Act 1871 was enacted not only in conformity with an existing hierarchy of Brahmanical knowledge provided by native elite dominant caste, but also with expedient reasons for criminalizing marginalized caste communities, Adivasi (indigenous) communities, and other communities deemed 'immoral'.[225] In this sense, the Act incorporated Brahmanical varna logics, which is some non-Brahmin castes are born in 'sin', along with British Victorian 'universal' morals on criminality and who is a 'good citizen'.[226] The dominant caste landlords were assigned as those who would notify and be notified of any 'tribe, gang, class' of person was believed to be 'criminal'.[227] Descriptions of who was to be a 'criminal' were not exact but depended on profession, residence and conditions in which a person was notified to be 'criminal'.[228] The notifications for identifying criminals was entirely based on identifying social practices which happened to be lower caste, trans- people and iterant communities which did not fit both the Brahmanical and Victorian notion of 'civilized'. Thus the Act itself gave power to the dominant caste leaders and landlords to

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This is also particularly why I deviate from Mani's understanding of confluence between upper native elite caste as ruling the subcontinent where the British were 'puppets' to 'Brahmin Raj' rather than it being a 'British Raj' specifically because of how British imperialism extended beyond the subcontinent as a form of indirect governance as I explain indirect rule in the next chapter on League of Nations, how forms of territorial control was central to revenue collection, capital accruement as a central aspect to its imperial mechanism and because of its own internal politics as explained by Viswanathan (n 215).

[224] Meena Radhakrishna, *Dishonoured by History: 'Criminal Tribes' and British Colonial Policy* (Sangam Books Limited 2001). These mostly included iterant communities i.e. travelling communities not tied to labour in land in the way conceptualized by the British.

[225] ibid 16.

[226] ibid 3.

[227] Mukul Kumar, 'Relationship of Caste and Crime in Colonial India' (2004) 39(10) Economic and Political Weekly 1078.

[228] ibid 1082.

enact the violence of governance by the British codification of criminality as a matter of 'civilizing' which overlapped with existing caste logics.

These penal logics based on control of land for use was used also particularly against Adivasi communities in princely states indirectly governed by the British, particularly forest-dwelling communities in Chattisgarh, order to extract timber during the late 19th Century, particularly through the Forest Act 1878.[229] While initially introduced as a way to 'preserve' the forest, it was essentially an attempt to manage the resources of the forest for their uses by the British along with their dominant caste zamindars i.e. mostly associating themselves with Brahmin/Khastriya caste (Rajputs), who acted as intermediaries between the indigenous Adivasi community and the British administrators.[230] The Forest Act particularly was a way for the British to interact with the otherwise isolated, tribal communities who depended for their livelihood on the resources of the forests, through the intermediaries i.e. dominant caste elites, to control access to the forest and extraction of specific resources.[231] These restrictions had left many Adivasi communities displaced and were also met with resistance from 1855 to1895.[232]

b. Socio-economic violence of the 'patronage caste networks'

International legal discourse in this time of British imperial bureaucratic networks was built on changing the perception of sovereignty associated with state control. Particularly important here was the idea of property as a social 'trust', whether public or private, held by the state for the benefit of 'loyal citizens'. While the violence of caste hierarchy itself is much older than the British encounter and eventual colonization over the subcontinent, international legal discourse intensified, and hid caste violence perpetrated by elite dominant caste natives. This was done often in confluence with British colonizers through logics

[229] Ajay Verghese, 'British Rule and Tribal Revolts in India: The Curious Case of Bastar' (2016) 50(5) Modern Asian Studies 1619.
[230] Shivaji Mukherjee, 'Historical Legacies of Colonial Indirect Rule: Princely States and Maoist Insurgency in Central India' (2018) 111 World Development 113. This was also the case in interactions with Adivasi/indigenous communities beyond Chattisgarh i.e. in Orissa as noted by Mukherjee.
[231] ibid 115-116.
[232] Verghese (n 229), see also on the Forest Act 1878, Ramachandra Guha, 'An Early Environmental Debate: The Making of the 1878 Forest Act' (1990) 27(1) Indian Economic & Social History Review 65.

of liberalism particularly 'pluralism', 'moral universalism' and 'trust' for tutelage to civilize especially in the 19th Century.[233]

Here, the role and position of dominant caste native elite leaders and communities, i.e. Brahmanical and Kshatriya caste, in providing information and occupying positions of privilege in administration and bureaucracy became the knowledge producers for the British colonial officers.[234] Peter Burroughs argues that this led administrators of India to pragmatically accommodate indigenous societies.[235] This pragmatism was essentially built on suppressing any resistance to British rule but also on justifying existing forms of exploitation perpetrated on the labour/peasantry caste community both by the colonial state and by the landowning native elite caste leaders and communities.

Notably, it is here we also see, what Rupa Viswanath calls, the exceptionalization of caste as a social, religious cultural form 'specific' to the subcontinent which was used by the British to justify exempting slavery of marginalized caste from the abolition of slavery in England and other colonies in 1833.[236] This was particularly so that the British could extract as much tax revenue as they could from the peasantry caste[237] which served also the landowners whose economic, social and political dominance depended on the peasantry caste continuing to be exploited for the maintenance

[233] It is important to point out here, as caste historians observe, that the same ideas used for imperial governance by the British and caste elites to continue their dominance, were also then used to create resistance movements by the marginalized caste people. 'Dalit' politics thus, as Rao (n 80) points out, used ideas of minority representation, access to public office, and army as a way to seek their own self-determination in a period where dominant caste elites had already secured political, administrative positions in the colonial government. In this sense, it is possible to look at the double edge of dalit politics as a form of emancipation and limitation inherent within the paradox of international law in the 20th Century. This particular chapter, however, is limited to the extent it only maps the germination of international legal discourse tied to native caste elite leaders in the 18th and 19th Century and as a result builds a foundation for further analysis into the intersection of caste politics and international legal discourse in the interwar years leading up to formal independence of the subcontinent and its partition in 1947.

[234] Mani (n 161); Bayly (n 63); Rao (n 80).

[235] Burroughs (n 212). Boroughs understands this as mediation with natives in the form of taking counsel of 'tribal' leaders and 'influential' natives who could be recruited and relied on but these, as other historical literature attests, were dominant caste elites.

[236] Rupa Viswanath, *The Pariah Problem: Caste, Religion, and the Social in Modern India* (Columbia University Press 2014) 4.

[237] ibid 4. See also: O'Hanlon (n 184) who notes how Dalit leader Jotirao Phule's criticised both the Brahmin landed elites as well as British for increased tax collection, greater interests on money lending, control of and access to rivers, forests, and leaving any caste violence to be dealt with by Brahmin caste elites.

of the 'caste hierarchy'. In Madras, at this time, this included the Pariyar, Pallar and Chakkiliyar caste, all of whom were categorized as 'Pariah' by the British as a derogatory term to assert connotations of 'outcast' or not fit for society due to their lower 'intelligence'.[238] Thus the caste hierarchy in which they were placed by the local native elite dominant caste leaders also became part of the British empire's institutionalized 'civilizing' mission.[239]

The criminalization of 'tribes' as well as 'castes', followed by the rebellion of 1857, also reiterated in the exceptionalisation of caste or the 'fencing' of caste within the 'Hindu' religion as the British policy after 1859 was not to intervene in 'native religion'.[240] Native religion was construed, following the construction of the 'Hindu' religion by the dominant caste elite leaders and communities, as 'Hindu' and 'Muslim'.[241] Thus this construction of the 'religious' identity of the subcontinent for the British to speak to their own administrative indirect rule, through pluralism, tutelage and proximity to British values, was turned in to an administrative issue devolved to judicial courts led by the dominant caste's exclusionary violence towards the marginalized caste. Thus any complaint of caste violence was fenced within a 'native religious' issue, even as the British administrators were complicit in codifying and constructing the 'religious' identity.[242] Thus, British imperial

[238] Of particular importance over here is the contested positions of protestant missionaries which had come in as a result of British administrative takeover who formed Pariah-protestant alliances for mass conversions in south India which gave the marginalized caste escape from the dominant caste violence and lack of protection of colonial government. See for example, Viswanath (n 236) 3.

[239] This confluence between the native elite dominant caste landowners, administrators and the British also translated to being part of British Empire's military, although one of convenience. As Stern (n 434), Rand and Wagner and Roy (n 181) point out, military recruitment was effectively build on caste networks even before the British took over administratively from the Company rule.

[240] Viswanath (n 236). This relegation of caste to 'Hindu' cultural reality also impacted understandings of Muslim or Islamic representations in the subcontinent, see for example Christopher Fuller, 'Anthropologists and Viceroys: Colonial Knowledge and Policy Making in India, 1871–1911' (2016) 50 Modern Asian Studies 217, thereby hiding caste violence within other communities/converts into Islam, Christianity, Sikhism. See for example, Joel Lee, 'Recognition and Its Shadows: Dalits and the Politics of Religion in India' (Doctoral Dissertation, Columbia University 2015); David Mosse, 'Outside Caste? The Enclosure of Caste and Claims to Castelessness in India and the United Kingdom' (2020) 62 Comparative Studies in Society and History 4

[241] This had also translated later on through the British colonial government census in late 1800s which was led mostly by dominant caste elite leaders as assistant to British Surveyors. For this see in particular, Awadhendra Sharan, 'From Caste to Category: Colonial Knowledge Practices and the Depressed/Scheduled Castes of Bihar' (2003) 40(3) Indian Economic and Social Review 279. This categorization became for the British a governable tool where they could neatly create fixed identities/social classes as 'natural' to be governed accordingly, see for example, Waqas H Butt, 'Beyond the Abject: Caste and the Organization of Work in Pakistan's Waste Economy' (2019) 95 International Labor and Working-Class History 18.

[242] Viswanthan (n 236) 7.

liberalism constructed particular ideas of 'religion' and 'native matters' as part of their pluralism and moral universalism to both intervene and justify their right for paternal tutelage, as well as, later on, pragmatically staying silent and letting elite dominant caste networks perpetrate violence on the marginalized caste communities.

These constructions of pluralism, trust over property and moral universalism, where the normative standard is one of the 'Victorian English', were all part of a development in the international legal discourse which allowed for a form of indirect governance over the subcontinent with the active help and support of native elite networks. The violence of these native caste elites particularly through cementing their logics of caste hierarchy in liberalism's discourses of pluralism, was integral to the development of international law at the time. Particularly in how underlying ideas of trust, pluralism and moral universalism became part of the notion of state 'sovereignty'.

V. Conclusion

In this way, it is possible to look at the governmental system of the Empire as a juridical-legislative network of colonial administrators that functioned with relative autonomy and separation from the British Crown. Burroughs argues that the imperial governance of India, for example, showed how routine administration and management within the governmental structures of 'India' did not conform to a direct rule in the form of parliamentary interference in 'Indian' affairs.[243] The imperial state could be seen as a network of colonial administrators whose governance of the colonies was done autonomously through mediation with natives,[244] with broader ideological imperatives of the Crown underpinned within the way they processed and implemented laws codified in native territories. This devolution of authority was not just an imperial device to rule but, as Burroughs argues, had to do with the geographic challenges of the idea of a Commonwealth.[245] Often administrators had to act within the necessity of situations without having to wait for directives of the Crown.[246] Even

[243] Burroughs (n 212).
[244] ibid 179.
[245] ibid 191.
[246] ibid 177.

after the technological boom, the idea of juridical and administrative unity was met with practical problems of decision making.[247]

Nonetheless, late 18th Century formulations that derived the idea of colonies as 'trust' from private property, and the importance of the State as the just governmental form, were integral to the imperial thinking in the 19th Century. It is these international legal discourses that gave way to the State's imperial network that with the devolved nature of juridical- legislative administration could be seen as indirect governance over the native population through an already willing consolidation of native dominant caste communities to benefit mutually from the indirect governance. Moreover, the ideology of liberalism that justified the presence of the imperial administrative network emphasized that government by the State was meant as a means for liberty and peace. This underlying claim of liberalism entrenched the view of public violence through war as the only contestable form of violence, ignoring and justifying, at the same time, the administrative and juridical violence and colonial policing that came with government through the State's network of colonial administrators and their patronage networks of dominant caste leaders/communities. This violence can be seen in the colonial administrators' systematic codification of oppressive laws, made in conjunction with native elite communities, and the organization of particular native elite knowledge through an Anglophonic form i.e. codified law.

This development of 'pluralism', 'moral universality' being integral to a 'trust' over property, and the 'civilising' of 'loyal citizens' over social matters was integral to the development of the international legal order in the 20th Century, particularly during the interwar years. The dialogical interplay between imperial officers, administrators and their network of native elites in the form of 'bureaucracy' of imperial governance was a foundational step towards its 'internationalisation' in the form of the League of Nations, which I explore in detail in the next chapter. The contribution of the British colonial encounter with the native elite caste structure in the subcontinent, particularly after 1833, to the development of international legal discourse, was reflected in their approach towards other colonies in the 20th Century.

[247] Robert Kubicek, 'British Empire, Expansion and Technological Change' in Andrew Porter (ed), *The Oxford Handbook of British Empire Vol 3:The Nineteenth Century* (OUP 1999).

It is important to point out that this was not through 'direct' domination over a homogenous native group, but conscious, pragmatic cooperation and confluence between a native elite community already present and operating through their logic of hierarchy. The form of the network we see developing in the subcontinent since the 1830s, and in the 18th Century with the merchant network of the East India Company, is a negotiation of overlapping powers in which one, i.e. the native dominant caste elite, ultimately continues to thrive in its caste dominance while gaining capital through subsuming itself under the racializing logic of the colonizer i.e. the British imperial legal order which extended beyond the subcontinent. Therefore, being closer to British values and civilization was also particularly important to the maintenance of caste hierarchy and superiority since dominant caste were deemed 'closest' – but never equal – to British civilization. The developments on the doctrine of sovereignty through pluralism, moral universality, trust and the hierarchy of civilization as a tutelage towards the non-British, and the non-European in other cases as the next chapter shows, facilitated by the confluence of imperial administrative networks with their native elite dominant caste communities was part of the subsuming racializing logic of the British Empire. Thus the violence perpetrated by international legal discourse justifying and legitimizing, as well as intensifying, the confluence between these two powers is made invisible as it is effectively also 'part' of its liberal order in the garb of pluralism, moral universality and civilizing discourse.

Chapter 5. The internationalisation of the *dialogical interplay*: League of Nations, mandated territories and indirect rule by a network of international experts

I. Introduction

In this chapter, I show how the dialogical interplay between networks and international law shifted from the imperial state's network of colonies to an international organization i.e. the League of Nations. Central to this shift in the form of the network was the continuation of the concept of trusteeship. This concept of trusteeship over 'uncivilized' people of colonies was formally internationalised through the Berlin Conference (1884–85) as the imperial state's governance reached its apex in establishing its presence through networks of military, naval forces and formation of administrative structures. After the Great War, the formation of the League of Nations institutionalized the concept of trusteeship into its vision of international global order in the form of the mandate system. Along with the institutionalization of the trusteeship system, the League presented a vision for peace defined by economic standardization, industrialization, and self-government to be supported through its 'technical' departments led by experts.

My argument in this chapter focuses on how the League can be seen as a network organization, particularly when it is conceived as such through the norm making position given to the League's experts, employed under the League's technical departments, who both produced policy and legitimised governance over mandated territories based on a new 'civilising discourse' of economic and industrial development. The League, I argue, should be conceptualized as rule by 'network of experts', whose politics are influenced by their transnational affiliations with imperial powers, private actors or non-governmental international organizations emerging at that time in the 20th Century. Through its institutional mechanisms such as the formation of committees, commissions on specific issues that are led by 'experts' from the League's various departments, international norms are both produced and then implemented in mandated territories. Expertise here becomes an important component of self-legitimization as the knowledge maker for the 'civilization'

discourse of ‘progress’. Expertise, as I show in this chapter, is a continuation of administrative ‘knowledge’ collection and categorization in the name of social liberal change, which the British imperial administrators had already experimented with in their indirect governance over the subcontinent. This particular era, i.e. the interwar period, signifies a shift from imperial international administration of a single empire to an internationalised ‘trusteeship’ system administrated by imperial powers together, rather than a single empire. In particular, we see a confluence between empires for indirect rule over colonized territories through an international legal organization for the first time in the history of international law.

The norms produced by these ‘experts’ under the auspices of the League legitimised the exploitation of colonized communities. Specifically, I look at not only how regimes of forced labour and policing during the interwar years in British and French mandated African territories were legitimised through the League’s experts but how the League’s broader vision of peace through economic standardization, industrialization and self-government obfuscated its role in the systemic violence perpetrated by the mandate powers. By understanding how the League of Nations was inherently violent in its governing mechanisms, i.e. through labour regimes and policing, we can also reinterpret how international organizations in the present times are not only imperial but how international legal discourse separates itself from this violence.

In the first section of the chapter, I discuss the rise of the imperial state network in the 19th Century which foreshadowed characteristics necessary for a model of an international organization. At the end of the 19th Century, this shift from the commercial to imperial state network was marked by putting the role of the state, more specifically the British imperial state, at the center of governance over territory. According to the particular idea of British imperial liberalism, the state is the only political entity that can govern territory entrusted to it as a trust. In the case of the British imperial state, as I have shown in the previous chapter, this was a gradual move away from the merchants of the commercial network to colonial administrators in the colonies as ‘experts’. At the apex of British imperial liberalism, international legal thinking consolidated with intellectuals who led the European intellectual

movement on international law in the late 19th Century.[1] I look particularly at the work of European legal scholars whose writings were key to the international legal thinking underpinning the Berlin West Africa Conference (1884–1885).[2] The legal thought at the conference was a direct result of conflicting imperial interest in the continent of Africa. The Scramble for Africa, as it came to be known, became a site of colonization as great powers of Europe including Britain, France, Germany and Portuguese empires concentrated their efforts in establishing settlements to acquire and mark their territorial boundaries in Africa in the late 19th Century. In the process of the carving up of Africa to avoid conflict between empires, the language deployed was a combination of British imperial liberalism, i.e. free trade, and what has been referred to as the internationalisation of territory.[3] The political and legal effect of the Berlin Conference has been described, however, as the partitioning and acquisition of Africa. Within the context of European colonial history, this internationalisation has also been referred to as 'New Imperialism' where, as Mieke Van Der Linden describes, 'a *Geist* of nationalism and competition resulted in the scramble for Africa'.[4]

This 'institutionalization of the process of acquiring territory in Africa'[5] has also been referred to as an example of a 'conceptual terra nullius'[6] i.e. 'no man's land' as it marked an era of exploitation and colonization of Africa.[7] Matt Craven[8] and Andrew Fitzmaurice,[9] however, reveal a more complicated picture of this New Imperialism as both a moment of

[1] For an intellectual history of 19th-Century international legal thinkers see for example: Duncan Bell (ed), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-century Political Thought* (CUP 2007).

[2] Notably the legal scholars of the Institute de droit international, for example see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001); Andrew Fitzmaurice, 'The Resilience of Natural Law in the Writings of Sir Travers Twiss', in Ian Hall and Lisa Hall (eds), *British International Thinkers from Hobbes to Namier* (Palgrave Macmillan 2009); Casper Sylvest, 'Our Passion For Legality': International Law and Imperialism in Late Nineteenth-century Britain' (2008) 34(3) Review of International Studies 403.

[3] Mieke van der Linden, *The Acquisition of Africa (1870-1914): The Nature of Nineteenth-century International Law* (Wolf Legal Publishers 2014).

[4] ibid 4.

[5] van der Linden (n 3).

[6] Antony Anghie 'Civilization and Commerce: The Concept of Governance in Historical Perspective' (2000) 45 Villanova Law Review 887.

[7] ibid 904.

[8] Matthew Craven, 'Between Law and History: the Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3(1) London Review of International Law 31.

[9] Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press 2014).

transitioning into a new logic of imperialism while also giving rights to natives. In the context of my overall argument in this thesis, and this chapter in particular, the important shift in this New Imperialism is that it is both 'colonial and anticolonial'[10] as a result of the changing form and character of the imperial state network. The Berlin Conference and the colonization process of Africa marks a period of the internationalisation of *dialogical interplay*. Following a period of collapse in building relations within Europe that resulted in the eruption of the Great War, a new world order emerged led by the victors of the war. With the advent of international organization in the 20th Century coming into play even before the war broke out, an idea for a political successor, materialized in a more institutional form, was led by the American and British intellectual and political forces. This came to be known as the League of Nations. I argue that despite major historical events and changes between the time of the Berlin Conference and the formation of the League of Nations, the two represent an attempt at the shifting from the imperial network of the colonial government to a system that relies on internationalised regulation through international organizations.

In the case of the League, internationalisation of rules became institutionalized, lending it a sustained organizational structure that gave it the legitimacy to pursue social, economic, legal and political objectives defined by a network of 'experts' employed under the League's various departments. The League's experts would hold leading positions on not just departments of the League, but be part of inter-departmental committees and commissions formed to advise on social, economic and humanitarian issues.

I look at the rise of internationalism in the early 20th Century, and particularly imperial internationalism, as it led to the formation and foundations of the League of Nations. In more orthodox terms these norms of 'international society', as they arose in the interwar period, have been explained by international relation theorists Adam Watson and Hedley Bull, as an emerging global order of inter-state, supra-state relations and interactions between societies as a promise of global peace and cooperation.[11] While the movements and organizations that arose during this time held a similar view,[12] I look particularly at the League of Nations' embodiment of internationalism that was inherently imperialistic. The

[10] Craven (n 8) 35.

[11] Adam Watson 'Hedley Bull, States Systems and International Societies' (1987) 13(02) Review of International Studies 147.

[12] See generally, Daniel Gorman, *The Emergence of International Society in the 1920s* (CUP 2012).

League as a separate entity had a mechanism for deploying administrative and legal apparatus that were based on civilizing discourse. I look at how indirect rule, which was already utilized by the British, as I have shown in the previous chapter, became as a technique of administration within the mandate system and the League's international corporation through the provisions of Article 23 were part of its overarching imperial internationalism. Moving beyond just an examination of the League's operation as a networked organization, I take into consideration how legal discussions by Georges Scelles (1878–1961) on the League of Nations' international cooperation demonstrate its relevance to international law rather than a separation from it generally assumed in orthodox literature.[13] I argue that it is particularly in viewing the mandate system and transnational cooperation through the paradigm of imperial internationalism that we can understand the League as a form of international organization that can deploy networks of social, administrative, economic and legal structures that can shape governance over mandated territories at the same time as these networks justify and expand the imperial internationalism of the League.

In the last part, I turn to the violence of the League of Nations expert networks. I argue that the internationalisation of the dialogical interplay between expert networks and international law shows the operation of international law similar to its different iterations throughout its history, i.e. the imperial state, the merchant network and the missionary network, as I have explored in the previous three chapters. Specifically, it renders the violence of the network external and invisible to international law's operation. On a broader scale, the League's legal and political vision of international global order defined peace through economic progress and industrialization, replacing the idea of military presence with policing structures for public order. Along with this particular idea of peace, the League's network of experts, through committees on specific issues such as Slavery, Native Labour and Penal Sanctions in mandated territories, legitimised the exploitation of natives particularly in the British and French Mandated African territories of Kenya, South Africa, Uganda, Sudan and Northern Gold Coast in the interwar years. In the examples I show, violence was systemized through forced labour regimes utilizing indirect rule as a means of governing over the people of mandated territories.

[13] For example on the origins of transnationalism as a separate field see Philip Caryl Jessup, *Transnational Law* (Yale University Press 1956).

II. From imperial state administrators to international administration

International legal thought as it developed in this time also contributed to and facilitated the growing expansion of the imperial state network at this time. The underlying presumption of this political and legal thought was that the culture, economics and social position of the European powers made them superior rather than a civilization anchored solely in a natural law given by God to the Christian communities. This thinking was entrenched quite clearly within 19th Century British Victorian legal thinkers.

The early British Victorian intellectuals in the 19th Century carried on thinking more clearly about the state and its place within the international legal order within Britain, particularly in universities. As Casper Sylvest observes, international legal thought as a discipline was 'increasingly professionalized and slowly consolidated within universities'.[14] Victorian scholars became a 'well connected intellectual-cum-political stratum in British society'.[15] During the early and mid-19th Century in particular, when international legal thinking was still referred in terms of 'Law of Nations', the intersection between religion and scientific thinking was the hallmark of political and intellectual thought.[16] The discussions of 'Law of Nations' within this particular intersection of religion and scientific thinking revolved around the discipline as part of an evolutionary progression of the human state. This thinking about the evolutionary nature of the human state was particularly pronounced in thinking about colonial governance.

In the mid-19th Century, it was in Cambridge that evolutionary thinking on Law of Nations became prominent. Notably, historian Henry Sumner Maine (1822–88), who took on the Whewell Professor of International law in 1887, argued that it is because of the historical progress of the 'Law of Nature' that we have the 'Law of Nations'.[17] His reasoning for associating an origin for the 'Law of Nations' to the 'Law of Nature' was based on the idea that the evolution of society linked to the progress of history has brought the 'civilized' nations to the point where only a morality through consent could lead to

[14] Casper Sylvest, 'International Law in Nineteenth-century Britain' (2005) 75(1) The British Year Book of International Law 9.
[15] ibid 19.
[16] ibid 28.
[17] Henry Sumner Maine, *International Law, a Series of Lectures Delivered Before the University of Cambridge 1887* (London John Murray 1888).

peace.[18] In this sense, for Maine, international law was both positivist i.e. based on codification and naturalist i.e. based on morality. A key characteristic of Maine's argument was how he viewed history as showing progress within the civilized world throughout time. This progress, according to Maine, is enabled by the 'Law of Nations' as derived from the morality of the 'Law of Nature', enabling the civilized world towards a better society i.e. the Victorian era.[19]

This particular line of thought that linked progress of history to the progress of the civilized society, that is towards benchmarks for a civilized society which included codification of law, was also prevalent in European thinking outside Britain. The 19th Century jurists, as Matt Craven observes, categorized historical progress in terms where the non-European could be geographically and temporally distinguished as 'behind in time'.[20] Describing the historical theorization in international law in the 19th Century, Matt Craven surmises that juridical thinking on non-European places made them open to the 'possibility of maturation and change'.[21]

This line of thinking also lent itself to the 'new rationality of imperial rule – the production of civilization through beneficent colonization'.[22] International legal thinking in the 19th Century then not only found itself justifying imperialism through very specific modes of discourse on 'tutelage', but was inherently different from 'empire' through commercial monopolies, as that would jeopardize 'free trade' philosophy.

Within British intellectual thought and European empires, the key elements of the new rationality of imperial rule were, in fact, the same i.e. the codification of international law or a move towards contractual thinking and the exportation of civilization through contract. These elements in the intellectual thought in the 19th Century were also ultimately a reflection of the practices of imperial governance through trade treaties at the time. As seen from Ed Keene's study of British anti-slavery treaties to establish free trade regimes, trade treaties in unequal terms were often a means to secure naval routes, have inspection rights over vessels, and often turned into annexations as part of the protection and tutelage of

[18] ibid 20.
[19] ibid 28.
[20] Matthew Craven, 'Theorising the Turn to History in International Law' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook on the Theory of International Law* (OUP 2016).
[21] ibid 30.
[22] ibid.

native people.[23] The British Empire free trade regimes involved naval forces as officers to implement the necessary changes for the 'civilization' of Africa. These were meant to, along with consulate officers, oversee the anti-slavery regulation to maintain a presence in the different parts of Africa where the British Empire had established trade agreements.[24] It is particularly in terms of what the navy, as a military force, and foreign officials, as the administrative officers, were able to do through trade treaties within the colonial territories that show a distinctive reason for an increase in treaty making.[25] Keene rightly observes that treaty making represented what Wilhelm Grewe describes as the 'intensive inclination towards contractual specification and codification of international law'.[26]

To add to Ed Keene's suggestion of why there was a rise in treaty making,[27] I argue that the rise of treaty making within and outside of Europe can also be explained by a shift in the mode of imperial governance from the commercial network to the imperial state network which was gradually reaching its apex. Trade treaties were a product of implementing a different way of imperial governance over colonial territories, which included settling in those territories that were yet to be colonized, for example, the continent of Africa. With the dissolution of charter companies as network governance, the move towards a state-centric governance over colonies through trade regulation required a new legal modality to justify presence in these new native territories.[28]

[23] Edward Keene 'The Treaty-Making Revolution of the Nineteenth Century' (2012) 34(3) The International History Review 475. In the case of African continent in particular, the British Empire set itself to employ moral language of anti-slavery as a way to gain free trade treaties specifically in the region of Niger, Zanzibar, Dahmer and Abyssinia, see for example, Andrew Porter 'Trusteeship, Anti-slavery, and Humanitarianism' in Andrew Porter (ed), *The Oxford history of British Empire Vol 3: The Nineteenth Century* (OUP 1999).

[24] The moralising discourse of anti-slavery in the context was a useful approach for the British Empire to claim trusteeship over territories in Africa with whom they had trade agreements. They would essentially lead the 'march for African civilization', see, ibid, see also, Emily Haslam, *The Slave Trade, Abolition and the Long History of International Criminal Law: The Recaptive and the Victim* (Routledge 2019); Emily Haslam, 'International Criminal Law and Legal Memories of Abolition: Intervention, Mixed Commission Courts and "Emancipation"' (2016) 18(4) Journal of the History of International Law 420; Emily Haslam, 'Redemption, Colonialism and International Criminal Law: The Nineteenth Century Slave-Trading Trials of Samo and Peters' in Diane Kirby (ed), *Past Law, Present Histories: From Settler Colonies to International Justice* (ANU E-press 2012).

[25] Keene (n 23), Keene observes that the British anti-slave trade treaties could be divided into three different categories. Those done with the European powers, those with the Muslim rulers i.e. the Ottoman Empire and those with the native chiefs of the African continent.

[26] ibid 477 citing Wilhelm Grewe, *The Epochs of International Law* (Berlin: Degruyter 2001).

[27] ibid.

[28] These changes in adopting legal forms like treaties to create military and naval supervision through sea routes and unequal treaties with native communities were also reflective of a broader change of the political

Treaty making became an important way to help the British Empire and other European powers to secure routes, maintain a presence, intervene and control native territories under the guise of a new form of legal discourse that was essentially another form of imperialism.[29] In this sense, the increase in treaty making as a way to govern through naval and administrative stipulations leading to annexations under the discourse of 'tutelage' can also be seen as characteristic of the new form of imperial state governance through networks of international administrators.

The political impact of this legal thinking on imperial governance in the 19th Century can be surmised from the influence of the institute de droit internationale. The institute was formed in 1873 in Ghent, Belgium as a private association of international legal thinkers whose purpose was and remains 'furthering the codification and progressive development of international law'.[30] In its inception, the main objectives of the institute mirrored a consensus on international legal and political order at the time. Under Article 2(1) of the institute's founding charter, the progress of international law would be made on 'principles based on the juridical conscience of the civilized world', cooperation towards progressive and gradual codification, 'acknowledging principles in harmony with needs of modern society' and 'contributing to peace and observance of laws of war'.[31]

This shift in intellectual thought, as I have mentioned in the last chapter, also marked a transition in the identity of the British Empire as defined through the commercial Company-State i.e. the British East India Company to the entity of the British imperial state. The ideology of the British imperial state as a tutor towards self-government and a bastion of free trade philosophy was utilized to expand to other territories. It is at this juncture that the imperial state network's techniques of utilizing trade treaties in the 19th Century and the reliance on the codification of law as part of the evolutionary thinking about civilization became central to its imperial logic. However, using treaties as a way to claim tutelage over native territories and thus enact forms of governance over them was not only a British tactic. For the European powers this differentiating set of relations based on a standard of

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order within Europe, specifically after the end of the Napoleonic wars in 1815, which also became important for the change in imperial forms of governance, see for example, Paul W Schroeder 'The 19th-Century International System: Changes in the Structure' (1986) 39(1) World Politics 1.

[29] Keene (n 23)

[30] Koskenniemi (n 2)

[31] ibid 47

civilization translated into and resembled, as William Bain points out, 'ideas of trusteeship developed by the British Empire'.[32]

a. The Berlin Conference as a model for internationalisation

European legal thought along with colonial policy in the 19th Century concerning the non-European world developed to the point where they had essentially facilitated the expansion of the colonial network of European empires. Territories in Africa, in particular, became a centre point for such expansionism. The primary legal mechanism to occupy territories at the time was trade treaties with native territories in Africa. As competition over occupation through treaties grew so too did the fear of an inter-imperial conflict.

Nonetheless, the African continent was an important place of resource for European empires. Along with the legal thinking on state-centric regulation over commerce in the 1800s, the 'Scramble for Africa' began with the growth for material and markets in Europe.[33] As Makua Matau observes, 'the scramble began with the French invasion of Algeria in 1830, and the British take-over of Suez Canal and Egypt'.[34] The British and French intensification in acquiring land in Africa was also envisioned through establishing a presence through trade treaties. Inter-imperial rivalry for the 'Scramble' did not come to the point of conflict, however, until the Belgian trading company owned by King Leopold II established itself as a governing institution in the Congo and the German Empire's interest in acquiring land in the continent of Africa also grew.[35]

In 1884, Otto Von Bismarck, the newly appointed Chancellor of the German Empire, called for a meeting in Berlin of recognized members of the community of nation states to contain the rivalry over land in Africa.[36] The call for a multilateral conference was primarily motivated by the growing competition over the acquisition of territory and access to territory

[32] William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (OUP 2003).
[33] John Anthony Pella Jr, *Africa and the Expansion of International Society: Surrendering the Savannah* (Routledge 2014).
[34] Makau wa Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1994) 16 Michigan Journal of International Law 1113.
[35] Barbara Harlow and Mia Carter, *Archives of Empire: Volume 2. The Scramble for Africa* (Duke University Press 2003).
[36] Craven (n 8).

in the continent of Africa. Specifically, as Matt Craven points out, the origins of the conference could be traced to letters exchanged between Bismarck and the French foreign minister Jules Ferry over terms of a possible Franco-German alliance to undermine the expansion of the British Empire's informal empire.[37] For Germany, Britain's influence in the African region also hampered its interests in Cameroon, Angora, Fiji and New Guinea.[38] With the foothold of King Leopold II's trading company in Congo and the possibility of an Anglo-Portuguese agreement to recognize sovereignty over the Congo Basin, there was a need for a multilateral involvement of parties who had competing trade regimes in the African continent.[39]

The Berlin colonial conference was held for three months between 15 November 1884 and 26 February 1885.[40] The General Act of the conference signed on 16 February 1885 was meant for 'the development of trade and civilization in certain regions in Africa', 'furthering the moral and material wellbeing of the native populations' and to prevent 'any misunderstandings and disputes which might in future arise from new acts of occupation on the coast of Africa'.[41] The most important aspects of the General Act included the freedom of navigation that banned any monopoly on the coastal sea around the continent (from Congo to Zambezi), and the access to any territory, coastline, rivers or lakes. Despite a protectorate having sovereign rights over such a territory, the territory would be open to 'all flags' and the powers would bind themselves to the preservation of the native tribes and care for the improvement of the conditions of their moral and material wellbeing'.[42]

Trade treaties and access through the acquisition of territories through such treaties were central to the underlying economic system proposed by the Berlin Conference – free trade. In the decades before, as I have noted earlier, imperial policy regarding non-Europeans was marked by an increasing interest in both codifications of international law – treaty making as a hallmark of such a codification and the evolutionary thinking about European civilization which must be exported. Like the British approach to trade treaties, the Berlin Conference in many ways replicated past and existing European practice in the 19th Century. The powers at the Berlin Conference even adopted the British moralizing approach of using

[37] ibid 36.
[38] Harlow and Carter (n 35).
[39] Craven (n 8).
[40] ibid 38.
[41] ibid.
[42] ibid.

anti-slavery as an ideological discourse to overshadow the economic and political advantage of acquiring territories from the natives of African territories.[43] In this way the conference only formalized, as Makau Mutua as observed, 'illegality already committed'.[44]

At the same time, Fitzmaurice argues that the novelty of the conference was in how it deviated from the British and French imperial practice of acquiring land through treaties.[45] The primary juridical tool employed to do so in the conference was the creation of the concept of 'territorium nullias'. Andrew Fitzmaurice argues that the acquisition of property by the colonizing powers at the Berlin Conference could not follow the same reasoning as acquiring territory through settlement or occupation.[46] For the most part, the juridical reason being that if trade treaties were made between European merchants and African tribal chiefs, there was an assumption that the natives had a legal right to the ownership of such territory. Politically, anti-colonial sentiments were a growing part of 19th Century liberalism which also included a growing concern, domestic and international, for the general will of the people in the appointment of a sovereign even when it concerned colonial ventures outside of Europe.[47] Furthermore, from a pragmatic point of view, there was a growing political consensus that acquisition by force required resources, both in resisting possible rebellion from natives and inter-imperial conflict that could no longer be afforded.[48]

Nonetheless, the main concern for the imperial powers at the Berlin Conference was to devise a concept to justify the establishment of imperium, or sovereignty over the use of territory, rather than ownership (dominium). The concept of having imperium (or the right to the use of territory) was tied into the concepts of trusteeship and the civilizing mission of the European powers over the territories they occupied. The two main elements that legitimised imperium were consent through treaties and the occupation of those territories for the betterment of the territory that might be left 'uncultivated'. From this perspective, the conference epitomized a continuing colonial logic, especially since, in practical terms, the

[43] Pella Jr (n 33).
[44] Mutua (n 34).
[45] Andrew Fitzmaurice 'The Genealogy of Terra Nullius' (2007) 38(129) Australian Historical Studies 1.
[46] ibid 12.
[47] ibid 11.
[48] ibid 10.

lines between the occupation of a protectorate and annexation as part of the imperial state were often quite blurred and unclear.[49]

However, as Fitzmaurice argues, the protection of African ownership over their territories within this concept made the particular structure of this concept anti-colonial.[50] Thus as Fitzmaurice explains, what stood out in the Berlin Conference was how to resolve the question of the territory when it came to 'backwards' people. As Fitzmaurice explains, the concept of the territory was distinguished from the concept of land as far as rights to govern were concerned.[51] The native people of Africa were understood to have rights over the land ownership; however, because of their lack of utilization over the land, the territory could not be classified as 'property'.[52] Thus, having no property rights over them, since the nature of the land has not been utilized, left the question of sovereignty hinged on what position the native people occupied on the ladder of civilization.[53] Nonetheless, Fitzmaurice argues it is pertinent to consider how, for the idea of dispossession through terra nullius to work, there needed to be legal recognition of land ownership of the native Africans.[54] According to Fitzmaurice, this shows how 19th Century liberalism did present opposition and resistance to colonialism through recognition of native land rights.[55] In Matt Craven's opinion as well, the conference could be seen in a more nuanced sense as putting restrictions on colonial powers through the banning of both monopoly and tax or tariff collection for revenue.[56] In both Fitzmaurice and Craven's argument, the conference reflects a moment of international legal thinking having values of liberation and rights of the colonized as well as an imperial character.

b. Indirect rule and the Scramble for Africa

However, the extent to which the doctrines developed in the conference, specifically terra nullius, could be held as both colonial and anti-colonial can be re-read by paying attention to how the protectorate system developed a governing technique adopted by the imperial state

[49] ibid 4.
[50] Craven (n 8).
[51] Fitzmaurice (n 45).
[52] ibid 11.
[53] ibid 13.
[54] ibid 14.
[55] ibid 14-15.
[56] Craven (n 8).

network during the mid-19th Century. The underlying logic of terra nullius depended on effective occupation through the consent of the native community – by way of the treaty and the undertaking of protection under colonial rule. While it may be that native rights were protected even if to advance colonial ambitions, as Fitzmaurice and Craven point out, I argue that the protectorate system agreed upon made it justifiable to politically and legally create the basic infrastructure of an administrative and armed presence in native territories. The administrative and military presence of the great powers, justified through a particular understanding of 'territory', allowed them to expand and sustain a network for colonial governance. The Berlin Conference was a concentrated multilateral effort of imperial powers at the time to define and adopt the legality through which territory is not only dispossessed but then occupied to establish a form of governance through its networks of administrators. Thus, even though this idea of 'effective occupation', fleshed out and agreed upon multilaterally in the Berlin Conference, did not create a new mode of colonial governance, it created conditions necessary for imperial powers to adopt colonial governance through indirect rule.[57]

Indirect rule, in its earliest iteration, was a technique necessary for the expansion and viability of the imperial state network. It essentially made colonial governance, an otherwise costly enterprise, financially bearable for empires.[58] Even though the term indirect rule is attributed later to Fredrick Lugard (1858–1945), the British colonial administrator who went on to become and to be most famously known as the first Governor General of Nigeria between 1914 and 1919, political scientist JC Syers argues that its earlier conception could be traced back to a British encounter with natives of the territory of Natal in sub-Saharan Africa in the 1840s.[59] According to Syers, its creator was Theophilus Shepstone (1817–93), the British government's diplomatic agent to the native people of Natal, who was the first one to implement indirect rule in Africa.[60] Indirect rule was developed as an imperial form of governance where, instead of imposing a domestic, that is British, political structure to govern the natives, pre-existing native political structures were used for the interests of the colonial power.[61] Mamdani describes this as 'decentralised despotism'.[62] In this sense,

[57] Jason Conard Myers, *Indirect Rule in South Africa: Tradition, Modernity, and the Costuming of Political Power* (University Rochester Press 2008).
[58] ibid 2.
[59] Joseph Conrad Myers 'On Her Majesty's Ideological State Apparatus: Indirect Rule and Empire' (2005) 27(2) New Political Science 147.
[60] ibid 154-155.
[61] ibid 155.

indirect rule was in some ways already an approach that the British Empire began to utilize to create the patronage network of members from native elite dominant caste leaders and communities in India as part of its approach to indirectly govern, which included codification of rules in colonial India in Anglophonic terms.[63] As Mamdani and Ochonu also point out, the system of indirect rule was an accruement of British colonial experience in the subcontinent, where the British utilized existing political structures through which to create an administrative and economic system for their benefit.[64]

As I point out in the last chapter, this was a particularly convenient fit for the British administrators given the existing socio-economic gradations of inequality produced through the caste system within the subcontinent. The British, in confluence with the elite dominant caste leaders and communities, subsumed the existing structuring within their civilizing hierarchy, codifying and labelling the caste structure into Anglophonic terms to integrate them in the judicial system of the colonies. The codification and utilization of native elite dominant caste hierarchy in Anglophonic terms did not just make it easier for the British administrators and judges to rule over the population but also meant a subsuming of it within the racializing logic of the British Empire beyond the subcontinent i.e., in this case, the African territories. It also marked, as I argue in the previous chapter, the shift from the commercial to imperial state network as the British East India Company devolved its power and made way for the British Empire's colonial administrators to take over the governance of the Indian subcontinent.

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[62] Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 2018).

[63] Sandra Den Otter, 'Law, Authority, and Colonial Rule' in Douglas Peers and Nandini Gooptu (eds), *India and the British Empire* (OUP 2013). As noted by Den Otter, the British approach towards natives of the Indian subcontinent started to shift as they took over from the Company rule in order to manage a colonial administration with the geographic scope it had then assumed.

[64] Mamdani (n 62); Moses Ochonu, 'Colonialism within Colonialism: The Hausa-Caliphate Imaginary and the British Colonial Administration of the Nigerian Middle Belt' (2008) 10(2-3) African Studies Quarterly 95. Both Mamdani and Ochuno, however, differ as to how exactly indirect rule was made operational in Africa. Mamdani differentiates the British indirect rule in India – which he asserts was more about a 'civilising' mission at first rather than land control through 'cultural' preservation. Whereas Ochuno places the lessons learned by the British in India specifically through an understanding of using 'Muslim' elites to work against and exploit 'Hindu peasantry'. Ochuno's understanding, however, falls short of considering caste as a social and political fabric used by the British and Mamdani's assertions too do not consider how the British created networks based on existing social and political hierarchies as part of their 'religious' tolerance to benefit from the caste violence within the subcontinent.

The indirect rule, then, was very much dependent on the Anglophonic construction of native community structures. In the case of Natal in the 1840s, the idea of chieftains as understood by the delegate of the British Empire did not exist.[65] The British needed a clear line of political authority to flow from the Kings through chiefs to households which could justify the cessation of rights to use of land through a 'consented' treated treaty by such a chief.[66] In this way, the ideas of native political structure required by British delegates to set up an administrative system to secure their effective occupation did not, as Jason Myers put it, 'fit the anthropological concept of the chief' as an elite political leader.[67] Mamdani too describes the British indirect rule in Natal and other 'stateless' communities' insertion of 'tribal chieftains' in a similar way. He observes that consolidating support to landed elites as 'chiefs' to create a hierarchical structure to control land revenue, labour, taxation, penalization was how the British incorporated indirect rule.[68] In places where the exact structures of 'chieftaincy' did not exist or had ceased to exist, the British delegates resorted to 'manufacturing and manipulation of chieftaincy' for a system of indirect rule to operate.[69]

The basic necessity of indirect rule in this earlier form was to control the institution of tribal political structures, not just the 'chieftain' or political elite.[70] Apart from the benefit of having native loyalty ensuring fewer risks of rebellion, it was both financially viable and politically expedient to fit the narrative of self-rule within domestic, i.e. British, political thinking. More importantly, the indirect rule allowed colonial rule to be sustained with the least amount of resources through a network of administrative offices and armed presence while gradually subverting native epistemology and juridical/political thinking. Its hallmark was not a direct force in the form of war that was more visible within the international legal discourse of justifications of war in the 'hinterlands' of Africa and other parts of the colonial territories, but in the assimilation through subversion of native thinking and political structures.

[65] Myers (n 57). Here it is also possible to understand the need for the British to read hierarchy and gradation into the native way of living as a social reality already present in their other encounter, i.e. through the naturalization of caste as graded inequality within the subcontinent affirmed by the native elite dominant caste leaders and communities (i.e. Brahmins and Kshastriyas and other upper caste leaders).
[66] ibid 2.
[67] ibid 2-3.
[68] Mamdani (n 62).
[69] ibid 101.
[70] ibid.

In one of the earliest interactions of the British Empire with the Northern Nigerian Sokoto Hausa Muslim caliphate, Reynolds and Ochonu argue, we see that the British found the most intuitive fit for their indirect rule in this particular pre-existing political rule.[71] Here the British utilized and intensified the Sokoto caliphate for their own colonial rule approximating them as efficient rulers who could facilitate the expansion of British colonial rule in other African territories.[72] Historian Muhammad Omar describes the indirect rule of the British in Northern Nigeria Hausa Muslims as a way of assimilation, control and surveillance by constructing Islamic discourse for administrative control of the region.[73] The British approach to indirect rule within Africa was by no means the same across the continent but was informed by how they could translate existing socio-political configurations, whatever form they were in, whether Afro-Islamic such as the Sokoto caliphate, or stateless communities of Igboland, into their homogenous system of social, political and economic governance of territory through intermediaries loyal to the British.[74]

At the core of the structure of chieftaincy as appointed by the colonial administrators, the governance was based on despotism marked by racial and economic segregation. Myers points out that a hut tax, introduced in Natal in 1848, was collected by the chief from the natives along with providing one labour per every eleven huts.[75] A relationship between the colonial protector and the natives was mediated through the chieftaincy structure as devised

[71] Ochonu (n 64), Jonathan Reynolds, 'Good and Bad Muslims: Islam and Indirect Rule in Northern Nigeria' (2001) 34(3) The International Journal of African Historical Studies 601. Ochuno cites in particular Lugard's view of Islam in Northern Nigeria as not being entirely as savage as pre-Islamic African beliefs but not as high in its civility as Christianity. Ochuno correctly identifies the social mode of control for British to find approximations to their civilizational ladder in order to expand their rule through a community, in this case it happened to be Sokoto Caliphate. However, as Reynolds correctly points out, it is the construction of the 'good' Muslim who is the civilizational approximation to the British not 'Islam' itself as argued by Ochonu, thus the only 'Islam' that worked for the British was the one they considered 'good' for their indirect rule.Thus the only muslims that were considered 'good' were the ones who would work with and be a part of the British indirect rule.

[72] See particularly Reynolds' thesis on how the orientalization of Muslim sufic orders such as 'qadirriya' and 'tijanniya' tariqas was used to categorize 'good Muslims' and 'bad Muslims' by the British in their indirect rule in Northern Nigeria. These constructions were contingent on who or what 'category' of Muslims were considered a 'militant' threat to British presence in northern Nigeria. The categorizations were, as Reynolds correctly points out, simply a means for the British to police any community who did not actively want to work with the British, even if they did not resist them through force. Reynolds notes how the construction of 'bad Muslim' was also informed by French colonial constructions of Muslims in West and North Africa.

[73] MS Umar, *Islam and Colonialism: Intellectual Responses of Muslims of Northern Nigeria to British Colonial Rule* (Brill 2006).

[74] Ochuno (n 64).

[75] Myers (n 57).

by the colonial administrators. Earliest native labour codes, specifically the Natal Native Code in 1891, were also embedded within the indirect rule of the British Empire, as Mamdani notes, to continue forms of slavery i.e. 'forced labour for public works, defence or needs of the colony'.[76] Rules within the territories did not define 'natives' but operated on the assumption of two separate systems; one for tribal natives and one for European settlers.[77]

It was in the land allotment policy, however, that, on the ground level, the racial/economic segregation and inequality reflected the broader legal thinking put forward in the Berlin Conference for the ideological motive for effective occupation. Land allotments were done purely based on a right to use for cultivation and betterment of land instead of ownership.[78] A similar logic differentiated the right of the protector to the land, that is imperium, and the native's right to ownership in the discussions of the Berlin Conference. In the discourses on the concept of legitimate effective occupation resulting from the Berlin Conference, the colonial protector of the native land would only work to cultivate and better the territory, which the native was not capable of doing. Land allotment policy would always, as Myers points out, work through patronage and discretion of the chief appointed by the colonial administrator.[79] The chief would allot land to cultivate to the European settlers, the protectors, who also manipulated and controlled the institution of the chieftaincy.[80] Indirect rule created a structure where the natives were systematically excluded through racial and economic divisions while benefiting European settlers or those that were appointed to be native 'chieftains' by the colonial protectors.[81]

Structural violence, in the form of racial segregation tied with economic and political disenfranchisement, of this kind was part of indirect rule, a concept that international legal

[76] Mamdani (n 62) 172.

[77] Derwent Whittlesey 'British and French Colonial Technique in West Africa' (1937) 15(2) Foreign Affairs 362. Here we also note the Janus face of indirect rule as Mamdani describes it, which divides the civil from the customary/cultural, by presenting the preservation of the cultural into a juridified form to sustain the hierarchy of 'chiefs', or their decentralized despotism for administration, while the British also create the civil as a province of enforcing universal moral rights – which would always work for the white settlers rights or their chosen chiefs loyal to them. My claim, as I show in detail in the previous chapter, is that this was already learnt from the encounter with caste elites by the British where construction of religion and religious tolerance meant that the caste elites were given reign to maintain their hierarchy which worked for the British to assert their position as indirect rulers.

[78] Myers (n 57).

[79] ibid 4.

[80] ibid 4-5.

[81] ibid.

thought about sovereignty as terra nullius within the Berlin Conference made possible. Not only that but by attributing the control of 'war' as part of the protectorate system in addition to the material wellbeing of natives, the General Act of the Berlin Conference accommodated an imperial mode of governance hiding the violence that was part of it.

In every sense, then, the Conference had significance for a shift in imperial governance of colonies, the extent to which that can be said to be anti-colonial as much as colonial in the way described by Craven and Fitzmaurice may be doubtful. At best the restrictions on empire building within the doctrines in the General Act were only a necessary step for the development of indirect rule. More importantly, the 'anti-colonial' character of the Act foreshadowed the need for imperial governance which could be sustained through co- imperial collaboration and consensus. In this way, the conference essentially marked a European multilateral consensus on legal rules with relation to non-European natives. Its 'anti-colonial' character, as described by Craven and Fitzmaurice, was only a reaction to liberalism's criticisms of colonialism at the time and not a native perspective of anti-colonial sentiment. Additionally, the 'restrictions' on monopoly and tax tariffs were at the same time a controlling mechanism to prevent inter-imperial conflict rather than a truly 'emancipatory' ideal for the native community. The system of or practices that resemble indirect rule ensured that an anti-colonial political and legal structure representative of native thinking is subverted to be used, as I have argued, for the interests of the European occupiers.

III. League of Nations: The internationalisation of *dialogical interplay*

The aftermath of the Berlin Conference saw an increase in the Italian, French, Belgian, German and English empires moving to secure their occupation in territories in Africa. The internationalisation of the protectorate system which required effective occupation also meant that securing administrative rights through treaties was imperative if any claim to legitimacy of terratorium nullius could be made. International legal recognition of the process through which protectorates are claimed as territories became just as important as simply occupying by force.

While this was true until a few years after the conference, Bismarck's attempt at a formalized approach to colonial expansion which would make indirect rule a possibility was

interrupted through aggressive competition between the imperial rivals.[82] Hence effective occupation through administrative control and military presence became a way of enforcing spheres of influence to prevent other European powers from negotiating with natives or penetrating territories or access to such territories with mineral-rich resources.[83] The objective, especially for the British at this time, remained to secure passages and through-fares across the empire's reach – 'from Cape to Calcutta'.[84] This expansionist vision was put forward by mining magnate Cecil Rhodes who was responsible for the British expansion in South Africa.[85] Even if legitimization through effective occupation was not the main approach of empires anymore, the core purpose in 'securing passages' for an imperial state network remained the same – i.e. control of access to territories and routes under the guise of the civilizing mission. By the turn of the century, as Martti Koskenniemi notes 'colonial protectorates, spheres of interest, hinterland claims and forms of indirect rule had become part of empires'.[86]

This is also why, after the Conference, settlements through trade treaties with natives often also came with the creation of commercial companies, for example, the incorporation of the British South African Company in the territories of Matabeleland and Mashonaland in 1889 and the Royal Niger Company in Niger Delta in 1886.[87] As chartered companies became a mode of expanding the imperial state network, claims to territories nonetheless were defined as colonies of the empire and not territories of the commercial companies.

However, the idea of colonial protectorate that the conference had formalized raised questions and contentions as to the extent to which a commercial company could be recognized as a political and governing entity. At the turn of the century, this became particularly relevant in criticisms against the international association of Congo – King Leopold II's private venture which turned to a privately owned state separate from the Belgian Empire. Even though a major part of the conference was aimed towards discussing the position of Leopold's company and actions in Congo, its recognition over the use of territory in the Congo was justified on a 'humanitarian basis'. As the rest of the European

[82] Koskenniemi (n 2).
[83] Harlow and Carter (n 35).
[84] ibid 2.
[85] ibid.
[86] Koskenniemi (n 2) 169.
[87] Steven Press, *Rogue Empires: Contracts and Conmen in Europe's Scramble for Africa* (Harvard University Press 2017) 219.

powers struggled to gain ground in Africa through commercial companies and annexing territories as 'colonies', Leopold's company reaped greater profits through draconian labour policies that amounted to enslavement and violence.[88]

After the 1900s, as the working of the Free state of Congo became controversial as it was reported to be 'inhuman' and against the rules established in the Berlin Conference, its recognition as a political entity was questioned especially by the British Empire.[89] The British government initiated the process of calling into question the legitimacy and legality of the actions of Leopold's regime in Congo by transmitting a diplomatic note to the signatories of the Berlin Conference. In 1908, the Belgian Parliament moved to annex the territory of Congo as part of its colony.[90] The British government and the pressure by other European powers on the matter was also a case of using formalized rules as a basis for challenging competition posed by a private venture on its own.[91] It, however, also signaled the need for claiming and enforcing the legitimacy of the imperial state network and its mode of governance – i.e. indirect rule – as the only acceptable colonial policy. The colonial protectorate essentially should be by this logic an extension of the state i.e. by being its colony. The colonial protectorate was essentially also an international protectorate. This idea of international protectorate also meant that, along with having a duty to the betterment of natives, there was also a responsibility to the rest of the civilized world.

The underlying notion of protection of natives in the Berlin Conference was to make the civilizing mission a global international obligation held by the European civilization. Even if the Berlin Conference only resulted in one concentrated attempt at formalization of international legal rules for this 'protectorate system', leaving the actual implementation to be done through imperial state networks, it, nonetheless, signified a concert of European powers legitimizing forms of indirect rule through mutual agreement on international legal doctrines. It is for these reasons that William Bain refers to the Berlin Conference and its aftermath as the time of 'internationalisation of trusteeship'.[92] This particular characteristic of the conference, along with how it helped set up the structural violence through indirect rule, is what makes it an apt precursor to the new form of dialogical interplay between the network and international legal discourse in the 20th Century i.e. the League of Nations.

87 Craven (n 8).
88 Koskenniemi (n 2).
89 ibid 158.
90 ibid.
91 Bain (n 32) 53.

a. The institutionalization of 'internationalism'

The turn of the 20th Century saw the peak of imperial state network not only crystallized as a mode governance but also legitimised through a call for a globally regulated and formalized legal order and state relations. The 19th Century 'concert of Europe', that is an informal relation for the maintaining of global legal order epitomized most clearly in the Berlin Conference, was seen to be one example of the internationalisation of global legal order. Regulation over war i.e. the Geneva Convention of 1864, trans-boundary formations of non-state actors such as the International Red Cross in 1864 and the Universal Post Union (1878) were other examples that called for a globally regulated convention or formalized set of rules for the international society.[93]

In the orthodox understanding of the history of international relation from scholars like Hedley Bull, this 'internationalisation' of rules signified a cohesion of 'universal' rules and the inclusion of all states – including colonial dependencies – to preserve global political order.[94] For Bull, it was the European society that took the lead in ingraining values of territorial integrity into the non-European international society.[95] Of course, critical legal scholars have questioned the assumption of territorial integrity as an egalitarian concept. Antony Anghie's work, in particular, makes the point that territorial sovereignty is imperialistic and that the 'universalization' of the international society was manufactured for the assimilation of colonial dependencies at the turn of the 20th Century.[96] The same skepticism applies also to the codification of rules of war in the Hague Conference of 1899 and 1907. In more orthodox history, as well as contemporary thought on rules of war, the codification is taken at its face value as brought about for humanitarian ends to alleviate human suffering in global conflict. Its codification as a matter of international administration of legal rules is also is seen as the global leaders coming together to impose a set of standard rules meant to apply equally to all states. Critical legal scholars again have questioned the neutrality and objectivity of the rules in how they legitimised violence

[93] David Armstrong, Lorna Lloyd and John Redmond, 'The Rise Of The International Organisation' in David Armstrong, Lorna Lloyd and John Redmond (eds), *International Organisation in World Politics* (Springer 2004).
[94] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (originally published 1977, Palgrave Macmillan 2012).
[95] ibid.
[96] Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2001) 34 New York University Jouranal International Law & Politics 513.

against colonial dependencies.[97] Internationalisation of rules and the historiography constructed around it is criticized for ignoring the inequality inherent in the process as it corresponded to the civilizing discourse of the time. In most cases, rules that were codified were by and for the benefit of international society defined as European or, later, American.

The First World War that lasted between 1914 and 1919 is understood as the impetus for the formation of an international organization to maintain peace and security in the world, along with other matters of trans-boundary concerns to the global community. David Armstrong observes, however, that even before the League of Nations the need for international organizations became necessary due to the increase in commercial activities owing to the industrial revolution.[98] Commercial interactions across boundaries required standardization of rules between states to accommodate the rise of international business transactions.[99] The first term coined for an international organization was 'public international union' and institutions were formed to internationalise matters ranging from the Universal Postal Union in 1878 to the International Office of Hygiene in 1907.[100] The institutionalization of these concerns to standardize regulation further emphasises them as matters of 'general concern' rather than just domestic issues. This also meant that it was central to create institutions that would be responsible for coordinating, supervising and drafting rules that allowed nation states to sustain these 'general concerns' as common issues of the international society.[101]

During this time of the industrial revolution, the internationalisation projects on different commercial, legal and social matters started to take the center stage. The economic competition between great powers created the necessary tension and opportunity for total war. As Christopher Clark observes, the political tensions within the Balkan region might have sparked the war but the existing competitive economic structures can explain the readiness with which the war also became a ground for imperial expansion.[102] Hence, with the outbreak of the war, a 'new scramble for Africa' began and with their defeat in the war, the Germans lost nearly 'a million square miles of territory in Africa, the Far East and the

[97] Chris Jochnik and Roger Normand Jochnick, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harvard International Law Journal 49.
[98] Armstrong (n 93).
[99] ibid 3.
[100] ibid.
[101] ibid 153.
[102] Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914* (Penguin 2012).

Pacific'.[103] As Michael Callahan observes, during this time, 'Britain and France sized half of this overseas empire' which included Togo, Cameroon, and the German East Africa'.[104]

Amidst this opportunistic seizure of territories as part of the war, the intellectual and political critiques of the colonial rule persisted. Especially within the United States, foreign policy maintained that the US would not fight for conquest or any material compensation but rather to make the world 'safer for democracy'.[105] Being surrounded by an anti- imperialist and anti-war sentiment that was already building up, even if that was within a liberalist intellectual framework, the British War cabinet withheld any decision as to the rearrangement or official annexation of the territory captured during the war.[106] With the Bolshevik revolution in Russia in 1917 that was concerned with peace without any annexations or indemnities,[107] the powers that held territories as a consequence of the war were under greater pressure.

The internationalisation projects and sentiments before the war and the later part of the 19th Century also picked up after the war.[108] As Daniel Gorman observes, there was a far more concerted effort in internationalised institutions and projects then there were before the war.[109] The range of groups that mobilized was also from a wider spectrum which included 'international communities of feminists, humanitarians, religious leaders, athletes, academics and ethnic minorities'.[110] The spirit of internationalism beyond politics was a massive impetus during the 1920s for the initiation of international projects which Gorman refers to as the 'emergence of the international society'.[111] Thus the era of internationalisation can be seen as a proliferation of various networks guided by various liberal imperial goals. What is important to note for this thesis in particular, as we will see in the next section, is which particular networks became central to the norm creation within the international organization, the League of Nations, in its global project to be imperial tutors for peace, economic development and social progress.

[103] Michael D Callahan, *Mandates and Empire: The League of Nations and Africa, 1914-1931* (ISBS 2008).
[104] ibid 2-3.
[105] Armstrong (n 93).
[106] ibid 2.
[107] As phrased in the Treaty of Brest-Litovsk 1918, Treaty of Brest-Litovsk (signed March 3 1918).
[108] Gorman (n 12).
[109] ibid 3.
[110] ibid.
[111] ibid 2.

As both ideas of growing internationalism beyond politics that relied on rules to be followed and regulated globally and the political imperative of self-government as a critique of colonial structures took shape, America's growing influence and interest in forming a 'new world order' was already underway. In 1915 two former presidents of the United States, Theodore Roosevelt and William Taft, sponsored a pressure group, 'The League to Enforce Peace', whose objective was to push for a collective system of global security to impose some kind of sanctions on aggressors who broke agreed upon rules.[112] The League to Enforce Peace put forward the notion of an international organization based on two principles: collective security and enhancing the status of international law.[113] While the approach proposed by Tusk and Roosevelt resonated as a possible reformative period based on international law, its legalist-sanctionist character got overshadowed in the domestic American sphere by Woodrow Wilson's vision for a new international legal order.[114]

In 1918, Woodrow Wilson delivered his fourteen point speech in front of the United States Congress wherein he called for a diplomatic structure which he described as 'a general association of nations for the purposes of affording mutual guarantees of political independence and territorial integrity to great and small states alike'.[115] The Wilsonian vision of an international society, as Stephen Wertheim observes, was based more on informal relations and diplomacy and it carried a strong commitment to 'self-determination' as a central principle of any international global order.[116] It was not long after that the British, who were the largest holders of colonial territories at that point, took the steps to form a commission to draft a plan to make the theory of such an association a reality. The plan, named Wilson's Plan, incorporated elements of a British vision of internationalism. Wilson's retraction from a legal sanctionist approach to internationalism and emphasis on informal relations with a push for 'self-determination' for all nations, at least in principle, fit in perfectly with British conceptions of international society.[117]

[112] Stephen Wertheim 'The League That Wasn't: American Designs For A Legalist-sanctionist League Of Nations And The Intellectual Origins of International Organization, 1914–1920' (2011) 35(5) Diplomatic History.
[113] ibid 799.
[114] ibid 798.
[115] John Eugene Harley *'The Aims, Methods and Activity of the League of Nations. By the Secretariat of the League of Nations*' (Geneva. Rev. Ed New York: Columbia University Press, 1938) 20.
[116] Stephen Wertheim 'The League of Nations: A Retreat From International Law?' (2012) 7(2) Journal of Global History 210.
[117] ibid 218.

Furthermore, Mark Mazower observes, in his study of the imperial internationalism of the League of Nations, how Jan Smuts, the British Statesman who was also appointed to be the Prime Minister of the Union of South Africa between 1919 and 1924 and later on between 1939 and1948, was central to putting forward a British vision of internationalism.[118] Smuts, as Mazower points out, was one of the main architects involved in the drafting of the League of Nations Covenant. He described the formation and purpose of the League as running as a closer model to the British Empire's colonial governance in the form of the Commonwealth. Smuts imagined the League of Nations as a world government akin to British rule over its colonies which he described as the 'only successful experiment in international government'.[119] In particular, the disregard for a sanction-based institutional structure and reliance on moral rhetoric of respecting native sovereignty was something the British were already quite familiar with in their colonial governance through indirect rule in India and its territories in Africa, particularly Natal in the 1840s.[120]

In 1919, a peace conference was conceived in Paris where Woodrow Wilson was appointed to draft the constitution to the League of Nations. Through the involvement and influence of the United States and Britain, the League thus had elements of both the English liberalism of the late 19th Century which operated through the logic of indirect rule and the Wilsonian vision for a diplomatic institutional forum.[121] Its informal character based mostly on supervision, recommendation and overseeing with actual implementation ceded to the states, or the Allied states more specifically, has led Stephen Wertheim to argue how the League's internationalism was essentially a step back for international law – i.e. international law understood an obligatory sanction based system of accountability.[122] This observation can also be surmised from how during the initial formation of League, efforts to coordinate and incorporate codified laws of war were pushed aside by the founding fathers of the League.[123]

Nonetheless, internationalism of the 20th Century, in whatever form envisioned – whether legal sanctionist, through codification and standardization of laws or as a

[118] Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009).
[119] ibid 37.
[120] ibid 158.
[121] ibid 45.
[122] Wertheim (n 116).
[123] ibid.

diplomatic forum – was inherently an imperial form of internationalism. The reason being that internationalism, even when it embodied matters relating to other social causes or humanitarianism that were prevalent during the time, was ultimately based on a hierarchal view of what it meant to be a 'part of the universal international society'. This is precisely why the League within its main objective, and throughout its obligations, gave the great powers the status of 'high contracting parties'. The League's internationalism then is based on a view of international society as envisaged by the 'High Contracting' Parties.

IV. The League of Nation as a network organization

The League embraced the idea of extending its purpose beyond a political international body for the security of the world, but also to 'promote international co-operation'.[124] This idea of also having a scheme for international cooperation, suggested by General Smuts, incorporated matters that were understood as trans-boundary issues at the time.[125] The British vision as put forward by both Smuts and other legal and political leaders of the British Empire, notably Robert Cecil, was ultimately an international organization of the nature of a commonwealth. In his address on 'international cooperation through the League of Nations', Robert Cecil had even described the League as an 'international experiment' that is a middle ground between the old European concert system and a punitive, sanctionist supra-state.[126] International projects at the time were also concerned with similar issues and for the principal authors of the League, particularly the British, incorporating matters of international morality was also part of the new organization of the world.[127] These were encapsulated in Article 23 of the Covenant of the League of Nations, which stipulated international cooperation and mutual support in the fields of human traffic, suppression of opium and other dangerous drugs, maintenance of freedom of communication, equitable treatment for the commerce of the Members of the League, and health.[128]

The political and legal arm of the League was devised for the 'safeguarding of peace' and the core component of this was the building of a new global legal order through the

[124] Harley (n 115) 28.
[125] ibid.
[126] Robert Cecil, 'The League of Nations and International Co-Operation Address' (1922) 5(1)World Peace Foundation Pamphlet Series 416.
[127] Gorman (n 12).
[128] Harley (n 115) 28.

mandates system. The mandate system, stipulated in Article 22 of the Covenant, set up an administrative system based on classification of territories acquired after the war.[129] The principle behind it was that the high contracting parties 'were advanced nations who, by reason of their resources, their experience and their geographical position, can best undertake the responsibility'.[130] The result of this administration was to be a guiding force for the native people 'for their wellbeing and development' as part of the 'sacred trust civilization' so that they may also be part of the international society.[131] While its rhetoric was based on moving away from colonialism, annexations of territories or extensions of an empire, how it approached a new global order resembled the imperial logic of the Berlin Conference. For the League, this rhetoric of 'sacred trust of civilization' was meant to fulfil the Wilsonian push for self-determination of all nation states, with the advanced states leading the less developed into international society for their social progress.[132] Accordingly, territories were divided based on 'backwardness' and giving classes of A, B, and C, with B and C having the lowest progress of 'civilization'.[133] Class 'A' mandates included Turkey, Palestine, Syria, Lebanon and Mesopotamia (Iraq), Class 'B' included territories of Central Africa i.e. Togoland, Cameroon, and East Africa and Class 'C' included territories in South West Africa including Samoa, Nauru.[134]

The division of social progress embedded within the mandates system was not separate from the idea of international cooperation.[135] These two aims, the social and political, were interdependent,[136] not just in the sense that they embodied what international society meant for the League but also in how the world would be divided and interdependently administered according to the League's ideas of social and moral values. Specifically, within the Mandates manual of the League of Nations, Mandate Class 'B' territories were explicitly linked to Article 23 general social, economic and moral concerns. The manual describes conditions under which mandated territories of 'B' class territories are to be administered subject to 'maintenance of public order and morals, the prohibition of arms traffic and liquor … and secure equal opportunities for the trade and commerce of other

[129] ibid 105.
[130] ibid.
[131] ibid 104.
[132] Susan Pedersen, *The Guardians: the League of Nations and the Crisis of Empire* (OUP 2015).
[133] Harley (n 115).
[134] ibid 26.
[135] ibid.
[136] ibid 26-27.

Members of the League'.[137] Robert Cecil went as far as explaining the international cooperation function of the League to include 'control of backward races'.[138] To do this, mandate administration through indirect rule was an integral concept and one that was not only a part of Article 22 but essential to give effect to the conditions, as described in the Mandates manual, of social, moral and economic concerns that were part of Article 23. Despite the underlying intellectual and political discourses as mentioned within the League's manual being underpinned by a politically charged idea of a ladder of civilization, the League's trans-boundary work is presented as 'common to all mankind'.[139] The incorporation of Article 23 or international corporation as embodying the moral universal discourse of the 20th Century essentially separated itself from the politics of the international organization as made up of interests of member states and the bias of 'international society'.

This 'depoliticization' of social, economic and moral concerns can be seen in both the political discourses of the League and intellectual legal tradition at the time. Robert Cecil, for instance, argued that the League would essentially act as an organization where 'civilized' nation states, despite political differences, as part of 'an interlocking world' can discuss how the 'progress' of science, arts and economics of the world can affect the wellbeing of their nations.[140] Cecil presented the League as the answer to the solution of a globalized interconnected world where the social, moral and economic condition of one state can affect another.[141] Giving the example of global economic markets, he argued how 'American grain and British coal are both controlled by operation in all the markets of the world'.[142] Political upheaval or war could affect the demand and thus the price of commodities in the global market, hence the work of the League in this way was to indirectly also preserve the global market for, as Robert Cecil points out, both England and America.[143] Jan Smuts also emphasised that the League was to bear a great burden in the economic 'progress' of the civilized world. From the perspective of the British

[137] Denis Myers, *Mandates Handbook on the League of Nations*: *A Comprehenseive account of its Structure, Operation and Activities* (World Peace Foundation 1935) 305.

[138] Robert Cecil cited in William E Rappard, 'The League of Nations as an Historical Fact' (1926) 11 International Conciliation 279.

[139] Margherita Zanasi, 'Exporting Development: The League of Nations and Republican China' (2007) 49(1) Comparative Studies in Society and History 143. Zanasi for example discusses the League's civilising discourse as adopted by its 'expert' advisors who applied the civilizational ladder to different states in accordance with the level of 'progress'.

[140] Cecil (n 126) 417.

[141] ibid 418.

[142] ibid.

[143] ibid.

administrators such as Smuts, the League as an international organization could not only build a new world order to bring peace, but could also allow the civilized states to regulate trans-boundary social and economic issues that are presented as necessary to a peaceful world.[144] This trans-boundary work is presented as essentially lacking political character, as it affects all nations equally and can only be governed under the League's supervision and through peace preserved by the League.

This particular division is also implicit in the writings of International legal jurists of the time, notably, Georges Scelles. Scelles, for example, envisioned the League as employing a 'double function'; one between the nation states i.e. political/diplomatic and the other common issues of global concern shared by the world as a community.[145] For Scelles, it was in the latter that the success of the League could be measured. For Scelles, then, the moralizing rhetoric or the second function of international law was not problematic, but a necessary step for the global legal order.

As a whole, the League was a separate entity that not only resembled the blueprint for colonial governance set out in the Berlin Conference, but was also an institutional structure that oversaw the implementation of indirect rule over the territories assigned to 'high contracting powers'. In other ways, it went further than the conference system by making social and moral progress on trans-boundary matters a part of its core aims. By interlinking trans-boundary work with its political divisions of the international society based on a scale of civilization, the League created a governance structure that draws its legitimacy from a moralizing discourse of progress.

Sovereignty at this juncture is then linked to the capability of mandated territories to conform to the 'universal' moral and social issues of the international society. Empires could no longer establish a presence in colonial territories through a military and naval presence as 'self-government' and 'de-escalation of military presence' became part of the League's vision of international society. The League as an organization created a different method of governing through collaboration and connection between departments and organizations under it. In this new 'internationalised' network governance, experts assumed a greater role as norm creating networked actors.

[144] ibid 419.

[145] Antonio Cassese, 'Remarks on Scelle's Theory of Role Splitting (dedoublement fonctionnel) in International Law' (1990) 1 European Journal International Law 210.

In all respects, the League was a separate entity even if it was an assembly of member states. It had a bureaucratic structure which included a Secretariat, an Assembly, and Council.[146] The League had a further prerogative to initiate separate commissions, committees, and bodies that coordinated, supervised and collected information at the Assembly and were given approval by the Council.[147] These separate committees initiated by the League through its Assembly, specifically concerning international cooperation that is of relevance to my analysis, include the committees of the economic and financial organization of the League, the Permanent Mandate Commission, the advisory committee established under Article 23 of the Covenant for the prohibition of the traffic in opium and dangerous drugs, the traffic in women and children, and the committee for intellectual cooperation. The League secretariat was the technical expertise body of the League, which consisted of civil servants as well as 'independent experts' on subjects of technical duties.[148]

These 'independent experts' nominated by the Council and appointed to the sub-bodies served as advisors on the various committees of the sub-bodies.[149] Even within the structure, publicly the underlying assumption presented was that these were independent bodies i.e. independent of politics and interests to serve technical duties common to all. Formally, as Patricia Clavin observes, policy making and influencing across boundaries is not explicit within the League's functions and parameters.[150] This formal stance is consistent with the vision presented by the leading architects of the League; those mentioned above, i.e. Jan Smuts and Robert Cecil, specifically maintained that despite being an international organization the role of the League would strictly be supervisory, advisory and for discussion on common issues.[151] While both ideologically and structurally there was an emphasis on the 'depoliticized' work of the League's technical organizations as part of its international cooperation objectives, in reality, this was not the case.

Clavin observes that even though the League Council appointed members to lead the committees, the selection process was done in an opaque manner where only the permanent

[146] Harley (115).
[147] ibid 107.
[148] Patricia Clavin, *Securing the World Economy: The Reinvention of the League of Nations, 1920-1946* (OUP 2013).
[149] ibid 6.
[150] ibid.
[151] Rappard (n 138).

members in the Council were involved to select 'independent experts'.[152] Clavin argues that it was left vague as to what background these 'experts' came from e.g. if they were to be economists or bankers.[153] These committees would be formed as part of 'technical duties', for example the League of Nations Gold Delegation formed under the economic and financial organization's committee.[154] These sub-committees would often be created for specific topics under the technical duties and the 'experts' leading them would have transnational affiliations and connections to think tanks, other international organizations and universities.[155]

This structure of the League of Nations formed, as Clavin explains it, a 'transnational network of expertise', which is a similar formulation through which I conceptualize the League as a network of experts.[156] This transnational network of expertise affiliated to international organizations and think tanks would inform how these experts both produced and influenced policy. Quin Slobodian, for example, observes how the League of Nations' involvement in the World Economic Conference 1927 was led by economists who would later be identified as progenitors of neoliberal economic thinking.[157] With the help of these economic thinkers, a blueprint for economic governance was produced that codified opposition to trade obstacles which included any tariffs or wage concerns of labour as a threat to economic development.[158] Slobodian's observation on the ideological basis of the League's economic and financial organization not only shows that the transnational network of experts was connected through affiliations across boundaries, but the legitimacy, authority and structure to organize at a global scale provided by the League enabled these experts to promote and push for policy beyond boundaries.[159]

Taking the economic and financial organization and its committees as a prime example of her study, Patricia Clavin argues that informally 'the international experts' chosen and approved by the Assembly and Council to be admitted into the League secretariat and head its different sub-bodies/committees would both draft and promote specific policy objectives

[152] Clavin (n 148) 6.
[153] ibid 6-7.
[154] ibid 19-20.
[155] ibid 6.
[156] ibid.
[157] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).
[158] ibid 30.
[159] ibid.

and promote and pressure governments into adopting policies.[160] In mandated territories, this ability to produce, implement and give reports on how policy is implemented was more pronounced due to the governing capacity of the Permanent Mandate Commission and the mandated government who effectively controlled the territories under the Mandates.

In other areas of technical duties, Clavin argues the same mechanism for appointment of 'transnational experts', and their ability to informally push for policy, worked in much the same way.[161] Stephen Legg, for instance, argues how, under the committee for the prevention of trafficking of woman and children, a travelling investigation commission was made and led by the head of the League's Department for Opium Traffic and Social Issues, Rachel Crowdy (1884–1964), to pressure and involve itself within the local as well as state regulations on prostitution in colonial India.[162] The initial impetus for a provision on the trafficking of women and children was derived from the 'white slave trade', which emphasised racial victimization of European women.[163] This and other movements, such as the Association for Moral and Social Hygiene (AMSH), that focused on moralizing the international society often did so with racial and religious stereotypes about the depravity of the east.[164] Crowdy, who led the travelling commission, understood the issue of trafficking as not a racial or ethnic problem but as gendered.[165] This generic division, between global patriarchies and women of all races, was a hallmark of the imperial feminist movement at the time,[166] where the native intersectional experience was blatantly absorbed and represented only as of the international – i.e. European – experience.[167] The League's travelling commission justified its presence and investigation based on colonial justification

[160] Clavin (n 148).

[161] Expertise,beyond just economic and financial organization, became a crucial part of international administration of the mandated territories particularly in the areas of agriculture, see for example: Joseph Morgan Hodge, Gerald Hödl and Martina Kopf (eds), *Developing Africa: Concepts and Practices in Twentieth-Century Colonialism* (Manchester University Press 2016).

[162] Stephen Legg, 'An Intimate and Imperial Feminism: Meliscent Shephard and the Regulation of Prostitution in Colonial India' (2010) 28(1) Environment and Planning D: Society and Space 68.

[163] ibid 74.

[164] Gorman (n 12).

[165] Legg (n 162).

[166] ibid 80.

[167] Legg n(162), however, does not emphasise the presence of caste in the subcontinent. For a clearer view of intersections between interwar era moralizing discourses and caste, see for example: Ruth Watts Breaking the boundaries of Victorian imperialism or extending a reformed 'paternalism'? Mary Carpenter and India. (2000) *29*(5) History of Education 443.

of moralizing the 'social evils' i.e. in this case prostitution, in the domestic sphere of native nation states to address properly its international character.[168]

Both the League's economic and financial organization and the League's opium and social issues department's ideological basis could be traced to transnational bodies of experts who had a specific ideological basis for their views on the social and economic issues. The humanitarian outlook of the League's opium and social issues departments reflected the work done by the imperial feminist movement and activists from the British Association against White Slave Trafficking and the Association of Moral and Social Hygiene.[169] In their own right, these organizations could be seen as individual networks consisting of activists and economists but, due to sharing the imperial liberal basis of the League's broader objectives, they were mediated and acted through the League on, for example, economics or humanitarian issues. The League, through its universalization of international morals and economic progress as depolitical factors to be promoted and sustained throughout the world, provided legitimacy, authority and most importantly the structure to these networks to translate their ideological reforms into governmental policy.

The League of Nations, then, can be understood as a form of a network of experts that, while operating through categorization of nation states through the ladder of civilization, also gave the structure and means for the transnational network of experts to translate their ideological reform into policy through its trans-boundary governmental channels, travelling commissions, international expert missions, and inter-departmental committees on issues of international concern. Indirect rule thus also became a crucial part of the interwar era administration of mandated territories.[170]

In conceptualizing the League in this manner, we can also question the supposed separation of the League's imperial governance through the Mandates Commission and technical trans-governmental function as two different arms of the League. Trans-governmental or transnational functions of the League, i.e. the social, humanitarian, economic agendas, were meant to bring the rest of the world to modernity.[171] Modernity

[168] Legg (n 162).
[169] Gorman (n 12) 54.
[170] Luis Eslava, 'The Moving Location of Empire: Indirect Rule, International Law, and the Bantu Educational Kinema Experiment' (2018) 31(3) Leiden Journal of International Law 539.
[171] Martin David Dubin 'Transgovernmental Processes in the League of Nations' (1983) 37(3) International Organization 469.

now, instead of being defined by empires as was the case in the 19th Century, is formulated by technical experts.[172] This civilizing objective of the trans-governmental function was the same underlying principle behind establishing the mandate system. By depoliticizing the technical/transnational function of the League, orthodox literature also inadvertently separated the civilizing discourse of its technical duties from those of its more political function – i.e. the Mandates Commission. I argue that by unveiling the functioning of the League's transnationalism as underpinned by the same logic of guiding the world in modernity we also understand that the imperial governance through mandates commissions did not operate in a silo of its own. The League's trans-governmental work intersected with the Mandate governments in implementing the social, economic and humanitarian reforms of the technical experts. As such the creation of certain conventions and policy relating to especially the mandated territories was a result of interconnections between League Departments or more specifically its network of experts.

The creation of the League not only brought into fore a new form of a network but set a model for the *dialogical interplay* between networks and international law for decades to come. The *dialogical interplay* had moved from imperial networks where civilizing discourse and governance was a result of part of imperial states, to an international governmental structure where technical experts supported by overlapping national, private and transnational interest that were instrumental in the governance of former colonies. This form of a network through expertise not only created transnational expert rule as a form of governance but depoliticized the civilizing discourse inherent in international law. With the added universalization of sovereign equality and self-determination, dialogical interplay in this form also obfuscated its role in violence on people of colonial territories ruled under the mandates as these were considered matters relating to challenges in colonial governance rather than a result of the international legal order envisioned by the League.

a. The violence of the League of Nations

a. The League's economic vision: 'peace' through social control

[172] Eva-Maria Muschik, 'The Art of Chameleon Politics: From Colonial Servant to International Development Expert' (2018) 9(2) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 219-244; Christophe Bonneuil, 'Development as Experiment: Science and State Building in Late Colonial and Postcolonial Africa, 1930-1970' (2000) 15 Osiris 258; Frederick Cooper, 'Modernizing Bureaucrats, Backward Africans, and the Development Concept', in Sarah Stockwell (ed), *The Rise and Fall of Modern Empires* (Taylor and Francis 2016).

The kinds of violence, I argue in this section, were the result of not only policy created and applied by the League's expert networks but also an underlying discourse of the civilizing mission. Concerning the latter, I look at how the interconnectedness of the League's departments and their experts creating policy led to violence that was part of the Mandate administration. Here, I look at how, primarily, the experts of the Permanent Mandate Commission and ILO of the League created a policy regarding employing a native labour force which resulted in forced labour, harsh working conditions, the creation of penal codes as part of establishing a system of policing in mandates, and violent punitive measures when employment contracts were broken or resisted.

Here, two important aspects of the League as an organization can be seen to have made more systemic forms of violence invisible; firstly, the idea of the economic development of the world, especially the 'lower countries' as part of the League's mission, and secondly the shift from military presence to the creation of policing structures in mandate territories. Implementing both these broader policies with the underlying notion of civilizing natives was the technique of indirect rule as part of colonial governance through a network of experts.

In relation to economic development, as I have argued above, economic, social and humanitarian departments were established within the League to show how transnational or international cooperation in these matters can sustain a period of peace. Creating a consistent system for economic and financial standardization was equated to being a deterrent to war. In a Proposal for an Economic Conference at the League of Nations Assembly, the French delegation emphasised how 'most frequent scourges of war have been a result of an economic struggle between different countries'.[173] Broader principles enshrined in the creation of its departments were meant to complement the idea that the standardization of economic, social and humanitarian principles need to be consistent with each other. Hence another agenda in the Proposal for an Economic Conference suggested at the League of Nations Assembly was to 'resolve economic difficulties' and call the Council

[173] World Peace Foundation, 'The Proposal for a Conference, International Economic Conference: Chapter IV (1927)' World Peace Foundation Pamphlet Series, 375.

to set up a 'preparatory committee for preparing work for the Economic conference with the help of technical organizations of the League and the international labour organization'.[174]

The French delegation, in particular, emphasised the involvement of the transit and communication department, the ILO and the League's economic and financial departments in forming and setting up the agenda for an Economic Conference. As I have argued in the above section, through its network of experts employed mainly in the economic and finance department of the League there was a push for a free trade policy that among other things focused on the removal of trade barriers including the construction of better communication, transport and transit as well as production capacities in industries with more labour employment.[175] Hence, the creation and agenda of the transit and communication department, creating greater transportation and communication, links directly to the League's economic principles to ensure both industrial and economic growth.

The broader aim of greater industrial growth, specifically concerning the mandated territories, held an exceptional position. Like the Berlin conference, the League covenant encapsulated under its obligations to colonial territories a 'sacred trust of civilization'. Colonies taken over by the German Empire were elaborated in terms of 'people not able to yet stand by themselves under the strenuous conditions of the modern world' and that 'there should be applied the principle of wellbeing and development of such peoples form a sacred trust of civilization'.[176] In applying this sacred trust specifically to African mandates territories, where the British and French Empires were given greater control, Article 22 specifies the 'need to secure equal opportunities for trade and commerce of other countries', emphasising not just 'development' of the natives but also 'economic opportunities for Members of the League'. In addition, read with Article 23(e) of the Covenant's reference to territories affected by war to 'secure means of communication and transit for the equitable treatment of the commerce of all Members',[177] the mandated territories held a specific role for the economic and industrial growth and creation of infrastructure to facilitate the commerce of the Members of the League. Specifically, as these were underpinned by the discourse of civilization where not only will the mandate empires facilitate the 'wellbeing

[174] ibid 375.
[175] ibid.
[176] Myers (n 137) 50.
[177] ibid 51.

and development' of natives, but the League Members are also supposed to benefit from the administration, particularly in terms of commerce and trade.

This exceptional place of both trusteeship and commercial 'benefit' to imperial powers responsible for guiding the 'lower' countries was the underpinning logic of the League's economic work. It was in the area of industrial labour that this underlying logic of the economic imperative of the League and the place of mandated territories as a 'trust of civilization' took a systematically violent turn.

b. Policing forced labour and the indirect rule of ILO administrators

The League of Nations formation also included the creation of the International Labour Organization under the League. While the ILO was established as a separate organization that was to work under the auspices of the League it is also considered part of the League's technical functions. Article 23(a) of the League of Nations Covenant stipulated that the League Members 'will endeavor to maintain fair and humane conditions of labour … and will establish and maintain the necessary international organizations'[178] and in the ILO constitution of 1919, the first reference is to the League of Nations as being established for 'universal peace, and such peace can only be established by social justice'.[179] Its significance, within the broader ideas of economic peace, was also apparent in how labour was referred to as central to the economic development in the call for an economic conference.[180]

When the international labour department was set up in 1920 with the international labour office placed in Geneva, the Permanent Mandate Commission was given a permanent seat at the international labour office.[181] Moreover, when it came to annual conferences and advisory committees, administrators from the Permanent Mandate Commission were to be involved in the policy making as well. The practical effect of this relationship between the Permanent Mandate Commission and the International Labour office could be seen in how

[178] Harley (n 115) 28.

[179] Treaty of Peace with Germany (*Treaty of Versailles* 28 June 1919), 2 Bevans 43, Part XIII.

[180] World Peace Foundation (n 173).

[181] Clarence Wilfern Jenks, 'The Relation between Membership of the League of Nations and Membership of the International Labour Organization' (1935)16 British Year Book of International Law 79.

mandated territories were understood and stipulated as exceptions to the social protection promised by the International Labour Organization.

The International Labour Organization's constitution, for example, while giving assurances as to protection for sickness arising out employment, leave from work, hours of work and living wages, and prevention of unemployment, did not necessarily apply these protections to all 'colonies, protectorates, not fully self-governing'.[182] Article 35 of the Constitution of the ILO stipulated that members engage to apply conventions which they have ratified under the present treaty except where 'owing to the local conditions the convention is inapplicable or, subject to such modification as may be necessary to local conditions'.[183] This Article as Luis Rodriguez-Pinero observes refers to 'different categories of colonial territories existing within the legal phraseology of the time' i.e. the mandated territories.[184] Regardless of how the Article already provided an exception to the protection of native workers in colonies and protectorates, the mandate powers contested the inclusion of this Article based on the fact that it interfered with colonial governance.[185]

Nonetheless, in the further development of creating a separate labour code for native workers, this exception based on 'local conditions' became a way of excluding the protection for native workers in mandated territories – particularly in the territories of Africa. The argument of 'local conditions' was used particularly to create regimes of forced labour especially in the creation of infrastructure, transit and communication, or 'public works' as they were called, as well as private industries for the agenda of economic development pushed by the League's economic department.[186]

The mandate powers incorporated ideas of economic development into the rhetoric of mandate administration that emphasised the 'development of native' as well as the commercial benefit to League Members. This was also the underlying logic of indirect rule, an administrative technique that in its previous iteration, was meant to control the 'native ruling' system or the native elite thereby respecting the 'sovereignty of native populations'

[182] ibid 82.
[183] International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)*, 1 April 1919.
[184] Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism and International Law: the ILO Regime (1919-1989)* (OUP 2005).
[185] ibid 24.
[186] ibid.

but preserving the imperial network's own interest.[187] With the publication of the *Dual Mandate in British Tropical Africa* (1922) by Fredrick Lugard, indirect rule was explained as a system where 'native chiefs were constituted as an integral part of the machinery of administration'.[188] Lugard, a British representative of the Permanent Mandate Commission as well as the former Governor General of Northern Nigeria controlled by the British, argued that the rule of the native chief has to be 'consistent with British officials' and his rule must 'subordinate to protecting powers in certain well defined directions'.[189] Referring to the League of Nations language used also in the Versailles treaty of 1919 Lugard points out that indirect rule recognizes limits on the native rule as 'the subject races are not yet able to stand, and that it would not conduce to the happiness of vast bulk of people – for whose welfare the controlling power is a trustee – that the attempt should be made'.[190]

The indirect rule thus preserved imperial control while maintaining service to Wilsonian conceptions of self-government. This also meant that implementation of policy, as well as the involvement of making policy at the international level, rested solely on the mandate powers. For instance, the exemption for the application of international labour to colonies and protectorates given to mandate powers was used to justify forms of forced labour and coerced employment through the rhetoric that it was tied to the future 'development' of the natives as well as benefit to the League Members.[191]

Thus native labour was the foundation of 'public works projects', that is railways and industrial infrastructure.[192] Notably in French West African territories from 1918 to 1946, forced public works labour were employed and referred to as the 'deuxieme portion du contingent', or men left over from military recruitment after the desired number of soldiers were sent off.[193] These labourers served on roads and other 'public works' enterprises and, while given wages, worked under bad conditions. Another form of forced labour that was structurally embedded through indirect rule was referred to as prestations, service of a villager to his local community or local chief was also common practice by the French

[187] ibid.
[188] Lord Lugard, *The Dual Mandate in British Tropical Africa* (Margery Perham ed, originally published 1922, Routledge 2013). See also Eslava on Lugard in Eslava (n 774).
[189] ibid, Lugard 204.
[190] ibid 197.
[191] Rodriguez-Pinero (n 184).
[192] Frederick Cooper, 'Conditions Analogous to Slavery: Imperialism and Free Labor Ideology in Africa' in Fredrick Cooper and Thomas Holt (eds), *Beyond Slavery: Explorations of Race, Labor, and Citizenship in Post-emancipation Societies* (UNC Press 2000).
[193] ibid 130.

governments in its West African territories.[194] This kind of labour was more of indirect pressure from native chiefs and would respect the affinity and power of the chief to work without wages for private enterprises and not just public works.[195]

In the British mandated territory of Kenya in the 1920s as well, indirect pressure to assign native labour without wages through native chiefs was a common practice that was, as Fredrick Cooper writes, more covert than the French approach where actual factors that led to forced labour were not brought up such as land seizures.[196] In British mandates territories, Lugard suggested, the policy of tax payable by those that do not work and may pay taxes in the form of labour was explicitly made part of indirect rule.[197] Lugard writes that for natives that 'are found to be living in idleness and drunkenness, special taxation is perhaps justified for their own best interest'.[198] During the Interwar Years, in British controlled Uganda, the practice of substituting a month of labour for payable taxes, while contested as not being 'forced labour', was common practice and equal to 'forced labour'.[199] Despite claims by British administrators, the use of forced labour was not just limited to 'public works'; in Northern Territories of the Gold Coast between 1920 and 1924 there was a surge in government assisted recruitment of labour to work in mines owned by private British gold mining companies.[200] Mining companies became part of government's recruitment scheme where native chiefs were asked to recruit workers from their villages as well as through recruitment depots to get 'casual' protectorate labour coming in from other African territories.[201]

This push for more labour that led to the recruitment of migrating natives led the chiefs to select workers who were not only unhealthy but made to work in the harsh conditions of the mine. Beyond just the dangers of working in the mine, this led to an increase in death rates in mines in the Gold Coast.[202] The exploitation of natives through forced and coerced means of labour became a systematic form of violence practised by the French and British

[194] ibid 131.
[195] ibid.
[196] ibid.
[197] Lugard (n 188).
[198] ibid 234.
[199] ibid.
[200] Roger G Thomas, 'Forced Labour in British West Africa: The Case of the Northern Territories of the Gold Coast 1906-1927' (1973) 14(1) The Journal of African History 79.
[201] ibid 80.
[202] ibid.

powers. Systemic violence embedded in indirect rule, then, did not change much from the violence following the Berlin Conference. This time, instead, it was legitimised and centralized on an international level through the experts of one institution: the League of Nations.

As anti-colonial voices, mostly activists and missionaries voiced their anger at what was considered 'practices analogous to slavery'; the League was forced as a matter of public opinion to suggest reform.[203] The inhumane treatment, bad conditions of forced labour prevalent as a result of the exception given to the mandated powers through the underlying logic of 'trust of civilization' embedded in the League's vision of international order became a point of contention. In 1925, the Temporary Slavery Committee of the League of Nations was tasked with drafting the Slavery Convention of 1926.[204] Among the members of the committee were representatives of mandated governments. Notably, Fredrick Lugard was one of the experts who sat in the Expert Committee from 1925 to 1941.[205] The experts appointed for the Temporary Slavery Committee also, as part of their drafting of the Slavery Convention, focused on forced labour in Article 5 of the Convention.[206] They stated that regulation for the abolition of slavery and practices analogous to slavery should include 'prohibition of forced labour or compulsory labour, except for essential public works and services and in return for adequate remuneration'.[207] Rodriguez-Pinero observes how the Slavery Convention of 1926 not only failed to ban forced labour but ended up creating an exception, i.e. the use of forced labour for public works in mandated colonies, with the League of Nations Assembly reinforcing this exception in a resolution concerning forced labour in 1926 thereby legitimizing it.[208]

[203] Daniel Roger Maul, 'The International Labour Organization and the Struggle against Forced Labour from 1919 to the Present' (2007) 48(4) Labor History 477; James Daughton, 'Behind the Imperial Curtain: International Humanitarian Efforts and the Critique of French Colonialism in the Interwar Years' (2011) 34(3) French Historical Studies 503; Yan Slobodkin, 'State of Violence: Administration and Reform in French West Africa' (2018) 41(1) French Historical Studies 33. These voices could also be described as forms of counter networks particularly present within the 20th Century age of internationalisation, but still need to be understood as bound within and through euro-centric notions of 'morality' with an absence of native agency or context.

[204] Rodriguez Pinero (n 184).

[205] This is particularly important to note since it was also Lugard who, before the League of Nations was formed, was at the forefront of building a Native authority system as indirect rule to create forced labour regimes for building of public works. See Mamdani (n 62).

[206] Rodriguez Pinero (n 184) 31.

[207] ibid, see specifically Art 5(1) which states 'subject to transitional provisions of subsection (2), compulsory or forced labour should be extracted only for public works.

[208] ibid.

The discussion by the Temporary Slavery Committee led to a separate movement to draft a convention exclusively for native labor standards as a separate category within international labour regulation.[209] A separate native labour code was underpinned by the same civilizing discourses, albeit more explicit than the International Labour Convention of 1919.[210] However, as Rodriguez-Pinero notes, even in the native labour code, 'a novel reading of civilization was couched in economic, modernizing terms'.[211] The resultant 1930 Forced Labor Convention (no.29) was in line with the Slavery Convention in that it did not outright ban forced labour but put it in a transitional period. Through language that left the practice of forced labour, especially concerning 'public works', open to the interpretation of mandate powers, the convention only legitimised the use of forced labour.[212] Thus forced labour continued even after 1930 particularly in French Mandates, specifically in the Upper Ivory Coast where pseudo-military labour, as well as a form of prestations i.e. recruitment through native chiefs, was very common for 'public work projects'.[213]

The labour conditions were another form of violence, i.e. policing and maintenance of public order that was also made invisible through the League's conception of 'peace'. In this respect, Article 22 of the League of Nations Covenant specifically focused on the 'maintenance of public order' and the 'prevention of the establishment of fortifications or military or naval bases and of military training of the natives for other than police purposes'.[214] The perception of removal of military bases, disarmament and prevention of fortification fell under the rhetoric that military aggression between states was what led to the Great War. Economic Peace requires the colonial practice of fortifications and bases in mandated territories to be prevented. It also focused on, as Article 22 states, an exception to training for police purposes.[215] Policing and maintaining public order was crucial in this way as a replacement for military fortifications and were in line with colonial governance preferred by the mandated powers at the time. Martin Thomas notes that creating a policing structure that consists of natives as part of the administration was integral to forms of

[209] ibid 33.

[210] James Daughton, 'ILO Expertise and Colonial Violence in the Interwar Years', in Sandrine Knott and Joelle Droux (eds), *Globalizing Social Rights:The International Labour Organization and Beyond* (Palgrave McMillan 2013).See also, Guy Fiti Sinclair, 'A "Civilizing Task":The International Labour Organization, Social Reform, and the Genealogy of Development' (2018) 20(2) Journal of the History of International Law 145.

[211] ibid Daughton 86.

[212] ibid.

[213] Thomas (n 200).

[214] Myers (n 137) 378.

[215] ibid.

colonial governance, especially in the case of indirect rule.[216] Creating a policing structure was also consistent with the purpose of indirect rule i.e. to effectively govern a territory that was vast with lesser costs than would normally have come from military presence or bases.

Concerning the discussion above on labour regulation as a form of violence, policing within the interwar years was focused on wage labourers and their places of work. Colonial policing of labour as Martin Thomas observes was 'the perennial feature and an increasingly prominent facet of police work in the inter-war years'.[217] As part of the policing of waged labour in the mandated territories, penal sanctions on breach of contract were common, particularly used as a tactic by the British in their mandated territories in the 1920s.[218] As Archibong and Obikili observe, a primary way of imposing forced labour was through those who were in breach of contract for 'voluntary' or prescribed labour for 'public works', who were penalized and then convicted to labour as a punishment.[219] Thus, in a cycle of violence, any resistance to forced labour on public works was penalized and translated into another form of forced labour, i.e. convict labour which was also exempt from ban through the Forced Labor Convention 1930.[220] In French West African mandates these ranged from summary punishments and fines to threats to life.[221] During the 1930s and 1940s, as part of the forced labour scheme for the '*office du niger* cotton production scheme' in French Controlled Sudan policing became central to forced labour.[222] Workers were rounded up and relocated in curfew compounds, women workers were threatened that their husbands would be beaten if the work was unsatisfactory.[223] The response at the international level, along with the native labour convention of 1930, was the parallel Abolition of Penal Sanction (Indigenous Workers) Conventions 1930 that did not outright ban penal sanctions for 'breach of contract' but put it under a temporally vague 'abolished progressively and as soon as possible'.[224]

[216] Martin Thomas (eds), *The French Colonial Mind: Violence, Military Encounters, and Colonialism* (University of Nebraska Press 2012).
[217] ibid, see also broadly, Martin Thomas, *Violence and Colonial Order: Police, Workers and Protest in the European Colonial Empires, 1918-1940* (CUP 2012).
[218] Belinda Archibong and Nonso Obikili, 'Convict Labor and the Costs of Colonial Infrastructure: Evidence from Prisons in British Nigeria, 1920-1938' [Columbia Academic Commons 2019] < https://academiccommons.columbia.edu/doi/10.7916/d8-4vg2-a380> accessed June,2020.
[219] ibid 9.
[220] ibid 3.
[221] Thomas (n 217).
[222] ibid 451.
[223] ibid.
[224] Rodriguez Pinero (n 184).

The relationship between the ILO and the Permanent Mandate Commission not only reflects the interconnectedness of League experts from different departments but also shows how the civilizing mission of the League mandate system was part of other technical, depoliticized organizations of the League. The policy created by the network of experts sitting in different committees and creating international regulatory codes discussed above were part of and lead to the systemic violence through the creation of forced labour regimes, policing and punishment to enforce labour contracts. At the same time, the ideas of 'economic peace', the emphasis on policing for the maintenance of public order with the reduction of fortifications and the place of mandated territories as a trust of civilization created the rhetoric that administrative violence was part of mandate governance rather than a result of the League's vision of international global order.

b. Conclusion

The internationalisation of dialogical interplay through the League of Nations was realized in two specific ways. Firstly, it institutionalized the 'internationalism' of the 19th Century that was based on a hierarchical ladder of civilization. Secondly, the violence that was part of the administrative structures deployed by the League of Nations through indirect rule and Article 23 of the League of Nation Covenant, International Cooperation was implicitly a part of what is understood as a peaceful global legal order. Ideas about 'social progress' and 'wellbeing' of natives within this period of international cooperation along with separate codification of the Laws of War within the 20th Century essentially rendered any other mode of violence external to the operation of international law.

More importantly, another aspect of this shift from the state's administrative imperial network to the international organization as a network was the de-politicization of trans-boundary relations from the civilization rhetoric which was part of 'international society' as it was being conceived at the time. This particular depoliticization was not just useful in making a very specific idea of morals of international society universal, but also in the assimilation of native thought into modernity. The seeds of this thought were already present in the British encounter with the caste elite leaders in the subcontinent, where indirect governance developed through 'pluralism', 'moral universality' and tutelage of the British to 'help' natives climb the ladder of civilization. These forms of thinking, which were tied to the conceptualization of territory as a trust by the British in the subcontinent,

were seen also in their interaction with the African communities where tax, revenue collection, labour, and the building of public works were all part of their extractive presence in the colonies. In this chapter, we see these techniques of indirect rule applied to the territory of Africa with, in the case of South Africa, a mix of settler colonial logic of also creating separate racialized regimes – one for settlers and the other for natives.

The forms of indirect rule became the common mode of imperial presence which was particularly informed by a shift in defining territory in the Berlin Conference. This set the stage for imperial cooperation which led to, as I show, the League of Nations. In the interwar era, the dialogical interplay thus moved into the realm of 'international', where transnationalism became a separate field of inquiry from the civilization logic and imperatives of international law post-1945. Colonial administrators became, through the international organization, experts of these fields of inquiry with their objectivity justified through the separation of social from political, thus hiding their civilization logics through the discourse of social progress. Further, the techniques of indirect rule advocated and used by colonial administrators, now experts, also became part of mandated rule over colonies through the League of Nations' imperial internationalism. In the course of a history of dialogical interplay, this internationalisation through an international organization became the foundation for post-1945 development in the *dialogical interplay* between international law and local state 'experts' in postcolonial countries.

Chapter 6. The 'multilateralisation' of *dialogical interplay*: decolonisation, World Bank and local state expert network

I. Introduction

In the previous chapter I examined the League of Nations and its network of experts. The League established a form of colonial governance primarily through international experts and introduced techniques of governance which had long lasting effects. These continuities particularly of international administration thus, particularly, in the 20th Century, carried on more fluidly into the post-Second World War era. However, the outbreak of the Second World War also precipitated a greater move towards political decolonisation which pushed for independence from colonial control towards self-governing territories. Throughout the 20th Century many of these former colonies calcified as 'nation states' equal in their political legitimacy to 'former' imperial states. In this chapter, I focus on how the dialogical interplay between networks and international law, specifically international expert networks, became complimented by local expert rule from *within* newly formed states. This expert rule from within, which I term a multilateralisation of the dialogical interplay between networks and international law, internalised the notion of the modern nation state through the development agenda. This resulted in the state itself perpetrating violence on its most marginalized populations – particularly by making them the subject of 'modernisation'. This violence is explained as structural violence of dispossession of land, dislocation, worsening socio-economic conditions and erasure of local knowledge in the name of modernisation and development.

In the first part of this chapter, I explore how this internalisation of the 'modern nation state' was a project both of Allied forces and of some 'decolonised' nation states pushing for development as a paradigm for a new global order. Part of this process of 'internalisation', or a multilateralisation of the logics of the modern nation state through 'development', was through the further entrenchment of the 'formal' separation between transnational forces and the political and military matters of the world. The state, now conceived as an independent unit of the international global order, could through its sovereignty engage in transnational legal orders such as the cross-regional work of international organizations and their trans-

governmental policy networks. This particular separation between transnational and international within the orthodox literature at the time did not consider the role of networked actors within international organizations as part of an underlying discourse of civilization in the form of development.

In the second section, I look at how we can conceptualize the local expert network by understanding how the internalisation of development thinking was done through the early years of the World Bank policy on training and development projects in countries of the global south. Through this process, we see the international legal order that separated the transnational from the international, by relying on the language of 'technical expertise', as an apolitical one geared towards universal progress for those on the path to development. It is here we see how the World Bank's practice of deploying political reform under the guise of universalising concepts of 'development' is a process of changing the nation state or making it from the inside out as a linear scale for states to step into modernity.

In the last section, I explore the violence we can see as a consequence of local expert networks. Like the previous form of network, particularly the League of Nations' expert rule, within the second half of the 20th Century local experts also replicated developmental logics and policies that led to systemic forms of violence, such as the erasure of economic and social protection. Furthermore, while policing, disarmament and economic peace were the ideological rhetoric that hid the violence of League experts, in this era, the same function was performed by the association of 'development' with human security from the very early inception of the idea of development in the 1950s to its explicit policy-driven literature during the cold war period and then intensifying in the post 9/11 era. Particularly through the militarization of postcolonial 'nation states', state failure was associated with under-development, lack of governance and control, and internal conflict. These elements of international law where war and 'development' were interlinked separated the violence perpetuated through systemic policies on governing of nation state pushed by trans-governmental policy networks invisible and unaccountable.

II. Decolonisation and the 'new political order'

a. The United Nations: from the League to Bretton Woods

The formation of the United Nations as a new international organization was charged with similar questions. This time, however, questions of sovereignty as a universal principle and the political global order were reformulated to address the 'failings' of its former model.

According to Guy Fiti Sinclair, the remaking of international organizations after the Second World War was driven also by the decolonisation movements in colonies.[1] Specifically from the politically active natives that had become part of the 20th Century 'modernisation' of colonies under the Mandates had now become political actors in their own right.[2] A challenge European rule as guides for the globe was made more prominently within the Indian subcontinent.[3] Jawaharlal Nehru of the Indian subcontinent presented a vision of internationalism where the same power dynamic of the League of Nations should not be reproduced. In Nehru's writing as well as among prominent political natives of the Indian subcontinent, the ousting of British imperial rule had been a common thread since the establishment of the Indian National Congress. For Nehru specifically, the 'English were self-professed democrats acting like fascists'.[4]

In the more European orthodox historical account of the formation of the United Nations, the making of the United Nations is attributed directly and exclusively to the lessons learnt from the 'failure' of the League of Nations to keep the peace.[5] As Luard writes 'a new organization would symbolise the birth of a new world, in which peace would now, at last, be more effectively safeguarded'.[6] Winston Churchill of Britain and Franklin Roosevelt of the United States of America drafted separate proposals during 1943 suggesting a security collective of Europe and Asia as separate regional blocs. Both put forward, at the same time, a post-war system where power would be wielded exclusively by great powers.[7]

[1] Guy Fiti Sinclair 'Towards a Postcolonial Genealogy of International Organizations Law' (2018) 31(4) Leiden Journal of International Law 841.
[2] Sunil Amrith and Glenda Sluga 'New Histories of the United Nations' (2008) 19(3) Journal of World History 251.
[3] Mark Mazower, *No Enchanted Place: The End of Empire and Ideological Origins of United Nations* (Princeton University Press 2013).
[4] ibid 167.
[5] James David Armstrong, *The Rise of the International Organisation: A Short History* (Macmillan International Higher Education 1982).
[6] Evan Luard, *A History of the United Nations: The Years of Western Domination 1945–55* (New York: St. Martin's Press 1982).
[7] Thomas G Weiss and Sam Daws, *The Oxford Handbook on the United Nations* (OUP 2018).

Roosevelt, in the same year, organized a conference of the United Nation Commission for Europe, comprising of the United States, Britain, the Soviet Union and its European allies including France. In the same year at Moscow, it was agreed by the Allied powers, specifically the Soviet Union, Britain and the United States, that some form of permanent post-war organization was to be made which led to a conference in Washington in 1944. The initial plans for a renewed post-war organization were made in two major conferences, one in Dumbarton Oaks, Washington and the second in San Francisco.

More importantly, in both conferences, especially Dumbarton Oaks, the conceptual link between peace and economic wellbeing was reiterated in much the same way as had been done by the architects of the League of Nations after World War I. In the Dumbarton Oaks proposals social and economic matters were to hold as part of the functions of the new organization, led by subsidiary bodies, as had been done under the League.[8] In the historical narrative, what has been referred to as the League's successful legacy, its economic and social i.e. technical organizations were always meant to reform and in fact intensify.[9] Within both the League's depoliticization of technical functions carried out by experts, and the intellectual literature on the 'successful' legacy of the League, the adoption of the same thinking about technical departments was a logical step. This carrying forward of the League's social and economic departmental work, whether through its Economic Council, the International Labor Organization or its social and humanitarian department, was built on the same assumptions about the technical functions being 'apolitical' and led by 'experts' for the good of all mankind.

In this period, intensifying and creating an international organization that was subsidiary to and independent from the United Nations became a sign for global victors of the Second World War of taking the 'best' of the League era internationalism and improving on it. Apart from the Economic and Social Organization of the League which was reformulated into the independent Economic and Social Council linked to the United Nations, other bodies to which the United Nations economic and social mandate was connected included, during the early post-Second World War years, the International Bank for Reconstruction (IBFR), the International Monetary Fund (IMF), and the International Trade Organization, which never

[8] ibid 140.
[9] ibid.

came into operation.[10] Other bodies, no longer identified as departments but as 'specialised agencies', 'funds' and 'subsidiary organizations' included the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund, the Office of the High Commissioner for Refugees, the Industrial Development Organization (UNIDO) and the UN Development Program (UNDP).[11]

Most of these organizations were reformulations of the League's technical departments and the work done by those departments. UNESCO was a successor of the League's international institute of cooperation department.[12] The statistical data collected as part of the League's economic and financial organization was carried over to the IMF.[13] Luis Pauly notes that the United Nations economic bodies i.e. the IBFR and IMF were direct successors to the League's economic and finance departments.[14]

The administrators and colonial officers of the League of Nations also moved onto the United Nations and the international financial institutions.[15] Apart from Sinclair's thesis on how developmental thinking can be traced to the early formation of the International Labor Organization,[16] the continuities of colonial and postcolonial expertise are described, particularly, in literature tracing the roots of technical experts on agrarian reforms.[17] In particular, as Christophe Bonneuil observes, 1930's settlement schemes for agrarian reform, specifically by the British in Sudan and the French in West Sudan which were meant to create agricultural 'experiments' to irrigate land to harvest cotton, continued in different forms after World War II.[18] Knowledge systems specifically concerning medicine, public health and agriculture came to be consolidated under the domain of colonial experts and later the

[10] ibid 142.
[11] Leland Goodrich, 'From League of Nations to United Nations' (1947) 1(1) International Organization 3.
[12] ibid 19.
[13] Louis W. Pauly, 'The League of Nations and the foreshadowing of the International Monetary Fund' (1996) 201 Essays in International Finance, Princeton University 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2173443> < accessed June 2020.
[14] ibid 3.
[15] Joseph M Hodge, 'British Colonial Expertise, Post-Colonial Careering and the Early History of International Development' (2010) 8(1) Journal of European History 24. Hodge also notes how League administrators and colonial officers moved their career onto to World Bank Experts. See also, Eva-Maria Muschik, 'The Art of Chameleon Politics: From Colonial Servant to International Development Expert' (2018) 9(2) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 219.
[16] Sinclair (n 1).
[17] Christophe Bonneuil, 'Development as Experiment: Science and State Building in Late Colonial and Postcolonial Africa, 1930-1970' (2000) 15 Osiris 258.
[18] ibid 261-262.

Developmental experts influenced largely by American notions of the interdependency of technology and development.[19]

The continent of Africa was always, as Bonneuil notes, termed as 'experiment', 'laboratory' and 'tests'.[20] For the British, French and Dutch, Africa, as well as South East Asia, was a place of extending developmental thinking to continue earlier extractions for improving standards of living in the metropoles,[21] towards a post-war reconstruction through continuing development in these regions.[22] As Hodge and Holt point out, the 1940s and 1950s saw a strong attempt by the British, Portuguese and French to keep a hold of their colonial territories through the logic of developmental training to justify its continued presence, for example the British colonial office saw an increase in recruiting technical experts in various areas such as agriculture, engineering, education, town planning, forestry and medicine between 1945 and 1952.[23]

One of the more direct continuities has been mentioned by Clavin specifically concerning the economic and financial organizations of the League and the United Nations.[24] Clavin notes the same network of 'experts' that occupied positions at the economic and financial organizations of the League were key contributors to the formation of organizations of the United Nations on economic and social matters. Specifically, the economic view on free markets, the gold standard and economic standardization policies that were part of the economic and financial departments' agendas were led by economists influenced by a liberal economic philosophy.[25]

[19] For the specific link between Development and Technology through the American 'developmental state', see for example Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (Routledge 2007). See also, Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (CUP 2015).

[20] Bonneuil (n 17), see also specifically on the link between development and scientific knowledge as part of imperial governance of Africa from 1870-1950, Helen Tilley, *Africa as a Living Laboratory: Empire, Development, and the Problem of Scientific Knowledge, 1870-1950* (University of Chicago Press 2011).

[21] Fredrick Cooper and Randall Packard (eds), *International Development and the Social Sciences: Essays on the History and Politics of Knowledge* (University of California Press 1997).

[22] Nicholas J White, 'Reconstructing Europe through Rejuvenating Empire: The British, French, and Dutch Experiences Compared' (2011) 210(6) Past and Present 211.

[23] Jospeph Hodge, Gerald Hödl and Martina Kopf (eds), *Developing Africa: Concepts and Practices in Twentieth-Century Colonialism* (Manchester University Press 2016).

[24] Patricia Clavin, *Securing the World Economy: The Reinvention of the League of Nations, 1920-1946* (OUP 2013).

[25] ibid 19. Clavin points out the connection between Alexander Loveday and the Rockefeller foundation. Loveday, a statistician and former director of the League Economic and Financial Organization as well as the transit and communication department, along with the support of the Oxford trained economist Edward

Referring to the 'experts' that collaborated in Princeton University with Alexander Loveday and the Rockefeller foundation as the Princeton Mission, Clavin shows how this group pushed for more autonomous, permanent international economic organizations.[26] In this sense, the commitment of this group was to the 'internationalism' or the structure of policy making through expert networks the League had formulated rather than the idea of an international organization itself.

This became evident later on when Loveday, along with the United States Governor Herbert Lehman, became a practical advisor in the intergovernmental negotiations that began between the 'Big Four' in 1943. They advised specifically on 'the problems involved in making any international organization work successfully'.[27] In plans for creating new international organizations associated with the United Nations' mission for economic and social wellbeing, the Relief and Rehabilitation Administration (UNRRA) leaned their plans heavily on the League's experience of how to recruit staff and manage relations through the intergovernmental representatives as well as experts.[28] This 'entangled history between the League's expert networks and the United Nations became evident'[29] when the UNRRA established its Headquarters at the *Palais des Nations* and Arthur Salter, the former head and main architect of the League's Economic and Financial Organization (EFO) departments, was made one of the deputy directors.[30]

As an organization that relied on 'expert' networks employed and working together across departments of the organization under common ideological aims, the United Nations'

Albert Radice of the New Fabian Research Bureau, his colleagues at the EFO and the US-based Rockefeller Foundation sought to lay a detailed plan in 1939 on what kind of global economic system was to be incorporated in the new political order. In his focus on post-war 'reconstruction of the global economic system', Loveday found support from the US State Department and Treasury. Even as the League's fall was seen to be evident nearing the end of the Second World War, with the support of the US State Department and the Rockefeller Foundation, the League's economic and financial department was moved to Princeton University. It was at Princeton that Loveday developed ideas for a reformulation of international economic organizations in the early United Nations era.

[26] ibid 268-274. The United States State department and the Rockefeller Foundation put in the monetary expense to create the School of Politics and Economic at Princeton where EFO of the League held its offices. Both these institutions in particular shared Loveday's vision of the League's achievement in the making of 'an international civil service' and gave full backing to the 'preservation of these groups with their records and traditions' that would 'add greatly to the usefulness of whatever type of international organization the world may adopt once the war is over'.

[27] ibid.

[28] ibid.

[29] ibid.

[30] ibid.

approach was similar to that of the League of Nations. Underpinning 'expertise' were notions of social progress and development, tied to technology and later on – as I will show – the nation state itself. The very structure of networked actors as policy experts was not only carried forward as a success of the League but it also further entrenched the separation between the 'political' and the 'technical' aspects of world order. This neat separation, as I have argued in the previous chapter, hid both the underlying politics of expert networks as well as its working as norm making actors. It is also in this way my thesis on how the League and international organizations operate as forms of network and differ from literature within the international organization/institutional law.[31] Specifically, I emphasise how the actors within these organizations operate as norm producing networks and how these actors derive their legitimacy from international legal norms just as they actively advance the international legal discourse.

b. International law post-1945: nation state and sovereignty

The culmination of the economic and financial organizations' efforts and its remnants in the Princeton Mission was, Clavin argues, partly what brought the Bretton Woods institutions forward. For the argument made in this chapter of the thesis and in the thesis more broadly, however, it shows the continuity between the expert network structure of the League and its departments and the United Nations and its 'sister' Bretton Woods institutions. Thus, the Bretton Woods institutes, when seen as the result of the continuous work of the League's economic and financial organizations transferred to Princeton University, as Clavin points out, they also represented the rhetoric of a 'better global order of peace'.[32] Additionally, like Cooper[33] and Binnoeul,[34] amongst others,[35] note, the expertise-dominated presence in other forms of knowledge, which were demarcated as social, technical and bureaucratic

[31] On this, I have explained in the introduction how my thesis differs from and adds to conversations on international organizations and their role in state/nation building. Also see for this literature, José E Alvarez, 'International Organizations and the Rule of Law: Challenges Ahead' in Chia-Jui Cheng (eds), *A New International Legal Order Ahead* (Brill 2016); Sinclair (n 16) Ole Jacob Sending, 'Afterword: International Organizations and Technologies of Statehood' (2020) 11(1) Humanity: An International Journal of Human Rights and Humanitarianism 139; Jan Klabbers, 'The Paradox of International Institutional Law' (2008) 5 Int'l Org L Rev 151.

[32] Clavin (n 24).

[33] Cooper (n 21).

[34] Binnoeul (n 17).

[35] Hodge, Hold and Kopf (n 23).

knowledge, continued its earlier iterations in the interwar era – and before the 1920s in different forms – into post-Second World War colonial developmental policies.

The early foundations of Bretton Woods institutions can also be understood within the context of the influence of American 'development' thinking. As Eric Helliener points out, the World Bank was initially in the form of the first draft for an inter-American bank.[36] Helleiner argues that the foundations of Bretton Woods need to be read through the presence of South countries, specifically and most importantly Latin American officials along with Chinese, Indian and Eastern European officials.[37] This support was primarily based on the state-led development agenda that a new international economic order could bring to these respective countries.[38]

The formulation of the nation state as part of the international legal order was already being constructed throughout the 19th Century specifically, as Luis Eslava,[39] amongst others,[40] points out, through the Latin American contribution to the international legal order in the 20th Century. Since the decolonisation movement emerged in the 1920s, Latin American countries already had the experience of consolidating themselves in forms of statehood.[41] As Eslava, Obregón and Lorca point out, the Latin American influence on the international legal order was primarily through the creation of a 'nation building' imperative which brought heterogeneous and plural communities, already divided in accordance to varying degrees of socio-economic hierarchies, into a single unitary consciousness.[42] The building of nation states in Latin America was thus pushed through a homogenized hierarchical view where the interests of the region were based on what the political and technocratic elite of Latin American states thought was required for its progress.[43] The progress of a nation state, then, translated to the development of its 'rural' areas, a push for modernisation through industrial

[36] Eric Helleiner, *Forgotten Foundations of Bretton Woods: International Development and the Making of Postwar Order* (Corenll University Press 2018).
[37] ibid 13.
[38] ibid 19.
[39] Luis Eslava, 'The Developmental State', in Jochen von Bernstorff and Philipp Dann (eds) *The Battle for International Law: South-North Perspectives on the Decolonization Era,* (OUP 2019).
[40] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (CUP 2014); Liliana Obregón, 'Between Civilisation and Barbarism: Creole Interventions in International Law' (2007) 27 Third World Quarterly 815.
[41] Eslava (n 39).
[42] Eslava (n 39); Lorca (n 40); Obregón (n 40). In Latin American context, this included black, indigenous and mestizo communities, all subsumed under what Obregon calls a 'creole legal consciousness'.
[43] Barbara Weinstein, *The Color of Modernity: São Paulo and the Making of Race and Nation in Brazil* (Duke University Press 2015).Weinstein points out how regional elite consciousness, in Brazil for example, translated development to 'whiteness'.

and technological 'advancement' in urban areas, ultimately defining and in many ways following suit to previous colonial notions of 'progress' attached to 'modernity' implemented in the continent of Africa.[44]

The imagination of modernity thus in this sense attached to nation building had its corollary roots in Latin American intervention and contribution to the international legal order as part of global governance of the old empire,[45] also translated into its backing and support for the Inter-American Bank and later the Bretton Woods institution.[46] As I have mentioned earlier, even after the decolonisation movement after the Second World War, developmental thinking effectively continued to be a form of imperial capitalization by former empires.[47] This also translated in the juridification of the nation state in the international legal order through the United Nations and its Charter. Specifically, while territorial sovereignty was articulated through a separation from intervention through the idea of Article 2(4),[48] 'territorial integrity', it was also contingent on the creation of a nation state free from 'colonial rule' towards self-government as per Article 73.[49] Article 73 can be understood, as Pedersen[50] amongst others has argued,[51] as a continuation of the trusteeship system of the League of Nations mandate system.

Unequivocally, Article 73 also connects the development to a self-government by an oversight of colonial powers to 'develop a self-government, to take due account of the political aspiration of people, and to assist them in the development of their free political institutions, according to the particular circumstances of each territory and its people and their varying stages of development'.[52] Additionally, the trustee could use their discretion to 'promote constructive measures of development with a view of practical achievement of social, economic, and scientific purposes'.[53] The new trusteeship system thus became attached to

[44] Arturo Almandoz, *Modernization, Urbanization and Development in Latin America, 1900s-2000s* (Routledge 2014).
[45] Willam Roger Louis and Ronald Robinson, 'The Imperialism of Decolonization' (1994) 22 The Journal of Imperial and Commonwealth History 462.
[46] Helleneir (n 36).
[47] Hodge, Hold and Kopf (n 23).
[48] Charter of the United Nations (San Francisco, 26 June 1945), 3 Bevans 1153, 59 Stat. 1031, T.S. No. 993, entered into force 24 Oct. 1945, Article 2(4).
[49] M Terretta, "We Had Been Fooled into Thinking That the UN Watches over the Entire World": Human Rights, UN Trust Territories, and Africa's Decolonization' (2012) 34(2) Human Rights Quarterly, 329; ibid Article 73
[50] Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP 2015).
[51] Terretta (n 49).
[52] UN Charter (n 48) Art 73b.
[53] ibid Art 73d.

ideas of development, self-rule and nation state becoming the means through which former empires could continue to justify their developmentist policies led by technical experts as part of the new international legal order.[54]

However, decolonisation did not always follow the simple map of trustee control given over to 'newly formed' postcolonial states. It included decolonisation movements and the culmination of these movements being the UNGA resolution 1514 declaration on the independence of colonial countries and peoples in 1960. Nonetheless, the nation state that emerged from this trusteeship system and decolonisation movements during the 1950s and 1960s formed or, as Rose Parfitt describes, 'reproduced' the understanding of a particular 'nation state' which was territorially bounded, embedded within notions of development led by modernity.[55]

Throughout these processes, it is important to emphasise how important the idea of expert networks as apolitical experts of objective knowledge was to the formation as well as the internalisation of 'development' and 'modernity' as part of nation state and nation building. These ideas, as I have shown, had already germinated in the internationalisation of colonial administration.[56] This was not limited to just economics but also other social fields.[57] In specifically the case of development thinking, James Ferguson describes the apoliticization through scientific expertise as the 'anti-politics' machine.[58] The political and economic separation to formulate the universal 'expert' in itself was not a novel iteration of post-war global order as Sundhya Pahuja,[59] amongst others,[60] has suggested, even if it was explicitly

[54] Jessica Lynne Pearson, 'Defending Empire at the United Nations: The Politics of International Colonial Oversight in the Era of Decolonisation' (2017) 45(3) The Journal of Imperial and Commonwealth History 525. This also translated into justifications of colonialism, defence of continued influence and presence within colonies by former empires especially through the reporting system of the trusteeship system.

[55] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019).

[56] David Scott, 'Colonial Governmentality' in Jonathan Xavier Inda (ed), *Anthropologies of Modernity: Foucault, governmentality life* (Blackwell Publishing 2005), David Scott has referred to this as 'colonial governmentality' in the interwar period, where improvement of social life of colonial subjects was tied to rationalizing interventions in their 'old life'.

[57] See for example, Bonneuil (n 776); Suman Seth, 'Putting Knowledge in Its Place: Science, Colonialism, and the Postcolonial' (2009) 12(4) Postcolonial Studies 373.

[58] James Ferguson, *The Anti-Politics Machine "Development" and Bureaucratic Power in Lesot*ho (University of Minnesota Press 1994); Joseph Morgan Hodge, *Triumph of the Expert. Agrarian Doctrines of Development and the Legacies of British Colonialism* (Ohio University Press 2007).

[59] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011).

[60] David Kennedy, 'The Forgotten Politics of International Governance' (2001) 2 European Human Rights Law Review 117. See also more broadly expert knowledge as the basis of shaping up of global political

reiterated within the Charter of the World Bank. Within the formation of the League, economics and other social fields were already presented and embedded within the administration of the global order as depolitical even while they operated under assumptions of hierarchical world order.[61]

The universalization of 'modernity' as part of development discourse materialized into a 'developmental state' and especially within postcolonial states became another reason for the dominance of network actors. Since it is here the resistance to dominant networks turns to internalised adherence to modernity, development and technology as part of a new frame for nation building and state nationalism, which as I show, reflects a similar imperial notion as colonial expertise rather than a counter to it.

III. The multilateralisation of the *dialogical interplay*

a. The new language of development: building the state from inside out

In 1944, The United Nations Monetary and Financial Conference hosted by the United States treasury department brought together delegates from 44 Allied and associated nations in Argentina.[62] Driven mostly by the United States treasury department, the United Nations Relief and Rehabilitation Administration (UNRRA) and British Finance Ministry, along with the economists supported by the governments on both sides including John Maynard Keynes and Harry Baxter White, the conference was already driven by a clear Anglo- European Allied bloc.[63] The IMF and the World Bank are two economic institutions referred to as the Bretton Woods institutes as they were conceived in the Bretton Woods conference, New Hampshire United States in 1943–44, in negotiations between the big three victors of the Second World War as economic institutions of the new order.[64]

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economy; David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018).

[61] Daniel Gorman, *The Emergence of International Society in the 1920s* (CUP 2012).

[62] Ngaire Woods, 'Bretton Woods Institutions' in Sam Daws and Thomas G. Wiess (eds), *The Oxford Handbook on the United Nations* (OUP 2006).

[63] Ngaire Woods, *The Globalizers: The IMF, The World Bank, and their Borrowers* (Cornell University Press 2006).

[64] ibid.

The IMF, according to Article 1 of the Articles of Agreement, has the purpose to promote international monetary cooperation through consultation and collaboration, promote orderly and stable exchange arrangements among members, to assist in the establishment of a multilateral system of payments for international trade and to make resources of the IMF 'temporarily available' to members under adequate safeguards to correct their balance of payments problems 'without resorting to measures destructive of national or international prosperity'.[65] These resources refer to loads provided by the IMF based on conditions for the member states it is loaning to that require structural changes to domestic social and economic policies.[66] The World Bank Group consists of five separate legal entities: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the international finance corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) regime and the International Centre for Settlement of Investment Disputes (ICSID).[67] The main IBRD and IDA, collectively referred to as the World Bank, are the two most important entities for my purposes here. The aim of IBRD as stipulated in Article 1 of its Articles of Agreement includes assisting in the reconstruction and development of the territories of member states by supporting the investment of capital for productive purposes, providing foreign investment capital through guarantees or participation in loans and other investments made by private investors, encouraging international investment, and arranging loans made for useful or urgent projects.[68] The World Bank essentially facilitates international investment to raise 'productivity, the standard of living and labour conditions' as well to assist a smooth transition from 'war to peace time'.[69]

As I have described in the last section, this notion of 'economic progress' as the hallmark of the modern state was internalised both as a necessity within the context of decolonisation in the political consciousness of the newly independent states and as part of the external structure of the global order which created norms on what constitutes as a universal, modern state. Even then, within a conference where some decolonised states were invited as political 'equals', the discourse on what the international economic order would

[65] International Monetary Fund, 'Articles of Association of International Monetary Fund' 1944 (United Nations Monetary and Financial Conference, Bretton Woods).
[66] Daniel Bradlow, 'International Law and the Operations of the International Financial Institutions' in Daniel Bradlow and David Hunter (eds), *International Financial Institutions and International Law* (Kluwer Press 2010).
[67] ibid 4.
[68] World Bank Group, 'International Bank for Reconstruction and Development Articles of Agreement' (as amended 27 June 2012) section 1.
[69] Bradlow (n 66).

look like was predetermined and the global south sidelined.[70] The reason was not only because the conference was a result of a confluence between powerful states but because of the institutional structures through which the knowledge was made authoritative and given space by these powerful states.

The leading economic philosophy at the time, on which the Bretton Woods agreements were built, was driven by an amalgamation of actors who shared common ideologies on global economic order. Richard Peet[71] and Ngaire Woods describe the conference as a predetermined formality that was already set in motion through political discussion between the two big victors, the United States and Britain.[72] Thus, the ideological conversations about economic knowledge that would be the basis of governing the new international order were driven by economists from both sides, i.e. the United States and Britain, who were based in universities with a shared school of thought i.e. a liberal economic model of opening exports, increasing investment and creating a single clearing union for a centralized loan-based system.[73] In relation to the context of a new global order, through the influence of the United States developmental agenda, the World Bank was tied inextricably to liberal economic policies and to United States foreign policy, particularly in relation to its competition with the USSR (Union of Soviet Socialist Republics) for control over newly decolonised states.[74] Walt Rostow, the economic historian and Policy Planning Staff at the State Department of the United States, placed the burden of the West to show that the 'under-developed nations can move successfully through the preconditions into a well- established take off in the orbit of the democratic world' against the threat of 'communist hopes'.[75]

The Bretton Woods institutions were placed as part of the 'twin pillar' of the 'new international order' post-World War II,[76] the other one being the United Nations. The underlying assumption of the international financial institutions was the same as the interwar period's emphasis on economic cooperation. This is also not surprising since the

[70] Helleneir (n 36). As Helleneir points out, this was despite the fact there was some backing, specifically from Latin American countries, India and China, on the question of development as part of the new economic liberal order.
[71] Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (Zed Books Ltd 2009).
[72] Woods (n 63).
[73] ibid 20.
[74] Michele Alacevich, *The Political Economy of the World Bank:The Early Years* (The World Bank Publications 2008).
[75] ibid 3.
[76] Pahuja (n 59).

presence and influence of the remnants of League of Nations economic and financial organization experts with the backing of the United States and the United Kingdom were instrumental to the formulation of the reformed global financial bodies. As Richard Peet observes, Bretton Woods was built on a 'classic notion that trade prevents war and brings about peace'.[77] Of course, this notion also has a juridical foundation beyond Peet's observation that it drew on the public international law jurisprudence on the separation between war and peace. This went back to the League of Nations' depoliticization of economics and other social fields under its technical departments, where peace was associated with the technical functions of international institutions.

With the formation of the Bretton Woods entities as not just subsidiary bodies but as separate institutions, two central ideas of the new global order were being materialized – even as they had germinated since the 1900's role of colonial administrators.[78] Firstly, that the economic development of the world was to be a separate 'universal' ideal, even more so than social and humanitarian concerns. This was crystallized, reflecting the entrenchment of the classic notion that economic progress needed to be 'depolitical'. Secondly, that the institutions set up would train and facilitate in the development of the rest of world.

Hence, economic progress, both intellectually and through the process of the institutional structure of experts carried forward by the League of Nations technical departments, became a discipline of rational, calculated and universal science for peaceful global progress. As Pahuja points out, even if the split between economics and politics was part of classic liberal economics, the defining moment of this split in this era was that it was 'juridified' and 'constitutionalised' within the international economic order as it was formulated at the time.[79] Specifically, the World Bank's constitution incorporates this particular division by stating in section 5(b) of the World Bank's constitution:

> the bank shall make arrangements to ensure that the proceeds of any loans are used of the purposes for which the loan was granted, with due attention to considerations of economy and efficiency, and without regard to political or other non-economic considerations[80]

[77] Peet (n 63).
[78] For example I have already mentioned this in relation to Africa; Hodge and Hold (n 23), Cooper (n 21) and Bonnieul (n 17).
[79] Pahuja (n 59).
[80] World Bank Group, 'International Bank for Reconstruction and Development Articles of Agreement' as amended 27 June 2012 section 5(b).

In section 10, this non-political character of the World Bank is further explained with specific reference to its 'officers', going further to indicate the nature of its staff employed in a non-political manner:

> The Bank and its officers shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political characters of the member or members concerned. Only economic considerations shall be relevant to their decisions.[81]

The depoliticization of experts thus was embedded within the specific notion of staffing and officers within the World Bank policies.

b. Multilateralisation from within local experts and the 'developmental state'

In understanding how technical 'experts', in the case of the Bretton Woods Institute mostly economists, drive policy change and implementation that is, in fact, political in nature, the structure that gives them this authority is just as materially significant as the disciplinary split between politics and economics created by intellectual thought on economics at the time. As an international body, the World Bank and the IMF both operate in a similar blueprint as far as its institutional structure is concerned. The governing body of the World Bank, specifically the IBRD, according to the Articles of Agreement section 1 consists of the board of governors, executive directors, president and staff employed under the executive directors.[82] Member countries of the organization, also known as donor countries, are countries that control the decisions on policy, membership and aims of the Bank through their positions on the board of governors and as executive directors.[83] The Bank decision making process in the board of governors and by executive directors is determined by voting power, which is set through 'quotas' related to the amount of gold, dollar reserve, foreign trade i.e. economic might set at the time of formation of the organization.[84]

[81] ibid Articles of Agreement, s 10.

[82] ibid Articles of Agreement s 1.

[83] Bradlow (n 66).

[84] ibid 9.

As it stood at the beginning of the post-war reconstruction efforts, and led by the two economic and political powers at the time, the United States and the United Kingdom held the most quotas and thus the most decision making powers at the highest level of the Bank.[85]

The president, appointed by the board of governors, is responsible for hiring 'staff' and, as subsection 5(c) of the Articles of Agreements elaborates, 'the President, officers and staff, in the discharge of their office, owe their duty entirely to the bank and no other authority. The members shall remember the international character of this duty, and shall refrain from all attempts to influence any of them in the discharge of their duties'.[86] In the next subsection 5(d), the Articles further state, 'in appointing the officers and staff the President shall, subject to the paramount importance of securing the highest standards of efficiency and of technical competence, pay due regard to the importance of recruiting personnel on as wide a geographical basis as possible'.[87]

These sections highlight not just the nature of the 'expert' that makes up the staff and officers of the Bank but also the nature of the Bank as a technical/apolitical institution. The loyalty of the 'experts' is to the Bank's authority, and Article 8.01 of the General Conditions for Loans, for example, states that 'The rights and obligations of the Bank and the Loan Parties under the Legal Agreements shall be valid and enforceable in accordance with their terms notwithstanding the law of any state or political subdivision thereof to the contrary',[88] in other words, the agreements have no governing law other than the agreement itself. This self-legitimizing position and authority that the Bank retains can be seen as consistent with how it embodies the work done by the officers, which are generally referred to as experts. The 'duty' of these experts is to the Bank's authority, which is autonomous from any state or political entity, thereby in a similar vein making these experts' authority autonomous in its authority and legitimacy.

While this governing 'clause' is meant to reaffirm the apolitical and technical nature of the Bank, its work and its staff, it only creates a self-legitimizing position of authority, and the authority through which economic progress can be defined is to be directed through its

[85] ibid.
[86] ibid Articles of Agreement, s 5(c).
[87] ibid, Articles of Associations, s 5(d).
[88] World Bank Group, 'International Bank for Reconstruction and Development: General Conditions for Loans updated 14 July 2018 Art 8.0.1.

staff across the globe. This is important because the Bank presents itself as an international institution with its headquarters in Washington, but it is structured in a more layered way, through regional offices under section 10(a)[89] and further mandate provided in section 9(b), which states that 'the bank may establish into country offices in the territories of any member state'.[90]

Apart from regional staff appointed by a/the president in charge of the regions, the staff members are meant to be experts on specific committees of the Bank and are meant to advise member countries on the appraisal of economic and social conditions, regulations and 'development' needed to satisfy the requirements of a loan for 'development' projects. In the first decade of the Bank, the IBRD Report 1952–53 laid out the expert committees, Bank staff that were sent out in different members states as part of the Bank's mission to survey 'programming units for under-developed' members of the Bank.[91] This particular vocabulary of 'under-developed' was the vernacular within which the Bank operated at the time in an attempt to make economic 'change' scientific and objective, impartial to any historical, political, contingent factor.

More importantly, this vocabulary was very much tied inextricably to the 'authority' and 'technical' knowledge of the experts sent to these 'under-developed' territories of member states. In the Report of 1952–53, the then president of the Bank, Eugene Black, describes the work of expert missions as operating within a specific framework or agenda of the Bank reaching out from 'village to cabinet council' visiting nearly 54 member countries.[92] An aim of these missions was 'to make broad economic assessments, to consult on major policies affecting development, to study individual projects and examine the possibility of making loans for them, to assist with the problems of dealing with management, engineering and finance arising in the course of project execution, to help in the mobilization of local capital, and to gain knowledge of or consult upon many other problems of concern to the bank and its members'.[93] The experts sent to these countries were not only given a broader aim of

[89] World Bank Group (n 80) Articles of Agreement, s 10(a).
[90] ibid Articles of Agreement, s 9(b).
[91] World Bank Group, 'International Bank for Reconstruction and Development 8th Annual Report, 1952-1953' 1 January 1953 Washington D.C: World Bank Group.
[92] ibid 9.
[93] ibid.

how they were guides to these ‘under-developed’ countries but were sent as producers of knowledge and having authority to ‘programme’ institutions within these territories.

Eugene Black’s reasons why these terms should be used and understood can be surmised by his description of the culture of ‘under-developed’ states. He states that ‘many cultures have placed a low value on material advance and some have regarded it incompatible with the desired objectives of the society and the individual’.[94] The cultural difference was not the only aspect that made up ‘development’ as an axiomatic claim for ‘progress’, there was an implicit lack of recognition of colonial rule and its violence. For example Black further says, in the World Bank Annual Report of 1952–53, that both ‘climate and topography’ have placed limits on growth, as ‘centres of technological innovation and capital resources’,[95] entrenching further the assumption that economic and social exploitation of the colonized was not a significant factor contributing to their position as being ‘lesser’ in economic terms as measured by the World Bank. By broadening economic development to other ‘interconnecting aspects’ such as ‘political responsibility, education, training, weak administration’ Black further elaborates these as possible causes for ‘lack of development’.[96] These other aspects can be seen in ‘developed’ countries preceding economic growth hence, Black argues, included ‘ideas of evolution of man, society and the physical world’.[97]

Beyond this particular analysis of cultural and geographical difference associated as a hierarchy between the global north which is ‘developed’ and the south which is ‘under-developed’, is how the World Bank staff were mobilized as its agent of change and guidance to help strengthen member states’ institutions from within. Not only were the staff deployed across the globe based on the division between developed and under-developed, thereby operating as transnational advisors/experts to country members, but they also became responsible for incorporating change from within the countries themselves. The two primary ways included advising on not just projects, i.e. the viability of loans, but also the building of governmental institutions that could consistently sustain the advice and periodic oversight by the World Bank experts i.e. governmental programming units as part of the member states’ governmental structure. These had been established under the advice of the experts

[94] ibid.
[95] ibid.
[96] ibid.
[97] ibid, 9-10.

at the time in the form of the National Bank for Development in the case of Brazil, the National Planning Council in Burma, the Planning Commission in India, to name a few.[98]

This change from within was done to create institutional units that would coordinate and align their policy making decisions with the World Bank. The second way in which experts incorporated, or rather the Bank exported, the idea of expertise to align governmental policies from within was to initiate training programmes for the government service personnel from member states who were sent to Washington to be trained and equipped in the knowledge of 'development' as understood by the Bank.[99] Until 1953, government staff from 34 member countries including Pakistan, Iraq, Nicaragua, China, Thailand, the Philippines and the Dominican Republic were admitted to the general training programme in Bank offices at Washington DC.[100] In 1956, to appraise economic problems under the Bank's operation, Eugene Black established a development institute in Washington DC for the training of developing-countries officials[101] with funding from the Rockefeller Foundation and the Ford Foundation.[102]

This particular approach of the Bank replicated and continued how the League of Nations' expertise in the form of travelling missions[103] would gather data and coordinate with native governmental administrations to enact change. It relied also on a more prevalent approach utilized as a part of network governance as early as the late 1800s and throughout the interwar period; that of indirect rule. Expertise was embedded both structurally, in the form of programming units, and personally, from within the member states, by those trained in the 'expert' knowledge at the World Bank and stationed back in their home countries to usher in a new age of development for their countries, having strong parallels to the indirect rule of imperial administrators. In this case, however, the expert knowledge is exported and universalised from within the territories of postcolonial states as the global economic order is controlled solely through the institutional networked structure of World Bank experts. The

[98] ibid 11.
[99] ibid.
[100] ibid 43.
[101] ibid.
[102] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (OUP 2017).
[103] For an example of these travelling missions see for example, Stephen Legg, 'Of Scales, Networks and Assemblages: The League of Nations Apparatus and the Scalar Sovereignty of the Government of India' (2009) 34(2) Transactions of the Institute of British Geographers 234.

institutional programming units that are made part of the government retain the state's sovereignty, but are guided and trained in the vernacular of expert knowledge produced by the World Bank in Washington DC.

The expert knowledge was conceived and concentrated among a handful of think tanks, universities and bankers and was supported/made prominent by the United States treasury department as the 'right' economic thought through which 'peace' and 'progress' could be made. The World Bank, in a similar vein to the League of Nations technical department, could be seen as a network organization whose governance across boundaries was made possible through its network of experts. However, with the emphasis on economics being separated as the science of progress, as a completely autonomous authority spear-headed by the Bretton Woods institutions and the decolonisation of former colonial territories, expert networks need to be involved in 'programming' how states 'could' do better. This 'programming', as the World Bank's initial reports refer to it,[104] was based on creating a regulatory structure, in both an economic and an administrative sense, shaped from within that could allow for the exportation and internalisation of the knowledge with continuing oversight from the World Bank's expert network. So even if the political autonomy is retained, the training given to government staff of the member states positioned within these governmental units established ensures that indirectly the knowledge of the World Bank prevails in guiding and directing socio-economic ideas concerning 'development' and economic 'progress'.

This period of post-world war II network of experts has to be seen in conjunction with the material connections to remnants of its predecessor i.e. the League of Nations. Specifically, these connections have to do with how the institutional structure operates through expert staff employed and the underlying set of principles on 'development' and 'progress' based on urbanization and technology underpinned by modernity under which these experts hold the authority they claim to hold. In understanding the international financial institutions as part of this long trajectory we can also see that what was different about the expert networks within this era was that they developed a technique for universalising vocabulary of authority in the face of resistant/dissident voices from the global south.

[104] World Bank Group (n 91).

This technique is the process of state formation through an indirect rule that was underpinned by the bureaucratisation of modernity from *within* the native populations through institutions. The advancement of international law or legal norms specifically on what constitutes a nation state, in this era, came from *within*, through native elite 'nation' builders trained as part of the expert network of developmental bodies, most notably, the World Bank. In this respect, the dialogical interplay between networks and international law in this era can be described as a multilateralisation of the *dialogical interplay*, where technocratic elites from within the nation states are part of expert networks even as they build their networks outside of the expertise of the World Bank while advancing knowledge on what constitutes sovereignty in international law.[105]

IV. The violence of local experts of the World Bank

My approach towards governance by the World Bank and its experts, particularly in the violence they perpetuated, is rooted more in how the experts themselves constructed knowledge about violence, violence as part of the modernisation of the state and the nexus between development and security that underpins these two ways of looking at the violence of the expert network in this age. This particular approach to looking at the violence of experts in the World Bank can also offer another explanation as to how the resistance from the global south was limited in its aim. As I explain below, the violence of experts is deeply embedded in the logic of modernity being internalised in the formation of the modern state during the decolonising period. At the most fundamental level, the resistance from the global south did not challenge the notion of modernity as growth. Thus, there was also no challenge to the violence embedded within the construction of the modern nation state by the local technocrats who internalised developmental thinking trained through the World Bank experts.

Within the League of Nations' formulation of technical departments and experts as well as the post-war, underlying frameworks from which the expert network derived its authority

[105] In the context of crystallization of the nation state in the new liberal order, this particular notion of state actors, technocrats, local experts providing and pushing international law has also been argued recently by Luis Eslava and Sundhya Pahuja,'The State and International Law: A Reading from the Global South' (2020) [2020] 11(1) Humanity: An International Journal of Human Rights and Humanitarianism. In the case of Latin America, see for example, Lorca (n 40) and Obregon (n 40).

was the shift from the economic, humanitarian and social fields to the separation between war and peace. The definitions of violent means were restricted within this separation, where peace meant economics and apolitical humanitarianism while political automatically referred to 'war' and included the normative narrow definition of violence. These frameworks reiterated and reified the dominant understandings of sovereignty that hid the material reality of the violence of expert policy

a. Modernisation as coloniality: the violence of the developmental state

Development and economic growth were embedded into the state construction process through international institutions such as the World Bank, IMF and even the United Nations General Assembly(UNGA). Priya Gupta aptly observes, within the global legal structure those who participate and decide the conditions of the flow of investment and its aims, called 'development' agents, were primarily statesmen in the early period of post-1945 world order.[106]

Developmental thought of the time was in line with not just the thinking that progress in the form of industrialization was needed in under-developed countries to 'catch up' with the powerful states, but also the particular structure through which development thinking operated. This structure, as I have identified through this thesis broadly, and specifically concerning the economic institutions is of a network of actors producing, implementing and informing the knowledge of various aspects of the international legal order. Reflected most aptly in the importance attached to both the economic experts and the profession of the engineer who would undertake the infrastructure project,[107] developmental thinking of 'progress' was already internalised through the expert networks of the World Bank in the state formation process of the postcolonial state.

The form of developmental thinking on which the anti-imperial aims of the Bandung conference itself were set had already been a part of thinking about the modern state and its governmental/bureaucratic structure the World Bank experts had devised for newly decolonised states within the first ten years of its inception.

[106] Priya S Gupta, 'From Statesmen to Technocrats to Financiers' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP 2017).

[107] Dipesh Chakrabarty, 'The Legacies of Bandung' in Christopher J Lee (ed), *Making a World after Empire: The Bandung Moment and Its Political Afterlives* (Ohio University Press).

Even if the values of what development meant were different for the statesmen of the global south, the framework under which they had accepted the linear social progression linked to industrialization, technology and infrastructure was ultimately the same as the World Bank. This particular bureaucratisation of modernity[108] in the postcolonial state was processed through the experts of the World Bank, internalised and accepted as part of a narrative of emancipation within the governments of the global south participating in Bandung.

Understanding developmental thinking as social progress that is linear in time and place, i.e. the idea that, with industry and technology, bureaucratisation is a natural course of progress of mankind, can be seen as similar to the logic of imperial governance where the colonization was justified as bringing civilization and modernity to the natives. It is particularly this allusion of developmental thinking to imperial governance that forms a critique of the resistance post decolonisation. Rajagopal for example argues the assumptions of developmental thinking understood by the third world lawyers and statesmen essentially were different in terms of 'the role of the state in the economy' i.e. planned versus the market.[109] However, in both cases, the goal and direction of development was always to 'modernise the primitives'.[110] Ashis Nandy also puts this particular critique of the modern state form in similar terms referring to political statesmen as 'indigenous elites', who 'acquired control over the state apparatus' and 'quickly learnt to seek legitimacy in a native version of the civilizing mission and sought to establish a similar colonial relationship between the state and society' by 'finding justifications in various theories of modernisation floating around in the post-World War 2 period'.[111]

Examples of the internalisation of 'modernity' as progress materialized in the case of newly decolonised states between 1945 and the 1960s came in waves of, especially in the

[108] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World*. (Princeton University Press 2011). This particular conceptualization of developmental thinking as adopted by the global south leaders is also described by Gupta (n 106) and Chakrabarty (n 107) in similar ways. My emphasis in this analysis is the role played specifically by experts of the World Bank in the internalisation of developmental thinking into the structures of the governments in the global south reinforcing the social pedagogy of modernity as growth thinking during the decolonisation process.

[109] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2003).

[110] Asish Nandy, 'State' in Wolfgang Sachs (ed), *Development dictionary, The: A Guide to Knowledge as Power* (Orient Blackswan 1997).

[111] ibid 264.

1960s, a particular kind of nationalism and nation building.[112] While being anti-colonial in its stand against neo-colonial dependency, these forms of nationalisms, in most cases, only reiterated particular modernity into its developmentalist projects. These reiterations focused on particular visions of nationalist self-development which hinged on technological advancement, reformation of the rural landscape both in agrarian reform and resource capitalization to transform the village as an asset to 'modernity' led change of the nation.

There was already a precedent for these developmentalist projects by colonial powers who were unwilling to let go of their colonies.[113] The orthodox understanding, then, is reiterated through the World Bank's experts being the agents of development who can both help devise economic policies to eradicate poverty and, in the earlier years, support governments in developmental projects.

From the 1950s, the processes of the modernisation of developing countries involved the displacement and appropriation of land from people settled within rural areas. This forced resettlement which dominated as a technique of imperial rule even during the decolonisation process was embedded in a logic of the developmentalist state. Even at the level of the United Nations, rural development became part of the United Nations' strategy for development aimed at 'community development'. Part of the United Nations' development strategy, 'industrialization, diversification and production of highly productive agriculture sector', meant the creation of infrastructures like damns for large scale irrigation systems.[114] These highly industrialized conceptions of agriculture industry led to these massive projects substituting and submerging fertile lands along with the forced resettlement of population.[115]

This was reinforced within the thinking of the World Bank itself at the ideological level and through expert thinking, as well as through its involvement in the funding of large scale infrastructural programmes. The World Bank's two major economic experts in the 1950s to 1960s, Paul Rosentien-Rodan and Dragoslav Armovic, followed a very specific neo- classical model of economic development whereby domestic economies could become 'self-

[112] Vijay Prashad terms this forms of Nationalism as internationalist nationalism, particularly during the 1960s, Vijay Prashad, *The Darker Nations: A People's History of the Third World* (The New Press 2008)
[113] As I have mentioned before, these emerged particularly in African colonies and territories held by the British, Portuguese and French.
[114] United Nations General Assembly Resolution, United Nations Development Decade: A program for international economic cooperation (adopted 19 Dec 1961) UNGA A/RES/1710 (XVI).
[115] Christian Gerlach, *Extremely Violent Societies: Mass Violence in the Twentieth-century World* (CUP 2010).

sustaining' through industrialized sectoral reform.[116] Within this model, the older agricultural techniques used as a means of sustenance by farmers in the 'under-developed' model were backwards and only through advanced, industrialized sectors in the economy were fully developed.[117] This particular thinking explained the project funding in the early years on larger projects like dams and mining industries. The concept of rural development or community development that was part of the United Nations' development strategy in the 1950s was aligned with the World Bank's idea of self-sustaining development lending for industrialization. This also became how British, French and Portuguese, through foreign aid and expert opinion in the international forums such as the UN and World Bank, incorporated 'villagization' within their territories that were under the process of decolonisation.[118]

The effects of this 'villagization' that was led through heavy scaled industrialization projects included mass displacement, uprooting communities from their land which was their sources of and means of production, turning them into wage earners in development projects.[119] Christian Gerlach observes how this could be seen as a form of 'sustainable violence' as it causes social stratification in communities placed in these settlements often lacking basic needs.[120] Citing particularly the case of Mozambique in the 1960s, Gerlach observes the social stratification between the older generations who were separated from a generational sense of identity attached to the socio-economic attachment to their lands that they were displaced from and the younger generations who grew up in these settlements without access to basic education and everyday needs which drove them towards insurgency against the controlling government.[121] Development settlements became, then, increasingly ascribed to places of violence that needed further reform through even broader structural adjustment policies in the later years of the World Bank's neoliberal reform.[122] Yet, the possibility that the violence of displacement and villagization itself could not be what

[116] For the influence of linear developmental thinking within the World Bank's earlier economic expert thinking see, Mazower (n 3), specifically for Paul Rodan's perspective see, Paul Rosenstein-Rodan, 'International Aid for Underdeveloped Countries' (1961) 43(2) The Review of Economics and Statistics 107.
[117] Gupta (n 106).
[118] Gerlach (n 115).
[119] ibid 177.
[120] ibid 208.
[121] ibid.
[122] Simon Springer, 'The Violence of Neoliberalism' in Karen Birch, Simon Springer and Julie MacLeavy (eds), *Handbook of Neoliberalism* (Routledge 2015).

caused the social forms of violence out of basic depravities is not considered within developmental policies in earlier decades or recent thinking on violence and development.[123]

The imposition of modernity on the 'village' also made it, in the context of the post- world war politics, a site of the 'cold war'.[124] In this context of Soviet-led communism in lock with American liberal capitalism, newly formed nation states were grounds for a new era of global politics.[125] Newly decolonised nation states that participated in the anti- colonial global economic order, however, had to build their form of internationalist nationalism underpinned by socialism(s).[126] Nonetheless, the native elite political class' imagination of 'village' as the centre point of 'development' or rather 'under- development'[127] then manifested in different ways than its colonial counterparts mentioned above.[128]

For example, as Prakash Kumar notes, in the case of India, Nehru's focal point of national 'progress' was the reformation of the village.[129] The Nehruvian vision of agrarian reform was in modernizing the peasants,[130] by national support for crop yield competitions to facilitate the growth of a 'progressive farmer'.[131] In postcolonial India, already rich and

[123] ibid 403.

[124] Nicole Sackley, 'The Village as Cold War Site: Experts, Development, and the History of Rural Reconstruction' (2011) 6 Journal of Global History 481.

[125] Michael E Latham, 'The Cold War in the Third World, 1963–1975' in Melvyb P. Leffler and Odd Arne Westad (eds), *The Cambridge History of the Cold War Volume 2: Crises and Detente* (CUP 2010); Michael E Latham, *The Right Kind of Revolution: Modernization, Development, and US Foreign Policy from the Cold War to the Present* (Cornell University Press, 2011); Jeremy Friedman, *Shadow Cold War: The Sino-Soviet Competition for the Third World* (UNC Press book 2015).

[126] I refer to these as national socialisms particularly due to the different political and contextual roots of socialist thinking; the participants of the Bandung Conference had found common ground, whether secular socialist grounds (India) or Islamic socialism(s) or Egypt and Indonesia which were grounded in different approaches to Islamic socialism, see generally for the latter, M Rodinson, *'Marxism and the Muslim World'*, Zed Books 2015); Kevin W Fogg, 'Indonesian Islamic Socialism and Its South Asian Roots' (2019) 53(6) Modern Asian Studies 1736.

[127] Sackley (n 124).

[128] Nazih N Ayubi, 'Withered Socialism or Whether Socialism? The Radical Arab States as Populist-Corporatist Regimes' (1992) 13 Third World Quarterly 89. Ayubi observes that the Arab socialist regimes from the 1950s to 1960s should be seen more as 'populist-corporate' regimes consolidating economic and social power as a top down mechanism in favour of the capitalist elite structures rather than a horizontal redistributive way.

[129] Prakash Kumar, 'Modernization" and Agrarian Development in India, 1912–52' (2020) 79(3) The Journal of Asian Studies 633.

[130] Benjamin Siegel, 'Modernizing Peasants and "Master Farmers": All-India Crop Competitions and the Politics of Progressive Agriculture in Early Independent India' (2017) 37(1) Comparative Studies of South Asia, Africa and the Middle East 64.

[131] ibid 66

privileged 'master farmers', termed Krishi pandits, and ambitious landlords[132] were supported over sustenance farmers, creating a deeper economic divide in an already caste- and class-ridden history of land use and ownership in the subcontinent.[133] Beyond India, similar 'modernity'-led development projects for nation building made the rural a space for a newly decolonised nation's identity beyond its former imperial rulers. In the case of South Africa specifically, reserve policy, land segregation, villagization and rural policies were informed by colonial developmentalists, as argued by Laura Evans, to 'stamp out communism' and 'preserve white supremacy'.[134] In postcolonial Tanzania, the villagization process concerning fishing communities caused forced resettlements into industrialized cooperatives which had massive social and ecological effects.[135] Communities were forced to destroy their own homes, or have the police destroy them for the relocation to proceed; while local knowledge and practices were said to be preserved, the government paid lip service to this commitment in favour of large scale industrialization.[136]

As much as accepting the 'universal' conditions to be part of the international global order as a modern state was the price of political emancipation for the global south, the network of the World Bank experts and its underlying rationale of expertise to oversee and internalise modernity from within through governmental structures was an integral part of the formation of the postcolonial state. Echoing the critiques by Nandy and Rajagopal of the postcolonial state and its resistance to imperial powers, I see the formation of the postcolonial development state as being facilitated by expert networks who were the agents of development and modernity. This internalisation of modernity within the state was already part of the interwar years' conceptualization of expert rule over mandated territories.

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[132] This was often done through political patronage through what is described as 'caste vote banks' in lieu of developmental support from the state, see for example, Kanchan Chandra, *Why Ethnic Parties Succeed: The Political Mobilization of Castes in India:Patronage and Ethnic Head Counts in Indi*a (CUP 2004).

[133] For the history of caste led hierarchy of land ownership see chapter 3. For more recent work exploring caste and development in the context of post-colonial state formation see, Jeffrey Witsoe, *Democracy against Development: Lower-Caste Politics and Political Modernity in Postcolonial India* (University of Chicago Press 2013). Mukal Sharma has also described this intertwining of caste, development, modernity with market economics of the postcolonial India as 'new casteism' where the 'backward' need to be controlled for nation building, see for example, Mukal Sharma, *Caste and Nature: Dalits and Indian Environmental Policies* (OUP 2017). See also generally, Alpa Shah and others, *Ground Down by Growth: Tribe, Caste, Class and Inequality in Twenty-First-Century India* (Pluto Press 2018).

[134] Laura Evans, 'Contextualising Apartheid at the End of Empire: Repression, "Development" and the Bantustans' (2019) 47(2) Journal of Imperial and Commonwealth History 372.

[135] Marja-Lissa Swantz and Aili Mari Tripp, 'Development for 'Big Fish' or 'Small Fish': A Study of Contrasts in Tanzania's Fishing Sector' in Fredrique Apffel-Marglin and Stephen A Marglin (eds), *Decolonizing Knowledge: From Development to Dialogue* (Clarendon Press 1996).

[136] ibid 46-49

Within the decolonisation period then, the native 'elites', as both Rajagopal[137] and Nandy[138] point out, were already also being trained whether through the World Bank as technocrats or as political elites through the administrative positions given by former imperial powers in their domestic political structure. This internalisation of modernity-led development reproduced logics of socio-economic hierarchization based on who was considered 'progressive' and 'modern' within these postcolonial states thus continuing to exacerbate and hide structural violence based on class, caste, gender or race.[139]

The framework of knowledge ultimately within which resistance, and formation of resistant networks through contested spaces, in the decolonisation period took place were part of a framework through which the expert network of the empire justified and legitimised rule over the natives. Part of the reason why the resistance through these spaces did not sustain or were not radical enough was since they not only relied on a framework similar to expert networks of the World Bank but were a result of expert networks' internalisation of modernity in the state formation process.[140] International institutions did not just transform into legally autonomous actors within this period of resistance.[141] The forms and spaces within which resistance operated were already part of imperial governance through the expert network before the establishment of the World Bank.

The presidency of Robert McNamara signified this particular shift in the economic philosophy of the League as criticisms of the World Bank and IMF's developmental thinking became prominent alongside the push from the third world on economic and social rights. In an address at a conference on development in Columbia University, McNamara described the development agenda as 'beyond the measure of growth in total output and provide practical yardsticks of change in the other economic, social, moral dimensions of the modernizing

[137] Rajagopal (n 109).
[138] Nandy (n 110).
[139] Such as those which I have mentioned above, specifically, Wienstien (n 43); Witsoe (n 133); Sharma (n 133); Evans (n 134).
[140] While these questions as to how or why resistance did not sustain through networks remains outside the scope of this thesis, I am in broad agreement with de Sousa Santos' critique of anti-colonial resistance within frameworks of modernity as having limited emancipatory potential. For example in Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (CUP 2002).
[141] Rajagopal (n 109).

project'.[142] Modernisation here imbued as part of development thinking was framed in terms of poverty alleviation and the 'disparity' associated not with the political contestation 'between rich countries and poor countries', but as a broader part of what McNamara viewed as the 'framework of the nations whole program'.[143] Gathii argues this move to a 'basic needs' vocabulary used by the World Bank at this point was an attempt to 'salvage the promises of modernisation or the myth of development'.[144]

The Bank's lending intensified with the view that governments should trust in the eventual benefit coming from the market alone. Lending from the Bank between 1968 and 1973 focused on socio-economic projects of farming, development of rural housing and development, all of which failed as specific conditions, particularly land ownership, were not taken into account.[145] This resulted in most of the loans being given only to richer landowners and farmers thereby increasing the gap between poorer and richer populations.[146] The approach of project-based lending became broader, but also attaching conditionality, that required the borrowing country to make structural changes to social domestic policies.[147]

The call for a 'social' character in the international financial institutions utilized the push for rights to embed within its expert knowledge broader areas of the social and economic concerns for what makes a state 'developed'. In the 1980s this became the vocabulary of 'good governance' underlined by the logic of a specific economic philosophy: neoliberalism. Neoliberal economic philosophy reflected a counter movement against the resistance movements of the 1960s and 1970s from the third world as well as the human rights activism on socio-economic rights. Experts who made neoliberalism the underlying economic thought within the World Bank came to be known as the 'Washington Consensus'[148] because

[142] John L. Maddux, and Robert S McNamara, *The Development Philosophy of Robert S. McNamara*, (Washington D.C. World Bank Group 1981) 13.
[143] ibid.
[144] James Thuo Gathii, 'Human Rights, the World Bank and the Washington Consensus: 1949- 1999' (2000) 94(5-8) Proceedings of the American Society of International Law Annual Meeting 144.
[145] ibid 144.
[146] ibid 145.
[147] ibid.
[148] The word Washington Consensus was coined by John Williamson, John Williamson, 'What Washington Means by Policy Reform' in Johnn Williamson (eds), *Latin American adjustment: How much has happened* (Peterson Institute for International Economics 1990).

they were based in Washington DC and included technical experts from the IMF, World Bank, US treasury, Federal reserve and think tanks based in the United States.[149] The Washington Consensus was essentially taking the neoliberal idea of making the market the loci of society where consumer rights were the be all and end all of the economic progress.[150] Within this paradigm, the World Bank projects were based on the deregulation of public sectors, prioritisation of the liberalization of the economy and the protection of private investors.[151] Another movement adhering to neoliberalism, as Quin Slobodian observes, was being done by experts from Geneva based in the General Agreement on Trade and Tariff (GATT), later named the World Trade Organization (WTO), who followed the tradition of Hayekian intellectual thought.[152] Focusing primarily on civil and political rights, structural reforms and lending conditions of the World Bank and the IMF in this period, the conception of rights were defined through the total and absolute priority to economic freedom as opposed to socio-economic rights.[153]

At the outset of the decolonisation process, continued differentiation between the newly decolonised state and old powers was not just a term of acceptance for political emancipation. Expert networks were constantly at the vanguard of shaping what a modern state looks like. Thus, as I observed in the previous sections of this chapter, this was at the level of not just shaping governmental structures and units of development but also training and internalizing modernity within the state technocrats and political elites. Experts became agents of modernity sent to under-developed states to make the state modern. Expert networks as agents of modernity both construct the vocabulary of differentiation and expand their geographical reach into the places they deem require their expertise and then shape the state through the process of internalisation of their knowledge as an authority.

This particular way in which expert rule was and is justified continued to define how the difference between under-developed and developed was maintained as an imperial logic

[149] Woods (n 63); Peet (n 71).
[150] ibid Woods 47.
[151] ibid.
[152] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018).
[153] Woods (n 63).

seen through the history of international as Anthony Anghie points out.[154] As 'governance' came to the forefront, the language of difference took a broader social context. Thus descriptions of filling the 'governance' gap,[155] 'poorer countries'[156] became associated with the World Bank's broader agenda towards project lending and policy-based reform for countries in the global south. These broader structural reforms that became part of the 1980s and 1990s work of the Bank were proved to be devastating on the poorer countries.[157]

b. Securitisation/development nexus: a cycle of socio-economic violence

In the era of the League of Nations, the rhetoric was one of economic progress pushed through the mandate governance, the League's technical organizations and it's overseeing expert committees as a preventative measure against another war. In the post-World War II era, the rhetoric on economic progress shifted to policies of the states and the stability of their internal security, emphasising that constant regulation of economic principles from the international to the national could help in avoiding a situation of internal and external war.[158] This literature, as Simon Springer points out, follows the assumption that war results from poverty and poverty result from poor economic policies.[159]

In the context of the Second World War, in many ways similar to discourses after the First World War, the aims and purpose of an international global order revolved around preventing the 'scourge of war'. Thus the United Nations as an organization described its own broader role as the prevention of war and hence the designation of the General Assembly and primarily the Security Council as referees of any 'military' crises between independent nation states within conventional domains of war as understood in terms of

[154] See Anthony Anghie's argument on the imperial continuities reflected within international law through international institutions differentiation between 'developed' and 'underdeveloped', Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007).
[155] Gathii (n 144).
[156] For more recent policy of world bank on poverty reduction strategy see for example, Celine Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge-Cavendish 2011).
[157] Michel Chossudovsky, *The Globalization of Poverty and the New World Order* (Global Outlook 2003); David Harvey, *A Brief History of Neoliberalism* (OUP 2007).
[158] Robert L. Ayres, *Crime and Violence as Development Issues in Latin America and the Caribbean* (The World Bank Group 1998). This was particularly the case with Bretton Woods institutes, and particularly the World Bank literature on the role of economic progress.
[159] Springer (n 122).

public international law. These provisions were of course seen as not only the understandings of violence within the framework of the war and peace distinction but also as part of the militarization and military security of the world being an undertaking necessary for new world order.[160] Unlike the shift towards discourses of demilitarization and policing within mandated territories, the discourses shifted instead towards having a structure to control military aggression after the Second World War.[161]

In the wake of decolonisation as well, state sovereignty was also defined in terms of military control over a territory. Hersch Lauterpacht in his essay on international legal recognition writes that 'contest of arms' within the state needs to end in a state of 'permanency' for it to assert its right to recognition.[162] One specific aspect of state recognition, at the end of the Second World War and in the formation of the new international global order, was a 'sufficient degree of stability as expressed through the functioning of the government enjoying the habitual obedience of the bulk of the population'.[163] Within this particular condition, Lauterpacht elaborates how we can further test the internal stability of territory by asking the question,

> is it in military possession of the country? And also in a respectable condition of military defence against any probable attack?[164]

This quote suggests the importance of military control and militarization to determine a nation state's statehood and sovereignty.

The dominant understanding, then, was towards an intensification of military structures as a condition to statehood and sovereignty. Therefore, statehood and sovereignty in this context meant militarized control as well as the regulation of state military through the United Nations Security Council. At the same time, the distinction was drawn between 'military security' and thus 'war' and 'human security'.[165] For example, the United Nations Charter states:

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[160] Rama Mani and Richard Ponzio, 'Peaceful Settlement of Disputes and Conflict Prevention' in Sam Daws and Thomas Weiss (eds), *The Oxford Handbook on the United Nations* (OUP 2007).
[161] ibid 301.
[162] Hersch Lauterpacht, *Recognition in International Law* (CUP 2012).
[163] ibid 28.
[164] ibid.
[165] Richard Jolly, Paul Streeten, and Khadija Haq, Mahbub ul Haq (ed), *The UN and the Bretton Woods Institutions: New Challenges for the Twenty-first Century* (Basingstoke: Macmillan 1995).

> with a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations … all members pledge themselves to take joint and separate action in cooperation with the organization for the promoting of higher standards of living, full employment and conditions of economic and social progress and development.[166]

Attributing to this particular distinction between human security and economic stability for peace relations, the US secretary of state in his report to the President of the United States regarding the San Francisco conference stated:

> The Battle of peace has to be fought on two fronts. The first is the security front where victory spells freedom from fear. The second is the economic and social front where victory means freedom from want. Only victory on both fronts can assure the world of enduring peace.[167]

In this formulation of military security, the regulation of militarization was the province of principles of public international law and social, economic regulation to maintain human security were part of the regime of peace under the United Nations technical bodies and more importantly the Bretton Woods institutes. As I explained in the previous section, economics as a discipline both defined and led by the Bretton Woods institutes associated itself with ensuring 'human security' in the new world order to prevent conditions of violence from within the state.

Within this neater narrative of what violence meant as lack of human security and how international law itself only concerned inter-state violence, the material ways in which decolonisation processes of the postcolonial state stepping into modernity was violent were ignored at the international plane. The formation of the state at this time was rife with internal violence between anti-colonial and imperial governments. Martin Thomas observes this took the form of the separation of populations into specific territorial logic representing a dichotomy of security and insecurity.[168]

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[166] UN Chartner (n 48) Art 55.

[167] Edward Reilly Stettinius, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State*. No. 71. (US Government Printing Office 1945) cited in Richard, Streeten, Haq and Haq (n 165) 3.

[168] Martin Thomas, 'Violence, Insurgency, and the End of Empires' in Martin Thomas and Andrew Thompson (eds), *The Oxford Handbook of the Ends of Empire* (OUP 2018).

This separation took the form of forced displacement of populations justified through 'restoring security and as a prelude to economic development'.[169] In the context of imperial states resisting decolonial struggles, particularly the British and French in their colonies in Kenya and Algeria respectively, Mauritz Feichtinger observes that forced settlements were part of containment of resistance under the guise of the socio-economic task of 'development'.[170] Echoing Feichtinger, Jeronimo argues that the late colonial turn during the 1940s and 1950s as the decolonisation period was in effect saw colonial territories being turned into 'technical experimental spaces of development and security' by powerful states.[171] Jeronimo cites developmental plans carried out at the beginning of the 1950s in Portuguese-controlled territories in Africa. Specifically, Mozambique and Angola, as carrying similar objectives of controlling populations to counteract anti-colonial insurgency while framing these forced 'strategic settlements' in terms of economic development and modernisation of the villages.[172]

These forced settlements during the decade of decolonisation uprooted communities from their lands and operated not just to contain and control populations as a measure against anti-colonial armed resistance, but also, at the same time, as part of massive modernisation projects in the form of infrastructural development. The violence that was a routine part of counterinsurgency against anti-colonial resistance in the resettlement spaces, including detentions, torture, policing and lack of access to basic resources,[173] was a direct form of imperial violence from powerful states holding on to their territories. The broader techniques whereby these forms of violence became justified were part of ideological support at the international level by experts such as those of the World Bank.

Dam projects became a massive part of the effects of this kind of violence throughout the 1950s–1970s. The Cahora Bassa Dam in Mozambique, started in 1969 by the Portuguese government still in control of its colonies, forced 25,000 native Africans to leave their homes and settlement of one million new white settlers.[174] In Angola, the Cunene dam project followed a similar process of placing white Portuguese settlers and moving of

[169] ibid 504-505.
[170] Moritz Feichtinger, '"A Great Reformatory": Social Planning and Strategic Resettlement in Late Colonial Kenya and Algeria, 1952-63' (2017) 52(1) Journal of Contemporary History 45.
[171] Miguel Bendiera Jerónimo,'Repressive Developmentalism: Idioms, Repertoires and Trajectories in Late Colonialism' in Martin Thomas and Andrew Thompson (eds), *The Oxford Handbook of the Ends of Empire'* (OUP 2018).
[172] ibid 538-539.
[173] Thomas (n 168).
[174] Gerlach (n 115).

African natives into resettlement villages as reserve labour.[175] Throughout this period, the World Bank supported the Portuguese government through aid for the development of large infrastructural projects. This became a point of contestation in the United Nations as the United Nations decolonisation committee criticized the World Bank's lending to the Portuguese government as adversely affecting the decolonisation process.[176] The World Bank's then president responded that the Bank did not take into consideration political concerns, referring to its policy for staff in making decisions keeping in mind the division of political and economic interests.[177]

In later years rural natives were displaced and resettled in development spaces in similar and broader ways. In 1980s Egypt, for example, Timothy Mitchell notes how the tourist industry became a market for incorporating a similar technique of creating 'enclaves' of rural communities to cater for the creation of tourist spaces for foreigners.[178] The World Bank directed this particular investment into building infrastructure for tourist development and was led by former IMF staff and tourism minister Fau'd Sultan who slowly privatized hotel chains. Mitchell gives the example of the city of Luxor transformed into a tourist project under the direction of the World Bank experts.[179] The villages surrounding the city, including Gurna, suffered a massive displacement, devised and funded by the World Bank, the United States Agency for International Development (USAID) and the Egyptian government, as villagers were moved into overcrowded settlements. This also resulted in resistance in the form of riots met with police repression in 1998.[180]

The effect of World Bank expert policy in the resettlement of native populations through the support and reinforcement of private property acquisition by foreign investors intensified in the period of the World Bank's Washington Consensus. David Szoubloski, for example, notes how the World Bank funded and supported the Compina Minera Antnima (CMA), a mining company, in acquiring lands and drafting the policy of native relocation from their district of San Marcos in Peru starting in 1996.[181] The World Bank was amongst the chief

[175] ibid 204-205.
[176] Guy Fiti Sinclair, 'State Formation, Liberal Reform and the Growth of International Organizations' (2015) 26 European Journal of International Law 445.
[177] ibid.
[178] Timothy Mitchell, *Rule of Experts: Egypt, Techno-politics, Modernity* (University of California Press 2002).
[179] ibid 199.
[180] ibid 199-200.
[181] David Szablowski, *Transnational Law and Local Struggles: Mining, Communities and the World Bank* (Bloomsbury Publishing 2007).

lending body invested in the mining project, giving a policy for the CMA to follow given that the project would include the acquisition of land by the company.[182] While this policy dictated that a resettlement evaluation be carried out confirming how the livelihoods of the population being dislocated were affected, the policy was directed more towards the Company who was under no obligation to reveal anything related to the policy to the community in question.[183] This resulted in the company providing oral assurance that the people being displaced with their livelihoods based on the highlands of San Marco would be given employment and involved in other development projects that were later denied to have been part of the company's development projects in the area.[184]

The violence of developmental experts of the World Bank that gives aid and provides an informal structure of expert policy opinion as a way of support separates itself from the violence of these policies in question. Instead of direct, physical violence associated with imperial and colonial policing and control, the violence of the expertise is as Arturo Escobar describes it 'long lasting and structural'.[185] It is essentially based on 'displacement producing processes'[186] that contribute to creating social conditions for everyday violence that is borne out of lack of basic needs and resources provided to communities/populations that are displaced.[187] Escobar correctly observes that this development thinking is embedded within modernity itself which has 'naturalized displacement',[188] a displacement which restructures spaces and territories, attributing the result of deteriorating conditions as a fact of the place being violent.[189] This categorization of these spaces as violent ties into the need for expert knowledge on economics, more specifically neoliberal policies, to change these spaces. What is unique about the violence of development experts is that they base their need for intervention into 'violent' spaces without accepting the role that modernity-driven development policies have played in the social deterioration of these places.[190] In fact, unlike the link that Escobar[191] and Nandy[192] attribute to development and violence, World

[182] ibid 208.
[183] ibid.
[184] ibid 258.
[185] Arturo Escobar, 'Development, Violence and The New Imperial Order' (2004) 47(1) Development 15.
[186] ibid 15-16.
[187] Springer (n 122).
[188] Escobar (n 108).
[189] Simon Springer, 'Violence Sits in Places? Cultural Practice, Neoliberal Rationalism, and Virulent Imaginative Geographies' (2011) 30(2) Political Geography 90.
[190] Springer (n 122).
[191] Escobar (n 108).

Bank thinking on violence and development is narrowly framed as needing even more developmental intervention based on neoliberal policies.[193]

V. Conclusion

As I explained in the previous section, the link between human security and developmental thought was already deeply embedded in both the international law thinking and practices of imperial control during the decolonisation period by powerful states. The same practices were also reinforced through continued support, ideological and material in terms of aid and expertise, by the World Bank. Through the historical and contemporary examples of the violence of development thinking and the experts that have been norm producers of socio-economic governmental policies, my argument shows how the orthodox understanding of violence in military security terms renders the violence of expert networks invisible. Through this orthodox understanding, we ascribe the economic institutions, state actors and international actors the role of preventing human insecurity, thereby ignoring how it is precisely these actors and institutions whose governance might be producing the conditions for human insecurity.

The era of dialogical interplay in this chapter signifies one of the most contemporaneous forms of the *dialogical interplay* i.e. the nation state's local expertise formed through the 'universalising' logic of modernity and development. I have shown in particular how the crystallization of the modern nation state is predicated on the dialogical interplay between local expert networks and international legal jurisprudence on sovereignty. Here we also see the emergence and utilization of concepts like 'human security' linked to 'governance' to create graded formulations of a 'sovereign' state. More importantly, we see the violence of local expert networks re-inscribing familiar forms of violence characteristic of colonial governance i.e. population control, displacement, dispossession of land, exacerbating socio-economic conditions. In this era, we also see that a security/development nexus is crucial to understand the evolution of the dialogical interplay at the turn of the 21st Century, which I explore in the penultimate chapter of this thesis and where I also return to the very first case study of a network I mentioned in the introduction of this thesis i.e. Network Warfare.

[192] Ashis Nandy, 'Development and violence', in Ashis Nandy, *The Romance of the State and the Fate of Dissent in the tropics* (OUP 2003).
[193] Springer (n 122).

Chapter 7. The omnipresence of the *dialogical interplay*: the War on Terror, ungoverned territories and the US Special Operation Forces Network

I. Introduction

In this chapter, I discuss the rise of the Unites States Special Operations Forces network and its adoption of the concept of Network Warfare in post 9/11 counter terrorism policies and strategies. In particular, I look at how, through understanding the relationship between Network Warfare and territorial sovereignty as part of the dialogical interplay of international law, we can look at the Network Warfare as a culmination of dialogical interplay. As the most recent development of a network and static territory-centred understanding of international legal doctrines working in tandem, informed by and informing each other's expansion, Network Warfare goes beyond any form of a network which has come before it in terms of its violence where it is deployed. Not limited by either a forum of contestation or multiple interests, as in the case of previous networks including expert networks, and yet utilizing different networks to its advantage, the USSOF network acts as a hegemonic entity facilitated by technological advancements which further enhance its network capabilities to diminish spatial and temporal limitations.

Counter to prevailing attempts at accountability or juridical framing of its operations, I argue that as a form of the *dialogical interplay*, it represents how international law's static understandings facilitate, support and enable the expansion and operation of USSOF in the world. Network Warfare of the USSOF is both a continuation of and a 'new' form of imperial network, which can be described as an accruement of previous imperial networks. It creates its logic of differentiation based on a construction of the 'Muslim' as the other. It is enmeshed within secular modalities of political governance. It also operates through modes of indirect governance in the territories where it is present. It thus takes elements of each imperial network I have explored, embodying it in a military network contingent on technological superiority – at a level not present within previous networks – to operate as an omnipresent techno-hegemony in the post 9/11 global order.

In the next section, I explore the continuities of developmental violence, particularly the security/development nexus as it manifested pre and post 9/11. I show how conversations on both development and the War on Terror operated alongside each other. In both critical and traditional literature, conversations on sovereignty dictated the 'legality' of the War on Terror and its so called exceptional nature. This also marked a scholarly intervention within the discipline of international law particularly after the Iraq Invasion in 2003. At the same time, within military and security circles of nation states leading the charge of the War on Terror, specifically the United States, conversations remained isolated within a re-emergence of 'Westphalian sovereignty' military liberalism which is embedded within its nation-building approach to military purpose. While critical voices within the discipline of international law responded to the legal justification of the War on Terror, just war, and particularly broader conversation on *ius ad bellum* and *in bello* considerations concerning the actions of the United States forces, intelligence and private military contractors. The responses were limited to either 'illegality' or pointing out the inherent imperialism of international law being manifested yet again in the post 9/11 international legal order.

In the section three, I explain USOF and its operational wing i.e. Joint Special Operation Command (JSOC) as a form of network organization. I look at the intellectual roots of its influence through the RAND(Research and Development) organization's intellectual genesis of a military technique i.e. Network Warfare. Network Warfare is described as an emerging mode of conflict that employs network organization in warfare. Adoption of network organization in warfare entails the structuring of forces in the web like connections and nodes[1] and dispersing them across the globe. The networked force utilizes advance technological communications to facilitate the dispersed nodes to operate in synchronicity across distances. This allows the networked force to maintain a presence across different territories and conduct operations at any given point in time. The concept itself predates 9/11, and it was proposed as a way to understand how transnational criminal organizations and terrorist organizations operate and how to counter these organizations using networked forces of nation states. Following 9/11, it had gained influence within the United States

[1] Sangiovanni describes nodes as any part of an organization that can be a person, unit, actor that shares the same goal as the network as a whole and is organizationally connected to the network in some respect. Mette Eilstrup Sangiovanni, 'Transnational Networks and New Security Threats' (2005) 18(1) Cambridge Review of International Affairs 7.

counter terrorism policy, specifically its adoption by the Special Operation Forces that led to the formation of the Special Operation Forces Network and its operation wing i.e. JSOC.

Concerning territorial sovereignty, the adoption of Network Warfare has been discussed by its proponents, mostly the United States and its policy organizations such as RAND, as a way to protect nation state sovereignty against terrorist networks. This narrative of Network Warfare roots the relationship between Network Warfare and territorial sovereignty in military liberalism along with a reliance on the development/security nexus present before 9/11 as propagated within and through the World Bank and IMF.

I explain how we can see that Network Warfare is a new iteration of previous imperial forms of networks within an international legal order, which works in tandem with international law's static understanding, but is also new in its particular form. In the view of the Department of Defence(DOD) of the United States and Special Operations Command, the persistent presence of the network is necessary for territories that are termed as 'ungoverned' and where violent anti-enlightenment mindsets are likely to foster. These territories that are viewed as ungoverned, yet still formally sovereign, are termed as places where 'gaps' in governance exist that need to be filled by the presence of the Unites States Special Operation Forces Network.[2] This would then bring the territory of such a nation state to the standard of 'governance' that matches its sovereignty in the way envisioned by the United States. Rather than justification based on pre-emptive self-defence, Network Warfare relies instead on maintaining a persistent presence in territories categorized as 'ungoverned'. This persistent presence in territories allows the use of force at any given time without reference to self-defence justification as such. I suggest that it is this idea of the persistent presence of the network based on the dynamic of difference that reflects a more expansive and persistent state of imperial influence through persistent presence. Instead of actual conquest and occupation, imperial violence through Network Warfare is based on persistent presence in territories whose formal sovereignty is recognized, but who are differentiated as less than a complete sovereign due to a 'gap in governance'. This differentiation becomes the justification for the presence of the network which facilitates violence in these territories.

[2] Richard Rubright 'A Strategic Perspective on the Global SOF Network: Little Money, Unclear Ends, and Big Ideas' in Chuch Ricks (eds), *The Role of Global SOF Network in a Resource Constrained Environment* (JSOU Report 2013).

In the last section, I show how operational actions of these network forces, i.e. covert operations such as drone attacks, rendition, targeted killings and overt indirect violence, such as intelligence gathering, soft influence and presence, which have primarily been discussed in isolation to its network nature, are a direct result of and facilitated through the dialogical interplay that the Special Operation Forces Network has with a static understanding of international law. In this particular phase of the dialogical interplay, where the United States initiated an 'endless, everywhere' war against a non-territorial enemy,[3] the concept of 'ungoverned territories' and the facilitation of such territories to reach a certain stage of governance is another development within international legal thought which facilitates the expansion of the Special Operation Forces Network.

The violence manifested through this network can then be understood not in an isolationist and regime oriented way, but as an inherent part of how networks and international legal thinking operate together, reinforcing one another for specific purposes and for the benefit of the network in question. Focusing on primarily direct/indirect operations in Afghanistan post 9/11, I show how we can understand the Special Operation Forces (SOF) Network as a socio-political, military governance body whose actions – both direct and indirect – are part of its techno-hegemonic governance over the territories it occupies.

II. International law after 9/11 and the discourse of development

a. Security/development and postcolonial state

In the 1990s, the security/development nexus became a more formal, recognized issue within the World Bank and United Nations bodies. Mark Duffield's foundational work on drawing the link between development and war points out how international public policy networks and NGO's push for the post-conflict reconstruction of nation states to build them into liberal democracies and economies to prevent a presumed vacuum which would be filled with insecurity and violence thus leading to poverty.[4] Liberal economic policies were

[3] Derek Gregory, 'The Everywhere War' (2011) 177(3) The Geographical Journal 238.

[4] Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security* (Zed Books 2014); Mark Duffield, *Development, Security and Unending War: Governing the World of Peoples.* (Polity, 2007).

conflated with, as Duffield argues, 'peace', as developmental tools would reduce or prevent insecurity which would 'inherently' lead to violence.[5] As I have mentioned in the last chapter, the discourse of development and security was tied to the construction of violence of insecurity as an internal state matter determining its sovereignty and its stage of development.[6] In particular, the concept of security as part of the developmental discourse, as Thomas and Jeronimo point out, was part of the late colonial developmental policy to justify further control, surveillance and hold over colonial territories' anti-colonial resistance.[7] The Bretton Woods institute itself associated the concept of human security to development and progress, making it an essential element of its understanding of nation state and nation building.[8] The roots of the development/security nexus, therefore, are perhaps as long as the late colonial period, intertwined with indirect rule, colonial administrators and experts.

During the post-cold war era, the security/development nexus represented within organizations like the World Bank assumed a stronger role in signifying the importance of stages of development to 'human security', which itself was then linked to the 'sovereignty' of a state.[9] The World Bank pushed for developmental institutions to disrupt what they considered a 'conflict trap',[10] which is a 'vicious cycle' of under-development leading to conflict, conflict leading to missed opportunities of economic progress and development, resulting in further under-development.[11] Interrupting the conflict trap translates to the integration of crime prevention, post-conflict reconstruction, good governance and security reforms.[12]

In more recent literature and the fact the World Bank's turn towards the link between violence and development, greater emphasis is put on how specific policies for 'Fragile,

[5] ibid, Duffield 'Global Governance and New Wars' 34.
[6] Martin Thomas, 'Violence, Insurgency, and the End of Empires' in Martin Thomas and Andrew Thompson (eds), *The Oxford Handbook of the Ends of Empire* (OUP 2018); Miguel Bendiera Jerónimo,'Repressive Developmentalism: Idioms, Repertoires and Trajectories in Late Colonialism' in Martin Thomas and Andrew Thompson (eds) *The Oxford Handbook of the Ends of Empire* (OUP 2018).
[7] ibid, See generally both chapters point to this particular feature of Late Colonialism after the Second World War.
[8] Duffield (n 4) 'Global Governance and New Wars'.
[9] ibid 47.
[10] Paul Collier, *Breaking the Conflict Trap: Civil War and Development Policy* (World Bank Publications 2013).
[11] Lars Buur, Steffen Jensen and Finn Stepputat (eds), *The Security-Development Nexus Expressions of Sovereignty and Securitization in Southern Africa* (2007); Ken Menkhaus, 'Vicious Circles and the Security Development Nexus in Somalia' (2010) 4 Conflict, Security and Development 149.
[12] Collier (n 20) 4-5.

conflict ridden, and vulnerable' states may benefit from policies drafted by experts.[13] This language perpetuates and continues to link both post-conflict territories and states that are 'fragile' to lack of proper socio-economic, as well as political, direction.[14] Immediately after 9/11 this link between better 'development policies' and help to govern 'fragile' territories assumed a central role in the World Bank policy.[15] Soon after 9/11 for example, the president of the World Bank in a joint statement of the Fund stressed the need for greater involvement in low-income countries given the after effects of the 9/11 attack.[16] The attribution of 'fragile, conflict ridden and vulnerable state' became associated with or more susceptible to 'violent criminal and terrorist networks'.[17] This linking of insecurity in 'fragile' states to terrorist networks and the need for development became the universalised vocabulary of global governance through international institutions, NGOs and government aid received from the countries in the global north.[18]

However, this logic of global governance and influence over controlling the socio-economic direction of the states in the global south was not just the purview of international institutions like the World Bank anymore or only the state. The security/development nexus also translates into forms of militarization as a way to reassert nation-building development projects, thereby also reaffirming the position of a nation state as a 'sovereign' one as reflected within Lauterpacht's understanding of self-government and control through the military. As Guy Lamb observes, in postcolonial Namibia, development projects also came with militarization to incorporate them to protect the government from dissidents of the policies.[19] Development projects and policies were actively part of militarization in this case but also then assumed an ideological and political undertone, referred to, by some scholars, as military liberalism.[20] Military liberalism, in United States foreign policy, meant understanding military intervention and utilization as part of the liberal world order, where

[13] World Bank, *World Development Report 2011: Conflict, Security, and Development* (World Bank, 2011).
[14] ibid 51.
[15] ibid 73-96.
[16] Statement from the President, Note to Development Committee, DC2002-0007/Rev 1, April 12, 2002
[17] World Bank (n 13).
[18] See for example, Pénélope Larzillière, 'Production of Norms and Securitization in Development Policies: From "Human Security" to "Security Sector Reform' (2012) Open Archive HAL-IRD < https://hal.ird.fr/ird-00786652/> accessed June 2020.
[19] Guy Lamb, 'Militarasing Politics and Development: The Case of post-independence Namibia' in Lars Buur, Steffen Jensen and Finn Stepputat (eds), *The Security–Development Nexus: Expressions of Sovereignty and Securitization in Southern Africa* (HRSC Press 2007).
[20] Bryan Mabee, 'From "Liberal War" to "Liberal Militarism": United States Security Policy as the Promotion of Military Modernity' (2016) 2(3) Critical Military Studies 242.

states could be divided into liberal/civilized and illiberal/uncivilized.[21] In this particular understanding, illiberal states, i.e. those that did not adhere to ideological imperatives of the United States, were 'war prone' and those that were not had the civilizing mission to bring modernity to the illiberal states.[22] Post 9/11 development/security nexus constructions of weak or fragile states as harbours and havens for terrorism became a trope in orthodox military and security literature justifying further interventions and taking up imperialism as a worthy mantle for the United States' military interventions for 'nation building'.[23] Stewart Patrick notes that it was the World Bank's 'Governance Matters' dataset that became the gauge to determine which countries would be classified as 'weak' and/or 'fragile'.[24] The linking of terrorist havens to what were considered failed/weak states depended on various elements. All of which were categorized as having inadequate 'state capacity' and the 'will' to 'govern' in specific areas that corresponded with the list of countries compiled by the World Bank Governance Matters indicators.[25] These nation states, as per the United States, could have 'spillovers' due to the 'gaps' in their state capacity, some considered as 'ungoverned territories'.[26] Since the Reagan era and the broader global neoliberal reforms in the 1970s, the United States' national security policy has included in its 'threat' to national security 'extra-military' concerns, such as transnational crime and terrorism, pandemic diseases, energy security and climate threat.[27] The link between economic liberal development and military and national security, therefore, was already present before 9/11 and was broadly concerned with issues and countries beyond just the remit of a War on Terror campaign.

As Jacob Mundy observes, these arguments of 'ungoverned spaces' as 'safe havens for terrorists' had some currency before 9/11, but now had 'discursively exploded' after 9/11.[28]

[21] ibid 243.

[22] ibid.

[23] Michael Ignatieff, *Empire Lite: Nation Building in Bosnia, Kosovo, Afghanistan* (Random House 2003); Sebastian Mallaby, 'The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire' (2002) 18(2) Foreign Affairs 2.

[24] Stewart Patrick, 'Weak States and Global Threats: Fact or Fiction?' (2006) 29(2) Washington Quarterly 27; Stewart Patrick, '"Failed" States and Global Security: Empirical Questions and Policy Dilemmas' (2007) 9(4) International Studies Review 644.

[25] For a more critical look at this see also, Nehal Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order' in Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012).

[26] ibid 135-137.

[27] ibid.

[28] Jacob Mundy, 'Failed States, Ungoverned Areas, and Safe Havens' in Fonkem Achankeng (ed), *Nationalism and Intra-State Conflicts in the Postcolonial World* (Lexington Books 2015).

The shift could be seen thus in a similar way to a colonial continuity of indirect rule in the 20th Century finding its way in the cold war era where the 'third world' became the battleground for imperial power. As the cold war ended, sustaining neoliberal policies through interventionist logic based on 'state failure' and 'humanitarianism' gave rise to another reason for indirect rule by imperial powers. The post 9/11 discursive shift on 'global terrorism', as Mundy notes, could also be seen as a similar continuation of previous attempts at consolidating power through discourses of 'progress and development'.[29]

While 'governance gaps'did not always have to do with countries assumed to be 'terrorist safe havens',[30] due to its discursive basis it also produced a certain intensification of otherization based on the construction of religion i.e. islam.[31] Nonetheless, the United States' deployment of War on Terror also extended and included its pre 9/11 global political enemies, such as North Korea and Iran. The terrorization of development,[32] as Mundy terms it, also led to a gradual shift in the military liberalist approach to intervene and control the state building projects of 'weak/failing' states towards a 'remote' and 'discreet' approach reliant on new technologies to fight a global War on Terror and facilitate the ungoverned spaces.

b. Sovereignty, territory and the War on Terror

As this gradual shift is happening, new technologies, the use of 'humanitarian intervention,[33] and global economic pressure to reconfigure the economic order close to the United States' vision of a world free from global terrorism become the center point of discussion in international law.

[29] ibid 131.

[30] For example, Africa also became part of greater intervention through the establishment of a military presence for the prevention of 'terrorists' taking holds in African nation states. See for example, Adam Moore and James Walker, 'Tracing the US Military's Presence in Africa' (2016) 21(3) Geopolitics 686; Eriksson Baaz and Judith Verweijen , 'Confronting the Colonial: The (Re)Production of "African" Exceptionalism in Critical Security and Military Studies' (2018) 49(1-2) Security Dialogue 57.

[31] This translated into both international and local structuring of state surveillance, policing, and governance over construction of 'Muslim' through the discursive centrality of 'Islam' drawn to global terrorism. Behar Sadriu, 'Rebranding the War on Terror and Remaking Muslim Subjectivities' (2019) 35(4) East European Politics 433.

[32] Mundy (n 28).

[33] Gelijn Molier, 'Humanitarian Intervention and the Responsibility to Protect after 9/11' (2006) 53(1) Netherlands International Law Review 37.

In particular, Third World Approaches to International Law, drew on already prevalent critiques of development and law, as well as more foundational critical readings of state sovereignty within international law to respond to the shift in international legal order justified through the post 9/11 Global War on Terror (GWOT).[34] As I explain in the introductory chapter of this thesis, TWAIL questions the colonial basis of international law and specifically the concept of territorial sovereignty.[35] In relation to GWOT, Anghie argues how the GWOT is another iteration of a dynamic of difference already embedded within the foundational and historical understanding of sovereignty.[36] His discussion on the dynamic of difference in the GWOT rhetoric has also, then, produced different ways in which other international legal principles, within specifically international humanitarian law and human rights, draw on the categorization of terrorists as the new barbarians,[37] and further how this rhetoric is reflected in the policy narratives of the US Bush doctrine, specifically in the Iraq War and the doctrine of pre-emptive self-defence.[38]

In the first instance, GWOT as a discursive justification allowed the United States to create, what some scholars refer to as, a state of exception in the global legal order, to both create exceptions to the 'rule',[39] in this case territorial integrity under Article 2(4), and create new modalities of war. In relation to the latter, it is particularly the United States' military, intelligence and special forces which have been at the centre of a new and rapidly evolving global security regime. Whether this is on a specific paradigm of covert operations, targeted killings[40] and rendition,[41] or through a more critical approach to understanding the inherent

[34] Notably Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007). But also see, Robert Knox, 'Civilizing Interventions? Race, War and International Law' (2013) 26(1) Cambridge Review of International Affairs 111; Byers (n 5); Antony Anghie, 'The War on Terror and Iraq in Historical Perspective', (2005) 43 Osgood Hall Law Journal 45; Gina Heathcote, 'Feminist Reflections on the "End" of the War on Terror' (2010) 11 Melbourne Journal of International Law 277. In relation to UNSC 1373 see also in particular Jack Beard, 'America's New War on Terror: The Case for Self-Defense under International Law' (2001) 25 Harvard Journal of Law & Public Policy 559. Particularly in relation to UNSC 1441 see, Onder Bakircioglu, 'The Future of Preventive Wars: The Case of Iraq' (2009) 30(7) Third World Quarterly 1297.

[35] Anghie (n 34).

[36] ibid 275-279.

[37] Erik Ringmar, '"How to Fight Savage Tribes": The Global War on Terror in Historical Perspective' (2013) 25(2) Terrorism and Political Violence 264.

[38] In relation to UNSC 1441, see Gerry Simpson, 'The War in Iraq and International Law' (2005) 6 Melbourne Journal of International Law 167.

[39] See specifically Anghie (n 34); Byers (n 34).

[40] Philip Alston, 'The CIA and Targeted Killings Beyond Borders' (2011) 2 Harvard Nationall Security Journal 283.

[41] Leila Nadya Sadat, 'Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law' (2006) 37 Case Western Reserve Journal of International Law 309.

politics and power within an international legal regime of aerial bombardment[42] and drones,[43] conversations on counter terrorism post 9/11 have produced novel understandings of the entanglement between sovereignty and the War on Terror.

Going beyond these scholarships attempting to either produce critiques of international legal doctrines through operational regimes or develop a normative understanding of international law, scholars using critical global governance and geography, such as Marieke de Goede[44] and Gavin Sullivan,[45] attempt to locate their analysis within global governance regimes as central to the functioning of counter terrorism's underlying politics and power. While these scholars emphasise different aspects of global governance, their attention to the nature of counter terrorism as being beyond the operational regime-based approach points towards a key component missing from conversations on counter terrorism post 9/11; that is the nature and processes through which counter terrorism policy permeates as a form of global, economic, political and military governance.

While the focus on the organizational and governance nature of counter terrorism broadly is being studied, the organizational and governance nature of its operational modes, such as drones, targeted killing, and rendition amongst other operations, have not been focused on in recent literature on counter terrorism. Even so, within orthodox literature, the central theoretical aspect through which counter terrorism operations have been mentioned is through organizational and governance i.e. 'networks'. Specifically, from the policy circles, military schools and think tank scholars in the United States have pushed for a network approach to be incorporated into a form of military governance as a solution to

[42] Campbell Munro, 'Mapping the Vertical Battlespace: Towards a Legal Cartography of Aerial Sovereignty' (2014) 2(2) London Review of International Law 233; Campbell Munro, 'The Entangled Sovereignties of Air Police: Mapping the Boundary of the International and the Imperial' (2015) 15(2) Global Jurist 117.

[43] Thomas Gregory, 'Drones, Targeted Killings, and the Limitations of International Law' (2015) 9(3) International Political Sociology 197; Ruth Blakeley, 'Drones, State Terrorism and International Law' (2018) 11(2) Critical Studies on Terrorism 321; Jamie Allinson, 'The Necropolitics of Drones' (2015) 9(2) International Political Sociology 113.

[44] Marieke de Goede and Gavin Sullivan, 'The Politics of Security Lists' (2016) 34(1) Environment and Planning D: Society and Space 67-88.

[45] Gavin Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (CUP 2020).

networked threats[46] or have advocated for this based on an exception to international legal doctrines.[47] This orthodox literature, of course, has a specific formulation and understanding of sovereignty, which, as I argue, is deeply linked to a particular formulation of sovereignty that can be traced to previous forms of networks, notably the World Bank and development/security nexus.

My focus on the United States Special Operation Forces, in the next section, therefore draws on this particular gap, which also informs my main hypothesis i.e. how networks and international law work together, in an interplay, developing each other. Unlike scholarship on the actions of Covert Operations, Special Forces, especially within international law, I am concerned with how we can view the United States Special Operation Forces as a governing, political, military network form in and of itself where its operations, regardless of how they manifest, are inherently linked to its network nature. More importantly, what it shows us about the nature of international law, as we understand that SOF network, is another reiteration, and yet novel form, of an imperial network which has expanded using and advancing through the static international legal doctrine of sovereignty as understood through the civilizational tropes of security/development nexus in a particular way.

This particular way is a development of state sovereignty understood through the precepts of development, security and state building. As I show in the next section, the United States Special Operation Forces Network thus is not, as some scholars argue, a shift from Bush's invasion of Iraq or a 'boots on ground' approach to counterinsurgency.[48] It is an already calcifying approach with its intellectual roots beginning before 9/11 and finding its material 'experimentation' in the Iraq War 2003 and Afghanistan occupation.

III. *Dialogical interplay* and omnipresent techno-hegemony of SOF Network

a. Network Warfare and the Joint Special Operation Forces

[46] John Arquilla and David F Ronfeldt. 'Netwar Revisited: The Fight for the Future Continues' (2002) 11(2-3) Low Intensity Conflict & Law Enforcement 178.
[47] Robert J Bunker, 'Introduction and Overview: Why Response Networks?' (2002) 11(2-3) Low Intensity Conflict and Law Enforcement 171.
[48] Jolle Demmers and Lauren Gould, 'The Remote Warfare Paradox: Democracies, Risk Aversion and Military Engagement' (2020 E-International Relations) https://www.e-ir.info/2020/06/20/the-remote-warfare-paradox-democracies-risk-aversion-and-military-engagement/. accessed June, 2020.

The United States Special Operations are referred to broadly as the organizations under the Department of Defence of the United States of America that are engaged in conducting 'Special Operations'.[49] Since 2003, The Department of Defense defines Special Operations as operations that require a unique mode of employment, tactical techniques, equipment and training conducted in hostile, denied or politically sensitive environments characterized as clandestine, conducted through or with indigenous forces.[50] The Special Operations Command (SOCOM), the headquarters of all SOF, controls the commando units involved in all special operations.[51]

While SOCOM heads different specialized units such as the Army Rangers, the Navy Seals and the Air Force special operations command, it is the smaller Joint Special Operations Command that carries out black/covert operations such as the kill/capture missions[52] and targeted raids which are also referred to as direct actions.[53] The JSOC unit is explained by Kibbe as a joint command of three military's elite shadowy units whose existence the Pentagon did not previously officially acknowledge.[54] The unit takes the lead in counter terrorism operations around the globe that are characterized as clandestine and covert.[55] By definition, Covert Operation is an activity or activities of the United States government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States government will not be apparent or acknowledged publicly.[56]

Following 9/11, the importance of Special Forces in taking the lead in the War on Terror was emphasised by the office of Secretary of Defense Donald Rumsfeld.[57] It was under Rumsfeld that the special operations were given the mandate to plan and execute combat missions against terrorists and terrorist organizations around the world.[58] This change

[49] Steven P Bucci, 'The Importance of Special Operations Forces Today and Going Forward' in Heritage Foundation, *2016 Index of US Military Strength* (Washington D.C, Heritage Foundation 2016).
[50] US Department of Defense, Joint Chiefs of Staff, Special Operations, Joint Publication 03-05, July 16, 2014, xi <http://www.dtic.mil/doctrine/new_pubs/jp3_05.pdf>. accessed June 2020.
[51] Bucci (n 49).
[52] Jennifer D Kibbe, 'The Rise of the Shadow Warriors' (2004) 83(2) Foreign Affairs 110.
[53] Linda Robinson, 'The Future of Special Operations: Beyond Kill and Capture' (2012) 91(6) Foreign Affairs 110.
[54] Kibbe (n 52). This changed with the Osama Bin Laden Raid, when the JSOC Unit Seal team 6 (DEVGRU) was officially acknowledged as carrying out the operation in Pakistan.
[55] Bucci (n 49); Kibbe (n 52).
[56] Marshall Curtis Erwin, 'Covert Action: Legislative Background and Possible Policy Questions', April 10 2013, Congressional Research Service report for congress, RL33715.
[57] Kibbe (n 52); Robinson (n 53).
[58] Kibbe (n 52).

removed a layer in the chain of command in the bureaucratic structure of the special operations command, creating a direct link between the Secretary of Defense and SOCOM.[59] In essence, JSOC was placed at the centre of global counter terrorism operations, giving it the mandate to carry out covert operations around the globe. Since the restructuring of the Special Operation Forces in 2003, the official growth of SOF has increased from thirty-three thousand to sixty-seven thousand operatives. Of these, twelve thousand are ready to be deployed in different locations where the network is based.[60] Officially, SOF are present and conducting operations in over 75 different countries around the world.

In his discussion of the JSOC covert operations through Network Warfare, Steve Niva explains JSOC as a network command that would link with, draw from and contribute to actions across the military structure by breaking down bureaucratic barriers.[61] Niva's account of JSOC explains how the unit grew from being a networked experiment of virtual information sharing to a networked force, which spread its units into dispersed locations throughout the battlefield. Connected through a virtual information sharing network, the physically dispersed units were given greater autonomy to act on the information shared on the common hub.[62] This essentially created a network of physically dispersed units to interact with each other and on its own without a hierarchical structure inhibiting its decision making process.[63] From Niva's perspective, this was essentially a problem of accountability and oversight for an organization that cuts across foreign sovereign territories. Niva thus describes Special Operation Forces as an unaccountable transnational police.[64] However, he does not look at the concept of networked warfare from a political perspective nor does he discuss the ideological underpinning of networked warfare linked to its networked organization. It is these two aspects that I focus on in my discussion of Network Warfare.

[59] ibid 110.
[60] Bucci (n 49).
[61] Steve Niva, 'Disappearing violence: JSOC and the Pentagon's new cartography of Networked Warfare' 2013 44(3) Security Dialogue 185.
[62] ibid 187.
[63] ibid 188-189.
[64] ibid.

While, in recent military and security studies literature, counterinsurgency based on the SOF has been described in different ways, such as 'liquid warfare',[65] 'vicarious warfare',[66] 'remote warfare',[67] 'proxy warfare'[68] and 'surrogate warfare',[69] my understanding is through describing it as Network Warfare. This use of 'Network Warfare' has to do both with the particular intellectual genealogy I trace in this section and with how networking as part of the military shift concerning counterinsurgency led by the SOF has been a central component of most major work on the SOF.[70]

The emergence of Network Warfare can be traced to two military and security studies scholars, Ronfeldt and Arquilla, who touch on characteristics of Network Warfare (which they term netwar) that engage with the political and ideological underpinning of Network Warfare. Further, it is their thesis on Network Warfare that has influenced how the Department of Defense has adopted Network Warfare within their Special Operation Forces. Both scholars first introduced their concept of Network Warfare through a research report for the military think tank RAND in 1997.[71] Network Warfare, for Ronfeldt and Arquilla, is based on an organizational structure that requires persistent presence and a strong political narrative underpinning the network. It is both these aspects of networked warfare that the Special Operations network has adopted; that is the policy of persistent presence and the utilization of the network for the political goals and interests of the United States.

Network Warfare is defined as an emerging mode of conflict in which protagonists use networks' forms of organization and related doctrines, strategies and technologies attuned to the information age.[72] Emerging technologies in the information age that allows for

[65] Jolle Demmers and Lauren Gould, 'An Assemblage Approach to Liquid Warfare: AFRICOM and the "Hunt" for Joseph Kony' (2018) 49(5) Security Dialogue 364.
[66] Thomas Waldman, 'Vicarious Warfare: The Counterproductive Consequences of Modern American Military Practice' (2018) 39(2) Contemporary Security Policy 181.
[67] Demmers and Gould (n 65).
[68] Andrew Mumford, 'Proxy Warfare and the Future of Conflict' (2013) 158(2) Royal United Services Institute Journal 40.
[69] Andreas Krieg and Jean-Marc Rickli, 'Surrogate Warfare: The Art of War in the 21st Century?' (2018) 18 Defence Studies 113.
[70] This includes Niva (n 61); Kibbe n (52); Magnus Christiansson, 'The Partnerfication of NATO: From Wall-Building to Bridge-Building?' in Trine Flockhart (ed), *Cooperative Security: NATO's Partnership Policy in a Changing World*' (Danish Institute for International Studies 2014); Markus Lyckman and Mikael Weissmann, 'Global Shadow War: A Conceptual Analysis' (2015) 8(3) Dynamics of Asymmetric Conflict: Pathways toward Terrorism and Genocide 251.
[71] John Arquilla and David Ronfeldt 'Information, Power, and Grand Strategy' in John Arquilla and David Ronfeldt *Athena's Camp: Preparing for Conflict in the Information Age* (RAND Corporation Publications 1997) 417.
[72] ibid. This differs from what is known as network centric warfare proposed by Cebrowski, influenced from Revolution in Military Affairs (RMA) and implemented by the US navy;which focuses instead on

communication across distant space and time have thus also allowed for the rise of organizational forms of networks.[73] Networks within the context of netwar are dispersed small groups that are connected through information technology across distant spaces to act in conjunction.[74] This interconnection allows for the independence of each group that is also called a 'node' of the network organization.[75] Nodes can include individuals, organizations, firms or even computers. Hence networks are conceived as a distinct form of social organization.[76] Within the security and military studies literature, the focus on the creation of networks is explained firstly as an information age phenomenon[77] Secondly it is also associated with emerging non-state forms of political and social ideologies.[78] Pitched as non-state forms of political and social organizations, networks are understood as a new phenomenon in contrast to older conceptions of a global order which the authors assume as nation state relations.[79] Robert Bunker adds to this understanding by stating that sovereignty and traditional politics are no longer of the same importance they once were; instead social and political forms that guide people are of greater importance.[80]

Netwars are thus imagined as 'taking place between competing forms of social and political organization as a means to determine what state form type will guide humanity in the postmodern world'.[81] Describing their netwar thesis in terms of ideological movements, Ronfeldt and Arquilla argue that the netwar spectrum of conflict includes a new generation of radicals, revolutionaries and activists whose identities may shift from the nation state to the transnational level.[82] This line of argument is based on the assumption that inter-nation state conflict has declined as ideological /political conflicts become more prominent.[83] As the conflict in the new age has shifted power and influence to non-state actors, state

technological networking between few large forces rather than what netwar suggests as a nodal expansion of small forces across a global battlefield.

[73] ibid 418.

[74] ibid.

[75] Arquilla and Ronfeldt (n 46). Network organization is not like a traditional organizational structure that follows a chain of command and top down decision making process. Network organization is a horizontal nodal structure that creates a web like connection between different nodes which allows for greater flexibility and faster decision making ability.

[76] ibid 184.

[77] ibid.

[78] Bunker (n 47).

[79] ibid 173.

[80] ibid.

[81] ibid.

[82] Ronfeldt and Arquilla (n 46).

[83] Bunker (n 47).

institutions must evolve a new form of conflict or war-like capability that can help with the preservation of the nation state.[84]

The concept of counternetwar or response networks is proposed by scholars such as Ronfeldt, Arquilla, Bunker[85] and Borgen[86] as a way for the nation state to counter non-state network forms particularly violent networks such as terrorists and criminal networks.[87] This particular perspective of utilizing network forms is described by Ronfeldt and Arquilla as a way of incorporating a network structure within state bureaucratic systems.[88] As such a networked organization will have its association with the state, it would not be completely similar to non-state networks.[89] However, such an organization imitates a networked organization by being dispersed throughout the world and having its different nodes connected through advanced technological communication. Another important element of the network force is shared goals/interests also explained as the narrative/ideological aspect of Network Warfare.[90] Sangiovanni describes the network's main characteristic of flexibility being dependant on communication and shared goals and values of the network.[91] For Zanini and Edwards as well the ties between nodes of a network are enabled by shared norms and values.[92] The same principle is also explained by Ronfeldt and Arquilla as the capacity for the effective performance of the network depending on the existence of shared principles, interests, goals or perhaps even an overarching ideology.[93] This allows for the central cohesion that allows tactical decentralization and sets boundaries and guidelines for the network.[94] A network within the context of networked warfare thus is an inclusive structure whose cohesiveness and effectiveness depends on shared goals and values.

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[84] ibid 174.
[85] ibid.
[86] Christopher Borgen, 'A Tale of Two Networks: Terrorism, Transnational Law, and Network Theory', (2008) 33 Oklahama City University Law Review 409. Citing Ronfeldt and Arquilla's work on netwars and counter netwars, Borgen argues much in the same way as Ronfeldt and Arquilla for the need to fight networks to fight terrorist networks as traditional military methods prove ineffective in countering terrorists/criminal networks.
[87] ibid 532.
[88] Arquilla and Ronfeldt (n 46).
[89] ibid 183.
[90] Ronfeldt and Arquilla (n 46).
[91] Sangiovanni (n 1).
[92] Michele Zanini and Sean JA Edwards 'The Networking of Terror in the Information Age' in John Arquilla and David Ronfeldt (eds), *Networks and Netwars: The Future of Terror, Crime, and Militancy* (Rand Corporation 2001).
[93] Ronfeldt and Arquilla (n 46).
[94] ibid 185.

b. Global SOF network, persistent presence and 'ungoverned territories'

Similar to Ronfeldt and Arquilla's conceptualization of a networked force, the idea of a Global SOF network is rooted in establishing a trust to be included in the network which depends on having an understanding of the shared goals and interests of the United States.[95] The joint report by the Department of Defense and RAND on developing a Global SOF network describes one of the network's purposes as expanding the strategic reach of the United States to achieve and support its goals and interests.[96] In the Joint Special Operations University[97] publication on the role of the Global SOF network in a resource constrained environment, Richard Rubright refers to the Global SOF network as an organizational plan meant to achieve and facilitate the political objectives of the United States.[98] Referring further to the Global SOF vision 2020 plan by the SOCOM, Rubright describes how the SOCOM envisions the purpose of the global network as being in harmony with the US national interests.[99] Further, the Department of Defense view on inclusion in the network is based on the fact that nations that are accepted as part of the network must also have objectives aligned to that of the United States.[100] From this perspective, the leadership of the network and the burden of achieving the objectives remains with the United States.[101] Recognizing how, within the context of building the Global SOF network, the role of the United States is one of a 'Sheriff of the current world order', Rubright acknowledges the possible difficulties of other nations accepting such an arrangement.[102] This idea of the United States Special Operation Forces as a 'global sheriff' is not just an expression but, as

[95] Christopher Lamb, 'Global SOF and Interagency Collaboration' (2014) 7 Journal of Strategic Security 8.
[96] Rubright (n 2).
[97] The Joint Special Operation University, established in 2000 by the Special Operation Command (SOCOM), is a Military Educational Institute in MacDill Airforce Base, Florida. The University provides specialized academic courses on Special Operation Forces theory, history and application. There is a specific focus on military and strategic studies and research on Special Operation Forces. http://jsou.socom.mil/Pages/Default.aspx.
[98] Rubright (n 2).
[99] ibid 5.
[100] ibid 7.
[101] ibid.
[102] ibid 11.

Stephen Warren observes, is how the Special Operation Forces themselves within their own culture understand their role in the global order.[103]

The Global SOF network and its operations are based, in this way, on goals directed by the United States, the state from which the network emanates. The goals of the Global SOF network are based on the political and security interests of the United States. Thus the parameters of inclusion in the Global SOF network are driving the political and security interests of the United States despite the network being deployed in various territories around the world. Lyckman and Weissman describe this as new warfare or rather its more proverbial description as a global shadow war, as 'utilization of highly autonomous special operation forces or paramilitary operating within a network organization equipped with advanced military technology performing tasks on a transnational global scale, hidden from the public eye, with little or no political oversight in a conflict with no immediate end in sight'.[104]

Referring to Arquilla and Ronfeldt's thesis that it takes a network to fight a network, the Department of Defense prepared an extensive plan for developing a Global SOF network that extends throughout the globe to achieve the security interests of the United States.[105] Explaining the role of SOF post 9/11 in countering threats from networked actors, Admiral McRaven emphasised that establishing a Global SOF network supports and enables operatives to conduct targeted operations.[106] This is further reflected in Admiral McRaven's posture statement in 2012, where he stated that such a network 'enables small persistent presence in critical locations',[107] and elsewhere that having a persistent presence is imperative to the ability of the Special Operations Forces to conduct direct actions such as covert operations either with the help of local partners or 'unilaterally if required'.[108] Networked Warfare in the way it is adopted by the SOF thus requires having a persistent presence throughout nation states that are described as a Global SOF network.

[103] Stephen Warren, 'US Special Forces: An Other within the Self' (2019) 5(1) Critical Military Studies 40.
[104] Lyckman and Weissman (n 70).
[105] Lamb (n 95), Scott Morrison. 'Redefining the Indirect Approach, Defining Special Operations Forces (SOF) Power, and the Global Networking of SOF' (2013) 4(3) Prism: a Journal of the Center for Complex Operations 38. Morrison in particular credits Ronfeldt and Arquilla's contribution and influence on developing and implementing a Special Operation Forces Network.
[106] Posture Statement of Admiral William H McRaven, USN, Commander, United States Special Operations Command, Before the 113th Congress, Senate Armed Services Committee, Emerging Threats and Capabilities Subcommittee, 2013.
[107] ibid 5-6.
[108] ibid 11.

As I mentioned above, the element of persistent presence that is required in Network Warfare and its adoption by the Special Operation Forces is also embedded within the political framework of the SOF. In talking about the US Special Forces Operations, Ronfeldt and Arquilla assess the strength of networked warfare in the Iraq occupation through the ideological narrative of the war. In this narrative/ideological level of analysis, Ronfeldt and Arquilla make the argument that the narrative of the war being a 'civilizing mission' to 'promote universal liberal values' was an effective narrative that the administration should maintain to strengthen the ideological dimension of networked warfare.[109] This particular notion was already embedded within the military liberalism culture of the United States military[110] but was further consolidated within the revised United States Counterinsurgency Field Manual and the Military Field Manual after the Iraq Invasion as Laleh Khalili points out.[111] However, even as counterinsurgency moved from the heavy presence, boots on ground liberal humanitarian discourse[112] to what in the Obama era was referred to as 'light footprint',[113] JSOC was already invested in framing their operations within a 'liberal' war mentality which justified humanitarian interventions underpinning earlier counterinsurgency military incursions. What Khalili refers to as a move to counter terrorism was already underway even as the Iraq Invasion happened through the idea of 'persistent presence'.

This can be seen primarily from the JSOC University research articles which described the post 9/11 era as the next step in a post-cold war era. In an article by Yoho and Borum, the authors frame the ideological narrative of the Global SOF network as the organization that can contain socio-political ideologies that are 'antithetical to the US values' and are driven by an anti-enlightenment mindset.[114] Referring to the new war as similar to the cold war which required containment through shaping the surrounding environment around the former Soviet Union, Yoho and Borum explain the new war as requiring a similar kind of

[109] Ronfeldt and Arquilla (n 46).
[110] Mabee (n 20).
[111] Laleh Khalili, 'Counterterrorism and Counterinsurgency in the Neoliberal Age' in Amal Ghazal and Jens Hanssen (eds), *The Oxford Handbook of Contemporary Middle-Eastern and North African History*. (OUP 2015).
[112] ibid 367.
[113] Lyckman and Weissmann (n 70).
[114] Keenan D Yoho and Randy Borum 'The Global SOF Network: Posturing Special Operations Forces to Ensure Global Security in the 21st Century' (2014) 7(2) Journal of Strategic Security 1.

containment through prevention.[115] The authors argue for persistent presence as part of this containment through prevention.

The association of the new war being one of the socio-political ideologies between the United States and those with an 'anti-enlightenment mindset' is then also translated by the Special Operation Command of the United States into how territories are then seen as 'ungoverned spaces'.[116] In his posture statements through 2012 and 2014, Admiral McRaven for example refers to the need for establishing a presence through a global network in 'ungoverned spaces' where violent ideologies are fostered.[117] In the same Joint Special Operations University publication on the role of the Global SOF network referred to in the previous section, another contributor, Bill Knarr, explains this perspective on the role of the SOF network in these ungoverned spaces further through the phrase 'matching the footprint of governance with the footprint of sovereignty'.[118] Referring to JQ Roberts, Knarr further describes the idea of ungoverned space as territories where the footprint of sovereignty is bigger than that of governance. This is further described as a difference in the sovereignty of a territory and the lack of 'governance' within that territory. According to the United States' 2012 Defense Strategic Guidance this lack of governance within a sovereign territory creates 'gaps in governance' that lead to the territory in question being characterized as '*ungoverned territory*'.[119] Echoing SOCOM's view that it is within these ungoverned territories that violent ideologies are fostered, the author argues that it is within these territories that a persistent presence of the SOF network is required before such ideologies grow and become a threat to US interests.[120] Further, the presence of the network in those territories can also allow the network to facilitate democracy in those sovereign nations, allowing the territories to match their governance with sovereignty.[121] Such a presence can also facilitate US goals and interests and make the network stronger due to an expansive presence in the globe.[122] Furthermore, networked presence in ungoverned

[115] ibid 3.
[116] ibid 4.
[117] McRaven (n 106) 4.
[118] Bill Knarr 'Matching the Footprint of Governance to the Footprint of Sovereignty' in Chuch Ricks(eds), *The Role of Global SOF Network in a Resource Constrained Environment* (JSOU Report 2013).
[119] ibid 31-33.
[120] ibid.
[121] ibid.
[122] ibid.

territories allows for direct operations to be conducted through partner states as proxy[123] and facilitates the virtual network that supports such operations.[124]

SOCOM's view of the role of establishing a persistent presence within those territories is not just related to the countering of terrorists' threats, but having such a presence is also based on categorizations based on ideological and political imperatives. These political imperatives are embedded within the network itself as parameters of inclusion, which are associated and set by the United States based on notions, as we saw above, of 'liberal values' and antithetical to 'anti-enlightenment mindsets'. The SOCOMs view on which nations should be a part of its network is also based on where its presence is required, which is determined through their view on the sovereign nations that have 'ungoverned territories'. Such territories require the presence of the network, which not only conforms to the idea of a stronger network but allows the United States to fill in the gaps of governance through its presence in order for the nation state to become 'democratic' and match its governance to its sovereignty.[125] It is also this presence in these territories that allows for JSOC to conduct its networked warfare in the form of covert operations.[126]

Importantly, in the case of the SOF network, the territories where presence is required are described as 'ungoverned' yet 'sovereign'. This creates a hierarchal distinction between a fully sovereign state and a state where 'gaps' in governance are said to exist. The network's presence then is justified to fill such gaps to bring them to a particular level of governance, in the way that the United States envisions the nation state to be governed. The move to 'counter terrorism' or 'light footprint', dictated by the presence of smaller clusters of special operation teams, use of drones and partnerships with the North Atlantic Treaty Organization (NATO),[127] makes the SOF network not just a military presence reaffirmed by or underpinned by 'liberalism' but an even more active socio-political and economic network organization.

In this narrative of the network's presence to facilitate state sovereignty through persistent presence, the policy of the SOF is a 'building' of or 'towards' the nation state which is a universal one i.e. the narrative of liberal values, democracy, rule of law in the

[123] McRaven (n 106) 4.
[124] ibid.
[125] Knarr (n 118).
[126] ibid 32.
[127] Christiansson (n 70).

War on Terror advanced by the United States and its allies.[128] By establishing its presence in different territories, the response network such as the Global SOF network is aimed at securing the political goals of one state, that is the United States. As we can see from this analysis, Network Warfare as adopted by the United States Special Operation Forces Network is not just about organizational innovation but is based on achieving the political goals of the United States under the guise of the ideological narrative of 'advancing universal liberal values' that is part of the War on Terror rhetoric. In this sense, then, the SOF network can be viewed in a similar vein as previous imperial networks discussed in this thesis, whose governance was based on an indirect rule, control and influence towards a specific socio-political and economic direction for the benefit of the network.

IV. The violence of Network Warfare

Given this analysis then, we can approach the violence of Special Operation Forces not just through operational acts and modes of violence such as drone attacks, targeted killings and renditions, but as a network organization which operates through a governance logic embedded in a new form of 'nation building' under the cover of counter terrorism and other 'national security' concerns. Primarily, 'light footprint' concerns itself with what could be described as 'direct actions', i.e. its more kinetic acts of violence such as drone attacks, targeted killings and renditions, and 'indirect actions', i.e. information gathering, making strategic alliances with local actors and indirect influence in the name of filling 'governance' gaps on a local level.[129]

Unlike previous forms of imperial network and their violence, my purpose here is not to highlight the existence of the violence per se, as in the case of the former there has been enough literature that does so from various angles, but showing exactly how the central elements that facilitates this violence remains a hidden due to territorially centred understandings of international law and 'war'. This central element is, as I have shown in the previous chapters, the network's interplay with international law itself which results in a colonial/imperial governance of a particular form. As I show in the following sections,

[128] Referring to drone programs and the global war on terror, Sara Kendall has described this as contingent sovereignty in the war on terror, see Sara Kendall, 'Cartographies of the Present: "Contingent Sovereignty" and Territorial Integrity' (2017) 47 *Netherlands Yearbook of International Law* 83.

[129] See Morrison (n 105).

understanding the centrality of network and international law's dialogical interplay, in case of both 'direct' and 'indirect' actions of the Special Operation Forces, reveals the SOF network not as an anomaly to international law, but another iteration or illustration of how international law and networks operate in tandem. Further, how fixating on the operational aspects of the SOF only frustrates our attempts to understand its violence as it is assumed to be in contravention to international law's static, territory-centered understanding. This only renders the effect of this interplay between networks and international law invisible, thereby also hiding the nature of violence of international law as colonial/imperial governance through networks.

a. Indirect violence: intelligence gathering, small footprint and influence

The most significant shift in the way 'war' is perceived within the context of GWOT is what has been recognized as the 'light footprint' approach to counterinsurgency.[130] Persistent presence, small outposts, small teams of Special Operation Forces being coordinated through a technological infrastructure and organized by, most importantly, a network organizational structure. In this sense, it is important to note that the 'technological' networks enable and facilitate what is more important to the mode of operation for special forces, i.e. its social human networks.[131]

What makes the SOF network different from a conventional military or even beyond the direct kinetic operations it is often associated with, i.e. kill/capture operations, drone strikes and renditions, is how a smaller presence is based on changing the 'battlefield' from the inside.[132] As Major Lujan, in his report on 'light footprint', describes, more visible, kinetic operations such as raids and drones are 'only the tip of the iceberg'.[133] The indirect violence of the SOF network is based entirely on its human intelligence networks, training of host

[130] Fernando Luján, *Light Footprints: The Future of American Military Intervention* (Center for a New American Security 2013).

[131] Robert Chesney,'Shift to JSOC on Drone attacks does not mean CIA has been sidelined' (Lawfareblog.com 2016)<https://www.lawfareblog.com/shift-jsoc-drone-strikes-does-not-mean-cia-has-been-sidelined>.accessed June 2020.

[132] Lujan (n 130); Khalili (n 111). See also, Thomas S Szayna and William Welser IV, *Developing and Assessing Options for the Global SOF Network* (RAND Corporation 2013); Dan Madden et al, *Toward Operational Art in Special Warfare* (RAND Corporation 2016); Angel Rabasa et al, *'Money in the Bank Lessons Learned from Past Counterinsurgency (COIN) Operations* (RAND Corporation 2007).

[133] ibid Lujan 7.

nation's forces, police and working with development actors as well as establishing trust with local actors,[134] often the population for whom the 'nation is being built'.[135]

The light footprint approach which is utilized by the SOF network allows it to remain a network force with persistent presence and is considered a long-term strategy precisely because it works with local development, military and state actors from within the territories they occupy. This makes its 'indirect' approach a form of 'counterinsurgency governmentality' as a Khalili points out,[136] as the focus is on changing the lives of people relying on the building of infrastructure and change in 'rural/village life'.[137]

The indirect approach to a presence in territories is informed by particular social constructions of the local population, with training based in the United States military bases, and universities such as the Joint Special Operation Forces University. Understood as building 'cultural intelligence' for SOF to develop links with local actors, the university also in some cases staged fields attempting to replicate local conditions of a village in occupied territory,[138] which became a way of constructing knowledge on the locals. This indirect approach is described also as a 'Human Terrain System'(HTS),[139] particularly as it is recognized as a key component of counterinsurgency within the Department of Defense counterinsurgency field manuals.[140]

In a JSOC University publication, Emily Spencer describes the importance of training Special Operation Forces in the 'culture' of different localities, especially state actors, to convince them of interlinking interests through which the interests of the United States can be met.[141] Spencer, for example, notes the importance of cultural intelligence training as a way for SOF operators to use, understand and place values and beliefs of the local

[134] Khalili (n 111) 368.
[135] Heather S Gregg, *Building the Nation: Missed Opportunities in Iraq and Afghanistan* (Potomac Books 2018).
[136] Khalili (n 111) 368.
[137] Laleh Khalili, 'The Roads to Power the Infrastructure of Counterinsurgency' (2017) 34(1) World Policy Journal 93.
[138] Oliver Belcher, 'Staging the Orient: Counterinsurgency Training Sites and the U.S. Military Imagination' (2014) 104(5) Annals of the Association of American Geographers 1012.
[139] Montogmery McFate and Janice H Laurence (eds), *Social Science Goes to War: The Human Terrain System in Iraq and Afghanistan* (OUP 2015); David Price, *Weaponizing Anthropology: Social Science in Service of the Militarized State* (AK Press 2011).
[140] Khalili (n 111) 367.
[141] Emily Spencer, 'Solving the People's Puzzle: Educating and Teaching SOF Operators for Enhanced Cultural Intelligence, in Chuck Ricks (eds), *The Role of the Global SOF Network in a Resource Constrained Environment* (JSOU report 2013).

population to secure their objectives i.e. of the national security interests of the United States.[142] Training local state actors is part of this need for cultural intelligence so the SOF can provide 'local solutions to global problems',[143] which also would result in the training of military forces and then the local police in accordance to the solutions presented by the SOF operators to 'match the footprint of governance to the footprint of sovereignty'.[144]

The indirect approach to counterinsurgency is, then, not unlike a form of indirect rule, where the SOF network is operating through and in tandem with the logic of sovereignty understood as only conditional on 'governance' as defined by a developmental logic. Building localities, populations and thus nation states to standards of 'governance' and 'development' become part of SOF Network Warfare's persistent presence. Here infrastructure changes to local conditions, through advice and working with development actors, is part of Network Warfare.

The transformation of the 'village', or Village Stability Operations (VSO), became a central point of SOF operation and violence – both direct and indirect.[145] In terms of its indirect operations, the use of 'cultural training' and establishing trust was one side of VSOs which included working to modernise the village through developmental promises.[146] Oliver Belcher argues that in VSOs in Kandahar and Helmand in 2010, as part of counterinsurgency operations against the Taliban, villages were completely or partially razed and then reconstructed in a way to facilitate indirect rule by the USSOF.[147] These reconstructions of the villages are done following the 'cultural intelligence' constructions of the locality as understood by and for the facilitation of USSOF primarily along with intersecting actors such as the state, selected 'tribal' leaders and their armed community police – who become allies to the USSOF, as well as development actors.[148] Using their vocabularies of describing 'traditional' Afghani village structure as 'tribal' and led by

[142] ibid 23.
[143] ibid 24.
[144] Knarr (n 2).
[145] Julien Pomarède, 'Archipelagos of Death: The Assemblage of Population-Centric War in Afghanistan' (2020) 20(3) Defence Studies 1.
[146] Oliver Belcher, 'Anatomy of a Village Razing: Counterinsurgency, Violence, and Securing the Intimate in Afghanistan' (2018) 20(3) Political Geography 202.
[147] ibid 98.
[148] ibid 99.

'paternalistic lineage links', which is often not the case, the USSOF reconstruction of villages leads to gendered, patriarchal enforcement of local men.[149]

The social constructions of the village for the use of USSOF is also inherently a form of colonial governance in the same vein as counterinsurgency operations due to the 1950s and 1960s decolonisation era.[150] This is particularly why Khalili and Belcher refer to the indirect approach as based on 'hearths and minds',[151] indicating the role that village households, through the SOF network's presence, direction and reconfiguration, play in Network Warfare. Patricia Owens notes how the village household 'becomes a site of indirect rule' as it is here that 'households are made into units for indirect and direct governance' as counterinsurgencies socially administer the households by 'withholding aid, repopulation, creation and re-creation of villages, tribal and sectarian militia, concentration camps for detention and re-education'.[152]

b. Direct violence: rendition, detention, drones, targeted killings

Explaining the counter terrorism approach of the SOF network, Khalili[153] and others agree[154] how primarily three elements are present, often working with and dependant on each other, i.e. 'technological through remote warfare', Special Operation Forces and intelligence gathering. The relationship between the technological advancements and the organizational move to 'light footprint' is a synchronistic one. The elements of the 'light footprint' approach, i.e. human terrain system and cultural intelligence constructions, are how we can understand the more direct kinetic violence of the SOF network as part of its governance. Ultimately, it is through establishing a small presence through military bases[155] and small outposts bringing in aid as well as infrastructure to facilitate the presence of SOF

[149] ibid; Laleh Khalili, 'Gendered Practices of Counterinsurgency' (2011) 37(4) Review of International Studies 1471.
[150] Robert Egnell, 'Winning "Hearts and Minds"? A Critical Analysis of Counter-Insurgency Operations in Afghanistan' (2010) 12(3) Civil Wars 282; Michael Fitzsimmons, 'Hard Hearts and Open Minds? Governance, Identity and the Intellectual Foundations of Counterinsurgency Strategy' (2008) 31(3) Journal of Strategic Studies 337.
[151] Khalili (n 111); Belcher (n 138).
[152] Patricia Owens, *Economy of Force: Counterinsurgency and the Historical Rise of the Social* (CUP 2015) 24.
[153] Khalili (n 111).
[154] Lujan (n 130).
[155] Demmer and Gould (n 65).

that the direct or kinetic forms of violence occur.[156] Drone attacks are not just isolated, distant or remote cause and effect incidents – even if they are based on a drone operator sitting 'far away' pulling the trigger.[157] They are inherently dependent upon the intelligence, data and meta-data gathered by a range of actors, including, most importantly, SOF on the ground.[158]

Indirect forms of violence, which I have discussed above, or what Khalili describes as 'mechanisms of counter insurgency governmentality', data collection, information gathering and the ability of the SOF to conduct drone strikes[159] are part of the same loop, i.e. the synchronicity between knowledge formation, through social actors, and governance over a population.[160] What is considered part of the human terrain system of the counterinsurgency manual facilitates in creating profiles and personalities based on both meta-data and human intelligence, informed mostly through 'cultural knowledge' of the population. Concerning drone strikes, 'surgical' strikes, as Arvidsson argues, are based on militant 'characteristics' through which their status as 'military aged men' is determined.[161] These characteristics are coded through gendered constructions[162] but are also reflective of broader 'cultural knowledge' of the population constructed as part of racialized othering of the 'host' country where Network Warfare is conducted.

The ability of the SOF network to conduct raids, sometimes renditions/kidnappings, to detention centers, both within the territory and at the same time outside of it, is possible through its approach of being a network force. As Niva describes it, rather than a direct military force, the SOF unit's small scale presence allows it to conduct what are described as 'swarm' tactics, where a convergence towards a possible location and/or target is fast and followed by dispersal without any large scale physical trace.[163] Military bases and small

[156] Khalili (n 111).
[157] Joseph O Chapa, 'Remotely Piloted Aircraft, Risk, and Killing as Sacrifice: The Cost of Remote Warfare' (2018) 16 Journal of Military Ethics 256.
[158] Lujan (n 111).
[159] Khalili (n 111) 366.
[160] Kristin Bergtora Sandvik, 'Technology, Dead Male Bodies, and Feminist Recognition: Gendering ICT Harm Theory' (2018) 44(1) Australian Feminist Law Journal 49. Here I am using Sandviks idea of Man-Machine synchronicity in tandem with the military studies literature understanding of the role that human terrain system plays in profiling and orientalising the 'host' nation's local actors.
[161] Matilda Arvidsson, 'Targeting, Gender, and International Posthumanitarian Law and Practice: Framing the Question of the Human in International Humanitarian Law' (2018) 44(1) Australian Feminist Law Journal 9.
[162] ibid 16.
[163] Niva (n 61).

outposts, termed lily pads, which facilitate the technological infrastructure, become the structure through which raids and targeted killing operations (kill/capture ops) are conducted.[164] Khalili points out how the same constructions of 'military aged men', profiling of the population based on cultural constructions of troublesome 'military aged men', is used to detain them and then they are 're-educated'.[165] 'Tribal' chiefs are given the responsibility to keep a check on those put in detention and then released conditionally on an assessment of the USSOF.[166] As part of VSOs, villages also become the site of direct violence as they can be bombed or targeted for raids if they are considered to be places where 'Taliban are based' or where there is a possibility of a weapon cache for the Taliban – especially when houses are abandoned for fear of coming in the line of fire between the Taliban and SOF.[167]

V. Conclusion

In this era of the *dialogical interplay*, I have returned to the initial question and problem posed in the thesis: how do we understand the nature and violence of Network Warfare by first understanding the relationship between networks and international law. Network Warfare and the way it is adopted by the US Special Operation Forces reflects a more expansive and persistent state of imperial influence than other focus on operational actions suggest. Whether it is a drone, targeted killing, rendition or questions on accountability, I argue that Network Warfare needs to be understood as a particular iteration of socio- political, economic network through which we see particular imperial governance.

Through a physical networked presence in ideologically categorized 'ungoverned' territories throughout the globe, a consistent influence within the presence of the sovereign territories is maintained to achieve the political goals of the United States. In these territories, then, the SOF network decides that the gap of governance exists and the territory is classified as ungoverned. The SOF then determines a persistent presence is needed in order for the territory to reach a certain level of governance to match its political sovereignty. The way the USSOF categorizes territory based on 'governance gaps' reiterates

[164] Demmers and Gould (n 65).
[165] Khalili (n 111) 371 see generally also, Laleh Khalili, *Time in the Shadows: Confinement in Counterinsurgencies* (Stanford University Press 2013).
[166] ibid Khalili 'Counterterrorism and Counterinsurgency in the Neo-liberal age'.
[167] Pomarède (n 145).

logics of military liberalism which are tied to developmental thinking aligned to United States national security agendas.

The violence of the SOF network is fundamental to its network nature as I have shown, and despite the focus on drones, kill/capture ops and detention, understanding the violence of Network Warfare is in how it operates as part of the historical continuity of interplay between networks and international law's static, territory-centred understandings. It is, as I argue, a form of imperial governance relying on an indirect rule, like imperial state networks, expert networks and local networks of technocrats which I have discussed in the previous chapters. It also represents an accumulation of these forms of networks I have covered in this thesis, in that the SOF operators claim to build relationships with the 'other', whom they profile, create social constructions of, and 'facilitate to modernise' through the control over their everyday social, economic and political life. Discursively, the SOF network and the GWOT create, and at the same time are also based on, a religious otherization of 'Islam' far more than commercial, bureaucratic or expert networks – even though there were social constructions being made in all of these cases. The use of technological advancements in communication, data and meta-data also creates a commercial/state nexus present within the era of commercial networks.

Through this reflection, we can understand the SOF network embodying variations of these different networks, while relying on particular understandings of sovereignty and territory to justify its expansion and presence in various territories. It is unique and 'new' in this sense, as through its reliance on technology, the social network of actors representing and acting for United States' national security interests govern through 'intimate' close ways, and yet also operate at various levels of governance – with various actors (commercial, state, international), to further its interests. This level of coherence and fluidity in indirectly governing populations and peoples is unprecedented and makes the SOF network an omnipresent techno-hegemon.

Chapter 8. Conclusion: networks, violence and resistance

I. Framework as a contribution: the concept of *dialogical interplay*

> Addressing climate change, ensuring reliable and sustainable sources of energy, preventing and responding to pandemics, adequate food and clean water for an expanding population, enabling economic development, resolving cultural conflicts, addressing the threats posed by transnational terrorist networks, fighting corruption, ensuring the stability of the financial system and the integrity of the internet, protecting privacy, combating money laundering: people understand that such things cannot be solved by one city or one nation or one corporation alone.
>
> David Kennedy[1]

Scholars of global governance, science and technology studies and to a certain extent, sociology of international law have explored over the past two decades how legal norms materialize or are the result of the politics and power relations of social actors and institutions.[2] In this thesis I have approached a similar set of concerns drawing from the longer, colonial root of what we may understand as governance through a social web of actors and institutions and the international norms that are produced as a result of the governance. Throughout the history of international law, we see networks of actors benefiting from, deploying and expanding through international legal jurisprudence. Once we approach international law's operation as a dialogical interplay between networks and international law, as I propose in this thesis, we see a production of an invisibility which hides the effects of the network's actions. This thesis has shown how the effects of networks, which I have covered in this thesis as imperial networks, are inherently violent and remain salient, as a form of governance over human social, political, economic, spiritual and intellectual life.

[1] David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018).

[2] Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (New Press 2017); Sheila Jasanoff (ed), *States of knowledge: the co-production of science and the social order* (Routledge 2004)

This violence takes different forms but is ultimately and inherently imperial and has been *part* of the development, use and evolution of the international legal doctrine of territorial sovereignty.

This thesis is a provocation to consider the operation of international law and networks as co-constitutive in nature, particularly through the doctrine of territorial sovereignty. More importantly, I show that by understanding this co-constitutive nature of international law or as I call it the *dialogical interplay*, we see how the violence of international law as colonial/imperial governance of human life gets hidden as part of the continuing adherence to a static territory-centered approach to international law.

The forms of networks I have chosen are by no means exhaustive, and my suggestion is not to close off different ways in which we might understand how international law and networks may operate together. It is to show how they do work together in the first place and have throughout different iterations where we see the developments of certain networks in continuity as well as changes in history necessitating different juridical and social formations to work together.

a. The historical interplay between networks and international legal jurisprudence

In this thesis, I have put forward a particular sociology of knowledge production within international law which is historically informed and, critically conscious of its inherent imperialism, not merely anchored blindly to its descriptive promises. It opens up the opportunity to, for example, explore different genealogies of regimes and doctrines in relation to networks. I suggest that we must re-examine, then, how we understand various other forms of networks working through and with international legal doctrines – not only in the development of the doctrine, but also as a way to work for the benefit of the network.

Here the focus on key historical moments was important to highlight a longer trajectory of the operation of international law and networks, a dialogical interplay, to understand the violence of international law which is rendered invisible. Thus, while key moments and key actors I have identified such as missionaries at a certain point in international legal history

have a part in the argument of this thesis, the chapter itself is not by any means the only way to understand the life of missionary networks and international law throughout history. In a similar vein, the Global SOF network is not a newly formed approach to govern nation states and the populations of these nation states. It is only another iteration in a series of networks which have had a role to play in the development, use and deploying of norms of territorial sovereignty.

b. Critical possibilities: treaties, international organizations, transnational companies, private global actors

Thus, the history of a dialogical interplay I present is only meant to illustrate how particular networks at certain temporal and spatial contexts worked in tandem with the international legal doctrine of territorial sovereignty. There can be various critical possibilities if we are to take international law's operation as a dialogical interplay framework to understand the development, use and deployment of doctrines by and through networks.

One set of critical possibility lies in the afterlives of networks I have identified but have not traced all through international legal history. For example, while in chapter 3, and partially in chapter 4, I have focused on the commercial/merchant network, the corporation as a network organization – particularly in its use of global supply chains of production[3] – and international law's interplay with it through its history is a rich space of further discussion where we can understand the limitations and facilitative role of corporate 'liability' and social responsibility. Another is my focus on international organizations as networks in chapter 5 – which can also lead to more critical reflections on contemporary or later regional organizations and their interaction/deployment of international legal doctrines.

Another possibility of applying the *dialogical interplay* to understand networks and international law is in the overlapping ways in which multiple networks work together, and in the underlying politics of knowledge formation of international law which results from their interaction. The SOF network's work with their multiple partners, including NATO, private corporations – notably arms and consumer oriented technology companies – and development actors, reflects this interlinking of networks that I have not fully explored in

[3] Dan Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance' (2005) 46 Harvard International Law Journal 411.

this thesis but is a rich ground for further analysis.[4] For example, particularly concerning my point about intersecting interests of networks, taking the role of NATO as part of the GWOT security regime is another rich area of study to explore the violence of the dialogical interplay between networks and international law.[5]

At the same time, there are possible forms of networks not focused on or highlighted as 'networks' which can also be explored through their interaction/deployment and development with international legal doctrines. Some of which has been a focus of attention in some literature, such as a network of lawyers,[6] but also some of which may be explored more – such as treaty making as creating a network of actors with overlapping interests.

II. Decolonising the concept of violence: violence beyond 'war' and 'peace'

a. Violence as embedded within international law's operation

In the previous chapter, my attention towards the Special Operation Forces Network is meant to reframe contemporary debates on how we understand the violence of what appears to be a deeply visible and contentious emergence of war. The visibility of drones, detention, raids and kill/capture operations all placed at the centre of conversations on SOF also make the broader, more salient undercurrent of violence as part of its nature as a network governing body invisible. While conversations on modern technology, artificial intelligence and a posthuman turn[7] are all questioning the nature of international legal regimes utilized to understand something 'new', I have shown that social actors themselves and how they perceive the world in which they interact is the bedrock on which their relationship to 'technologies' rests – which in the case of international law needs to deal with its colonial/imperial roots of

[4] Here my thesis can inform and be in conversation with literature concerning the politics of humanitarianism, development thinking, see for example, Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011).

[5] Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism' [1999] 10(4) European Journal of International Law 679; Anne Orford, 'NATO, Regionalism, and the Responsibility to Protect' in Ian Shapiro and Adam Tooze (eds), *Charter of the North Atlantic Treaty Organization together with Scholarly Commentaries and Essential Historical Documents* (Yale University Press 2018).

[6] Yves Dezalay and Bryant G Garth, '*Asian Legal Revivals Lawyers in the Shadow of Empire'* (University of Chicago Press 2010).

[7] Emily Jones, 'A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons Systems and Other Killing Machines' (2018) 44(1) Australian Feminist Law Journal 93; Matilda Arvidsson, 'Targeting, Gender, and International Posthumanitarian Law and Practice: Framing the Question of the Human in International Humanitarian Law' (2018) 44(1) Australian Feminist Law Journal 9.

understanding, interacting with and structuring the world. The violence of hi-tech drones, surveillance and artificial intelligence is part of the broader violence of colonial governance of human life.[8]

The running thread of this thesis, apart from the governance through networks of actors, has been the violence perpetrated on people governed by the networks. The purpose of highlighting this violence as invisibilised, unchecked and unaccounted for was to unearth an operation of international law otherwise hidden through its orthodox frames. My focus in showing what knowledge is 'shown' and 'legitimised' within the orthodox development of international law i.e. sovereignty and the separation between war and peace was not just to demonstrate how these norms get legitimised as part of an imperial project of international law. It was also to, simultaneously, show what kind of violence is hidden by adhering to the knowledge of orthodox international law.

This allows for a deconstruction of the concept of violence within international law. My framework provides a basis for imagining different modalities of violence in the historical and contemporary operation of international law as a dialogical interplay between networks and its doctrines. Through this framework, critical international lawyers can move beyond static territory-centred assumptions of the international legal order. Thus even scholars who focus on violence perpetrated by private military contractors,[9] corporations[10] and transnational criminal organizations[11] imagine violence in their discussions within a static territory-centric view of the international legal order. The violence of international law's interplay with networks, as I have described in this thesis, is a more salient, constantly

[8] Ibid, see also: Lauren Wilcox, 'Drone Warfare and the Making of Bodies out of Place' (2015) 3(1) Critical Studies 127. Lauren Wilcox, 'Embodying Algorithmic War: Gender, Race, and the Posthuman in Drone Warfare' (2017) 48(1) Security Dialogue 11; Sara Kendall, 'Law's Ends: On Algorithmic Warfare and Humanitarian Violence' in Max Liljefors, Gregor Noll and Daniel Steuer (eds), *War and Algorithm* (Rowman & Littlefield International 2019); Nehal Bhuta and Claus Kreb (eds), *Autonomous Weapons Systems: Law, Ethics, Policy* (CUP 2016).

[9] Rita Abrahamsen and Michael C Williams, 'Security beyond the State: Global Security Assemblages in International Politics' (2009) 3(1) International Political Sociology 1; Emanuela Chiara Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 International Review of the Red Cross 525; Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (CUP 2010).

[10] In case of corporations, however, recent work by Pahuja, Dan Danielson and Grietja Baars is pushing for a more complicated longer history and understanding of corporations in international law. See for example, Danielsen (n 3); Sundhya Pahuja and Anna Saunders, 'Rival Worlds and the Place of the Corporation in International Law' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019); Grietje Baars, *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill 2019).

[11] Neil Boister, '"Transnational Criminal Law"?' (2003) 14(5) European Journal of International Law 953.

evolving hegemonic governance over those the network seeks to control and direct. Understood as colonial/imperial governance, the violence of networks is both intimate and everyday, as well as structurally reconfiguring how social, political and economic life is constructed on different local, rural, urban, state and international scales.[12] The use of international legal doctrines, in this thesis territorial sovereignty, is itself shown as a juridical concept which imposes, allows and facilitates violence. This is so even when it evolves into 'anti-colonial' or 'self-determinist' forms as its interlinking with nation state makes it an inherently extractive form of organizing the world.[13]

b. Understanding 'accountability' through the *dialogical interplay*

Thus, if understanding the violence of networks shows us how international law's foundational concept is itself violent, we must also push for a critical inquiry into how 'regimes' of international law, such as international humanitarian law, international criminal law, human rights and their doctrines, are themselves violent – even as they promise liberation, protection, accountability and/or justice.[14] While critical international law scholars have explored these questions, given the particular intervention of my thesis on the

[12] Here I am referring to ways in which networks of actors operate through, and within, scales of governance, such as local, state, international. One of the multiple threads of this thesis at certain points has been the reconfiguration of spatial, everyday life of those governed by networks, specifically in chapter 4, 5, 6 and 7 – indirect rule and governance has focused on the construction of and continuous reconstruction of the village as a site for the utopias of international legal imaginations. While this is a point of analysis not within the remit of this thesis, understanding the violence of international law in this thesis can open up the possibility of exploring the 'village' as a site of international law in its history. In addition to this suggestion, a more recent excellent approach to the 'everyday' of international law particularly the reconstruction of spatial urban life is explored by Eslava in, Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (CUP 2015).

[13] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019).

[14] See critical work within human rights, Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001) 42 Harvard International Law Journal 201. Within international humanitarian law, Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law and its Others* (CUP 2006); Chris af Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) Harvard International Law Journal 35. Within international criminal law, for example, Christine Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law' (2018) 29(3) European Journal of International Law 703; Kamari Maxine Clarke, 'Affective Justice: The Racialized Imaginaries of International Justice' (2019) 42(2) Political and Legal Anthropology Review 244; Sara Kendall, 'Critical Orientations: A Critique of International Criminal Court Practice' in Christine Schwobel-Patel (eds), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014); Tor Krever, 'Dispensing Global Justice' [2014] 85 New Left Review; Christian de Vos, Sara Kendall and Carstin Stahn (eds), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (CUP 2015).

role of networks, my specific suggestion is for the possibility of exploring how networks of actors embed knowledge into these regimes and doctrines for their benefit. Following from this knowledge production and operation of and by networks, then how can we understand the interplay of the different regimes within international law and the networks of actors producing an invisibility, hiding the violence of their operation.

Such a deconstruction of violence is meant to be decolonial, in the sense that it questions the Eurocentric perceptions of violence in international law as only being physical state violence and within the confines of international legal frameworks.[15] By both theorizing and discussing the concept of violence as a material reality of those on whom it was and continues to be inflicted, my project decolonises the idea of violence in international law. Ultimately, what I am also proposing is for critical international law scholars to re-examine how they ought to consider violence as embedded within legal regimes through networks of actors.[16] Further, how this particular violence of networks is made invisible through the underlying epistemological assumptions making these international legal regimes 'technical' or apolitical and objective.

This deconstruction of what is recognized as violence within the history of international law, both in past and present times, would give scholars within the field a new understanding of how and why regimes of international law themselves can be restrictive in understanding how violence is experienced both in the colony and post colony. Questions of accountability, then, in this case become less about using 'regimes' to hold law breakers accountable, especially when this relates to international crimes, humanitarian crimes and human rights contraventions, and more about how the violence is 'experienced'.

Thus, rather than trying to attribute 'accountability' through a framework created by an imperial production of knowledge through networks, we inform our understanding of 'accountability' through the violence of networks and international law's interplay. As soon as we shift the locus from a normative regime to social actors, the politics of legal knowledge production in the international legal order, we must also question 'where' and

[15] See for example scholars writing on decoloniality, particularly, Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America (English Translation)' (2000) 15(2) International Sociology 215; Achille Mbembe, '*Necropolitics'* (Duke University Press 2019); Walter D Mignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26(7-8) Theory, Culture & Society 159; Boaventura de Sousa Santos, *Epistemologies of the South: Justice against epistimicide* (Routledge 2015).

[16] On how legal regimes themselves legitimise violence, see Mégret (n 14); Jochnick and Normand (n 14).

'how' we understand 'legal knowledge' and the colonial encounter[17] between imperial networks of actors and their 'others'.

III. Work beyond critique: resistance networks and knowledge production

a. Decolonial methodology and alternate epistemologies

In exploring this juridical encounter, within the context of my thesis, what we are then focusing on is a sociology of knowledge production. Here conversations around what is considered international legal knowledge take far greater significance. Thus, scrutinizing the place of epistemological roots and effects of international legal knowledge with classically Eurocentric characteristics of imperial networks, such as modernity and/or the legal structures of the state, in building knowledge on resistance needs to be considered. In thinking beyond the critique of networks in international law, we also need to think more substantively about the alternate epistemological basis of 'international legal knowledge'. In this regard, I am in broad agreement with de Sousa Santos' critique of anti-colonial resistance within frameworks of modernity as having limited emancipatory potential. For example, thinking through de Sousa Santos'[18] critique of the current ontological basis of legal thinking is a more useful way of looking at a resistance through networks of communities which move beyond the 'wrecked emancipatory promises of modernity'.[19] Instead, we need to explore the possibility of emancipation in plural epistemological frameworks of ideas other than 'progress', and 'growth'.[20]

At the same time, the turn to epistemological plurality also cannot be the totalizing narrative in our attempt to 'decolonise' international legal knowledge. If anything, this thesis cautions against a polarized or binarized view of global order into the imagination of colonial/colonized/anti-colonial through the north/south, European/non-European, Western/non-Western divide. As I explore particularly in chapter 4, even before colonial

[17] Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law'(2013) 1(1) London Review of International Law 63.

[18] Boaventura de Sousa Santos *Toward a New Legal Common Sense: Law, Globalization, and Emancipation,* (CUP 2002)

[19] ibid 16.

[20] Here I refer to the turn in developmental thinking to 'degrowth' as a resistance to dominant forms of developmental thinking. See for example, Arturo Escobar, 'Degrowth, Postdevelopment, and Transitions: A Preliminary Conversation'(2015) 10(3) Sustainability Science 451.

modernity associated with the nation state's developmental programmes, the imperial British administrators worked in cooperation with existing hierarchical structures rooted in the social category of caste within the subcontinent. 'Alternate' forms of knowledge, from what would be considered part of this polarized binary of colonial and anti-colonial as being western/non-western, do not automatically equate to a 'decolonial' form of knowledge which can use its separation from the 'non-western' as an escape from scrutiny over questions of violence, coloniality and universalisation.

This is particularly why the conceptualization of violence of networks in this thesis focuses on a fluid understanding of violence as part of, what Quijano has called, a 'colonial matrix of power'.[21] My emphasis of understanding violence as experienced by people – who are governed by networks – is also a call for methodological intervention into how we explore plural epistemologies of international legal knowledge. Here I am referring to not just what we can understand as sources of a history of international law,[22] but lived, experiential and community knowledge in various forms – oral knowledge, stories – or generally what would be considered non-juridical forms or even approximations of juridical form.[23]

Here it is also important to question the process through which forms of knowledge are considered 'juridical' within international legal imagination, as I explore in chapter 4 the construction of 'cultural knowledge' useful to creating an indirect rule was 'juridified' as the closest approximation to legal, 'civilized' form.[24] What was important in this instance was the interesting interests of a network of actors which facilitated the juridication of certain

[21] Quijano (n 15).

[22] Rose Parfitt, 'The Spectre of Sources' (2014) 25(1) European Journal of International Law 297; Matilda Arvidsson and Miriam Bak McKenna, 'The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries'(2020) 33(1) Leiden Journal of International Law 37.

[23] For scholars who have pushed for this methodological shift in relation to race, see for example, James Thuo Gathii, 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn From Each Other' [2020] 67 University of California Los Angeles Law Review; Jeanne M Woods, 'Theoretical Insights at the Margins of International Law: TWAIL and CRT' [2012] American Society of International Law Proceedings of the Annual Meeting 389-398; Makau Mutua, 'Critical Race Theory and International Law: The View of an Critical Race Theory and International Law: The View of an Insider-Outsider Insider-Outsider' (2000) 45 Villanova Law Review 841. For scholars who broadly push for this in research methodologies generally see for example, Linda Tuhiwai Smith, *Decolonizing Methodologies* (Zed Books 1999); Achille Mbembe, 'Decolonizing Knowledge and the Question of the Archive' [2015] Wits Institute for Social and Economic Research (WISER) <https://wiser.wits.ac.za/sites/default/files/private/Achille%20Mbembe%20%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf> accessed June 2020.

[24] Balmurli Natrajan and Radhika Parameswaran, 'Contesting the Politics of Ethnography: Towards an Alternative Knowledge Production' (1997) 21(2) Journal of Communication Inquiry 27.

knowledge as true to the 'natives', which was a re-inscription of a socio-political and economic hierarchy of caste.[25]

What I am suggesting is that this thesis shows that the question of international legal order as imperial is not simply a binary of western/non-western as colonizer/colonized, but as a more complicated story of how international law's universalised nature also inscribed racial, gendered, and other forms of exclusions. Interactions with the colonized were not simply a story of domination but of, often, cooperation, intersecting interests, resistance, assimilation and negotiation.

Thus even though we must contend with the 'secularised theological'[26] nature of international law,[27] the projection/construction of western white man as 'human' after the colonization of New Indies,[28] construction of 'religion',[29] and even the ecclesial genesis of networks and international law's interplay with networks, a turn to some 'alternate' form of knowledge needs to be understood in accordance to its location, proximity and interaction with power. One particular example to illustrate this point is European encounters with 'Islam', some of which also feature throughout the thesis.

Since the ecclesial genesis of the dialogical interplay, the place and role of Muslim communities have been different depending on various locations of power within which the encounter between European imperial powers and 'Islam' has happened. In every case there are constructions of 'Islam' encoded which have been dependent on the imperial network and the overall social, political, economic goals of the network. The reaction from different Muslim communities, empires and states is heterogeneous ranging from resistance to cooperation, assimilation and negotiation.[30]

[25] ibid 32.

[26] Peter Fitzpatrick, '"What Are the Gods to Us Now?": Secular Theology and the Modernity of Law'.(2006) 8(1) Theoretical Inquiries in Law 161.

[27] Mark W Janis and Carolyn Evans (eds), *Religion and International Law* (Martinus Nijhoff Publishers 1999).

[28] Sylvia Wynter, 'Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, after Man, Its Overrepresentation - An Argument' (2003) 3(3) CR: the new centennial review 257.

[29] Nelson Maldonado-Torres, 'AAR Centennial Roundtable: Religion, Conquest, and Race in the Foundations of the Modern/ Colonial World' (2014) 82 Journal of the American Academy of Religion 636

[30] The imagination of 'Islam' within a dialogical interplay between networks and international law was seen first in the missionary networks of the Holy Roman Church as I have explored in the second chapter, through Spanish perceptions of the 'moors' and 'black Muslims' brought in as slaves in the New Indies. This could also be seen throughout the interaction of the European colonial encounter with different Muslim communities, in the Java Islands (chapter 3), in the subcontinent (chapter 4), in northern Nigeria and Ottoman Empire (chapter5), and during decolonisation in both colonies fighting for self-determination,

A search for plural epistemologies needs to consider, then, the locations of power within which international legal knowledge is responded to rather than some homogenous 'non-western' decolonial 'way of knowing'.[31]

b. Towards a decolonial study of resistance networks

This does not, however, mean that my claim about networks is that they are ontologically determined to be *only* imperial. As I have explored briefly in chapter 6, during the decolonisation period alternate forms of resisting a global legal order dominated by the victors of World War II were being imagined. Within this alternate global legal order, questions around expertise and networks were instrumental – if not explicitly, yet implicit in the form they took in their international organizing for resistance.[32]

I have explored this particular incident as one of organizing through networks as part of a resistance to the/a hegemonic international global order not only as it is important to the narrative of expert networks during this period, but also, particularly, to highlight what we can learn from the lack of lasting impact of this particular moment in international resistance.[33] I see my critique and formulation of networks as an imperial mode of governance in the making of international legal norms as one that informs studies about 'emancipatory' or 'resistance' forms of networks. To then write critically and responsibly about resistance networks, we need to be aware of what can make a network inherently imperial and violent – and how imperial modes of networks operate. This is at its core a deviation from what is inherently considered a form of resistance or political potential, such as John Braithwaite, whose approach to network governance and resistance is based on

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such as Algeria, and the global Islamic socialist movements (chapter 6).

[31] An excellent recent study considering the location of power, encounter and reaction to international legal order and local contextual understandings of Islam by 'Muslim communities' is Darryl Li, *The Universal Enemy: Jihad, Empire, and the Challenge of Solidarity* (Stanford University Press 2019).

[32] I am referring here specifically to the NIEO movement and the Bandung Conference. See for example, Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP 2017) ; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011); Umut Özsu, '"In the Interests of Mankind as a Whole": Mohammed Bedjaoui's New International Economic Order' (2015) 6 (1) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 129.

[33] ibid Eslava, Fakhri and Nesiah, *Bandung, Global History and International Law*; Pahuja, *Decolonising International Law.*

participatory politics.[34] My claim has consistently been to show how networks have historically been an imperial mode of power; however, this does not mean they cannot also be forms of resistance.

While the scope of de/anti-colonial resistance lies outside the scope and beyond the purpose of this thesis, what I do suggest in this thesis is that the interplay between networks and international law throughout history has not been a simple one – but involves intersection with and across various interests, sometimes also direct violence against resistance networks. Violence understood as coloniality and governance over human life itself is by its nature repression against any plurality in intellectual, social and political life. I have indicated a possibility of resistance to various networks throughout this thesis, such as fear of black Muslim slave resistance by the Spanish Empire in chapter 2, resistance against Dutch commercial empire by Muslim communities in the Java islands, direct and indirect violence particularly in chapter 4, Dalit resistance against both British and native elite case networks, and the reiteration of violence against different anti-colonial and decolonial movements through the 20th Century.

Nonetheless, the breadth of knowledge we can gain from anti-colonial and decolonial networks throughout history is not yet given the attention that it should be to learn about resistance more critically. These studies, however, need to move beyond 'critical' international law's limitations and methodological conversations – which this thesis has also not moved away from despite focusing on the task of decolonising international law. However, this thesis does indicate, through the study of international law's interplay with networks resulting in colonial/imperial governance as violence, how our study of 'resistance networks' must consider colonial/imperial violence. Any study of resistance networks where we are not considering if the 'resistance network' itself has a 'universalising' nature and is itself exhibiting colonial/imperial violence, directly or indirectly, would be an incomplete attempt empty of critical attention towards the question of violence as coloniality. Here 'writing resistance'[35] into international law is not about simply adopting a 'non-elitist', 'civil society' approach to resistance uncritically.[36] It means to be wary of either a top-down

[34] John Braithwaite, Hillary Charlesworth, Aderito Soares, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste* (ANU E Press 2012).
[35] Ruth Buchanan, 'Writing Resistance into International Law' (2008) 10(4) International Community Law Review 445.
[36] Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2007) 27 Third World Quarterly 767.

reformation or a bottom-up resistance based on locations of power where the different actors are speaking from, and if they are reiterating forms of violence which are inherently colonial.

IV. Concluding remarks

By presenting a complicated story of international law, especially in relation to how networks and international operate in tandem, and how we can see multiple forms of colonialism developing – particularly a native elite economic and political class – I am not dooming international law of its possibilities beyond imperialism. If anything, by focusing on the violence of international law as one of colonial governance, which is totalizing, salient and controlling the everyday as well as the structure of human life, I am also opening up the 'field' in which international legal imagination operates.

This opening of a 'field' within which international law operates, both analytical and material, also opens us up to other counter-hegemonic encounters, dialogues, forms of resistance and sources within which we may derive prefigurative parallel lives of international legal order. Knowledge production is, in this instance, situated in more than just 'technical' legal fields of international regimes. In a sense, research and teaching of international law, by researchers and academics, becomes yet another site for imaginations of the 'field' in which international law exists. Even if these are limited to academic circles,[37] the role of critical legal education becomes central to pushing the boundaries of international law.[38]

Thus, in remembering this particular facet of readjusting our view of the 'field' where international law happens, we are then also faced with the question of how we bring these counter-hegemonic encounters in the 'field' to the forefront – ethically, cautiously and

[37] Rajkovic et al note, however, that even academics form part of the sociology of knowledge production within the international legal order. Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen, 'Introduction: Legality, Interdisciplinarity and the Study of Practices' in Nikolas Rajkovic, Tanya Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and their Politics* (CUP 2016). See also, Gleider Hernández, 'The Responsibility of the International Legal Academic: Situating the Grammarian within the "Invisible College" in Jean d'Aspremont, Tarcisio Gazzini, Andre Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (CUP 2017).

[38] There is at the same time an important discussion on the politics of international legal education specifically on what is considered 'international law' and if it is truly 'international', see for this, Anthea Roberts, *Is International Law International?* (OUP 2017).

carefully. Here, attention to the substantive reflection on ethics of the 'jurisprudent's office'[39] is as important as the 'doing'/acting and connecting with communities on whom the violence is perpetrated – even if they are not the subject of our research. The importance of understanding how the violence of international law operates at the most material ground level requires us to also reflect on the separation of academia from the material.[40] Praxis, here, is about 'getting down and dirty' with international law,[41] but also about sociological positioning of the research/teacher within the local, state and international concerning those they write and teach about.

While understanding the 'field' in which international law happens must be reflected in the research/teaching, the position of the researcher/teacher must also be part of the conversation. Thus our engagements with the 'field' of international law can just as well be about 'standing rock', to Black Lives Matter, to peasant dalit resistance in Sindh, Pakistan. At the same time these fields in which international law operates need to be attentive to the location of power from which they are speaking/writing and researching. This reflection is more than just about substantive research. It requires us to be, what Allama Iqbal has called, the scholar who stays connected to the everyday struggles of people and continuously fights against the oppressive structures surrounding them.[42]

[39] Shaun Mcveigh, 'Afterword: Office and the Conduct of the Minor Jurisprudent' (2015) 5 University of California Irvine Law Review 499.
[40] Smith (n 23).
[41] Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade, Law and Development 103.
[42] Allama Iqbal cited in Iqbal Singh Sevea, *The Political Philosophy of Muhammad Iqbal: Islam and Nationalism in Late Colonial India* (CUP 2014).

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