Sovereign (In)equality: How Decolonization Shaped the World Order

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The relationship between decolonization and international law has been an understudied venture; in this paper I re-examine this relationship, and pay particular attention to the general understanding that the process of decolonization resulted in a world of universal international law amongst sovereign equals. In doing so I challenge some of the fundamental underpinnings of international law – such as the idea that relations between States are governed by the rules which fit under the heading of "sovereign equality" and the notion that decolonization ended in a world populated by independent sovereign States. Rather, I seek to argue that the process has largely been fraught by attempts from the dominant powers in the world order to maintain their positions of hegemony and to ensure the articulation of their world view. In doing so, this paper is concerned with power, politics and the unequal shape of the international world.

Introduction

International law prior to 1945 was the exclusive preserve of a Family of Nations composed mostly of European States.[1] The law itself was constructed through bilateral agreements between States, and through concerts coordinated by the Great Powers. State interaction was predicated largely on power relations, and there were very few limits on the exercise of that power.[2] The international legal order established in 1945, however, presented a very different state of affairs. In 1941 US President Franklin D. Roosevelt and British Prime Minister Winston Churchill drafted what came to be known as the Atlantic Charter – their joint vision for a post-war world. This set in motion a series of events leading to the consolidation of an Allied plan for a post-war International Legal Order, based on the coordination of the Great Powers, or what Roosevelt termed the "Four Policemen Model". In 1945 this vision was realized, as a group of 50 Allied nations gathered in San Francisco to discuss the drafting of a new international institution. The horrors of the Second World War were etched deep in the minds of those present at the United Nations Conference on International Organization (UNCIO), and the resulting document is evidence of this. The opening line of the Charter reads: "We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[3] It then goes on to advocate principles of respect for human rights, and the dignity and worth of the human person, and stresses the importance of international peace and security.[4] The primary means by which this new legal régime sought to achieve these aims was through two means: the creation of an international law based on the sovereign equality of States;[5] and the prohibition of the use of force as a legitimate tool of foreign policy.[6] This was also building on the mistakes of the United Nations' predecessor – the League of Nations. The league failed to prevent the outbreak of WWII, and had lacked any suitable machinery for ensuring the effective maintenance of international peace and security. Critiques of the League blamed many of its ills on the fact that it didn't completely outlaw the use of force as a legitimate tool of foreign policy; hence the complete prohibition as articulated in the United Nations (UN) Charter.

The UN Charter also contained provisions concerning the right of all peoples to self-determination. This in itself was a

[1] One should bear in mind that the author is making reference to the creation of *modern* international law, based on a system of relations between sovereign States so to speak (See *infra* note 24 on the Westphalian origins of the State system), which has its origins from a largely European background. Some argue with quite some sway that international law has its roots in a range of civilisations and societies across history; *See e.g.*, Onuma Yasuaki, "When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective," *Journal of the History of International Law,* Vol. 2 (2000) p.1-66; For a critique of Yasuaki's approach, *see* Nicholas Onuf, "Eurocentrism and Civilization," ibid., Vol. 6 (2004): 37-42.

[2] Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (New York: Penguin, 2006), 6.

[3] United Nations Charter (1945) *Preamble.*

[4] At the UNCIO "Committee I/1 asserted that the Preamble is of as much legal validity as the text itself." Clyde Eagleton, "The Charter Adopted at San Francisco," *The American Political Science Review,* Vol. 39, No. 5 (October 1945): 937, footnote 5.

[5] United Nations Charter (1945) Article 2(1).

[6] United Nations Charter (1945) Article 2(4).

revolutionary step, as at the time the majority of the world's population was under colonial domination. Colonial issues were also dealt with in the Charter, under Chapters XI and XII, both of which expressed that those residing in colonial territories would be put under a system of international tutelage, in order to ensure their development, and their progression towards self-government. By the 1960s the European colonial Empires had relinquished most of their colonial territories, and these peoples were welcomed into the Family of Nations as sovereign equals. They now shared the same rights under international law as their former colonial masters, and, likewise, were bound by the same obligations and duties. International law had at last become universal. Colonialism, it would seem, came to be regarded as an "unfortunate event."[7]

This, broadly speaking, is the "traditional" understanding of the evolution of the modern international system. It sees these developments as the "progress towards greater equality among nations and a general historical movement in the direction of universality."[8] Decolonization, in the traditional perspective of international law, presents itself as a largely unproblematic and unobtrusive epoch of history. However, a wave of post-colonial theorists – especially those from the Third World – have begun to challenge this notion, and to probe deeper into the process; to pick apart the relationships, the problems facing the new States, the difficulties of reconciling an international law that was created without the acquiescence of the majority of the world's people. International lawyers have largely avoided answering these questions, with the self-assured reliance that international law is universal, and that its norms are designed to protect States. They can fall back on the principle of sovereign equality, which ensures that States are guaranteed the same rights as all other States, no matter what their shape or size or economic or military prowess: "The smallest and weakest of independent political communities has ... exactly the same rights in International Law as the strongest and most extensive empire."[9] Colonialism has been relegated to the history books, a matter no longer relevant in today's more egalitarian world order.

I seek to re-examine the claims made by the so-called "classical" understanding of international law, as enumerated above. In other words, I seek to challenge the view that the 1945 arrangements established a world in which equality, not power, governs international relations, and where States are equal before the law. Indeed, despite international law's purportedly egalitarian aspirations, the reality often suggests that States are far from equal in their relations with one another. However (again) lawyers often avoid dealing with such issues by laying the claim that there is a distinction between the political and the legal, and as a consequence many issues of power and other inequalities are relegated to the domain of politics. However, it is impossible to examine law without considering the political and social context; to study law in a vacuum is to miss its true character. Law is a social construct; international law especially so. "Realizing that law is ultimately a social construct – having travelled through a political process in its formulation, development, and finally in its application – means that law can never be divorced from its relationship to power."[10] I argue, then, that power, politics and hegemony play a vital role in shaping the law.

The starting premise of this paper is that international law is founded in European culture, and that, in its earlier formulations, it was "directed toward the promotion of European interests."[11] I argue further that the fundamental character of international law was wrought by European perceptions of the "Self" and the non-European "Other".[12] There has been, in this self-image, the perception of a dichotomy between the "civilized" and the "uncivilized", which has been used to justify exploitative régimes, colonialism, and structures of domination and subjugation. Indeed, "to misrepresent and undermine the unity of the Other is a crucial element in any strategy of dominance."[13] I seek to demonstrate that this dichotomy has not lost its potency, and that it still is used to great effect, even today, to justify structures of domination and subordination. This has been done through reconstituting the notion of the "international community", and selectively defining the norms that govern it.[14]

Although decolonization is presented as having a somewhat benign quality, I suggest that the process has been characterized by tensions between the formerly colonized, and the former colonizers. The latter has been reluctant to relinquish control over its colonial possessions, and so cede its position as the dominant power, whereas the former has been striving to obtain equality and justice. I seek to show that throughout the second half of the twentieth century these decolonized States have made multiple attempts to bring about a change in various international norms, and to create new ones. Indeed, this is hardly surprising considering that international law "now claims the allegiance of nations

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[7] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2004), 3.
[8] Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: CUP, 2004), 11-12.
[9] Thomas Joseph Lawrence, *Essays on Some Disputed Questions in Modern International Law* (2nd ed. rev. and enl.) (Cambridge: Deighton, Bell and Co., 1885), 208.
[10] Jean Allain, *International Law in the Middle East: Closer to Power than Justice* (Burlington: Ashgate, 2004), 1.
[11] U. O. Umozurike, *International Law and Colonialism in Africa* (Enugu: Nwamife, 1979), 11.
[12] Siba N'Zatioula Grovogui, *Sovereigns, Quasi-Sovereigns and Africans* (Minneapolis: University of Minnesota Press, 1996), 16.
[13] B. S. Chimni, "Third World Approaches to International Law: A Manifesto," *International Community Law Review,* Vol. 8 (2006): 6.
[14] Simpson, 2004: preface p.x.

which had no part in building it up, and which either have never known, or no longer accept, the fundamental beliefs and sentiments on which it was originally founded."[15] The West, on the other hand, has continually prevented the ascendancy of any credible opposition to its dominant global position, and has been a substantial obstacle to the attempts made by the decolonized States to change the law. In section two I examine the process of decolonization in more detail, illustrating how the principle of self-determination was expanded and employed by certain States to further anti-colonial ambitions. I also show how the newly decolonized States utilized this principle further to assert their independence, and to claim certain rights under international law. At the same time, I show how the colonial powers persistently objected to the assertion of these principles – until, at least, the political power of the United Nations General Assembly (GA) gained enough momentum to encourage the process of decolonization. The third section is concerned with the attempt to create a New International Economic Order (NIEO) by the new States, and I look at the attempts of the new States to gain control over their sovereign economic rights, and so facilitate the process of development. Once again there was strong opposition from the dominant States, which inevitably led to the failure of the proposed NIEO. One of the key arguments I draw out from the analysis contained in these two Chapters is the nature of the rights that these new States tended to enunciate. They tended to place a far greater emphasis on Economic, Social and Cultural Rights, and advocated an international legal system premised on social justice and equality. The West viewed these as a threat to the continuance of the global structures that enabled it to prosper and maintain a position of domination, and so moved to prevent these plans from being fulfilled.

A key tenet of my argument in this paper is concerned with the hegemony of the West, and the ways in which it has used its superior position to prevent the rise of any serious challenges against it. An extension of that argument concerns the failure of the Third World to achieve equality under international law, and its subsequent subordination to the West. "The tragedy for the Third World is that the mechanisms used by international law to achieve decolonization were also the mechanisms that created neo-colonialism; and that, furthermore, the legal structures, ideologies and jurisprudential techniques for furthering neo-colonialism largely were in place before Third World states actually acquired independence."[16] Section four examines the ways in which the dominant States have violated the international laws concerning the immunity from intervention and the prohibition on the use of force in order to maintain their position. The principle means of doing this has been through employing indirect force against States with the aim of toppling governments that pose a threat to the international order, and – ultimately – to their interests. Finally, the fifth section looks at the international financial structures which the Third World has had to adhere to, and how these have similarly led to the perpetuation of colonial-type structures of domination and subordination. Here I argue that the norms which govern the international economy have created the conditions in these States which are necessary for transnational capital to flourish, and that all the supposed benefits that were to arise from these development programmes end up either back in the hands of the Western States, or in a transnational ruling class.

It is the principle of sovereign equality which is the foundational rule of the international system – at least in the eyes of international lawyers anyway. This principle ensures that relations between States are conducted in a peaceful manner that does not infringe on the sovereign rights of other States. In section one I conduct an analysis of the legal rule, and draw out that there are two "qualities" of the principle: the first I call "internal sovereignty" which is designed to allow States the freedom to choose a plurality of different forms; the second attribute is "external sovereignty", and this aspect seeks to limit the exercise of one's sovereign powers, so that it does not interfere in the sovereignty of others – this is usually expressed in the Latin maxim *"par in parem, non habet imperium"*, which translates roughly as "no authority shall have authority over an equal". These two qualities comprise the legal principle of sovereign equality; one permits States the exercise of their sovereignty, the other seeks to protect this through placing qualifications on the ways in which sovereigns can act. It is thus a "doctrine of liberty and constraint."[17] It is this legal principle which forms the underlying basis to this paper. I argue that although it pertains to create an international system where States stand on an equal footing, each protected from domination, it has, largely speaking, never been fully realized. To this end, I posit that international law has, therefore, never become truly universal. There has been a large group of States – which is composed largely of the decolonized States, which now make up the "Third World" – which has been unable to fully exercise their right to this principle due to the constraint placed on them by the dominant powers. It would seem that the principle of sovereign equality in international law has never achieved its full potential: all States have never been granted their full sovereign rights as enshrined in the principle of sovereign equality. There are, then, numerous themes and strands of arguments running through this paper, all of which seek to challenge the notions and understandings of international law as perceived through 'traditional' scholarship.

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[15] James Leslie Brierly, *The Law of Nations: An Introduction to the International Law of Peace,* 5th ed., (Oxford: Clarendon Press, 1955), 44.
[16] Anghie, 2004: 192.
[17] Simpson, 2004: 41.

I am greatly indebted to the works of Edward Said, Antony Anghie, Gerry Simpson, Chimni; the texts produced by these scholars have greatly inspired me throughout the course of my research, and have encouraged me to challenge the everyday perceptions of the international order. I also have sought to adopt a multidisciplinary approach, combining elements of law, international relations, history and economics. I have also borrowed a great deal from the various post-colonial theorists; it was through these that I began to take an interest in the early years of international law, its European origins, and the issue of universality with respect to those who had had no say in how the law was written. As I mentioned earlier in my introduction, truly understanding law is impossible without recourse to knowledge of the context, the outside world, the actors in the process and their aims and ideals; I feel that international law benefits greatly from the contributions of these other disciplines, as it helps to add a "shell" to the skeleton that the law otherwise presents. I don't intend this work to be a wholly authoritative or exhaustive; obviously I have had to pick and choose which texts, cases, and examples to use, and in doing so I have inevitably missed out on some important facts and issues. However, I feel that the evidence I have used aptly portrays the sorts of issues and answers I am trying to provide. Finally, I don't, in writing this paper, wish to negate the good things that international law has achieved, and nor do I wish to displace the potential that it still carries; however, it is no good considering international law without seeing the reality.

The Nuances of Sovereign Equality

Article 2(1) of the UN Charter *explicitly* notes the fundamental importance of the principle of sovereign equality to the functioning of the UN,[18] and – as the principle plays a vital regulatory role in international relations – to international law itself.[19] Indeed, it can be said to be the cornerstone of international law, insofar as other fundamental tenets of the law depend upon it. However, although it can be expressed in and of itself, one cannot fully explain the precise contours of the principle without reference to multiple corresponding and corollary rules.[20] That is, "sovereign equality" is not a tangible concept, so to speak; rather, it is composed of various rules and norms which, taken together, can be labelled as sovereign equality. The purpose of this section, then, is to provide an analysis of sovereign equality, and in doing so to establish the nuances of the principle. First of all, I consider the two terms – sovereignty and equality – and explore the somewhat contradictory nature that they seem to present when expressed together. From this I draw out what I deem to be the two key attributes of sovereign equality, which I put under the headings "internal sovereignty" and "external sovereignty". In these sections I outline the legal sources and aspects, and illustrate the overall character of sovereign equality.

Sovereign Contradictions

The idea of the sovereign State lies at the core of our understanding of international relations, the international community, and international law.[21] The concept of sovereignty is often conveyed in terms of supreme authority and jurisdiction over a given area of territory; in other words, there is no authority higher than that expressed by the sovereign of a particular territory. As Huber succinctly put it, "sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other State,* the functions of a State."[22] Sovereignty, it would seem, is the power of a State to act as it will, a power which can be bound by no external authority; it is the exclusive right of the State to administer its territory as it sees fit. However, the extent to which a sovereign can wield its power

[18] For example, consider the *preamble* to GA Res. 2625 (XXV) 1970 [emphasis added]: "...the purposes of the United Nations can be implemented *only if* States enjoy sovereign equality and comply fully with the requirements of this principle in their international relations." Likewise, Goodrich and Hambro argue that sovereign equality is the defining attribute of the UN. L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents,* 2nd ed., World Peace Foundation (1949), 7.

[19] Ian Brownlie, *Principles of Public International Law,* 4th ed., (New York: Clarendon Press, 1990), 287. "The sovereignty and equality of States represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having a uniform legal personality."

[20] *UN Repertory of Practice,* Article 2(1)-(5) of the Charter, Repertory of Practice (1945-54), Vol.1, p.7, para. 17,: available online at: http://untreaty.un.org/cod/repertory/art2/english/rep_orig_vol1-art2_1-5_e.pdf#pagemode=none; Also, Prof. Dr. Albert Bleckmann, and Dr. Bardo Fassbender, "Article 2(1)," in *The Charter of the United Nations: A Commentary,* ed. Bruno Simma (Oxford: OUP, 2002), 81. "It is a rather unspecific concept the content of which is only determined by a number of more concrete rules of international law binding on States at a given time."

[21] See, for example, Hedley Bull: "The starting point of international relations is the existence of *States* or independent political communities, each of which possesses a government and asserts sovereignty in relation to a particular portion of the earth's surface and a particular segment of the human population." Hedley Bull, *The Anarchical Society: A Study in Order in World Politics* (New York: Columbia University Press, 1977), 8. See also, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986, para.163: "... the fundamental principle of State sovereignty, on which the whole of international law rests."; Penelope Simmons, "The Emergence of the Idea of the Individualized State in the International Legal System," 5 *Journal of the History of International Law* (2003), pp.293-336; Georges M. Abi-Saab, "The Newly Independent States and the Rules of International Law," *Howard Law Journal,* Vol. 8, (1962): 95-121. For an historical appraisal of the concept of sovereignty and the State, see, Diane F. Orentlicher, "Separation Anxiety: International Responses to Ethno-Separatist Claims," *Yale Journal of International Law,* Vol. 23 (1998). On the importance of the Peace of Westphalia, see, L. Gross, "The Peace of Westphalia, 1648-194," 42 *AJIL* (1948). Stéphane Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" *Journal of the History of International Law,* Vol. 2 (2000).

[22] Max Huber, Island of Palmas case (Netherlands, USA), *United Nations Reports of International Arbitral Awards,* Vol. II. (April 4, 1928): 838 [emphasis added].

is *not* limitless. The logic of this is somewhat contradictory, as States – through the exercise of their sovereign powers and their own free will – may be party to international agreements which place limitations on the exercise of their power; such was the position taken by the PCIJ in the so-called "Lotus" case.[23] The UN Charter, however, represents the *highest* legal authority to which States submit, and places heavy qualifications on the ways in which States can act.[24] The most extensive limitation on the exercise of State sovereignty comes from the principle of sovereign *equality*, and all the corollary rules which follow from this. As was noted in the "Lotus" case, "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – *it may not exercise its power in any form in the territory of another State."*[25] The two key pronouncements of this rule are found in Articles 2(4), and 2(7) of the UN Charter; the former issuing a prohibition on the use of force in international relations,[26] and the latter against intervention by a State "in matters which are essentially within the domestic jurisdiction of any State."[27] These three rules (Articles 2(1), 2(4), and 2(7)) comprise the notion of non-intervention – or, the immunity from intervention – which seeks to protect the sovereignty of States.[28]

We can see, therefore, that sovereign equality is composed of ultimate authority and jurisdiction on the one hand (internal sovereignty), and a series of checks on the exercise of that power on the other – checks which are designed to safeguard and protect the sovereign authority of States, and to ensure equality in their relations (external sovereignty).

Internal Sovereignty

The definition of sovereignty as provided by Huber notes that independence is an important aspect.[29] Indeed, its importance was stressed by delegates at the San Francisco Conference, who argued that "territorial integrity and political independence" are considered to be inclusive within the term "sovereign equality".[30] The notion of independence was also frequently posited by the newly decolonized States throughout the latter half of the twentieth century.[31] These States often wished to accentuate their position of independence in relation to their former colonizers, and move away from the previous structures that had ensured their subordination.[32] The basic content of the principle of independence is best captured by the following statement: "Every State has the right to exist ... to organise itself as it sees fit."[33] Essentially, then, a State has the right to be a State, and to choose the form which the State shall take; international law does not issue any declarations to the contrary.

In 1949 the International Law Commission (ILC) composed a "Draft Declaration on Rights and Duties of States", Article 1 of which stated: "Every State has the right to independence and hence to exercise freely, without distinction by any other State, all its legal powers, *including the choice of its own form of government."*[34] The so-called "Declaration concerning Friendly Relations" of 1970 – the content of which the GA "declared to be basic principles of international law"[35] – echoed, and added to, these sentiments. It declared that: "Every State has an inalienable

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[23] The Case of the S.S. "Lotus", Collection of Judgements, PCIJ, Series A, No. 10 (1927): 18. "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."

[24] United Nations Charter (1945) Article 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

[25] The Case of the S.S. "Lotus", Collection of Judgements, PCIJ, Series A, No. 10 (1927), 18 [emphasis added].

[26] Subject to the qualifications of Chapter VII and Article 51 of the UN Charter (1945).

[27] UN Charter (1945) Article 2(7).

[28] See GA Res. 2131 (XX) 1966, Article 1: "No State has the right to intervene, directly or *indirectly,* for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are condemned." [emphasis added]; Also, see S. McCaffrey, "The Forty-First Session of the International Law Commission," AJIL, Vol. 83, No. 4, (1989) for a good indication of the controversy over the meaning of the notion of "intervention."

[29] See *supra* note 21; See also, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Advisory Opinion, ICJ Rep. (1950), Separate Opinion, Judge Zoričič, p. 98.

[30] Report of Rapporteur of Sub-committee I/1/A to Committee I/1: Chapter II, 1 June 1945; UNCIO VI, pp.717, quoted in Prof. Dr. Albert Bleckmann, and Dr. Bardo Fassbender, "Article 2(1)," in *The Charter of the United Nations: A Commentary,* ed. Bruno Simma (2002),78. Consider also, *The Corfu Channel Case,* Merits, ICJ Rep. (April 9, 1949): 35. "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."; See also, *Corfu Channel Case,* Judgment, ICJ Rep. (1949),1 *et seq.*, at p.35.

[31] See Sections 2 & 3

[32] For example, GA Res. 1514 (XV) 1960, *preamble:* "...all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory…"; Article 1: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation." Similarly, consider the wording of GA Res. 103 (XXXIV) 1979, *preamble:* "...imperialism, colonialism, neo-colonialism, racism including Zionism and *apartheid* are all forces which seek to perpetuate unequal relations and privileges acquired by force."

[33] Cuban proposals on Dumbarton Oaks, UNCIO III at 496, Doc.2 g/14(g), May 2, 1945.

[34] Draft Declaration on Rights and Duties of States, ILC first session, 1949; Full text in annex to GA Res. 375 (IV) 1949 [emphasis added].

[35] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986, para.203.

right to choose its political, economic, social and cultural systems, without interference in any form by another State."[36] Indeed, as the ICJ remarked: "Adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State."[37] It is this "freedom of choice" which defines sovereign equality; essentially, then, States have equal capacity to determine what shape and form they take. Gerry Simpson calls this the "pluralist" element of international law, something which "derives from a State's right to self-determination."[38] Common Article 1 of the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, explicitly recognises the right of all peoples to self-determination, and reiterates the right stemming from this of all peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[39] A "State's sovereignty under international law is its legal independence from other States,"[40] as well as the right to exist under a plurality of forms. The essential element of "internal sovereignty", then, is the right of the State to choose freely what form it will take. It is, however, political and economic sovereignty which has seen the most frequent use in international law, especially by those States which found their independence from colonial régimes during the latter half of the twentieth century, and it is with these that this paper is largely concerned.

External Sovereignty

In addition to providing assurances that States can determine the form which they take, international law also seeks to protect these rights, the key pronouncements of which are to be found in Articles 2(4) and 2(7) of the UN Charter. The latter stipulates that States are immune from intervention in their domestic affairs – except where international law dictates otherwise[41] – whilst the former issues a prohibition against the use of force in international relations. There is a distinction between the two, although both fall under the heading of intervention, and both are unlawful. This aspect of sovereign equality is what Michel Consard called a "pacifying response to power-hungry sovereigns."[42]

Intervention

In *Nicaragua* the ICJ stated that "a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[43] As we have seen in the previous section, international law stipulates that such matters include the right to determine political status, as well as economic, social and cultural systems. As the judgement in *Nicaragua* went on to state, "one of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.

Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."[44] GA Resolution 2131 states that: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."[45] Matters of a domestic nature relating the political systems of a country, foreign policy decisions, or the economic system, for example, should be matters which are controlled exclusively by the sovereign authority within that State. All States are prohibited from depriving the sovereign of those rights. Resolution 2131 makes a broad statement concerning the methods that are prohibited: i.e., "economic, political *or any other type of measures."*[46] The GA later made a similar proclamation, in Resolution 3281, stating that States

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[36] UNGA Res. 2625 (XXV) 1970; See also, GA Res. 2131 (XX) 1966, Article 5.

[37] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986, para.163.

[38] Simpson, 2004: 54.

[39] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), GA Res. 2200A (XXI) 1966, Common Article 1; Concerning problems which arise in the distinction between rights of peoples and States see conclusion of section two.

[40] Hans Kelsen, "The Principle of Sovereign Equality as a Basis for International Organization," *Yale Law Journal,* Vol. 53, (1943-1944): 208.

[41] There are, however, certain limits concerning what a State *cannot* do within its jurisdiction (i.e., cannot commit human rights abuses); In the *Case of the Nationality Decrees in Tunis and Morocco,* PCIJ, Series B, No. 4 (Feb. 7, 1923): 24, the court declared that: "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations." In other words, a State is essentially free to do as it wishes, except where rules of international law expressly states that certain acts are prohibited. The ICJ, in *Nicaragua*, confirmed this (I.C.J. Rep. 1986, para.258): "A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law."

[42] Michel Consard, "Sovereign Equality: „the Wimbledon sails on,'" in *United States Hegemony and the Foundations of International Law,* eds. Byers and Nolte (Cambridge: CUP, 2003), 121.

[43] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Rep. 1986, para.205.

[44] Ibid.

[45] GA Res. 2131 (XX) 1965, Article 2; Also repeated in GA Res. 2625 (XXV) 1970.

[46] GA Res. 2131 (XX) 1965, Article 2 [emphasis added].

were free to choose their form, "without outside interference, coercion or threat *in any form whatsoever."*[47]

Use of Force

The prohibition on the use of force in the international relations of States is one of the founding premises of the UN itself. Its creators envisaged the creation of a world order without the threat of war, and so sought to abolish force as a legitimate means of conducting relations between States. "Today, the Charter's ban on the use of force is understood not so much as a limitation of sovereignty but as a necessary prerequisite for a *de facto* enjoyment of sovereign equality by States. A State's sovereign equality depends on a comprehensive prohibition of the use of force."[48] The phrase "use of force" is somewhat misleading, but expansion on the meaning of the concept has come through various GA Resolutions and ICJ judgements. It is generally accepted that it covers two broad spheres: direct and indirect uses of force.[49] The former is where a State sends its own troops to engage in acts of aggression, whereas the latter generally constitutes the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State."[50] Both forms are prohibited under international law, although it is harder to determine precisely what qualifies as an indirect use of force; indeed, in *Nicaragua* the court held that not every act of support of subversive groups constitutes an indirect use of force – however, it did remark that it would still constitute an unlawful intervention.[51]

Similarly, covert intervention is prohibited: "*Resolutely condemns* policies of pressure and use or threat of use of force, direct or indirect aggression, occupation and the growing practice of interference and intervention, *overt or covert,* in the internal affairs of States."[52] The US support of the *Contras* in Nicaragua was considered to be one such example of indirect use of force: "The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, *or in the indirect form of support for subversive or terrorist armed activities within another State.* ... These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention."[53] The GA has too shown support for this principle, as it declared that "any forcible action, *direct or indirect,* which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status and pursue their economic, social and cultural development constitutes a violation of the Charter of the United Nations."[54] Likewise, the "Friendly Relations Declaration" reiterates this.[55]

Conclusion

To draw on my earlier analogy of the world system as it existed pre-1945, a system where there were few limits on the exercise of power and hierarchy was the norm, the principle of sovereign equality is one which creates a system of States based on a more equitable and horizontal order. It is a legal principle which protects a State's right to exist, and to exist free from "domination, subjugation, interference or intervention."[56] To surmise, sovereign equality is composed of two attributes: internal sovereignty, which constitutes the right of the State to exist in a plurality of forms; and external sovereignty, which protects the State from interference by outside powers. As Fisch notes, sovereign equality "is a principle directed against any kind of superiority and inequality among states and thus presupposes an equal distribution of power. It is threatened by any sort of hegemonic power."[57]

Emancipation and Tutelage: The origins and evolution of decolonization

The only reference to colonial territories in the League of Nations Covenant is to be found in Article 22, and was solely concerned with those colonial possessions relinquished by the Central Powers following the end of the First World War.[58] This established the so-called Mandate system,[59]

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[47] GA Res. 3281 (XXIX) 1974, Article 1 [emphasis added].
[48] Prof. Dr. Albert Bleckmann, and Dr. Bardo Fassbender, "Article 2(1)," in *The Charter of the United Nations: A Commentary,* ed. Bruno Simma (2002), 84.
[49] P. Lamberti Zanardi, "Indirect Military Aggression," in *Current Legal Regulation of the Use of Force,* ed. Antonio Cassese (Dordrecht: Martinus Nijhoff Publishers, 1986), 111.
[50] GA Res. 3314 (XXIX) 1974, Article 3(g).
[51] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Rep. 1986, para.228.
[52] GA Res. 103 (XXXIV) 1979, Article 4.
[53] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J. Reports 1986, para.205 [emphasis added]. NB, the inclusion of the "formulation of foreign policy" as falling under the umbrella of activities which are the exclusive prerogative of a sovereign.
[54] GA Res. 2160 (XXI) 1966, Article 1(b).
[55] GA Res. 2625 (XXV) 1970.
[56] GA Res. 103 (XXXIV) 1979, Article 3.
[57] Jörg Fisch, "The Globalization of International Law in the Nineteenth Century," *International Political Economy,* Vol. 15, No. 3 (2005): 5.
[58] See, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgement of December 21, 1962; Treaty of Versailles, June 28, 1919.
[59] For a history of the Mandate system, see, D. Rauschning, "Article 75," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (2002); J. Crawford, *The Creation of States in International Law* (New York: OUP, 2006); Anghie, 2004.

which transferred the administration of the colonies of the defeated Central Powers to the victorious nations, "who by reason of their resources, their experience or their geographical position" were best suited to "undertake this responsibility"; these territories were to form a "sacred trust of civilization."[60] This system envisaged securing the well-being of these former colonies, and a form of progressive development. The UN Charter, however, expanded the concept of the Mandate system. Whilst incorporating the old Mandate territories and bringing new ones[61] into a new system of Trusteeship, it also brought the issue of *all* colonial territories to the fore of international relations – for the first time international law recognized colonial territories as subjects, rather than objects, of international law.[62] It is in these two Chapters of the Charter that the obligations of the administering States toward their various "dependencies" are established.[63] Firstly, I look at the wording of the provisions in each Chapter, as well the positions taken by delegates at the UNCIO, in order to try and unearth the specific legal meaning destined for each category of territory (colonial territories appeared in the Charter in two separate categories, with Mandate and Trust Territories (Chapter XII) on the one hand, and Non-Self-Governing Territories (Chapter XI) on the other).[64] From here, I shall consider the evolution of the process of decolonization, and how the concept of self-determination, and its subsequent development, played a fundamental role in the process. Throughout, I shall attempt to illustrate the constant tension between the desires of the dependent States, and the tension and conflicts this created with the colonial powers who sought to keep hold of their positions of power.

Travaux préparatoires

The basic content and structure of the UN and the Charter was decided at a series of conferences, prior to the plenary conference in San Francisco. These early conferences were conducted by the Great Powers of the time, and the discussions typically took place amongst talks of pressing war concerns. It was, however, at the United Nations Conference on International Organization (UNCIO) that the majority of the rules concerning colonial territories were discussed, and it was here that the real intentions behind the actions of the major powers were made clear. In this respect, then, the travaux préparatoires are extraordinarily useful in illustrating what it was that the delegates – the colonial powers and the US in particular – perceived the international role in colonial affairs to be.

From the outset of the Conference it was clear that the US was keen to advocate independence for all colonial territories, however such ambitions "were vehemently opposed … by the UK."[65] Understandably, the British colonial territories were absolutely vital to the existence of its Empire and standing on the world stage. Their view of the future was the development of a new form of empire – one which involved a collection of semi-autonomous entities under the aegis of the UK. This, then, was the key disagreement between the US and the UK: "In the British opinion the goal should be self-government within the framework of empire. … [the US] favour[ed] independence as the goal of those dependencies capable of enjoying it."[66] Furthermore, with regards to the notion of trust territories the British foresaw the system as being more of a domestic, rather than international problem. The US, on the other hand, favoured "retention of the distinction between trust territories which have an international status and ordinary colonies. In [their] usage, "trusteeship" has an international significance whereas the British apply it in the national sense, with themselves as trustees."[67]

One potential indicator of the US' attitudes towards colonial questions can be found in the following statement: "The [US] President [Harry S. Truman] said he was concerned about the brown people in the East. He said that there are 1,100,000,000 brown people. In many Eastern countries, they are ruled by a handful of whites and they resent it. Our goal must be to help them achieve independence – 1,100,000,000 potential enemies are dangerous."[68] It would seem that the US was keen to avoid any potential conflicts arising from the issue of colonial domination – indeed, the inter-war period had been somewhat demonstrative in illustrating the sort of international problem and unrest that

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[60] League of Nations Covenant (1924) Article 22.

[61] UN Charter (1945) Article 77(1); The decision to bring the colonial territories of the "enemy States" under a system of Trusteeship under the auspices of the UN was decided prior to the end of WWII; see, FRUS, Conferences at Yalta and Malta, 1945, The Yalta Conference, pp.547-996.

[62] Ulrich Fastenrath, "Article 73," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (2002), 1090; J. Crawford, 2006: 603; Huntington Gilchrist, "Colonial Questions at the San Francisco Conference," *The American Political Science Review,* Vol. 39, No. 5, (Oct. 1945): 985.

[63] In addition to this, Chapter XII deals with the Trusteeship Council – although it doesn't confer any obligations upon colonial powers toward their colonial possessions (except Article 88, which stipulates that each "administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly…").

[64] On this distinction see, e.g., *Memorandum by Mr. Leo Pasvolsky, Special Assistant to the Secretary of State,* January 13, 1945, Washington, FRUS, Diplomatic Papers, 1945, General: The United Nations, Vol. I, The UNCIO, San Francisco, California, (April 25 – June 26, 1945):18-20.

[65] Fastenrath, 2002: 1090. See also, FRUS, Diplomatic Papers, 1945, General: The United Nations, Vol. I, The UNCIO, San Francisco, California, (April 25– June 26, 1945):18-20.

[66] FRUS, Diplomatic Papers, 1945, General: The United Nations, Vol. I, The UNCIO, San Francisco, California, (April 25 – June 26, 1945):19 [brackets added].

[67] Ibid., 19.

[68] Ibid., 124.

colonies could cause. Similarly, the US was keen to preserve its developing overseas commercial and strategic interests. The issue of the Pacific Islands created a great deal of conflict between US Departments of State during discussions on trusteeship leading up to the UNCIO. The War and Navy Departments held the position that the US should maintain absolute sovereignty over the territories – however, this was at odds with the general policy advocated by the administration at the time of independence for all "dependent" territories.[69] There was a general feeling amongst officials, however, that although the US "should be the 'administering power for the Japanese mandated Islands', [they] should not insist upon 'complete sovereignty' because this would give an opening for the British – for example – to claim absolute title to areas in the Middle East which would injure [their] security interests as well as commercial interests involved in 'our great stake in Middle Eastern oil'."[70] In the end though, the US retained its anti-colonial position.

The UN Charter

It is in Articles 73, and 76 that the objectives and international obligations of colonial administration of Non-Self-Governing and Trustee Territories are established. The former are defined as "territories whose peoples have not yet attained a full measure of self-government"[71]; whereas the latter are defined in a rather more specific manner in Article 77.[72] There are, then, clearly two separate categories of territory, and two corresponding separate sets of obligations towards each.

Article 73 states that those who are responsible for those "territories whose peoples have not yet attained a full measure of self-government"..."recognize the principle that the interests of the inhabitants of these territories are paramount" and have an "obligation to promote ... the well-being of the inhabitants of these territories."

The Article then lists five points which the colonial powers are to ensure within their colonial territories: (a) is concerned with the "advancement" of the peoples concerned, and "their protection against abuses"; (b) with the development of "self-government" in which colonial powers should take "*due account* of the political aspirations of the people" and the "progressive development of their *free* political institutions"; (c) "to further international peace and security"; (d) "promote constructive measures of development"; and, (e) the duty to regularly transmit information to the Secretary-General.[73]

Independence as a goal?

"Numerous delegates [at the UNCIO] understood self-determination merely in the sense of self-government, with they in turn took to mean internal autonomy …; they did not, however, connect it with any right to independent Statehood."[74]

Article 76 explicitly states that for Trust Territories either independence or self-government is an appropriate objective. Article 73 on the other hand includes no mention of independence as a foreseeable option for Non-Self-Governing Territories – the ambit for their development is constricted to self-government. The GA reaffirmed this position in a resolution on Non-Self-Governing Peoples, again making the distinction between the objectives outlined in Chapters XI and XII.[75] Furthermore, Article 76 makes reference to Article 1 of the Charter, which talks of the principle of self-determination, whereas Article 73 makes no such connections. It would seem, therefore, that independence and self-determination were to be restricted to Trust Territories. The reason for this distinction can be understood by examining the policies held by the colonial States at the time. Their general position was that colonies should remain under the control of the metrapole. Consequently, it was the case that "no colonial power except the United States look[ed] upon it as a normal and natural outcome of colonial status – and it must be remembered that the Conference was a conference of governments and not dependent peoples."[76] Thus it was that "self-government" was considered in terms of self-government, or relative autonomy, for peoples under the auspices of empire.[77]

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[69] Ibid., 140-141.

[70] Ibid., 141.

[71] UN Charter (1945) Article 73; On the ambiguity of this definition, see Crawford, 2006; Also, consider GA Res. 1541 (XV) 1960, *Annex,* Principle I: "The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type."

[72] UN Charter (1945) Article 77(1): "The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: (*a*) territories now held under mandate; (*b*) territories which may be detached from enemy States as a result of the Second World War; and (*c*) territories voluntarily placed under the system by States responsible for their administration."

[73] UN Charter (1945) Article 73 (a) – (e), (1945) [emphasis added].

[74] Fastenrath, 2002: 1090 [brackets added].

[75] GA Res. 9 (I) 1946, paragraphs 3, 4.

[76] Gilchrist, 1945: 987 [brackets added].

[77] See e.g., CO 537/5698, no. 69, May 1950, "The Colonial Empire today: summary of our main problems and policies": CO International Relations Dept paper. *Annex:* some facts illustrating progress to date, British Documents on the End of Empire, Series A, Volume 2, *The Labour Government and the End of Empire, 1945-51,* Part I, pp.354-361; Also, Douglas G. Anglin, "The Legacy of Colonialism," *International Journal,* Vol. 10, (1954-1955): 123; CO 537/5698, no. 69, May 1950, "The Colonial Empire today: summary of our main problems and policies": CO International Relations Dept paper, British Documents on the End of Empire, Series A, Volume 2, *The Labour Government and the End of Empire, 1945-51,* Part I, p.334: "Our aim is to create independence – independence within the Commonwealth – not to suppress it."

However, Gilchrist maintains that it is "clear that the language of the Declaration actually includes independence ... when it refers to 'progressive development of their free political institutions.' What is the meaning of the phrase 'free political institutions' if it does not at least include potential independence?"[78] Furthermore, the wording of the Article (a *"full measure of self-government"*) suggests that independence is the logical outcome, for how can a "people" attain a full measure of self-government if they are still subject to the imperial controls of empire?

Domestic or International Concern

There was a conflict of opinion with regards to whether the territories under Chapters XI and XII were of domestic or international concern. The mere fact that there was even a chapter concerning colonial territories was rather significant, and some argued that such issues could no longer "be considered of purely domestic interest to each declarant State."[79] However, others posited that it was a "unilateral declaration, made by each signatory on its own behalf."[80] The British were of the position that although it was a matter of international concern, control and sovereignty still resided with the colonial powers.[81] Indeed, "it was maintained by the Western powers for many years that any discussion or action by the United Nations with regard to their colonial possessions was contrary to international law."[82] However, the colonial powers came under increasing strain from anti-colonial States who began to exert political pressure through the UN GA.[83] Colonial matters were discussed far more frequently in the Assembly, and it asserted its competence to debate and issue resolutions on colonial affairs.[84] It was through the exercise of these powers that it applied the principle of self-determination to the Non-Self-Governing Territories.

Self-determination and Decolonization

In Resolution 742 the GA boldly asserted that independence was an option for those territories under Chapter XI of the Charter, thus expanding the meaning of "self-government" as asserted by the colonial powers. The exact wording of the Article stated that of the ways in which these territories could achieve self-government, independence was the *primary* means by which it could do so; and, furthermore, it stated that any other means of self-government had to be "done freely and on the basis of absolute equality."[85] Already this was a far stretch from the original provisions of the Charter, and provided the foundations for the growth of the principle of self-determination.[86] It was in 1960 though, that the GA first coherently expressed its contempt of colonialism, and issued a general proclamation against it. The Resolution was a landmark moment in the process of decolonization[87] as it effectively recognised those under colonial domination as possessing rights under international law;[88] notably, it drew heavily on the words contained in the Charter concerning human rights, the dignity and worth of the human person, universal peace, and – most importantly – self-determination. "The subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of sacred trust was confirmed and expanded to all 'territories whose peoples have not yet attained a full measure of self-government' (Art. 73). Thus it clearly embraced territories under a colonial régime."[89] Furthermore, it explicitly linked the notion of independence to that of self-determination, and stated that "immediate steps shall be taken … to transfer *all powers* to the people of those territories."[90]

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[78] Gilchrist, 1945: 987.

[79] Ibid., 986.

[80] Ibid., 986.

[81] CO 537/2057, no. 48, "International aspects of colonial policy – 1947": memorandum by J S Bennett, British Documents on the End of Empire, Series A, Volume 2, *The Labour Government and the End of Empire, 1945-51,* Part II, pp.410-411: "Since San Francisco, the UK and other colonial powers have attempted to take up the position that Chapter XI is a voluntary declaration, imposing obligations on them alone and conferring no rights of supervision or initiative on the UN... The debates last ... have ... made it clear that the majority of the UN are not content with this limited interpretation, and attach great importance to Chapter XI as a means of discussing and formulating resolutions on colonial affairs."

[82] Malcolm N. Shaw, *International Law,* 5th ed., (Cambridge: CUP, 2003), 191.

[83] CO 936/56/6, no. 3, Oct 1951, 'Anglo-American talks on colonial and trusteeship questions in the United Nations, 1951': general introductory note to CO briefs, pp.495-498.

[84] Crawford, 2006: 605.

[85] GA Res. 742 (VIII) 1953, Article 6.

[86] Anghie, 2004: 196 "The doctrine of self-determination, that had been developed in the inter-war period principally in relation to the peoples of Eastern Europe, was now adopted and adapted by the UN to further and manage the transformation of colonial territories into independent, sovereign States."; In *Namibia,* the ICJ recognised that the concepts and laws governing colonial territories are not "static", and as such "its interpretation cannot remain unaffected by the subsequent development of law" including "customary law." *Namibia Case,* ICJ Rep. 1971, p.16, 31.

[87] Indeed, some have argued that it represents a jus cogens norm of international law; See e.g., Joshua Castellino, *International Law and Self-Determination* (The Hague: Martinus Nijhoff, 2000), 22.

[88] GA Res. 2625 (XXV) 1970 later confirmed that "the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it."

[89] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Rep. (June 21, 1971): 31, para. 52.

[90] GA Res. 1514 (XV) 1960, Article 5 [emphasis added]; See also, Western Sahara, Advisory Opinion, ICJ Rep. (1975): 31, para. 55.

In Resolution 1541 the GA listed the means by which a Non-Self-Governing Territory could "be said to have reached a full measure of self-government", and "emergence as a sovereign independent State" was stated as the first of these.[91] However, it stipulated that no matter which option was taken, each should arise as a result of "free and voluntary choice of the peoples of the territory."[92] This principle was further developed by States, and gained strong momentum as a norm of customary international law.[93] The process of decolonization, then, was largely as a result of the GA asserting its influence, using the leverage of the position granted to it in Chapter XI to debate on colonial affairs, and then to expand on the notion of self-determination.

There was, however, considerable opposition from the colonial powers, who were, on the whole, reluctant to relinquish control of their dependent territories to the GA.[94] "The main thrust of the Resolution itself [Res. 1514] was the host of newly formed States who, with the support of the Soviet Union, were keen to reformulate the international sphere of influence."[95] Indeed, it was they, and not the colonial powers, who took the steps to bring about the legal régime to dismantle the colonial empires They emphasised the idea that "the rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfill its obligations."[96] In other words, the administering and colonial powers were bound by their obligations under international law, and that colonial issues were a matter of international, not internal concern. It is clear, however, that "the developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and the independence of the peoples concerned."[97] Indeed, of great significance is the statement that "the interests of the inhabitants of these territories are paramount". However, there is great difficulty in arriving at a uniform position of how to gauge these interests. Two points are clear though. The first is that political decisions must be decided freely by the people; especially in terms of deciding their political futures. Secondly, it suggests a prohibition of the exploitation of the resources of those countries. The ICJ confirmed this position in the *Nauru* Case.[98]

Conclusion

Prior to the 1960 Declaration,[99] and, indeed, prior to the creation of the UN, independence for all colonial territories was not a considered option. It was an available option for Trust Territories, although most administering powers took the stance that administration was primarily a domestic matter, in which the international community should not interfere. It was, by and large, the evolution of the principle of self-determination which propelled the development of the legal norms concerning colonialism and colonial peoples. It is this principle that was responsible for the creation of a wealth of new States throughout the latter half of the twentieth century, as self-determination was "represented as the right to an independent State, implying that it leads to sovereignty."[100] As Anghie remarks, "decolonization supported the claim that international law had finally become, for the first time, truly universal." Those States that had previously been excluded from international law were now sovereign equals. "Thus a true "community of States" had finally come into being."[101]

It is worthwhile to state here – as a little aside – that the principle of self-determination has generally been considered to be limited to the colonial context,[102] although some have sought to argue that the principle can be extended further, and that it now constitutes a right of "peoples".[103] As decolonization progressed, there was a clear trend in that protection of rights gradually changed from rights invested in the people, to the protection of sovereignty. However, there still seemed to be a consistent emphasis of the State working for the benefit of the people.[104] However, this transformation could be considered from the position that, because of the principle of *uti possidetis*, these emerging States were faced with problems of minority groups within

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[91] GA Res. 1541 (XV) 1960, *Annex,* Principle V; The other means were listed as "free association with an independent State, or Integration with an independent State."

[92] Ibid., Principle VII; See also, Western Sahara, Advisory Opinion, ICJ Reports (1975): 32, para. 57. The GA later affirmed that independence must be in accordance with the wishes of the majority of the population – see Resolutions concerning the problem of South West Africa (Namibia), e.g., GA Res. 1747 (XVI) 1962, GA Res. 1805 (XVII) 1962.

[93] Western Sahara, Advisory Opinion, ICJ Rep. (1975): 33, para. 58.

[94] Prof. Dr. Georg Nolte, "Article 2(7)," in *The United Nations Charter: A Commentary,* ed. Bruno Simma (2002), 162.

[95] Castellino, 2000: 23.

[96] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, (Judgement of December 21, 1962): 329.

[97] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Rep. (June 21, 1971): 31, para. 53.

[98] *Certain Phosphate Lands in Nauru,* (Nauru v. Australia), ICJ Rep. 1992, (Preliminary Objections, Judgement).

[99] GA Res. 1514 (XV) "Declaration on the granting of independence to colonial countries and peoples."

[100] Paul Keal, "Indigenous Self-Determination and the Legitimacy of Sovereign States," *International Politics,* Vol. 44, (2007): 287.

[101] Anghie, 2004:196-197

[102] Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development,* (Oxford: Clarendon Press, 1995), 24.

[103] On the difficulties of defining a "people" see R. Emerson, "Self-Determination," *American Society of International Law Proceedings,* Vol. 60, (1966): 136.

[104] See section three

their borders. Thus, it probably seemed prudent to change the emphasis to the rights of the sovereign, rather than of the people, or it could perhaps give leverage of minority groups to claim *their* right to self-determination, and so threaten the newly founded authority of the decolonized State. "For the newly independent States, sovereignty is the hard won prize of their long struggle for emancipation. It is the legal epitome of the fact that they are masters in their own house. It is the legal shield against any further domination or intervention by stronger States."[105]

It is perhaps an ironic twist of fate that Woodrow Wilson[106] and Lenin[107] were the forefathers of self-determination, as the States to whom they belonged were to later utilise these principles for their political self-advantage; it was to embroil the Cold War, as each would give their (somewhat nominal) support to various groups on the basis of supporting self-determination.[108]

A New International Order?
And Permanent Sovereignty Over Natural Resources

In the last section we saw how the dependent territories utilised the principle of self-determination to wrestle their political independence from their former colonial masters, and in this section we will examine how they sought to expand this principle to achieve economic independence. Economic independence began to be regarded by the "new States" as an essential component of the notion of sovereignty, and it was thought that there could be "no complete sovereignty unless economic liberation ... [was] achieved alongside political emancipation."[109] On the whole, there was great dissatisfaction with the international status quo, with many States expressing the view that international law did not fully meet the requirements of the new States;[110] and, furthermore, many felt that "the rules of law were developed by the exploiting imperialistic powers to promote their interests at the expense of countries which in earlier centuries were either colonies or politically and militarily weak and provided important sources of raw materials and perhaps labour to the exploiting powers."[111] So, although these new States had been welcomed into the Family of Nations as equals, they still felt bound in a struggle against imperialism.[112] By and large they took the view that, "imperialism as an effective system of control is not automatically removed by political independence. The economic structure that was built as part of the market system and the investment pattern of the metropolitan centre lives on. And with it *economic* dependence lives on."[113] Without being free from the constraints of economic dependence these newly independent States were not therefore able to "enjoy *complete* independence and freedom."[114]

Economic independence, then, was seen as an indispensable aspect of self-determination and sovereign equality (as I have demonstrated in the past two chapters, freedom to determine one's economic as well as political system was considered vital to the notion of sovereignty and independence), as well as forming an integral part of shaking off the remnants of the old colonial régime. The real impetus of this drive for economic independence came during the Sixth Special Session of the UN GA,[115] where two resolutions were adopted: the Declaration on the Establishment of a New International Economic Order (NIEO)[116] and the Programme of Action on the Establishment of a New International Economic Order.[117] This was set against the background of an emerging right to development[118] and of

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[105] Georges M. Abi-Saab, "The Newly Independent States and the Rules of International Law," *Howard Law Journal,* Vol. 8, (1962): 103.

[106] Woodrow Wilson's Thirteen Points, Jan. 8, 1918; available online at: http://www.ourdocuments.gov/doc.php?flash=true&doc=62

[107] Castellino, 2000: 21; Vladimir I. Lenin, "The Right of Nations to Self-Determination (1914)," reprinted in Micheline R. Ishay, *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present,* 2nd ed, (London: Routledge, 2007): Lenin considered it to be "incorrect to understand the right to self-determination to mean anything but the right to a separate State existence."

[108] See section four

[109] George Elian, *The Principle of Sovereignty Over Natural Resources,* Sijthoff and Noordhoof, (1979), 27 [brackets mine].

[110] Abi-Saab, 1962.

[111] J. J. G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (The Hague: Martinus Nijhoff, 1961), 230; Ram Prakash Anand, *International Law and the Developing Countries* (The Hague: Martinus Nijhoff, 1987), 106-107.

[112] See, e.g., Political Declaration of the Fourth Conference of Non-Aligned Countries (Algiers, Sept. 5-9, 1973); Also, consider the opening speech made by the leader of the Non-Aligned Countries – Algeria's President Boumedienne at the Sixth Special Session of the UN GA, UN GAOR, 6th Special Sess., prov. Verbatim rec. A/PV.2208 (April 10, 1974); Also, Harold D. Lasswell, "The Relevance of International Law to the Development Process," *American Society of International Law Proceedings,* Vol. 60, (1966): 2-3.

[113] Harry Magdoff, *Imperialism without Colonies,* New York: Monthly Review Press (2003), 33 [emphasis added]; Also, Grovogui, 1996: 2: "The process of decolonization transferred rudimentary political powers tot he formerly colonized, but it did not transform the structures of domination – the institutional and cultural contexts of Western hegemony in the global order."

[114] GA Res. 1514 (XV) 1960, Article 5.

[115] John King Gamble and Maria Frankowska, "International Law's Response to the New International Economic Order: An Overview," *Boston College International and Comparative Law Review,* Vol. 9, (1986): 257 [brackets mine]: It was only during the latter half of the twentieth century that "the LDCs [less developed countries] enjoyed the political power necessary to press their case for an NIEO."

[116] GA Res. 3201 (S-VI) 1974.

[117] GA Res. 3202 (S-VI) 1974.

[118] Although not formally recognised until 1986, in GA Res. 41/128 (XLI) 1986; See also, Ved P. Nanda, "The Right to Development under International Law: Challenges Ahead," *California Western International Law Journal,* Vol. 15 (1985); Jack Donnelly, "In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development," *California Western International Law Journal,* Vol. 15 (1985).

(economic) self-determination.[119] Notions of development were established in the terms governing obligations of the colonial powers towards the dependent territories, and tended to be expressed in terms of ensuring the "well-being" and "progressive development" of the peoples.[120]

In this section I will outline the various propositions that were put forth for the creation of a NIEO, their legal ramifications, and the arguments posited in favour of them – as well as an appraisal of their legal validity, so to speak; I shall also consider why it was resisted by the developed nations, their arguments in opposition to it, and, ultimately, why the proposed order failed. Again, I wish to draw emphasis upon the tensions between the struggles of the new Third World States to obtain independence and sovereignty, and the imposition of structures of domination and subordination.

The Principles of a New Order

The proposed NIEO was essentially an attempt to establish a system of more equitable economic relations,[121] one which would help the development of the newly established Third World[122] (and so lessen the ever-widening gap between the developed and underdeveloped countries),[123] and finally abolish imperial control over the sovereign capacities of the decolonized States.[124]

It culminated in the adoption of the "Charter of Economic Rights and Duties of States,"[125] adopted in 1974. It was recognised that it was "not feasible to establish a just order and a stable world as long as a charter to protect the rights of all countries, and in particular the developing States, is not formulated."[126] The Charter, then, was designed to protect these rights, and enshrine them in international law. It contains three chapters: the first of which is concerned with the principles which should guide economic relations; the second set out the economic rights and duties; and the third outlined "common responsibilities towards the international community". It is in the second chapter that the main objectives are enunciated. There is a general feeling in these Articles of the need for uniform regulations to create stable and equitable economic relations, based on co-operation and development.[127] Especially prevalent is the insistence on instigating trade relations to benefit the developing countries, which ultimately aspire to improve their development. For instance, Article 14 states that "States shall take measures aimed at securing additional benefits for the international trade of developing countries so as to achieve a substantial increase in their foreign exchange earnings."[128] In addition to promoting their development, these States were keen to ensure their independence. Uruguay argued that economic independence was essential to, and the most effective means of ensuring the development of underdeveloped countries.[129] Article 1 restated the principle that States are free to choose their political and economic systems; in a similar vein, Article 32 held that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."[130] One of the most controversial and highly contentious recommendations dealing both with the development of these countries, and with ensuring their independence, was concerned with the notion of permanent sovereignty over natural resources, and the issue of nationalization and expropriation of alien property.

Permanent Sovereignty and Expropriation

The doctrine of Permanent Sovereignty over Natural

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[119] Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties,* (Cambridge: CUP, 1997), 369.

[120] See section five for expansion on this notion of development; also conclusion of section two.

[121] GA Res. 3201 (S-VI) 1974, *Preamble;* Andres Rozental, "The Charter of Economic Rights and Duties of States and the New International Economic Order," *Virginia Journal of International Law,* Vol. 16 (1975-1976): 311.

[122] Mark Ellis, "The New International Economic Order and General Assembly Resolutions: The Debate Over the Legal Effects of General Assembly Resolutions," *California Western International Law Journal,* Vol. 15 (1985): 647.

[123] International inequalities of wealth presents itself as a substantial threat to international peace and stability and is thus a pressing international concern; GA Res. 1428 (XIV) 1959, *Preamble:* "Recognizing the urgent necessity of correcting economic and social imbalances existing in the world."; UN GAOR, 29th Session, provisional summary record, A/C.2/SR.1638, at p.9; quoted in G. W. Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States," *International Lawyer,* Vol. 9, No. 4, (1975): 596.

[124] For an historical overview of the NIEO, see e.g., John King Gamble and Maria Frankowska, "International Law's Response to the New International Economic Order: An Overview," *Boston College International and Comparative Law Review,* Vol. 9, (1986): 257-263; F. V. Garcia, "The Proposed New International Economic Order: A New Approach to the Law Governing Nationalization and Compensation," *Lawyer of the Americas,* Vol. 12, (1980): 10-18.

[125] GA Res. 3281 (XXIX) 1974; On the history of the Charter, see Rozental, 1975-1976: 312-314.

[126] GA Res. 3281 (XXIX) 1974, *Preamble.* Also, UN Doc. A/PV.2315, at p.62 (1972); The fact that the NIEO would favour the developing States thus points to a contradiction in terms, as it purports to be in favour of establishing *equitable* relations – yet, favouring one group of States over another (it has been argued) constitutes discrimination, and so is Contrary to the General Agreement on Tariffs and Trade (Oct. 30, 1947, Art.1, T.I.A.S., 1700, 55 UNTS, 194 (1948)).

[127] García, 1980: 17-20.

[128] GA Res. 3281 (XXIX) 1974, Article 14.

[129] UN Doc. A/C.2/SR.231, Dec. 6, 1952, p.253, para. 1 (Mr Cusano), cited in Schrijver, 1997: 43.

[130] GA Res. 3281 (XXIX) 1974, Article 32.

Resources[131] (hereinafter PSNR) was one of the most prominent features of the NIEO, and was a central part of the claim to the sovereignty and independence of the new States. Many States "perceived this to be a main basis for their economic development and for a redistribution of wealth and power in their relations with the industrialised world."[132] Indeed, "the proclamation of this right resulted from a long-standing demand put forward by the developing countries of the southern hemisphere against the industrialized, capital-exporting States of the North in an attempt to win control over their resources and economies."[133] It was, however, a principle which was originally introduced in the UN GA in 1952, when it recognized that "the under-developed countries have a right to determine freely the use of their natural resources."[134] Later that year the Assembly deemed the "*right* of peoples freely to use and exploit their natural wealth and resources" to be an inherent aspect of sovereignty.[135] Indeed, PSNR was often regarded as an expression of economic sovereignty, and economic self-determination.[136] During the crisis over South West Africa (Namibia) the GA stated that the Namibian people had a right to permanent sovereignty over their natural resources, and condemned "the policies of those States which continue[d] to support foreign economic and other interests engaged in exploiting the natural and human resources of Namibia."[137] Concurrent with the principle of self-determination, PSNR seemed to be a right vested in the people. Indeed, even when the emphasis changed from "peoples" to "States", it was still expressed in such a fashion whereby the interests of the peoples of the territory were paramount.[138]

One of the central tenets of PSNR is the right of States to expropriate, or nationalize alien property;[139] again, this was a principle established well before the contemplation of a NIEO. In its original manifestations it required that "requisitioning shall be based on grounds of reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests."[140] Additionally, "appropriate" compensation should be paid, and if any dispute were to arise it should be settled through arbitration or international adjudication. Eleven years later the GA took a different approach. This resolution held that each State "is entitled to determine the amount of possible compensation and the mode of payment," thus removing any mention of international law; and, with regards to disputes, it stipulates that they should be "settled in accordance with the national legislation of each State carrying out such measures."[141] This position was adopted the Charter on Economic Rights and Duties, and was thus a part of the proposed NIEO.[142] Essentially, there was an attempt to ground the process of expropriation and nationalization of alien property in the law of the State concerned, and so exclude it from the ambit of international law. The intent behind this was to give States more control over their resources by easing the restrictions concerning nationalization. A number of the industrialized States were wary of this move, as many of the resources and industries that were most likely to face nationalization were foreign owned, generally by companies based in the industrialized world. Furthermore, it also threatened to potentially disrupt the vital flow of resources upon which their economies and the international economy depends.

The Opposition

In reaction to the "Charter of Economic Rights and Duties" the US Council of the International Chamber of Commerce (ICCom) remarked that it was "the cutting edge of a threat to the well-being – and even the existence – of foreign-owned private enterprise and to the security of foreign investment in many countries."[143] This was a typical reaction amongst the Western States who feared that, if utilised, the principles enunciated in the proposal for a

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[131] On the issue of what qualifies as a "natural resource", see generally, Schrijver, 1997. The issue is a complicated one, as there is no real indication as to what precisely constitutes a "natural resource"; some interpretations have been restrictive, whereas some expansive. For example, *contrast* the 'Declaration on the Establishment of a NIEO' GA Res. 3201 (S-VI) 1974, Article 4(*e*), posits that permanent sovereignty extends over a State's "natural resources *and all economic activities*"; *with* the "Charter of Economic Rights and Duties of States" GA Res. 3281 (XXIX) 1974, Chapter II, Article 2(1), which states that it includes its "wealth, natural resources and economic activities."

[132] Schrijver, 1997: 82.

[133] Prof. Dr. Albert Bleckmann, and Dr. Bardo Fassbender, "Article 2(1)," in *The Charter of the United Nations: A Commentary,* ed. Bruno Simma (2002), 81.

[134] GA Res. 523 (VI) 1952, *Preamble.* The paragraph continued: "…and that they must utilise such resources in order to be in a better position to further the realization of their plans of economic development in accordance with their national interests," although it goes on to add "…and to further the expansion of the world economy."

[135] GA Res. 626 (VII) 1952; Elian, 1979: 24.

[136] See sections 1 & 2

[137] GA Res. 3295 (XXIX) 1974, Section IV, Article 8 [brackets added].

[138] GA Res. 1803 (XVII) 1962, Article 1: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the wellbeing of the people of the State concerned."; GA Res. 2158 (XXI) 1966, Article 1.

[139] See, generally: Mr. Justice Harlan, *Banco Nacional da Cuba v Sabbatino,* (1964), 428-429.

[140] GA Res. 3171 (XXVIII) 1973, Article 3.

[141] Schrijver, 1997: 82.

[142] GA Res. 3281 (XXIX) 1974, Chapter II, Article 2(2c).

[143] US Council of the International Chamber of Commerce, *A New Challenge to Private Enterprise,* (1975), cited in Gillian White, "A New International Economic Order?" *Virginia Journal of International Law,* Vol. 16, (1975-1976): 323.

NIEO could seriously damage their overseas commercial interests, as it would make their foreign assets extremely liable, and would make foreign investment less desirable. Indeed, "this unwillingness to accept the principle that foreign investors are entitled by international law to a minimum standard of fair treatment was clearly one of the reasons why the US, the UK, Belgium, Denmark and ten other countries abstained."[144] When the Western States could not change the wording of the Articles in the Charter during the drafting process, they then made a series of reservations against it. The US delegate (Ambassador Scali), stated: "the present Declaration [on the economic rights and duties of States] does not couple the assertion of the right to nationalize with the duty to pay compensation in accordance with international law. For this reason we do not find this formulation acceptable. The governing international law cannot be and is not prejudiced by the passage of this resolution."[145] The reservations of the other reserving States made similar points and Ambassador Richards of the United Kingdom stated: "We do not interpret the Declaration as in any way affecting international obligations in relation to States' sovereignty over natural resources, nor do we accept the apparent obligation for compensation referred to in paragraph 4 (f)."[146]

Additionally, there was a question as to whether or not the NIEO constituted a new norm of customary international law. The debate was centred around the distinction between what is the law (*lex lata*) and what the law should be (*lex ferenda*), and the question of whether the resolutions issued were a reliable indication of *opinio juris*, and so indicating the view of States that these principles considered to be law.[147]

Delegates of the industrialized nations doubted "the advisability, possibility or feasibility of making the rights and duties formulated in a draft charter legally binding on States."[148] Some argued that the resolutions were simply "political acts", and therefore succeeded in "excluding them from the neat and orderly realm of legal principles."[149] Moreover, the fact that a small but significant group of States strongly opposed the implementation of these principles, made reservations, voted against them, and actively spoke out against them, lends itself to suggest that the proposals didn't gain the required *opinio juris*. Indeed, it was not consented to by the whole of the international community.[150] The non-legal character of the declarations establishing a NIEO have been further confirmed through numerous international arbitral awards.[151]

There is strong opinion however that the GA does possess legislative abilities.[152] But owing to the large opposition, the resolutions appear to be more declaratory rather than legally binding. "On the one hand, virtually all governments have affirmed the general line that General Assembly resolutions are not legally binding (except when addressed to subsidiary organs or secretariats). Not surprisingly, this position is most vigorously asserted when they oppose the content of the resolution. On the other hand, we find that at one time or another many of the same governments have maintained that particular declarations express agreed law based either on the Charter or on general international law."[153] It must be noted though, that it was always the intent of the developing world that the Charter partly be the codification of existing customary international norms, but also be designed to start the development of new rules.[154] That is, it was explicitly acknowledged that all the principles were not established rules of international law; the aim was to gain the acquiescence of other States, and so create new conditions of international law. "It was envisaged as a practical instrument, for use by all States, which would clearly set out the rights and obligations governing international economic relations. … Thus, the Charter was not perceived as an end in itself but as a first, necessary, and long-overdue step towards a complete régime governing States in the economic field."[155]

Conclusion

As we have seen, the NIEO was an attempt by the newly decolonized States to change an international law which had disadvantaged them; it was, moreover, an attempt to establish a system that was based on social justice and

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[144] Haight, 1975: 603.
[145] *I.L.M.,* Vol.13 (1974):746.
[146] *I.L.M.,* Vol.13 (1974):762, at 763.
[147] See generally, White, 1975-1976: 323-345.
[148] UNCTADOR, TD/B/AC.12/1 (March 6, 1973) cited in G. W. Haight, 1975: 595.
[149] Oscar Schachter, "The Evolving International Law of Development," *Columbia Journal of Transnational Law,* Vol. 15, (1976): 4.
[150] *I.L.M.,* Vol. 13 (1974) p.745; Haight, 1975: 596.
[151] *Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of Libyan Arab Republic,* International Arbitral Tribunal, *ILM.,* Vol.17 (1978): 29; *Kuwait v. American Independent Oil Company (AMINOIL),* Arbitration Tribunal, *ILM.,* Vol.21 (1982): 1033.
[152] D. H. N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations," BYIL, Vol. 32, (1955-1956); Richard A. Falk, "On the Quasi-Legislative Competence of the General Assembly," *The American Journal of International Law,* Vol. 60, No. 4 (October 1966); Jericho Nkala, *The United Nations, International Law, and the Rhodesian Independence Crisis,* (New York: OUP, 1985).
[153] Schachter, 1976: 4.
[154] Rozental, 1975-1976: 314, 316: "Their hope was that a solemn proclamation by the GA, although not legally binding, would incorporate legal norms which would gradually acquire a certain force in the regulation of economic interactions."
[155] Ibid., 311.

development.[156] The main route to their development, as they saw it, was through asserting their sovereignty over their economic spheres and claiming a right to permanent sovereignty over their natural resources. "Consequently, the West had to confront the challenge of preventing the disruption of the international order which would follow from the developing world's campaign to articulate its history of exploitation and to change the rules of international law that had both justified and furthered this system of exploitation."[157] It was precisely because of this challenge to its legal nature that the NIEO failed to become an established norm of international law; the opposition from the West prevented the Charter from becoming legally binding. The new States had been denied the opportunity to remake international law so as to benefit themselves, to rectify the damages inflicted by colonialism, and had been denied the freedom to express their sovereign rights over their economic spheres and so take control of their development.

Maintaining a Hidden Hand: Correcting Disobedience

The new international law of the twentieth century advocated peaceful relations between States, premised on the norms of equality between sovereigns, respect for territorial integrity, and on the principle of immunity from intervention in the domestic affairs of States. The process of decolonization greatly expanded the number of independent States on the world stage, and these new States were keen to assert their independence through adherence to and respect for these base norms of international law. However, as I have attempted to illustrate thus far, the third world States were met with continuous opposition from the Western powers. Their newly acquired sovereignty faced many challenges as the dominant States exerted their power to ensure the perpetuation of their world view. However, it was not only on the international legal field that these new States faced problems in guarding their sovereignty; they were also under threat from intervention by the dominant powers (both the Western States, and the Soviet Union). In this section I examine the new logics posed by the Cold War, and how the notion of supporting self-determination was used and abused. I look further at two specific examples of intervention: firstly, the Suez crisis, as this neatly demonstrates how the concept of the "uncivilized Other" was used to justify intervention – and it was the defining moment when the US became the dominant power in the world, effectively making the UK and France (which thought that they still were near equal status to the US) very much second class powers; and, secondly, the US facilitated coup d'état in Iran, as this was the first (documented) case of successful "régime change" by the US, which led to many more similar covert operations. I seek to argue that the dominant powers sought to safeguard their positions through ridding themselves of potential threats to their hegemonic positions, and were readily willing to violate norms of international law to do so. "A key prerogative of this position has been a right to intervene in the affairs of other States in order to promote some proclaimed community goal."[158] Furthermore, I contend that there was a fundamental paradox emanating from these States, as they often claimed to support human rights and self-determination, but in reality their actions were aimed at maintaining certain international structures and at creating "friendly" relations (i.e., relations that were amicable to their interests). Here, then, I attempt to set the legal aspects of this paper against the political background: to reconcile the *realpolitik* with the law. I also argue that it was during this period that the US took over the role Britain had played in protecting the Western sphere – the so-called "changing of the guard of Empire".

New Cold War Logics

In 1950 the US National Security Council (NSC) issued a classified report concerning the Cold War, known as NSC 68.[159] The document outlined the Soviet threat to the US and its global position, and the zero-sum nature of the conflict itself. It advocated, *inter alia*, that the US should seek to follow a policy of "containment", and so create a sphere of influence that would be supportive of US interests. This sphere of influence would be created from the host of newly decolonized States. The process of decolonization posed a grave threat to US hegemony, and the Western world as a whole: if these States were to align themselves with the Soviet Union, then the US and the West would lose the natural resources it required to fuel its economies; if they were to be brought under the wing of the West on the other hand, then the West would triumph. So, despite the Cold War being classified as "cold", there were still a great many "hot" wars being fought, often under the heading of "national liberation struggles". In 1968 Richard Falk wrote: "If empire once depended primarily upon the extent of colonial occupation, it now increasingly depends upon the capacity to influence the outcome of important internal wars."[160] Indeed, this was the case, as we shall see in the next section. An important element throughout was the relationship between the British and the Americans. The

[156] See James Thuo Gathii, "Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law," *Buffalo Human Rights Law Review,* Vol. 5 (1999): esp. 115-119.
[157] Anghie, 2004: 235.
[158] Simpson, 2004: 5.
[159] NSC-68: online at: http://www.fas.org/irp/offdocs/nsc-hst/nsc-68.htm.
[160] Richard A. Falk, *Legal Order in a Violent World,* (Princeton, N.J.: Princeton University Press, (1968), 112.

US *needed* the British Empire in order to win the war; "the dissolution of the empire was not in our interest as there were many things the Commonwealth could do which we could not do and which we wished them to continue doing."[161] The influence that the British held over their dependent territories was of great importance to the US: "Let us be frank in recognizing our stake in the strength and stability of certain European nations which exercise influence in the dependent areas. ... A sudden break in economic relations might seriously injure the European economy upon which our Atlantic defence system depends, and at the same time prove equally injurious to the dependent territories themselves."[162] So, whilst "officially" maintaining an anti-imperial stance, and advocating independence for colonial peoples, they kept a "hidden hand" in the affairs of the new States: "it was essential for the United States and the British Commonwealth to keep out of the limelight ... but ... absolutely essential to "pull the strings" whenever necessary."[163] In other words, "ideally, the United States preferred "independence" and covert influence to colonialism."[164] Thus, despite expressing strong anti-imperial sentiments, the US was effectively underwriting the continuance of the European Empires in order that it could win the Cold War.

Interventions and the Indirect Use of Force

Since 1945 the US has preferred to use various forms of coercion other than the direct application of military force to implement its policies across the globe, and these have often taken the form of covert operations (interventions) or the indirect use of force. These methods were especially prevalent throughout the Cold War, when the US was reluctant to use its forces in global struggles lest it turn the Cold War into a Hot War. It found, however, that these methods were extremely effective in removing unwanted governments and installing more likeable tyrants (indeed, despite its avid support for democracy the US government has often been found to be propping up brutal dictators and tyrants who, generally speaking, did not have the best interests of the population at heart).[165] The US has executed dozens of covert operations and indirect uses of force against countries all over the world.[166] Needless to say, these actions were and are in direct violation of international law,[167] however, "where the interests of the European powers, such as those of Britain, collided with their obligations under international law, more often than not they did not let those obligations limit their action; instead, such powers were willing to forego the standards of behaviour established by international law."[168]

Supporting Self-Determination

A key means by which the US sought to consolidate its interests and maintain a sphere of friendly relations was to support numerous groups in their quest for self-determination. In short, it sponsored nationalist groups in the hope that when they gained power they would be supportive of and protect US interests. The logic was "to prevent nationalism getting out of control ... by creating a class with a vested interest in cooperation."[169] The British, too, saw the fruits of supporting the nationalist groups: "Nationalism is an emotion requiring to be harnessed for constructive purposes if it is not to become extremist, destructive and the instrument of Communist incitement."[170] This was, in part, the reasoning behind US advocacy of independence for colonial territories. They believed that "given political independence, the nationalists would stand on their own feet against the communists. A relatively small amount of economic and military aid from the West would win their alliance and secure Europe's economic assets."[171]

The Suez Crisis

The Suez Canal[172] was for a long time of significant

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[161] George Kennan, Top Secret Minutes of 7th Meeting of the Policy Planning Staff, January 24, 1950, Foreign Relations of the United States, 1950, Vol. III, 620.

[162] Ibid.; Also, CIA, Office of Reports and Estimates, "Review of the World Situation," September 26, 1947, Secret, in Michael Warner (ed.), *CIA Cold War Records: The CIA under Harry Truman* (Center for the Study of Intelligence, CIA, 1994): "Existing British overseas commitments are so extensive and important that their precipitate liquidation would create conditions prejudicial to security interests of the United States."

[163] Anglo-American official talks, Washington, 13 September 1949, Foreign Relations of the United States, 1949, VII, Part 2, p.1199; See generally, R. J. Aldrich, *Hidden Hand: Britain, America and Cold War Secret Intelligence,* (New York: Overlook Press (2002).

[164] WM. Roger Louis and Ronald Robinson, "The Imperialism of Decolonization," *The Journal of Imperial and Commonwealth History,* Vol. 22, No. 3 (1994): 471.

[165] Prof. Dr. Albrecht Randelzhofer, "Article 2(4)," in *The Charter of the United Nations: A Commentary,* ed. Bruno Simma (2002).

[166] William Blum, *Killing Hope: US Military and CIA Interventions since World War II* (London: Zed Books, 2003).

[167] See section one, subsection "External Sovereignty."

[168] Jean Allain, "Orientalism and International Law: The Middle East as an Underclass," *Leiden Journal of International Law,* Vol. 17, No. 2 (2004): 399.

[169] FO memorandum on "The Problem of Nationalism," June 21, 1952, CO 936/217, in *British Documents on the End of Empire,* Series A Volume 3, *The Conservative Government and the End of Empire 1951-57,* David Goldsworthy (ed.), Part I (HMSO 1994), 18.

[170] CO 537/5698, no. 69, May 1950, British Documents on the End of Empire, Series A, Volume 2, *The Labour Government and the End of Empire, 1945-51,* Part I, "The Colonial Empire today: summary of our main problems and policies": CO International Relations Dept paper. *Annex:* some facts illustrating progress to date, p.354.

[171] Louis and Robinson, 1994: 471.

[172] For a brief history of the Suez Canal, see Allain, 2004:47-57.

importance to British overseas interests, primarily because it represented the gateway to the Middle East[173] – an area which held great strategic and commercial value to the British, especially with regards to their empire. In 1956 Colonel Gamal Abdel Nasser and his revolutionary council revealed plans to nationalize the Canal; a move that was met with worry and hostility from the major colonial powers. The minutes taken from a discussion of the matter during a Cabinet meeting are very revealing of the British reaction. Firstly the Cabinet members noted that they would "be on weak ground" if they employed the "narrow argument that ... Nasser had acted illegally." In fact, they even went so far as to admit that the action taken by Nasser "amounted to no more than a decision to buy out the shareholders." They concluded that they should present their case on "wider international grounds", arguing that it was "an important international asset ... that Egypt could not be allowed to exploit ... for a purely internal purpose", and so it "should be managed as an international trust." In order to convince the international community that this should be the case, they sought to demonstrate that "the Egyptians had not the technical ability to manage it effectively", nor would they "be able to provide the resources needed" to develop the canal further. Additionally, the Cabinet decided that "they must be subjected to the maximum political pressure ... and, in the last resort, this political pressure must be backed by the threat – and, in need be, the use – of force."[174]

Note, first of all, the recognition of the fact that the action taken by Nasser was entirely legal, and hence the need to find another route to recapturing the vital asset. The justification that was devised was that the Egyptians would be incapable of running the Canal effectively; in other words, the "uncivilized" non-European Other should not have the responsibility of controlling such an important international resource. They sought to create this just cause for intervention through a covert operation, called "Operation Pile Up". The aim of this was to overload the Canal by swamping it with traffic, and thus prove how ineffective the Egyptians were at running it. Perhaps it is an ironic twist of fate that the proposed covert operation did no such thing: the Egyptians proved to be able to operate the Canal, even with the drastically increased load.[175] Following the failure of this operation, attempts were made to get authority from the UN SC to sanction the use of force against Egypt, and – failing this – a tripartite attack was organised, involving Britain, France and Israel (which similarly failed).[176] This episode is enlightening insofar as it demonstrates the ways in which the European powers considered the new non-European States, and the perpetuation of ideas of the Self and Other. Similarly, it shows the willingness to break international law – yet, *at the same time,* trying to work within the confines of it, by providing justifications (such as a reasonable cause for invasion).

Iran

When Dr. Mohammed Mossadeq assumed leadership of Iran in 1951, he nationalized Iran's petroleum industry – which had previously been controlled by the Anglo-Iranian Oil Company (now the British Petroleum Company) on the basis of an oil concession, granted in 1901.[177] Evidence shows that the coup d'état was originally a British proposal, requesting US support.[178] The US expressed interest, and soon took over the operation. Their main motivation was driven by the fear that Iran, with a nationalist anti-Western leader behind the reigns, had the potential to "fall behind the Iron Curtain" which would "mean a victory for the Soviets in the Cold War and a major setback for the West in the Middle East."[179] The British were equally concerned about the potential downfall of Iran, especially as they had large commercial interests there.[180] The coup itself is highly significant because it "marked the first peacetime use of covert action by the US to overthrow a foreign government. As such, it was an important precedent for events like the 1954 coup in Guatemala and the 1973 overthrow of Salvador Allende in Chile."[181] The facts are well documented,[182] and it leaves little doubt that project TPAJAX was an illegal intervention into the sovereign affairs of Iran. "Specifically, the aim was to bring power to a government which would reach an equitable oil settlement."[183] The project succeeded in ousting (democratically elected) Mossadeq, and replacing

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[173] PRO CAB 128/30 Pt II, CM 54(56), 27 July 1956, cited in Anthony Gorst and Lewis Johnman, *The Suez Crisis,* Routledge (1997), 58: "The Canal was the vital link between the East and the West and its importance as an international waterway ... had increased with the development of the oil industry and dependence of the world on oil supplies."

[174] Ibid.

[175] Keith Kyle, *Suez: Britain's End of Empire in the Middle East,* (London: I.B Tauris, 2003), 249-252.

[176] Allain, 2004: 60-69.

[177] CAB 128/20, CM 51 (51) 2, "Persia": Cabinet conclusions on action to be taken in Anglo-Iranian oil dispute, British Documents on the End of Empire, *The Labour Government and the End of Empire, 1945-1951,* Part I, p.87

[178] Dr. Donald N. Wilber, *Overthrow of Premier Mossadeq of Iran,* (1969), 1-2. Available online at: http://www.nytimes.com/library/world/mideast/iran-cia-summary.pdf.

[179] Ibid., p.iii

[180] William Clark (Anthony Eden's press adviser), Diary, 15 Aug. 1956, cited in W. Clark, *From Three Worlds: Memoirs,* London: Sidgwick and Jackson (1986), 174: "People still talk about the danger of our alienating India, or worrying Africa, but the fact is that if we lose out in the Middle East we shall be immediately destroyed."

[181] Mark J. Gasiorowski, "The 1953 Coup D'état in Iran," *International Journal of Middle East Studies,* Vol. 19, No. 3 (Aug. 1987): 261.

[182] Wilber, 1969.

[183] Ibid.

him with a leader who was less likely to fall into the hands of the Soviets.

Conclusion

In the conclusion of the first section, I posited that the principle of sovereign equality is threatened by any sort of hegemony within the international order. It is a principle whose aim is to remove power as a legitimate tool of international relations, and to grant States the freedom to choose the form which they take – and to protect that freedom. As we have seen in this section, however, the dominant States have frequently acted against these international legal rules, in order to try and coerce sovereign independent States to change policies which are the sole prerogative of that sovereign State. The US in particular has utilised its immense power to, for want of a better word, meddle in the domestic affairs of other States, in order to obtain certain objectives. It has used its power to ensure its hegemonic position, to the detriment of many States and peoples. The resulting factor is that it has been able to successfully block the rise of any serious opposition, especially amongst the Third World States, who are especially hostile to the actions of the West. "Billions of dollars have been spent to undo regimes and movements not favourable to the dominant States. It has prevented an effective third world coalition from emerging as a counterweight to the unity of the first world."[184] Such interventions have often been framed as "necessary" due to the threat that these "uncivilized" peoples posed to the "international community". Indeed, the notion of the international community has been extremely valuable in legitimising the actions of the West in violating the norms of State sanctity. It would seem that "Britain's wishes (and those of the "civilized" world) are of a "far profounder importance". If this means blatantly disregarding the dictates of international law, so be it, the civilizing process must proceed unhampered."[185] The recent Iraq war provides a good example of this in action; George W. Bush, former President of the US, framed the threat of Iraq as a threat to humanity, to civilization itself. "Every nation in every region now has a decision to make. Either you are with us, or you are with the terrorists... This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilizations' fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom."[186]

Triumph of the West: Domination

My contention thus far has been that the dominant powers in the world order have been reluctant to cede their position to allow for a world order predicated on more equitable relations. Firstly, the colonial powers did not give up title to their colonial possessions without severe pressure from anti-colonial States within the GA, and the evolution of the principle of self-determination for all peoples was wrought with the tension between these powers and the desires for independence expressed by those under colonial domination. Secondly, the dominant States strongly opposed the new States' attempt to exercise their full sovereign rights, especially in obtaining sovereignty over their economic facilities – as evidenced in the debate concerning a NIEO and PSNR. Thirdly, the dominant States have readily violated *jus cogens* norms of international law in order to "correct" disobedient States, and to install régimes that would be amicable to their interests. These trends seem to suggest that, since 1945, the plight of the Great Powers has been characterized by "the unpredictable erosion of position after position, foothold after foothold, followed on each occasion by further efforts to hold together the remnants of world power and influence, by one means or another."[187] The objective of this section is to illustrate the means by which the Great Powers (i.e., the dominant West) have maintained their position of power through informal channels: through global structures and institutions, and through the exertion of a system of economic relations.[188] Such systems have had the effect of holding "the new States as far as possible within the commercial, and also the monetary, systems of the metropolis, and so retain[g] the supposed economic benefits of empire."[189] Furthermore, I posit that the imperial project has been able to do so due to the absence and suppression of notions of justice in international law, and the employment of a restrictive concept of development – i.e., the denial of the expression of a right to development as enunciated by the new States during 1970s, and the subsequent assertion that development must be achieved through specific means. This has led to development programmes being employed that fail to account sufficiently the best interests and well-being of peoples. Indeed, I argue that they have been constructed with the aim of creating the stability and infrastructure required to exploit the resources of those countries.

Perspectives on Development

A large part of colonial policy tended to be directed toward the development the dependent territories, and was often portrayed in terms of increasing the productive capacity of the territories. The defining feature of such policy initiatives was the "belief that the primary [for development] need

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[184] Chimni, 2006: 6.
[185] Allain, 2004: 400.
[186] George W. Bush, "Address to the Nation by the President of the United States," 147 *Congressional Record* H5737, 5861 (daily edn. Sept. 20, 2001).
[187] John Darwin, "British decolonization since 1945: a pattern or puzzle?" in *Perspectives on Imperialism and Decolonization,* eds. R.F. Holland and G. Rizvi, (London: Routledge, 1984), 206.
[188] John Springhall, *Decolonization Since 1945* (New York: Palgrave Macmillan, 2001), 4 [emphasis in original].
[189] D. K. Fieldhouse, *The West and The Third World* (Malden: Blackwell, 1999), 231 [brackets mine].

was capital investment."[190] This was, essentially a policy of pursuing economic growth to fuel development; it linked the expansion of industrial sectors, and the growth of the GDP with the notion of development. It was this approach to development, broadly speaking, that came to be accepted as the "official" policy of those international agencies responsible for development of third world countries. This "growth" orientated approach was chosen in lieu of the more "social" form, as advocated by third world States during the debates concerning the NIEO. In fact, there is evidence to suggest that this rival approach was actively suppressed by the industrialized States, as they saw it is a threat to their interests, and the continuance of the capitalist system as the accepted norm. Its base premise was concerned with ensuring that people's basic needs were fulfilled – this was, they argued, a fundamental prerequisite to development and economic growth.[191] Its advocates argued that because the other approach had as "its primary emphasis … increasing per capita income, it downplayed or ignored the provision of basic needs such as formal education, public health, utilities or other similar social amenities."[192] Here, then, are the two general perspectives on development; one concerned with economic growth, the other placing its emphasis on providing basic social rights. Indeed, this distinction can be witnessed in the debate that preceded the adoption of the two international human rights covenants, and the States that signed up to each. The industrialized Western States supported and gave more emphasis to the ICCPR, whereas the developing Third World States tended to support the ICESCR.[193] It is the rights encapsulated in the former covenant that have been attached by institutions such as the World Bank, and States of the Western world, to the issue of development.[194] I argue that the implementation of Civil and Political rights has the effect of bringing stability to States, which is thus effective in creating the conditions necessary for "transnational capital to flourish."[195] Furthermore, it places emphasis on private over social rights, which, in turn, "allows the pursuit of the neo-liberal agenda."[196] Finally, I posit that this approach to development has not helped bring about the development of the people of the third world, and has, in fact, perpetuated the system of unequal relations that has caused the subjugation of the third world, whilst ensuring the dominance of the West.

Third World Debt

The debt accrued by the third world has today reached immense proportions, and presents itself as a significant barrier to the progression of the underdeveloped countries. A large portion of this debt was transferred and "imposed on the newly independent States when they acceded to international sovereignty: in 1960, the external public debt of these countries already amounted to US $59 billion. With the additional strain of an interest rate unilaterally set at 14 per cent, this debt increased rapidly. Before they had even had time to organise their economies and get them up and running, the new debtors were already saddled with a heavy burden of debt."[197] Not only was this considerably unjust, it also challenges the notion that these States had acquired full sovereignty, as they were bound by agreements that had been imposed by their former colonial masters which were contrary to the best interests of the people of the territories concerned.[198] The majority of the rest of the debt acquired by the third world was a direct response to the programmes of development created and sponsored by the Western States. By removing the means by which third world States had envisioned their development, these States had then to rely largely on aid and loans to ensure development. The primary function of the World Bank was to facilitate development through issuing loans to the third world States. However, these loans were of little use, as the repayments frequently eclipsed the amount given. "The new loans that a developing State felt obliged to enter into for development purposes could not be used for development … [as they] were not even enough to cover the servicing of the existing debt."[199] As part of the programmes of financial assistance the World Bank has attached a series of conditions to the loans it grants, known as Structural Adjustment Programmes (SAPs). These have tended to prescribe the liberalization of the economy and have encouraged privatization and export centred open markets which are attractive to foreign investors. These have ultimately led to cutbacks on spending of important things such as healthcare and education in order to meet loan repayments. In other words, they have reduced the standards of living of the population in order to open up the economy to foreign investment and resource extraction; they actively encourage the exportation of resources, and the importation of foreign goods. "If a society spends one hundred dollars to manufacture a product within its borders, the money that is used to pay for materials, labour and other costs, moves through the economy as each recipient spends it. Due to this multiplier effect, a hundred dollars worth

[190] Ibid., 226 [brackets added].
[191] Gathii, 1999: 123.
[192] Ibid.,123.
[193] GA Res. 2200A (XXI) 1960.
[194] Gathii, 1999.
[195] Chimni, 2007: 8.
[196] Ibid., 17.
[197] E/CN.4/Sub.2/2004/27, para.8.
[198] On the issue of obligations to act in the best wishes of the people of colonial territories, see section two.
[199] E/CN.4/Sub.2/2004/27, para.10.

of primary production can add several hundred dollars to the GNP of that country. If that money is spent in another country, circulation of that money is within the exporting country. This is the reason an industrialized product-exporting/commodity-importing country is wealthy and an underdeveloped product-importing/commodity-exporting country is poor … Developed countries grow rich by selling capital-intensive (thus cheap) products for a high price and buying labour-intensive (thus expensive) for a low price. This imbalance of trade expands the gap between rich and poor. The wealthy sell products to be consumed, not tools to produce. This maintains the monopolization of the tools of production, and assures a continued market for the product."[200] This, I contend, is one of the fundamental reasons for the levels of poverty in the developing countries. It would seem that "debt has thus become not only a means of pushing these countries into extreme poverty, but also a tool for domination and exploitation, phenomena that one might have supposed to have disappeared along with colonialism."[201]

Norms of "Good Governance"

Chimni shrewdly observes the role that ideology plays in the creation and development of law. He argues that "the language of law has always played … a significant role in legitimizing dominant ideas," and that international law, as a "matrix in which global problems are approached, analysed and resolved … is shaped and framed by the dominant ideas of the time."[202] Of course, the international sphere is composed of a wide variety of different actors, all with varying ideologies, national interests, and so forth, and thus it would not only be impossible, but also a fallacy to posit that international law is shaped by any one force.[203] However, the dominant actors play a very big part in shaping the world stage, and it is their ideas which have, by and large, shaped the course of international law. Essentially, then, international law is important in "legitimiz[ing] their vision of world order."[204]

The idea of "good governance" (i.e., the norms to which governments should adhere to in the operation of their sovereign functions) is one such ideology which has been enunciated by the dominant States and has subsequently acquired the force of accepted international norms. This has been justified largely by reference to the "uncivilized" nature of the non-European nations:[205] "The North seeks to occupy the moral high ground through representing the third world peoples … as incapable of governing themselves."[206] This has led to the application of various norms of "good governance", often included as conditions on loans issued by the World Bank. These norms are inextricably connected with the rights contained within the ICCPR; the focus of which is on rights such as the protection of private property, and the enforcement of contracts.[207] "By emphasising the compatibility between human rights and laissez-faire economic policy, the good governance agenda underplays the constraints neo-liberal economic policy imposes on the realization of social and economic rights (or welfare entitlements/basic needs) in particular, and third generation rights associated with the NIEO, such as the right to development."[208]

Democracy and the freedom of capital

Democracy is one such ideal that has been exported by the dominant forces in the world. Thomas M. Frank argues that while it has yet to emerge as a recognized international legal norm, it "is rapidly becoming … a normative rule of the international system."[209] On the surface, this perhaps appears to be a beneficial development – after all, democracies operate on the premise that the legitimacy of the government is to be found in the hands of the people. However, a corollary of democracy as a system of governance is the separation of government and the economy, and the opening up of the national economy to the international. Indeed, "a country's performance on issues such as the nature of its political institution, elections and democratization constitutes an important framework for successful economic adjustment."[210] The general result of this has been the "relocation [of] sovereign economic powers in international institutions, greatly limiting the possibilities of third world States to pursue independent self-reliant development."[211] Furthermore, one of the fundamental objectives of spreading democracy is "to create the conditions in which transnational capital can flourish."[212] A further impact of democratization has been the move towards the international protection of

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[200] J. W. Smith, *The World's Wasted Wealth* (Cambria, CA: Institute for Economic Democracy, 1994), 127, 139.
[201] E/CN.4/Sub.2/2004/27, para. 3.
[202] Chimni, 2006: 15; See also, Jean Allain, op. cit., p.1
[203] See *supra* note 1.
[204] Chimni, 2006: 16.
[205] See e.g., Anghie, 2004.
[206] Chimni, 2006: 16.
[207] Gathii, 199: 122.
[208] Ibid.
[209] Thomas M. Frank, "The Emerging Right to Democratic Governance," *AJIL,* Vol. 86, No. 1 (Jan. 1992): 46.
[210] Gathii, 1999: 144.
[211] Chimni, 2006: 7.
[212] Ibid., 8.

private property, and the internationalization of property rights, which has led to the removal of the rights of third world States to the technologies of the developed world that they desperately need.

Closer Together, Further Apart

I challenge the perception that this method of development is effective in alleviating poverty, as rarely does the money trickle down to the majority of the peoples of the third world.[213] Whilst advocates of this form of development may point to growth in Gross National Product (GNP) as an indicator of improving conditions, I argue that it is only a marginal proportion of the population that are feeling the effects. Rather, the divisions of wealth within these countries are steadily getting larger; a select few benefit from these conditions, whereas the rest live in poverty.[214] "These developments seek to accommodate the interests of a transnational ruling elite which has come to have unprecedented influence in shaping global policies and law."[215] These so-called transnational ruling elites have benefited greatly from these development policies as they tend to be in control of the resources and in the position to accept lucrative deals in return for concessions on these resources, as well as diverting and squandering large sums away from public spending.

Conclusion

It is in the opinion of this author that the emphasis placed on Civil and Political Rights over Economic Social and Cultural Rights in the realm of development has had disastrous consequences for the Third World. It has kept the Third World in a subordinate position, and has prevented any meaningful development, whilst in some cases actually creating further poverty. It seems, *prima facie* at least, that the instruments used to promote development are simply an extension of the old colonial régimes, with the primary aim of extracting resources and creating markets to sell goods to. The justification that is summarily offered is that the exploitation of natural resources is for the benefit of mankind, which, again, seems to be a continuation of old colonial policies.[216] I argue that through the suppression of the Third World attempts to create a new order, based on social justice and equitable relations, and the subsequent triumph of Western models of governance and economics, we have witnessed the creation of a new system of domination and subordination. These systems have made a large group of resource-rich States dependent upon the small majority. In many senses, then, it would appear that nothing much has changed from the old system of colonialism.

Conclusion

At the beginning of this paper I outlined the so-called "traditional" perspective of the evolution of the international system, and of the process of decolonization. In the second section I considered the evolution of decolonization in international law, from its inceptions at San Francisco, to its enshrinement in the United Nations Charter, and, finally, to the evolution of the principle of self-determination, which was largely responsible for granting the colonized people a right to independence under international law. I also showed how the attitudes and actions of the Great Powers tried to prevent this process from occurring, as they frequently used their superior civilized position to bar action from the United Nations General Assembly and the various anti-colonial States. "The German colonies in the Pacific and Africa are inhabited by barbarians, who cannot possibly govern themselves, but to whom it would be impracticable to apply any ideas of political self-determination in the European sense."[217] I then showed in section three how these new States attempted to obtain a true measure of sovereignty through their attempts at the creation of a New International Economic Order. These attempts were directed at changing the international law which had subjugated them to the Western powers for so long, and deprived them of their independence. Indeed, the latter half of the twentieth century has been marked by the struggles of the majority of the globe to emancipate themselves from their colonial pasts, and to achieve both political and economic independence. These attempts had been largely unsuccessful, and have led to the perpetuation of the same structures of domination and subordination as existed under colonial rule. "The newly independent States … fought to develop new rules, even a new international economic order. But in the event the Bretton Woods Institutions triumphed, imposing their own view of development and a certain set of structures of governance on half the world's population and a majority of its governments. The outcome has been, on the whole, increased indebtedness and new forms of dependence."[218]

In section four I show how the West – and, during the Cold War, the Soviet Union – awarded itself the right to intervene in the internal affairs of others, and as a

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[213] Gathii, 199: 130.
[214] Magdoff, 2003: 13.
[215] Chimni, 2007: 7.
[216] Lord Lugard, cited in, CO 537/5698, no. 69, May 1950, British Documents on the End of Empire, Series A, Volume 2, *The Labour Government and the End of Empire, 1945-51,* Part I, "The Colonial Empire today: summary of our main problems and policies": CO International Relations Dept paper, p.334
[217] J. C. Smuts, *The League of Nations: A Practical Suggestion,* (New York: The Nation Press, (1919), 15.
[218] Anghie, 2004: xii.

consequence deprive them of the function of their sovereign rights. The objective of this has been to prevent the rise of any credible threat to the position of the West as a whole, and the US in particular. During the Cold War the US was especially busy in the activities of removing foreign governments which they disliked – i.e., governments who could potentially turn to the Communists, or who were simply not willing to bend to America's will. I show how the conceptualization of the international community has been vital in legitimising these actions, often through appealing to a sense of "Self" and "Other". That is, the defining of the "international community" through reference to what one perceives the "Self" to be, and justifying actions taken against the "Other" because of a potential (usually imagined) threat to the interests of the community. Again, there is a tendency to portray the community as superior to the Other. This, I feel, has been a strong justification for the continuance of structures which subordinate the "Other" to the West.

In the fifth section I argue that as a result of the West's suppression of the NIEO and the corollary expression of development as articulated by the Third World, the economic institutions of the West and their methods of encouraging development were adopted as the international norm. I posit that this new system deliberately disadvantaged the Third World, so as to keep its economies tied to the West, in a new form of dependency and – although it is perhaps somewhat taboo to say so – a new form of slavery. I have illustrated that the mechanisms of development as employed by the West have had the effect of opening up the economies of Third World States, and have employed various means to make the extraction of capital and resources as straightforward and cheap as possible. Furthermore, I argue that this "growth as development" method is entirely ineffective at bringing the population of these countries out of poverty. Even if there has been recorded growth in GNP, the wealth tends to stay in the hands of only a few people, creating what Chimni called a "transnational ruling elite". This system has not improved the living standards or the wealth of the people of the Third World, and has in some cases made conditions worse. I posit that the suppression of the vision of development created by the Third World, grounded in ideas of social justice and equity, and the restraints on their right to exercise Permanent Sovereignty over their Natural Resources, has seriously impeded their development, and has greatly qualified the exercise of their sovereign rights – i.e., the right to pursue one's own economic development, and to choose the type of economic system.

Each of these Chapters seeks to show that the West has tried to severely limit the sovereignty of the States of the Third World, even prior to their independence. It seems to imply that despite the claims made by the principle of sovereign equality, States are not accorded equal sovereign rights, and have not been able to achieve the plurality to which the principle promised. Indeed, as Gerry Simpson remarks, there appears to be a distinction between: "an elite group of States, commonly referred to as the "Great Powers," and a large mass of middle and smaller States who defer to these larger powers in the operation and constitution of international legal order. These Great Powers occupy a position of authority within each of the legal régimes that has risen since 1815 … In each instance, these powers have policed the international order from a presumed position of assumed cultural, material and legal superiority. A key prerogative of this position has been a right to intervene in the affairs of other States in order to promote some proclaimed community goal."[219]

Furthermore, the arguments put forward in this paper implicitly (if not in some cases explicitly) suggest that power and politics have played a far greater role in shaping the international order than international lawyers otherwise suggest.

Another thread of this paper has been concerned with the rise of the US to the position of the primary hegemonic power. With the decline of British power, the British Empire required increasing support from the US, and with it came ever more concessions to the US. Indeed, post World War Two Britain was heavily dependent on America for holding up its Empire. In section four I remarked that the Suez crisis marked the last occasion that Britain and France really had a hold over global affairs; following this the US began to dictate international affairs much more. In some ways, it seems as this was simply the "changing of the guard" of the British Empire, as the US sought to continue the same structures of domination that had existed under the colonial Empires of Europe, and it even seemed to continue with the civilizing mission started by the British in their heydays of global imperial control. So although the US strongly advocated freedom and independence to colonial peoples, it still wished to maintain a hand in their internal affairs; indeed, it has sought to perpetuate its world vision, using its strength – which is derived from the structures that govern the world order – to ensure the dominance of these same structures. I argue, therefore, that the US constitutes a new form of "empire". Empire is: "a relationship, formal or informal, in which one State controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social or cultural dependence. Imperialism is simply the process or policy

[219] Simpson, 2004: 5.
[220] Michael W. Doyle, *Empires* (New York: Cornell University Press, 1986), 45.

of maintaining an empire."[220] It certainly displays all the necessary characteristics.

For my final surmising remarks, I argue that it is sovereign *in*equality rather than sovereign equality that governs international law. Hegemony and power have characterized the international order, and the process of decolonization achieved little success in creating true independence for colonial peoples. So, in lieu of a conclusion, I state that "traditional international law has helped to make independence a completely superficial phenomenon, beneath the surface of which old forms of domination survive and the economic empires of the multinational corporations, and the powers that protect them, prosper."[221]

[221] Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979), 81.

Appendix

Abbreviations:

- American Journal of International Law – AJIL
- British Documents on the End of Empire Project – BDEEP
- British Yearbook of International Law – BYIL
- Cabinet (of the British Government) Documents – CAB
- Cambridge University Press – CUP
- Central Intelligence Agency – CIA
- Colonial Office – CO
- European Journal of International Law – EJIL
- Foreign Relations of the United States – FRUS
- International – Int'l
- International Chamber of Commerce – ICCom
- International Court of Justice (Reports) – ICJ / ICJ Rep.
- International Covenant of Civil and Political Rights – ICCPR
- International Covenant of Economic, Social and Cultural Rights – ICESCR
- International Law Commission – ILC
- International Legal Materials – ILM
- International Monetary Fund – IMF
- General Assembly Resolution – GA Res.
- Law Journal – L. J.
- Law Review – L. R.
- Less Developed Countries – LDCs
- National Security Council – NSC
- New International Economic Order – NIEO
- Oxford University Press – OUP
- Permanent Court of International Justice – PCIJ
- Permanent Sovereignty Over Natural Resources – PSNR
- Structural Adjustment Programme - SAP
- United Nations – UN
- United Nations Conference on International Organisation – UNCIO
- United Nations Conference on Trade and Development - UNCTAD
- United Nations General Assembly – GA
- United Nations Reports of International Arbitral Awards – UNRIAA
- World Trade Organisation – WTO
- World War One / Two – WWI / WWII

General Assembly Resolutions:

- GA Res. 523 (VI) 1952
- GA Res. 742 (VIII) 1953
- GA Res. 1428 (XIV) 1959
- GA Res. 1514 (XV) 1960
- GA Res. 2131 (XX) 1966
- GA Res. 2160 (XXI) 1966
- GA Res. 2200A (XXI) 1966
- GA Res. 2625 (XXV) 1970
- GA Res. 3201 (S-VI) 1974
- GA Res. 3202 (S-VI) 1974
- GA Res. 3281 (XXIX) 1974
- GA Res. 3314 (XXIX) 1974
- GA Res. 103 (XXXIV) 1979

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