Decolonisation and the Narration of International Community

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ABSTRACT

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The international community is an imagined community, which relies on narratives to construct its identity. Fragments of these narratives can be found in international legal documents such as the Charter of the United Nations. The basis of the international community is not a common identity or a substantive convergence of values but rather a consensus on a common procedure to resolve conflict about values. One of the most persistent narratives of the international community is the assertion that international society is a community of sovereign and co-equal States, which have consented to the international legal order governing their interaction with one another. This narrative was contested during the process of decolonisation. By appealing to the principle of sovereign equality, the newly independent countries revealed how the international community provided rational justification for the suspension of significant international norms- such as sovereign equality- in the treatment of entities deemed to lie beyond the international community.

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FOR MY PARENTS

THE LAW CAN RENEW ITSELF ONLY BY BREAKING WITH ITS PAST...FOR THE IDEA OF LAW IS ETERNNAL BECOMING; BUT THAT WHICH HAS BECOME MUST YIELD TO THE NEW BECOMING.

--VON JHERING

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INTRODUCTION

Decolonization, which sets out to change the order of the world, is, obviously, a programme of complete disorder. But it cannot come as a result of magical practices, not of a natural shock, nor a friendly understanding. Decolonization, as we know it, is a process: that is to say that it cannot be understood, it cannot become intelligible nor clear to itself except in the exact measure that we can discern the movements which give it historical form and content. Decolonization is the meeting of two forces, opposed to each other by their very nature, which in fact owe their originality to that sort of substantification which results from and is nourished by the situation in the colonies.... Decolonization never takes place un-noticed, for it influences individuals and modifies them fundamentally. It transforms spectators crushed in their inessentiality into privileged actors, with the grandiose glare of history's floodlights upon them. It brings a natural rhythm into existence, introduced by new men (sic), and with a new language and a new humanity. Decolonization is the veritable creation of new men (sic).

--Frantz Fanon, 1963[1]

Decolonization represented, on the international plane, the democratization of the community of nations.

--Brian Urquhart, 1989[2]

Premier Nikita Khrushchev arrived in New York on September 19, 1960 as the head of the Soviet delegation to the General Assembly (GA) of the United Nations (UN, the Organisation). During his time in the General Assembly, the Soviet leader delivered a number of speeches on the abolition of colonialism. On September 23, he noted that "the emancipation and revival of independent life among peoples who for centuries have been kept off the highway of mankind's development by the colonialists is taking place for all to see- this is the great sign of our epoch....A new period in the history of mankind[.]"[3] Khrushchev claimed that the complete and final abolition of the colonial regime in every

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[1] Frantz Fanon, "The Wretched of the Earth" (New York: Grove Press, 1963) at 29-30.
[2] Brian Urquhart, *Decolonisation and World Peace* (Austin: University of Texas Press, 1989) p8.
[3] Nikita Sergeevich Khrushchev, *Disarmament and Colonial Freedom: Speeches and Interviews at the United Nations General Assembly, September- October 1960* (Westport, Connecticut: Greenwood Press, 1961) p26-27.

form and manifestation would be "a supreme act of true humanism", one that was inevitable, stemming as it did from "the entire course of world history over the past few decades."[4] His speech ended with the following demands: 1) All colonial countries, all trust and other non-self governing territories should be immediately granted full independence and freedom to build their own national States, in accordance with the freely expressed will and desire of their peoples. The colonial regime and colonial administration in every shape and form should be abolished completely, so as to give the peoples of such territories an opportunity to decide their own destiny and forms of administration. 2) The governments of all nations should base their relations with other countries on strict and undeviating adherence to the provisions of the UN Charter and to the present declaration of equality and respect for the sovereign rights and territorial integrity of all States, and should refrain from any manifestations of colonialism.[5] On October 12, Khrushchev told the GA: "[w]e must not permit the colonialists to continue hiding behind false talk about 'rendering assistance', about 'inculcation of civilisation', behind assertions that the colonial people are not yet sufficiently mature for self-government. All this is nothing but the ravings of slave merchants and slave owners."[6]

One would be naïve not to appreciate the link between Khrushchev's comments and the Cold War competition between the West and the Soviet Union, a competition that played itself out in every sphere of international relations. All the same, Khrushchev's speeches formed part of a vibrant debate on decolonisation, which flourished in the General Assembly in 1960 and culminated in the passage of Resolution 1514 (XV), the *Declaration of the Granting of Independence to Colonial Countries and Peoples* (Resolution 1514 (XV)[7], the Declaration or the 1960 Declaration) on December 14 of that year. In an early moment of

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[4] *Ibid.* at 33, 30.
[5] *Ibid.* at 32, 33.
[6] *Ibid.* at 172.
[7] G.A. Res. 1514, 15 U.N. GAOR Supp (No.16), U.N.Doc. A/4684 (1960).

post-war international consensus, the Declaration was passed by an overwhelming majority with no dissenting votes and only nine countries, including Britain, France, the United States and Australia, abstaining. Drafted and submitted by forty-three African, Asian and Latin American nations, the 1960 Declaration proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations." Colonialism, defined as the subjection of peoples to alien subjugation, domination and exploitation, was condemned as constituting a denial of fundamental human rights that is contrary to the Charter of the UN and an impediment to the promotion of world peace and co-operation. Affirming the right to self-determination of all peoples, the declaration also stated that the "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence." It declared that "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other Territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions and reservations, in accordance with their freely expresses will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."

The 1960 Declaration is, arguably, the major authoritative text containing the philosophical and juridical underpinnings of the process of decolonisation, the subject matter of this thesis. Along with other UN documents that set out the principles and procedure of decolonisation and its concurrent, self-determination, it represents the jurisprudential foundation of decolonisation. With good reason, the effects of Resolution 1514 (XV) have been the subject of much theorizing. As one critic put it, the 1960 Declaration can be taken without too much exaggeration as almost an amendment of the Charter; through it, "colonialism was stripped of its legitimacy."[8] Decolonisation forever changed the image of

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[8] Geisa Maria Rocha, "In Search of Namibian Independence- The Limitation of the United Nations" (London: Westview Press, 1984) at 27.

the nature and composition of the international community. The exercise of self-determination led to the birth and recognition of new States which joined the international community as independent and legally competent entities. In 1945, the UN, an organisation with universalist aspirations, only had 51 members, the vast majority of which were Western industrialist nations. By the end of the 1960s, UN membership had increased to 127 and many commentators were celebrating the replacement of an old colonial order, one characterized by the hegemony of a few empires, with a new order, one characterized by a world of a sovereign, independent States working together in a system of collective security and responsibility centred around the values of the UN Charter.[9] The legacy of decolonisation is a present international community that consists of 189 sovereign members. When the UN was established in 1945, 750 million people-almost a third of the world's population- lived in territories that were non-self-governing or dependent on colonial powers. Today, fewer than 2 million live in such territories.[10]

The profound effects of decolonisation on national societies and the international legal order have not escaped critical interrogations and there exists a notable body of scholarship on the subject. Notwithstanding the valuable insights that can be gained from the review of the available literature, much of the existing analysis of decolonisation has occurred in an intellectual framework or paradigm that focuses on certain claims, privileges certain approaches, and reaches certain conclusions. As a consequence, other perspectives, viewpoints and approaches are neglected or relegated to the margins of the enquiry. This author has identified five distinct approaches, which have characterized past scholarship on decolonisation. The following list of these approaches is in no way meant to be exhaustive. Rather, its function is to demonstrate the nature of the critical analysis that has thus far shaped the thinking on decolonisation.

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[9] Urquhart, *supra* note 2 at 2, 3.
[10] "The United Nations and Decolonization- History" at <http://www.un.org/Depts/dpi/decolonization/history.htm> (accessed on 12 May, 2001)

The first approach examines decolonisation in the context of individual colonies, individual colonial powers and the relationship between the two. Many works using this approach study individual political independence movements and go to great lengths to describe how particular colonies progressed from dependency to national sovereignty.[11] Alternatively, the focus is on individual metropolitan colonial powers and the political, cultural and economic reasons that induced them to agree to the liquidation of empire.[12] Domestic conditions and policies are studied to ascertain the factors that contributed to the demise or contraction of empire. In both cases, decolonisation is portrayed largely as an internal process that is disconnected from larger, more global processes. Frequently, analyses combine the histories of the colony and the colonial power to discuss their relationship, but the transformative character of decolonisation is limited to the colony and colonial power in question and links to the wider international community are not sufficiently made or acknowledged.

The second approach to the study of decolonisation rejects the very term of decolonisation and the exercise of self-determination and national sovereignty that it is commonly associated with it. Departing from the emancipatory view of the law of self-determination, the argument is that decolonisation did not signal the end of empire, but the beginning of neo-colonialism. Neo-colonialism, as elaborated by Kwame Nkrumah, is characterized by the continuing economic influence and predominance of colonial powers,

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[11] See generally Charles Ohiri Chikeka, "Decolonisation Process in Africa during the Post-War Era, 1960-1990" (Lewiston, NY: Edwin Melen Press, 1998), B.A. Ogot & W.R. Ochieng', eds., "Decolonisation and Independence in Kenya, 1940-1993" (London: Ohio University Press, 1995), John. D. Hargreaves, "Decolonisation in Africa" (London: Longman, 1988), Kerina Mburumba, "Namibia: The Making of a Nation" (New York: Books in Focus, 1981).

[12] See generally John Springhall, "Decolonisation since 1945: The Collapse of European Overseas Empire" (New York, St. Martin's Press, 2001), David William McIntyre, "British Decolonisation, 1946-1997: When, Why and How Did the British Empire Fall?" (Houndmills: Macmillan Press, 1998), Franz Ansprenger, "The Dissolution of the Colonial Empires" (London: Routledge & Kegan Paul, 1989), John Darwin, "Britain and Decolonisation: The Retreat from Empire in the Post-War World" (New York, St. Martin's Press, 1988), Muriel Evelyn Chamberlain, "Decolonisation: The Fall of the European Empires" (Oxford: Basil Blackwell, 1985), Edward Grierson, 'The Death of the Imperial Dream: The British Commonwealth Empire, 1775-1969" (London: Doubleday, 1972).

after the achievement of formal political independence, whereby control is exercised through transnational corporations and international financial agencies.[13] In other words, neo-colonialism signals the movement from direct economic and political control to indirect control exercised through the penetrative effects of the investment of private corporations and indirect influence exercised primarily through communications and tourism.[14] Decolonisation, therefore, did not constitute the end of empire, but merely its transformation. The significance of gaining national independence from the colonial power is diminished because the state of dependency that is so essential to colonial relations continues to exist, albeit in a different form. Neo-colonial theories, therefore, refute orthodox theories of postcolonial independence that equate the transfer of political power from coloniser to colonized to the exercise self-determination. They reject the focus on the juridical or formal equality and, instead, highlight the fact that the end of *de jure* colonialism marked the beginning of *de facto* colonialism. Neo-colonial theories offer particularly sophisticated analyses of the unequal economic relations between former colonies and the West[15], but frequently pay inadequate attention to other forms of continued relations of dependence, in the areas of gender relations, law, culture and systems of knowledge.

The third approach engages the wider historical, metaphorical and cultural meaning of decolonisation. Often utilising the slogan "decolonise the imagination", this approach recognises the complex and varied process that was colonialism and calls for an equally complex and eclectic process of decolonisation, one that re-imagines the relationship between power and culture, domination and the imaginary, identity and discourse beyond the

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[13] Pal Ahlawalia & Paul Nursey Bray, "Introduction" in Pal Ahlawalia & Paul Nursey Bray, eds., *PostColonialism: Culture and Identity in Africa* (Commack, New York: Nova Science Publishers, 1997) p4.
[14] *Ibid.* at 6,7.
[15] See generally D.K. Fieldhouse, "The West and the Third World: Trade, Colonialism, Dependence and Development" (Oxford, UK: Blackwell, 1999), Susan Demske, "Trade Liberalization: De Facto Neocolonialism in West Africa" (1997) 86 Georgetown Law Journal 155, Yolamu R. Barango, "Neocolonialism and African Politics: A Survey of the Impact of Neocolonialism on African Political Behaviour" (New York: Vintage Books, 1980), Kwame Nkrumah, "Neo-colonialism: The Last Stage of Imperialism" (London: Nelson, 1965).

imaginative geography of colonialism.[16] Decolonisation is understood as an "act of exorcism" for both colonizers and colonized. According to Pieterse and Parekh, the decolonisation of the Western imagination means reviewing Western horizons in the light of the collusion with empire and colonialism, and with the ongoing asymmetries of global power. In the South, the decolonisation of the imagination must be a process that goes beyond the narrow framework of political/national liberation or economic independence and incorporates a cultural dimension that examines the values, institutions and identities of the colonized.[17] One of the earliest and most compelling theories of cultural decolonisation can be found in the works of Frantz Fanon, an Algerian psychoanalyst. Fanon was concerned with the mental presence of the coloniser, which was, in his view, more pervasive and dangerous because it could be incorporated into the consciousness and culture of the dominated until it becomes part of their *Weltanshaung*. His solution was the formation of a new consciousness, embodied in a new national culture, a new history, a new subject formation and dialectic of the self that was different from the one imposed by the coloniser.[18]

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[16] See generally Partha Chatterjee, "Nationalist Thought and the Colonial World: A Derivative Discourse?" (Minneapolis: University of Minnesota Press, 1993), Fernando Coronil, "Can Postcoloniality Be Decolonised? Imperial Banality and Postcolonial Power", (1992) 5 Public Culture 90, Homi K. Bhabha, "Nation and Narration" (New York: Routledge & Keegan Paul, 1990), W.D.

[17] Jan Niederveen Pieterse & Bhikhu Parekh, "Shifting Imaginaries: Decolonisation, Internal Decolonisation, Postcoloniality" in Jan Niederveen Pieterse & Bhikhu Parekh, eds., *The Decolonisation of the Imagination-Culture, Knowledge and Power* (London: Zed Books, 1995) p3. On the transcendence of colonialist rationalities through decolonisation Pieterse and Bhikhu write:

> The epoch of decolonisation is enframed by contradiction and by the oppositional mode of anticolonialism; a binary, dichotomizing approach predominates, contrasting colonial culture to national culture, cultural imperialism to cultural resistance, Pan-Europeanism to Pan-Arabism, Pan-Africanism (etc.), Eurocentrism to Afrocentrism (etc.), CocaColonization to 'Westoxification', and do so. Decolonisation is a process of emancipation through mirroring, a mix of defiance and mimesis. Like colonialism itself, it is deeply preoccupied with boundaries- boundaries of territory and identity, borders of nation and state. The dynamics of internal decolonisation displace opposition from without to within, carried by popular social forces, women and ethnic groups, in the name of equal rights, or possibly autonomy to the point of secession. The latter starts a new cycle of micro-nationalism and decolonisation. (p11)

[18] Fanon quoted in Ahluwalia & Nursey-Bray, *supra* note 13 at 27, 32, 36.

The fourth approach to the study of decolonisation emphasises the role of the UN in the decolonisation process.[19] Decolonisation and, more specifically, the principle of self-determination, are linked to the progressive development of international law within the UN system. The 1960 Declaration was followed by numerous other measures in the UN system to promote decolonisation and self-determination. In 1961, the General Assembly, having noted that, with few exceptions, the provisions of the Declaration were not being carried out, and that armed action and repressive measures continued to be taken in certain areas against dependent peoples, depriving them of their prerogative to exercise peacefully and freely their right to complete independence, through Resolution 1654 (XVI) established a Special Committee of seventeen members. Later enlarged to twenty four members in 1962, the Special Committee was mandated to "examine the application of the [1960] Declaration,...make suggestions and recommendations on the progress and extent of the implementation of the Declaration, and to report to the General Assembly[.]" Later still, the Committee was also empowered to make special recommendations concerning the dissemination of information to mobilize public opinion in support of the decolonisation process and examine the assistance provided to the people of the Territories by the specialized agencies and other organizations of the UN system.[20] Since there are no longer any Trust Territories left[21], the Special Committee on Decolonisation now works to

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[19] See generally Emil J. Sady, "The United Nations and Dependent Peoples" (Washington, D.C.: Brookings Institution, 1956), I. Claude Jr., "The Changing United Nations" (New York: Random House, 1971), UN, "Granting of independence to colonial countries and peoples: a selective bibliography, 1960-1980" (New York: UN, 1981).

[20] "The United Nations and Decolonization- Special Committee of 24 on Decolonization" at <http://www.un.org/Depts/dpi/decolonization/committee.htm> (accessed 12, May 2001)

[21] To date, all Trust Territories have attained self-government or independence, either as separate States or by voluntarily joining neighbouring countries. In 1994, the Security Council terminated the United Nations Trusteeship Agreement for the last of the original eleven Territories on its agenda- the Trust Territory of the Pacific Islands (Paulu), administrated by the United States. Paulu became an independent State the same year and joined the UN as its 185th member. With no more Trust Territories, the Trusteeship Council, the body created under Chapter XIII of the Charter to supervise the administration of Trust Territories and ensure that governments responsible for their administration took adequate steps to prepare them for the achievement of self-determination, suspended its operation on 1 November 1994. By a resolution adopted on 25 May 1994, the Council amended its rules of procedure to drop the obligation to meet annually and agreed to meet as occasion

implement the 1960 Declaration to the remaining 17 Non-Self-Governing Territories.[22] The problem with the UN approach to decolonisation is that it frequently involves a celebratory discourse, particularly in official UN communications, as demonstrated in the statement of Secretary General Javier Pérez de Cuéllar on the occasion of the 40th anniversary of the UN and the 25th anniversary of the 1960 Declaration: "The UN is entitled to feel a measure of pride for creating an international consciousness of the imperatives of decolonisation and for mobilizing moral and political support to dependent peoples in their efforts to realise their rights to self-determination and independence"[23] Even works critical of the UN role in the process of decolonisation tend to restrict their arguments to the political limitations of achieving decolonisation through the organisation's multilateral frameworks. Arguments that address the link between decolonisation and the construction of international community are not central to the debate and are, therefore, rarely fully developed and sophisticated.

The last approach consists of political arguments in favour of broadening the concepts of decolonisation and self-determination beyond the confines identified in the 1960 Declaration and subsequent legal pronouncements. Proponents of this approach view decolonisation as an "unfinished business" and seek to widen its application to indigenous peoples, First Nations and the territories of Hawaii, Puerto Rico, Quebec, Kosovo and Palestine to name but a few examples.[24]

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required- by its decision or the decision of its President, to at the request of one of its members, General Assembly or the Security Council.

[22] These are Western Sahara, American Samoa (US), East Timor (under UN Transitional Administration, established by Security Council Resolution 1272 (1999) of 25 October 1999), Guam (US), New Caledonia (France), Pitcairn (UK), Tokelau (NZ), Anguilla (UK), Bermuda (US), British Virgin Islands (UK), Cayman Islands (UK), Falkland Islands/Malvinas (UK), Gibraltar (UK), Montserrat (UK), St Helena (UK), Turks and Caicos Islands (UK), and United States Virgin Islands (US).

[23] Javier Pérez de Cuéllar quoted in UN, *Teaching About Decolonisation* (New York: UN Department of Public Information, 1991) p15.

[24] See generally, Mililani B. Trask, "Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective" (1991) 8 Ariz. J. Int'l & Comp. L. 77, Catherine J. Ions, "Indigenous Peoples and Self-determination: Challenging Sovereignty" (1992) 24 Case W. Res. J. Int'l. L 199, Dianne Otto, "A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia" (1995) 21 Syracuse J. Int'l L. & Com. 65, Edward T. Canuel, "Nationalism, Self-determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence" (1997) 20 B.C. Int'l & Comp. L. Rev. 85, Ediberto Roman, "Empire

This author in no way questions the value and importance of the existing scholarship on decolonisation, merely the boundaries in which it took place. In fact, the inquiry of this thesis will incorporate and draw from the existing approaches on decolonisation in order to make the link between decolonisation and the construction of international community. The particular contention of this thesis is that the scholarship on decolonisation, as identified and categorised in the previous paragraphs, operates in an intellectual framework that has yet to explore the conceptual link between decolonisation and notions of community. As noted by Grovogui, the process of decolonisation is empirically interconnected with the nature of the international community, yet both subjects remain rhetorically disjointed "in the hegemonic Western metaphysics, reflected by the dominant political and international legal theories."[25] It is this "metaphysical disassociation" that this thesis is trying to rectify by illustrating the manner in which decolonisation and the juridical norms underlying it are intimately linked to the discourse on international community. The argument will be that an examination of the link between decolonisation and notions of community can reveal a "new" story or narrative about the international community, about its structure, foundation and mythology. This new story will be shown to be disruptive of elements of the "old" story of the international community. The old story of the international community does not exist in a unified or complete sense, but fragments of it may be found in a number of international documents such as the UN Charter and the 1970 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (1970 Declaration or Declaration of Friendly Relations). The most important element of the old story lies in its

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Forgotten: The United States' Colonization of Puerto Rico" (1997) 42 Vill. L. Rev. 1119, Rudolph C. Ryser, "Between Indigenous Nations and the State: Self-Determination in the Balance" (1999) 7 Tulsa J. Comp. & Int'l. L. 129, Thomas D. Grant, "Extending Decolonisation: How the United Nations Might Have Addressed Kosovo" (1999) 28 Ga. J. Int'l. & Comp. L. 9, Julie M. Sforza, 'The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonisation" (1999) 22 Suffolk Transnat'l L. Rev. 481.

[25] Siba N'Zatioula Grovogui, *Sovereign, Quasi Sovereigns and Africans*, (Minneapolis: University of Minnesota Press, 1996) p179.

assertion that international society is a community of sovereign and co-equal States, which have consented to the international legal order governing their interaction with another.

Just as national communities require and rely on (national) narratives and foundational myths to construct their identity, values, and a sense of belonging for their members, so the same can be argued for the international community. Similarly, just as some pieces of national narratives can be found in important national documents such as constitutions and legislation, so fragments of international narratives can be found in international legal instruments like the UN Charter and 1970 Declaration of Friendly Relations. In other words, these two documents can be seen as articulations of how an international community or an international legal order was to be *imagined* after the end of World War II, to use Benedict Anderson's terminology. The international community imagines itself and attempts to construct a narrative of the self in the same manner as nations do. However, just as counter-narratives contest and oppose official national narratives, so the official international story as articulated in the Charter and elsewhere is challenged and disputed. The process of decolonisation is capable of revealing such a counter-story. The nature and objective of this counter-story is comparable to the concept of a 'subaltern history', as promoted by Giyatri Spivak and other subaltern scholars. Subaltern history is based on the premise that historical narratives are not simply a disinterested production of facts but acts of epistemic violence. Apart from problematising the distinction between fact/truth and fiction in history, the subaltern history project aims to construct counter-narratives to hitherto monopolized historiography. Spivak refers to this strategy as "bringing hegemonic historiography to crisis".[26]

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[26] Spivak quoted in Robert Young, *White Mythologies- Writing History and the West* (London: Routledge, 1990) p160.

Structure

This thesis will be divided into three chapters. Chapter one will examine the concept of an international community, and review arguments for and against the existence of such a community. It will conclude with the contention that the idea of international community requires us to rethink our views on the concept of community, the nature of community boundaries, the level of homogeneity necessary before one can assert the existence of a community, the convergence in the values of its members, and, finally, the ties that bind these members together. Chapter one will also feature a discussion of the Charter as a document that provides the basis for an imagined international community. The Charter is central to the construction of an international community. It represents, arguably, an attempt at self-narration by and for this imagined international community. To clear up definitional concerns, a community is imagined "because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion."[27]

Chapter two will begin with a discussion of two basic features of the international community: sovereignty and equality. Both principles are integral components of the narrative on international community as articulated in the Charter and are deeply implicated in the construction of the international self. Chapter two will then proceed to examine in detail the connection between decolonisation and international community. The main objective of this chapter is to demonstrate the manner in which decolonisation enabled newly independent States to contest notions of sovereignty and equality, the two foundational principles of the international legal order, by revealing their frequently fictional, contradictory and politically contingent character. In doing so, they challenged the vision of international community as articulated in the international legal instruments and attempted to

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[27] Benedict Anderson, *Imagined Communities- Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983) p6.

articulate an alternative history, one which revealed problems with the most basic assertion about international society- that relations between its members are structured by the principle of sovereign equality and consent. Notable exceptions to and deviations from the sovereignty and equality doctrines can be found in the Charter in the form of Chapter XII (which establishes an International Trusteeship System) and Chapter V (which establishes the Security Council). The legal characteristics of Chapters XII and V are fundamentally incompatible with the liberal vision of the international community as aspired to by the principles of sovereignty and equality. The decision to refer to the legal provisions in Chapter V in this thesis is strategic- the extensive jurisprudence on the relationship between the composition and procedure of the Security Council and the principles of sovereign equality and consent is insightful and provides useful arguments on the compatibility and reconciliation of seemingly contradictory provisions in UN Charter.

Chapter three will seek to contextualise the connection between decolonisation and international community through a case study. To this end, this chapter will consist of a critical analysis of the 1950 International Court of Justice (ICJ, World Court or the Court) advisory opinion on *The International Status of South West Africa*, the 1971 advisory opinion on *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* and the 1962 and 1966 judgments of the Court in the *South West Africa Cases*. Once again the focus will be on the principles of sovereignty and equality and their connection to an imagined community. The judicial pronouncements in the cases on South West Africa represent authoritative statements on the relationship between decolonisation and the international legal order. Although this link was not expressly made by the ICJ itself, a number of the assertions made by the Court regarding the nature of the International Trusteeship and Mandates Systems, the interest of the international community therein, and the nature of the sovereignty of mandate territories or territories held in trust or under mandate, are directly implicated in the narration of an international community that consists of sovereign and equal members.

The Court's use of legal fictions such as "sovereignty in abeyance", "resting sovereignty" or "sovereignty yet to be revived" to describe the international status of South West Africa signifies a radical departure from the norms and values of the Charter but one that is ultimately in line with the philosophy behind Chapter XII. In other words, the reasoning of the Court in the South West Africa cases lays bare the fundamental contradiction and tension that exists in the text of the Charter, one that becomes visible in the provisions of Chapter XII.

Methodology

The concept of 'community' has assumed a new importance for contemporary legal theory, and scholars such as Unger, Mark Tushnet, Ronald Dworkin, Bjork, Cass Sunstein, Frank Michelman, and Duncan Kennedy have explored the implications of communitarian discourse for law. However, as one critic points out, while ubiquitous in current academic legal discourse, the model of community has not been internally generated, but rather was imported from the neighbouring disciplines of moral and political theory where it has been a central theme for the past few decades.[28] Since the concept of community was traditionally conceived outside the normative structures of legal discourse, an interdisciplinary approach will be employed in this thesis. While the main focus will be the *legal* concept of community, such a discussion cannot occur without reference to political and sociological theories on community.

In making the connection between decolonisation and international community, this thesis will critically analyse international legal documents, such as the Charter, General Assembly resolutions, declarations and other pronouncements to reveal their dominant values and principle. Special attention will be paid to the Charter as the authoritative text on the construction of an imagined international community. All texts will be subjected to a

[28] Stephen A. Gardam, "Law, Politics, and the Claims of Community", (1992) 90 Mich. L. Rev 685 at 687.

deconstructive technique, which involves not only interpreting the text but also revealing and, in this case, displacing its hidden assumptions, hierarchies and incoherent foundations. Deconstruction, as elaborated by French philosopher Jacques Derrida, deals with the manner in which meaning is generated by and through texts. Derrida argued that texts relied on a binary philosophy or hierarchical dualisms (i.e. male/female, being/non-being, reality/fiction, objectivity/subjectivity etc.), where the first element is regarded as superior or essentially true. A deconstructionist reading reveals and implodes this arrangement. The meaning that is generated by the text is shown to be unstable, illogical and contradictory. An alternative meaning is generated by highlighting what the text excludes, hides or silences.

The other identifiable method that will be employed is referred to as Third World Approaches to International Law (TWAIL). The objectives of TWAIL have been articulated by a number of scholars. Anghie and Mutua define TWAIL as being driven by three basic, interrelated and purposeful objectives:

> The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative edifice for international governance. Finally, TWAIL seeks through scholarship, policy and politics to eradicate the conditions of underdevelopment in the Third World.[29]

Other scholars have characterised TWAIL as a polemical or counter-hegemonic term designed to rupture received thinking and as "emerging to challenge the statist, elitist, colonialist, Eurocentric, and masculine foundations of international law". [30] Whatever else this complex and ambitious project of TWAIL may be, it is first and foremost a dialogue and conversation of different voices with the existing theory of international law from a

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[29] Makau Mutua & Antony Anghie, "What is TWAIL?" (2000) 94 Am. Soc'y Int'l. Proc. 31 at 31.
[30] Rajagopal quoted in James Thuo Gathii, "Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries To International Legal Theory" (2000) 41 Harv. Int'l L.J. 263 at 274.

perspective informed by Third World concerns. It is the intention of this thesis to add to this dialogue. The author recognises the essentialist dangers associated with using the term 'Third World', implying as it does a certain degree of homogenization and simplification that does not correspond with reality. However, essentialism, while a trap, is, as Spivak correctly points out, something that we *cannot not* use. Spivak's resort to "a strategic essentialism", a theoretical fiction and unifying methodological presupposition, represents an acceptable solution to the problem of essentialism. The use of term Third World is also useful in the context of this thesis because it signifies the ambivalent and dialectic relationship that the Third World has had with the discipline of international law and the general international legal order. This relationship is central to understanding the dynamics of decolonisation.

CHAPTER ONE

The Constitution of my own country came from a Convention which –like this one- was made up of delegates with many different views. Like this [UN] Charter, our Constitution came from a free and sometimes bitter exchange of conflicting opinions. When it was adopted, no one regarded it as a perfect document. But it grew and developed and expanded. And upon it there was built a bigger, a better, and a more perfect union.

The [UN] Charter, like our own Constitution, will be expanded and improved as time goes on. No one claims it is now a final or a perfect instrument. It has not been poured into a fixed mould. Changing world conditions will require adjustments- but they will be adjustments of peace and not of war.

--Harry S. Truman, 1945[1]

...States live, as from their birth, within a legal framework of a limited number of basic rules which determines their basic rights and obligations with or without their will [.]

--Professor Christian Tomuschat[2]

Introduction

The expression 'international community' (or 'world community', 'international society") is occupying an increasingly important place in debates about the international order and has become a common feature in international legal discourse. The term is used in an almost careless manner; it is rarely defined and no explanation or justification is given for its usage. References to the term can be found in textbooks on international law and human rights, print, broadcast, and electronic media, and national and international legal instruments. An example of the term finding its way into the domestic law of individual States is a provision in the Preamble of the Constitution of the Russian Federation, which states that the People adopting the Constitution "recognised [itself] as

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[1] Harry S. Truman quoted in Bardo Fassbender, "UN Security Council Reform and the Right of Veto- A Constitutional Perspective", (The Hague: Kluwer Law International, 1998) at 19. [herinafter "UN Security Council Reform]

[2] Tomuschat quoted in *Ibid.* at 55.

part of the world community". According to Igor Ivanovich Lukashuk "[t]his is a reflection of a new, contemporary relation to the surrounding world based on the notion of an organic link to the world community. Russia, as any other country, cannot pursue its national interests in isolation but only in cooperation with other countries as a member of the international community."[3] On an international level, the term 'international community' is used in an even more inflationary manner. The UN General Assembly, Security Council and international conferences organized by UN frequently address themselves to an 'international community', which is sometimes interpreted as a global community of States, sometimes as a community consisting of States and international organisations and sometimes as a collective and all-encompassing name for all sorts of international actors, such States, international organisations and non-governmental organisations.[4]

One of the earliest references to the concept of 'international community' in an international legal instrument after WW2 can be found in the International Law Commission's *1949 Draft Declaration on the Rights and Duties of States*, which proclaimed in its Preamble that "the States of the world form a community governed by international law". The 1970 *Declaration of Friendly Relations*, in elaborating the principle of the sovereign equality of States, asserts that all States "have equal rights and duties and are *equal members of the international community*" [emphasis added]. The *1969 Convention on the Law of Treaties* in Article 53 defines peremptory norms of international law (*jus cogens*) as norms that are "accepted and recognised by *the international community of States as a whole* [and] from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." [emphasis added] The wording and meaning of

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[3] Igor Ivanovich Lukashuk, "The Law of the International Community" in UN: International Law Commission, *International Law on the Eve of the Twenty-First Century-Views from the International Law Commission* (New York: United Nations Publications, 1997) at 51, 51-2.

[4] Bardo Fassbender, "The United Nations Charter as Constitution of the International Community" (1998) 36 Column. J. Transnat'l L. 539 at 563. [herinafter "The United Nations Charter as Constitution]

'international community' was retained in the *1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.*

The jurisprudence of the ICJ also reveals a frequent use of the concept of 'international community." In both *United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (1979-1981)*[5] and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (SWA) Notwithstanding Security Council Resolution 276 (1970)*[6], the Court appealed to the international community. In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[7], the ICJ used the term 'international community' seven times, mostly to refer to 'all States' in the international system. However, the most notable use of the term 'international community' appears in the Court's famous obiter dictum in the 1970 *Barcelona Traction Case*, which identified obligations *erga omnes* owned to the 'community of states' or 'international community as a whole'. Such obligations bind each State with respect to all others and are to be distinguished from obligations that bind one state vis-à-vis another. The Court stated that

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection

[5] (1980) ICJ Reports 3.
[6] (1971) ICJ Reports 6.
[7] (1996) ICJ Reports 66.

> from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi universal character.[8]

Obligations *erga omnes* are, thus, directly related to the interests and values of the whole international community and give States, which according to traditional international law would otherwise not be affected by a breach of these obligations, "a legal interest in their protection". Clearly, obligations *erga omnes* presuppose common interests and presume the existence of an international community against which an offence is committed. Individual States gain a cause of action by virtue of their membership in such a community.

The idea of an 'international community' has also been supported and promoted in the jurisprudence of the International Law Commission (ILC), the body created by the UN in 1947 to promote the progressive development and codification of international law. In 1994, the ILC recognised the concept of obligations *erga omnes* in its Draft Articles on State Responsibility. According to the Draft, a violation of an obligation *erga omnes* would result in an injury to every State, which would give to all States sufficient standing to seek a remedy for the violation. The definition of an injured State can be found in Article 40 and may include a breach of a norm of customary international law. ILC jurisprudence links the concepts of obligations *erga omnes*, *jus cogens* and international crime in relation to international community, although the exact nature of this relationship is still contested. What is clear, however, is that violations of *jus cogens*- which can be interpreted as giving rise to obligations *erga omnes*- and violations of norms which result in the commission of an international crime have one common feature: they all protect the fundamental interests of the whole international community

[8] (1970) ICJ Reports 3 at 32.

and not just of individual States.[9] The 1997 ILC Report on the work of its Forty-ninth Session noted that in the case of an international crime, the injured party was "the community of States as a distinct legal entity and that the concept of international crime has helped to promote the international community to the status of, as it were, a quasi-public legal authority."[10]

International laws designed to protect the world's environment and natural resources also presume the existence of an international community and interests that transcend those of individual states *ut singulari* in a manner that is not fully comprehensible in the classic bilateralism of international relations. In 1982, the *Convention on the Law of the Sea* affirmed and consolidated the concept of the 'common heritage of mankind.' The Preamble of the Convention talks of the "interests and needs of mankind as a whole" and declared "that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole". The *Convention on the Law of the Sea* is another example of the conceptualisation of collective interests which, similar to obligations *erga omnes*, result in the notion of an injured party being any State of the international community whose interests are not longer merely individual but linked to the collective interests of this community.[11]

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[9] The relationship between *jus cogens* and obligations *erga omnes* is not entirely clear. The *Barcelona Traction Case* does not mention *jus cogens* as such, but it is generally assumed that the definition of obligations *erga omnes* refers to peremptory norms, because the 1969 Vienna Convention uses the expression of the 'international community of States as a whole.' The ILC has stated the following on the subject matter: "It can be accepted that obligations whose breach is [an international] crime will 'normally' be those deriving from rules of *jus cogens*, though this conclusion cannot be absolute....[A]lthough it may be true that failure to fulfil the obligation established by a rule of *jus cogens* will often constitute an international crime, it cannot be denied that the category of obligations admitting no derogation (i.e. *jus cogens*) is much broader than the category of obligations whose breach is necessarily an international crime."

[10] ILC quoted in Lukashuk, supra note 3, at 56.

[11] See generally *First Report of the International Law Association (ILA) Study Group on the Law of State Responsibility*, Submitted by the Chair of the Study Group to the Special Rapporteur and the Chair of the

Denying International Community

Despite the above-cited normative invocations of an international community (of States), there are those who continue to doubt the existence of such a community. Arguments that deny or are deeply sceptical of the idea of an international society can be divided into three broad categories: classic realism, modern realism and orthodox community theory.

1. Classic Realism

The classic realist thesis on relations between sovereign entities can be found in Thomas Hobbes' *Leviathan*. Simply put, according to Hobbesian logic, the international behaviour of States can only be understood in terms of aggressive self-interest; States are engaged in a permanent struggle to maximize their own power and minimize that of others. Hobbes derived at this conclusion through an analogy between States and individuals in a state of nature. The state of nature hypothetically describes human relations before the creation of a Common Power or Commonwealth through a Covenant or Contract. Hobbes writes that "during the time men live without a common Power to keep them in all awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man."[12] Hobbes points out that the *bellum omnium contra omnes* of the state of nature does not actually consist of actual fighting, but rather an overwhelming disposition thereto.[13] In order to escape the "solitary, poore, nasty, brutish, and short"[14] life of the state of nature, Hobbes envisages individuals, motivated by the foresight of their self-preservation, establishing a political society by submitting and transferring their power (i.e. giving up their natural rights) to the Common Power of

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UN International Law Commission and the ILA Director of Studies, 2000, online: <http://www.ila-hq.org/pdf.studyreport.pdf>.

[12] Thomas Hobbes, (edited by C.B. Macpherson) *Leviathan* (Middlesex, UK: Penguin Books, 1951) at 185.

[13] *Ibid.* at 186.

[14] *Ibid.*

the Commonwealth who or which –depending on whether the power rests in a person and in an institution- will exercise that power for the Common Benefit.

Hobbes' analysis of the state of nature and the Commonwealth precludes the existence of an international community in a number of ways. First, Hobbes characterized the power of the Commonwealth, also called sovereignty, as indivisible. Sovereignty describes the power attributable to individuals in the state of nature and later to the Sovereign in the Commonwealth. The nature of this power does not change, merely its location. First exercised by many -a 'disunited Multitude', as Hobbes calls them-, the power becomes concentrated in one place through the establishment of the Covenant. According to Hobbes, sovereign power implies that the subject is author and judge of his/her own actions and not subject to external review. The sovereign knows no superior (power). In other words, sovereignty, residing in a particular subject, knows no limitations; it is incommunicable, inseparable and indivisible. This means that States, sovereign entities which exercise Common Power, relate to another based on the notion of an indivisible sovereignty which precludes the possibility of one State being held accountable for its actions by another State.[15]

Hobbes himself comes to the conclusion that because of the attribute of sovereignty States must *necessarily* exist in continuous competitive struggle. In *Leviathan* he writes:

> ...Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and postures of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts,

[15] The same idea was expressed by Jean Bodin, who thought that sovereignty could not be delegated nor divided: "Sovereignty is that absolute and perpetual power vested in a commonwealth which in Latin is termed majestas." Bodin also wrote that "it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete." See generally Jean Bodin, *Six Books on the Commonwealth* (trans. by M.J. Tooley) (New York: Barnes & Noble, 1967).

> Garrisons, and Guns upon the Frontiers of their Kingdoms; and continuall Spyes upon their Neighbours; which is a posture of War.[16]

States, therefore, confront each other as people did, as enemies by nature ('*duae civitates natura hostes sunt*'); their right extending precisely as far as their power does ('*quia unusquisque tantum iuris habet, quantum potentia valet*').[17] For Hobbes then, natural law relations remain the main regulative principle of the mutual relations of States. The possibility of any formal legal relations between States existing beyond temporary alliances that are motivated by self-interest is problematic in Hobbesian philosophy. The state of nature is characterized by an absence of law:

> To this warre of every man against every man, this also is consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have no place. Where there is no law common Power, there is no Law: where no Law, no Injustice. Force, and Fraud, are in warre the two Cardinall virtues. Justice, and Injustice are none of the Faculties neither of the Body, nor Mind.[18]

An early positivist, Hobbes clearly thought the absence of a common Power to enforce a law an important factor in ascertaining the existence of a legal regime. As Grewe notes, for Hobbes the characteristic quality of a legal rules was not its rightness or reasonableness, but rather its guaranteed enforcement through an irresistible command mechanism. Consequently, law in its precise meaning existed only where such a command mechanism (i.e. a State) could enforce it.[19] Hobbes himself believed that "Right and Wrong can only be perceived within the State", arguing that a no true legal order could exist between States because there was no effective command mechanism which could guarantee the enforcement of legal rules against specific States.[20] "What in

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[16] Hobbes, supra note 12 at 187-188.
[17] Wilhelm G. Grewe (translated and revised by Michael Byers) *The Epochs of International Law* (Berlin: Walter de Gruyter, 2000) at 350.
[18] Hobbes, *supra* note 11 at 188.
[19] Grewe, *supra* note 17 at 350.
[20] Hobbes quoted in *Ibid.*

an era before the established of the state of natural law is between man and man, is afterwards the law of nations between ruler and ruler", Hobbes concluded.[21]

To conclude, Hobbesian realism views the role of the sovereign in international relations as an extension of the sovereign's role at home. Hobbes assumed that States co-exist in state of nature, in which they are limited only by the extent of their own power. Their sovereign rights are indivisible and they are the sole judge of their actions. The lack of a superior common Power to enforce laws, means that sovereign entities are bound only by their own conscience and deal with one another on a discretionary basis. The existence of international relations or cooperation is merely an expression of sovereign will, an indication of States pursuing their self-interest, "an ideological reflex of natural, dynamic processes in a permanently changing field of forces within the political balance of power."[22]

2. Modern Realism

Just as with classic realism, the basis of modern realist arguments precluding the existence of an international community of states is the concept of sovereignty. This time, however, the concept is analysed in the context of modern legal instruments such as the UN Charter and the intention of its framers. The main assertion is that a world community as a separate entity and with a personality above and beyond States was not envisioned when the modern international system was created after the Second World War by way of the UN treaty. In fact, the intention of the contracting sovereigns in 1945 was not to sign over their sovereignty to some sort of world parliament to exercise dominion over them. Arangio-Ruiz contends that "the founders of the UN intended to remain, and remained, what they were prior to the treaty"- sovereign entities.[23] He notes

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[21] Hobbes quoted in *Ibid.*
[22] Spinoza quoted in *Ibid.*
[23] Gaetano Arangio-Ruiz, "The 'Federal Analogy' and UN Charter Interpretation: A Crucial Issue" (1997) 1 European Journal of International Law 1 at 14.

that "[t]he member States remain, under the Charter, the separate, independent entities they were beforehand, in their mutual relations as well as in relation to the UN; and they remain also- and this is of paramount importance- subject to general international law and endowed with the rights deriving therefrom. Indeed, they would have remained sovereign, given the way that the Organisation was set up, even if the Charter did not state so, or stated so less clearly than it actually does".[24] Arangio-Ruz concludes that the use of the term 'international community' is merely 'a matter of linguistic convenience' and does not reflect a real altercation of the essentially inter-State nature of relations in the international system.[25]

Proponents of modern realism point to specific legal provisions to illustrate the unaltered position of sovereign States in modern international relations. First, they direct our attention to Articles 2(1) and (7) of the Charter which affirm the principle of sovereign equality as the basis of the UN and prevent the Organisation from intervening in matters which are essentially in the domestic jurisdiction of any State. Read together, these two provisions are cited as preserving the sovereignty of UN member States. Article 2(1) indicates that the UN is not superior to member States (i.e. they have not abdicated their sovereignty to it through their membership); rather, they remain sovereign States "because the limitations on their sovereignty in connection with UN membership are based on a treaty agreement, i.e. they are brought by agreement and are not of such an extent that they would affect the core of the member States' constitutional authority."[26] Similarly, Article 2(7) expresses the idea that States are not, by reason of their membership in the UN, deprived of their sovereignty, except in enforcement actions pursuant to Chapter VIII of the Charter.[27] Proponents of modern realism do acknowledge that member States can and do renounce or limit their sovereignty; after all, the Charter

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[24] *Ibid.* at 16-17.
[25] *Ibid.* at 10.
[26] Bruno Simma Herman Mosler, Helmust Brokelmann & Christian Rohde, eds., *The Charter of the United Nations- A Commentary* (Oxford: Oxford University Press, 1994) at 73.
[27] *Ibid.* at 76.

and the very concept of international law are dependant on this very occurrence and Article 2(1) and (7) must be read on view of this reality. It is argued, however, that what sovereignty States renounce or transfer is not sufficient to give rise to a system of relations that prioritizes distinctive collective/community interests over individual State interests.

Modern realists also maintain that the UN is merely another instrument, which, in addition to other diplomatic organs, States use to conduct what are, essentially, unaltered egalitarian relations. Although the Organization issues decisions and recommendations to member States, governments have through it merely organized their relations in a different way and remain as juxtaposed as before.[28] Ultimately, the UN is viewed as a tool of inter-State relations, empowered to function by virtue of the national legal systems of those States which have adopted the relevant international agreements. Arangio-Ruiz believes that "once the false notions of community and its functional personifications are set aside, it may clearly be seen that in setting up the UN the founding States organized *neither* the universal society of men and women (or the regional society of their peoples) *nor* the so-called 'society of States'. However important, what they did was something less than any of the above."[29] Arangio-Ruiz's statement indicates that modern realists do not fail to appreciate the political significance of the UN system; they just are not convinced that it created an international community. To them the UN system represents a huge legal phenomenon of a contractual, inorganic and 'private' law: "This is a monumental phenomenon because of the dimensions of the entities involved and the interests at stake, but not for its normative quality or 'weight'. It is still the *relationnel* of Holland's 'private law writ large'."[30]

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[28] Arangio-Ruiz, *supra* note 23 at 17.
[29] *Ibid.* at 18
[30] *Ibid.*

3. Orthodox Community Theory

The concept of community has been called "infuriatingly slippery"[31] and "highly resistant to satisfactory definition".[32] Yet, no matter how loosely community is conceptualized, as a term, it is generally taken to suggest a unity or social totality of some sort with boundaries separating it from other totalities. Community, therefore, has two dimensions: an internal dimension that implies a unity within a community and an external dimension that relates to the boundaries of that community. Thus, the word community is used to describe a group of people who (a) have something in common, and (b) can be distinguished or distinguish themselves in a significant way from other putative groups.

The internal aspect of community requires common interests, values or principles that bring and hold a group of people together. Typically, communities consist of people who share a common language, a common history or political fate, common traditions, memories or values. As Abi-Saab writes, "[o]nly if [a] society is welded together by a sense of community, even to very different degrees, over a broad range of matters (that is to say interests and values), can it be aggregately designated a 'community'."[33] Similarly, German philosopher Carl Schmitt asserted that an association of political community requires, as an essential prerequisite, a certain homogeneity of its members, that is "a substantial similarity which establishes a concrete and real association."[34] It is this link normative link between community and notions of 'substantial similarity', homogeneity, commonality, unity or convergence that has given rise to doubts about the existence of an international community. International society, if such a term can be used, consists of diverse entities that do not share the common identity- whether historical, racial, ethnic,

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[31] Roger Cotterrell, "A Legal Concept of Community" (1992) 2 Can. J. L. & Soc. 75 at 78.
[32] Anthony P. Cohen, *The Symbolic Construction of Community* (Chichester: Ellis Horwood Limited Publishers, 1985) at 11.
[33] Georges Abi-Saab, "Whither the International Community" (1998) 9 European Journal of International Law 248 at 249.
[34] Carl Schmitt quoted in "The United Nations Charter as Constitution", *supra* note 4 at 564.

nationalist or linguistic- that all communities supposedly require. Instead international society is fragmented and composed of a multitude of highly differentiated members: superpowers, medium-sized powers, small States, macro-States, and also weak, rich, and poor States. As Anthony Carty notes, any theory about international community must begin with the realization of the very partial, multilayered and fragmented nature of such a community: "International society consists, above all, of opposing and self-differentiating national and regional/continental cultural traditions, criss-crossing with both religious and commercial systems, which are more transnational."[35]

Apart from the deep material, social, cultural and power-political differences, States are also divided by ideological issues, a reality which is cited as another factor undermining the formation of shared values and interests. With the concept of 'humanity' dismissed as too vague a uniting reference point, critics of the idea of an international community argue that the lack of consensus on the form and content of so-called fundamental international norms illustrates the lack of common standards and values. As Grewe notes in the area of human rights:

> Human rights were not the same in the East and West. As understood by communist regimes and other dictatorships, they guaranteed neither freedom of the person, of opinion, nor less the press. For some, social progress meant dictatorship of the proletariat and socialization of the means of production; for others it meant free competition, freedom of association in labour unions, and social security. For some, good neighbourliness meant open border and free movement of people and information; for others it meant sealing populations off from one another with walls, barbed wire and death strips.[36]

While for some critics the reality of ideological diversity and the relativity of international norms merely precludes the existence of a true international community beyond a

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[35] Anthony Carty, "Critical International Law: Recent Trends in the Theory of International Law", (1991) 3 European Journal of International Law 66 at 68.
[36] Grewe, *supra* note 17 at 647.

rhetorical use the term, others have gone further and predicted a violent confrontation between States of different cultures and ideological persuasions. Samuel Huntington, for example, envisions a 'clash of civilization', a future conflict which will not be fought over resources but over fundamental and often irreconcilable values.[37]

The external aspect of community has also been used to question the idea of an international community. The external dimension of community recognises that in conjunction with an inside aspect, communities also possess an outside aspect, an environment which defines and delineates its identity. As Cohen correctly points out, the term community is a relational idea that implies simultaneously both similarity and difference. Community embodies a sense of discrimination and the very use of the word expresses the desire and need to distinguish one community from another community or other social entities.[38] So, because it must be possible to differentiate between people belonging to one community (self/us/insiders/familiars), it is necessary to establish ways of identifying those that fall outside the community (other/them/outsiders/strangers). This is accomplished through mechanisms of (social) closure, which create boundaries between communities and help in the creation of an admission policy. Critics of the idea of an international community argue that international mechanisms of social closure are non-existent or vague at best. As Brunno and Paulus observe: "In the case of an all-embracing community like the international one, it is unclear who or what constitutes [the] 'outside': Does it only consist of those with whom nobody wants to deal with, namely terrorist 'rogue states'? But even these outcasts are not fully excluded from international relations and institutions."[39] The possibility of the international community personifying a particular civilisation or value, which excludes groups opposing this

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[37] See Samuel P. Huntington, *The Clash of Civilisations and the Remaking of World Order* (New York: Simon & Schuster, 1996). For a contrasting thesis, see Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

[38] Cohen, *supra* note 32 at 12.

[39] Bruno Simma & Andreas L. Paulus, "The 'International Community': Facing the Challenge of Globalization" (1998) 9 European Journal of International Law 266 at 268.

civilisation or these values is also dismissed because this would contradict the idea of a universal international society that embraces people from different cultures.

This is not so say that there have not been attempts to limit the international community. In the eighteenth and nineteenth centuries, international legal norms restricted entry to the international community on the basis of such vague concepts such as "civilization".[40] Mini-States were also excluded.[41] Today, article 4 (1) of the Charter of the UN, the representative body of the international community, opens membership to the international community "to all...peace-loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations." Article 4(2) adds that "[t]he admission of any such State to membership in the UN will be affected by a decision of the General Assembly upon the recommendation of the Security Council." Article 4 is significant because it signals the entry of a new State into the international community; on admission as a member of the UN, the new state becomes part of the globally organized community of States by way of co-optation.[42] Thus, new States do not automatically become part of the

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[40] Oppenheim wrote the following on the idea of civilization as a condition of membership in the Family of Nations: "A State to be admitted must, first, be a civilized State which is in constant intercourse with the members of the Family of Nations; such a State must expressly or tacitly consent to be bound for its future international conduct by the rules of international law; and those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member."

[41] See e.g. P.J. Baker, "The Doctrine of Legal Equality of States" (1923-24) The British Yearbook of International Law 1.

[42] It should be pointed out that the conditions set out in Article 4 are exhaustive. In its 1948 advisory opinion on the *Conditions of Admission of a State to Membership in the United Nations (Article 4)*, the ICJ analysed the scope and meaning of Article 4 and decided that Member States are not legally entitled to make admission into the UN dependent on conditions not expressly provided in the article. The Court held that Article 4 would lose its significance if other conditions could be demanded. Consequently, the conditions must be regarded as exhaustive and not merely stated by way of an example. They are not merely the necessary conditions, but also the conditions which suffice. The Court made it clear that any other interpretation of Article 4 would confer upon Member States an indefinite and practically unlimited power to impose new conditions, a situation which could not be reconciled with the wording and character of the provision. The Court concluded that if the authors of the Charter has meant to leave Members free to import into the application of Article 4 considerations extraneous to the principles and obligations of the Charter, the would undoubtedly have adopted a different wording. However, it was noted that Article 4 did not forbid Member States from taking into account factors, which, reasonably and in good faith, can be connected to the conditions laid down.

international community, but are chosen or recognized by those States that are already members. Article 4 contains ambiguous aspects, one of which is the term "peace loving", a concept loaded with ideological meaning but one that has never been clearly defined. The phrase "ability and willingness to carry out [international] obligations" is generally viewed to relate to the fulfilment of the general principle of statehood which can be found in the *1933 Montevideo Convention on the Rights and Duties of States*.[43] In its 1948 advisory opinion on the *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, the ICJ interpreted Article 4(1) as enumerating five conditions for admission into the UN: a candidate must be 1) a State; 2) peace-loving; 3) must accept the obligations of the Charter; 4) must be able to carry out these obligations and 5) must be willing to do so. [44]

It is commonly argued that Article 4 no longer represents an effective admission policy or method of closure. During the Cold War, the term 'peace-loving' became an instrument of struggle between the superpowers, which attempted to use it to exclude each other's client/satellite-States from membership in the UN.[45] However, all States whose membership application was initially contested were later admitted as members of the Organisation and the criterion of "peace-loving" was robbed of any substantive content and importance. Today the universality of the international legal community

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[43] The Convention mandates four criteria: 1) a permanent population; 2) a defined territory; 3) a government; 4) independence in the capacity to enter into legal relations with other States. It is widely agreed that these criteria are necessary, but probably not sufficient for statehood. There is a continuing debate as to whether statehood is purely determined by the operation of international law or whether it hinges on political acts of recognition by other States. The latter proposition is linked to the notion of peer review and has received much criticism, particularly from Third World countries, on the basis that it is an illegitimate and unjustifiable exercise of power in the case of the State conducting the peer review. For a good discussion on the ideology behind the Montevideo Convention see Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents", (1999) 37 Columbia Journal of Transnational Law 403. Also see Diane Otto, "Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference", (1996) 3 Social & Legal Studies 337 at 341-342.

[44] (1948) ICJ Reports 57.

[45] Grewe, *supra* note 10, at 355. To give some examples, the West questioned the 'peace-loving' character of Albania, North Korea, North Vietnam and Mongolia. Similarly, the East did the same with respect to Ireland, Portugal, Spain, Jordan and Thailand.

allows all categories of States to claim rights and duties under international law, as well as membership in the United Nations, providing that they satisfy the classical criteria of effectiveness as defined in the 1933 *Montevideo Convention on the Rights and Duties of States*. As Grewe notes: "Substantive criteria such as belonging to 'Christendom', to 'Europe', or to the society of 'civilised nations', no longer play a role. An international legal community has developed which embraces democracies and dictatorships, superpowers and mini-States, industrialised States as well as developing States at the very edge of existence. The United Nations adapted to this development by moving from a concept of conditional membership, to one of unconditional membership and automatic admission."[46]

A Legal Community

Despite the arguments put forward by realists and orthodox community theorists precluding the existence of an international community, a persuasive counter-argument

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[46] *Ibid.* There have been cases where the UN has withheld international recognition and consequently membership. Non-recognition, an exception in State practice, is considered an option only if the new State appears so unreliable as a partner in international relations that the international community feels compelled to refrain from integrating it into the community of States. The most notorious examples of entities denied international legal personality and membership into the international community through non-recognition are Rhodesia and the South African homelands of Transkei, Bophuthatswana, Venda and Ciskei. In the case of Rhodesia, recognition was refused because the independence of the territory under a white minority rule contravened international law by violating and frustrating the right to self-determination of the majority of the population. Accordingly, Security Council Resolution 217 (1965) of 20 November 1965 reaffirmed the 1960 Declaration, denied Rhodesia's declaration of independence any legal validity, and called upon all States not to recognise the illegal regime and not to entertain any diplomatic or other relations with it. The linking of state recognition with the principle of self-determination as articulated in the 1960 Declaration suggests that the principles contained in the Declaration have become fundamental international obligations. Thus, if it seems probable that an entity would not carry out these obligations or had even declared its intention not to do so, this would amount to a denial of its being willing to respect fundamental international rights and thereby fulfilling its international obligations as required by Article 4(1) of the Charter. Some authors, however, have advised caution in the terms of the significance of the right to self-determination of peoples in the practice of State recognition. For example, Christian Hillgruber states that "[o]n the basis of State practice towards Rhodesia and the homelands in South Africa, it is only in the colonial context, if at all, that a violation of the right to self-determination of (native) peoples by the establishment of a racist white minority regime necessarily means that, as a legal consequence, a new State set up by this regime by way of secession is not able to be recognised." For more on this see Christian Hillgruber, "The Admission of New States to the International Community", (1998) 4 European Journal of International Law 491-509.

can be made in favour of such a community being a reality. However, in order for this to occur, it is necessary to question the orthodox definition of community and re-evaluate the terms ordinarily employed to talk about communities. Many of these terms are philosophically inadequate and can be contested or re-conceptualised. What is needed is a new dialectic conception of community.

1. Rethinking Community Theory

Orthodox community theory unjustifiably relies on and privileges notions of commonality, unity and homogeneity. This denies the reality that conflict and heterogeneity can be found in all communities. In fact, conflict exists in even the most natural of communities: the family. As Abi-Saab notes, while the family constitutes an intense community with a (frequently) spontaneous and unconditional solidarity among its members, it is also characterized by ruptures and conflicts among its members, sometimes as the result of these very family bonds.[47] If this is the case, then it must be conceded that communities can be fragmented entities that are occasionally disrupted by conflict and disunity. The failure of orthodox community theory to acknowledge this reality can be attributed to its close association with liberal theory. Liberalism- and liberal individualism in particular- presumes a self or subject that is unified and self-sufficient. Orthodox community theory relies on the same idea of totality and unity in its conceptualization of community, thereby denying or reducing to insignificance the fragmented nature of the self/subject. In this sense, orthodox community theory not only operates from a philosophically impoverished premise (i.e. the unified and whole self), but it also ends up endorsing a particular conception of community that leads to the suppression of difference, multiplicity or heterogeneity. In other words, the desire to establish the homogeneity, commonality and totality is philosophically suspect because it denies the difference that exists within and between members of a community and

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[47] Abi-Saab, supra note 33 at 248.

because it leads to exclusionary practices associated with racism, ethnic chauvinism and political sectarianism.[48]

Thinking about the nature of community boundaries also needs revising in order to accommodate the idea of an international community. "[N]ot all boundaries, and not all the components of any boundary, are...objectively apparent. They may be thought of, rather, as existing in the minds of their beholders. This being so, the boundary may be perceived in rather different terms, not only by people on opposite sides of it, but also by people on the same side."[49] This means that not only can a boundary mean different things to different people, but also that boundaries perceived by some may be utterly imperceptible to others.[50] In relation to the international community this can be interpreted to mean that some States may subjectively experience boundaries and exclusionary practices that are not apparent to others. An example of this phenomenon can be found in Third World countries, which experience some of the law of the international community as being European in origin and unresponsive their values, viewpoints, needs and aspirations. Orthodox community theory also pays little attention to the possibility of boundaries not being absolute but merely transitory and capable of being subverted by outsiders. Much of the history of modern international law can be analysed in view of the attempts by so-called outsiders (e.g. former dependent territories, feminists, critical race theorists, refugees etc.) to contest established boundaries. The fact that international law has traditionally recognised only States as its subjects can also be interpreted as an attempt at social closure, particularly by entities who claim but are denied legal personality on the basis that they do not meet the conditions of statehood.

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[48] For an excellent critique of the liberal conception of community see Iris Marion Young, "The Ideal of Community and the Politics of Difference" in Linda J. Nicholson, ed., *Feminism/Postmodernism* (London: Routledge, 1990) pp300-323.
[49] Cohen, *supra* note 32 at 12.
[50] *Ibid.* at 13.

Arguing in favour of an international community also challenges the orthodox view that communities require homogeneity through a significant degree of convergence in the values of its members. While it can be argued that there are standards, which are capable of providing a minimal consensus of values for the international community (e.g. sovereign equality, self-determination, prohibition of the use of force, non-intervention, obligation to respect human rights, obligation to protect the environment etc.), there are other ways of producing the homogeneity and consensus that holds communities together. Habermas, for example, explores in his work the possibility of communities based not on a substantive convergence of values but on a common procedure that is capable of resolving disagreement about values:

> [I]n complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedure for the legitimate enactment of laws and the legitimate exercise of power. Citizens who are politically integrated in this way share a rationally based conviction that unrestrained freedom of communication in the political sphere, a democratic process for settling conflicts, and the constitutional channelling of power together provide the basis for checking illegitimate power and ensuring that administrative power is used in the equal interest of all. The universalism of legal principles manifests itself in procedural consensus, which must be embedded through a kind of constitutional patriotism in the context of a historically specific political culture.[51]

The idea that societal/communal integration can be founded on rational choice and legal principles rather than common values, has been explored by other writers in a more international context. Danilenko, for example, acknowledges the existing divisions that exist within international society, but argues that agreement among States about fundamental principles of international law, both of a procedural and substantive

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[51] Habermas quoted in Frank Michelman, "Morality, Identity and 'Constitutional Patriotism'" (1999) 76 Denv. Un. L. Rev. 1009 at 1026-1027.

character, is capable of uniting them in a community governed by law.[52] For Danilenko, procedural agreement is more important because even in the absence of agreement on substantive rules, agreement on procedural rules will provide members of a community with the necessary tools to resolve their problems:

> Consensus on the procedural aspect of community decision-making is thus the most basic constitutional element of the existing international community, providing the level of understanding necessary for the promotion of any common policy. A number of constitutional principles establishing normative procedures for the formulation of substantive rules of community behaviour reflect this consensus. These principles identify and characterize the participants of the law-making processes and establish appropriate procedures for the promulgation of generally rules of conduct.[53]

The focus on procedural rules rather than substantive agreement as the basis of community allows for the possibility of an international community based on a consensus of legal rules and principles. In the words of one author: "The international community thus is a community based on agreement on rules. Common belief in a number of elementary rules generates law, and this law reinforces the sense of community. This is all the homogeneity which is needed."[54] The international community is, therefore, a legal community governed and regulated by specific rules (i.e. international law). This characterization does not negate or diminish the very real differences, contradictions and divergent interests that separate members of the international community; rather, it recognizes the fact that these members are linked through their shared recognition of specific legal rules. In this sense, States exist in a legal framework of a limited number of basic rules -both procedural and substantive- which determine their basic rights and

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[52] Gennady M. Danilenko, "The Changing Structure of the International Community: Constitutional Implications" (1991) 32 Harv. Int'l L. J. 353 at 355

[53] *Ibid.*

[54] "The Charter of the United Nations as Constitution", *supra* note 4 at 566.

obligations[55]. This view of things can also be expressed in terms of the form/content distinction: homogeneity and unity in the international community is produced by a commonality of form (i.e. procedural rules), which is capable of accommodating a diversity of content (i.e. substantive rules).

The idea of law as the cohesive glue that holds a community together is central: "The notion of 'international community' proceeds from the assumption that it is international law which binds the parts together, affirming the existence of a 'community of States' on the one hand and lending the necessary normative structure to this community on the other: thus, not only '*ubi societas, ibi jus*', but also and above all '*ubi jus, ibi societas*'."[56] The inversion of the Roman maxim suggests that "where individuals or legal persons enter into legal relationships- whether bilateral, multilateral, or constitutional- legal communities come into being. As soon as independent communities established legal relations with one another, an international system of corresponding size and character came into existence."[57]

The international legal community is also made more real by the existence of community interests. Although critics have denied the existence of community interests which can be distinguished from the sum of individual State interests, there are rights which are uniquely vested in the international community as whole such as in the case of international crimes, obligations *erga omnes* and the environmental rights articulated in the *Convention on the Law of the Sea (1982)*. In all of these cases, the holder of the right/interest is the international community, which is endowed with a capacity to exercise and enforce such rights either individually or through specialized agencies.[58] It is also important to point out here, that the very act of establishing a strict binary between State sovereignty and international society or individual State interests and community

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[55] Tomuschat quoted in Simma & Paulus, *supra* note 39 at 549.
[56] *Ibid.* at 267.
[57] "The United Nations Charter as Constitution", *supra* note 4 at 562.
[58] Lukashuk, *supra* note 3 at 57.

interests is misleading and of little conceptual use. Just as the birth of a national community does not require the annihilation or (conceptual) death of individual subjects, so the birth of international community need not be premised on the death of State sovereignty; the two need not be mutually exclusive. As Martii Kosekenniemi astutely points out, "[t]he Rule of Law constitutes an attempt to provide communal life without giving up individual autonomy."[59] In other words, law is capable of enhancing community, while also safeguarding the sovereignty of the members of such a community. The creation of a community through law may *curtail* the sovereignty of the autonomous subject, but it does not necessarily entail his/her death. Similarly, the existence of an international community need not be equated with the death of the statist system of international relations.

Since a significant number of the procedural and substantive rules that govern international society can be found in the UN Charter, it is constructive to examine this document more closely in order to ascertain its nature and content. The Charter has been called many things: "perhaps the most important contemporary international document; a unique document in the history of inter-State relations; the most significant legal act adopted since World War II; a fundamental instrument of modern international relations establishing the general organization of the maintenance of peace and security and formulating the basic principles of contemporary law and relations; a legal framework for peaceful existence; a code of peaceful co-existence."[60] Despite these multiple representations and labels, characterizations of the Charter as a special treaty, an international social contract or a constitution for an international community have been most persistent.

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[59] Martii Koskenniemi, "The Politics of International Law", (1990) 1 European Journal of International Law 4 at 28.

[60] R. St. J. Macdonald, "The United Nations Charter: Constitution or Contract" in R. St. J. Macdonald & Douglas M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Boston: Martinus Nijhoff Publishers, 1986) at 891-2.

2. The UN Charter as a Special Treaty

It is generally recognised that the UN Charter is not an ordinary multilateral treaty or legal instrument dealing with a particular legal issue or question. Rather, it is a treaty with a special character, a sort of super-statute, a 'world order treaty' or special treaty *sui generis*, which contains most if not all of the rules on contemporary international relations and elaborates the principles, which form the constituent elements of the international legal order. One author writes that "the Charter of the United Nations, being a special treaty *sui generis*, stands among statutes of international organizations as an instrument of the highest authority. This is due to the fact that the Charter is the statute of an organization which States have placed in a predominant position with regard to all other international organizations and whose competence includes the most important questions of international relations, especially those relating to the maintenance of international peace and security."[61]

The special character and significance of the Charter is usually demonstrated through a careful analysis of two provisions in the instrument. Article 103 is said to establish the superiority of the Charter in relation to all other treaties, transforming the instrument into a 'higher law'. It reads: "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." Article 103 has been interpreted to mean that member States have recognised the superiority of the Charter's norms above all other treaty obligations on which they had agreed to in the past or which they might agree on in the future, both in their relations

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[61] *Ibid.* at 891. Although the Charter has been called a special treaty *sui generis*, this characterization has limited effect. Few commentators would support the contention that the Charter should be subjected to different interpretative standards because of its special character. The 1969 Convention on the Law of Treaties is still applicable. However, attention should also be paid to the words of Judge Charles de Vischer in the first South West Africa Case (1962): "[O]ne must bear in mind that in the interpretation of a great international legal instrument, like the UN Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice."

inter se or with third parties.[62] Another provision that sets the Charter apart from other bi- or multilateral treaties is Article 2(6), which relates to the status non-members. The Article states that "[a]ll Members shall ensure that States which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." Article 2(6) adds to the *sui generis* character of the Charter because it represents a significant altercation of the traditional principle of general international law that a treaty creates rights and obligations only for those who are party to it ('*pacta tertiis nec prosunt nec nocent*').[63] Instead, the principle of *tertiis neque nocent neque prosunt* is invoked, which means that the direct effects of the treaty are not limited to the parties of the treaty but can affect third parties. Article 2(6) suggests that the Charter requires compliance by non-members and permits actions against such non-members for the purpose of maintaining international peace and security.[64]

3. The UN Charter as a Constitution

Closely linked to the school of thought that views the Charter as a special treaty *sui generis* is the argument that the Charter functions as a constitution for the international society. The term 'constitution' or 'constitutional' has been invoked in relation to the Charter by a number of authors. The first Registrar of the ICJ wrote in a 1946 edition of the British Yearbook of International Law: "The Charter like every written Constitution, will be living instrument."[65] Similarly, Professor Oscar Schachter asserted in 1954 that "[t]he Charter is surely not to be constructed like a lease of land or

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[62] Judge Lachs quoted in *Ibid.* at 892.
[63] *Ibid.* Article 34 of the Vienna Convention on the Law of Treaties confirms that "[a] treaty does not create either obligations or rights for a third State without its consent."
[64] Constance Jean Schwindt, "Interpreting the United Nations Charter: From Treaty to World Constitution", (2000) 6 U.C. Davis J. Int'l L. & Pol'y 193 at 208.
[65] Edvard Hambro quoted in Blaine Sloan, "The United Nations Charter as a Constitution" (1989) 1 Pace Y.B. Int'l L. 61 at 118.

an insurance policy; it is a constitutional instrument whose broad phrases were designed to meet the challenging circumstances for an undefined future."[66]

Debates about the 'constitutional predisposition' of the Charter usually begin with the acknowledgement that the Charter, although technically only a multilateral treaty between States, it is a more than that. As Fassbender contends "just calling the Charter a treaty, placing it on a level with thousands of other international agreements, would not do justice to its outstanding importance in postwar international law."[67] In the strict sense, the Charter is the constitution of an international organisation, the UN; it defines the basic rights and obligations of the member States, regulates the international personality and accountability of the Organisation, sets up institutions, defines their limited power and decision-making procedures, sets out ratification, amendment and dispute settlement procedures and ensures consistency of subsequent international law through a 'priority rule'. However, a notable number of critics have extended the constitutional character of the Charter beyond the Organisation of the UN to the whole international community because it was the first instrument to define the basic purposes and principles of such a community and establish norms with which all branches of international law must be consistent (see Article 103). While some supporters of a Charter constitutional theory have tried to establish the existence of a separation of powers or type of federalism[68], the majority have focused on the superiority of the document in relation to other treaties, its near universal ratification, the provisions on non-members, the difficulty in amending it, the language of the Charter, the very choice of the word 'Charter' and the Preamble. With regard to the latter, the Preamble has been

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[66] Oscar Schachter quoted in *Ibid.* at 119.

[67] "The United Nations Charter as Constitution", *supra* note 4 at 531.

[68] There is a notable body of literature on the similarities between the organs of the UN and the administrative, executive and legislative organs of the State. The argument made is that the Security Council functions as a law-making body as well as executive while the General Assembly performs administrative functions. The ICJ serves judicial functions. For more on this see generally Antonio F. Perez, "On the Way to the Forum: The Reconstruction of Article 2(7) and the Rise of Federalism Under the United Nations Charter", (1996) 31 Tex. Int'l L. J. 353, Matthias J. Herdegen, The "Constitutionalization" of the UN Security System", (1994) 27 Vand. J. Transnat'l L. 135.

interpreted as an invoking image of a pre-existing but also self-constituting political community coming together to formulate fundamental principles to ensure a rule of law and set up institutions and decision-making processes for the making, administration and judicial enforcement of legal rules. The introductory words of the Preamble "We the Peoples..."-modelled after the Preamble of the American constitution ("WE THE PEOPLE of the United States...), for some critics, suggests as 'constitutive moment' when the peoples of the international community came together through their representatives to create a blueprint for the modern international system.[69] In other words, "We the Peoples..." indicates that the drafters of the Charter intended to enact some sort of constitution. The drafters also showed their constitutional aspirations by their choice of the word 'Charter', which denotes an especially elevated class of legal instrument, an instrument setting forth constitutional rights and responsibilities. Lastly, further fortification of the Charter's role as a constitution for the international community comes from the generality and flexibility of the document's language, which allows it to develop according to changing circumstances. Schwindt claims that "[t]he Charter's uniqueness stems, in part, from the fact that it does not merely summarise the settlement of World War II, but creates an ongoing and developing relationship between member States as well as the entire international community."[70]

4. The UN Charter as an International Social Contract

According to Louis Henkin "[t]he end of the Second World War saw a new social contract represented in the UN Charter. The Charter...is a social contract of States."[71] The application of social contract theory to the Charter of the UN derives from the idea that the document and the resultant international order are based on a voluntary agreement among States to constitute a supreme *civitas maxima* for the promotion of a

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[69] Schwindt, *supra* note 64 at 207.
[70] *Ibid.* at 209.
[71] Louis Henkin, "The Mythology of Sovereignty" in Ronald St.John MacDonald, ed., *Essays in Honour of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994) at 356.

common good for the nations concerned. Applying the principles of the philosophy of social contractarianism, as articulated by the likes of Hobbes, Locke and Rousseau, it is argued that the international order is the result of the free association and agreement of States, which chose to submit to a higher system of governance. Those who argue that the Charter is an international social contract compare States to individuals in a state of nature trying to escape the Hobbesian nightmare of *bellum omnium contra omnes*. Although Hobbes and other social contract theoreticians did not theorize about the end of international anarchy through the setting up of a social contract among sovereign entities, a type of international Leviathan, other scholars have examined the possibility of an international agreement among sovereigns so as to limit their external sovereignty and achieve lasting peace. Kant, for example, believed that just like individuals and peoples had grouped themselves into nation States so as to ensure the rule of law,

> [e]ach nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to a civil one, within which the rights of each could be secured. This would mean establishing a federation of peoples....[P]eace can neither be inaugurated nor secured without the general agreement between the nations; this a particular kind of league, which we might call a pacifist federation, is required. It would differ from a peace treaty in that the latter terminates one war, whereas the former would seek to end all wars for good. This federation does not aim to acquire any power like that of a State, but merely to preserve and secure the freedom of each State in itself, along with that of the other confederated States.[72]

Kant's main objective was the realization of perpetual peace (which can be linked to the Charter's promotion of international peace and security), but his use of the voluntary

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[72] Emmanuel Kant quoted in Ernst-Ulrich Petersmann, "How to Constitutionalize Law and Foreign Policy for the Benefit of Civil Society" (1998) 20 Mich. J. Int'l L. 1 at 9.

contractual obligation paradigm still forms the basis of modern social contract theory in relation to the UN Charter.[73]

Critiques and Problems

Terms like 'special treaty', constitution and social contract are ideologically loaded. They invoke and legitimize certain social arrangements. Consequently, their use must be explained and justified, particularly if they are to have any relevance for the concept of international community.

1. One of Many

The characterization of the UN Charter as a special treaty *sui generis* or cosntitution is disputed most notably by the New Haven School of Jurisprudence. The view of the New Haven School is that the Charter is not a constitution in a normative sense, but merely an expression of *a* (and not *the*) constitutional and constitutive process. In other words, the Charter "is just one, albeit momentous, element in a 'world constitutive process of authoritative decision'".[74] Other 'world order treaties' that form part of the constitutive process are the two 1966 International Covenants on Human Rights, the *1948 Genocide Convention*, the *1961 Vienna Convention on Diplomatic Relations* and the *1982 Convention on the Law of the Sea*- all of which mirror and concretize "the constitutional premises of the existing international legal order."[75] The constitutional foundation of the international community are not, therefore, to be found in

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[73] The association of a treaty and a constitution in the form of a contract by which several independent States establish a federation or confederation is not unusual. In German constitutional doctrine such agreements are called *Bundesvertag* or treaty-constitutions. Historical examples include the Articles of Confederation and Perpetual Union between the thirteen original United States of America of 1777, the Constitution of the United States of America in 1787, the fundamental acts of the German Confederation of 1815 and 1820, the constitutions of the North German Confederation and the German Empire of 1867 and 1871, respectively.

[74] "The United Nations Charter as Constitution", *supra* note 4 at 550.

[75] *Ibid.*

only one document but are expressed in other documents, which, arguably, also have a constitutional rank.

2. Of National Origins

Similar to many other fundamental legal norms, 'constitution' has no fixed meaning and its definition has varied 'from period to period, place to place, and author to author'. However, the term is usually employed with regard to national systems. Hans Kelsen, for example, described a constitution as "the highest level *within national law*"[76] [emphasis added], while Dicey defined constitution to include "all rules which directly or indirectly affect the distribution or exercise of the *sovereign power in the State.*"[77] [emphasis added] The use of a term whose historical and theoretical foundation are normatively linked to the State in the area of international law is problematic for some critics. As Fessbender notes, since the time of the American and French Revolution, the two concepts of State and constitution have been so closely linked that one could almost say: "Where there is a State, there is a Constitution, and wherever there is a Constitution, there is a State."[78] Referring to the Charter as a constitution, therefore, involves carrying a concept that has been shaped in a particular field and historical context into another, potentially broadening its meaning and scope. Orthodox theoreticians also point out that the ultimate goal of constitutionalism- the restriction of sovereign power- cannot be realised within the international community because States retain their sovereignty under international law.

Notwithstanding its proximity to the State, there are persuasive arguments for the use of constitutionalism in relation to the international community. First, the concept of constitutionalism and its goals- such as security and freedom of the individual member of

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[76] *Ibid.* at p533.
[77] Dicey quoted in Christian Tomuschat, "International Law as the Constitution of Mankind" in International Law Commission, *International Law on the Eve of the Twentyfirst Century- Views from the International Law Commission* (New York: United Nations Publications, 1977), p37
[78] "The United Nations Charter as Constitution", *supra* note 4 at 555.

the community, transparency and unambiguousness of the law, separation of powers, law-making procedures adequate to the needs of the community, and peaceful resolution of disputes- are valuable concepts for the international community.[79] Second, there is no compelling reason to limit constitutionalism to the sovereign State. Pure statist constitutionalism no longer reflects the real world as can be seen through the European Union which is an example of the process of the gradual constitutionalisation of a treaty-based public order.[80] There is no reason why the term 'constitution' should be limited to its traditional domain and not apply to a supranational community which is not, and does not necessarily have to become, a State. Fessbender summarises the situation perfectly:

> Those who oppose the relevance of constitutionalism to international law correctly note that the concept is meant to describe or promote a legal integration of States which is more intense than the traditional one. He who is satisfied with the present state of affairs or who insists on preserving the independence of the individual State vis-à-vis the international community as much as possible certainly has no reason to refer to the notion of an universal constitution. International Constitutionalism is a progressive movement which aims at fostering international cooperation by consolidating the substantive legal ties between States as well as the organisational structures built in the past. The idea of a constitution is summoned as a symbol of (political) unity which will eventually be realised on a global scale.[81]

3. An Effective Constitution

There is a school of thought that argues that the term 'constitution' can only be applied to a document that *effectively* performs the activities that constitutions are supposed to perform. Kelsen, for example, wrote the following: "Naturally a constitution deserves its name only if its rules are being effectively observed and enforced. If it is

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[79] *Ibid.* at 553.
[80] Ibid. at 558.
[81] *Ibid.* at 552.

reduced to a purely rhetorical claim without any correspondence in life, it may at most be called a nominal constitution. Under such constitution, however, the term loses its value as an analytical tool suitable to better understand political realities."[82] Similarly, Loewenstain argued that a constitution must be effective in order to deserve this title; "[i]t's words must be a true reflection of the prevailing way and manner in which public power are exercised within any given society."[83] So, whether applied in a national or international context, nominal constitutions need to be distinguished from real constitutions which are effectively observed in real practice and effectively constitute and limit the rights of citizens and government powers. On an international level, it is difficult to conclude that the Charter effectively protect freedom, legal equality and provide constitutional constraints on public and private abuses of power: "[N]either general international law nor the UN Charter secures respect for...constitutional principles, such as the rule of law, separation of powers, compulsory judicial review, democratic government, human rights, or social justice."[84]

It is true that the Charter is not always an effective document and that the lack of compulsory judicial review and effective monitoring and enforcement undermine the realization of the values enshrined therein. However, the idea of an effective constitution- contrasted to a nominal one- fails to appreciate the aspirational character of all constitutional documents. While constitutions speak to the contemporary distribution of societal power, they also contain visions of what society is to be in the future.

4. Constitutional Violence

In previous paragraphs, this thesis considered the virtues of constitutionalism and the advantages of adopting the term in relation to the international community. This rather optimistic view of the term, however, has to be tempered with a fair warning about

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[82] Kelsen quoted in Tomuschat, supra note 77 at 38.
[83] K. Loewenstein quoted in *Ibid.*
[84] Petersmann, *supra* note 72 at 13.

the more problematic aspects of the concept. Three subjects will be discussed here: the Eurocentric origin of the concept, the discursive violence of constitutional practices as experienced by outsiders such a colonial and indigenous peoples and the lack of participation that certain classes of people have experienced in the constitutional process. All of these subjects are interrelated and may be summed up as relating to the question of legitimacy in relation to constitutions.

The concept of constitution as commonly understood is grounded in Western legal and political thought. When researching constitutional law, one will notice an overwhelming reliance on Western texts and authors. Yet, the historical link between constitutionalism and Western epistemological structures is problematic in so far as it could undermine the universality of the concept. Admittedly, constitutionalism has 'spread' beyond its Western roots and can be 'found' in countries in Africa, Asia and Latin America but historically the existence of constitutional thought was denied by and through certain doctrines in Western constitutionalism. As a result of this, certain peoples experienced constitutionalism not as a positive process but as a site of violence.

The link between constitutional practices and discursive violence is explored by Upendra Baxi, who argues that much of modern constitutionalism was transacted during the days of colonialism and imperialism. In his work, Baxi illustrates the schizophrenic and fractured identity of constitutionalism: in the metropolitan societies, it was linked with the progressive and liberal rule of law, but in the colonies, constitutionalism amounted to an epistemic violence which ignored its own tenets and constituted a juristic and juridical *terra nullius*.[85] In other words, what was a rule of law in the centre was a reign of terror in the peripheries. Upendra Baxi writes:

> Historically...traditions of modern constitutionalism enact what Jacques Derrida, following Walter Benjamin, names as the foundational violence of law.

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[85] Upendra Baxi, "Constitutionalism as a Site of State Formative Practices", (2000) 21 Cardozo L. Rev. 1183 at 1184, 1185.

> Comparative constitutional theory and practice risk irrelevance when they fail to perceive the inherent, and at times genocidal, violence that accompanies the grand narratives concerning the founding notions of modern constitutionalism: the rule of law, separations of powers, autonomous constitutional review, and guarantees of basic human rights.[86]

Constitutional violence is not a thing of the past and today members of First Nations and postcolonial peoples continue to experience law's foundational violence through constitutional practices that deny the constitutional character of their own systems of social organization.

One form of constitutional violence exists in the sometimes violent suppression and exclusion of subaltern perspective in constitutional narratives. For Baxi, constitutions are 'moral autobiographies of nation-states', which enunciate specific histories and stories. Baxi is particularly concerned about the tendency of dominant constitutionalism to ignore the experiences and histories of hurt and suffering of subaltern peoples: "From a subaltern perspective, the making of a constitution is always an enactment of several orders of violence. Thus, discourse on constitutionalism is a mode of organizing the politics of several orders of violence. A modern constitutional text thrives on the annihilation of contexts. The foundational violence of an inaugural constitutional text lives, if at all, in the dominant narrative tradition as a ruin of memory, not as with the subaltern, as a lived and generationally embodied histories of collective hurt."[87]

The constitutional violence thesis applied to the Charter and international community requires that we ask certain questions about the inclusion/exclusion of so-called outside perspectives. Is the Charter a document that was fashioned through violent discursive practices, which continue to operate today and erase the history of suffering of certain peoples? Although an extensive review of the process that led to the formulation

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[86] *Ibid.* at 1185.
[87] *Ibid.* at 1191-2.

and ratification of the Charter is beyond the scope of this thesis, a quick glance will reveal a limited participation by Third World countries. It turns out that "We the Peoples of the United Nations" consisted only of the representatives of fifty-one countries who attended the founding conference at San Francisco and drew up the UN Charter in the summer of 1945. From these fifty-one countries, only 12 were developing countries from outside Latin America. The Great Powers –the US, Great Britain and Russia- dominated all of the four stages through which the Charter was conceived, elaborated, negotiated, drafted, signed and finally ratified on June 26, 1945: 1) discussions between the principal Allies in 1941; 2) the Dumbarton Oaks Conference during the summer of 1944, 3) the Yalta Conference in February 1945; and finally 3) the San Francisco Conference. The initiation, detailed elaboration and formulation of the Charter lay, therefore, primarily in the hands of the dominant European powers.[88]

Given that the Charter was drafted and ratified with the least participation of peoples, is it reasonable to attach to it constitutional status? If the values enshrined in the Charter, despite claims of universal application, only reflect one system of thought and history, can such a document be the basis of an international community? The answer is uncertain, but what is clear is that if the legitimacy of the Charter is questionable, it is no more so than the legitimacy of domestic constitutions, which also reflect sectional interests and specific philosophical traditions. If the Charter is illegitimate, then so are all other (national) constitutions, which were drafted through processes that excluded children, women, indigenous peoples, First Nations, people of colour etc.

5. An Impoverished Sense of Attachment

The link between the Charter as a constitution and an international legal community is, according to some critics, not of a sufficient strength or intensity to give

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[88] For a detailed description of the process that led to the drafting of the Charter see Bruno Simma, Herman Mosler, Helmut Brokelmann, Christian Rohde, eds., *The Charter of the United Nations- A Commentary* (Oxford: Oxford University Press, 1994).

rise to the bonds of affection which usually exist between members of a community. This argument is conceptually similar to the one put forward by orthodox community theorists about the internal aspect of community and suggests that a legal document such as Charter is not capable of constituting a community or produce the intense feelings of belonging that are usually associated with communities. In the words of one author: "Law, in and of itself, cannot change our conception of who we are or the place of politics in that self-understanding."[89]

In *Imagined Communities*, Benedict Anderson emphasises the emotive connection that exists between a member of a community and his/her group. Anderson talks of a 'willingness to die', 'colossal sacrifices', pride, an 'often profoundly self-sacrificing love', and a political love that recognises 'the beauty of *gemeinshaft*' in poetry, prose fiction and music. All of these words and phrases suggest a powerful emotive connection between individual and community. So, the question is whether it is possible to have a community without this emotive connection. For many the idea of a community based on anything but a deep emotive connection seems cold, boring and incapable of gripping the human imagination. Such a community is described as one where 'boundless loneliness' reigns, a place that offers only reason but no intensity, colour or passion. Benjamin Barber compares people who advocate communities based on legal personhood and contract to the actions of playwright Henry Ibsen's character Pastor Brand. Pastor Brand urges his parishioners up a harsh and lonely mountain to an abstract godhead they cannot see, but because the prishioners are ordinary women and men, they soon fall away from the quest and return to the loving warmth of their hearthsides in the valley below.[90]

Notwithstanding the above concerns, the idea of community united through the recognition of abstract legal rights is conceivable. Consider, for example, the work of

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[89] Paul W. Kahn, "American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order" (2000) 1 Chi. J. Int. L. 1 at 16.
[90] Benjamin Barber, "Constitutional Faith" in Martha Nussbaum and Joshua Cohen, eds., *For Love of Country- Debating the Limits of Patriotism* (Boston: Beacon Press, 1996) at 43.

Jürgen Habermas on the idea of a 'constitutional patriotism'. Habermas begins with a critique of the intense feelings –particularly those that produce a sacrificial love- that many theorists associate with the of the most typical of communities, the nation-State:

> There is a remarkable dissonance between the rather archaic features of the 'obligation potential' shared by comrades of fate who are willing to make sacrifices, on the one hand, and the normative self-understanding of the modern constitutional State as an uncoerced association of legal consociates, on the other. The examples of military duty, compulsory taxation, and education suggest a picture of the democratic State primarily as a duty-imposing authority demanding sacrifices from its dominated subjects. This picture fits poorly with an enlightenment culture whose normative core consists in the abolition of a publicly demanded *sacrificium* as an element of morality. The citizens of a democratic legal State understand themselves as the authors of law, which compels them to obedience as its addressees.[91]

Although Habermas writes about a national context, his analysis is, nevertheless, useful here because it provides an alternative basis of community: *reason* instead of *love*. As Martha Nussbaum recognises, such a community "can seem boring- to those hooked on the romantic symbols of local belonging. But many fine things can seem boring to those not brought up to appreciate them."[92] Furthermore, emotive attachment to communities is frequently based on the admiration of kitsch and idolatry and can easily descent into a pathological nationalism.

6. The Fiction of Equality and Consent

There are essentially three issues that make the use of social contract theory in relation to the international community somewhat problematic. First, social contract

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[91] Jurgen Habermas, "The Postnational Constellation and the Future of Democracy" in Jurgen Habermas (translated and edited by Max Pensky) *The Postnational Constellation- Political Essays* (Cambridge: Polity Press, 2001) at 101.

[92] Martha Nussbaum, "Reply" in Martha Nussbaum and Joshua Cohen, eds., *For Love of Country- Debating the Limits of Patriotism* (Boston: Beacon Press, 1996) at 139.

theory presumes that social relationships are contractual in nature or by definition. This is important point to make because all subsequent claims of social contractarianism derive from this conceptual framework. Secondly, social contract theory presumes a state of equality before the establishment of a political society through a contract. For example, individuals in Hobbes' state of nature are all equal, that is all equally motivated by self-interest: "Nature hath made men so equall, in the faculties of the body, and mind; as that though there be found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himselfe any benefit, to which another may not pretend, as well as he."[93] Social contract theory's presumption of equality is linked to liberalism's conception of the individual. The individual in liberal theory is autonomous and independent; he/she is equal to all other individuals and free from other individuals. Equality among these individuals implies an equality of autonomy and equal rights to freedom from interference by other individuals in the exercise of control of their own faculties.[94] Because of the individual's autonomy, equality and freedom, he/she is entitled to pursue his/her own self-interest so long as this does not interfere with the equal opportunity of others.

The issue of equality leads to the third problem with social contract theory: the presumption of consent. The principle of consent supposes that individuals, who are free, equal and rational, not subject to anyone's authority, equally enjoying certain natural powers and liberties, come together in a collective agreement. Consent, therefore, requires rational and self-interested individuals who, able to discern their own needs and desires and conception of the good, voluntary join with other equally situated individuals to form a contract in order to further their own needs.

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[93] Hobbes, *supra* note 12 at 183.

[94] Michel Rosenfeld, "Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory" (1985) 4 Iowa L. Rev. 769 at 778.

The application of social contractarianism to the international community shows that the principles of consent, equality, and rationality are not always easily transferred to the international context. Not all States are equal and free to pursue their self-interests. The poverty and political problems, which many Third World countries experience, are sometimes so severe as to make the idea of an equal context before the establishment of the contract a fiction. Also, since most Third World countries were forcibly drawn into the international system as dependent territories or colonies, it cannot be appropriate to talk of the existence of any meaningful consent. The argument that social contract theorists like to put forward to deflect criticism, namely that those who disagree with the terms of the social contract are free to leave, is also problematic, particularly in an international context. If a State wanted to leave the international community, where exactly would it go? Even if it were possible to 'exit' the international community, the political, economic and social isolation that would result from such a move would almost certainly outweigh the benefits of leaving. When the repercussions of leaving a social contract are too great, the 'choice' of leaving is not really an option and consent in that context becomes superficial.

However, before dismissing social contract theory altogether, it should be pointed out that social contractarianism is distinguishable from specific contracts. There are many conceptions of contracts and not all of them need to suffer from the general defects of social contract theory. Social contract theory, as described by the likes of Hobbes, does not exhaust the meaning of contract in modern society. It ought to be possible to enter into a mutual agreement to construct a common life based on other principles and values.

The Narration of International Community

For the purposes of this thesis it is not necessary to definitely determine whether the Charter is *the* constitution of the international community, or merely one part of the international constitutive process, a special treaty *sui generis* or an international social

contract. All terms capture the special importance of the Charter and demonstrate its role in constituting the international community and expressing its norms and values. However, for the sake of clarity, this thesis will adopt the term 'constitution' in relation to the Charter.

Constitutionalism is useful here because of its constitutive, integrative, conciliatory and visionary attributes. Phillip Allot identifies three faces/aspects/perspectives/moments/internal dimensions of a constitution: the legal, the real and the ideal. Through a constitution a society creates itself, recognizing what it is (the real), what it conceives itself to have become (the legal) and what it conceives it could be (the ideal). Allot explains:

> The legal constitution is the constitution of law, a structure and a system of retained acts of will...The legal constitution determines the categories of persons holding the categories of social power; it determines the contents and limits of social power. It determines the methods of implementing and enforcing social power [.]
>
> The real constitution is the constitution as it is actualised in the current social process, a structure and system of power. It is the constitution as it takes effect in the present-here-and-now, as actual persons exercise the social power made available by the legal constitution to realise the possibilities of the ideal constitution [.]
>
> The ideal constitution is the constitution as it presents to a society an idea of what society might be. In the ideal constitution, society conceives of its other selves, possible selves which conform to its idea of itself as society. In willing, society chooses to make an actual self out of its possible selves. Its possible selves are possibilities inherent in the legal constitution and the real constitution, but they are also possibilities which shape the legal and real constitution...The

> ideal constitution is the pattern of society's self-conceived possibilities-for-itself and thereby the pattern of possible self-creating through willing and acting.[95]

Allot's theory recognizes the descriptive part of constitutionalism (i.e. the real and legal), but, more importantly, it captures the constitutive aspect of the process. Constitutionalism is, above all, a process through which society is making itself by contemplating itself: "In contemplating itself, society is making itself. In making itself, society is remarking itself. In remaking itself, it is constituting its self."[96] Constitutions are like autobiographies, narrative attempts of a community imagining itself and giving substance to this imagined self. Constitutions are, therefore, imaginative artefacts and identity shapers: they receive, contain and resolve a constantly forming identity. "The identity is able to discover its own image in the making the constitution, to reveal itself in the mirror of the changing constitution."[97] The narrative formation of identity through constitutional practices allows members of a community to make sense of their condition and interpret the common life they share.

The context of constitutionalism is also useful in relation to the international community because it allows for a discussion about the violent discursive practices that have been known to accompany the constitutional process. The narration of a dominant constitutional identity frequently involves the suppression or marginalisation of alternative identities.

Conclusion

The international community is a legal community of sovereign States. These States exist and structure their relations with another in the framework of international law. They are also diverse and share a rational rather than emotive bond with another.

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[95] Phillip Allot, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990) at 135, 136.
[96] *Ibid.* at 137.
[97] Ibid. at 141.

The basis of community is not so much a common identity or a substantive convergence of values (moral, political, economic and otherwise) but a consensus on common procedure to resolve conflict about values. Nevertheless, there are common community interests, which unite the members of the international community in a common purpose: the furtherance on international peace and security, the prevention of international crimes and the protection of environmental rights to name just a few. While the dominant philosophy of this community is one of universality, attempts at social closure and boundary-erection still exist in the form of the admission policy of Article 4(1) of the UN Charter, which demands a specific and uniform legal personality of prospective members. The UN Charter is central to understanding the nature of the structure of the international community. It functions as a constitution and assists the international society in creating itself. Through the Charter, multiple identities and possibilities for the international self are resolved and shaped into one.

CHAPTER TWO

Africa demands a new international law.

--Doudou Thiam, 1967[1]

[I]t is thought that justice is equality; and so it is, but not for all persons, only for those that are equal. Inequality also is thought to be just; and so it is, but not for all, only for the unequal.

--Aristotle[2]

Introduction

On September 20, 1960, the General Assembly, in its Fifteenth Session, discussed Agenda Item 20 entitled "Admission of new Members to the United Nations". That day fourteen new members, predominantly African, were admitted into the United Nations. A study of the official UN transcripts reveals that the admission of new members under Agenda Item 20 was accompanied by a ceremonious discourse which welcomed the new entities into the so-called 'family of nations' and celebrated the expansion of the international community. The President of the General Assembly, for example, pronounced the following: "...I feel I will be expressing the desire of all of us if I extend [the new members] a sincere and cordial welcome on behalf of the Assembly as a whole....The emergence of the peoples of Africa into freedom and independence has greatly strengthened the position of the United Nations. I am sure that the new Members from the continent of Africa who have taken their seats among us today will further enhance the advantages which our Organization has already derived from the great liberation movement in Africa."[3] The hope that the new members would make a valuable

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[1] Doudou Thiam cited in Konrad Ginther, "Re-Defining International Law from the Point of View of Decolonisation and Development and African Regionalism" (1982) 1 Journal of African Law 49 at 58.
[2] Aristotle quoted in Athena Debbie Efraim, *Sovereign (In)equality in International Organizations* (The Hague: Martinus Nijhoff Publishers, 2000) at 47.
[3] Frederick H. Boland quoted in "Agenda Item 20: Admission of New Members to the United Nations", UN GAOR, 15th Sess, 864th Mtg., UN.Doc. A/PV.864 (1960) at 7.

contribution to the Organization was also expressed by the Representative from Tunisia: "It is particularly heart-warming for the young African State that I represent to see the African continent fill the void which has subsisted so long in our Organization by reason of its absence and enjoy, on the same footing as the other continents, a representation more in line with its possibilities and its rapid political development. And it is still more heart-warming, on a more general plane, to see the United Nations coming closer to universality, which we still regard as its primary characteristic and one that must be reflected in its membership."[4] Continuing in the same vein, the Saudi Arabian Representative said: "Coming from Africa these nations bring to the United Nations something more than additional Members. The Organization is not in dire need of numbers- just numbers; it craves for believers, for crusaders and for ardent Members. Its agonizing necessity cries out not only for peace-loving peoples, as required by the Charter, but also for freedom-observing independent-thinking and liberty-struggling nations... The United Nations stands in need of a new force, and the nations we have admitted are the vanguard of this force...We rejoice in their arrival after this heroic journey. We rejoice in their admission to the Organization, and from this rostrum we send their peoples our heartfelt congratulations."[5]

Despite the above rhetoric of welcome –littered with emotive references to concepts such as 'friendship', 'embrace' and 'rejoicing'-, the admission of new members into the UN was not cause for universal celebration. Not all saw the admission of new States as the emergence of a much-needed new force and as an act that would promote friendly relations among nations and add to the universality of the Organization. Apprehensions about the viability of the new members and their effect on the political strength of the UN formed an integral part of the discussions surrounding Agenda Item 20. Consequently, as well as welcoming the new members, many Representatives took

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[4] Slim in *Ibid.* at 8, 9.
[5] Shukairy in *Ibid.* at 11, 12.

the opportunity, in their speeches, to voice their specific concerns. The fact that the new States were 'young' or inexperienced in the ways of international relations was repeatedly emphasized by the Representatives of France, Italy, Peru, and the United States and, like children, the new members were reminded that with independence and membership also came duty and responsibility.[6] Concerns about the impact of new members became more frequent and more pronounced in the late 1960s and 1970s as decolonisation produced a proliferation of new States, which joined the UN and used their numeral dominance in the most representative organ of the UN, the General Assembly, to contest the status quo and produce enduring political realignments. The anti-colonial policies pursued by the newly independent States often clashed with the established interests of certain Western countries, giving rise to the perception that the new UN members were 'upstarts' or '*nouveau riche*', immature entities, and infants in international relations.

Misgivings about the new members of the UN and their perceived political agenda were also expressed in academic circles. For some scholars the admission of new States into the UN was an alarming, potentially dangerous and subversive act. A Freeman, for example, cautioned against the "practice of admitting to the society of Nations primeval entities which have no real claim to international status, or the capacity to meet international obligations and whose primary congeries of contribution consists of replacing norms serving the common interest of mankind by others releasing them from inhibitions upon irresponsible conduct."[7] In a book titled *The Crisis in International Law*, another scholar contended that the foundations of international law were being menaced by newly independent Third World countries.[8] Similarly, John G. Stoessinger noted with concern the proliferation of new and undemocratic members in the UN, cautioning that

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[6] See generally *Ibid.* at 8, 10, 11, 15.

[7] A. Freeman quoted in F.C. Okoye, *International Law and The New African States* (London: Sweet and Maxwell, 1972) at 176.

[8] See in W. Tieya, "The Third World and International Law" in J. MacDonald and D.M. Johnston, eds.., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Practice* (The Hague: Martinus Nijhoff Publishers, 1983) at 960.

democracies were becoming an 'endangered species."[9] Another critic, Mohyihan, spoke of "a diminishment of liberal conviction" within the UN system, apparently caused by the new members' attachment to totalitarian principles and practices which were at variance with the original purpose of the Organization.[10]

Fear of new members and how their incorporation may impact on the structure and cohesion of a community is understandable. After all, as was illustrated in the previous chapter, communities are creatures of boundaries and community members define themselves in negative terms by juxtapositioning themselves in relation to those they consider to lie outside of their community. According to liberal theory, the need to establish boundaries and exclude is not a choice or a deficiency; rather, it represents a politically necessary or compulsory act. Self-definition is necessarily reliant on exclusion or social closure. This way, liberalism comes to support a philosophical position which views the erection of boundaries as the legitimate and essential prerogative of any community. The manner in which liberalism establishes an intimate and almost organic link between community boundaries and identity has a number of consequences. First, the act of admitting newcomers assumes political significance because it is equivalent to admitting people who were once regarded as strangers, people, who were once thought to lie beyond one's community boundaries, and who may once have been seen as incommensurably different, if not uncivilized and barbarous. In other words, incorporating strangers means incorporating into one's community elements and qualities once considered foreign.

Second, (because of the link between identity and community boundaries) any adjustment of or shift in a community's boundary will produce a corresponding shift or adjustment in the identity and sense of self in the members of the community in question.

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[9] Stoessinger quoted in Usha Sud, *Decolonisation to World Order- International Organisations and the Emerging Pattern of Global Interdependence* (New Delhi: National Publishing House, 1983) at 92.
[10] Mohyihan quoted in *Ibid.* at 94.

It is, therefore, not surprising that the admission of new members can be a moment of crisis or anxiety for certain community members, who perceive the extension of membership as a profoundly threatening exercise, involving as it does an adjustment of who they perceive themselves to be. Anthony Cohen explains that the anxiety in response to a perceived encroachment of community boundaries through the admission of strangers arises because community members find their identities as individuals through their occupancy of the community's social space:

> If outsiders trespass in that space, then its occupant's own self of sense is felt to be debased and defaced. This sense is always tenuous when the physical and structural boundaries which previously divided the community from the rest of the world are increasingly blurred. It can therefore easily be depicted as under threat...Thus, one often finds in such communities the prospect of change being regarded ominously, as if change inevitably means loss. A frequent and glib description of what is feared may be lost is 'way of life'; part of what is meant is the sense of self.[11]

It is not merely the act of shifting community boundaries (through the incorporation of strangers) that creates a crisis in the receiving community. More specifically, the crisis arises because those existing outside community boundaries are considered to be incommensurably different. Their difference is a matter of fact or necessity because otherwise the boundary lacks meaning or legitimacy. The logic of exclusion is circular, self-referential and ultimately illogical: because the function of a boundary is to exclude those that are different, it is presumed that all those who lie beyond the boundary *are* actually different. (I.e. Beyond the boundary lie those that are different; the boundary keeps out those that are different; those that lie beyond the boundary are different; if you are beyond the boundary then you are different because beyond the boundary lie those that are different.) In other words, it is the boundary itself

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[11] Anthony Cohen, *The Symbolic Construction of Community* (Chichester: Ellis Horwood Limited Publishers, 1985) at 109.

which ultimately creates the difference which is then used- as if it were a pre-existing fact- to exclude 'others' and justify the erection of the boundary in the first place. Thus, boundaries give rise to the fallacy that difference pre-dates them and that they are merely a response to this difference. Cohen expresses the same idea when he notes that the difference that is supposedly excluded (and the similarity protected) by the boundary is not a matter of objective assessment, but rather a feeling or matter that resides in the minds of the members of a community. He argues that "[s]ince the boundaries are inherently oppositional, almost any matter of perceived difference between community and the outside world can be rendered symbolically as a source of its boundary. The community can make virtually anything grist to the symbolic mill of cultural distance, whether it be the effects upon it of some centrally formulated government policy, or a matter of dialect, dress, drinking or dying. The symbolic nature of the opposition means that people can 'think themselves into difference'. The boundaries exist quintessentially in the contrivance of distinctive meanings within the community's social discourse."[12] It should be noted that the fact that boundaries are mental constructs that are 'thought up' and not objectively real should not necessarily give rise to the interpretation that they are 'fabricated', 'invented' or simply 'false'. Rather, their origin in oratorical abstraction is indicative of the power to narrate reality and imagine material communities through conceptual tools.

To sum up, it not merely the act of shifting boundaries that produces anxiety, but specifically the incorporation of those considered different. Because communities are, as Benedict Anderson argues, essentially imagined constructs, they are fundamentally reliant on common (founding) myths and historical narratives to establish a bond between their members. Since those outside community boundaries are defined as inherently different and, thus, unfamiliar with these myths and narratives, the very foundation of the community is under threat. Strangers may not only lack a proper knowledge of the

[12] *Ibid.* at 117.

narratives of their new community, they may also hold values that are interpreted as fundamentally inconsistent with the ones of the community they are entering. Possessing different political or ideological orientations, their incorporation is dangerous because they have the capacity to fundamentally alter (or 'degrade', 'corrupt' and 'endanger' depending to whom the question is put) the system of the community they enter.

The story of the admission of new members into the UN and the international community is a story which demonstrates the anxieties which accompany the shifting or re-alignment of community boundaries. Formerly considered strangers to the international community, uncivilized entities incapable of functioning in the family of nations on their own accord, the newly independent States entered a community which doubted their familiarity with and commitment to the foundational norms and narratives of the community and feared their political and ideological orientation (as one being inconsistent with the one of the community). The fact that admission into the UN was not automatic but required the satisfaction of the criteria outlined in Article 4 of the UN Charter was not sufficient to eliminate the apprehension that the new members would disrupt the natural order of things. The conditions of Article 4 -the most significant of which is the requirement of statehood- merely mitigated or transformed the difference of the new members to an acceptable level; it did not eliminate this difference, or more accurately, the perception of it, entirely. Thus, ironically, concerns about the impact of new members on the international system, can be interpreted as a lack of faith in the effectiveness of the UN's admission policy as outlined in Article 4. After all, the objective of any admission criteria is to transform strangers into intimate community members through their careful appraisal in order to determine whether they possess the requisite characteristics that would make them suitable candidates for inclusion. Those who are considered too different, too unprepared or too dangerous are denied entrance.

Those who feared that the newly admitted members would bring about a fundamental shift in structure and values of the international community were proven

correct. Decolonisation and the admission of new members into the international community had a profound impact on the UN system and the international community. As Usha Sud writes: "Not only did the structure of international organizations become more complex, having within their fold a continually expanding heterogeneous group; but their functioning was also affected. The Euro-centred organization, which was mainly dominated by the European States and their problem[s,] was malleable enough to be moulded and adjusted to reflect the Afro-Asian priorities. The newly emergent nations poured their own concerns into the United Nations funnel...Decolonisation, anti-racism, equity, social and economic justice became the prime concerns of the United Nations and other international organizations."[13]

The object of this chapter is to analyse the manner in which the newly admitted UN members engaged with the dominant vision of international community as articulated in international legal instruments. Like any member of a community, the newcomers- as feared by some of the States which considered themselves to be 'founding members' of the modern international community after World War II- reviewed their position and status in their new community and, finding it wanting, sought to change it. In doing so, they re-imagined the international community and contested what is arguably the most fundamental concept in international law, namely sovereign equality.

The Meaning of Sovereign Equality

International law presumes the existence of separate and politically independent States. It is these *sovereign* States that form the constituent members of the international community. The rights, obligations and relationships existing within this community are articulated by international law, a body of rules derived from the capacity of sovereign States to enter into binding relations with other sovereign entities. To put it plainly, it is

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[13] Sud, *supra* note 9 at 9.

the attribute of sovereignty that gives rise to international law. Within international society, relations between sovereign entities are structured by the principle of legal equality. The idea that States are equal in the international community is derived from the *sovereign* quality of States; States are considered to be equal insofar as they are sovereign. In other words, sovereignty is an attribute of independent statehood and equality is an attribute and consequence of that sovereignty. Together, sovereignty and its corollary equality are viewed as the most important principles of international law and the international community. Referred to as 'meta-principles', '*Grundnormen*', 'the cornerstone' or 'the decisive premise' of the international system, the 'foundational', 'fundamental', and 'underlying constitutional principles' of international society, sovereignty and equality embody the (political, social and legal) values upon which the ordering of international society rests. They establish the parameters of the legal and intellectual framework of the international community and all other values and principles derive from them. According to Louis J. Halle, the doctrine of sovereign equality is so well entrenched in international legal discourse that examining it "critically would seem to almost all of us as dangerous as the first critical examination of Holy Scripture by the historians of the nineteenth century seemed to their orthodox contemporaries."[14]

1. Historical Evolution

International legal scholars have since the inception of their discipline established a link between sovereignty and equality. The dominant intellectual model in international law has for centuries regarded international society to be constituted of sovereign and co-equal actors. "No matter how large or small the State, each sovereign receives from the international community an identical gift upon attaining sovereign status- a package of rights and duties the same as presented to every other entity gaining sovereignty in that

[14] See Louis J. Halle, "Forward", in Robert A. Klein, "Sovereign Equality Among States: The History of an Idea" (Toronto: University of Toronto Press, 1974).

same era."[15] Chief Justice Marshall proclaimed in *The Antelope* case (1825): "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It is from this equality that no-one can rightfully impose a rule on another."[16] Similarly, Oppenheim noted in his 1905 edition: "In entering the Family of Nations a State comes as an equal to equals; it demands a certain consideration to be paid to its dignity, the retention of its independence, of its territorial and its personal supremacy....The equality before International Law of all member States of the family of nations is an invariable quality derived from their International Personality."[17]

Sovereign equality is commonly said to derive from a philosophical tradition that is committed to an "anthropomorphic" view of the State, which entails the comparison of State to natural persons. The State is seen as a person in a community composed of other such State-persons. Vattel, for example, saw similarities between the international community and human societies, leading him to conclude that States, like individuals, are equal in nature. In *The Law of Nations* (1834), he adapted the Hobbesian thesis to the international arena: "Since men are naturally equal, and a perfect quality prevails in their rights and obligations,...Nations composed of men...are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect

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[15] Fowler and Bunck quoted in Gregory Fox, "The State and the Law" (1996) 7 Crim. L. F. 459 at 459.
[16] Justice Marshall quoted in Manfred Lachs, "Some Thoughts on Equality" in Ronald St. John MacDonald, ed., *Essays in Honour of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994) at 484.
[17] Oppenheim quoted in Georges Abi-Saab, "International Law and the International Community" The Long Road to Universality", in Ronald St.John MacDonald, ed., *Essays in Honour of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994) at 484.

produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."[18]

Classically, the concept of equality in international law was taken to mean that States, the subjects of international law, possessed the same rights and duties within the community of nations. More specifically, this meant equal status under international law, equal capacity to acquire rights and assume obligations, equal capacity to bring claims and, finally, the right not be subjected to another sovereign will as captured by the doctrine of sovereign immunity (*par in parem non habet imperium*).

2. Sovereign Equality under the UN Charter

If the idea of sovereign equality has existed since the inception of international law, then it was under the UN Charter that it acquired its modern normative content. The Charter sought to provide greater coherence, precision, visibility and importance to the principle of sovereign equality. It contains a number of references to the notion of equality in the international community, but essentially two different uses or conceptualizations of the term can be identified. The Preamble and Articles 1(2) and 55 speak of the equal rights of nations and people[19], whereas Articles 2(1) and 78 relate to

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[18] Vattel quoted in MCW Pinto, "Democratization of International Relations and Its Implications for Development and Application of International Law" (1995) 5 Asian Yearbook of International Law 111 at 113.

[19] The term 'equality of people' has ethnic connotations and is closely related to the prohibition of racial discrimination. It embodies the belief that there should not be a hierarchy between the various peoples of the world. The Charter also links the principle to the right to self-determination. No peoples can be denied the right to self-determination on the basis of some alleged inferiority. The link between the equal rights of people and self-determination was confirmed in the *1970 Declaration of Friendly Relations*; 'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter, all peoples have the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." The inclusion of the idea of the equality of people at the San Francisco Conference was not without controversy. Some representatives argued that 'equality of people' -unlike the 'equality of States- was not a general principle of international law. Today, the *1970 Declaration* has established that "the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on the respect for the principle of sovereign equality."

the sovereign equality of all UN members. Article 2(1) states that "[t]he Organization is based on the principle of sovereign equality of all its Members." This provision primarily defines the position of member States with regard to and within the UN. In other words, it addresses the issue of the institutional treatment of States as Members of the UN.

There has been some confusion as to whether Article 2(1) merely mediates relations between the UN and the Member States or whether it can be extended to govern the actions of Member States with one another.[20] The confusion is due to three factors. First, the language of Article 2(1) suggests that the focus is exclusively on the relationship between the Organization and Member States. Second, Article 2(1) can be found in Chapter 1 of the UN Charter which is titled "Purposes and Principles" of the UN. This implies that all of the principles within this Chapter are primarily linked to the purposes of the Organization and its relationship with Member States. Third, the first sentence of Article 2 is "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles", which in turn implies a wider operation of the principle of sovereign equality. Simma *et all* argue an interpretation of Article 2(1) as applying to inter-State relations is appropriate and justifiable: "The contradiction between the first sentence on the one hand, and Article 2(1) on the other hand must be resolved in favour of the first sentence, as it would be inconceivable for the Organization to be able to regulate the legal relations between its Member States in a manner different from that employed by the Member States in their mutual relations."[21] The contradiction is also resolved by Article 78, which states that "[t]he trusteeship system shall not apply to territories which have become Members of the

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[20] The distinction between the two interpretations of Article 2(1) is significant. The first interpretation relates to the specific context of international institutional law and addresses the particular question of the status of States *within* the organized structure that is the UN. The second interpretation relates to the status of States in general international law when they stand on their own and act *outside* the sphere of an organized structure. The distinction is, therefore, between *inter-state relations* and *intra-institutional treatment*.

[21] Bruno Simma, Herman Mosler, Helmut Brokelman, Christian Rohde, eds., *The Charter of the United Nations –A Commentary* (Oxford: Oxford University Press, 1994) at 78-79.

United Nations, relationship among which shall be based on respect for the principle of sovereign equality." Thus, Article 78 has the effect of extending the principle of sovereign equality to relations among the members of the UN; it confirms that the principle constitutes the basis for the entire legal system of the UN.[22] It is important to point out here that Articles 2(1) and 78 establish a clear boundary on the operation of the principle of sovereign equality: it only applies to and between sovereign States that are Members of the UN and, consequently, of the international community. The discriminatory effect of this narrow interpretation will be discussed in greater detail later in this chapter.

The exact meaning of the principle of sovereign equality remains highly contested and there is little doctrinal unity regarding the many facets of sovereign equality. International treaties and declarations of States abound in references to the principle, but most statements are ambiguous or frustratingly general, suggesting deep divisions behind a value that is supposedly fundamental to the international legal order.[23] Since there is no scope to discuss the many intricacies of sovereign equality in this thesis, we may, once again, look to the *1970 Declaration of Friendly Relations* for an authoritative interpretation. Considered to be the most comprehensive statement on the equality of States and disclosing the consensus base for the *opinio juris* of Members of the UN with respect to the content and scope of the principle of equality in light of the provisions of the Charter and the general principles of international law[24], the *1970 Declaration* particularises the elements of sovereign equality in the following manner:

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community; notwithstanding differences of an economic, social, political or other nature.

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[22] Djura Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (The Hague: Martinus Nijhoff, 1970) at 36, 37.
[23] Vratislav Pechota, "Equality: Political Justice in an Unequal World" in Ronald St. John MacDonald, ed., *Essays in Honour of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994) at463.
[24] *Ibid.* at 462.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right to freely chose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

The jurisprudence of the *1970 Declaration* establishes a clear link between the principle of equality and the concept of sovereignty. All rights and duties arise because States are sovereign entities. Legal equality, respect for state personality, freedom of choice as to internal regime, territorial integrity, political/social/economic/cultural independence, non-intervention, and the assumption of consensual obligations all are viewed as consequences of State sovereignty.

Contesting Sovereign Equality

The extension of statehood to peoples formerly held outside the international community had a profound impact on the manner in which the principle of equality was interpreted in international law. The process of decolonisation itself was the equivalent of formal inequalities of status disappearing through the achievement of political independence (i.e. formal equality) by hitherto dependent territories. Upon entering the international community, the newly independent countries accepted many of the general rules of international law, but also attempted to reshape the international community by contesting key aspects of the vision of world order articulated in the UN Charter. Their ultimate goal was to re-imagine the international community by highlighting the

ambiguities, contradictions and inconsistencies in legal texts, such as the Charter, and to develop new doctrines, principles and rules of procedure. The efforts of the new members of the international community are aptly described by Grovogui as a 'discursive insurrection', which aimed to gain 'control of the discourse of international relations' and 'liberate postcolonial legal thinking from the genealogical structures and epistemological apparatus of Western thinking'.[25] Similarly, Dr. Chen Tiqiang analyses the role of the newly admitted Third World countries in terms of the progressive development of international law, pointing out that "[i]n every stage of history, new forces assert[] themselves, and manifest[] themselves in new principles, norms, rules and institutions."[26]

It is true that the efforts of the newly independent countries can be examined in the context of an evolving international law responding to the needs and concerns of new members, but this view must be complemented with the realization that it was the *entire* international community which was being re-structured, not merely specific legal norms. If the foundation of international community is international law, then any substantive changes to central legal principles of the international order necessarily have implications for the whole structure of international society. Thus, a link must be drawn between the contestation and reformulation of legal norms and the structure of the international community. Decolonisation gave rise to new sovereign entities, which had, for the first time, the capacity to legitimately participate in and influence the construction of international community. Their project can be interpreted, using the phraseology of Upendra Baxi, as challenging the dominant constitutional discursivity or meta-narrative of international community as articulated in legal texts and telling a new and very different narrative which spoke of history of social suffering, deprivation, denial and depravation. The new members also challenged the dominant linear and progressive

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[25] Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans* (Minneapolis: University of Minnesota Press, 1996) at 191, 192, 193.

[26] Dr. Chen Tiqiang quoted in M. Shahabuddeen, "Developing Countries and the Idea of International Law" in Ronald St. John MacDonald, ed., *Essays in Honour of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994) at 732.

narrative perpetuated in international discourse that decolonisation- the granting of official independence- constituted a process that satisfied the principles of self-determination and sovereign equality under international law.

The newly admitted members produced a new narrative of the international community by focusing on the oftentimes fictional, contradictory and politically contingent character of the principles of sovereignty and equality. The 'newness' of the narrative consists in its rejection of the most basic belief about the international community, namely that it is a community of sovereign and co-equal states. The fictional character of this assertion was demonstrated, for example, by analysing the characteristics of the provisions in the Charter which establish the Trusteeship Council and the Security Council and finding them wanting in promoting the principle of sovereign equality. The Charter was shown to be a schizophrenic legal text, which, while seemingly affirms the principle of sovereign equality, in reality oscillates between high ideals, stated goals and purposes and other rather undemocratic and unequal principles. Just as American critical scholars exposed the fictional character of the prominent constitutional declaration that 'all men are created equal' in a society that sanctioned slavery and gender inequality[27], the newly independent countries exposed the myth that all States are equal, free, possessing of the same rights and obligations and only bound to laws to which they had freely consented. Sovereign equality was shown to be myth or fiction, with no basis in reality. Furthermore, it was an inadequate and misleading theoretical model, which, instead of illuminating international relations, had the effect of obscuring unequal relations.

The continued relevance of the engagement of the new members with the above mentioned provisions in the UN Charter and their impact on the concept of international community should not be underestimated. Today a 15 member Security Council acts on

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[27] See e.g. Juliet E.K. Walker, "Whither Liberty, Equality or Legality? Slavery, Race, Property and the 1787 American Constitution" (1989) 6 New York Law School Journal of Human Rights 299.

behalf of 189 member States and calls for reform are stronger than ever.[28] Questions about the nature of the International Trusteeship System and its place in the international community are also still topical, notwithstanding that there are no longer any Trust Territories left. In recent years, a number of scholars have argued that the anarchic breakdown in some African States is so fundamental and severe that these countries can no longer claim to be sovereign entities. Instead they have become "failed", "collapsed", or "quasi" States, dysfunctional entities incapable of sustaining themselves as members of the international community and in need of external intervention. To respond to this problem, some critics have proposed the resurrection of the International Trusteeship System, under which member States or the Organization itself would take over certain governmental functions, help administer the failed State in question, initiate economic change, modify political structures and processes and generally see to the health of the State until it is 'rehabilitated'.[29]

1. The Concept of Trusteeship

Chapter XII of the UN Charter establishes an International Trusteeship System "for the administration and supervision of such territories as may be placed thereunder by

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[28] See generally W. Reisman, "The Constitutional Crisis in the United Nations" (1993) 87 Am. J. Int'l L. 83, Michelle Smith, "Expanding Permanent Membership in the United Nations Security Council: Opening Pandora's Box or Needed Change?" (1993) 12 Dick. J. Int'l L. 173, David Kaye, "How to reform the United Nations" (1994) 88 Am. Soc'y Int'l L. Proc. 105, Matthias J. Herdegen, "The 'Constitutionalisation' of the UN Security System" (1994) 27 Vand. J. Transnat'l L. 135, Sean D. Murphy, "The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War" (1994) 32 Colum. J. Transnat'l L. 201, Peter Mutharika, "The Role of the United Nations Security Council in African Peace Management: Some Proposals" (1996) 17 Michigan J. Int'l L. 537, Michael Kelly, "United Nations Security Council Permanent Membership: A New Proposal for a Twenty First Century Council" (2000) 31 Seton Hall L. Rev. 319, Amber Fitzgerald, "Security Council Reform: Creating a more Representative Body of the Entire UN Membership" (2000) 12 Pace Int'l L. Rev. 319.

[29] See generally Gerald B. Helman & Steven R. Ratner, "Saving Failed States", (1992-1993) 89 Foreign Pol'y 3, Paul Johnson, "Colonialism's Back- and Not a Moment Too Soon", N.Y. Times Magazine (April 18, 1993), William Pfaff, "New Colonialism? Europe Must go back into Africa", (1995) 74 Foreign Policy 2, Jon H. Sylvester, "Sub-Saharan Africa: Economic Stagnation, Political Disintegration, and the Specter of Recolonization", (1994) 27 Loy. L.A. L. Rev. 1299, Robert D. Kaplan, "The Coming Anarchy", Atlantic Monthly, Feb. 1994 at 44, Ali Mazrui, "The Blood of Experience: the failed State and Political Collapse in Africa", (1995) 12 World Policy Journal 28.

subsequent individual agreements."[30] The basic objectives of the Trusteeship are linked to the purposes of the UN Charter as listed in Article 1 and include the promotion of international peace and security[31], respect for human rights and fundamental freedoms[32], and equal treatment in social, economic and commercial matters for all Members for the Organization.[33] Article 75(b) suggests that the trusteeship system is also a vehicle for self-determination because it prepares dependent territories for independence as sovereign States. The provision creates a duty to "promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its people and the freely expressed wishes of the people concerned, and as may be provided by the terms of each trusteeship agreement." The individual trusteeship agreements (Article 80) specify the terms under which the trust territory is to be administered and designates the authority, which is to exercise the administration of the trust territory. In this manner, the Charter imposes justiciable fiduciary obligations on the administering authorities to protect the interest of dependent peoples. It also establishes a system of supervision designed to ensure that the administering authority would administer the trust territory according to the obligations under the trust agreement as well as the general principles in the Charter. All supervisory activities are exercised by the General Assembly with the assistance of the Trusteeship Council (Article 85), which is made up of countries divided equally between those that administered trust territories and those that did not (Article 86). Under Article 87 the General Assembly is empowered to (a) consider reports submitted by the administering authority; (b) accept petitions and examine them in consultation with the administration authority; (c) provide for periodic to the respective trust territories at times agreed upon

[30] See Article 75, UN Charter.
[31] See Article 75(a), UN Charter.
[32] See Article 75(c), UN Charter.
[33] See Article 75(d), UN Charter.

with the administering authority; and (d) take these and other actions in conformity with the terms of the trusteeship agreements.

The philosophy behind the International Trusteeship System can be traced to the Mandates System under the League of Nations. Article 22 (1) of the Covenant of the League of Nations stated: "To those colonies and territories which as consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by *peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization* and that securities for the performance of this trust should be embodied in the Charter." [emphasis added] Subsection 2 explained that "[t]he best method of giving practical effect to [Article 22(1)] is that the tutelage of such people should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can be best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League." Although the UN Charter does not contain any references to 'tutelage' or 'civilisation', the ICJ did in its 1950 advisory opinion on *The Status of South West Africa* and again in its 1962 judgement in the first *South West Africa Case* recognise that the Charter embraced the principle of 'sacred trust', which was to be extended to all territories whose people has not yet attained full self-government.[34]

The concept of trusteeship or mandate has two important implications for the international community. First, it could be argued that it amounts to a *de facto* admission policy. The basis of this argument is the scholarship of Antony Angie, who views the Mandates System as an attempt to manage the cultural difference of colonies: "The mandates system placed territories not yet capable of being independent under the

[34] See (1950) ICJ Reports 128, (1962) ICJ Reports 319.

administration supervised by the League of Nations. It was through this system and its successor, the trusteeship system, that international law and the civilizing mission promised to fulfill its task of incorporating all territories into the international society on equal terms as part of one universal system."[35] The presumption behind Article 75 is that there are entities who do not yet have the requisite "political, economic, social and educational advancement" to join the international community as full members. The intervention of administering authorities and the link between their 'sacred duty', self-determination and "the progressive development towards independence" further implies that trust territories can be socialised and transformed into proper subjects of international law- i.e. sovereign States.

This brings us to the second implication of the trusteeship system for the concept of international community. Article 78 of the Charter precludes the application of the trusteeship system to members of the UN "*relationship among whom shall be based on respect for the principle of sovereign equality.*" This means that member States -which, by virtue of their sovereignty, enjoy the right to independence and the right to be free of intervention- cannot be placed under trust. To put it more plainly, it is their equality (which springs from their sovereign nature) that makes the trusteeship system inapplicable to them. Pechota sums up the situation most effectively: "Equality marches in the footsteps of sovereignty and independence. Consequently, any sovereign and independent State is entitled to equal status in the international community."[36] The flip side of this logic is that entities, which are not sovereign, are considered unequal and can, therefore, be subjected to treatment that would otherwise be unacceptable to member States. In other words, if an entity finds itself defined as lying beyond the boundaries of the international community, it may not rely on the principle of sovereign equality for

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[35] Antony Anghie, " 'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case", (1993) 34 Harv. Int'l L. J. 445 at 448.
[36] Pechota, *supra* note 23 at 470.

protection as it only applies between equals- i.e. sovereign States. Other principles apply of course, particularly those of a fiduciary nature, but not sovereign equality.

The limited application of the principle of sovereign equality gives rise to some very interesting and worrisome possibilities. First, to say that equality is exclusively the prerogative of sovereign States brings to mind classic arguments denying certain entities the protection of international law because they were deemed to lack a requisite legal personality. Until the fifth edition, Oppenheim's *International Law* stated that "[t]he Law of Nations, as law between States based on common consent of the members of the Family of Nations, naturally does not contain rules concerning the intercourse with and treatment of such States outside the circle...*It is discretion and not international law, according to which the members of the Family of Nations deal with such States as still outside the Family.*"[37] [emphasis added] Before Oppenheim, John Stuart Mill wrote:

> To suppose that the same international customs, and the same rule of international morality, can obtain between one civilised nation and another, and between civilised nations and barbarians, is a grave error, and one which no statesman can fall into....Among many reasons why the same rules cannot be applicable to situations so different, the two following are among the most important. In the first place, the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate....In the next place, nations which are still barbarous have not yet gone beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners.[38]

John Stuart Mill concluded with the assertion that "[t]o characterize any conduct whatsoever towards a barbarous people as a violation of the law of nations, only shows

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[37] Oppenheim quoted in Abi-Saab, *supra* note 17 at 39.
[38] John Stuart Mill quoted in Robert W. Tucker, *The Inequality of Nations* (New York: Basic Books Inc. Publishers, 1977) at 9-10.

that he who so speaks has never considered the subject."[39] It cannot be said that the International Trusteeship System is the equivalent of a total absence of law or that it amounts to the rule of an unfettered discretion in relation to the administered territories- there are after all the fiduciary obligations created under the trust agreements. However, the observations made by Oppenheim and John Stuart Mill remain relevant because they demonstrate the suspension of accepted legal norms (e.g. sovereign equality) in relation to outsiders or strangers. This represents, arguably, the most notable shortcoming of the international community's liberal roots: it has consistently failed- beyond the typical paternalistic provisions- to articulate a theory of justice which recognizes and respects the difference of those considered to exist beyond its boundaries.

Interestingly, John Stuart Mills' reference to the lack of reciprocity as a justification for abandoning international law when dealing with outsiders does not provide an adequate or precise description of the relationship that exists between outsiders and the international community. As previously discussed, the Charter is a unique legal text in that it makes provisions for non-members, who under Article 2(6) are called upon to act in accordance with the Principles of the Charter so far as may be necessary for the maintenance of international peace and security. Article 84 continues in this vein and requests that trust territories play their part in the maintenance of international peace and security: "To this end, the administrating authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory." The implications of Article 84 are astonishing: the administered territory lacks the sovereign character to enter the international community and yet is expected to participate in the protection of the interests of such a community. Furthermore, in terms

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[39] John Stuart Mill quoted in R.N. Anand, "The Influence of History of the Literature of International Law" in R. St. John Macdonald and Douglas M. Johston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Boston, Martinus Nijhoff Publishers, 1986) at 358.

of the obligations towards the Security Council, the administered territory is barred from the discussions, which determine whether there is a threat to international peace and security in the first place and, if so, what protection measures are warranted. There is also a tension between the Charter's provision that administering authorities should ensure that trust territories do their part to maintain international peace and security and other sources of international law, which viewed the continued spread of dependence itself as a threat to international peace and security. The 1960 Declaration, for example, stated that colonialism was "an impediment to the promotion of world peace and co-operation"; in 1965 the GA passed Resolution 2195 (20) which stated that colonialism threatened world peace.[40]

The philosophy behind Article 84 also represents a curious departure from the liberal conception of the ideal citizen or community member. Ordinarily, liberalism idealizes the soldier, a person who shows his (because traditionally the soldier invariably *was* male) commitment to his community through his willingness to perform military service and sacrifice his life for the benefit of that community. The concept of the citizen-soldier establishes a clear link between military duty and notions of community, suggesting that the citizen-soldier, more than any other member, is entitled to enjoy the benefits of the community. In fact, citizenship -the ultimate indicator of community belonging- is seen as a consequence of and reward for the military services rendered to the community. In contrast to this reasoning, Article 84 permits a situation whereby dependent peoples perform military services for a community to which they do not officially belong.

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[40] Geisa Maria Rocha, "In Search of Namibian Independence: The Limitations of the United Nations" (London: Westview, 1984) at 12, 27.

2. A Justifiable Derogation?

Chapter XII either contradicts the principle of sovereign equality of UN Charter altogether or represents one of its most narrowly defined interpretation. Yet there are many scholars who view the provisions on the trusteeship system as consistent with the purposes and principles of the Organization. Perhaps it is wise here to inject the insights of Erwin Cheremensky on the general principle of equality. Cheremensky recognizes that equality is not an absolute or self-determining concept and accepts the many derogations from and exceptions to the principle. He notes that the most important quality of equality is that it is the only analytical concept that is capable of creating a presumption that people should be treated alike, thereby putting a burden of proof on those who wish to discriminate. In other words, by creating an argumentative burden –which would otherwise not exist- the principle of equality forces those who intend to impose differences in treatment to rationally explain and justify why this would be acceptable or tolerable, and therefore permissible.[41] Applied to the context of the Charter, this would mean that there ought to be allowed the possibility that some departures from the principle of sovereign equality are acceptable and tolerable. As Lauterpacht, puts it, the issue is whether derogations from the principle of sovereign equality under the Charter are "consistent, to a substantial degree, with international justice and with the progressive development of international organization."[42] So, in relation to this thesis, the question to be answered is, insofar as Chapters XII represents a departure from the principle of sovereign equality, is such a departure justifiable and acceptable?

Those who would answer in the affirmative would probably emphasise the fact that the International Trusteeship System, like its predecessor, the Mandates System, was intended to promote the eventual independence of trust territories. In other words, since

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[41] For more see Erwin Chemerinsky, "In Defence of Equality: A Reply to Professor Westen", (1983) 81 Michigan Law Review 574.

[42] Lauterpacht quoted in Bardo Fassbender, "UN Security Council Reform and the Right to Veto- A Constitutional Perspetive" (The Hague: Kluwer Law International, 1998) at 291. [herinafter "UN Security Council Reform"]

the ultimate goal of trusteeship is full inclusion and the equal status of trust territories, a temporary inequality in status is acceptable. The flawed logic of this argument is illustrated by Antony Anghie who draws our attention to the fact that the lack of sovereignty –which brought about the status of dependent territories- was created by the very international community which is now trying to re-create it by a process of tutelage and the civilizing mission. Anghie writes that "[i]t was within the space created by the absence of sovereignty that these authorities could proceed to extend and refine the civilizing mission by means of a new science of administration. The theme of the mandates system is inclusion and the incorporation of backward territories into the international society, but it is the crucial exclusion of the non-European world from this society in the first instance that gives the whole system its momentum."[43] Chapter XII can, therefore, be viewed as an example of a boundary creating the very difference which it then later purports to exclude and then transform. The absence of statehood in territories under mandate or trust is not an objective fact; rather that status is the result of a political process, which leads to specific legal consequences.

In order to assess whether the International Trusteeship System represents an acceptable departure from the principle of sovereign equality, the concept of trusteeship must be analysed in view of the other purposes and principles of the UN system. Aside the goal of self-determination, the Charter also promotes international peace and security, friendly relations (based on respect for the principle of equal rights and the self-determination of peoples), international co-operation in solving international problems of an economic, social, cultural or humanitarian character, respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[44] So, it could be argued that trusteeship, while contradicting the principle of sovereign equality, is nevertheless justifiable because it promotes the achievement of the above

[43] Anghie, *supra* note 35 at 496.
[44] Article 1, UN Charter.

stated UN purposes and principles. However, this view is sharply contradicted by the jurisprudence of the *1960 Declaration on the Granting of Independence to Colonial Countries* which views any dependent status as constituting a denial of fundamental human rights that is contrary to the Charter and an impediment to the promotion of world peace and co-operation. The suggestion that some peoples may not yet be ready for sovereignty is also repudiated in the *1960 Declaration*: "Inadequacy of political, economic, social or educational preparedness should never serves as a pretext for delaying independence."[45] It is therefore not sufficient that the trusteeship system's stated goal is the promotion of the political, economic and social advancement of the trust territories and their development towards self-government and self-determination, particularly when, as established in the previous paragraph, it is the trusteeship system itself that gives rise to the sort of inequality that requires the intervention of administering powers.

The International Trusteeship System can also be justified through the pragmatic assertion that the Charter was simply not designed to protect absolute sovereignty and equality and nor would it want to. After all, the very existence of the international system relies on the limitation of sovereignty and Charter obligations significantly circumscribe many aspects of States' traditional sovereignty (admittedly while enhancing others or increasing their effectiveness). As Ninčić points out 'absolute' sovereignty by its very nature is incompatible with membership in an international organization, which entails a 'relative' sovereignty.[46] Similarly, Athena Debbie Efrain writes:

> ...[T]he only way a State can avoid giving up its sovereign will, and its right to Sovereign Equality, is by remaining outside the international institutional framework. The mere fact of belonging to an international institution necessarily means that a State, in pursuit of the common benefit of all member States and of

[45] G.A. Res. 1514, para. 3, 15 U.N. GAOR Supp (No.16) at 66, U.N. Doc. A/4684 (1960).
[46] Ninčić, *supra* note 22 at 27.

> the function of the [UN], and in areas which fall under the [UN's] mandate, relinquishes or shares its sovereignty and, therefore, cannot claim the right to Sovereign Equality within this organized structure."[47]

It can also be argued that the drafters of the UN Charter never intended to create a system whereby all States would be equal at all times. After all, "[i]t is 'sovereign equality, not 'equal sovereignty' that the Charter speaks of."[48] The fact that the architects of the Charter did envision a narrow interpretation of the principle of equality may be demonstrated by contrasting Article 2(1) with the provisions which detail the composition, powers and procedure of the Security Council. In apparent contradiction to the principle of sovereign equality, these provisions privilege five UN member States with respect to power and political influence by granting them permanent membership in the Security Council and the right to veto. The tension between Article 2(1) and the provisions in Chapter V were noted from the outset, causing one diplomat to point out that "[i]t was somewhat ironical, in view of the inequality evident in the UN, to find, as the head of the system of principles, a bold reference to the sovereign equality of members."[49] Characterized by some scholars as *legalisierte Hegemonie* (legalized hegemony) and oligarchic, the membership of the Security Council has nevertheless been interpreted by just as many scholars as existing in harmony –admittedly a sometimes uneasy harmony- with Article 2(1). Arguments justifying the composition, powers and procedure of the Security Council focus on three issues: a) consent; b) effectiveness and efficiency; and c) rights and responsibilities.

The focus on consent relies on a contractual view of the Charter. For the sake of clarity, it may be prudent to divide consent into two categories: a broadly defined consent

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[47] Efrain, *supra* note 2 at 104-5.
[48] Bardo Fassbender, "The United Nations Charter as Constitution of the International Community", (1998) 36 Columbia Journal of Transnational Law 539 at 352. (herinafter "The United Nations Charter as Constitution"]
[49] (Belgian) Representative Rollin quoted in Ninčić, supra note 22, at 46-47.

and a more narrowly defined consent. The broad definition is aptly summarised by Ninčić:

> In joining the Organization, States have, by an act of their sovereign will, invested it with certain powers, which had hitherto been considered to be prerogatives of their sovereignty, and which it was felt the Organization needed in order to perform its essential function- the maintenance of international peace and security, and thereby offer States, and their sovereignty, the protection which they has previously been compelled through their own devices, either individually or in alliance with other States. The Organization as a whole, had, furthermore, equally in the interest of the effective discharge of the main function of the United Nations, concentrated part of these powers in one of its organs, the Security Council. States have thus, of their own volition, restricted their sovereignty in order to protect it from its forceable negation through imposition of those forms of expression of the 'sovereign will' of other States which the Charter prohibits and which the Organization, through the collective efforts of all its Members, render impossible [.][50]

The more narrowly defined concept of consent focuses on the wording of Article 24, which states that "[i]n order to ensure prompt and effective action by the United Nations, its Members *confer* on the Security Council primary responsibility for the maintenance of international peace and security, and agree that *in carrying out its duties under this responsibility the Security Council acts on their behalf.*" [emphasis added] Article 24 has been interpreted a forming a division of competence that was established when all member States voluntarily conferred power to the Security Council to carry out a specific mandate.

Arguments which focus on notions of efficiency and effectiveness are concerned with the construction of a viable collective security system. The argument is that since there was an overwhelming need for a machinery capable of functioning swiftly and

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[50] *Ibid.* at 94.

effectively in the event of a breach of or threat to breach international peace, any attempt to create such a machinery would be a justifiable deviation from Article 2(1).[51] This was also complemented by the view that, based on the experience of WW2, any system of collective security had to be centralized in order to be effective and centralized, moreover, in the hands of the powers which are alone in a position, both in a political and in a material sense, to make it genuinely effective.[52] As noted by one critic: "Legal equality may permit an unequal distribution of administrative and directing functions in an international organization to the benefit of the more powerful and better qualified States."[53] In other words, the Charter created a system which prioritizes the efficient and effective maintenance of international peace and security over the strict observance of sovereign equality.

Closely related to the above arguments is the position that legal principles such as sovereign equality are always subject to political considerations. "A legal order devoted to the realization of defined material goals like peace, welfare, freedom and human rights, cannot do without...pragmatic considerations and their translation into constitutional law. In the end, it may be necessary to give in to the demands of those States whose contribution to common aims and purposes it needed, but cannot be procured by force."[54] It is also argued that the composition and powers of the permanent members of the Security Council are justified because they represent sovereign equality coherently modified by the rational principle of distinction. This modification is based on the recognition "that States bearing the greatest institutional responsibility should also have the greatest say in critical disputes. The distinction accords with the general principle of equality by relating exceptional privilege to exceptional responsibility and limiting privilege to a narrower category or institutional activity."[55] This means that the permanent

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[51] *Ibid.* at 87.
[52] *Ibid.* at 87, 88.
[53] Korowitz quoted in *Ibid.* at 130.
[54] "UN Security Council Reform", *supra* note 42 at 294.
[55] Professor Thomas Franck quoted in *Ibid.* at 293.

members are 'rewarded' for assuming primary responsibility (political, military, fiscal and otherwise) for the protection of international peace and security. This line of reasoning attempts to establish a relationship between rights and responsibilities, between the influence States are permitted to exercise within the Organization and their actual capacity to discharge their responsibilities.[56]

Arguably, the most persuasive theory justifying inequality within the UN system and the international community is articulated by Bardo Fassbender. Fassbender proceeds from the assumption that the Charter is a constitution-like document and argues that all constitutions allow certain derogations from the principle of equality. He draws our attention to one of the earliest constitutional instruments, the Virginia Bill of Rights, which in its fourth Article contained the following exception to the rule of equality: "[N]o man or set of men are entitled to exclusive or separate emoluments or privileges from the community, *but in consideration of public service.*"[57] [emphasis added] Fassbender maintains that to assert an inherent contradiction between Article 2(1) and the provisions in Chapter V is to misinterpret the guarantee of sovereign equality in Article 2(1): "A reading of any legal text, in particular a constitution, must aim at reconciling seemingly contradictory statements. Accordingly, under the Charter sovereign equality in its traditional meaning can only be held to be guaranteed to the extent that it has not been qualified by specific provisions –among them those regarding the composition and procedure of the Security Council."[58] Fassbender concludes that it may even be prudent to abandon the very term 'sovereign equality':

> [I]n 1945, traditional sovereignty and equality of States were replaced by a new principle with a different content. Since it represents equality as defined and qualified by the Charter, it may be called 'equal status under the constitution of

[56] Ninčić, *supra* note 22at 34.
[57] "UN Security Council Reform", *supra* note 42 at 291.
[58] Ibid. at 289.

> the international community' or, shorter, [the] principle of constitutional equality...
>
> An understanding of the Charter as a constitution supports the exceptional character of Great Powers' prerogatives, for the idea of equality of those constituting the body is inherent in the very concept of a 'constitution' since the days of the American and French Revolution.[59]

Just like Erwin Cheremensky, Fassbender believes that there always exist tolerable and justifiable departures from the concept of equality. His argument is ultimately convincing because of his use of the constitutional context, which stands not for the promotion of absolute principles but the reaching of compromise through a series of balancing acts.

The question that remains, however, is whether the above-cited arguments can assist in justifying the International Trusteeship System's departure from the principle of sovereign equality? Even if we accept that sovereign equality is not an absolute concept, but subject to limitations such as the rational principle of distinction, consent, the purposes and principles of the Charter, and principles of efficiency and effectiveness, it cannot be just that only specific countries experience these limitations. The legal provisions in Chapters V and XII create, what Ninčić calls, a 'gradation' of sovereignty, which describes a situation whereby not all States are called upon to renounce their sovereignty to the same degree. Certain members, full members of the UN in the context of the trusteeship system and permanent members in the context of the Security Council, are exempted from the limitations to which the sovereignty of the other members is subject.[60] Although the idea of absolute sovereignty is generally deemed to be incompatible with the Charter, the practical effects of Chapters V and XII is that certain members do in fact experience an unimpaired and absolute sovereignty, while the

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[59] *Ibid.* at 290.
[60] Ninčić, *supra* note 22 at 131.

sovereignty of other members becomes distinctly 'relative'.[61] It could be argued that for some entities, Chapters V and XII do not merely dilute their sovereignty, but extinguish it altogether. Even is we accept that Article 2(1) was never intended to guarantee that *all States are absolutely sovereign or absolutely equal all the time*, it cannot be acceptable that for some sovereign equality, the *Grundnorm* of the international community, has meaning only through the exceptions to the principle or its entire suspension.

Responses to Third World Contestation

The newly independent States, employing the principle of equality, enjoyed some success in their campaign to question certain arrangements in the UN and the international community. Their campaign led to the amendment of Articles 23(1) and (2) and 27(2) and (3) of the Charter in 1965. These amendments were ratified in August 1965 and enlarged the membership of the Security Council from 11 to 15 (increasing the number of non-permanent membership from 6 to 10), the Social and Economic Council (ECOSOC) from 18 to 27, and the International Law Commission from 21 to 25. Later still the membership of ECOSOC was expanded from 27 to 54. All of these amendments occurred because of complaints by the newly admitted States that the composition of these UN organs did not reflect the entire UN membership.

The campaign of the newly independent States to revise the international community was seen by many as an unwelcome disruption of the fundamental order of the community of States, causing a 'crisis' in the system. As stated before, altering communities causes anxiety and resentment on the part of members, whose identity hinges on the maintenance of the status quo and the diligent policing of community boundaries. A common response to the efforts of the newly admitted members was to

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[61] *Ibid.* at 132.

label their arguments as existing outside, what Dianne Otto calls, 'the boundaries of acceptable speech', merely constituting political 'noise', not rational legal discourse.[62]

A similar point is made by Mohammed Bedjaoui who notes that an important feature of the liberal response to Third World attempts to restructure international law and society was the idea of 'legal paganism', which refers to the dismissal of these attempts as lacking a legal basis. 'Legal paganism' implied that the revision of international relations would unduly destabilize the international legal order and subject it to the whims of developing countries.[63] An example of the deployment of 'legal paganism' is the dismissal of the many General Assembly resolutions sponsored by the newly admitted members to restructure the international economic order as merely soft law, lacking the requisite level of legality that would have constituted them as hard law. For Gathii this response was not unique:

> The bifurcation of legal claims (representing the status quo) on the one hand, and moral claims or soft law (deviations from the status quo or challenges to it) on the other hand, is a liberal strategy for perpetrating an unjust status quo by adopting the political stature that oppositional claims may in time become legal principles when they attain or command a sufficient level of legality. While the oppositional claims arise from a communitarian conception of international society based on ideals of solidarity and democratic accountability, those representing the legality of the status quo self-represent as neutral, natural and objective are based on individualistic conceptions where the will of States gives legitimacy to the prevailing international law.[64]

Drawing similar conclusions, Karin Mickelson writes: "The traditionalists lament the politicization of law, for which they hold the Third World responsible. They diagnose a

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[62] Diane Otto, "Subalterity and International Law: The Problems of Global Community and the Incommensurability of Difference", (1996) 3 Social and Legal Studies 337 at 356.
[63] Bedjaoui quoted in James Thuo Gathii, "International Law and Eurocentricity" (1998) 9 European Journal of International Law 184 at 207.
[64] *Ibid.* at 207.

'crisis in law', whereas in fact what they are talking about is a crisis in their own perception of law. Like the philosopher of antiquity who looked for the man in the crowd, they are seeking a kind of law, 'their' international law, which they no longer recognize in the movement which is causing it to change, and do they talk of a 'decline' of law itself."[65]

Conclusion

If the Charter of the UN provides the constitutional framework of the international community, then sovereignty and equality, and their composite, sovereign equality, represent the most important constitutional principles of this community. They are an integral part of the narrative of international community and deeply implicated in the construction of the international self. The entry of newly independent States into the international system had a profound impact on the manner in which the principle of sovereign equality was interpreted. By focusing on the provisions in the UN Charter which establish the International Trusteeship System and the Security Council, the new members revealed the contradictory and politically contingent nature of the principle of sovereign equality and of the Charter in general. In doing so, they articulated a new narrative of international community, one that rejected the dominant assertion that international community consisted of sovereign and equal States subject only to laws to which they had voluntarily consented. Instead, their narrative told of a community which allows for and provides seemingly rational justification for the deviation from significant constitutional norms in the treatment of so-called outsiders. The new narrative of international community also revealed an impoverished theory of justice, which failed to recognize and respect the difference of those considered beyond the boundaries of the international community.

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[65] Karin Mickelson, "Rhetoric and Rage: Third World Voices in International Legal Discourse" (1998) 16 Wis. Int'l L. J. 353 at 373.

CHAPTER THREE

International law reflects first and foremost the basic state-oriented character of world politics. Units of formal independence benefiting from equal sovereignty in law and equal possession of the basic attributes of statehood have succeeded in creating a system enshrining such values.

--M.N. Shaw[1]

Sovereignty has...spun a mythology of State grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worth in it- a mythology that is often empty and sometimes destructive of human values.

--Loius Henkin[2]

Introduction

The objective of this chapter is to use the authoritative judicial pronouncements of the International Court of Justice (ICJ or the Court) in the South West Africa/Namibia cases[3] to demonstrate the link between decolonisation and the narration of international community. The jurisprudence employed by the Court in the cases on South West Africa sheds light on the nature and ideology of the Mandates System and the International Trusteeship System, explains the interest of the international community in these systems, and speaks to the rights- if such rights do indeed exist- of non-state entities that are excluded from the community of international legal subjects as defined by international law. In the cases on South West Africa, the Court indirectly, and mostly unconsciously, implicated itself in the narrative of international society. The logic employed by the ICJ can be linked to the dominant rationalist and liberalist vision of the international legal

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[1] M.N. Shaw quoted in Athena Debbie Efrain, "Sovereign (In)equality in International Organizations" (The Hague: Martinus Nijhoff Publishers, 2000) at 108.

[2] Louis Henkin, "The Mythology of Sovereignty" in Ronald St.John MacDonald, ed., *Essays in Honour of Wang Tieya* (London: Martinus Nijhoff Publishers, 1994) at 351-2.

[3] See G.A. Res. 2372, 22 U.N. GAOR Supp. (No. 16A), U.N. Doc. A/6716/Add. 1 (1968). In this resolution the General Assembly acknowledged Namibia as the new name for the territory of South West Africa.

community as a society of formally equal entities, namely States, governed by international law.

The jurisprudential value of the South West Africa cases and their particular relevance to the issues raised in this thesis, is aptly described by Solomon Slonim, who writes:

> ...South West Africa stands for much more than the mere durability or intractability of an international dispute. For it encompasses and, in fact, has come to symbolize, many of the critical problems of the postwar world-colonialism and self-determinationl; racialism and human rights: apartheid and equality; minority rule and democracy. Furthermore, it represents a noteworthy instance of an attempt by the organized international community to impose its consensus upon a defiant member state.[4]

The legal-political context of the dispute that surrounded South West Africa is, therefore, one that provides fertile ground for discussions about the sort of issues, which, as demonstrated in previous chapters, are directly implicated in the manner in which the international community is imagined: the foundational principle of sovereign equality, its relationship to the Mandates System and the International Trusteeship System, the compatibility of these two systems with the liberal vision of international community, and the status and rights of entities deemed to be non-members of the community of States.

In order to establish the link between the opinions of the Court and the construction of international community, the author will analyse the cases on South West Africa with a view of answering three basic questions:

1) What did the Court have to say about the relationship between sovereign equality, the *Grundnorm* of international society, and the Mandates System and the International Trusteeship System?

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[4] Solomon Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (Baltimore: The John Hopkins University Press, 1973) at 2-3.

2) What did the Court have to say about the rights of entities deemed to lie outside the boundaries of the international community in relation to the issues raised in the cases?

3) What did the Court have to say about the international status of entities that lie beyond the boundaries of the international community and how is such a status compatible with the liberal vision of international society as a community of sovereign and co-equal states?

To answer these questions, the author will rely on both majority and dissenting judgments and opinions in the South West Africa cases. One more point should be made here. It is not uncommon for courts to fail to specify exactly what they are doing or, worse, to do say one thing and then do another thing entirely. The ICJ is not immune to such contrary behaviour. In the cases on South West Africa, the Court never expressly acknowledged a link between its reasoning and the broader questions regarding the structure and nature of the international community. Nevertheless, it is the assertion of the author that such a link exists and that it can be made visible through a careful examination of the various judgements and logic employed by the Court to justify its findings. So, while the three specific questions asked by the author were not directly addressed or answered by the Court, reasonable conclusions can be drawn and important insights gained from both the majority and dissenting judgments and opinions in relation to the narration of international community.

In order to make the material and arguments in this chapter accessible, first a brief history of the territory of South West Africa will be provided. This will be followed by concise summaries of the findings of the Court in the four South West Africa cases discussed in this thesis. Finally, the implications of the cases in the context of the concept of international community will be discussed.

Historical Background

Foreign control over the territory that later became known as South West Africa began in the 1880s when Germany colonized it. South West Africa constituted part of the German colonial empire until 1915, when in concert with Allied war efforts, South African forces seized the territory. After the end of World War I, Germany was forced to renounce its colonial interests and overseas possessions by way of Articles 118 and 119 of the Treaty of Versailles. On June 28, 1919, Germany transferred its legal and equitable title to South West Africa to the Principal Allied and Associated Powers, which in turn agreed to transfer title to the League of Nations on the condition that the territory enter the Mandates System. The mandate over South West Africa was awarded to the Union of South Africa, which was to exercise it and administer the territory on behalf of the League of Nations. The decision that the territory was not to be re-colonized or annexed as spoils of war by the victorious powers, was reached only after prolonged and bitter diplomatic discussions at the 1919 Versailles Peace Conference, at which the Allied Powers- guided by the views of President Wilson- came to endorse the principle of "no annexation of enemy territories."[5] The Mandates System, under which South West Africa was formally placed by the League Council in 1920, was to establish a tutelary responsibility on the part of the organized international community for the welfare of the inhabitants of mandated territories as envisaged under Article 22 of the Covenant of the League of Nations.

Article 22(3) of the Covenant's Mandates System differentiated among the mandated territories on the basis of "stage of development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances". To this end, it established three types of mandates labelled classes A through C, which referred to the different developmental stages of the territories in question and the

[5] Ernest A. Gross, "The South West Africa Cases: What Happened?", (1966) 45 Foreign Affairs 36 at 37.

correlated international supervision. South West Africa was confirmed by the League of Nations on December 17, 1920 as a Class C mandate. Article 22(6) of the Covenant explained the status of Class C mandates in the following manner: "There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can best be administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population." This position was reiterated in the text of the Mandate for South West Africa, which defined the scope of authority South Africa was to exercise in the territory and the obligations incumbent upon it as the mandatory power. Article 2 read as follows: "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Union of South Africa, and may apply the laws of the Union of South Africa to the territory, subject to such local modification as circumstances may require." The provisions of the Covenant and the Mandate on the international status of South West Africa have been interpreted by many critics as having amounted to a *de facto*, if not *de jure*, annexation of the territory. Slonim notes, for example, that "[i]n practical terms South Africa was accorded full control over [South West Africa] subject to the ultimate, but rarely imposing, supervision of the League of Nations."[6]

While the League of Nations existed, South Africa insisted on administering South West Africa as a fifth province and repeatedly proposed the formal incorporation of the territory. These efforts intensified after the dissolution of the League of Nations. At the San Francisco Conference, South Africa again argued for incorporation, on the grounds of geographical proximity, comparable ethnic structures, the legal situation after the dissolution of the League of Nations, and the *de facto* pattern of administration that

[6] Slonim, *supra* note 4 at 2.

already made the territory an integral part of South Africa.[7] In 1946, South Africa renewed its proposal to formally annex South West Africa and, to this end, submitted to the UN General Assembly a memorandum seeking formal recognition of its attempts at incorporation. The South African proposal was categorically rejected by the members of the United Nations, who were apparently now dedicated to the implementation of a reverse process in international relations, namely, the emancipation of dependent territories to self-government and independence.[8] After failing to persuade South Africa to place South West Africa under the UN International Trusteeship System according to the provisions of Chapter XII of the Charter, the GA in December 1949 passed Resolution 339 (IV), requesting an ICJ advisory opinion on the international legal status of South West Africa. The stage for the one most important international legal battles of the post-war era was thus set.

The South West Africa/Namibia Cases

On July 11, 1950, the ICJ issued its first advisory opinion on the *International Status of South West Africa*.[9] The GA had submitted the following questions to the ICJ:

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[7] Sushma Soni, "Regimes for Namibia's Independence: A Comparative Study" (1991) 29 Colum. J. Transnat'l L. 563 at 570.

[8] Slonim, *supra* note 4 at 2.

[9] It should be noted that even though an advisory opinion is not legally binding upon UN Member States, it does constitute a statement of the law by the most authoritative international tribunal, the ICJ. The status of ICJ advisory opinions was elaborated by Advocate I. Goldblatt, Q.C. of the South West African Bar. He wrote:

> In the case of an advisory opinion, there is no dispute between States. The General Assembly and certain subordinate organs of the United Nations have been specifically given the right by Article 96 of the Charter, to submit for the opinion of the International Court of Justice any questions of law arising out of the performance of their functions.
> Exactly as in the case of a compulsory judgement, the Court examines documents, records, the Charter, hears arguments on both sides, applying principles of International Law, lays down the law applicable to the particular dispute, and gives answers to the questions put, in accordance with the law as laid down.
> ...[Both in compulsory judgements and advisory opinions], the Court declares the law applicable to the case either explicitly or impliedly declares, where necessary, the legal rights and obligations that flow from the law so laid down.

"What is the international status of the Territory of South-West Africa and what are the international obligations of the Union of South Africa arising therefrom, in particular:

(a) Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are those obligations?

(b) Are the provisions of Chapter XII of the Charter applicable and, if so, in what manner, to the Territory of South-West Africa?

(c) Has the Union of South Africa the competence to modify the international status of the Territory of South-West Africa, or in the event of a negative reply, where does the competence rest to determine and modify the international status of the Territory?[10]

The Court held that "[t]he Union of South Africa continues to have the international stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa as well as the obligation to transmit petitions from the inhabitants of that Territory, the supervisory functions to be exercised by the United Nations, to which annual reports and the petitions are to be submitted."[11] The Court also decided unanimously that the provisions of Chapter XII of the Charter were applicable to the Territory of South West Africa in the sense that they provided a means by which the Territory *may* be brought under the Trusteeship system. Finally, the Court decided

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> ...[T]he law [of advisory opinions] pronounced by the Court cannot be wiped out of existence....and in International Law it is exactly the same value as the law as laid down in a compulsory judgment.

For more see I. Golblatt as quoted in John Dugard , ed.,, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (Berkeley: The University of California Press, 1973) at 162, 163-4.

[10] (1950) ICJ Reports 128 at 129.

[11] International Court of Justice, "Case Summaries, International Status of South West Africa, Advisory Opinion of 11 July, 1950" at <http://www.icj.cij.org/icjwww/idecisions/isummaries/isswasummary500711.htm> (accessed 22 March, 2001)

unanimously that the Union of South Africa was not competent to modify the international status of South West Africa, such competence resting with the Union acting with the consent of the United Nations.

South Africa's refusal to abide by the opinion of the Court and place South West Africa under the UN International Trusteeship System, led to further litigation in 1960 when Ethiopia and Liberia, with the encouragement of African States, instituted contentious proceedings at The Hague against South Africa. The jurisdictional basis for the proceedings was Article 7 of the Mandate, which created an obligation on the part of South Africa to submit to the jurisdiction of the Permanent Court of International Justice in any dispute whatever between it as Mandatory and another Member of the League of Nations relating to the interpretation or application of the Mandate if such a dispute could not be settled by negotiation. Ethiopia and Liberia also asked the Court to reaffirm in binding form its 1950 advisory finding that the Mandate had survived the dissolution of the League of Nations and that South Africa was under a subsequent duty to submit to the administrative supervision of the UN. Lastly, the Applicants requested that South Africa be ordered to cease forthwith the imposition of apartheid on South West Africa on the ground that such a policy was not compatible with the Mandatory's obligation to promote the well-being of the inhabitants.

The judgement on the *South West Africa Cases (Preliminary Objections)* was delivered on December 21, 1962. Responding primarily to the preliminary objections raised by South Africa to the jurisdiction of the Court to hear the case, the ICJ held by eight votes to seven that it had jurisdiction to adjudicate upon the merits of the dispute on the basis of Article 80(1) of the UN Charter[12], Article 7 of the Mandate for South Africa

[12] Article 80 (1) states: "Except as may be argued upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any States or any peoples or the terms of existing international instruments to which Members of the United Nations may be parties." In their application, Liberia and Ethiopia had argued that

and Article 37 of the Statute of the Court[13]. The Court also rejected South Africa's argument that the Court lacked jurisdiction because there was no real dispute between the parties as envisaged by Article 7 of the Mandate.

On July 18, 1966, the ICJ delivered its judgment on the *South West Africa Cases (Second Phase)*. The contentions of the parties covered, *inter alia*, the following issues: whether the Mandate for South West Africa was still in force, and if so, whether the Mandatory's obligation to furnish annual reports on its administration to the Council of the League of Nations had become transformed into an obligation to report to the GA of the UN; whether the Respondent had, in accordance with the Mandate, promoted the utmost the material and moral well-being and the social progress of the inhabitants of the territory; whether the Mandatory had contravened the prohibition in the Mandate of the "military training of the natives" and the establishment of military or naval bases or the erection of fortification in the territory; and whether South Africa had contravened the provision in the Mandate that it (i.e. the Mandate) cannot be unilaterally modified.[14] Not even considering the merits of the case, by eight votes to seven, the Court found that the Applicant States, Liberia and Ethiopia, could not be considered to be have established any legal right or interest in the subject matter of their claims and accordingly decided to reject it.[15]

Article 80(1) maintained their rights which had resulted form the Mandate and the Covenant of the League of Nations, despite the dissolution of the League.

[13] "Wherever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

[14] International Court of Justice, "Case Summaries: South West Africa Cases (Second Phase), Judgement of 18 July, 1966), at <http://www.icj-cij.org/icjwww/idecisions/isummaries/ilsaesasummary660718.htm> (accessed on 22 March, 2001)

[15] The decision of the Court was criticized even by a South African newspaper which wrote: The South African case at The Hague ended not with a bang but with a wimper. After six long years, after an interim judgement on jurisdiction and after lengthly, learned and very skilful argument....the issue was decided on a mere technicality. Turning its back firmly on the great questions that move the world of the second half of the 2oth century, such as racial discrimination and the responsibility of the United Nations for the welfare of non-self governing peoples, the Court cast an eye on the plaintiffs as if seeing them for the first time and asked what rights they has to be there at all." See Geisa Maria Rocha, "In Search of Namibian Independence: The Limitations of the United Nations" (London: Westview, 1984) at 52.

The final act of the *South West Africa Cases* was played out on June 21, 1971, when the ICJ delivered an advisory opinion, on the request of the Security Council, on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970).[16] The Court confirmed that through GA Resolution 2145 (XXI), the UN had formally terminated South Africa's mandate over South West Africa and resumed formal control over the territory. By thirteen votes to two it was held that the continued presence of South African in Namibia being illegal, South Africa was under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory. By eleven votes to four, it was decided that all member States of the UN were under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration. By the same ratio, the Court held that it was incumbent upon States which are not members

[16] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 ICJ Reports 6. In resolution 276, titled "The Situation in Namibia, the SC, among other things, (a) reaffirmed the inalienable right of the people of Namibia to freedom and independence recognized in General Assembly resolution 1514 (XV) of 14 December 1960; (b) reaffirmed GA resolution 2145 (XXI) of 27 October 1966, by which the United Nations decided that the mandate of South West Africa was terminated and assumed direct responsibility for the Territory until its independence; (c) reaffirmed SC resolution 264 (1969) which recognized the termination f the Mandate and called upon the Government of South Africa immediately to withdraw its administration of the Territory; (d) reaffirmed that the extension and enforcement of South African laws in the Territory together with the continued detentions, trials and subsequent sentencing of Namibians by the Government of South Africa constitute illegal acts and flagrant violations of the rights of the Namibians concerned, the Universal Declaration of Human Rights and of the international status of the Territory, now under direct United Nations responsibility; and (e) declared that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid.

of the UN to give assistance, within the scope of the previous paragraph, in the action which has been taken by the United Nations with regard to Namibia.[17]

Implications for the Concept of International Community

(1) What did the Court have to say about the relationship between sovereign equality, the *Grundnorm* of international society, and the Mandates and International Trusteeship Systems?

In the South West Africa cases, one can observe in the reasoning of the Court a notable absence of any meaningful debate about the principle of sovereign equality and the philosophy behind the legal provisions in Article 22 of the Covenant of the League of Nations and Chapter XII of the UN Charter. Not once does the Court take note of the "contradictory jurisprudential urges" of the UN Charter and consider the possibility of the existence of a fundamental incompatibility, or at least tension, between the Mandates System, the International Trusteeship System and the dominant liberal vision of the international community as articulated in the Charter and other international instruments. In fact, the Court recognized and treated both the Mandates System and the International Trusteeship System as integral and important elements of the international legal order.

For example, in its advisory opinion on *The Status of South West Africa (1950)*, the ICJ merely noted that in relation to territories which, as a consequence of the war of 1914-1918, had ceased to be under the sovereignty of the States which formerly governed them, and which were inhabited by peoples not yet able to assume a full measure of self-government, two principles were to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form "a

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[17] International Court of Justice, "Case Summaries: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971" at <http:www.icj-cij.org/icjwww/idecisions/isummaries/inamsummary710621.htm>, (accessed 6 August, 2001)

sacred trust of civilization."[18] In order to give practical efforts to these principles, an international regime, the Mandates System, was created by Article 22, whereby a scheme of tutelage was established for these peoples, the administration and exercise of which was to be entrusted to certain advanced nations on behalf of the League of Nations.[19] The ICJ analysed the Mandate for South West Africa and found that the obligations in Articles 2 to 5 in conjunction with the general duties under Article 22 of the Covenant of the League of Nations, required South Africa to fulfill its obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants, particularly in relation to the issues of slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, freedom of conscience and religion.[20] The Court concluded that these obligations represented the very essence of the sacred trust of civilization, and that since their *raison d'etre* and original object remained, their fulfillment did not depend on the existence of the League.

In its reasoning, the Court never entertained the possibility that the Mandates System and the International Trusteeship System were unacceptable deviations from the vision of an international community of sovereign and co-equal States. The Court's failure to take note of this is indicative of its ability to reconcile the ideology of Chapter XII and Article 22 with other fundamental principles of the international legal order, such a sovereign equality. This reconciliation is so natural, that it did not even require verbalization. The Court never concerned itself with the very legitimacy of the Mandates and International Trusteeship Systems; much of the substance of the Court's opinion was taken up with the question of whether these two systems continued to have application for the territory of South West Africa after the dissolution of the League of Nations. In

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[18] ICJ quoted in John Dugard, ed., *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (Berkely: The University of California Press, 1973) at 132.
[19] *Ibid.*
[20] *Ibid.* at 133.

answering this question, the Court simply took judicial notice of the fact that the Mandates and International Trusteeship Systems existed as organic parts of post-WW II international life. Thus, by default, the ICJ accepted that the international community, formally constituted by the members of the UN, also included in its folds dependent territories which, because of their inability to govern themselves, required the international intervention and supervision in the form of Article 22 and Chapter XII so that they may be adequately prepared for their eventual entrance into the international community.

In its 1962 judgement the Court once again briefly recalled the origin, nature and characteristics of the Mandates System. It observed that the essential principles of the Mandates System consisted chiefly of the recognition of the peoples of underdeveloped territories, the established of a regime of tutelage for such people under an advanced nation, and the recognition of 'a sacred trust of civilization' laid upon the League as an organized international community and upon its Member States.[21] The Court spent some time focusing on the purposes of the Mandates System and found them to be legitimate. For example, Judge Bustamante wrote in a separate opinion: "[The purposes behind the Mandates System] are the well-being and development of the mandated peoples, so as to lead them on to higher stages of civilization and to political independence. These purposes are sought to be obtained through a complex legal system, which has fairly close similarities- in the views of writers- with the legal concepts of guardianship, trust and mandate in private law, and with the protectorate in public law."[22] Once gain the Court was able to reconcile the idea of international tutelage, and the dependent territories it entails- with the dominant narratives on international community without perceiving a fundamental rupture or disruption in such narratives.

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[21] South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) (1962) ICJ Reports 319 at 329.
[22] *Ibid.* at 352.

Thus, the fact that certain territories are, due to their supposed partial incapacity, subject to the protection by the 'civilized' States assembled in the League of Nations or UN- which in turn represent the international community- did not pose a jurisprudential issue for the Court. On the contrary, the Court accepted that the Mandates System and later the International Trusteeship System were essential vehicles for the promotion of the material and moral well-being and social progress of the inhabitants of the territories "not yet able to stand by themselves under the strenuous conditions of the modern world". They were integral in "promot[ing] the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence." The ultimate objective and declared purpose of the legal provisions in Article 22 and Chapter XII –the eventual self-determination and independence of the peoples in dependent territories- was, therefore, sufficient reason for the Court to accept the legitimacy of these provisions. A good example of this reasoning can be found in the dissenting judgement of Judge Tanaka in the 1966 judgement. Judge Tanaka stressed that "the Mandate as a social entity must be maintained and protected."[23]

Arguably, the only discussion of the relationship between the issues raised in the South West Africa cases and the sort of general principles of international law that have been the focal point of this thesis can be found in the separate opinion of Vice-President Ammoun in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970). Jugde Ammoun's opinion is unique in its attempt to link issues like the sovereignty of dependent peoples, the mandate institution, its nature and objects, the right of peoples to self-determination and decolonisation, equality between nations and between individuals and fundamental principles of international law.[24] Judge Ammoun criticises his learned colleagues for not so much overlooking this link, but for "not always [going] far enough

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[23] South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) Second Phase, 1966, at 271.
[24] (1971) ICJ Reports 6 at 67.

in spelling out the legal conclusions to which they point."[25] Like his colleagues, Judge Ammoun accepts that the ultimate justification of the institution of mandate can only be the preparation for sovereign independence of the peoples under the mandate. He concludes that the denial of the Namibian people's right to self-determination was among the key breaches of the Mandate by South Africa.[26] The principle of equality features strongly in Judge Ammoun's opinion; its historical origin is traced, its meaning in the Charter and its place in international and human rights discourse are discussed. The struggle of the Namibian people for self-determination is viewed in terms of the progressive "evolution of international law...through the implementation and extension to the whole world...the principles of equality, liberty and peace in justice which are embodied in the Charter and in the Universal Declaration of Human Rights."[27] Although Judge Ammoun never goes so far as to discuss the relationship between sovereign equality and the very nature of the tutelary-mandate institution, his opinion represents the Court's best effort to establish a conceptual link between these two issues.

To conclude, although the South Africa Cases gave the ICJ ample opportunity to comment on the nature and object of the Mandates System and the International Trusteeship System, the Court failed to link the two systems of international tutelage with other fundamental norms of international law, other than self-determination, which was to be eventually exercised by the peoples under tutelage. The Court did not perceive a conflict or tension between fundamental norms of the international community such as sovereign equality and Article 22 and Chapter XII. Alternatively, if such a conflict was registered, it was considered insignificant or already resolved and, thus, not meriting further elaboration. The provisions in Article 22 and Chapter were seen as organic features of the post WW II international order, ultimately justifiable because they

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[25] *Ibid.*
[26] Ibid. at 81. Judge Ammoun considered apartheid to be the negation of equality, freedom and self-determination.
[27] *Ibid.* at 72.

prepared backward peoples for their entrance into the international community as sovereign entities. In other words, instead of viewing Articles 22 and Chapters XII as the negation of the idea of an international community of sovereign and co-equal states, the ICJ chose to interpret these provisions as aspiring to the realization of such a community because their goal is the eventual exercise of self-determination by hitherto dependent peoples. This way, the Court came to endorse the view that the Mandates and International Trusteeship Systems were justifiable because they were merely a temporary arrangement; they represented a preparatory stage in the ascending of certain entities to full membership in the international community.[28] They are, therefore, acceptable because they represent specific regimes for the eventual achievement of formal political independence.

(2) What did the Court have to say about the rights of entities deemed to lie outside the boundaries of the international community in relation to the issues raised in the cases?

In its submissions, the South African government insisted that the mandate was intended for the primary benefit of the mandatory. In particular, it rejected the argument that Class C mandates -under which South West Africa was placed-, like the other two categories of mandate, was intended to promote the welfare of the mandated people. Instead, it argued that "the Mandate...was not accepted by the peoples of South West Africa, but was imposed upon them without; and the rights which they acquired under the Mandate they acquired as individuals but not as a legally competent community."[29] This

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[28] In a separate opinion, Judge Bustamante wrote the following: "An international Mandate is, by it svery nature, temporary and of indeterminate duration. Its durations is limited by the fulfillment of the essential purpose of the Mandate, that is to say, by the completion of the process of development of the people under tutelage through their acquisition of human and political capacity. It follows that any Mandate agreement remains in force until such time as the people concerned attains the desired degree of structural organization as a nation." 1962 ICJ Reports 319 at 357. The temporary nature of mandate status is also pointed out by Umozurike O. Umozurike in his book "Self-Determination in International Law" (Hamden, Conn.: Archon Books, 1972).

[29] Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans,* (Minneapolis: University of Minnesota, 1996) p156.

aspect of South Africa's submission, which leads to the conclusion that people under mandate had no rights, was firmly rejected by the ICJ, which confirmed that the establishment of a regime of tutelage was intended to benefit of peoples who had not yet attained full self-government. These people had interests of their own and possessed the potential for independent existence upon the attainment of a certain stage of development.[30] In its 1950 advisory opinion, the Court determined that "*[t]he Mandate was created in the interest of the inhabitants of the territory [under mandate]*, and of humanity in general, as an international institution with an international object- a sacred trust of civilization."[31] [emphasis added] In 1962, the Court similarly stated that the Mandates System "is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights."[32]

However, if peoples placed under the Mandates Systems (or the International Trusteeship System) had their own independent interests in the performance of the Mandate (or the Trust), such interest did not give rise to specific legal rights or causes of action on their part. Article 22 and Chapter XII, which set up the supervisory machinery for both systems, elaborately discuss the powers, responsibilities, duties and rights of the Mandatory Power or administrative authority, the Council of League of Nation, the General Assembly and the Trusteeship Council, but contain only the most negligible references to the rights of the people placed under this international tutelary system.[33] Although both legal provisions created justiciable fiduciary duties on the part of the Mandatory Power or administrative authority, these duties could only be enforced by the relevant international supervisory bodies (i.e. the League of Nations, the UN), as the

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[30] Ruth E. Gordon, "Some Legal Problems with Trusteeship" (1995) 28 Cornell Int'l L. J. 301 at 318 (footnotes).
[31] (1950) ICJ Reports 128 at 132.
[32] (1962) ICJ Reports 319 at 329.
[33] Arguably, under the provisions of Article 87 (a) of the UN Charter the population of trust territories could petition the General Assembly and the Trusteeship Council. These bodies *may* accept these petitions and examine them in consultation with the administration authority.

representatives of a universal international community or individual members of these bodies if they demonstrated a sufficient legal interest in the performance of the mandate. The interest of members of the international community in the performance of an international mandate was summarised by Quincy Wright:

> The members of the League are also entitled to invoke the jurisdiction of the Permanent Court of International Justice for any dispute with the mandatory involving the interpretation or application of the mandate which diplomacy fails to settle....Every member of the League can regard its rights as infringed by every violation by the mandatory of its duties under the mandate, even those primarily for the benefit of the natives, and can make representations which not effective will precipitate a dispute referable to the Permanent Court of International Justice if negotiations fails to settle it.[34]

The basic reasoning of this statement still holds, although the ICJ repudiated some aspects of it in its 1962 decision. Drawing a distinction between 'conduct' and 'special interests' provisions[35] and characterizing the dispute before it as relating to the former, the Court considered the issue whether any legal right or interest was vested in members of the League of Nations individually as regards to the 'conduct clauses' of the mandate- i.e. whether the various mandatories had any direct obligation towards the members of the League, as regards the carrying out of the 'conduct' provisions of the mandates. The Court answered this question in the negative.

Regardless of the distinction drawn between 'conduct' and 'special interests', the fact is that members of League of Nations had the right to obtain judicial remedies in relation to violations of specific terms of the Mandate. The same could not be said of the

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[34] Quincy Wright quoted in Richard A. Falk, "The South West Africa Cases: An Appraisal", (1967) 21 International Organization 1 at 5.

[35] The Court defined 'conduct' provisions as defining the mandatory's powers and its obligations in respect of the inhabitants of the territory and towards the League and its organs. "Special interests' arose from those provisions in mandates which conferred certain rights relative to the mandated territory directly upon the members of the League as individual States, or in favour of their nationals. See 1966 ICJ Reports 1 at 20-26.

territories placed under the Mandates System. Under the prevailing principles of international law, they lacked the requisite international legal personality with which to contest their treatment and allege any violation of the Mandate. Consequently, the ICJ was not an accessible forum for the people of Namibia. The Statute of the International Court is directly implicated in the perpetuation of the dominant narrative that the international community is a community of States. By way of Article 34 ("Only States may be parties in cases before the Court"), the ICJ reflects the statist bias of the international system. The effect of Article 34 is that the population of Namibia did not have the option of applying to the ICJ. Grovogui puts it simply: "Because Namibia was not a state, it could not directly to the court....Since the statist bias prevented stateless communities from applying to the court, Liberia and Ethiopia stepped in."[36] Thus, although Namibians were the most affected by South Africa's failure to fulfil its obligations in respect of the administration of their territory and ensure their moral and material well-being and security, they had no legal grounds upon which to allege a breach of the mandate. The position of the Namibian people as outsiders in relation to the international community is one which deprived them of the necessary legal tools with which to voice their concerns, specifically in relation to the legal forum that is the ICJ. Their voice lacked the requisite form (i.e. it did not emanate from an entity that is a State) to be heard; only full-fledged members of the international community can seek remedies for breaches from other members of the international community, even if these breaches are primarily committed against entities that supposedly lie outside the international community. In other words, prior to the acquisition of the legal and factual indica of statehood, the Namibian people existed outside the sphere of legal rights because only States –entities which had already gained status within the international community- could claim rights under international law. They were free to assert their claims in

[36] Grovogui,*supra* note 29 p156, 157.

morality or politics, but not law. The latter was the exclusive prerogative of States; only States could be the legitimate bearers of sovereign rights.

(3) What did the Court have to say about the international status of entities that lie beyond the boundaries of the international community and how is such a status compatible with the liberal vision of international society as a community of sovereign and co-equal States?

The juridical status of territories under mandate was a matter of jurisprudential debate long before the ICJ made its judicial pronouncements of the subject matter. John Dugard lists at least eight different positions in the juristic discussion about the precise international status of mandated territories:

> Some writers found that sovereignty resided in the mandatory; others in the mandatory *pro tem*; yet others in the mandatory acting with the consent of the League Council. Another school favoured the view that sovereignty vested in the Principal Allied and Associated Powers. The League of Nations was put forward by other jurists but was decisively rejected by the Appellate Division of the Union in *R v Christian*. A variation of the latter thesis was that sovereignty vested in the League but was exercised by the mandatory. Finally, there was the claim that sovereignty resided in the inhabitants of the mandated territory, but was temporary in suspense. Quite another type of approach was followed by those considered that nothing was to be gained by trying to apply the concept of sovereignty to the juridical status of a mandated territory, which was something *sui generis*.[37]

The ICJ entered the debate regarding the juridical status of mandated territories in its 1950 and 1972 advisory opinions. The opinions of Judges McNair and Ammoun are of particular relevance and contain a number of interesting observations on the subject.

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[37] Dugard, *supra* note 18 at 153.

Judge McNair's opinion is notable for one basic argument: that there are situations, in which sovereignty -ordinary the essential basis of international law- becomes an inappropriate conceptual framework. In these situations sovereignty is temporarily suspended, dislocated or extinguished. According to McNair, the above reasoning is applicable to the mandates and trusteeship systems:

> The Mandates System (and the 'corresponding principles' in the [UN] Trusteeship System) is a new institution- a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other- a new species of government, which does not fit into the old conception of sovereignty is alien to it. *The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandates Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the cases of some of the Mandates, sovereignty will revive and vest in the new State.*[38] [emphasis added]

McNair compared the temporarily suspended sovereignty of mandated territories to the common law institution of the trust, "whereby the property of (and sometimes the persons) of those who are not *sui juris*...can be entrusted to some responsible person as a *tuteur* or *curateur*,"[39] In the common law trust, the trustee "is not in the position of the normal complete owner", but must "carry out...the mission confided to him for the benefit of some other person."[40] Similarly, under the Mandates System, the principle of 'sacred trust' dictates that the mandate be performed for the benefit of dependent peoples, their material and moral well-being and social progress. So, in both common law and the Mandates System (as well as the analogous UN trusteeship system), power is transferred on a trustee for the benefit of someone else with a supervisory authority vested in the courts.

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[38] McNair quoted in Nathaniel Berman, "Sovereignty in Abeyance: Self-Determination and International Law", (1998) 1 Wis. Int'l L. J. 51 at 77.
[39] *Ibid.* at 77-78.
[40] *Ibid.* at 78.

In the 1971 advisory opinion, Judge Ammoun made the argument that in both colonial and mandate paradigms, sovereignty resided in the people who were deprived of it by domination and tutelage. With respect to the matter before the court, he stated that Nambia had always possessed a legal personality and national sovereignty, but merely lacked the exercise thereof: "Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore, did not cease to belong to the people subject to mandate. *It had simply, for a time, been rendered inarticulate and deprived of freedom of expression.*"[41] [emphasis added] Judge Ammoun's reasoning is affirmed by the UN, which stated that nations which have not yet reached self-government where 'incomplete States' which, "while possessing the element of populations and territory lack only government or, in other words, the capacity of self-determination and self rule. For that reason, possession of their territory is the inalienable right of the non-self-governing peoples and never of the administrators, whose only power over such territory can be compared with the powers under civil law of a guardian over a ward. We can no more speak of the sovereignty of an administering Power over a non-self-governing territory than we can speak of a guardian's ownership of his ward's property."[42]

The opinions of Judge McNair and Judge Ammoun are both characterized by the belief that sovereignty is temporarily dislocated in the territories under mandate or trust. For Judge Ammoun sovereignty resides in a people who are temporarily deprived of its exercise by tutelage, while Judge McNair argues that sovereignty is suspended, to be revived when the territory under mandate or trust is recognized as independent. Whether sovereignty is latent, in abeyance, or the people are denied of its exercise, the imposition of a mandate or trust means that sovereignty is denied, even if only temporarily.[43]

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[41] (1971) ICJ Reports 6 at 56.
[42] See U.N. Doc. A/PV.485, at 146 (1954).
[43] Gordon, *supra* note 30, at 343.

It is this theme of temporality that is of central interest to this thesis, signifying as it does a suspension or rupture in the narrative of international community. International law, which ordinarily relies on the idea of sovereignty as its ultimate basis, suddenly can do without sovereignty as the basis for the legal representation of people and territory within the international community when it comes to the mandated or trust territories.[44] Berman notes that when it comes to the Mandates and Trusteeship System, the 'normal' rules of international law (i.e. sovereignty) are suspended and a different kind of international legal jurisdiction comes into existence.[45] Berman analyses the Mandates and Trusteeship Systems in terms of a crisis of ordinary international law, which leads to a situation in which the essential basis of international law must be sought elsewhere than in sovereignty: "In normal times, international law finds its justification, its 'essential basis', in the safeguarding of sovereignty; in extraordinary times, it grounds itself in the transformations that occur during the suspension of sovereignty."[46] Berman is correct in noting that this suspension is only temporary because the ultimate goal is the restoration a 'normal' situation, whereby the 'complementarity of law and sovereignty' is re-established. In other words, the extraordinary circumstances that arise because of the imposition of a trust or mandate, while leading to a suspension of the established complementarity of law and sovereignty, remain teleologically directed towards the reconstruction of such a complementarity. [47] Berman's characterization of the situation is persuasive in view of the fact that the Mandates and International Trusteeship Systems, while representing the negation of sovereignty, do indeed claim to aim for the eventual restoration of sovereignty so as to enable dependent entities to join the international community as full members.

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[44] Berman, *supra* note 38 at 78.
[45] *Ibid.* at 74.
[46] *Ibid.*
[47] Ibid. at 75.

It is unclear how sovereignty is revived or restored so that the inhabitants of mandated or trust territories can exercise it and become full subjects of international law. ICJ jurisprudence seems to suggest that somehow in the process of the tutelary obligations under Article 22 and Chapter XII, sovereignty is given full expression. In other words, there is something in the tutelary process that restores sovereignty, presumably through the promotion of "the political, economic, social, and educational development" of the people under mandate or trust. Interestingly, this means that the concept of sovereignty has political, economic, social and educational components.

Anghie argues that the idea and goal of *creating* sovereignty in a territory under mandate or trust or *bestowing* a legal status on a territory for the purposes of preparing that territory for entry into international society, represents international law at its most aspirational moment: "Far from being dictated to and ruled by sovereignty as exercised by States, it set about the divine task, through international institutions, of creating it."[48] Apart from being paternalistic, the claim that the sovereignty of territories under trust or mandate is revived through international tutelage can also be viewed as an instance of constitutional violence. The use of the term 'sovereignty in abeyance' empowers international law to administer so-called dependent territories and dispense rights and duties to mandatory and administering powers without regard for the sovereignty of the territory in question.[49] In this way, it gives rise to and sanctions a situation where the foundational principles of the international legal order- sovereign equality, independence, self-government, non-interference- are temporarily suspended, deemed inapplicable to people who supposedly require international governance before they can enter international society.

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[48] Antony Anghie, " 'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case" (1993) 34 Harv. Int'l L. J. 445 at 495.
[49] Berman, *supra* note 38, at 78.

Conclusion

To conclude, in the South West Africa cases the ICJ made a number of observations about the nature and objective of the Mandates and International Trusteeship Systems, the interest of the international community therein and the international legal personality of territories held in trust or under mandate. In doing so, it implicated itself in the narration of international community and perpetuated the fiction that international society is a community of sovereign and equal members. The Court failed to entertain the possibility that the philosophy behind Article 22 of the Covenant of the League of Nations and Chapter XII of the UN Charter may be incompatible with the dominant liberal vision of international community and inconsistent with foundational principles of the international legal order, such as sovereign equality. Instead, the Court characterized Article 22 and Chapter XII as giving rise to merely temporary dislocations, which were reasonable and justifiable because they ultimately lead to the restoration of sovereignty and the entry of dependent peoples into the international community. The possibility that Articles 22 and Chapter XII could be instances of constitutional violence, a violence that disenfranchises so-called outsiders and excludes their claims, does not in any way constitute an important element of the Court's jurisprudence.

It should be noted, however, that the ICJ's reliance on legal fictions such as 'sovereignty in abeyance' is not without any redeeming features. Berman, for example, sees in the suspension of ordinary international law in the mandate or trust paradigm a novel opportunity for the conception of a new international law, a type of international law which need not rely on sovereignty as its essential basis. Berman writes that "[w]ith the rupture of the complementarity of law and fact, the foundations of international law become a matter for discussion...What is at stake here are alternative forms and bases of international law, not merely opposing jurisdictional positions."[50] He concludes that

[50] *Ibid.* at 75.

"[t]he moment in which sovereignty reposes in abeyance is the moment of opportunity for forms of legal creativity, forms whose full potential we perhaps cannot yet fully anticipate."[51] Berman's assertion is important because it alludes to the possibility that the dislocation that trust and mandated territories produce in the dominant narrative of international community- a narrative that ordinarily relies on the complementarity of law and sovereignty- is not merely a temporary or transitional phenomenon, as the ICJ would have us believe. Instead indicative of a profound rupture in the international order of things. In other words, the supposedly temporary dislocation of sovereignty poses a challenge to the normative character of international law and the very foundation of the international community.

[51] *Ibid.* at 105.

CONCLUSION

> *Law in general, and international law in particular, operate not only in the realm of state systems, but also in the realm of the imagination, where meanings are created and where we are invited to see ourselves and the world in certain ways.*
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> *--Anne Orford*[1]

The Concept of International Community

The dream of community is a natural one. It is a dream that expresses our yearning for mutual identification and mutual affirmation, social closeness and comfort, unity and wholeness.[2] The idea of community negates our feelings of alienation and lonely individualism and creates a solidarity and bond between strangers. However, the yearning for community, while understandable, is also politically problematic "because those motivated by it will tend to suppress differences among themselves or implicitly exclude from their political groups persons with whom they do not identify."[3] Ironically, the quest for community, which aims to create closeness, generates borders, dichotomies, and modes of exclusion that suppress difference or heterogeneity. As Marion Young puts it: "The desire to bring things in unity generates a logic of hierarchical opposition. Any move to define an identity, a closed totality, always depends on excluding some elements, separating the pure from the impure."[4]

The above-mentioned dynamics of community are not context specific, but point to a universal process. The longing for community cannot be said to be exclusively, or even predominantly, bound to the national context; the desire for closeness, connection

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[1] Anne Orford, "Muscular Humanitarianism: Reading the Narratives of the New Interventionism" (1999) 4 European Journal of International Law 679 at 689.
[2] Iris Marion Young, "The Ideal of Community and the Politics of Difference" in Linda J. Nicholson, ed., "Feminism/Postmodernism" (London: Routledge, 1990) at 300, 301.
[3] *Ibid.* at 300.
[4] Ibid. at 304.

and unity exists at multiple levels, including the international. On this level, we have a community of sovereign entities, States, which have come together in an institutional framework to pursue common goals and purposes, which include the promotion of international peace and security, the development friendly relations among States and the protection of human rights.[5] The nature and structure of the international community is complex and defies a simplistic characterization. Sometimes it gives the appearance of being able to fit into established intellectual frameworks and conform to our orthodox understanding of what a community is. For example, just like any other community, the international community erects boundaries which either exclude entities deemed to be unworthy of membership, or give rise to admissions policies. These in turn first screen newcomers and then subsequently transform or normalize them so that they may 'fit' into the community. Article 4 of the UN Charter is an example of this process. However, other times it seems that to truly capture the idea of international community, we need to rethink or reject the manner in which we have theorized about communities. It may even be necessary to conceive of a new dialectic conception of community, one that abandons the old view of things and relishes the possibility of imagining and constructing community using new methods and conceptual tools. This is the simultaneous challenge and promise of the concept of international community: by challenging and departing from orthodox articulations of community, it provides us with new ways of building and being in a community. There are lessons to be learned from the idea of an international community and it is up to us identify and examine these lessons and find an appropriate application for them.

The first lesson relates to the liberal dichotomisation of the concept of community, on the one hand, and individualism, on the other hand, as if the two were mutually exclusive. Yet, international community has not obliterated the classic, bilateralist system of inter-statal relations and such obliteration is not necessary: there is

[5] See Article 1, UN Charter.

no irreconcilable conceptual contradiction between the concept of community and individualism or the sovereign self. In fact, the idea of international community necessarily involves a recognition that such a community co-exists with other modes of international relations, such as bilateral inter-state relations. The UN Charter, the blueprint of the international community, recognises and protects this view of things in Articles 2(1) and 2(7). Thus, the concept of international community does not require the annihilation of State sovereignty, merely its circumscription. This has important implications for those who see a fundamental contradiction between the longing and construction of community and sovereignty- of the state or of the individual. The concept of international community can be used to illustrate that communal life may co-exist with individual autonomy.

The second lesson relates to the foundation of international community. Orthodox theories on the concept of community require things like a common history, shared experience, comradeship, deep feelings of attachment between members or a convergence of values. Scholarship on the nation, one of the most common forms of community in modernity, abound with references to the images and symbols around which members of community assemble to form and then celebrate a shared identity; these symbols and images include national flags, hymns, language, poetry, music, literature, and dress to name but a few. The symbols are a source of pride but frequently produce a sacrificial love in the hearts of community members for their group. The concept of international community challenges the notion that the formation and perpetuation of community necessarily requires a deep emotive connection between community members and asks of us that we consider an alternative basis of community: *rationality* instead of *emotion*, *law* instead of *love*. Habermas describes this basis as one of civic solidarity: "With this solidarity, the bonds that had formed between members of a concrete community on the basis of personal relationships now change into new, more abstract form. While remaining strangers to one another, members of the same 'nation' feel responsible enough

for another that they are prepared to make 'sacrifices'- as in military service or the burden of redistributive taxation."[6] For Habermas, civic processes like the law are capable of acting as a force of social integration. In fact, these civic processes may be a preferable foundation of community because they can function as " a sort of emergency backup system for maintaining the integrity of a functionally differentiated society, in cases where the multiplicity of interests, cultural forms of life, or worldviews overwhelms the supposedly natural substrate of a community of shared descent."[7] Community in Habermas' philosophy is, therefore, premised on an abstract and legally constructed solidarity that reproduces itself through political participation. The idea of political participation is central and Habermas himself seems to believe that the democratic process is integral to maintaining civic solidarity. Only when people feel that they are able to participate in the shaping of their community can they feel a civic and abstract loyalty towards their fellow members. When they feel excluded and marginalized, their sense of loyalty –emotive or abstract- is severely diminished. The possibility of an alternative way of relating to our communities, one which may avoid the pitfalls of extreme nationalism, should be a welcome development.

The fact that the international community is grounded in law ought not lead to the assumption that the international is a place completely devoid of feeling or passion. The foundation of the international community may be a legal text (i.e. the UN Charter), but within the structures of this community, members are not immune to the emotive appeal of certain narratives about their community. Anne Orford illustrates this in a recent article on international intervention narratives, which, according to her, "operate not only, or even principally, in the realm of state systems, rationality and facts, but also in the realm

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[6] Jurgen Habermas, "The Postcolonial Costellation and the Future of Democracy" in Jurgen Habermas, "The Postcolonial Constellation- Political Essays" (translated and edited by Max Pensky) (Cambridge: Polity Press, 2001) at 65. It could be argued that on an international level, the willingness of members to make sacrifices for their fellow members can be seen in their payment of money to the UN and their willingness to participate in international peace-keeping and peace-enforcement missions.

[7] *Ibid.* at 76.

of identification, imagination, subjectivity and emotion."[8] Orford defines intervention narratives as the sort of stories that justify or legitimize the international use of force in order to put an end to such horrors as genocide and ethnic cleansing. In these narratives, the international community appears as the guarantor of progressive core values such as peace, security, human rights, justice and freedom and the reader is invited to identify with these values and feel good about him/herself. Orford writes:

> Intervention stories invite the reader to identify with a central figure with whom the qualities of agency and potency are associated. The characters given agency, and with whom identification is invited, include the UN, the Security Council, the 'international community', NATO and the US. Those largely interchangeable characters are portrayed as the heroic agents of progress, democratic values, peace, and security, who shape target states through their interventions. The images of new threats of violence and instability serve to announce the attractiveness of such heroes as guarantors of stability, bearers of democracy, and protectors of human rights and of the oppressed.[9]

Orford concludes that intervention stories are 'heroic narratives', which enable readers to experience 'a pleasurable sense of expanded freedom to be and act in the world' by inviting them to identify with the international community acting in the role of a 'humanitarian knight in shining armour'.[10] From Orford's analysis, it becomes clear that while the *form* of the international community may be law, its *content* or *substance* is still grounded in emotion. There is no denying that the vision of blue helmets- international peace-keepers or enforcers- carrying the flag of the UN and risking their lives to end human rights abuses in a world of 'racist and ruthless dictators, tribalism, ethnic tension, civil war and religious fundamentalism' has a strong emotive appeal for many people. Their sense of self as members of a community that is benevolent and cares about the

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[8] Orford, *supra* note 1 at 683.
[9] *Ibid.* at 692.
[10] *Ibid.* at 695.

plight of their fellow human beings and international law and morality is affirmed. In fact, so strong is the sense of pride afforded by this vision that the violence and injustice committed in the name of international interventions is ignored or at least thought of as ultimately justifiable as acceptable means to achieve a noble end.

Decolonisation and International Community

The objective of this thesis was to examine the relationship between decolonisation and the construction of international community. The context of decolonisation was chosen because it represents a moment in which the boundaries of the international community were radically altered, producing what some critics at the time called a crisis in the established order of things; others saw it as a unique opportunity to re-imagine the international community. Whatever the characterization, the entry of newly independent States into the international community with the power for the first time to interact with other entities and voice their concerns on the basis of the principle of sovereign equality, created a discursive space from which new ideas about the nature and structure of the international community could be articulated. The new members used their new equal status to contest the old narrative of international community, which had asserted that international society consisted of sovereign and co-equal States bound by rules of international law to which they had consented. The new narrative told by the newly admitted members challenged key elements of the old narrative. First, it revealed how certain entities had been forcibly drawn into the international system through conquest and colonialism and then kept at the margins of this system as dependent territories. As such territories, they had obligations towards the international community (see Article 2(6) and Article 84 of UN Charter) but lacked the requisite legal personality to interact on the basis of equality with other members of the UN. They could not contest their treatment by members of the international community through the usual legal channels and the most foundational constitutional norms of this community were

suspended in relation to them. The political and legal justification for this lies with the principle of sovereignty- the founding principle of international law and the basis of the boundaries erected to define the international community. Once certain entities are defined as lacking sovereignty, the ideology of the international community permits the (temporary) suspension of its core values. This precise moment is an instance of constitutional violence; the legal provisions relating to entities defined as lying outside the international community negate their agency and seek the transformation of their perceived difference before they are assimilated into the international order.

To study the manner in which the construction of international community was imagined in the context of decolonisation generates a number of important insights. First, it becomes apparent that the concept of sovereignty or its most common interpretations need to be modified in view of the sort of demands first articulated during the process of decolonisation. If sovereignty is to continue to operate as the ultimate source of international rights and entitlements and the basis of international citizenship/membership, then some changes must occur. Contemporary international law needs to revise its theory regarding the legal capacity of certain entities beyond a state-centric focus. It may be useful in that regard to examine the cases on South West Africa, which illustrated the problematic status of non-state entities in international law, particularly in terms of their capacity to articulate legal claims. International law must develop a progressive theory of justice that recognises and respects the rights and interests of entities that lie beyond its boundaries according to current criteria of membership. The provisions set out in Chapter XII will not suffice in this regard; they are paternalistic and embody a discursive practice, one that claims to restore sovereignty but is ultimately predicated upon its annihilation.

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