Meta-Civilization

by

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Abstract

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This thesis argues that the role of the United Nations' (UN) human rights regime is to constitute all peoples into a specific universal standard of civilization, which this thesis identifies as the UN *meta-civilization*. Meta-civilization is defined as the UN's colonial and imperial impulse to legislate, implement and enforce human rights in ways which are meant to uniquely 'civilize'. Analysis of the doctrinal and theoretical foundations of international law illustrates the historical and contemporary power dynamics that enable the UN to 'universalize' human rights. As a case in point, the United Nations Alliance of Civilizations (UNAoC) political dialogue highlights the UN's constitution of the meta-civilization. The case study proves the UN meta-civilization is hegemonic in its claim to universality. In the end, this analysis demonstrates that more consideration about the appropriate utility of human rights within the theories and practices of international relations and international law is required.

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Acronyms

AAA - American Anthropological Association

BSSR - Byelorussian Soviet Socialist Republic

CTITF - UN Counter-Terrorism Implementation Task Force

EU - European Union

HLG – United Nations Alliance of Civilizations High Level Group

IPR - Intellectual Property Regime

IR - International Relations

OSCE - Organizations for Security and Cooperation in Europe

UDHR - Universal Declaration of Human Rights

UN – United Nations

UNAoC – United Nations Alliance of Civilizations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

USSR - Union of Soviet Socialist Republics

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Dedication

All of this and everything I do is in honour of my Mom: Aurica Torentia Bondoc. You give me invaluable lessons about what it means to be human.

Chapter 1

Introduction

Introduction

> The human rights regime… is an expression of a discursively constituted world populated by subjects normalized as human rights monitors, human rights violators, and human rights prosecutors."[1] Barnett and Duvall, 2005.

This thesis challenges the universality of human rights in order to prove that more consideration about their utility within international relations and international law is required. Above all, this thesis examines their universality in terms of scope of application, participatory input, normative significance, and practical significance. It also highlights the United Nations' (UN) formal position on human rights by offering the United Nations Alliance of Civilizations (UNAoC) as a case study. In this case, the UNAoC was created in 2005 in order to combat conditions giving rise to terrorism. Specifically, it was built to address cultural tensions said to exist between Muslim peoples and Western states. Here, human rights serve as the political and ethical foundation for the mandate and objectives of the dialogue. As a precondition for participation, the UN argues for unconditional and universal adherence to human rights. This thesis criticizes this precondition for participation and in so doing it illustrates the UN's constitution of the meta-civilization.

The term meta-civilization is defined as an umbrella civilization containing Western ontological, epistemological, and ethical biases, which all peoples are forced to

[1] Michael Barnett and Raymond Duvall, 'Power in International Politics', *International Organization* 59 (2005), Cambridge University Press, pp. 4-5.

embrace. Accordingly, meta-civilization symbolizes both a concept for understanding how the UN human rights regime operates and a descriptor of the way in which the UN implements and promotes human rights. Conceptual analysis of the term "meta-civilization" allows for an exploration of the primary inhibitors to the universality of the UN's human rights regime. It shows that human rights are introduced by the UN as universal norms, but in truth represent a set of Western ideals – born out of Eurocentrism – which do not hold equal providence globally. As a descriptor, it symbolizes the UN's unswerving attempts to universalize human rights through the UNAoC. In this situation, the UN advocates that all human beings adopt *Western civilization as the sole form of international order to which all peoples must adhere*.

To prove the existence of the meta-civilization, this thesis examines the development of international law and the Universal Declaration of Human Rights (UDHR). It shows how specific theories, concepts and doctrines – the theory legal positivism, the concept terra nullius, the protectorate category, and others – solidified European colonial empire during the 18th, 19th, and 20th centuries. These foundations ensured that Indigenous and Third World peoples were not granted international legal personality. Without it, Indigenous and Third World peoples were unable to join the international society of states (also referred to as 'international community' and/or 'international society'). This move facilitated the colonization of Indigenous and Third World peoples in several ways. In particular, it ensured that international law did not recognize Indigenous peoples' inherent right to self-determination. This enabled the dispossession of their ancestral lands. Arguably, the state-centric nature of the international legal framework enabled this history of dispossession, and resulted in the

exclusion of Indigenous and Third World peoples in the formation of not only international law but also the UN human rights regime. Human rights were developed at a time when many peoples were still being subjected to colonial regimes. Consequently, the development of the UDHR lacked universal participatory input, precisely because it involved a small minority of the current UN membership. This lack of input resulted from the colonial nature and imperialist trajectory of international law. For these reasons, human rights symbolize culturally particular views about humanity, peace, freedom from oppression, and so forth.

Elaborating further, this analysis integrates three analytical concepts that assist in demonstrating the limits of human rights. They present ways of describing and characterizing international law. The concepts utilized are: universalism, Eurocentrism and the power/knowledge nexus. These concepts are abstracted from the texts of postcolonial scholars Grovugui (2006), Anghie (2004), Said (1979), Barnett and Duvall (2005), Doty (1996), and Chowdhry and Nair (2004). Universalism is defined as the universal applicability of the UDHR and describes the scope and aspirations of the UDHR. Furthermore, the universality of the UDHR is examined according to factual, normative, and material criteria. This analysis examines the extent to which the UDHR applies to all peoples in terms of its global scope of application, participatory input, normative significance, and practical significance. Eurocentrism is defined as the nature of the UN human rights regime and international law more broadly. It shows that the true nature of human rights and international law is characterized by the historical exclusion of certain peoples, cultures, nations, and societies. Finally, the power/knowledge nexus is

defined as the process whereby knowledge is transformed into laws and mandates with associated regulatory mechanisms and cultural and political objectives.

This thesis sheds light on this process by analyzing the UNAoC political dialogue. As a case in point, it analyzes the role of the UN human rights regime. It focuses on the preconditions for participation and problematizes how human rights take on a fundamental role. This discourse symbolizes the current functionality of the UN's human rights regime: knowledge claims are authorized as universal truths, which the UN is empowered to universalize. This analysis demonstrates that the UNAoC's structure and objectives reinforce the meta-civilization. It therefore questions the ability of the UN to ensure equality amongst its participants.

Thesis Structure

The following Chapter criticizes the universality of human rights. This critique is introduced in the context of the UDHR and its present application within the UNAoC. It provides rhetorical evidence of the UN's attempts to enforce the meta-civilization. For further context, this chapter assesses the War on Terrorism. It pays special attention to the positions of Muslim populations within Western states. This chapter then offers a genesis story of the UDHR that challenges the universal legitimacy of the human rights contained therein. Next, it analyzes the aforementioned three analytical concepts as well as two interdependent debates. It defines these concepts and their utilization for this analysis. It then highlights several ontological concerns surrounding the debate between cultural relativism and universalism as it is captured in the discussion involving Jack Donnelly and Charles Taylor. The chapter examines the manner in which Donnelly and Taylor both argue, albeit in different ways, that the UN's human rights regime represents

"an overlapping consensus" across all peoples, cultures, societies, nations, and states. This argument puts into question the relationship between universality and human rights.

Chapter three examines the doctrinal, categorical, and theoretical foundations of international law. It provides evidence of the Eurocentric origins of international law. In particular, it examines the 'civilizing' purpose of the international legal order. More specifically, it shows that the doctrine governing international legal personality inhibits Indigenous and Third World peoples' equal legal subjectivity under international law. This analysis shows how international law dispossesses Indigenous and Third World peoples of their ancestral lands and rights to self-determination. In this way, it exposes the problematic Western biased analytical foundations of international law, which give it its colonial and imperial inertia. To illustrate, this chapter examines the treatment international law affords to Indigenous peoples and their collective rights to self-determination. This chapter also outlines several theoretical accounts of international law. It examines how each addresses the relationship between international law and international society. It also analyzes how each theory would treat the doctrinal foundations discussed in chapter three. Comparisons are drawn between Natural Law, Southern Theory and Postcolonial Theory, and the theory of legal positivism. This analysis focuses in particular on legal positivism, which is arguably *the* theoretical foundation for exclusion within international law.[2] In the process, it explains exactly how particular theories promote the continuing constitution of the meta-civilization, while others challenge and deconstruct it. Finally, this chapter formally criticizes the UNAoC.

[2] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', *Harvard International Law Journal* v. 40 n.1 (1999), p. 2.

This critique re-introduces the power/knowledge nexus, particularly Roxanne Lynn Doty's theory about "power within discursive centres".[3]

Chapter four concludes this thesis with observations about the merits of 'universal' human rights.

[3] Roxanne Lynn Doty, *Imperial Encounters: the politics of representation in North-South Relations*, University of Minnesota Press 1996, p. 3.

Chapter 2

The Relationship Between Universality and Human Rights

Introduction

This chapter challenges the universality of human rights. Specifically, it problematizes the demand that UNAoC participants give their universal, absolute, and irrefutable observance to the human rights set out in the UDHR. This precondition for participation defines the problem. Two key issues approached in this chapter are the UN's arguments that human rights are universally applicable to all peoples and that the human rights regime is embodied in 'universal' international law. This chapter deconstructs these claims through the following analysis. First, it explores the political tensions that propel the UNAoC dialogue. Second, it outlines the UNAoC's mandate and objectives. Third, it analyzes the UDHR, revealing both its genesis story and the problems associated with its current deployment in contemporary international relations. Fourth, it offers three analytical concepts that further develop the argument that the UNAoC reinforces the constitution of the meta-civilization. The concepts are universalism, Eurocentrism and the power/knowledge nexus. Finally, it offers conclusions about universality as it relates human rights.

Terrorism

The UNAoC has been constructed in order to combat the conditions that give rise to terrorism. This section explores the concept of terrorism and how it propels the dialogue. Historically speaking, the relationship between Europe and peoples following

Islam is fraught with cultural insensitivity. Arguably, this results from a lack of intercultural understanding.[4] As a result, it instigates tenuous struggles between peoples from both broad demographics. Therefore, critics and pundits alike agree that an increase in cross-cultural knowledge may prevent further problematic engagement.[5] This logic underscores the creation of the UNAoC dialogue. By and large, the UNAoC sets out "to bridge the cultural gaps" said to exist between Western states and Muslim populations. It is believed by the proponents of the UNAoC dialogue that these gaps underscore recent acts of terrorism.[6]

However, defining terrorism is very difficult. Simply put, it has over 200 definitions.[7] Generally speaking, it can be defined as an unlawful attack against a group of persons or property with the intention of destabilizing civilians, government, and society, in order to further political, social, cultural, and/or spiritual objectives.[8] It is therefore identifiable, but also very unspecific. However, its definition depends on which objectives one holds to be legitimate and 'worth fighting for'. This is because one's terrorist is another's freedom fighter. Differences in cultural and political beliefs ensure that making the distinction between terrorist and political activist remains the subject of

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[4] United Nations High Level Group Report, June 2006, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

[5] Ibid; Tore Bjorgo, *The Root Causes of Terrorism*, London, New York, Routledge 2005; Timothy M. Savage, 'Europe and Islam: Crescent Waxing, Cultures Clashing', *The Washington Quarterly* 2004, p. 2.; David Wright-Neville, 'Community Policing and Counter-Terrorism: The Australian Experience', *Research Institute for American and European Studies*, Research Paper No. 130, April 2009, p. 6.

[6] The United Nations Alliance of Civilizations (2006) High Level Group Report, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Reports.pdf

[7] Ibid.

[8] Stamos Papastamou, Gerasimos Prodromitis, and Tilemachos Iatridis, 'Perceived Threats To Democracy: An Examination of Political Affiliation and Beliefs about Terrorism, State Control and Human Rights', *Analyses of Social Issues and Public Policy*, Vol. 5, No. 1, 2005, pp. 248.

vast controversy. Nevertheless, this section attempts to reconcile this difficulty and then assess how terrorism gives rise to the UNAoC.

As the majority of the world witnessed, 9/11 was a catalyst for Western states to change their approaches towards defending their citizens from further terrorist acts.[9] The atrocity of 9/11 and the destruction caused by terrorism amongst additional Western and non-Western states left the world feeling vulnerable to further acts.[10] Quickly, Western states strongly denounced terrorist activity of all types.[11] Suddenly, the political tensions said to exist reached their zenith and tragically transformed into one of the major concerns facing the international community.[12] The United States of America, Great Britain, France, Italy, Canada, and Australia capitalized on these concerns. Before long, they spearheaded the UN-sanctioned War on Terrorism.[13]

Since 9/11, Europe experienced tremendous growth in intolerance shown by its citizens towards Muslim peoples, both domestically and abroad. At the same time, Europe has seen its Muslim presence increase. Describing present demographics, Timothy Savage explains that:

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[9] Jonathan I. Charney, 'The Use of Force against Terrorism and International Law', *The American Journal of International Law*, Vol. 95, no. 4, (Oct. 2001), pp. 835-899.

[10] Ibid.

[11] United Nations High Level Group Report, June 2006, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

[12] Ibid.

[13] Joan Fitzpatrick, 'Jurisdiction of Military Commissions and the War against Terrorism', *The American Journal of International Law*, Vol. 96, No. 2 (April 2002), pp. 345-354.

> Few European states have gathered comprehensive data on the number and nature of the Muslim presence within their national borders. A number of states in Europe, notably Belgium, Denmark, France, Greece, Hungary, Italy, Luxembourg, and Spain, actually bar questions on religion in their censuses and other official questionnaires, as does the United States. Thirteen countries still do not recognize Islam as a religion, even though it is at least the second-largest religion in 16 of 37 European countries (including the Baltic states but not including the other former Soviet republics or Turkey). In many countries Muslims are an unrecognized minority, excluded from most minority safeguards and discrimination because they do not fit national definitions of minorities that are based primarily on racial and ethnic criteria. More than 23 million people reside in Europe, comprising nearly five percent of the population… This figure is significantly larger than the 13-18 million typically cited by the media or in academic studies, which are based on data and often incomplete information. When Turkey is included, the figures balloon to 90 million and 15 percent respectively.[14]

Two terms describe the thinking of some Europeans, Islamophobia and xenophobia. Islamophobia describes particular attitudes towards Muslim peoples. Specifically, it "designates the stigmatization of all Muslims, and is defined as a widespread mindset and fearladen discourse in which people make blanket judgments of Islam as the enemy, as the 'other', as a dangerous and unchanged, monolithic bloc that it is the natural subject of well-deserved hostility from Westerners".[15] To conflate matters there is xenophobia.[16] From its Greek origin, xenophobia is defined as the fear (*phobos*) of the strange (*xenos*).[17] Xenophobia describes how an influx of immigrants into Western states such as England, France, Canada, Italy, Spain, and Australia is being met with increasing hostility.[18] This may be due to their race, cultural beliefs, employment needs, usage of national and state/provincial social assistance, or all of the above. The usage of

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[14] Timothy M. Savage, 'Europe and Islam: Crescent Waxing, Cultures Clashing', *The Washington Quarterly* 2004, p. 2.

[15] Jose Petro Zuquete, Jose Petro, 'The European extreme-right and Islam: New Directions?", *Journal of Political Ideologies*, October 23, 2010, p. 4.

[16] Victoria Springer and Barbara Larsen, 'The Phenomena of Xenophobic Violence: A Historical and Social Psychological Review of America in the Wake of Terror', *The Journal of the Institute of Justice and International Studies*, Vol. 8, 2008, p.1

[17] Sara De Master and Michael K. Le Roy, 'Xenophobia and the European Union', *Comparative Politics*, Vol. 32, No. 4, June 2000, p. 425.

[18] David Wright-Neville, 'Community Policing and Counter-Terrorism: The Australian Experience', *Research Institute for American and European Studies*, Research Paper No. 130, April 2009, p. 6

terrorism within Western states already struggling with the pressures of becoming multicultural has strengthened this opinion.[19] Paradoxically, terrorism is said to exacerbate the tensions that underscore its deployment.

Not surprisingly, far-right wing [extremist?] political parties endorsing xenophobic views have gained popularity.[20] They have capitalized on the idea that Muslim immigrants within Europe constitute a societal threat.[21] Accordingly, they view immigration as destabilizing to the social fabric of well-established national cultures and identities.[22] Taking this argument one step further, Tariq Modood argues that within Europe there has been "widespread questioning of whether Muslims can be and are willing to be integrated into European society and its political values – in particular, whether Muslims are committed to what are taken to be the core European values of freedom, tolerance, democracy, sexual equality and secularism".[23] Not coincidentally, all of these values are defined as human rights within the UDHR. According to Savage, Europe must reshape these political dynamics to better respect its Muslim citizens and inhabitants. Otherwise, further ignorance may force "increased social strife, national entrenchment, and even civil conflict domestically but could also succumb to a

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[19] Ibid.; Evelien Brouwer, 'Immigration, Asylum and Terrorism: A Changing Dynamic, Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09', *European Journal of Migration and Law* no. 4, 2003, pp. 399-424; United Nations High Level Group Report, June 2006, p. 16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

[20] Stamos Papastamou, Gerasimos Prodromitis, and Tilemachos Iatridis, 'Perceived Threats To Democracy: An Examination of Political Affiliation and Beliefs about Terrorism, State Control and Human Rights', *Analyses of Social Issues and Public Policy*, Vol. 5, No. 1, 2005, pp. 251-252.

[21] Ibid.

[22] David Wright-Neville, 'Community Policing and Counter-Terrorism: The Australian Experience', p. 6; Victoria Springer and Barbara Larsen, 'The Phenomena of Xenophobic Violence: A Historical and Social Psychological Review of America in the Wake of Terror', p.1

[23] Tariq Modood, 'British Muslim Perspectives on Multiculturalism', *Theory, Culture &Society* Vol. 24 (2007), pp. 187-213.

'Fortress Europe' posture and decline on the international stage".[24] Though these implications have yet to be fully realized, their full realization is regarded by some to be inevitable.[25]

All in all, European national self-determination emboldens the threat of immigration. This perceived threat colours the legal and practical policies of democratic political parties. National and extremely nationalist political parties such as the British National Party, the American Republican Party, the Canadian Conservative Party, Le Front National (France), the Australian Conservative Party, and Lega Nord (Italy) further capitalize on these growing tensions. In this manner, they justify generating nationalist fervour and social pride through blatant acts of discrimination.[26] Zuhal Yesilyurt Gunduz argues that these parties' ideological topics can be summarized as follows:

- (Ethnic) Nationalism: favouring a strong state (including state suppression, militarism) with its dominant ethnic community.
- Exclusionism: dividing between the dominant ethnic or religious group, seen as "us" and other groups, excluded as "them". Along comes racism and anti-Semitism.
- Xenophobia: fear, hatred or aggression towards foreigners, immigrants, Muslims, etc.
- Anti-democratic character: hostility to pluralist democracy and its main values.
- Support for repressive state power, elitism, intolerance, authoritarianism.
- Anti-party attitudes: misuse of prevalent disillusionment with politics to initiate assaults on middle-of-the-road political parties.
- Traditional values: promoting traditional moral and religious values, misusing these to promote a repercussion against modern, pluralist society.
- Socio-economic policies stressing "welfare chauvinism"—the idea that employment and social welfare should be restricted for people of the dominant ethnic group ("us").[27]

These parties focus on propagandizing the urban European/Western national male 'working classes'. They claim that Muslim immigration within their region contributes to

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[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Zuhal Yesilyurt Gunduz, 'The European Union at 50 – Xenophobia, Islamophobia and the Rise of the Radical Right', *Journal of Muslim Minority Affairs*, May 06, 2010, pp. 6-7.

their lowly prospects for employment and lifestyle security.[28] Their supporters show that "Frustration and fury are centred on those who do not belong to 'us', that is Muslims, immigrants, asylum seekers or all those who look, live, and believe differently from 'us'".[29] This racist ideology mainly seduces the people facing material insecurity. These "others" are seen and shown as scapegoats for all of their problems".[30] Giving examples of Islamaphobia, xenophobia, and the implications Muslim peoples face, Modood argues that:

> Even before September 11 and its aftermath, it was widely becoming acknowledged that, of all groups, Asians face the greatest hostility, and many Asians themselves feel that this is because of hostility directed specifically at Muslims. In the summer of 2001 the racist British National Party began to explicitly distinguish between good, law-abiding Asians and Asian Muslims. Much low-level harassment (abuse, spitting, name calling, pulling off a headscarf and so on) goes unreported, but the number of reported attacks since September 11 was four times higher than usual (in the United States it has increased thirteenfold, including two deaths). [Furthermore,] the extremist French Front National, for example, insisted that the ethics of Islam are incompatible with ideals of the French civilization and that Muslims in France belong to a broader community of believers, who jeopardize France's national security. The radical right Danish People's Party held provocative speeches, accusing Muslims of "undermining democratic values and promoting violence". A fortnight after September 11, Italian prime minister Silvio Berlusconi initiated a debate when he stressed the "superiority of the Western civilization". In Belgium's Flemish region, the Integration Minister stated that mosques will be obliged to meet some criteria in order to receive public funds, like the use of the Dutch language except for when reciting Arabic rituals. While no other religious community was compelled to use the dominant group's language, the Muslim community was. In Greece, for over 20 years Muslim representatives have lobbied for the construction of a mosque in Athens, where over 200,000 Muslims live. Although the Greek government finally agreed to this appeal in 2000, the mosque still awaits to be built. Other examples of Islamophobic rhetoric: British Member of Parliament Winston Churchill (grandson of the former British prime minister with the same name) lamented the "excessive" entry of Muslims into Great Britain. Jean-Marie le Pen, head of the French nationalist Front National, pleaded for a "halt to the Islamization of France". Head of the right-wing German Republikaner Party Franz Schoenhuber stated, "Never will the green flag of Islam fly over Germany". The election slogan of the Denmark Progressive Party demanded: "Denmark Without Muslims".[31]

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[28] Ibid.

[29] Ibid.

[30] Tariq Modood, 'British Muslim Perspectives on Multiculturalism', pp. 187-213.

[31] Ibid.

The War on Terror only reinforces this twisted logic that positions Muslim peoples as the "enemy from within". Moreover, the relationship between xenophobia, Islamophobia and the War on Terrorism continues to be exacerbated as the war drags on, the global economy lags, and the popularity of far-right political parties continues to rise.

Therefore, European states are now dealing with the "Islamic Challenge".[32] This symbolizes the current societal, political, cultural, economic and ethical implications for the collective national identities of European states in light of recent events. To counter this challenge, the EU argues that: "internally, Europe must integrate a ghettoized but rapidly rising Muslim minority that many Europeans view as encroaching upon the collective identity and public values of European society…"; "…[and] externally, Europe needs to find a viable approach to the primarily Muslim-populated volatile states , stretching from Casablanca to Caucasus".[33] The EU's new security strategies "A Secure Europe in a Better World" and the emerging "Wider Europe – New Neighbourhood" both articulate how members of the EU can choose sensible policies to combat the War on Terrorism and provide domestic remedies for these tensions.[34]

These European responses coincide with the UN's denunciations of terrorism.[35] In Resolution 60/288, adopted in November 2006, the United Nations General Assembly created The UN Global Counter-Terrorism Strategy. The Strategy provides another internationally aligned position against terrorism. In this Resolution, the UN formally

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[32] Timothy M. Savage, 'Europe and Islam: Crescent Waxing, Cultures Clashing', p. 1.

[33] Tariq Modood, 'British Muslim Perspectives on Multiculturalism', pp. 187-213.

[34] Timothy M. Savage, 'Europe and Islam: Crescent Waxing, Cultures Clashing', p. 1.

[35] United Nations General Assembly, Resolution 60/288 The Global Counter-Terrorism Strategy. Date last accessed: February 11, 2011. Available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement

declared: "The General Assembly: *Reiterat[es]* its strong condemnation of terrorism in all forms and manifestations, committed by whomever, wherever, and for whatever purposes, as it constitutes one of the most serious threats to international peace and security".[36]

Two measures stand out that link the UN Global Counter-Terrorism Strategy to the creation of the UNAoC. In one section of the Strategy, the UN outlines measures to address the conditions conducive to terrorism.[37] In particular, the second measure supports the creation of the UNAoC dialogue:

> 2. To continue to arrange under the auspices of the United Nations initiatives and programmes to promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs and cultures. In this regard, we welcome the launching by the Secretary-General of the initiative on the Alliance of Civilizations. We also welcome similar initiatives that have been taken in other parts of the world;[38]

Also in the Strategy, the UN outlines measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard. Most notably, the fifth measure suggests that the UN will lead states in capacity building through the institutionalization of a UN Counter-Terrorism Implementation Task Force:

> 5. To welcome the intention of the Secretary-General to institutionalize, within existing resources, the Counter-Terrorism Implementation Task Force within the Secretariat in order to ensure overall coordination and coherence in the counter- terrorism efforts of the United Nations system;[39]

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[36] Ibid.

[37] United Nations General Assembly, Resolution 60/288 The Global Counter-Terrorism Strategy. Date last accessed: February 11, 2011. Available online at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement

[38] Ibid.

[39] Ibid.

Therefore, the UNAoC has been created to address cultural tensions conducive to terrorism and to reinforce the UN's position as leaders in the global fight against terrorism. Section 2.6 exemplifies this position. It states:

> 2.6 Terrorism can never be justified. In order to succeed in enabling international institutions and governments to stop terrorism, we need to address all the conditions conducive to it, recognizing the links between peace, security, social and economic development, and human rights. In this regard, the recently approved UN Global Counter-Terrorism Strategy represents an important landmark.[40]

Furthermore, section 3.1 states:

> 3.11 …Recently, a considerably number of acts of political violence have been committed by radical groups on the fringes of Muslim societies. Because of these actions, Islam is being perceived by some as an inherently violent religion. Assertions to this effect are at best manifestly incorrect and at worst maliciously motivated. They deepen divides and reinforce the dangerous mutual animosity between societies.[41]

Evidently, the UNAoC attempts to build cross-cultural understanding in order to confront these issues. In fact, these fears dominate the logic behind creating the UNAoC.[42] The UNAoC dialogue is an attempt to soothe the Islamophobic and xenophobic needs of Europeans. The following section elaborates upon this requirement whilst highlighting the mandate and objectives of the dialogue.

The United Nations Alliance of Civilizations

As the previous section suggested, the UNAoC is mandated with producing a forum for participants to bridge cultural gaps that supposedly underscore the War on Terrorism. Specifically, it focuses on the tensions between Western states and Muslim

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[40] Ibid.

[41] Ibid.

[42] United Nations High Level Group Report, June 2006, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

populations. This mandate is supported by approximately seventy-five out of a possible 192 members of the UN General Assembly, as well as external international organizations such as the Organizations for Security and Cooperation in Europe (OSCE) and the European Commission.[43]

The UNAoC originated when leadership from Spain and Turkey brought forth their endorsement of these aforementioned objectives to the UN General Assembly in 2005. Their effort was rewarded by the UN supporting their agenda. Again in 2005, after discussions with the two co-sponsors, President of Spain Jose Luis Rodriguez Zapatero and Prime Minister of Turkey Recip Tayyip Erdogan, UN Secretary General Kofi Annan officially nominated the UNAoC High Level Group (HLG) to serve as the primary organizing body for the dialogue.[44] The HLG's members are: Spain, Turkey, Indonesia, Iran, Uruguay, Qatar, the United States, United Kingdom, Russia, South Africa, China, Senegal, Morocco, India, Egypt, Pakistan, Tunisia, and Brazil.[45] UNAoC documents state that the HLG is "composed of twenty prominent leaders in the fields of politics, academia, civil society, international finance, and media from all regions of the world, the High-level Group guides the work of the Alliance of Civilizations".[46] They are mandated with: "assessing the forces that contribute to extremism, and recommending

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[43] Myriam Kaser (2008): 'Civilizations: Alliance or Clash' *International Relations and Security Network*, March 3, 2008. Date last accessed: February 11, 2011. Available online at: http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?id=54175&lng=en

[44] The United Nations – Alliance of Civilizations, ''High Level Group'. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/content/view/126/166/lang.english/

[45] The United Nations – Alliance of Civilizations, 'Member'. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/content/view/160/197/lang.english/

[46] The United Nations – Alliance of Civilizations, ''High Level Group'. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/content/view/126/166/lang.english/

collective action to counter these forces".[47] The HLG's mandate is "supported by a Group of Friends – a community of over 85 [UN] member countries and international organizations and bodies".

Between November 2005 and November 2006, the HLG was "tasked with generating a report analyzing the rise in cross-cultural polarization and extremism and made a set of practical recommendations to counter this phenomenon".[48] The HLG "produced a report which takes a multi-polar approach within which it prioritizes relations between Muslim and Western societies". Therefore, the HLG is a group of twenty who outline guiding principles for the dialogue. In the report they discuss the UNAoC's mandate, objectives, and grounds for participation. They argue for "better cooperation frameworks and partnerships that can be nurtured to achieve the goals of the Alliance".[49] The following official statement articulates the manner in which the report shapes the discursive parameters of the UNAoC dialogue:

> [The High Level Group Report] considers practical steps to strengthen constructive voices and to engage mass media to shape public debates in productive ways. It proposes educational approaches and methods for supporting the mobilization of young people in promoting the values of moderation, cooperation, and the appreciation of diversity. The plan aims to identify systems and strategies for collective action to produce the conditions in which security, stability and development can thrive.[50]

According to the HLG, "The Alliance of Civilizations (UNAoC) aims to improve understanding and cooperative relations among nations and peoples across cultures and religions and, in the process, to help counter the forces that fuel polarization and

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[47] Ibid.

[48] Ibid.

[49] Ibid.

[50] The United Nations Alliance of Civilizations (2006) High Level Group Report, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Reports.pdf

extremism". In order to meet these objectives, the UNAOC is "[w]orking in partnership with governments, international and regional organizations, civil society groups, foundations, and the private sector. [Therefore] the Alliance functions, both globally and within the UN system, as:

a.) A **bridge builder and convener**, connecting people and organizations devoted to promoting trust and understanding between diverse communities, particularly – but not exclusively – between Muslim and Western societies;
b.) A **catalyst and facilitator** helping to give impetus to innovative projects aimed at reducing polarization between nations and cultures through joint pursuits and mutually beneficial partnerships;
c.) An **advocate** for building respect and understanding among cultures and amplifying voices of moderation and reconciliation which help calm cultural and religious tensions between nations and peoples.
d.) A **platform** to **increase visibility**, enhance the work and highlight the profile of initiatives devoted to building bridges between cultures; and
e.) A **resource** providing access to information and materials drawn from successful cooperative initiatives which could, in turn, be used by member states, institutions, organizations, or individuals seeking to initiate similar processes or projects."[51]

However, this political rhetoric is very misleading. Beneath the UNAoC's surface rhetoric, there exist underlying culturally assimilatory goals that require further scrutiny. Three formal statements reproduced below [2.1-2.3] demonstrate the rhetorical manner in which the UNAoC reinforces the constitution of the meta-civilization. These statements outline: the UNAoC's promotion of the political dialogue due to the political reality of terrorism [2.2]; the significance of the UDHR in shaping the parameters of the dialogue [2.1]; and the necessity for all participants to adhere to human rights [2.3].

First, Section 2.2 outlines the primary goal of the UNAoC, to create an exchange of ideas, policies, debate, research, and writing to facilitate bridging cultures. It states:

[51] The United Nations Alliance of Civilizations. Date last accessed: February 11, 2011. Available online at: www.unaoc.org

> 2.2 The need to build bridges between societies to promote dialogue and understanding and to forge the collective political will to address the world's imbalances has never been greater. This urgent task constitutes the *raison d'être* of the Alliance of Civilizations... The Alliance of Civilizations affirms a broad consensus across nations, cultures and religions that all societies are bound together in their humanity and interdependent in their quest for stability, prosperity and peaceful coexistence.[52]

This statement highlights several arguments made by the HLG. The UNAoC functions as a forum to bridge cultural gaps. The act of bridging cultural gaps constitutes the '*raison d'être'* of the UNAoC. Furthermore, resulting from terrorism's nascent political and cultural implications, Islamophobia and xenophobia, this task has never been more important. If proven successful, the UNAoC can serve to increase global peace and prosperity. Finally, the UNAoC position is said to be upheld by a broad consensus across peoples, cultures, nations, and religions all bound together in hopes of achieving the previously mentioned goals. This chapter's section on universalism, particularly normative universalism, will further explore this idea of 'consensus'.

Second, Section 2.1 argues that the UNAoC utilizes the UDHR as a tool to further harmonize relations between peoples of different cultures. It states:

> 2.1 An Alliance of Civilizations must by nature be based on a multi-polar perspective. As such, the High Level Group has been guided in its deliberations by principles which set out the framework for promoting a culture of dialogue and respect among all nations and cultures. The Charter of the United Nations, the Universal Declaration of Human Rights of 1948 which seeks to free humanity of fear and misery, as well as the other fundamental documents on cultural and religious rights are the basic references for these principles...[53]

Here, the HLG argues that their 'consensus' takes into account multi-polar perspectives. In addition, they state that the very structure of the dialogue is underscored by adherence to the UDHR as well as additional declarations of fundamental cultural and religious

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[52] The United Nations Alliance of Civilizations (2006) High Level Group Report, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Reports.pdf

[53] Ibid.

rights. The HLG's usage of the declaration as the basic references for the principles articulated in the HLG Report illustrates the importance placed on human rights. The HLG posits the UDHR as the primary political and ethical foundation for the dialogue. This explains why their proposed discursive structure remains problematic. Tragically, it is centered upon their recommended usage of the UN human rights regime, as will be explained below.

Finally, Section 2.3 of the HLG report defines the scope and applicability of the UDHR. It also offers the rationale behind using human rights in this manner. It states:

> 2.3 A full and consistent adherence to human rights standards forms the foundation for stable societies and peaceful international relations. These rights include the prohibition against physical and mental torture; the right to freedom of religion; and the right to freedom of expression and association. The integrity of these rights rests on their universal and unconditional nature. These rights should therefore be considered inviolable, and all states, international organizations, non-state actors, and individuals, under all circumstances must abide by them.[54]

Here, the HLG argues that human rights are universal. In this instance, the HLG makes several problematic statements about human rights. It argues that human rights form the foundation for global peace and harmony. It also argues that full adherence to human rights forms stable societies and peaceful international relations. Most tellingly, it argues that the integrity of these rights rests on their universal nature and application. This last statement represents the crux of all problems found with the UNAoC and the UN more generally. The universal inviolability of UN human rights regime defines all problems surrounding the UN's constitution of the meta-civilization.

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[54] Ibid.

This thesis argues that this foundation is incredibly problematic, deeply culturally insensitive, and rooted in the legacy of colonization. This problematic history is something which the UN and international law have yet to escape. In this way, analyzing the UNAoC's structure, mandate and objectives provides several reasons for scrutinizing the underlying goals of the dialogue. Exploring this view further, the following section continues to problematize the UNAoC. It offers an account of the origins of the UDHR. This genesis story provides crucial historical context for assessing the universality of human rights.

The Universal Declaration of Human Rights

Despite its current functionality, the UDHR was originally conceived of as an educational tool. It was to be disseminated in schools as a method to promote freedom from all types of oppression.[55] The lesson given from the UDHR was one of profound humanism towards all peoples regardless of their cultural background. After all, the UDHR sets out rights to prevent discrimination based on religion, race, culture, sex, political speech and so forth.

By and large, the UDHR was created in response to the Holocaust. As Johannes Morsink points out, the Declaration would not have survived the drafting stages had the UN delegates, and much of the world, not sought to avoid any recurrences of the atrocities of World War II, specifically, the ones perpetuated by the Nazi Regime.

[55] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent,* University of Pennsylvania Press 1999, p. xiv.

Morsink argues that "for without the shared moral revulsion against that event the Declaration would never have been written".[56]

The call for universal freedoms is said to have begun in the United States when in 1941 during his State of the Union address President Franklin Roosevelt declared the need to protect four essential freedoms: "the freedom of speech and expression, the freedom of worship, the freedom from want, and the freedom from fear".[57] President Roosevelt's declaration was the catalyst for a growing movement that took place during the 1940s.[58] Roosevelt believed protecting these 'universal' rights would create the conditions for peace and therefore would eliminate war.[59] Not surprisingly, "When the drafters of the Universal Declaration wrote in their Preamble that, 'the freedom of speech and belief and freedom from fear and want ha[ve] been proclaimed as the highest aspiration of the common people,' they knowingly paid tribute to this American president and his ideals".[60] Again in 1941, as the human rights mobilization continued to grow, the National Catholic Welfare Conference sent Eleanor Roosevelt a letter requesting that she advocate on behalf of this agenda.[61] In August of the same year, at a Conference in Buenos Aires, the Pope also made the case for human rights.[62] In February 1943 the American Institute of Law produced its own version of an International Bill of Rights,

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[56] Ibid.

[57] Ibid.

[58] Susan E. Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights', *Human Rights Quarterly* Vol. 23, Number 1, 2001, p. 47.

[59] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent*, pp. 1-10.

[60] Ibid.

[61] Ibid.

[62] Ibid.

which turned out to be very influential.[63] By the time the United Nations formed in San Francisco in 1945, there was already enormous pressure for the delegates to the UN to create an international bill of rights to be included alongside the UN Charter.[64] International pressure for the adoption of the UDHR also came from Latin American countries, notably Panama, Cuba, and Chile.[65]

The UN mandated the Economic and Social Council to oversee the development of a Human Rights Commission. At first, in 1946, in the first of seven drafting stages, the UN Nuclear (Preparatory) Committee was tasked with making recommendations for the structuring and mandate of a Human Rights Commission.[66] The Nuclear Committee had with them one of the earliest drafts for an international bill of rights submitted by several Latin American nations.[67] Several recommendations were put forth from the Nuclear Committee to the Economic and Social Council of the UN. Soon the Nuclear Committee claimed that, "while it was in its competence to draft a bill of human rights, it was not as yet in a position to do so, but it would proceed with the preparatory work".[68] They recommended that the Economic and Social Council "should at all times pay due regard to equitable geographical distribution and to personal qualifications of the nominees for service on the Commission".[69]

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[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Ibid.

In the end, the Commission only partially met this requirement. The member states included were: Australia, Belgium, Byelorussian Soviet Socialist Republic (BSSR), Chile, China, Egypt, France, India, Iran, Lebanon, Panama, the Philippine Republic, United Kingdom, United States of America, Union of Soviet Socialist Republics (USSR), Uruguay, and Yugoslavia. Absent from the table were peoples from Africa, Indigenous nations, much of Eastern Europe, the Caribbean, and Eastern, Southern, and South-East Asia.

Lacking universal participatory input, the Commission went ahead drafting the UDHR. In the First Session of the Commission it was stated that, "The Chairman of the Commission on Human Rights, together with the Vice-Chairman and the Rapporteur, undertake, with the assistance of the Secretariat, the task of formulating a preliminary draft international bill of human rights". Soon afterwards, Canadian Professor John P. Humphrey from McGill University was appointed as the Director of the Secretariat's Division on Human Rights. Humphrey was joined by Peng-chun Chang of China and Charles Habib Malik of Lebanon.

Quickly, Humphrey became primarily responsible for drafting the declaration. At this level, Humphrey served as the primary drafter of the UDHR. At the behest of Eleanor Roosevelt, he presented numerous drafts of the UDHR to her for approval prior to submitting them to the rest of the Drafting Committee.[70] In any case, the declaration was written through Humphrey's ontologically biased, humanistic lens. Humphrey also borrowed freely from supporting international bills coming from Latin American states [most notably Panama], the United States of America, and the United Kingdom, and gave

[70] Ibid.

all other 38 members of the UN four opportunities to be included in the drafting process.[71]

All in all, the draft UDHR was presented several times to additional national representatives for review. Any member state of the UN, during the time of drafting the UDHR, was able to propose their own bill of rights for discussion. Morsink notes that, "The following countries did so, and in more than one case found their suggestions hotly debated and incorporated in the final bill: China, United Kingdom, France, Chile, Ecuador, Cuba, Panama, India, and the United States".[72] A second time input was requested from the UN member states on the whole, those who responded were: Egypt, Norway, South Africa [whose government was enforcing the Apartheid regime], Pakistan, Canada [whose relations with Indigenous peoples are widely considered violations of human rights][73], the Netherlands, Australia, the United States, New Zealand, India, Sweden, Brazil, France, and Mexico.[74] What remains clear is that throughout the development of the UDHR, the size of the drafting committee was continually problematized. For example, at one point, the USSR objected to the UDHR being drafted by a "small group of experts" [Eleanor Roosevelt, Chang, Malik, and Humphries].[75] The USSR received support from Canada, Chile, Czechoslovakia, and France. As noted above, the USSR subsequently did not vote in favour of the UDHR. Consequently, the drafting group 'grew' from three members to eight members representing Australia,

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[71] Ibid.

[72] Ibid.

[73] Grand Chief Edward John, 'Survival, Dignity, and Well-being: Implementing the *Declaration* in BC', in Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, ed. Jackie Hartley, First Nations Summit Society 2010, pp. 54-55.

[74] Ibid.

[75] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent*, pp. ix-12.

Chile, China, France, Lebanon, the USSR, the U.K., and the U.S.[76] Altogether eighteen nations comprised the Human Rights Commission and only eight were delegated the task of drafting the UDHR.

However, the UDHR did not achieve its coveted universal status even amongst the drafting committee. During these drafting stages, Humphrey concluded, almost prophetically, that certain philosophical and ontological problems existed between those who were named primary drafters of the Declaration. Describing a meeting with Eleanor Roosevelt, Chang, and Malik, Humphrey wrote that:

> [Peng-chun] Chang [China] and [Charles Habib] Malik [Lebanon] were too far apart in their philosophical approaches to be able to work together on a text. There was a good deal of talk, but we were getting nowhere. Then, after still another cup of tea, Chang suggested that I put my other duties aside for six months and study Chinese philosophy, after which I might be able to prepare a text for the committee. This was his way of saying that Western influences might be too great, and he was looking at Malik as he spoke. He has already, in the Commission, urged the importance of historical perspective. There was some more discussion mainly of a philosophical character, Mrs. Roosevelt saying little and continuing to pour tea.[77]

On December 10, 1948 at the Plenary Session of the Third General Assembly, after the fourth time input was sought from the broader UN delegation, the Declaration was adopted by a vote of 48 to zero and 8 abstentions.[78] Those who abstained were the entire Soviet Bloc – Byelorussia, Czechoslovakia, Poland, Ukraine, The USSR and Yugoslavia – as well as South Africa and Saudi Arabia. Whereas, the following countries supported the adoption of the Declaration: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece,

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[76] Ibid.

[77] Ibid.

[78] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent*, pp. ix-12.

Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay, and Venezuela.

In general, the UN delegates were extremely proud of what they had achieved. They claimed that the UDHR held special normative value because of the geographically-distributed representation of the Human Rights Commission and the Drafting Committee.[79] Malik [Lebanon] argued that this input demonstrated the universal nature, or at the very least the universal spirit of the declaration. He proclaimed "that the present declaration had been drafted on a firm international basis, for the Secretariat's draft was a compilation not only of hundreds of proposals made by governments and private persons but also of the laws and legal findings of all the Member States of the UN".[80] Also on this day, the President of the UN General Assembly, Herbert Evatt of Australia, proclaimed it "was the first occasion on which the organized community of nations had made a declaration of human rights and fundamental freedoms. [The UDHR] document was backed by the body of opinion of the UN as a whole and millions of people, men, women, and children all over the world would turn to it for help, guidance and inspiration".[81] Abdul Rahman Kayala, of Syria, commented as well, proclaiming that "civilization had progressed slowly through centuries of persecution and tyranny, until finally the present declaration had been drawn up".[82] Furthermore, the Declaration was

[79] Ibid.

[80] Ibid.

[81] Ibid.

[82] Ibid.

not "the work of a few representatives in the Assembly or in the Economic and Social Council; it was the achievement of generations of human beings who had worked towards that end. Now at last the peoples of the world would hear it proclaimed their aim had been reached by the United Nations".[83]

Since the adoption of the UDHR, many additional concrete and detailed international instruments have become entrenched with its 'universal' principles and messages. Morsink argues that the UDHR "floats above all local and regional contingencies and is a statement of more or less abstract moral rights and principles, the Declaration [has therefore] served as a midwife in the birth of all these other more concrete and detailed international instruments".[84] Most notably, Hurst Hannum analyzed the extent to which the UDHR has influenced the development of human rights in the international legal system.[85] His analysis opens with the following acknowledgement: "The Universal Declaration of Human Rights has been the foundation of much of the post-1945 codification of human rights and the international legal system is replete with global and regional treaties based, in large measure, on the Declaration".[86] Hannum gives evidence of approximately fifty international human rights instruments "that make reference to, and so can be said to have been inspired by, the Universal Declaration of Human Rights".[87] This supports Mary Ann Glendon's argument that, "The United Nations Universal Declaration of Human Rights of 1948 is the single most

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[83] Ibid.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Hurst Hannum (ed.), *Guide to International Human Rights Practice*, International Human Rights Group, University of Pennsylvania Press 1984, pp. xvi-324.

important reference point for cross-cultural discussion of human freedom and dignity in the world today".[88] In this fashion, the UDHR has achieved a parental, holy written, status as a testament to human rights.[89]

These arguments bestow universality upon the UDHR in terms of its scope of application, participatory input, normative significance, and practical significance. They are based on the notion that the UDHR was drafted by a geo-graphically diverse and cross-culturally sensitive group and as such achieved universal participatory input. Arguably, this input gives human rights their universality.

More than likely however, this Declaration is universal only to the peoples who were involved in drafting its contents. Thus, it is not surprising that issues have arisen post-adoption of the Declaration. They mostly surround cultural differences. This is because many peoples were excluded from developing its contents. Therefore, the above citations from the UN representatives who implemented the Declaration demonstrate that its subsequent universal reach is dangerously overemphasized.

The defining problem surrounding universality is summarized anecdotally. The following clairvoyant warning issued to the UN Human Rights Commission defines the problem. In 1947, the Human Rights Commission received a memorandum from the American Anthropological Association (AAA). The AAA challenged the Human Rights Commission and their universal principles. They claimed that they risked being ethnocentric. They proposed options for the Human Rights Commission to solve the following problem: "How can the proposed Declaration be applicable to all human beings

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[88] Mary Ann Glendon, 'Knowing the Universal Declaration of Human Rights', 73 Notre Dame L. Review, p. 1153 (1997-1998)

[89] Ibid.

and not be a statement of rights conceived only in terms of values prevalent in the countries of Western Europe and America?"[90] In other words, the AAA lays out a profound ontological problem for the Human Rights Commission: How is it possible to conceptualize universal values, if what is right in one society could be considered inhumane in another (either presently on at a different historical juncture)? In response, the AAA gave the following three propositions for the Commission to consider:

> (1) The individual realizes his personality through his culture, hence respect for individual differences entails respect for cultural differences;
> (2) Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered; and
> (3) Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must *to that extent* detract from the applicability of any Declaration of Human Rights to mankind as a whole (emphasis added).

The AAA ended by saying "what is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history".[91] Morsink provides an excellent summary of this exchange. He argues that:

> Depending on how we interpret the phrase "to that extent" in the third proposition, the Commission was either asked to be extremely careful so as not to recommend merely Western values to the rest of the world, or was politely told that it was trying to square the circle and that the job it had been given by the Economic and Social Council could not be done. Given that the AAA also held that no qualitative way of comparing cultures had yet to be found, I believe that they thought the job could not be done.[92]

Critics argue that civil and political rights flow from a particular cultural upbringing.[93] This argument follows from the debate between cultural relativism and

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[90] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent,* University of Pennsylvania Press 1999, p. ix.

[91] Ibid.

[92] Johannes Morsink, *The Universal Declaration of Human Rights: origins, drafting, and intent,* pp. ix-xi.

[93] Reza Afshari, Reza, 'An Essay on Islamic Cultural Relativism in the Discourse on Human Rights', *Human Rights Quarterly*, Vol. 16, no.2 (May 1994), p. 246 [235-276].

universalism, which is also discussed later in the chapter. Rezr Afshari argues that, "Cultural relativists advance divergent positions. They all share the value that human rights do not constitute the cultural ideals adhered to by the world's ethical systems, with the exception to the West".[94] Fernando Teson defines cultural relativism as the "position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society". Therefore, "Culture is the supreme ethical value, more important than any other. Human rights, in particular, should not be promoted if their implementation might result in a change of a particular culture".[95] Even Jack Donnelly refers to this dilemma when he hypothesizes that "as a matter of historical fact, most non-Western cultural and political traditions lack not only the practice of human rights but the very concept. As a matter of historical fact, the concept of human rights is an artefact of Western human civilization".[96] These ontological concerns surrounding culture and universality speak to the problematic nature of creating universal human rights. Their assumed universality despite cultural differences, defines the problem.

With this in mind, Tharoor argues that, "The challenge is to work towards the indigenization of human rights, and their assertion within each country's traditions and history".[97] Sudanese international legal scholar Abdullahi Ahmed An-Na'im comes to

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[94] Fernando R. Teson, "International Human Rights Relativism," *Virginia Journal of International Law*, Vol. 25 (Summer 1985), p. 870.

[95] Ibid.

[96] Jack Donnelly, 'Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights' *The American Political Science Review*, Vol. 76, no. 2, (Jun. 1982), pp. 303-304 [303-316].

[97] Shashi Tharoor, 'Are Human Rights Universal?', *World Policy Journal*, Vol. 16, no.4, (Winter 1999/2000), pp. 1-6

similar conclusions surrounding this crucial ontological problem.[98] Abdullahi Ahmed An-Na'im argues that, "All normative principles… are necessarily based on specific cultural and philosophical assumptions".[99] From this viewpoint he concludes that, "Given the historical context within which the present standards have been formulated, it was unavoidable that they were based on Western cultural and philosophical assumptions". [100] Similarly, Asmarom Legesse, a scholar of human rights within Africa, believes that Western liberal democracies wrote "most of their values and code of ethics into the Universal Declaration."[101] This forces him to conclude that, "The human rights movement faces danger of becoming an instrument of cultural imperialism".[102] Perhaps Nietzsche offers the best articulation of this ontological problem when he states that, "If there is nothing to morality but expressions of will [then] my morality can only be what my will creates. There can be no place for such fictions as natural [human] rights".[103] To be sure, this is only a snapshot. Indeed, there are many critics of the UDHR who characterize human rights as an "ethnocentric" display of "moral chauvinism" that is "bound to fail".[104]

On the other hand, there are those who believe the UDHR represents 'universal' values. For example, Donnelly argues in favour of universality. He states that, "Human rights are conceived as naturally inhering in the human person. They are neither granted

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[98] Ibid.

[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] Ibid.

by the state nor are they the result of one's actions".[105] Emphatically, he asserts that human rights emanate from human nature, thus they are inalienable, precisely because of their natural character.[106] They are human, and to be a human is an inalienable quality. He states that "human rights are conceived as being held primarily in relation to society and particularly in society in the form of the state. As the natural rights of the person, they are seen as logically and morally to take precedence over the rights of the state and the society".[107] For these reasons, human rights are natural and as such override all other rights deriving from political and social systems.[108] Donnelly develops this 'universal logic' in the following statement:

> ...at the minimum what is suggested is that in some moral sense one cannot fully renounce, transfer, or otherwise alienate one's human rights. To do so would be to destroy one's humanity, to de-nature oneself, to become other (less) than a human being and thus it is viewed as a moral responsibility. There is also a strong and quite essential implication that human rights, as an important class of rights, take priority over all but the serious non-rights demands. If rights in general are trumps, human rights are the honor cards in the suit.[109]

Thus, the very nature of human rights presupposes governance as well as cultural differences, precisely because they are interpreted as being vital to the collective interests of not only all members of the international community, but all peoples. In fact, they operate dogmatically as a present day form of natural law. In this manner, human rights influence global affairs far more pervasively than the rest of international law.

This presentation of the origins of the UDHR is merely one, albeit widely cited, account. Developing this point, Susan Waltz argues that no official account exists.

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[105] Ibid.

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] Ibid.

Waltz's analysis of the role of small states provides an enlightening counter-point to this presentation of the UDHR. It explains how small states also influenced the process of structuring the UDHR. For instance, Waltz argues that "a wide range of participants outside of the Western bloc made significant contributions to the construction of the most elemental standard of human rights, and were aware at the time of the significance of their words and deeds".[110] She specifically outlines four principal functions of small states during the drafting stages of the UDHR: as state observers, as active participants, as leaders from their ranks, and as advocates advancing their own interests.[111] Chile, Lebanon, China, Egypt, India, Panama, Philippines, and Uruguay all enjoyed these roles. However, at the time, said countries held relationships with Britain, France and the United States that were characterized by strong vested material and political interests. This is not to say Waltz argues incorrectly. Instead, she does provide useful analytical substance for deconstructing claims that the system of human rights was shaped by Western hegemonic powers. Waltz reinforces the myth that human rights are cross-culturally universal based on the geographical makeup of the Commission. However, she misses the point. She does not account for the exclusion of additional non-Western perspectives, nor does she outline the pervasiveness of Western influences. In this way, her analysis overestimates the influence of non-Westerners.

The problematic history of exclusion and ontological problems made apparent during the drafting of the UDHR demonstrate why there are inherent power imbalances in the subsequent implementation of the human rights framework. Clearly this history of

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[110] Susan E. Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights', *Human Rights Quarterly* Vol. 23, Number 1, 2001, pp. 50-53.

[111] Ibid.

exclusion affects its instrumentality. This begs two questions: who draws the most benefit from the human rights framework? And, which human rights do not apply in certain cultural contexts?

Shari'a law presents an important example of the potential issues surrounding the universal applicability of human rights.[112] This is especially informative based on this chapter's discussion of the War on Terrorism, the UNAoC, and cultural upbringing. In particular, Shari'a law is very influential amongst Muslim individuals, communities, and leadership.[113] Its authority stems from moral and religious teachings as well as official state legal mechanisms.[114] An'Naim explains that, "Shari'a, as a moral and religious body of principles and directives, has had and continues to have a significant impact on the thinking and behaviour of Muslims. It forms an integral part of the socialization of every Muslim child and is one of the primary forces behind the institutions and customs of the vast majority of Muslim societies".[115] The tenets of Shari'a law at times contradict articles of the UDHR suggesting that the UDHR is cross-culturally insensitive.

One potential conflict arises with Article 18 of the UDHR. Article 18 states that, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in

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[112] Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry', *Harvard Human Rights Journal*, Vol. 3 (1990), p. 13-15 [13-52].

[113] Ibid.

[114] Ibid.

[115] Ibid.

teaching, practice, worship and observance".[116] Conversely, the practice of apostasy under Shari'a law demonstrates the importance of questioning the universality of this article. Under the rule of apostasy any Muslim person who denies their faith in Islam, either verbally, explicitly, or implicitly with their behaviour, is said to be guilty of a capital offence. A person said to deny Islam under the law of apostasy may be given the death penalty.[117] In this way, this tenet inhibits the full realization of Articles 18 and 19. Article 19 states that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[118] An'Naim argues that, "The claim that Shari'a is fully consistent with and has always protected human rights is problematic both as a theoretical and practical matter. As a theoretical matter, the concept of human rights as rights to which every human being is entitled by virtue of being was unknown to Islamic jurisprudence or social philosophy until the last few decades and does not exist within Shari'a".[119]

This analysis will not weigh the merits of this debate surrounding whether Shari'a law contradicts these articles. However, it reinforces the conclusion that philosophical, moral, and ontological differences prevent the UDHR from being universal. It also highlights the previously discussed problems associated with the UNAoC, specifically their usage of the UDHR as the political and ethical foundation of their forum. Their

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[116] United Nations, Universal Declaration of Human Rights. Date last accessed February 11, 2011. Available online at: http://www.un.org/en/documents/udhr/index.shtml

[117] Abdullahi Ahmed An-Na'im, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives – A Preliminary Inquiry', *Harvard Human Rights Journal*, Vol. 3 (1990), pp. 13-52.

[118] Ibid.

[119] Ibid.

platform is especially disconcerting when considering the influence of Shari'a Law, the tensions exacerbated by the War on Terrorism, and the mandate and objectives of the dialogue itself, which is to "bridge the cultural gaps that exist between Western states and Muslim populations".[120]

To summarize, all peoples and societies should have enjoyed the opportunity to present their own draft of human rights for discussion. Instead, their exclusion explains why there are crucial omissions within the UDHR. With that said, the author does not hold a universal understanding of the cross-cultural applicability of human rights. No one does. To assume this was the case would prove erroneous. Instead, it is far more important, to focus on the controversy surrounding universality, and focus on the extent to which the UDHR represents this ideal. Arguably, human rights lack universality according to their global scope of application, participatory input, normative significance, and practical significance. Therefore, it is possible to conclude that the lack of universal participatory input prevents the full realization of universal scope of application, normative significance, and practical significance.

Universalism

Universalism refers to the supposed universal applicability of the UDHR. In other words, it describes the scope of the UDHR. It explains the extent to which the UDHR applies to all peoples in terms of its global scope of application, participatory input, normative significance, and practical significance. The universality of the UN human rights regime is questioned according to factual, normative, and material criteria.

[120] The United Nations Alliance of Civilizations (2006) high Level Group Report, pp. 1-16. Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Reports.pdf

Factual criteria are defined by the UN Human Rights Commission's ability to ensure universal participatory input. Normative criteria are defined by the extent to which the UDHR reflects the best interests of all peoples, nations, societies, and cultures. This describes the extent to which the knowledge informing the principles of human rights symbolize 'an overlapping consensus'. 'An overlapping consensus' is defined by John Rawls as "the means to achieving a lasting commitment to established principles among citizens who agree to disagree about many fundamental issues".[121] This begs the question: does international law, more specifically the UN's human rights regime, operate as an inclusionary or exclusionary system of principles, doctrines, objectives, norms, and decision-making procedures? Finally, material criteria are defined by the extent to which the UDHR is utilized to sustain the colonial (and neo-colonial) interests of Western states. Here, the Intellectual Property Regime serves as an example of potential material exploitation of Indigenous and Third World peoples.

As a starting point, the system of international law requires norms of universal application to establish and maintain international order. Hedley Bull's discussion of international order and international society supports this argument.[122] Bull argues that an international society "exists when a group of states conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions".[123] Following this line of thought, Bull defines

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[121] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), especially "Lecture IV: The Idea of an Overlapping Consensus," pp. 133-72.

[122] Hedley Bull, *The Anarchical Society*, Columbia University Press 1977, pp.1-325.

[123] Ibid.

international order as "a pattern of activity that sustains the elementary or primary goals of the society of states, or international society".[124] Accordingly, international order is established and maintained by the minimum conditions for coexistence in a world of cultural pluralism.[125] In this world, the conditions Bull refers to symbolize the primary goals of the international society, which are to preserve the system and the society of states, maintain the independence or external sovereignty of individual states, maintain peace, limit violence, maintain rules of property, and to maintain a society built upon the observance of agreements.[126] Once order has been created, it is maintained by a set of "common interests, common rules and common institutions".[127] These interests, rules and institutions are translated into international law. Moreover, in order to maintain order, the international community must continue to extend their common interests and consensuses to meet additional global demands.[128] In order to continue to meet these demands the conditions conducive to international order must be universal in application. The rules, procedures, decision-making procedures, agreements, and norms that make up international law must therefore become universal in scope and application. Antony Anghie provides the popular logic that underscores the association between international law and the concept of universality. Anghie states that:

[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] Ibid.

[128] Ibid.

> International law is universal. It is a body of law that applies to all states regardless of their specific cultures, belief systems, and political organizations. It is a common set of doctrines that all states use to regulate relations with each other. The association between international law and universalism is so ingrained that pointing to this connection appears tautological. And yet the universality of law is a relatively recent development. It was not until the end of the nineteenth century that a set of doctrines was established as applicable to all states, whether these were in Asia, Africa, or Europe.[129]

Thus, international law presupposes universal scope and applicability. This is precisely because international law requires universal application for its legitimacy. Establishing international law and human rights as universal in application ensures that the international society is built upon agreements, as Bull describes.[130] This means that agreements made between and amongst a plurality of states are consistently observed. Bull argues that order is maintained accordingly. In particular, order is maintained by "a sense of common interests in the elementary goals of social life; rules prescribing behaviour that sustains these goals; and institutions that help to make these rules effective".[131] In order to meet evolving global demands, and to have order and to maintain order, not only international law but also human rights must be created as universals. The international order is therefore built upon a system of universal agreements that represent the limited prospects for international normative solidarity. Thus, the legitimacy of the international order is based upon the myth of universality to maintain this order.

Within contemporary international relations, the role of human rights to maintain international order has grown. The UNAoC proves this argument. In this way, the UNAoC reinforces the claim that the universal applicability of human rights should be

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[129] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', *Harvard International Law Journal* v. 40 n.1 (1999), p. 1.

[130] Hedley Bull, *The Anarchical Society*, pp.1-325.

[131] Ibid.

enforced to maintain international order. With that in mind, this analysis examines universalism as it relates to two key preconditions for participation within the UNAoC: first, full adherence to the UN's human rights standards; second, absolute recognition of the authority of the UN's institutions upholding human rights. These two conditions ensure that the UN human rights regime serves as the political and ethical foundation for the dialogue. It also exposes the problem of whether the UN's articulation of human rights should guide all human behaviour.

Factually**,** the historical development of international law and the origins of the UDHR demonstrate how universal human rights really are. This begs two questions: first, based on the history of exclusion associated with the development of the UDHR, does the UN's human rights regime lack universal applicability according to scope of application, participatory input, normative significance, and practical significance? And, if this is so, how influential were the doctrinal and theoretical foundations of international law in creating the space for exclusion?

The UN Human Rights Commission was represented geographically across Northern Africa, North America, Latin America, Western Europe, Central and Eastern Asia. Noticeably absent from the Commission were many representatives from Western, Eastern, Central and Southern Africa, many Arab states, Indigenous Peoples, Eastern Europeans, South Asian, and West Indians (peoples from the Caribbean islands). During the time of its creation, many of the aforementioned excluded peoples were subjects of colonial governments. The international system did not recognize these peoples as having sufficient authority – civility – to inform the constitution the UN human rights regime. As a result of colonization, these peoples were not involved in the development of human

rights. They could not possibly have participated in the creation of 'an overlapping consensus' per Rawls.

Normatively, Rawls postulates that there exist principles signifying the common good of all humanity. He states that all peoples of the globe have agreed upon certain fundamental ethical values, despite the certainty of cultural differences. These values symbolize 'an overlapping consensus'. In the late 1980's and early 1990's, John Rawls presented lectures articulating his theory. Rawls defines 'an overlapping consensus' as "the means to achieving a lasting commitment to established principles among citizens who agree to disagree about many fundamental issues".[132] He argues that despite cultural differences, "People who might otherwise disagree on many fundamental issues regarding the good and the purpose of life could find some common and deep seated agreement on a scheme of political cooperation, a common political framework".[133] He bases his theory on the idea that humankind will evolve in this manner. He thought "our reasonable nature will increasingly entangle us in a political system we will be forced to justify both to ourselves and to others with different views".[134] Similar to Bull's account of international order, this idea of 'an overlapping consensus' underscores the logic that supports the creation of international society and international law. Both Rawls and Bull describe a pattern of interaction amongst a cultural plurality of peoples that manifests into distilled declaration of core group values.

According to Rawls, 'an overlapping consensus' contains three main features. First, the consensus is dynamic. It evolves over time as more peoples become

[132] John Rawls, *Political Liberalism*, pp. 133-72.

[133] Ibid.

[134] Ibid.

increasingly involved in its articulation. The concept's dynamism is based on a hermeneutical approach. Hermeneutics considers environment and social context within the production of knowledge. Hermeneutics is defined by Heidegger as "the unified manner of the engaging, approaching, accessing, interrogating and explicating of facticity".[135] Heidegger defines facticity as "the character of being of our 'own'. [In Heidegger's own words:] *Dasein"*.[136] According to this theory, hermeneutics and *Dasein* work synergistically to establish knowledge surrounding 'being'. This relationship might explain Rawls' theory of 'an overlapping consensus,' which can be understood to outline the parameters for creating global justice.[137] It is a collection of understandings about just ways of 'being'. This move presupposes that 'an overlapping consensus' will be multi-culturally and cross-geographically sensitive. An interpretive process ensures that multiple perspectives are included. Therefore, the hermeneutical approach ensures that multiple understandings of 'being' are considered.[138] Second, Rawls hypothesizes that the peoples who create the consensus must also justify its content to all peoples, including themselves.[139] Third, bringing the first two features together, Rawls surmises that the principles contained in the consensus will become increasingly universally agreed upon.[140] Thus, over time the universality of the overlapping consensus will become more

[135] Martin Heidegger, Ontology: The Hermeneutics of Facticity, Indiana University Press 2008, pp. 1-152.

[136] Ibid.

[137] John Rawls, *Political Liberalism*, pp. 133-72.

[138] Martin Heidegger, Ontology: The Hermeneutics of Facticity, pp. 1-152.

[139] John Rawls, *Political Liberalism*, pp. 133-72.

[140] Ibid.

legitimate due to its dynamic nature, the hermeneutical approach, and the ratification process Rawls alludes to.[141]

Lying beneath Rawls theory, and to some extent Bull's as well, is the debate between universalism and cultural relativism. Underscoring both discourses are 'ontological commitments'. In *The Philosophy of Social Science*, Martin Hollis defines an ontological commitment as "the foundation upon which all ideas on the subject begin".[142] He posits the 'universal bridgehead argument' to assert that a universal rationale exists. Evidently, "there exists a common universal logic of understanding that is impervious to the cultural and historical traditions that underscore human behaviour".[143]

The normative universality of human rights requires the concept 'human' to assert strong ontological commitments. Very problematically, these commitments, which now can be defined as universals reflect the manner in which all humankind is understood. This argument prioritizes rationality above relativism. This is because it accepts the fact that differing ontologies originate from other minds and other cultures, but lends more credence to the notion that people overcome cultural and political differences by relying on universal logic.[144] This leads to questions surrounding universal logic. Most notably: what is universal logic? And how is it formulated?

In *An Introduction to Epistemology* Charles Landesman tackles these two questions. Landesman poses two questions concerning language and ontological

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[141] John Rawls, *Political Liberalism*, pp. 133-72.

[142] Martin Hollis, *The Philosophy of Social Science* (revised 6th edition, 2008), Cambridge University Press 1994, pp. 244-247.

[143] Ibid.

[144] Ibid.

commitments: first, "is the meaning of the word 'human' a universal?" and second, "how does it manage to represent and apply to many different particulars?"[145] In this situation, language connotes universals. Hence, the word 'human' necessitates ontological commitments to the nature of humankind. Hollis argues that these questions also necessitate inquiries into the a priori nature of meanings. This is because language "acquires a significant ontological weight" that "brings with it an ontological commitment to the real existence of universals".[146] Arguably, Bertrand Russell shares the same ontological commitment. This is evident in his argument that, "All a priori knowledge deals exclusively with the relations of universals", meaning that, "General words mean or denote universals". [147] Russell argues further that, "This semantic realism about words is bolstered by a conceptual realism about ideas".[148] Russell commits to the rationale that all sentences include at least one word, and therefore "no sentence can be made up without at least one word which denotes a universal... Thus all truths involve universals, and all knowledge of truths involves acquaintance with universals".[149] Back to Landesman, who summarizes this debate by stating that, "Speakers do not apply words to objects blindly, but in the light of the information about word meaning in their possession".[150] Thus, it is possible to conclude that language reveals universals, because language reinforces ontological commitments, and these commitments in turn reveal how 'universal truths' are created. Furthermore, producing knowledge involves using words,

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[145] Charles Landesman, *An Introduction to Epistemology*, Blackwell Publishers, pp. 177-189.

[146] Martin Hollis, *The Philosophy of Social Science*, p. 245.

[147] Bertrand Russell, *Problems of Philosophy*, Watchmaker Publishing 2010, pp. 95-96.

[148] Ibid.

[149] Ibid.

[150] Charles Landesman, *An Introduction to Epistemology*, pp. 177-189.

these words connote meanings, these meanings define said knowledge, and this knowledge reinforces ontological commitments to some degree. Thus, the logical foundation of universalism is the ontological commitment to universal coherence in thought.

This analysis creates the discursive space for considering the extent to which the knowledge surrounding human rights is universal. This also requires examining whether it represents universal coherence in thought. This begs the question: to what extent do the ontological commitments surrounding human rights signify 'an overlapping consensus'?

Following Rawls, a number of scholars have engaged in either justifying or delegitimizing this notion of 'an overlapping consensus'. For example, Jack Donnelly[151] and Charles Taylor[152] give alternate, albeit similar, accounts of Rawls' theory. Both Donnelly and Taylor apply Rawls' concept of 'an overlapping consensus' to the UN human rights regime. They argue that the human rights contained within the human rights regime are principles that all peoples agree to. They both claim that human rights are borne out of a process similar to the aforementioned global hermeneutical consensus required to build Rawls' consensus. Here, the hermeneutical method of understanding 'being' is utilized in order to constitute human rights. Thus, by applying hermeneutics and 'an overlapping consensus' to human rights the meaning of this approach is transformed towards understanding just ways of human 'being'.

In terms of human rights and Rawls, Donnelly's theory emulates Rawls' more closely than does Taylor's. Donnelly argues that, "The essential insight of human rights

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[151] Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press 2003 (3rd edition), p. 78.

[152] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights', in Obrad Savic, The Belgrade Circle, *The Politics of Human Rights,* Verso 1999, pp. 124-136

is that the worlds we make for ourselves, intentionally and unintentionally, must conform to relatively universal requirement, that: rest on our humanity, and seek to guarantee each person equal concern and respect from the state".[153] Unlike Rawls, Donnelly's consensus is not founded on the premise of justice. Donnelly claims that structurally, rather than culturally or philosophically, the need for a consensus on human rights has been created. The structural approach is premised upon the influence of capitalism and liberalism from Europe. Donnelly's structural approach is defined as a 'universal' human response to the penetration of capitalist institutions and modern market state systems into Asia, the Americas, Africa, the Middle East, and many Indigenous societies. Donnelly uses the following logic to support this argument:

> Social structure, not "culture", does the explanatory work. When the West was filled with "traditional societies", it had social and political ideas and practices strikingly similar to those of Asia, Africa, and the Near East. Conversely, as those regions and civilizations have been similarly penetrated by modern markets and states, the social conditions that demand human rights have been created. This is the foundation for the overlapping consensus on and contemporary moral universality of human rights.[154]

Human rights therefore have been created through a consensus building process similar to the ones described by Bull and Rawls, however in this instance they are produced in response to the social conditions of market-state societies.[155] Donnelly decidedly takes a functional approach that accounts for the near-universal development of capitalist modern market structures and states. In the process, he backs away from a more serious discussion about cultural relativism. For Donnelly, universal human rights symbolize a consensus that measures against the conditions of modern, liberal, capitalist,

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[153] Jack Donnelly, *Universal Human Rights in Theory and Practice*, p. 78.

[154] Ibid.

[155] Ibid.

structuralization.[156] Accordingly, the rights contained in the UDHR symbolize the human response to modern market structures and states. They ensure protection from threats to "human dignity" that actors within market-state societies perpetuate.

His reflections about structure amount to one hypothesis surrounding how "natural or human rights ideas first developed in the modern West".[157] Accounting for this universalization move, he theorizes that:

> …in early modern Europe, ever more powerful and penetrating (capitalist) markets and (sovereign, bureaucratic) states disrupted, destroyed, or radically transformed "traditional" communities and their systems of mutual support and obligation. Rapidly expanding numbers of (relatively) separate families and individuals were thus left to face a growing range of increasingly unbuffered economic and political threats to their interests and dignity. New "standard threats" to human dignity provoked new remedial responses.
>
> The absolutist state offered a society organized around a monarchist hierarchy justified by a state religion. The newly emergent bourgeoisie envisioned a society in which the claims of property balanced those of birth. And as "modernization" progressed, an ever widening range of dispossessed groups advanced claims for relief from injustices and disabilities. Such demands took many forms, including appeals to scripture, church, morality, tradition, justice, natural law, order, social utility, and national strength. Claims of equal and inalienable natural/human rights, however, became increasingly central. And the successes of some groups opened political space for others to advance similar claims for their equal rights.
>
> The spread of modern markets and states has globalized the same threats to human dignity initially experienced in Europe. Human rights represent the most effective response yet devised to a wide range of standard threats to human dignity that market economies and bureaucratic states have made nearly universal across the globe. Human rights today remain the only proven effective means to assure human dignity in societies dominated by markets and states. Although historically contingent and relative, this functional universality fully merits the label universal—for us, today… Whatever our other problems, we all must deal with market economies and bureaucratic states. Whatever our other religious, moral, legal, and political resources, we all need equal and inalienable universal human rights to protect us from those threats.[158]

Flowing from this history, human rights operate universally according to the following four tenets:

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[156] Ibid.

[157] Ibid.

[158] Ibid.

> (1) As entitlements, universal rights are the mechanism for implementing such values as nondiscrimination and an adequate standard of living;
> (2) All rights in the Universal Declaration and the subsequent Covenants, with the exception of self-determination of peoples, are rights of individuals, not of corporate entities;
> (3) Universal rights are treated as an interdependent and indivisible whole, rather than as a menu from which one may freely select or choose not to select;
> (4) Although universal rights are held equally by all human beings everywhere, it is states that have near exclusive responsibility to implement them for their nationals.[159]

Donnelly's assumption that modern market structures and states have penetrated all regions of the globe makes his theory structurally deterministic. The determinism of human rights results from the universalization of modern market-state societies. The structural approach assumes universality. It foregoes cultural relativistic arguments, in order to assert that human rights exist somewhat pre-deterministically.

The UDHR is indicative of international legal universality. He argues that today almost all nations have endorsed the UDHR, therefore signifying a consensus.[160] In this manner, international legal universality is conflated with Rawl's conceptualization of 'an overlapping consensus'.[161] Donnelly maintains that human rights remain universal in theory even though not necessarily in practice. Assuming this logic, if the nations of the West have established protections for their citizens, then the nations outside of the West will have done the same. By and large, Donnelly concludes that human rights require universal implementation, and to this day, continues searching for further evidence of 'an overlapping consensus'.

Unlike Donnelly, Taylor's theory problematizes the universality of human rights when he "acknowledges the Western origins of the 'universal' norms in the UN's human

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[159] Jack Donnelly, *Universal Human Rights in Theory and Practice*, p. 78.

[160] Ibid.

[161] Ibid.

rights regime".[162] Taylor's theory focuses on cases where non-Westerners evolve towards embracing the UN's human rights regime.[163] Taylor's labels this an "unforced consensus".[164] Unlike Donnelly, Taylor admits to the Eurocentric/Western centric nature of human rights. In other words, he agrees that the UDHR contains cultural biases towards Western understandings of human 'being'. Herein lays the main difference between Taylor and Donnelly: Taylor emphasizes the hope for a just inclusion of non-Western cultural and historical traditions into any possible consensus. Taylor's theory also incorporates the hermeneutical approach Rawls alludes to. Indeed, for Taylor, the creator's of the UDHR must continue to justify its contents to others as well as themselves. Taylor states this in the following:

> Without sacrificing the integrity or authenticity of their traditions, non-Western thinkers have found ways to justify human rights, thus creating an overlapping consensus very much like the one Rawls envisions regarding a politically liberal conception of justice. Such a consensus over great and potentially incommensurable differences in outlook and belief is therefore a possibility and implicitly preferable to the prospect of coerced or forced agreement.[165]

Conversely, Donnelly offers no such hope. His conditions for universality are predetermined by market structures and states. Here, hermeneutics are absent. Even worse, he downplays any potential issues with universality, choosing instead to describe many peoples as being too ignorant to concern themselves with the finer details of cross-cultural sensitivity. Donnelly claims that:

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[162] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights', pp. 124-136

[163] Ibid.

[164] Ibid.

[165] Ibid.

> The consensus on the Universal Declaration, it seems to me, principally reflects its cross-cultural substantive attractions. People, when given a chance, usually (in the contemporary world) choose human rights, irrespective of region, religion, or culture.
>
> Few "ordinary" citizens in any country have a particularly sophisticated sense of human rights. They respond instead to the general idea that they and their fellow citizens are entitled to equal treatment and certain basic goods, services, protections, and opportunities. I am in effect suggesting that the Universal Declaration presents a reasonable first approximation of the list that they would come up with, largely irrespective of culture, after considerable reflection. More precisely, there is little in the Universal Declaration that they would not (or could not be persuaded to) put there, although we might readily imagine a global constitutional convention today coming up with a somewhat different list.[166]

These are considerable differences. Granted, Taylor's "unforced consensus" also functions quite similarly to Rawls' consensus. The former is a normative, rather than a structural approach. In contrast, Donnelly regards human rights as overlapping because market forces require states to offer a specific form of protection to its nationals, in this case, the UDHR. In other words, there are certain rights which all market state societies should agree to protect. This is a 'social-structural' human response.[167] Whereas, Donnelly regards the UN's human rights regime as already representing this form of market oriented "overlapping consensus", Taylor differs because he acknowledges the problematic origins of human rights. The difference lies in Donnelly's market-statist determinism. For Donnelly, human rights are universal based on the premise that market structures and states have penetrated basically all regions of the world. Taylor, on the other hand takes more of a moral-political approach. Taylor does not specify that human rights are defined as 'humanist' responses to market structures and states. Taylor concedes to the Western origins of human rights and therefore puts into question their universality based on factual evidence of non-universal participatory input. Taylor

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[166] Jack Donnelly, 'The Relative Universality of Human Rights', pp. 281-306.

[167] Jack Donnelly, *Universal Human Rights in Theory and Practice*, p. 78.

understands that the culturally particular origins of human rights could adversely affect their universal normative significance. Donnelly's approach is the more static and the less cross-culturally sensitive of the two. Donnelly's approach assumes that there is a 'universal' method to respond to 'universal' conditions of 'universal' market structures and states. Taylor's theory is more cross-culturally relevant, because he is influenced by the hermeneutical method and therefore seeks incorporation of non-Western perspectives so that 'an overlapping consensus' may evolve over time. This is by far the more normative of the two. Conversely, Donnelly obfuscates the issue of normative universality. Donnelly demonstrates very little cross-cultural sensitivity when he harkens back to late 17th century John Locke and his articulation of natural rights found in his *Second Treatise of Government.* Instead, he replaces normative cultural concerns with 'universal' structural ones. Donnelly assumes that all cultures and civilizations accept the universal penetration of market structures and states. He therefore offers a functional argument in support of human rights. This functional argument allows him evade questions about cultural biases. Donnelly can simply state that all societies are affected by modern market forces and as such should benefit from the UDHR.[168] Clearly then, Donnelly argues more aggressively in favour of the meta-civilization. On the other hand, Taylor acknowledges the potentiality of a meta-civilization, but chooses to search for evidence of non-Westerners accepting human rights on their own terms.

Closely examining their positions reveals that they both hold strikingly similar ontological perspectives. They both agree that the UN human rights regime represents 'an overlapping consensus'. They both conclude that universal values exist. Moreover, the

[168] Jack Donnelly, 'The Relative Universality of Human Rights', pp. 281-306.

UN human rights regime contains said values. Furthermore, all three scholars – Donnelly, Taylor, and Rawls – share the ontological commitment to the existence of universal logic. Rawls does not equate human rights with this logic, however, Donnelly and Taylor do. More specifically, Donnelly and Taylor acknowledge a shared rationale, which in other words connotes universalism, or universal coherence in thought. They share the ontological commitment to universal coherence in thought. Assuredly, they argue that universal logic manifests into human rights. According to them, the UDHR serves as the principal display of this ontological commitment. Most importantly, they use language, which implicitly and explicitly denotes universal coherence in thought.

In this way, it becomes apparent that any consensus over this ontological debate posits the existence of overlapping universal logic. This assumption underscores all problems associated with the UN human rights regime. It makes the ontological commitment that all peoples are capable of coming to a global consensus on values, not just moral and political ones. Bearing this in mind, this thesis disputes these claims. It argues that contrary to what the UN, Donnelly, and Taylor believe to be true, the UN's human rights regime lacks universal applicability in terms of its global scope of application, participatory input, normative significance, and practical significance. Moving on to the third and final criteria, material universality, this thesis explicates upon the influence of cultural environment.

Materially, the cultural environment remains the key ontological problem for universality. This criterion illustrates the cross-cultural application of human rights. It highlights questions surrounding whether culture determines the manner by which peoples understand human 'being'. Two questions require further reflection. To what

extent does the cultural environment affect the ways in which humans conceptualize human rights? And if differences in environment are influential, then to what extent is it possible to create "an overlapping consensus" on human rights? These two questions also pertain to the broader debate between cultural relativism and universalism. This analysis puts into question the state-centric nature of the international legal framework and by extension the material universality of human rights. When discussing material universality, it quickly becomes apparent that as the result of a lack of cross-cultural applicability, the UDHR may lack material universality.

The material dimension of universality is going to be explained in the context of the Intellectual Property Regime (IPR) later in chapter three. That discussion will address material criteria involving lands and resources. The Chapter discusses the universal applicability of human rights based on Indigenous peoples' interpretation of self-determination and the way in which it is recognized within the international legal framework. Specifically, this analysis examines whether international law and the human rights regime protect rights that are most pertinent to Indigenous peoples' cultural environments?

However, before doing that, two analytical concepts remain insufficiently analyzed: Eurocentrism and the power/knowledge nexus. The proceeding section will introduce Eurocentrism. This concept contextualizes this chapter's discussion about the universality of human rights, and offers a gracious framework for later discussing the doctrinal and theoretical foundations of international law. As will be discussed, Eurocentrism characterizes the true nature of human rights. The concept helps to explain

that human rights are culturally biased towards Western understandings of just ways of human 'being'.

Eurocentrism

As the earliest form of international law, *jus commune* posited the universality of law.[169] Before the development of the international state system and its corresponding international legal framework, "the entire civilized world was governed by one form of legal system: the Roman Catholic *jus commune*".[170] During this era, an international community of lawyers offered a common international language of the law, which was expressed in common literature and taught at common universities.[171] The universal authority of *jus commune* was given through the Roman Catholic Church and the existence of a Holy Roman Empire.[172]

Jus commune highlights the importance of questioning the method of belonging within an international community. In this instance, one had to follow Western Christendom and the authority of the Roman Catholic Church in order to belong. John Merryman notes that, "The medieval *jus commune* applied only throughout Christendom, thus excluding large areas of the world which would seem by modern standards to have had a reasonable to claim to being 'civilized'".[173] As will be discussed in the next

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[169] Ibid.

[170] John Henry Merryman, 'On the Convergence (and Divergence) of the Civil Law and the Common Law', *Stanford Journal of International Law*, Vol. 17 (1981), pp. 357-388.

[171] Ibid.

[172] Ibid.

[173] Ibid.

chapter, *Jus* commune, along with other forms of natural law, was replaced with international law once an international society of states was created.[174]

Subsequently, European jurists' corresponding formulation of the international legal framework carried with it a similar cultural bias that is difficult to overlook. This is because law itself, "as understood in European societies is not universal. It is the creation of a particular set of historical and political realities of a particular mindset or worldview".[175] It also "posits Europe as morally coherent and ontologically superior and therefore the source and inspiration of international morality and norms".[176] Therefore, it is important to consider the nature of human rights. Specifically, whether this nature is characterized by the historical inclusion or exclusion of certain peoples, cultures, nations, and societies in the historical development and existing application of the international legal framework?

Eurocentrism is a characteristic of these biases that inhibit the UN's human rights regime from being universal. As Grovogui points out Western/European moral thought constitutes a double movement: 'presence' – meaning legitimacy of European thought in relation to alternative worldviews; and 'erasure' – signifying European thought disguised as 'universalisms'.[177] In the process, non-European thought is erased.[178] Additionally, analyzing the development of the international legal framework demonstrates that a

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[174] Ibid.

[175] Kenneth B. Nunn, 'Law as a Eurocentric Enterprise', *Law and Inequality: A Journal of Theory and Practice*, Vol. 15 (1997), p. 324.

[176] Siba Grovogui, *Sovereigns, Quasi-sovereigns, and Africans: race and self-determination in international law*, University of Minnesota Press (1996), pp. 1-282

[177] Ibid.

[178] Ibid.

Eurocentric responsibility was borne out of Western methods used for its construction.[179] These methods included Western conceptions of state sovereignty, Western colonialism, and Western humanity.

State sovereignty serves as the primary legal doctrine of international law. In order to serve Western biased interests, European jurists constructed the doctrine of state sovereignty.[180] In Grovogui's words, "Europe instituted practices and norms that undermined the autonomy and viability of other regional systems and their units as conditions of its own ascent to autonomy".[181] Indeed, with this ascent, international law facilitated the colonization of Third World and Indigenous peoples. The next chapter explicates upon how non-recognition of Third World and Indigenous peoples rights to self-determination resulted in the exclusion of these peoples from creating the human rights regime. These practices ensured that only European nations would construct the international legal framework.

Rephrasing this argument slightly, state sovereignty enabled colonization, which in turn created exclusion within the international community. Understanding exclusion is critical for grasping whose knowledge went into the constitution the UN's human rights regime. There are serious implications for Third World and Indigenous peoples being excluded from decision-making and research about themselves.[182] Specifically, with the development of international law and the UN human rights regime, alternative

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[179] Ibid.

[180] Ibid.

[181] Siba Grovogui, *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions*, Palgrave MacMillan (2006), p.237.

[182] Siba Grovogui, *Sovereigns, Quasi-sovereigns, and Africans: race and self-determination in international law*, pp. 1-282

worldviews and mindsets of these peoples were not included.[183] Thus, the knowledge about human rights that informs the UDHR is fundamentally culturally biased towards benefiting Western ethical, material, political, cultural, and social interests.

Lastly, the conception of Western humanity designates the method of universalizing the UDHR. This concept illustrates the ethical, ontological and epistemological assumptions and biases that inspire the UN's justifications to enforce human rights law universally. It explains the logic informing the creation of rights, but more importantly, it underscores the culturally imperialist trajectory of the UN human rights regime.

Eurocentrism defines how human rights are "civilizational markers of the West".[184] This argument is supported by the multiple ways this chapter has challenged the universality of human rights. First, the "small groups of experts" who originally drafted the UDHR surmised that there were Western cultural biases informing the content of the Declaration. Second, the UDHR has been shown to counter certain tenets of Shari'a law. Third, the extent to which the UN human rights regime represents the best interests of Indigenous peoples, particularly in regards to their collective rights to self-determination, challenges the universality of human rights.

In sum, Eurocentrism describes the nature of the UN human rights regime and international law more broadly. It shows that the true nature of human rights and international law may be characterized by the historical exclusion of certain peoples, cultures, nations, and societies. Arguably, exclusion allowed for perspectives largely

[183] Ibid.

[184] Ibid.

characterized by Western American and European ontological and philosophical biases to shape the development of these rights. This nature colours the development and existing application of the UDHR. For these reasons, it explains why humankind should not accept the international order/society/ethics without strong reservations. Therefore, beneath the surface rhetoric of the UNAoC, there exist colonial and imperial foundations and trajectories.

Power/Knowledge Nexus

The last analytical concept, the power/knowledge nexus, examines how Eurocentrism informs the creation of not only international law, but also international society and the conditions to maintain international order. For this concept, we turn to Michel Foucault. Foucault's importance centres upon his description of power and knowledge. He describes their significance for understanding discourses. He argues that the relationship between knowledge and power is entirely regulative. This is why much of his work attempts to deconstruct the influence of knowledge and power in controlling peoples' behaviours within societies.

To counteract their influence, he outlines a "local criticism of totalitarian theories".[185] This symbolizes "an autonomous, non-centralised kind of theoretical production, one that is to say whose validity is not dependent on the approval of the established regimes of thought".[186] Foucault attempts a "return to knowledge", knowledge that is characterized by a "return to reality" based on the observance of an

[185] Michel Foucault, *Power/Knowledge: Selected Interviews and other Writings 1972-1977*, Pantheon Books 1980, pp. 81-95.

[186] Ibid.

"insurrection of subjugated knowledge".[187] His analytical mode seeks to "emancipate historical knowledges from subjection". This begs the question: how is knowledge subjected?

To answer this question, Foucault proposes power. He discusses both knowledge and power within discourses. All theories are based upon discourses and all discourses upon knowledge and power. To explain, the West has "attributed" power to science and has afforded it to those partaking in scientific discourse. Therefore, he argues for the "reactivisation" of local, diffuse, knowledges in the face of a hierarchization of "theoretical, unitary, formal and scientific" knowledges and discourses.[188]

This defines Foucault's 'archaeology of knowledge'.[189] Accordingly, archaeology symbolizes the performance of a genealogy of knowledge that brings in local criticism. Foucault historicizes the knowledge produced in discourses, and claims that this knowledge is problematic, static, and not reflective of the best interests of all peoples within societies. Foucault unearths historical knowledge contents that have been buried and breathes life into alternative ways of 'knowing' that have been 'erased' in favour of systematic and functionalist European thought.[190] In this way, the local criticism allows for the insurrection of subjugated knowledges.[191] For this reason, these methods of inquiry work synergistically to perform the aforementioned task of knowledge liberalization.

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[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] Ibid.

[191] Ibid.

Foucault admits that these methods are often responded to with 'silence'. However it is this 'silence' which legitimizes and reinforces the need for these methods.[192] This 'silence' represents the forces of power in discourse, which the insurrection of knowledge attempts to deconstruct.[193] Foucault argues that:

> In a society such as ours, but basically in any society, there are manifold relations of power, which permeate, characterize and constitute the social body, and these relations of power cannot themselves be established, nor consolidated, nor implemented without the production, accumulation, circulation and functioning of a discourse [and the knowledge contained therein]. There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. [Therefore,] We are subjected to the production of truth through power and we cannot exercise power except through the production of truth. This is the case for every society, but I believe in ours [Western] the relationship between power, right and truth is organized in a highly specific fashion.[194]

As a result, within Western societies, "power never ceases its interrogation, its inquisition, its registration of truth; it institutionalises, professionalises and rewards its pursuit".[195] This is why the discourse surrounding human rights – knowledge – links well to the way in which Foucault understands power and knowledge. Describing power, Foucault argues that:

> I have tried that is, to relate its mechanisms to two points of reference, two limits: on the one hand, to the rules of right that provide a formal delimitation of power; on the other, to the effects of truth that this power produces and transmits and which in their turn reproduce this power. Hence we have a triangle: power, right, truth.[196]

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[192] Ibid.

[193] Ibid.

[194] Ibid.

[195] Ibid.

[196] Ibid.

Power is vital for understanding the relationship between knowledge and truth. Indeed power enables the transformation of knowledge into truths.[197] Power enables truths to become rights, the power of truth makes the laws that produce knowledge, this knowledge informs discourses, and the knowledge informing discourses determines the production of future knowledge. Finally, within this vicious cycle, the knowledge reinforced and produced within discourses influences the future production and distribution of power within societies.

This power/knowledge nexus defines how international order is created. Today, the international society is comprised of laws, structures, agreements, processes and norms that mediate the power/knowledge nexus. The development of human rights represents a process similar to the one mentioned by Foucault whereby knowledge is transformed into rights and then into truths. In this case, similar societal consequences arise from the manner by which non-Western knowledge was subjugated in order to draft the UDHR. As discussed earlier, the development of the UDHR lacked universal participatory input and this lack of input directly inhibits its universal scope of application, normative significance, and practical significance. This power/knowledge also sheds light on the problems found with the UNAoC. These problems highlight the power dynamics that guide the UN and its deliberations. Case in point, the UNAoC demonstrates the manner in which the power/knowledge nexus is utilized to create and maintain order within international society. This Foucauldian analysis of power and knowledge defines the UNAoC. Specifically, it defines its problematic structure and

[197] Ibid.

mandate, which uses human rights as a political and ethical foundation. This analysis receives even longer treatment in Chapter three's formal critique of the UNAoC.

Before moving on, several questions require treatment: "what rules of right are implemented by the relations in the production of discourses of truth?"; "what type of power is susceptible of producing discourses of truth that in a society such as ours are endowed with such potent effects?";[198] or in other words, is it possible to say that "right is in the general way, the instrument of domination"?;[199] and if so, should human rights be characterized in this manner?

The concept of right in Western societies presupposes sovereign will. The functionality of rights is to efface, 'erase', the 'intrinsic' domination of power within society.[200] Power operates in other forms as well. Most notably, "The theory of sovereignty permits an absolute power. It does not allow for a calculation of power in terms of the minimum expenditure for the maximum return".[201] Disciplinary power, a bourgeois invention, allows for knowledge to dominate in lieu of the state.[202] Disciplinary power is defined as a process that is defined by the aforementioned transference of power to articulate and produce knowledge. In this case, power is exercised to transform knowledge into reinforced and potentially increased power. This new degree of power enables said knowledge to become transformed into truths. These truths give the powerful even more power. Finally, this even higher level of power authorizes said truths

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[198] Ibid.

[199] Ibid.

[200] Ibid.

[201] Ibid.

[202] Ibid.

to become rights. Once rights are created, they are reinforced within discourses, whereby the powerful produce the parameters and conditions of inclusion and exclusion.

Analyzing the power/knowledge nexus demonstrates the way in which knowledge transforms into laws and mandates. In this way, it is a process and relationship that explains how dominant truths are formed. First and foremost, ontology is the basis for which epistemological methods validate truths. In this manner, the human rights regime operates as a form of knowledge claims, which through power, peoples have authorized as universal truths. These produce regulatory mechanisms with associated cultural and political objectives. This phenomenon provokes ontological questions about whose knowledge is being used to reinforce the international legal order. Or, reformulated into a question: is the knowledge surrounding human rights inclusive of subjected knowledges?

Bearing Foucault's power/knowledge nexus and postcolonial scholarship in mind, it now becomes possible to explore the potential disciplinary functionality of the UN human rights regime (UDHR), the doctrinal and theoretical foundations of international law, and the mandate and objectives of the UNAoC. Therefore, this thesis formulates one last analytical concept, the power/knowledge nexus.

The power/knowledge nexus is utilized to offer a more realistic articulation of the UN human rights regime. It symbolizes the relationship between knowledge and power. It functions as a descriptor of their interrelated and interdependent relationship. As a concept, knowledge represents the prevailing ideas, theories, prejudices and biases used to develop the UN human rights regime. The other half of this nexus, power, reinforces knowledge. Power, as a concept, is defined by Hans Morgenthau as, "Man's control over

the minds and actions of other men".[203] This definition reflects the manner in which power is "central to the organization and production of knowledge in the discipline [of International Relations]".[204] In this instance, the UN exercises power in order to universalize its particular viewpoints surrounding the content and purpose of international law. In the case of the UNAoC, there are culturally assimilatory goals that require further attention. Therefore, the power/knowledge nexus symbolizes power and knowledge reinforcing one another. Brought together as a descriptor, the power/knowledge nexus symbolizes the power dynamics at play throughout the development of the UDHR. the Colonial access resulted in the creation of knowledge mainly "about nature, peoples and themselves".[205] Colonization permitted European and American powers "universal access" to the Third World and Indigenous peoples territorially.[206] The knowledge subsequently became universalized and justified according to the different historical manifestations of universal rationales.[207] Examples of this include the aforementioned theories by Donnelly[208] and Taylor[209] theories that link human rights to some form of 'an overlapping consensus'. Consequently, false universal truths were created, ones that the next chapter will explore in further detail. Soon the international community was tasked with offering a universalizing rationale to justify the promotion of human rights. Power was required to perform this task.

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[203] Hans Morgenthau, *Politics in the Twentieth Century*, University of Chicago Press 1962 p. 28.

[204] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' pp. 33-55.

[205] Ibid.

[206] Ibid.

[207] Ibid.

[208] Jack Donnelly, 'The Relative Universality of Human Rights', pp. 281-306.

[209] Charles Taylor, 'Conditions of an Unforced Consensus on Human Rights', pp. 124-136.

With this in mind, Barnett and Duvall argue that power is produced through social relations. For example, the power to hold knowledge about and to enforce human rights within international relations is a form of productive power. Productive power is defined as: "power over" and "power to" define and constitute social relations of interaction either by enablement or constraint. It affects and shapes the capacities of actors to determine their circumstances and fate. Thus, (productive) power enables the constitution of social identities and capacities.[210] This defines the relationship between Western knowledge-making about human rights and the requirement of Western power for 'universal' knowledge-projecting.

Examining the UDHR and its relation to the UNAoC provides evidence that the knowledge characterized as human rights is premised as "universal truths" about "nature, peoples and themselves".[211] These truths are justified through a particular rationale that only the creators of this knowledge hold. This non-'universal' logic grants the UN power and authority as knowledge bearers.[212] Ernest Haas' definition of knowledge is particularly useful in this regard. Haas defines knowledge as "the sum of technical information and of theories about that information which commands sufficient consensus at a given time among interested actors to serve as a guide to public policy designed to achieve some goal".[213] Haas definition relates to the earlier critique of 'an overlapping consensus' insofar as it highlights the manner in which human rights guide the

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[210] Michael Barnett and Raymond Duvall, 'Power in International Politics', *International Organization* 59 (2005), Cambridge University Press, pp. 4-5.

[211] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' pp. 33-55.

[212] Ibid.

[213] Ernest B. Haas, 'Why Collaborate? Issue-Linkage and International Regimes', *World Politics,* vol. 22, no. 3 (1980), pp. 357-405.

contemporary maintenance of international order. The UN's contemporary usage of the UDHR is problematized, because of the power/knowledge nexus. As discussed later, the power/knowledge nexus resulted in the legal implementation of sovereignty and international legal subjectivity for Western states and conversely non-sovereign status and objectification for Third World and Indigenous peoples. Furthermore, the dynamics of the power/knowledge nexus legitimated the transformation of Western understandings of human rights – knowledge – into the UN human rights regime. As a result, the UN human rights regime depended on the relationship between Western knowledge and Western power. Thus, the power/knowledge nexus seeks to capture the process whereby knowledge is transformed into laws and mandates with associated regulatory mechanisms and cultural and political objectives. This defines most problems associated with the manner in which the UDHR came to fruition and the manner in which universal human rights are currently being articulated and enforced by the UN human rights regime.

Critique

This chapter's critique of the universality of human rights uses these analytical conceptions to argue that the international legal framework enables the UN's constitution of human rights hegemony upon all human beings as a set of "international truths shaping global order".[214] It sheds light on Grovogui's argument that "universalism does not account to universal injunctions by self-assured subjects".[215] Surely this is because of the

[214] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' in Sheila Nair and Geeta Chowdhry eds., Power, Postcolonialism and International Relations: Reading Race, Gender and Class (New York: Routledge, March 2002), 33-55.

[215] Ibid.

UN's normative impulse to universalize human rights, but also the absence of their factual and material universality. Accordingly, the international system, as Chowdry and Nair characterize it, symbolizes "the grand narrative of IR [which] is rooted in universality and rationality, which has been maintained by the exclusion of others". [216]

Therefore, this chapter highlights the importance of challenging "the projection of the West as history as well as the epistemological, ideological, and political authority of Western and elite knowledge".[217] Grovogui captures this logic when he states that, "In illuminating global politics and their values and institutions, postcolonial scholars insist on a corresponding social science agenda that envisions methods and lines of enquiry that account for plural and temporal and spatial social experiences and their carried conceptions of law and morality".[218] Echoing Chowdhry and Nair, "Thus conceived, IR must be less 'pragmatic' in its lines of inquiry and more responsive to the experiences of subjects, agents, and actors whose existence the discipline signifies".[219] To accomplish this task, "[the discourses, participants, and outside observers] must also consider the possibility as well as desirability of translations across cultural and geographical boundaries".[220] Unfortunately, this is something the UNAoC High Level Group fails to accomplish.

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[216] Geeta Chowdhry and Sheila Nair (ed.), *Power, Postcolonialism and International Relations: Reading Race, Gender and Class,* London: Routledge, 2004. pp. 1-324

[217] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' pp. 33-55

[218] Siba Grovogui, *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions*, p. 240

[219] Geeta Chowdhry and Sheila Nair (ed.), *Power, Postcolonialism and International Relations: Reading Race, Gender and Class,* pp. 1-324.

[220] Geeta Chowdhry and Sheila Nair (ed.), *Power, Postcolonialism and International Relations: Reading Race, Gender and Class,* pp. 1-324.

Indeed, criticizing the universality of human rights contextualizes the exploration of the manner in which the meta-civilization draws its legitimacy and strength from the doctrinal and foundations of international law. The next chapter will examine the extent to which international legal framework, and by extension the UDHR, is borne out of Eurocentric, non-universal, ontology and epistemology.

Chapter 3

The Colonial Nature and Imperialist Trajectory of International Law

Introduction

This chapter illustrates the extent to which the doctrinal and theoretical foundations of international law are imperial/colonial by nature. It examines how these foundations enable the UN's constitution of the meta-civilization. In particular, it explores the manner in which these foundations reinforce Western knowledge and a Western projection of history. Specifically, this analysis borrows from Antony Anghie's argument that historically, "colonial confrontation was central to the formation of international law, and, in particular its founding concept, sovereignty". It examines how confrontation facilitated and fostered the colonial expansion of European states. It also examines whether colonial confrontation underscores the subsequent regulation of decolonized non-European states.[221] In particular, the Chapter assesses Anghie's claim that these foundations, particularly the theory legal positivism, entrenched international law in Western-biased structures and institutions.

In final consideration of the UNAoC, this analysis merges three post-colonial arguments: Said's 'Orientalism', Grovogui's re-interpolation of Said, and Doty's theory of 'power in discursive centres'. This theory supports examining the extent to which the UN legislates, implements, and administers Western civilization as the international community/society/order. The analysis shows the power/knowledge nexus at work in the

[221]Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press 2004, p. 2-3.

context of the UNAoC dialogue. This analysis sheds light on how the UN exercises normative power. To conclude, it discusses the merits of 'universal' human rights.

Doctrinal, Categorical, and Theoretical Foundations of International Law

Problematizing the universality of international law, this section reveals how particular legal doctrines, categories, and theories legitimated colonial rule. It shows that they facilitated the dispossession of Indigenous and Third World peoples' lands and sovereignty. First, it analyzes the influence of natural law theory on early international law. It then examines the enormous influence of Legal Positivism as a theory of international law replacing natural law. For historical context, this section outlines the significance of the 1648 Peace of Westphalia Treaty as well as the 'imperialist juncture'.[222] The former demonstrates the historical moment upon which the international society was created, while the latter captures the cultural moment when the distinction between 'Civilized' and 'Uncivilized' peoples became popularized within European culture. These doctrinal and historical foundations reinforce this division. To illustrate, the Chapter outlines the following doctrines: International Legal Personality, state sovereignty, Recognition, Occupation, *Terra Nullius*, Discovery, Conquest, Protectorate, and *Jus Cogens*. Additionally, it outlines Treaties of Capitulation as a legal category that function as sources of international law. This analysis explores how these foundations influence the manner by which the international community recognizes Indigenous peoples' collective rights to self-determination. It also discusses the movement to collective recognition and self-determination of Indigenous peoples in the United Nations

[222] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, Harvard University Press 1999, p. 7.

Declaration on the Rights of Indigenous Peoples (UNDRIP). Elaborating further, this section discusses Southern Theory and Postcolonial Theory. These theories contain differing logics surrounding the relationship between international law and the international society. In order to demonstrate the domineering influence of legal positivism, this analysis contrasts this theory with others. It hypothesizes about how each theory would treat these doctrinal and categorical foundations. In the process, the Chapter examines the extent to which each theory accounts for the colonial nature and imperialist trajectory of international law. In so doing, it debates whether these theories reinforce or deconstruct the meta-civilization.

Natural Law

First and foremost, the aspiration and claim of international law to universality was inspired by beliefs in a universal moral order rooted in natural law. As was mentioned earlier, the origins of what would become international law, the laws of nations, can be traced to religious principles from Roman and Hellenic civilizations, which were practiced by Romans and Greeks respectively.[223] Classic American lawyer, diplomat and legal scholar Henry Wheaton argues that "the laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites".[224] As an historical example, when states of the same religion and race waged war against one another, their battles were declared with religious rites and ceremonies.[225]

[223] Henry Wheaton, *Elements of International Law*, pp. xvi-xviii.

[224] Ibid.

[225] Ibid.

Soon after the fall of the Roman Empire, during the Middle Ages, European Christian states became united under the common belief that international law applied to all states who observed the same religion.[226] Wheaton explains that this law of nations was built upon the following foundations:

> First: the union of the Latin Church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX, the canon law was reduced into a code, which served as a rule to guide the decisions of the Church in public as well as private controversies.
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> Second: the revival of the study of Roman law, and the adoption of a system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal codes, or as subsidiary to the local legislation in each country.[227]

Indeed, the origins of international law can be traced to these two sources.[228]

During this era, international law was considered universal, because participating states believed it reflected divine providence.[229] Anghie reinforces Wheaton's story by explaining that the "traditional framework" of international law was based upon two premises.[230] First, "human relations were governed by divine law".[231] Second, "it was argued that the Pope exercised universal jurisdiction, by virtue of his divine mission to spread Christianity".[232] Accordingly, European rulers requested the Pope's authorization of their foreign affairs. More specifically, they sought permission for territorial invasions

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[226] Ibid.

[227] Ibid.

[228] Ibid.

[229] Ibid.

[230] Antony Anghie, 'Francisco Di Vittoria and the Colonial Origins of International Law', *Social & Legal Studies,* 1996, pp. 1-16.

[231] Ibid.

[232] Ibid.

such as warfare and colonization.[233] Thus prior to the formation of state sovereignty and a corresponding international system of states, many European states considered international law universal because it was defined as the Law of God.[234]

Peace of Westphalia

Despite these origins, most international legal scholarship link international law's origin to the formalization of state sovereignty produced during the Peace of Westphalia in 1648. The Peace of Westphalia remains a convenient historical moment for situating the origins of international law. In particular, it represents the historical moment for which the move from an "imperial and ecclesiastical order... to an international society of independent, sovereign national states" took place.[235] It supports the argument that colonization never ceased to exist following this time in history. Since 1648, international law has represented a distinct form of cultural, social, economic, and political imperialism. This marked the beginning of an era where hostilities between competing imperial powers became limited by international treaty. Here, at this moment, the primary authority in international relations became the sovereign nation-state. This marked a stark contrast from a time in which "the Emperor and the Pope exercised hierarchical authority over groups and communities."[236] Most importantly, the Peace of Westphalia signalled the end of Holy Wars between Catholic and Protestant entities.[237] Prior to this Treaty, the

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[233] Ibid.

[234] Ibid.

[235] Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A feminist analysis, Manchester University Press 2000, pp. 24

[236] Ibid.

[237] Michael Akehurst, *Modern Introduction to International Law*, Allen and Unwin 1970, pp. 10-11.

Church held external control over the territorial entities that later became states. Thus, it is precisely when secularism infused global politics. It symbolizes the first instance of sovereign secular states cooperating on an international legal framework. Indeed, based on this level of cooperation, some sort of 'an overlapping consensus' was borne out of this moment. If the UDHR depends on the creation of an international legal framework for its deployment, then this moment provided a normative and doctrinal foundation for its evolution by granting sovereignty only to states.

State Sovereignty

The Peace of Westphalia created for the first time an international legal order made up of several European sovereign states. Participating states included France, England, the Netherlands, Germany divided into small states, and Switzerland. They entered into international allegiances with each other "under certain conditions".[238] Renowned international legal scholar Michael Akehurst describes this moment as a "watershed" where these states "envisaged a collective security system which obliged parties to defend its provision against all others".[239] State-sovereignty was the key distinguishing feature of the international legal order. Anghie defines sovereignty as "[a]n absolute set of powers bound by no higher authority and properly detached from all the imprecise claims of morality and justice". [240] To put it another way, state sovereignty affords power to states. The entire international system evolves from this concept.[241]

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[238] Ibid.

[239] Ibid.

[240] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 2.

[241] Stephen Krasner, *Structural Conflict*, University of California Press 1985, p. 3.

Over one hundred fifty years later, in 1815, the Vienna Congress signalled the introduction of Prussia, Austria, Russia, and England into the international community, which was then labelled the Concert of Europe.[242] In the 1850s, when the era of colonization was quite pronounced, European states acknowledged the partial sovereignty of several non-European states. The quasi-sovereigns were: the Mogul Empire, India, the Ottoman Empire, Persia, China, Japan, Ethiopia, Siam (Thailand), and Burma.[243] Their sovereignty was partial for several reasons, which this section describes in the context of several legal doctrines and categories such as Recognition, Occupation, Treaties of Capitulation and the Protectorate system. The quasi-sovereigns did not participate fully in the construction of the international community. Moreover, colonizing said quasi-sovereigns proved to be very difficult because of several concerns, most notably their military strength. In the end, they were valuable trading partners. Akehurst notes that the Europeans in question "were aware that [quasi-sovereigns] did not play a major role in global affairs".[244] This development was guided by Europeans only. Broadening the international community further, in 1856, Turkey became the first non-Christian state to enter the Concert of Europe.[245] Akehurst states that, "In sum, although legally all members of the international community were equal, in fact, the international system was dominated by the great powers of Britain, France, Spain, Portugal, the United States, Russia, Austria, Prussia and the Netherlands."[246]

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[242] Ibid.

[243] Michael Akehurst, *Modern Introduction to International Law*, p. 12.

[244] Ibid.

[245] Ibid.

[246] Michael Akehurst, *Modern Introduction to International Law*, Allen and Unwin 1970, p. 13.

International Legal Personality

The specific doctrine that gives states their autonomous role in the international legal framework is international legal personality. This doctrine gives authority to subjects of international law. Specifically, it designates which subjects are defined as "possessing rights and duties enforceable at law".[247] Explaining this transition, A. Claire Cutler argues that, "The law came to operate in a dialectical fashion with the state. The law both constituted the state as 'subject' and mirrored the state through laws governing sources and personality. But, the law also stood outside the state and, through the process of objectification described above, policed and measured state action".[248] Therefore, international legal personality enables specified subjects to dictate the rules that will subsequently govern them. These subjects are sovereign states. These states are given authority to produce international law. Thus, international legal personality means having the legal capacity to enter into treaties, declare war, colonize non-European peoples, appear before the International Court of Justice, and so forth. This foundation ensures that sovereign states are solely capable of constructing the international legal framework. This explains why it is necessary to invoke the concept of the power/knowledge nexus. Bearing the power/knowledge nexus in mind, this foundation defines concerns about the universality of international law. Namely, it excluded Third World and Indigenous peoples from joining the international community and from constructing international law. Therefore, it is problematic because the framework was used to regulate relations between sovereign entities and non-sovereign peoples.

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[247] Malcolm N. Shaw, *International Law*, 3rd ed. (Cambridge: Cambridge University Press, 1994), p. 135.

[248] A. Claire Cutler, 'Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy', *Review of International Studies* (2001) 27, pp. 133-150.

Non-European states were disadvantaged, precisely because they did not hold international legal subjectivity. Legal positivism gave the sovereign European states the power to function autonomously and with authority in regards to establishing any relations with non-sovereign, non-European, states.[249] Therefore, non-Europeans, non-sovereigns and/or Indigenous peoples could not formulate any legal recourse to address the abolition of their rights to self-determination and territorial autonomy.[250] This history underscores this thesis' critique of universal human rights. It shows that international law became illegitimately universalized. This was due to the doctrine of international legal personality dictating who could participate in its construction.

International Society

In order for European jurists to create laws, there had to be an international society for these laws to govern. This society, "provided the matrix of ideas, the analytical resource that, allied with sovereignty, could establish a positivist international legal order".[251] John Westlake argued that "without society no law, without law no society".[252] To further this point, he argued that "in recognizing a society of states, which are sovereign, we recognize international law".[253]

European jurists created the principle of sovereignty in order to enable European states to become sovereign, and then once sovereign, afford only themselves the capacity

[249] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 3.

[250] Ibid.

[251] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 17.

[252] John Westlake, *Chapters on the Principles of International Law*, p. 3.

[253] Ibid.

to determine which states subsequently could become sovereign.[254] As Anghie puts it, "society's operational role as a mechanism by which cultural assessments can be transformed into legal status. Furthermore, presenting society as a creation of sovereignty suggests another way in which international law suppresses the colonial past at the doctrinal level".[255] *Laissez faire* assumptions placed on the international legal order allowed these states to act on behalf of their own national-self-interests. Once accepted into the international system, there were limited constraints placed on states. This permitted European states to set up colonial empires soon after imperialism 'ended', post-Westphalia.[256] Acting in this manner accorded with the recent indoctrination of an international code of civility.[257] This code underscores all doctrinal foundations covered in this chapter, including those still requiring treatment.

Imperialist Juncture

Speaking of civility, The 'Imperialist Juncture' illustrates the historical, political and cultural context behind the European distinction between the 'Civilized and Uncivilized'. Chowdry and Nair define the "imperialist juncture" as "a critical historical juncture in which postcolonial national identities are constructed in opposition to European ones, and come to be understood as Europe's other".[258] It shows that this

[254] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', pp. 3-68.

[255] Ibid.

[256] Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A feminist analysis, Manchester University Press 2000, pp. 24

[257] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 3.

[258] Geeta Chowdhry and Sheila Nair (ed.), *Power, Postcolonialism and International Relations: Reading Race, Gender and Class,* pp. 1-324.

distinction was first produced in European literature prior to its translation into law. Spivak argues:

> One might suggest that the end of the "German" eighteenth century (if one can speak of "Germany" as a unified proper name in that end) provides material for a narrative of crisis management,: the scientific fabrication of new representations of self and world that would provide alibis for the domination, exploitation, and epistemic violations entailed by the establishment of colony and empire.[259]

During this, time, Europeans began denouncing the cultures and political systems of Third World and Indigenous peoples. Non-European peoples were categorized with irrevocable and inflammatory labels. As with the corresponding advent of international law, and doctrines such as international legal personality, these peoples significance diminished legally as well.

This is another example of the power/knowledge nexus at work. Third World and Indigenous peoples and societal knowledge were 'erased' in favour of European definitions and categories. During this time, "Europe instituted practices and norms that undermined the autonomy and viability of other regional systems and their units as condition of its own ascent to autonomy". The 'erasure' of non-Western knowledge as illegitimate and barbarian ensured this process was a success.[260] As we recall, Grovogui argues that European moral thought constitutes a double movement: 'presence' – meaning legitimacy of European thought in relation to alternative worldviews; and 'erasure' – signifying European thought disguised as 'universalisms'.[261] Additionally, analyzing the development of the international legal framework demonstrates that

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[259] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, p. 7.

[260] Ibid.

[261] Siba Grovogui, *Sovereigns, Quasi-sovereigns, and Africans: race and self-determination in international law*, pp. 1-282.

Eurocentric morality was borne out of Western methods used for its construction.[262] Once again, these methods were Western conceptions of state sovereignty, Western colonialism, and Western humanity. These methods reinforce one another and are inextricable. They worked in tandem as the foundation for the construction of an international society.

At the time, German political thought was largely concerned with how best to capture a universal logic. Reinforcing this movement, German thinkers bestowed "authoritative universal narratives".[263] Gayatri Chakravorty Spivak argues that the "narrative of crisis management" was given in several ways.[264] Examples include: Kant's cosmopolitheia[265], Hegel's philosophy of the mind[266], Marx's discussion of class struggle[267], and so forth.

Kant's narrative describes humankind as perpetually threatened by warfare.[268] The earlier discussion on Bull recounts several of Kant's integral principles of international cosmopolitanism. His management solution was a society of sovereign republican states that could ensure international peace by agreeing on certain fundamental principles, i.e. 'an overlapping consensus'.[269]

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[262] Ibid.

[263] Ibid.

[264] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, p. 7.

[265] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* 1795, Allen and Unwin 1917.

[266] G.W.F. Hegel, *Phenomenology of Spirit*, ed. Howard P. Kainz, Pennsylvania State University 1994, pp. 1-180.

[267] Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, Progress Publishers 1986, p. 1

[268] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch.*

[269] Ibid.

Hegel's narrative dealt with the threatening battle between human and natural reason.[270] The battle was between Science and God, which were symbolized by human and natural reason respectively. His management solution was ideas borne out of a dialectical relationship between both, positing that scientific and natural knowledge are cross-informative.[271] This cross-pollination of knowledge informs individual and collective consciousness's and advances humankind. His management solution was the dialectic which would elevate humankind to a higher level of understanding. This level according to Hegel, becomes the Spirit, which is Hegel's God.[272] This understanding is far out of reach. However through science and the 'certainties' it produces, humankind could engage in a dialectical conversation about Science and Spirit that raises consciousness and thus improves human understanding.[273] Both forms of knowledge were said to progress humans towards exhibiting greater grace of God.

Marx' narrative tackles the threat posed to human kind based on social and economic class. He argues that history can be summarized as a history of class struggles.[274] The effects of market state capitalism inflame these struggles. Here, it is important to recall Donnelly's discussion of the pervasiveness of market structures and states.[275] Marx's management solution involved unifying the working class who will form a revolution that would overthrow global capitalist powers and ensure equality for all humankind.

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[270] G.W.F. Hegel, *Phenomenology of Spirit*, pp. 1-180.

[271] Ibid.

[272] Ibid.

[273] Ibid.

[274] Karl Marx and Friedrich Engels, *Manifesto of the Communist Party*, p. 1.

[275] Jack Donnelly, *Universal Human Rights in Theory and Practice*, p. 78.

All of these forms of management sought to liberate humankind by creating a 'universal logic'. These narratives informed European jurist's universalizing logic. Additionally, the "narrative of crisis management" strengthened the position of newly created states. This creation introduced a cosmopolitan community of peoples. However, this required a logical explanation of universal coherence in thought.[276] By and large, European jurists favoured a Kantian approach. Spivak claims it is possible to identify Germany as the source for cosmopolitan thought, the creation of a Kantian system of states, and the primary historical and geo-political time and space where boundaries between peoples of the globe, namely between the 'civilized' and 'uncivilized', were articulated into an international system. Spivak argues that:

> Cultural and intellectual "Germany", the place of self-styled difference from the rest of what is still understood as "continental" Europe and Britain, was the main source of the meticulous scholarship that established the proto-archetypal ("comparative" in the disciplinary sense) identity, or kinship without direct involvement in the utilization of that other difference, between the colonizer and colonized, in the nascent discourses of comparative philology, comparative religion, and even comparative literature[277]

On account of this distinction, European jurists were challenged with bringing all peoples into the international community. In other words, they attempted to reconcile cosmopolitanism with an international system. This crisis was manifested in the development of a collective Eurocentric conscience concerning international law, which by legal definition supported colonization, and excluded Third World and Indigenous peoples. To resolve this dilemma, European jurists defined Third World and Indigenous peoples as inferior beings. They described their inferiority in terms of their cultural,

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[276] Siba Grovogui, *Sovereigns, Quasi-sovereigns, and Africans: race and self-determination in international law*, pp. 1-282.

[277] Ibid.

social, economic and political practices. This distinction laid the groundwork for constructing the international legal framework to benefit Europeans only.

Civilized versus Uncivilized

Benefitting from the soon to be mentioned legal doctrines as well as the theory of legal positivism, European jurists legally instituted a racist distinction between the 'civilized' and the 'uncivilized'.[278] As John Westlake noted, the biggest issue with natural law was its inability to make this distinction concrete. [279] This proved epistemologically problematic.[280] They believed that any law had to account for this distinction. That is to say, law should be created by human societies and institutions, specifically Europeans who are 'civilized'.[281] Natural law, by contrast, applied the concept of human reason more broadly. It applied to all peoples. Positivists therefore developed the vocabulary to denigrate and marginalize non-Europeans by presenting them as objects of international law suitable for conquest. Indeed this distinction legitimized violence against them.[282]

This language also furthered the Europeans' civilizing missions. According to Anghie, this move symbolizes the first element of the "dynamic of difference".[283] Anghie argues that it "denote[s] broadly, the endless process of creating a gap between two cultures, demarcating one as 'universal and civilized and the other as 'particular' and

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[278] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 1.

[279] John Westlake, *Chapters on the Principles of International Law*, Cambridge University Press (1894), pp. 137-143.

[280] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p 25

[281] Ibid.

[282] Ibid.

[283] Ibid.

uncivilized, and seeking to bridge the gap by developing techniques to normalize an aberrant society". This presupposes the conjoined nature of the dynamic of difference and the doctrinal foundations of international law. Both worked synergistically to grant European nations international legal subjectivity and authorize colonization.[284]

Anghie explains how "this understanding of the colonial encounter is characteristic of the traditional approach to international law, which understands the discipline in terms of the fundamental question of how order is created among sovereign states".[285] To solve this dilemma, Anghie describes this tragedy in the following statement:

> The characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transform them. Equally, however, the assertion of this dichotomy between the two worlds, the civilized and the uncivilized, posed several novel problems for the European jurists who sought to account for the colonial project in legal terms.[286]

Therefore, the change to the international legal framework was based upon "the fundamental positivist position, that states are the principal actors of international law and they are bound only by that to which they have consented".[287] This position exemplifies how international law was developed according to the coordination of European power/knowledge nexus. In this case, European knowledge was transformed into law and European power afforded Europeans the ability to behave as they pleased in relation to according to non-European non-sovereign states. The international system soon became based on laws applicable to 'civilized' states. It functioned as a code of

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[284] Ibid.

[285] Ibid.

[286] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 4-5.

[287] Ibid.

civility amongst them. It also imparted upon Third World and Indigenous peoples non-sovereign status. In so doing, the myth of European superiority became strengthened.

Legal Positivism

In the late 19th century, legal positivism became the "principal jurisprudential technique of the discipline of international law, replacing naturalism".[288] Anghie points out that, "Positivism, by way of contrast [to its predecessor, natural law] asserts, not only that the sovereign administers and enforces the law, but that law itself is the creation of sovereign will".[289] European jurists invented positivism to place ultimate value on state sovereignty. Therefore, state sovereignty formed a relationship with legal positivism as a theory. The concept and theory reinforce one another and together explain the relevance of the state within international law. The marriage between the principle of state sovereignty and the theory of legal positivism gave European jurists the legal authority to authorize the dominance of the state within global affairs.

This is precisely how positivism influenced European jurists. Positivism ensured that "once established [the European sovereign], only the sovereign can recreate the legal universe"[290]. Thus, jurists outlined an interdependent relationship between the positivist legal framework and a broader international society. Furthermore, society was integral in

[288] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', pp. 2-14.

[289] Ibid.

[290] Ibid.

allowing positivists to make cultural distinctions internationally, which then reinforced cultural exclusions within international society.[291]

Classic legal theorist C.H. Alexandrowicz declared that "positivist law consisted of those rules that had been agreed upon by sovereign states, either explicitly or implicitly, as regulating relations between them".[292] Underscoring all formulations of positivist international legal thought is the belief in the principle of state consent. Positivists believe the principle of state consent is based on the interests of nation-states, which are articulated into a quasi-form of international obligation. Consent creates the rules to follow and underscores all forms of positivism. Thus, "the fundamental positivist position that states are the principles actors of international law and they are bound only by that to which they have consented, continues to operate as the basic premise of the international legal system".[293] The positivist argument works to form the foundation for justifying international relations by explaining state power in its many manifestations - material, military, normative, and so forth.[294]

Throughout the development of legal positivism, as Anghie notes, "The English jurists of the 19th century were most influenced by John Austin, the foremost spokesman for positivists at the time".[295] This is because Austin posited international law as sheer morality, due to a lack of centralized authority over European states. [296] Austin

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[291] Ibid.

[292] C.H. Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations', *British Yearbook of International Law* vol. 37 (1961), p. 506.

[293] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 2-14.

[294] Roxanne Lynn Doty, *Imperial Encounters: the politics of representation in North-South Relations,* p.3.

[295] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 14.

[296] Ibid.

highlighted several major issues associated with the international legal framework. Coinciding with the omission of a central arbiter was the lack of authority to mediate international conflicts, create legislation that would serve to alleviate international tensions, subordinate nation-states and their national interests for the broader goal of improving global affairs, and implement and enforce international law globally.

Because of this omission international law served as legally defined, albeit normative, illustrations of the rightful way to exercise nation-state interests when engaging with other nation-states. Without a central arbiter, all power remained in the possession of the nation-states. These states shaped the international community according to the collusion of their own best interests. Out of these consensuses, decisions about international principles and norms were produced and then written into international law.

To be clear, Austin challenged the possibility of creating order amongst sovereign states.[297] Positivists formulated a legal science to de-legitimize the Austinian critique and establish the international legal framework as law.[298] Specifically, positivists focused on the problematic instances of disputes between two sovereigns. This is why positivists outlined a 'scientific method' for creating international law. The 'scientific method' ensured international law would not operate privy to an independent universal force. It would instead operate in accordance with principles, norms and decision-making around a set of issues deemed worthy of international legal mechanisms.

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[297] John Austin, *The Austinian theory of law : being an edition of lectures I, V, and VI of Austin's "Jurisprudence," and of Austin's "Essay on the uses of the study of jurisprudence" with critical notes and excursus*, F.B. Rothman, Littleton Colorado, 1983.

[298] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 14-15.

The 'scientific method' functioned methodically according to three basic tenets. First, positivists systematically observed state behaviour.[299] Second, within these observations, positivists elaborated upon the rules to guide behaviour.[300] Finally, positivists arranged these observations and then subsequently ordered these rules around certain fundamental principles.[301] The direct manifestation of this form of 'scientific' categorization and "classification of facts" was the creation of the international legal "order". Thus, in so doing, positivists crafted a political foundation for international law.[302] Charlesworth and Chinkin argue that, "Positivism, in its international legal manifestations, developed as a response both to the challenge to state sovereignty posed by natural law and to the perceived failure of natural law theories to articulate objective and reliable principles of international conduct".[303]

With positivism, a particular form of reason became universal. By definition, positivists argue that nation states represent the source of international law plus the primary unit of analysis, or subject, for it as well. According to positivists, state practices and behaviours symbolize the "normative foundation of international obligation".[304] In this way, positivists believe the international legal system functions solely in accordance with "totally self-enforcing rules", instead of any sort of prescriptive models, which are erroneous and "doomed" from the outset."[305]

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[299] Ibid.

[300] Ibid.

[301] Ibid.

[302] John Westlake, *Chapters on the Principles of International Law*, pp. 137-143.

[303] Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A feminist analysis, p. 23.

[304] Roxanne Lynn Doty, *Imperial Encounters: the politics of representation in North-South Relations,* p. 9.

[305] Ibid.

It is worth noting how legal positivism legitimated European colonization by giving complete sovereignty only to European states. With this privilege, European members of the international society began categorizing non-Europeans with varying degrees of sovereignty. As will be shown, colonization manifested in different forms to ensure that European state interests were continually met. In this way, legal positivism underscores the development of the following legal doctrines, practices and categories.

Recognition

The practice of recognition ensured that non-Europeans were not recognized as subjects of international law. Sovereignty and international legal personality were crucial for the development of the international legal framework and the subsequent marginalization of non-European peoples within it. Thus, the "recognition doctrine is implicitly based on the assumption that a properly constituted sovereign exists". [306] Furthermore, sovereignty relates to the concept of territory insofar as "sovereignty over territory means 'the right to exercise therein, to the exclusion of any other state, the functions of a state".[307] Recognition gave Europeans "control over territory" and denied non-Europeans the same.[308] In this way, Europeans acquired non-European territories by recognizing only their own international legal subjectivity.[309] Conversely, non-Europeans

[306] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 64.

[307] Michael Akehurst, *Modern Introduction to International Law*, Allen and Unwin 1970, p. 148.

[308] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 26.

[309] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 69.

could not protect their lands or rights through the mechanisms of international law based on their non-recognition.

Terra Nullius

The doctrine of *terra nullius* was the first legal doctrine used to acquire territory. *Terra nullius* is defined as "territory that prior to acquisition belonged to no state".[310] *Terra nullius* refers to "unowned" and/or "uninhabited" land.[311] Indigenous peoples were said to occupy *terra nullius* upon discovery by Europeans between the 15th and early 18th century.[312] Anghie argues that "[t]he doctrine of *terra nullius* is now understood to have been used over the centuries to dispossess and destroy indigenous peoples throughout the non-European world."[313] Non-recognition of non-Europeans international legal subjectivity legitimated European colonial empires usage of this doctrine.

Discovery

European jurists invented the term discovery to signify European settlement on non-European land. As early 20th century legal scholar Simsarian notes, "[D]iscovery always includes a landing, and such landing is accompanied by a symbolic taking of

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[310] Michael Akehurst, *Modern Introduction to International Law*, p. 148.

[311] Stuart Banner, 'Why *Terra Nullius*? Anthropology and Property Law in Early Australia', *Law and History Review*, Vol. 23, No. 1 (Spring, 2005), p. 95.

[312] Karen Martin and Booran Mirraboopa, 'Ways of knowing, being and doing: A theoretical framework and methods for indigenous and indigenist re-search', Journal of Australian Studies, (2003) 27: 76, p. 203.

[313] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 76.

possession".[314] The act of a territory being 'discovered' gave the European state endorsing the voyage "inchoate title" over said territory. This means it gave the state, "an option to occupy the territory within a reasonable time, during which time other states were not allowed to occupy the territory".[315] Discovery was intertwined with the concept of *terra-nullius*. It was upon the grounds of *terra nullius* that discovery became valid for legitimizing European possession of non-European territory.

Occupation

Trade amongst European states became an integral influence in the development of the international law that guided the colonial dispossession of rights and lands of Third World and Indigenous peoples. In certain instances discovery and *terra nullius* became insufficient for establishing possession over lands. There are several examples of European states becoming adversarial and embroiled in controversy when colonizing North America. For example, France and England competed over rights to Indigenous peoples' territories in today's Canada during the late 1690s and well into the 18th century.[316] Another example is the 1790 Nootka Sound controversy between England and Spain over possession of Pacific Northwest Coast territories and resources.[317] These controversies were prevalent and therefore, formal and legal occupation was necessary for European trade to take place during the 18th century. [318] The concept of occupation

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[314] James Simsarian, 'The Acquisition of Legal Title to *Terra Nullius*', *Political Science Quarterly*, Vol. 53, No. 1 (Mar., 1938), p.111.

[315] Michael Akehurst, *Modern Introduction to International Law*, p. 149.

[316] James Simsarian,'The Acquisition of Legal Title to *Terra Nullius'*, p.111.

[317] Ibid.

[318] Ibid.

was utilized in order to give European states legal authority over the resources of newly possessed lands.[319] As noted by Simsarian, "occupation was regarded as an essential concomitant in the acquisition of *terra nullius*".[320] In the 18th century, "as a matter of official policy, the British acknowledged North American Indians as possessors of property rights in their lands, and [consequently] in practice settlers and colonial governments often acquired the Indians' land in transactions structured as purchases".[321] This did not mean recognition of sovereignty or legal personality for Third World and Indigenous peoples. Instead, the acknowledgement of Indigenous property was merely a formality that permitted European acquisition.

Treaties of Capitulation

European jurists created treaties of capitulation to further serve their international trade and economic interests. In particular, treaties of capitulation forged international economic ties with states that held sufficient autonomy to withstand colonization through the means of occupation. Essentially, European jurists forced free trade amongst the "old powers", such as China and Japan.[322] Akehurst accounts for how this doctrine delineates non-Europeans according to levels of sovereignty. He states that:

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[319] Ibid.

[320] Ibid.

[321] Stuart Banner, 'Why *Terra Nullius*? Anthropology and Property Law in Early Australia', p. 95.

[322] Michael Akehurst, *Modern Introduction to International Law*, pp. 1-151.

> In the case of the "old powers" such as Turkey, Siam (Thailand), China and Japan, Western states basically relied on the so-called capitulation system, treaties which were designed to establish lasting privileges for European trade and commerce in those states and which exempted Europeans from local jurisdiction. In the case of communities without sufficient central authority, the method was simply conquest and appropriation. Conquest and appropriation became particularly apparent in the scramble for Africa, the dividing up of the continent among European powers at the Berlin West Africa Conference 1884/5, which managed to settle the issues among colonial powers without provoking another European war.[323]

This is another example of certain states being afforded partial sovereignty. Indeed, partial sovereignty was granted to these peoples due to Europeans inability to establish local jurisdiction within their territories. As a result, certain peoples were sovereign and enjoyed limited personality. However, the rest of non-Europeans did not hold this distinction and as a result were ultimately colonized throughout the 19th and 20th centuries.

Conquest

Moreover, during the initial strike of colonization throughout the latter half the 19th century, conquest was deemed a legitimate method to acquire territory.[324] Conquest signified territory which was taken through military defeat. With conquest, victory in war granted territorial sovereignty.[325] It enabled territory to be later ceded with or without treaty. In order to prove conquest, a state must have shown that all resistance to occupation had ceased and desisted.[326] For Indigenous peoples, this doctrine was used between European powers who were fighting for control over land already deemed *terra nullius*. However, with the United Nations Charter becoming ratified in 1945, conquest

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[323] Ibid.

[324] Ibid.

[325] Ibid.

[326] Ibid.

was overruled by the principle that limited states from the right to use force to acquire control over territory.[327] In particular, article 2(4) of the Charter states that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[328]

The Protectorate System

After the UN Charter de-legitimized conquest, colonization continued to evolve. The British and North American governments began to assess the implications for Indigenous peoples resulting from territorial dispossession. The principles of occupation, discovery, recognition and *terra nullius* already ensured that the majority of the world had been colonized by Europeans. In comparison, the protectorate system offered certain 'privileged' Third World peoples and Indigenous peoples a marginal degree of international legal personality. The protectorate system re-established European superiority by allowing non-Europeans to enter into treaties with European states. These treaties defined the European state as the more advanced political entity that guides the non-European states domestic and foreign activities. In essence, the European state took on a paternal role. The protectorate system continued the evolution of the international society's demarcation of civilized and uncivilized peoples. In fact, this system was legally recognized within the UN. However, in this instance, quasi-sovereignty was afforded to non-European states only insofar as it was compatible with European colonial

[327] Ibid.

[328] UN Charter, Date last accessed: February 11, 2011. Available online at: http://www.un.org/en/documents/charter/chapter1.shtml

interests.[329] The protectorate system served as an example of how European jurists continued to justify and subsequently extend their control over non-Europeans.[330] Nevertheless, it did not afford protection for non-Europeans over their own territory and affairs, because, "when vital issues were at stake, European states simply assumed authority over that issue".[331] This sentiment underscores the state-centric nature of international law. Therefore, it should come as no surprise that today the UN human rights regime also embodies the Eurocentric and state-centric nature of international law. As the next section will illustrate, this nature presupposes a non-universal form of human rights recognition.

Collective Rights to Self-Determination

Indigenous peoples' claims surrounding human rights are extra-statial and often contradict the interests of states.[332] By convention, nation-states recognize Indigenous peoples as Indigenous *populations*. Likewise, international law recognizes them as holding minority status within a state.[333] The international legal framework protects national self-determination through the UN Charter and individual rights to self-determination through the UDHR, but until recent developments such as the UNDRIP, Indigenous peoples' collective rights to self-determination were unacknowledged. In fact,

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[329] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 71.

[330] Ibid.

[331] Ibid.

[332] Dianne Otto, 'Rethinking the Universality of Human Rights', *Columbia Human Rights Law Review* 1997, (1998-1999).

[333] Romeo Saganash and Paul Joffe 'The Significance of the *UN Declaration* to a Treaty Nation', in Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, ed. Jackie Hartley, First Nations Summit Society 2010, p. 140.

"*The Declaration* is the only international instrument in which Indigenous peoples' representatives played a key role in the United Nations standard-setting and decision-making procedures."[334]

To be sure, prior to the development of the UDHR, Indigenous peoples entered Geneva to speak in front of the League of Nations and assert their collective rights to self-determination. It is acknowledged that both Chief Dekaskaheh of the Haudenosaunee in 1923 and Chief Ratana of the Maori in 1924 went to Geneva to defend the rights of their peoples in front of the League. They both advocated for the right to live on their land, under their own laws and customs "even though they were not allowed to speak to the international body".[335] They were recognized by the League as members of Indigenous populations, rather than leaders of Indigenous nations and thus were not considered rightful subjects of international law.

Nonetheless, their efforts paved the way for Indigenous peoples' collective rights to become further recognized within the international legal framework. Presently, three formal mechanisms exist within which Indigenous peoples advocate for their collective rights to self-determination. These are: the Special Rapporteur to the UN Human Rights Commission, the Permanent Forum on Indigenous Issues, and the UNDRIP. The UN Permanent Forum on Indigenous Issues developed through several UN workshops that took place during 1993-1997. Today, it serves as an advisory body to the UN's Economic

[334] Phil Fontaine 'A Living Instrument', in Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, ed. Jackie Hartley, First Nations Summit Society 2010, pp. 9-11.

[335] Ibid.

and Social Council.[336] It is through these mechanisms that "the UN had to be convinced that Indigenous rights were different from Minority rights".[337] The difference being that Indigenous peoples have the right to self-determination. The right to self-determination "is the key and the basis for equality and respect from the rest of the world".[338] Accordingly, the Permanent Forum on Indigenous Peoples drafted UNDRIP using self-determination as the underlying principle.

Former National Chief of the Assembly of First Nations Phil Fontaine from Sagkeeng First Nation states that, "The *Declaration* is about building meaningful relationships with Indigenous peoples across the globe, and with nation-states and with Indigenous rights supporters. It is about our relationships with each other, our lands, natural resources, our rights, our laws, our languages, our spiritualties, our ways of life".[339] The Declaration emphasizes support for Indigenous peoples at the global level. The Former National Chief of the Assembly of First Nations argues that, "The *Declaration* bridges the global and the local. It is a response to the human rights abuses suffered by Indigenous peoples everywhere. It is an expression of the local experiences of Indigenous peoples all over the world. But it is also an expression of global solidarity of Indigenous peoples".[340] More specifically, the *Declaration* "sets out best practices that

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[336] United Nations Permanent Forum on Indigenous Issues, available online at: http://www.un.org/esa/socdev/unpfii/en/about_us.html Date last accessed: February 27, 2011.

[337] Kenneth Deer 'Reflections on the Development, Adoption, and Implementation of the *UN Declaration on the Rights of Indigenous Peoples*', in Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, ed. Jackie Hartley, First Nations Summit Society 2010, pp. 19-20.

[338] Ibid.

[339] Ibid.

[340] Ibid.

nation-states should implement" based around: "principles of equality"; and "minimum standards for the survival, dignity, and well being of Indigenous peoples worldwide".[341]

The UNDRIP was drafted and subsequently ratified by over 140 UN member states. Notable opposition came from states concerned about the implications for collective rights to land and self-determination. [342] Four Commonwealth nations – the UK, Australia, Canada, and New Zealand – as well as the United States opposed.[343] Possibly after realizing the normative significance of the declaration, both New Zealand and Canada signed on in 2010. This leaves Australia, the UK and the US as the only Western non-signatories.

Today, with the enactment of the UNDRIP, a certain level of recognition has been achieved. However, this form of recognition is more of a statement of best practices for states, rather than a shift in the way in which Indigenous peoples' international legal subjectivity is recognized. Article 1 of the *Declaration* states that, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law".[344] The focus on "inherent collective rights" is a crucial step in the right direction. Within the realm of collective rights: treaty rights, land and resource rights, and the right to self-determination are all protected equally and inter-relatedly.[345] It recognizes Indigenous

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[341] Ibid.

[342] Sheryl R. Lightfoot, 'Indigenous Rights in International Politics: The Case of Overcompliant Liberal States' *Alternatives* 33 (2008), pp. 83-104.

[343] Phil Fontaine 'A Living Instrument', p. 9.

[344] Ibid.

[345] Phil Fontaine, 'A Living Instrument', p. 9.

peoples` human rights both individually and collectively.[346] Indigenous peoples' collective rights to self-determination are recognized as the right to determine their political status and freely pursue their economic, social and cultural development. In recognizing self-determination, "Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".[347] For example, Articles 3 and 4 of the *Declaration* recognize the collective right to self-determination:

> Article 3
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 4
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[348]

However, Article 46(1) of the *Declaration* contradicts Articles 3 and 4 by indicating that this form of self-determination is recognized only within the confines of the territory of the existing state:

> Article 46
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[349]

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[346] The United Nations Declaration on the Rights of Indigenous Peoples. Date last accessed: February 11, 2011. Available online at: http://www.un.org/esa/socdev/unpfii/en/drip.html

[347] Phil Fontaine, 'A Living Instrument', p. 9.

[348] United Nations Declaration on the Rights of Indigenous Peoples, Date last accessed: February 27, 2011. Available online at: http://www.un.org/esa/socdev/unpfii/en/drip.html

[349] Ibid.

This form of recognition makes the UNDRIP vital as a normative measure because "the human rights of the world's Indigenous peoples are routinely trampled, even when entrenched in national laws".[350] Unfortunately, the entire *Declaration* must be interpreted by states and within the international legal framework in ways that ensure the territorial integrity and political unity of states are maintained. Meaning, this *Declaration*, albeit of high normative significance, does not do enough to ensure that Indigenous collective rights to self-determination are protected within the international legal framework. The *Declaration* contains principles such as Articles 3 and 4 which articulate the manner in which Indigenous peoples should be recognized under international law, however these statements are ideals that are left to the will of states with whom Indigenous peoples co-habituate. At the most cynical level, the *Declaration* articulates the rights of self-determining Indigenous populations, rather than nations, existing within sovereign states. Therefore, the state-centric nature of the *Declaration* is yet another example of the problems found with the international legal framework. It demonstrates the power/knowledge nexus at work, which creates international law to benefit states only. In this instance, Indigenous peoples inherent rights are measured against maintaining the territorial integrity and political unity of states. The remainder of this section will go on to explain how there are serious controversies that result from this form of legal interpretation.

As it stands, the international legal framework, specifically the UN human rights regime and the UNDRIP, lacks material universality because it dispossesses Indigenous peoples of their inherent collective rights to self-determination. In particular, the current

[350] Ibid.

human rights framework recognizes individual rights of citizens but not collective rights for Indigenous peoples.[351] By virtue of this distinction, Indigenous peoples are consistently subjected to states having the power to determine the extent to which Indigenous human rights are protected. For example, the leadership of the "United Kingdom and the United States both have indicated that they do not accept that the collective human rights of Indigenous peoples are human rights".[352] Sharing these concerns about the universality of human rights, Richard Falk argues that:

> Undoubtedly, the most vulnerable of all categories of vulnerable peoples is that of "indigenous peoples."… The specific identities and grievances of indigenous peoples played literally no role in the influential formulations of the provisions of the Universal Declaration of Human Rights. Amazing as it may seem, indigenous peoples were simply not treated as "human" by the Universal Declaration, despite its drafters being among the most eminent idealists of their day.[353]

Falk condemns the UN human rights regime. He accounts for the dismissal of collective rights within the UN's human rights regime as a "significant omission and failure".[354]

These differences all point to structural issues with the UN's human rights regime. The Canadian Human Rights Commission recognizes the resulting consequences for Indigenous peoples. They state:

> [H]uman rights have a dual nature. Both collective and individual rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unreasonable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of right without diminishing either.[355]

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[351] Ibid.

[352] Romeo Saganash and Paul Joffe 'The Significance of the *UN Declaration* to a Treaty Nation', pp. 137-140.

[353] Richard Falk, 'Foreword' in Maivan Clech Lam., *At the Edge of the State: Indigenous Peoples and Self-Determination*, Transnational Publications, 2000, p. xiii.

[354] Ibid.

[355] Romeo Saganash and Paul Joffe 'The Significance of the *UN Declaration* to a Treaty Nation', p. 139.

Sheryl R. Lightfoot also acknowledges these difficulties. She states that:

> International human-rights law and discourse currently excludes the two elements that are critical to the indigenous quest for rights recognition and recovery. First, the international human rights consensus does not include collective rights, yet when indigenous people seek land rights, they generally mean collective [rather than individual property] rights to the land. Second, although self-determination is the one group right included in the international consensus on human rights, indigenous peoples' self-determination was specifically excluded from the decolonization regime by the "saltwater thesis" (sometimes known as the "blue water thesis"), which asserted that only overseas colonial territories were eligible for decolonization and self-determination. Furthermore, the indigenous use of the term *self-determination* differs from how the term was used during the decolonization movement that followed World War II. When indigenous people speak of self-determination, it "should ordinarily be interpreted as the right of these peoples to negotiate freely their political status and representation in the States in which they live," rather than as secession or independence.[356]

The power/knowledge nexus explains how dominant Western conceptions of human rights as inhering in the person and not the collective, are incapable, epistemologically, of capturing Indigenous peoples' identities, cultures, knowledges, and so forth. As Lightfoot argues, decolonization and self-determination have only been granted to peoples from Third World states.[357] By contrast, Indigenous peoples located within both Third World and Western states do not have their self-determination recognized. Grand Chief Edward John, Hereditary Chief of Tl'azt'en Nation located on the banks of the Nak'al Bun (Stuart Lake) in Northern BC, Canada, holds the position of North American Representative to the Permanent Forum. In response to this problem, Grand Chief John states that, "Indigenous peoples' rights are inherent, and they do not depend on the interpretation of states".[358] Moreover, "Indigenous peoples have the inalienable right of self-determination. By virtue of this right, we are free to determine

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[356] Sheryl R. Lightfoot, 'Indigenous Rights in International Politics: The Case of Overcompliant Liberal States' *Alternatives* 33 (2008), pp. 83-104.

[357] Ibid.

[358] Grand Chief Edward John, 'Survival, Dignity, and Well-being: Implementing the *Declaration* in BC', pp. 54-55.

our political status and free to pursue our economic, social, health and well-being, and cultural development".[359] Therefore, "Indigenous peoples have the right to manage and benefit from the wealth of their territories".[360]

However, the state-centric nature of the international legal framework is incapable of exhibiting universal equality on material terms. As indicated in the UNDRIP, the right to self-determination is linked explicitly to Indigenous peoples' management of their ancestral territory, as a collective.[361] This right is also linked explicitly to the protection of their traditional knowledge, and yet the state-centric nature of the international legal framework prevents Indigenous peoples from protecting their lands and resources in the face of private individual pharmaceutical corporations.[362] In terms of the UN human rights regime protecting the right to property, the UN human rights regime protects individual citizens' rights to property, but not the collective rights of Indigenous peoples' to their traditional territories.[363]

The right to property affects Indigenous peoples in terms of their lands and usage of their lands. Private pharmaceutical corporations are coming into conflict with Indigenous peoples' right to self-determination. This conflict results from the omission of collective rights protection under the UDHR. The IPR reinforces these issues. Presently, the IPR protects corporations in their pursuit of natural resources and traditional medicinal knowledge on indigenous peoples' ancestral lands. In other words, individual

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[359] Ibid.

[360] Ibid.

[361] United Nations Declaration on the Rights of Indigenous Peoples, Date last accessed: February 27, 2011. Available online at: http://www.un.org/esa/socdev/unpfii/en/drip.html

[362] Chidi Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge', *Indiana Journal of Global Legal Studies*, 11.2 (2004), pp. 135-169.

[363] Ibid.

rights to private property overrides Indigenous peoples' inherent collective rights to self-determination. Indigenous peoples as a collective self-determining nation do not yet have the international legal personality required for protection under the UDHR. Instead, the IPR protects private individual corporations. Oftentimes, this leads to the exploitation of natural resources and traditional knowledge.[364] This demonstrates the manner in which the international legal framework infringes upon Indigenous peoples' rights to self-determination.

For example, Article 17 and Article 27 of the UDHR exemplify why it is crucial that the UN human rights regime protect the rights of both individuals and collectives. Article 17 states that: (1) Everyone has the right to own property alone as well as in association with others; and (2) No one shall be arbitrarily deprived of his property. Additionally, Article 27 states that: (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Examining these two provisions in the context of the struggle between the IPR and Indigenous peoples, it becomes apparent that in an ideal world these provisions would exhibit material universality. However, this is simply not the case. The UDHR only protects the rights of individual citizens of states. Consequently, private pharmaceutical corporations enjoy international legal subjectivity as private individual entities and Indigenous peoples are left insufficiently recognized. In this instance, the IPR protects the corporations instead of the collectives of Indigenous peoples who seek to

[364] Phil Fontaine 'A Living Instrument', p. 11.

protect not only their territorial integrity but also their traditional knowledge. Chidi Oguamanam argues that "protection of intellectual property using the mechanisms of international law is possible at the price of epistemological assimilation of the former".[365] Therefore, "Giving due regard to cultural protocols on knowledge protection is different from evaluating such schemes only in terms of their relevance to the conventional [Intellectual Property] system. The latter approach undermines differences in epistemological narratives between Western and non-Western ways of knowing".[366]

The current statist framework interprets all Indigenous rights within the context of territorial integrity and political unity of the state. Thus, the framework denies Indigenous peoples their inherent rights to alternative interpretations of property and the preservation of the resources thereon, as well as protection of their traditional medicinal knowledge from entities using the IPR for their own legal protection. This problem is defined and also reinforced by epistemological differences towards knowledge protection.[367] Within the international legal framework, the IPR regime is characterized by a specific Western epistemology.[368] The power/knowledge nexus informs this epistemology, which by definition is state-centric and unable to support the cultural needs of Indigenous peoples. There are several explanations for this dilemma. Many Indigenous communities hold and share knowledge as part of their oral cultures. By contrast, the IPR is a market instrument most suited for the capitalist ideology.[369] As the key epistemological difference, many

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[365] Ibid.

[366] Ibid.

[367] Chidi Oguamanam, 'Localizing Intellectual Property in the Globalization Epoch: The Integration of Indigenous Knowledge', pp. 135-169.

[368] Ibid.

[369] Ibid.

Indigenous peoples' nations and communities practice an "intellectual commons," whereby traditional knowledge is oftentimes publicly shared within and across communities. Conversely, international law protects individual corporations in their pursuit of knowledge ownership.

Ideally, the UN human rights regime would recognize the collective rights of Indigenous peoples on equal terms with the individual rights of private pharmaceutical corporations. This would only be possible if Indigenous rights were recognized outside of the context of territorial integrity and political unity of the state. However, because international law does not protect collective rights, it cannot recognize Indigenous peoples' collective international legal personality. Again, this is the power/knowledge nexus at work. The power of states due to the doctrinal and historical foundations of international law prevents Indigenous peoples from protecting their knowledge. The differences in interpretations of knowledge protection are based on cultural ways of knowing. This dilemma is underscored by differences in ways of knowing. It therefore reinforces the argument that the power/knowledge nexus not only informs the international legal framework, but also restricts the necessary universalizing amendments to its structure. In this case, Indigenous peoples' knowledge surrounding property rights remains subjugated within the context of the international legal framework. The practice of knowledge subjugation is made evident when considering the state-centric interpretation of the UNDRIP. Furthering this argument, Shashi Tharoor claims the structure of the international legal framework affects many African societies as well. Elaborating on this assertion he asserts that, "In most African societies group rights have always taken precedence over individual rights, and political decisions have been made

through group consensus, and not through the assertion of one's individual rights".[370] Tharoor states that, "It is the community that protects the individual".[371] Or, stated otherwise, "I am because we are, and because we are therefore I am".[372] That is not to say that all peoples belonging to these societies do not wish to have their individual rights protected as well. It would be unwise and ethnocentric to assume this to be the case. Rather, this analysis provides reasons why the UDHR should protect both collective and individual human rights. This is particularly problematic, because within Indigenous communities, "the health of the individual is often linked to the health of a society as a whole and has a collective dimension".[373] Thus, Indigenous peoples' nations and communities require better safeguards for their collective rights both within the international legal framework, as human rights, as well as additional international legal instruments.[374]

In summary, these doctrinal, categorical, historical, and theoretical foundations expose the colonial nature of international law. It is now important to reflect on the influence of Eurocentric thought on the continued development of the international legal framework. As shown thus far, the exclusionary character of the international community ensured the UN human rights regime was built without universal participatory input. As this analysis has already shown, a culturally biased myth of universality was produced out of these foundations and was attached to international law. Moreover, as chapter

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[370] Ibid.

[371] Shashi Tharoor, 'Are Human Rights Universal?', *World Policy Journal*, Vol. 16, no.4, (Winter 1999/2000), pp. 1-6

[372] Ibid.

[373] Ibid.

[374] Ibid.

two's critique argues, this myth also dominates the UDHR as far as ontology, epistemology, and morality are concerned, i.e. 'an overlapping consensus'. Therefore, as that chapter's genesis story suggests, the UN human rights regime contains non-universal values. Thus, in this sense, universalizing human rights amounts to a form of cultural imperialism. For this reason, the imperialist trajectory of international law is defined as the UN's attempts to universalize European moral thought disguised as human rights. This leads to the final doctrine - *jus cogens*. This signals a shift away from this chapter's preoccupation with the exclusionary nature of the international legal framework and instead focuses on the current status of human rights within international society.

Jus Cogens

The technical name now given to the basic principles of international law, which states are not allowed to contract out of, is 'peremptory norms of general international law', otherwise known as *jus cogens".*[375] Defining *jus cogens* is a varied exercise for jurists and scholars. Parker and Neylon describe how "[s]ome stress its substance, some its procedural effect, and some its character of upholding world order".[376] Akehurst defines *jus cogens* as invoking natural law's focus on morals and values.[377] Akehurst argues that, "The rule is now said to limit the liberty of states to create local custom, as well as their liberty to make treaties; the rule thus acts as a check on the tendency of international law to disintegrate into different regional systems. The rule of *jus cogens* depends on a custom or set of customs being accepted by the international community *on*

[375] Ibid.

[376] Karen Parker and Lyn Beth Neylon, 'Jus Cogens: Compelling the Law of Human Rights', *Hastings International Law Comparative Review*, 1988, p. 413-414

[377] Michael Akehurst, *Modern Introduction to International Law*, Allen and Unwin 1970, pp. 57-58.

the whole.[378] As far as ontology, Akehurst states that: "[*jus cogens*] must find acceptance and recognition by the international community at large and cannot be imposed upon a significant minority of states. Thus, an overwhelming majority of states is required, cutting across cultural and ideological differences".[379] The rules said to constitute *jus cogens* include, but are not limited to the prohibition of slavery, racial discrimination, and genocide.[380] These principles in effect refer to the "basic human rights of the person".[381]

As the international legal order continued evolving, the concept of *jus cogens* became increasingly powerful. Today it signifies customary international law "which has developed as a natural law concept while being incorporated as part of legal positivism and modern international law".[382] It remains the most important form of international customary law.[383] It allows for certain human rights principles to overrule international legal doctrines privileging sovereign state autonomy.[384] In this way, the hierarchy of the international system, which traditionally privileges nation-states, is changing.

With that in mind, this thesis defines *jus cogens* as human rights principles consented to by subjects of international law, which are fundamental to maintaining international legal order. Human rights are *jus cogens* based on their extant position within and above international law.[385] As an illustration, the recent juridical movement

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[378] Ibid.

[379] Ibid.

[380] Ibid.

[381] Ibid.

[382] Karen Parker and Lyn Beth Neylon, '*Jus Cogens*: Compelling the Law of Human Rights', *Hastings International Law Comparative Review*, 1988, p. 413-414.

[383] Ibid.

[384] Ibid.

[385] Ibid.

towards the 'normative hierarchy theory' proves these changes are taking place. The 'normative hierarchy theory' explains the increase in regulative power for human rights. This thesis provides the following anecdotal definition for the 'normative hierarchy theory': if a state violates a human right legally defined as *jus cogens* and then defends itself based on an internationally legal principle like sovereign immunity that is not considered equally important, the international legal system will defend the supremacy of said human right instead of sovereign state immunity. It demonstrates that increasingly jurors advocate for *jus cogens* as a way of ensuring that "a state's juridical immunity is abrogated when the state violates human rights protections that are considered peremptory international law norms, known as *jus cogens*".[386] Lee M. Caplan summarizes this logic by stating that "because [insert principle here] is not a *jus cogens*, it ranks lower in the hierarchy of international law norms, and therefore can be overcome when a *jus cogens* norm is at stake".[387] In this regard they operate as "norms that trump the will of individual states".[388]

In similar instances, human rights trump the sovereign will of states based on the logic that such a decision enhances the "collective benefit in state relations". Thus, jurists agree that certain human rights must be protected at all costs not only to protect all peoples but also in order to sustain peace and harmony within the international

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[386] Lee M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens:* A Critique of Normative Hierarchy Theory', *The American Journal of International Law*, Vol. 97, No. 4 (Oct. 2003), pp. 741-781.

[387] Ibid.

[388] Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A feminist analysis, Manchester University Press 2000, p. 23-37.

community.[389] Caplan analyzes this upward trend.[390] The following argument from Caplan provides a useful summary:

> The normative hierarchy theory proceeds on the assumption that state immunity in cases of human rights violations is an entitlement of states that derives from international law. Indeed, the centerpiece of this theory is a proposed hierarchy of international norms, which resolves the conflict between *jus cogens* and state immunity of the former. This hierarchy quite clearly, operates on a purely international level under the theory that the core interests of the community of states, enshrined in *jus cogens*, outweigh the individual interests of any one state, i.e. immunity from foreign domestic proceedings. As at present there is no universally accepted multilateral treaty to govern state immunity law, the normative hierarchy theory must rest on the assumption that is either the product of a fundamental principle of international law – a principle that arises from the very structure of the international legal order – or a rule of customary international law.[391]

This concept sheds light on the issues taken with human rights. The central problem is that certain human rights operate above the law.

For example, self-determination has evolved as a *jus cogens*.[392] In the case *Legal Consequences for States of the Continual Presence South Africa in Namibia (S.W. Africa) not withstanding Security Council Resolution 276* International Court of Justice Judge Ammoun declared that, the right to self-determination is "a norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances".[393] To make matters more complicated, *jus cogens* continue to evolve, so it is impossible to predict which additional human rights will become peremptory norms. International Court of Justice Judge Tanaka has strongly argued for all human rights being *jus cogens*:

> If we can introduce in the international field a category of law, namely *jus cogens*, recently

[389] Lee M. Caplan, Lee M., 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of Normative Hierarchy Theory', pp. 744-745.

[390] Ibid.

[391] Ibid.

[392] Karen Parker and Lyn Beth Neylon, 'Jus Cogens: Compelling the Law of Human Rights', pp. 440-441.

[393] 1971 ICJ 16, pp.89-90. (Ammoun, J., separate opinion).

> examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispovitum*…surely the law concerning the protection of human rights may considered to belong to the *jus cogens*. As an interpretation of Article 38, paragraph 1 (c) [Statute of the ICJ,] we consider that the concept of human rights and of their protection is included in the general principles mentioned in the Article [as a source of international law.[394]

The opinion of Judge Tanaka rests on the assumption that human rights represent cross-culturally applicable norms that should be protected at all costs. In taking this position, Judge Tanaka reinforces many of the problems already discussed surrounding the universality of human rights. In advocating for all human rights to become *jus cogens*, Judge Tanaka does not account for the cultural differences that have been previously mentioned such as those involving Shari'a Law or Indigenous peoples' interpretations of individual and collective rights. Moreover, in taking this position, Judge Tanaka ignores problems associated with the genesis of the UDHR. In particular, Judge Tanaka does recognize the fact that human rights lack universality because they were created without universal participatory input. Furthermore, Judge Tanaka ignores how this level of exclusion subsequently inhibits human rights universality in terms of their scope of application, normative significance, and practical significance. For these reasons, one may assume Judge Tanaka argues in favour of the meta-civilization.

Thus, *jus cogens* have the potential to marginalize Third World and Indigenous peoples more than any other form of international law. Their supremacy defines the problem. Therefore, if Judge Tanaka's recommendation achieves international legal precedence, then it is possible to surmise that *jus cogens* symbolizes the most effective doctrinal method for the UN to constitute all human beings into the meta-civilization.

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[394] The South West Africa cases (Ethiopia vs. S. Afr.; Liberia vs. S. Afr.) 1966 I.C.J. 6, 298 (Tanaka, J., dissenting).

In summary, just as European states gave their consent to the formulation of international law and the international legal order, *jus cogens* continues this legacy. Today, the 'normative hierarchy theory' ensures that international society is guided by principles and norms prescribed primarily by European powers. Demonstrating tremendous awareness, Anghie argues that, "The essential structure of the civilizing mission may be restructured in the contemporary vocabulary of human rights, governance, and economic liberalization".[395] This explains why the UNAoC's declaration of the universal, inextricable, and progressive functionality of human rights is extremely problematic. It shows the UN human rights regime exhibiting similar civilizing tendencies. In the same vein, it reveals a vicious cycle of these foundations legitimating norms falsely labelled as universal in scope and applicability.

Problems in Theory

Legal Positivism

Positivists would treat all doctrinal foundations covered in the previous chapter as legitimate, with exception of one, *jus cogens*. Positivists would condemn international courts for suppressing the sovereign will of the state. Positivists would also claim that the UNAoC wrongly chose human rights as its political and ethical foundation. In this case, the UNAoC prescribes human rights as a model for ameliorating the conditions conducive to terrorism. Thus, positivists would rather the dialogue remained focus on sharing domestic remedies to terrorism and not prescribe any sort of political or ethical

[395] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', p. 80.

foundation for its participants. Positivists would prefer if UNAoC participants would instead scientifically observe the behaviours of states in response to terrorism, systematically categorize these behaviours, and then draw out general rules of engagement. It is also important to note that only Western states would be involved in the discussion, thus excluding Muslim populations. The UNAoC's HLG does not seek to bridge the cultural gaps between Western and Muslim states, and because of the state-centric nature of legal positivism, Muslim populations would be excluded from influencing any related developments in international law.

Southern Theories of International Law

This explains why Southern theorists often consider international law in cultural terms. They argue that it represents a form of cultural imperialism. Southern theorists view international law as colonial in nature. Specifically, they consider all the aforementioned doctrines and categories to be representative of a legal system that marginalizes Third World and Indigenous peoples. For example, Grovogui insists upon creating "a new international order (or none at all), free of the legacies of colonization and colonial institutions".[396] Spivak, Said, and Grovogui, and Anghie represent this school of thought. Furthermore, 'Charlesworth and Chinkin state that:

> [Southern theorists] have argued that many international legal principles, such as the laws relating to the acquisition of territory, diplomatic protection for aliens abroad and compensation for expropriation of property interests, were devised to justify colonial confiscation and appropriation and they have suggested that participation by states of the South of the south in the further development of international law will lead to a new international legal order.[397]

[396] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' pp. 33-55.

[397] Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A feminist analysis, p. 37.

It is possible that the cultural composition of many Southern theorists influences this perspective. Southern theorists often belong to communities within states who were historically excluded. Their entrance took place at some point in recent history, post-colonization, after the creation of the international community. They often claim that Indigenous peoples and peoples of the South were not even recognized as valid participants in the creation of international law. For these reasons they argue that peoples who were excluded from developing international law should not be constrained by it. To solve this dilemma, they advocate for substantial amendments to the conditions of the international community. Ideally, these would reflect the interests and perspectives of the excluded.

Postcolonial Theory

Postcolonial scholars tackle whether international law operates according to universal values. They argue that it operates as an exclusionary system of principles, doctrines, norms and decision-making procedures advanced through the power/knowledge nexus that are biased towards Western interests. International law is often said to reflect European knowledge, which was coercively legislated into an international legal framework using European power for the benefits of actors existing within a European designed international society.[398] Anghie's treatment of international law serves as one of the best articulations of postcolonial thought.[399]

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[398] Siba Grovugui, *Beyond Eurocentrism and Anarchy*, p.237.

[399] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law'; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*; Antony Anghie, 'Francisco Di Vittoria and the Colonial Origins of International Law', A Anghie - Social & Legal Studies, 1996, pp. 1-16.

Furthermore, the UN human rights regime also represents the manner in which Western knowledge and Western power function as cornerstones to universalize human rights. In this regime, European thought is disguised as being universal, and consequently "rationalisms of hegemony [Eurocentric human rights] are disguised as universal humanism [the meta-civilization]".[400] Human rights therefore reinforce hegemonic practices. They state that human rights are "those practices that seek to create the fixedness of meaning".[401] They analyze the cultivation and preservation of the UN's legitimacy to universalize particular knowledge. Correspondingly, they describe how this process enables the construction of identities and meanings. Overall, their critique exposes how "[t]he determinants of the legitimacy and credibility of the process of discovery and knowledge have undermined the universalist ambition of IR". Thus, oftentimes they suggest "that international theory will remain incomplete if it does not assimilate anticolonial and postcolonial thoughts with respect to ontology and the productive changes that must foster international security, peace, and justice – if indeed this objective is still central to the teleology of IR and international theory".[402] A point in fact is the UNAoC's denial, or at least obfuscation of the colonial nature of the UN human rights regime. This lack of recognition is precisely what gives the UN its hegemonic potential.

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[400] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,'pp. 33-55

[401] Ibid.

[402] Siba Grovugui, *Beyond Eurocentrism and Anarchy*, pp. 234-237

Critique

Thus, it should come as no surprise that the UNAoC imposes its umbrella culture on all participants. Obviously, the HLG fails to recognize the legacy of colonization. Instead, the UNAoC's description of human rights as "inviolable and [that] all states international organizations, non-state actors, and individuals, under all circumstances, must abide by them," magnify concerns about the UN continuing to construct its meta-civilization.[403] Thus, the UN wrongfully proposes human rights as the answer to terrorism and xenophobia. It is important to challenge this position because of three outstanding issues. First, the existence of a universal ontology in regards to human rights has yet to be proven. Second, the UDHR drafting process did not eliminate concerns surrounding Eurocentrism. Finally, resulting from the first two issues, an "overlapping consensus" was not achieved. In fact, it would be impossible to define the UDHR as symbolizing 'an overlapping consensus' when considering the geographical makeup of the Human Rights Commission Drafting Committee, let alone the UN General Assembly.

The absolute ignorance required to assume that the UNAoC could function as a neutral host for the dialogue is profound. To be sure, the very makeup of international law invalidates the UN's human rights regime. It ensured that the UN never created a forum for all peoples to articulate their best interests. Therefore, this analysis places the UNAoC in a problematic political-theoretical space, precisely where it is possible to envision traces of Eurocentrism and Orientalism producing a form of hegemonic, Western neo-imperial power. In this space, "Western modernity, rationalism, and

[403] The United Nations Alliance of Civilizations (2006) 'High Level Group Report', Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

instrumentalism" contextualize the UNAoC and the role of human rights therein.[404] This demonstrates the power of knowledge, or in other words, the power/knowledge nexus. Specifically, it illuminates the way in which particular forms of knowledge can play a large role dictating the terms for mediation within international relations.

The concept of Orientalism serves as a powerful reminder of the influence of Eurocentric knowledge. In Edward Said's seminal work *Orientalism* (1979) it is defined "as a way of coming to terms with the Orient that is based on the Orient's special place in European Western experience". Likewise, Orientalism was borne out of Eurocentrism. Orientalism derives from individual authors and the large political concerns shaped by the three great empires: British, French, and American.[405] The cultural biases resulting from Eurocentric thought dominates a distribution of geopolitical awareness into scholarly economic, sociological, historical, and philosophical texts.[406] Orientalism also elaborates on this distribution, as well as the "series of interests" that "creates and maintains" this distribution.[407] Overall, it demonstrates the will or intention to understand the other, and "to control, manipulate, even incorporate, what is a manifestly different (or alternative and novel) world".[408] Said argues that, "I think it can be shown that what is thought, said, or even done about the Orient follows (perhaps, occurs within) certain distinct and intellectually knowable lines".[409] Therefore, he problematizes the historical

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[404] Siba Grovogui, *Beyond Eurocentrism and Anarchy: Memories of International Order and Institutions*, p.237.

[405] Ibid.

[406] Ibid.

[407] Ibid.

[408] Ibid.

[409] Edward Said, *Orientalism*, Oxford University Press 1979, pp. 1-13.

generalizations made about Arab peoples in popular Western academic texts during the 19th and 20th century.

Said's *Orientalism* also gave a prophetic account of the 20th century assumptions and resulting fear that would underscore a US led war, the War on Terrorism, as well as the international community's response, both domestically and collectively, to the aforementioned societal effects of this war. The manner in which Westerners come to terms with the Orient is through academic, cultural, or politically administrative knowledge and supportive functions which "expresses and represents [the Orient] culturally and even ideologically, as a mode of discourse with supporting institutions, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles".[410] Said's powerful indictment of academia shows the way in which Orientalism – 'knowledge about the Orient' – coloured Western traditions of history, philosophy, and literature, and therefore contributed to significant aggressive attitudes towards the Middle East.[411] Said predicted that, "American expansion into the Middle East recreates the claims of the Orient".[412] Thus, the US War on Terrorism should likewise be considered another "European [and American] invention".[413] One that also characterizes a contrasting image, idea, personality, experience, in order to come to terms with political and cultural differences of a group of peoples.[414] This is how the fear induced by terrorism propels the UNAoC dialogue. Moreover, it points to the manner in which the HLG Report fits within the characterization of Orientalism.

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[410] Ibid.

[411] Ibid.

[412] Ibid.

[413] Ibid.

[414] Ibid.

In this way, the UNAoC represents what Said proclaimed as a "corporate institution for dealing with the Orient".[415] Grovugui takes this argument one step further drawing explicit parallels between the War on Terrorism and Orientalism.[416] He argues that this war represents a movement across the "Orientalist continuum".[417] Discussing similar institutions and discourses he argues that, "Today, pretentious civilizational discourses provide sustenance to the belief that Muslim emegres [immigrants] within the gates of Europe would work in tandem with Muslim barbarians [terrorists] beyond to destroy Europe".[418] Hence, the UNAoC is mandated with "dominating, restructuring and having authority over the Orient".[419] According to him, the War on Terrorism displays three tenets of Orientalism. These are:

1. "the existence of separate, unequal, and hierarchical spheres of civilizations" [Eurocentrism]
2. "the need to maintain the boundaries between them by defending Western civilizations' goods or values against corrupt ones without; [The UNAoC]
3. "the necessity for moderate or secular Arab groups to join the West in introducing progressive values in the region." [The UN meta-civilization!][420]

The above parentheses summarize how these three tenets contribute to this analysis of the meta-civilization.

They also define the importance of the power/knowledge nexus, specifically, understanding the role of power in mediating the mandate and objectives of the dialogue, as well as the conditions for participation [full adherence to human rights]. Roxanne

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[415] Ibid.

[416] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' pp. 33-55.

[417] Ibid.

[418] Ibid.

[419] Ibid.

[420] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' in Sheila Nair and Geeta Chowdhry eds. *Power, Postcolonialism and International Relations: Reading Race, Gender and Class* (New York: Routledge, March 2002), 33-55.

Lynn Doty defines the source of power as "the power center".[421] This definition reveals the arbitrariness of supporting the UN's universalization of international law and human rights.[422] Doty argues that power in discursive centres dictate the conditions for participation.[423] Western states, as members of the international community, exercise their power to perform identifying tasks using Western knowledge to identify "the issues themselves [which] have provided contexts in which the identities have been constructed and reconstructed".[424] Therefore, "in the process of attempting to formulate policy, resolve problems, and come to terms with various issues, subjects and objects themselves have been constituted". [425] In particular, the UNAoC demonstrates the importance of considering power within discursive centres. It shows that whoever holds the power to set the terms of a given political discourse becomes empowered to prescribe identities and meanings for its participants. Therefore, within the UNAoC discourse, certain participants have the power to identify the actors participating, and define the purpose of the dialogue. The UNAoC precondition to participation – full adherence to human rights – exemplifies power within discursive centres. The UNAoC exemplifies the power of the UN to uphold particular forms of knowledge – the UN human rights regime – and to establish hierarchies of rights such as *jus cogens*. It also embodies the way in which the UN human rights regime functions as an oppressive system of knowledge which certain peoples have been empowered to offer and enforce universally.

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[421]Roxanne Lynn Doty, *Imperial Encounters: the politics of representation in North-South Relations,* University of Minnesota Press 1996, pp. 1-7

[422] Ibid.

[423] Ibid.

[424] Ibid.

[425] Ibid.

This snapshot demonstrates more generally how Westerners define human rights and the actors affected by them. In particular they have the power to set the parameters for a discourse about them, and ultimately refute alternative voices from entering the conversation about their construction, deployment and enforceability. Again, this is the power/knowledge nexus at work. Thus, the peoples with the capacity to set the terms of a given political discourse are then able to identify and define the actors participating within the international community. In this instance, the UNAoC supports a meta-civilization enforcing power centre. Therefore, one must deconstruct the center itself, to expose its arbitrariness and contingency and thereby call attention to the disciplinary functionality of power centres.

Doty's definition of asymmetrical encounters confirms the importance of this suggestion.[426] Asymmetrical encounters ensure that one entity enjoys the capacity to construct "realities that were taken seriously and acted upon and the other entity has been denied equal degrees or kinds of agency".[427] The HLG Report supports this argument. That is to say, the UNAoC's precondition for participation supports Doty's logic.[428]

Instead of displaying any degree of universalism, the UNAoC demonstrates what Barnett and Duvall define as "the concept of productive power".[429] Barnett and Duval argue that, "productive power as applied to global governance highlights how the discourses and institutions of IR contingently produce particular kinds of actors with

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[426] Ibid.

[427] Ibid.

[428] Ibid.

[429] Michael Barnett and Raymond Duvall, 'Power in International Politics', p. 60.

associated social powers, self-understandings and performative practices".[430] As a result, the UN's human rights regime functions as "an expression of a discursively constituted world populated by subjects normalized as human rights monitors, human rights violators, and human rights prosecutors".[431] Surely then, if the UNAoC has prescribed participants, who have prescribed identities, it is possible for them to construe relationships between the participants, and analyze the meanings of all of the above.

Careful consideration of the scope and depth of the UNAoC's imposition of human rights on all peoples and civilizations reveals the oppressive and culturally assimilatory nature of the UN. This is the powerful nature of human rights. They are seemingly moving towards transcending cultures and knowledge frameworks. Thus, they have evolved into transcendental rights, almost similar to a form of natural law. However, the UN human rights regime [re]presents the power dynamics and exclusionary practices found in colonial rule, precisely because the genesis of the UDHR and the doctrinal and theoretical foundations of international law reveal both Western ideological as well as material colonization.

Disconcertingly, the HLG Report does not acknowledge that the UN human rights regime is underscored by Eurocentric political thought. It omits the fact that despite what many UN supporters would argue, international law does not represent a universally achieved consensus of any sort. Presently, there is no consensus as to what the rules of international law should be, how the legal institutions should be structured, or how law should be enforced.

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[430] Ibid.

[431] Ibid.

Taken as a whole, the assumption of universality punishes people who think alternatively. In the case of the UNAoC, participants who choose not to invoke the UN's human rights regime inherent pre-constructed cosmopolitan existence alienate themselves from the UN's discussion on "bridging cultural gaps".[432] Therefore, by enforcing human rights, the UNAoC creates a universal standard of civility for the dialogue. However, in the process, they negate their objectives.

Conclusion

To summarize, the doctrinal, categorical, theoretical and historical foundations illustrated in this chapter included Natural Law, the 1648 Peace of Westphalia Treaty, Legal Positivism, State Sovereignty, International Legal Personality, the 'imperialist juncture', which influenced European jurists to distinguish between the 'Civilized and Uncivilized', Recognition, Occupation, *Terra Nullius*, Discovery, Conquest, Treaties of Capitulation, Protectorate, Southern Theory, Postcolonial Theory and *Jus Cogens*.[433]

Particular foundations created the legal space for the UN's institutions to reinforce exclusion. This is why it was possible for certain states exercise more power than others. The Peace of Westphalia is widely recognized as the birthplace for the sovereign nation-state. Recognition ensured that only non-Europeans held international legal subjectivity under international law, based on their status as sovereign states. The imperialist juncture solidified this treatment of non-European peoples. German cosmopolitan thought promoting universal logic and human progress made distinguishing

[432] The United Nations Alliance of Civilizations (2006) 'High Level Group Report', Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

[433] Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, p. 7.

between ‘Civilized’ and ‘Uncivilized’ peoples very popular. This distinction offered Europeans moral grounds for colonizing non-Europeans. These grounds underscore calling Third World and Indigenous peoples’ territories *Terra Nullius* upon Discovery. It also permitted the Occupation of said lands, and if contested by another colony, it enabled the opportunity for Conquest. If a population was deemed remotely ‘Civilized’ and therefore held partial sovereignty and legal personality, then Treaties of Capitulation were enacted to ensure that European colonial interests were still met. As time went on and colonial powers started to lose their moral traction, Protectorate Systems were established for the continuation of colonial dominance. In the end these systems were still well in place at the time the UN Human Rights Commission drafted the UDHR. This is what makes the ‘normative hierarchy theory’ so dangerous. Its interpretation in relation to *jus cogens* defines the full extent of the imperialist trajectory of international law. Furthermore, the cultural imperialist trajectory may increase in strength if the ICJ heeds Judge Tanaka’s recommendation to include all human rights as *jus cogens*. In accordance with this development, the UDHR’s normative role has become more effective than an educational tool. It now serves as the political and ethical foundation for the constitution of the UN’s meta-civilization, precisely because it operates transcendentally as *jus cogens*. As Southern and Postcolonial Theory point out, these rights potentially overlap and suppress cultural diversity between. In accordance with this development, the meta-civilization continues to gather strength.

International society therefore becomes fundamental for understanding the traditional utility of international law. By defining an international society, European jurists could subsequently offer cultural and political justifications for instituting the

demarcation between the civilized and the uncivilized peoples of the world. In other words, those placed within and outside international society.[434] In this way, certain states cultural differences can be translated into legal ones.[435] Thus, the concept of state-sovereignty, given by nation-states, for the usage of nation-states within their own constructed international society, enabled the international society to operate today as a "Projection of the Western history, development, human rights, progress and so forth".[436]

Ontological and epistemological questions result from this chapter's demonstration of European jurists' Western state-centric focus. Oftentimes, ontology precedes epistemology. It is usually safe to assume ontological commitments presuppose methods of producing knowledge and truths. In these instances, knowledge producers must have a sense of what they are analyzing. In essence, knowledge does not appear out of thin air. It is usually underscored by primary ontological commitments. However, in this case, ontology and epistemology continually reinforce one another. As this chapter illustrated, ontologically-biased international law was created with the understanding that certain peoples were 'Civilized' and others 'Uncivilized'. These ontological problems arise from the epistemology of legal positivism. The epistemological concerns arise when considering the extent to which legal positivism perpetuates the universalization of Eurocentric reason. In other words, Eurocentrism affords the UN its requisite legitimacy to universalize biased ontological commitments to human rights. Although, human rights standards have changed to become further reflective of global diversity, they are far away

[434] Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', pp. 17-26.

[435] Ibid.

[436] Ibid.

from being inclusive of all peoples, nations, societies, cultures and civilizations. The peoples who were originally excluded from participating in the development of the system of human rights remain excluded from decision-making in regards to whom and how human rights apply.[437]

Therefore, behind the surface rhetoric of the UNAoC in defence of the UN human rights regime, at its very core, lays imperial and colonial foundations. These continue to threaten the full realization of human rights for 'Third World' and Indigenous peoples. The reason being "that the colonial origins of international law created structures of domination between the European and non-European worlds, which continually recreate relationships that facilitate colonial domination".[438] The human rights movement is imperial in the sense that the constitution of the universal human rights creates an umbrella culture. Moreover, the colonial nature of international law allows for Western members of the international community to marginalize the colonized and formerly colonized peoples of the world. Furthermore, this colonial nature enables the imperialist trajectory of human rights. It ensures that the meta-civilization will be built in the first place.

[437] Siba Grovogui, 'Postcolonial Criticism: International Reality and Modes of Inquiry,' pp. 33-55

[438] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 2-3

Chapter 4

Conclusion

> It is difficult to deny that there are parallels between the present and past in terms of a division of the world into civilized and uncivilized spheres. For it is apparent that many contemporary Western theorists, commentators, and political practitioners continue to hold to a division of the world into different shades of civilization.[439] Brett Bowden, 2004

Conclusion

The logic of the UN High Level Group lying beneath their espousal of human rights reflects more deeply the logic of the creators of the international legal framework. The UNAoC proves that the UN envisions a co-dependent relationship between human rights and international order. Without human rights, the international community lacks international order, and without international order, the UN human rights regime lacks the structure required for its universalization. Thus, if the UN human rights regime serves an important role within the international community, then it is possible to conclude that the international system and UN's human rights regime reinforce one another. Consequently, this relationship strengthens and sustains the UN's constitution of the meta-civilization.

In the end, the UN should review its human rights regime and engage in meaningful conversation that all peoples can participate in equally. In order to be taken more seriously, the UN human rights regime requires re-conceptualization. However, this would be possible only if the UN seeks to destroy and rebuild its meta-civilization. This

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[439] Brett Bowden, 'In the Name of Progress and Peace: The "Standard of Civilization" and the Universalizing Project, *Alternatives* Vol. 29 (January/February 2004), p. 63.

could be accomplished in two ways. First the UN should recognize the cultural biases that limit its universal appeal. Second, the UN human rights regime must be reconstituted altogether. The UN should argue that human rights represent an ideal, or in other words, 'an overlapping consensus' not yet achieved. For this reason, there are three precursors to achieving the heightened universalism in human rights. First, there must be increased participation involving the peoples traditionally excluded from developing the UN human rights regime. Second, there must be re-conceptualization and reconstitution of human rights. And finally, there must be the means to sustain this engagement for the foreseeable future. All three precursors would serve to increase the overall universality of the UN's human rights regime.

Depending on the power centre involved, this process might allow the UN to make the UN human rights regime more inclusive so that it captures 'an overlapping consensus'. Until then, human rights should be interpreted as ideal-types that all peoples consistently move towards. Thus, the UNAoC should serve as an example of the manner in which human rights should not be discussed either now or in the near future.

In final consideration, the most likely criticism that will be levied against this thesis should be its inability to articulate with certainty the human rights that are not universal. This is a point well taken. However, the aim of this thesis is not to articulate a requisite level of universality for each human right. Instead, it is to demonstrate that the UDHR is not universal *overall*. Bearing this in mind, it is important to show that the UN's and more specifically the UNAoC's approach remains too dogmatic to be considered cross-culturally sensitive.

With that said, this is very difficult analytical terrain to navigate, because on the other hand it is not argued that human rights are without importance or utility. Human rights remain enormously beneficial. Bringing it all back home, human rights should be based on tolerance, which may, or MAY NOT, lead to 'an overlapping consensus'. In this manner, human rights should be treated as ideal-types rather than as a political and ethical foundation utilized for bridging cultural gaps. This means that the UN must acknowledge the colonial nature and culturally imperialist trajectory of international law. In this instance, the UN's method for enforcing human rights in order to bridge the "inherent cultural gaps" amongst a plurality of civilizations fails to account for these problems.[440] In sum, the UN requires better mechanisms within the international legal framework to ensure equality. This would only be possible if the UNAoC recognized alternatives to the universal standardization of the UN's meta-civilization.

Therefore, this thesis concludes that the UN must recognize its limitations in enforcing human rights. If not, the UN will continue to either explicitly or implicitly constitute all human beings into the meta-civilization. Simultaneously, this thesis encourages all peoples to continue to expose these problems and limits associated with the UN human rights regime. In this way, they will bring the necessary normative, structural and doctrinal changes to light.

[440] The United Nations Alliance of Civilizations (2006) 'High Level Group Report', Date last accessed: February 11, 2011. Available online at: http://www.unaoc.org/repository/HLG_Report.pdf

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