THE PROCESS OF DECOLONIZATION, THE EMERGENCE OF INTERNATIONAL HUMAN RIGHTS, AND THE CURRENT DE FACTO INEQUALITY OF INTERNATIONAL LAW

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An analysis of the process of decolonization in the Cold War decades after World War II offers two fundamental insights about the undercurrents of modern international law. Firstly, as developing 'Third World' states acquired formal sovereignty, the international legal system of European origins had truly become universal. Secondly, through this acquisition of statehood, the international community no longer solely consisted of the traditional club of European states. This article analyzes the ramifications of developing states subscribing to the Eurocentric international legal system. In light of its foundations in exclusively catering to European interests, it is contemplated whether modern international law can adequately accommodate the desires and needs of the new non-European states, who collectively represent over half of the global community. The analysis focuses on the emergence of international human rights to find that formal sovereign equality of developing states has not translated into actual power equality on the international plane. The article endeavors to provide a foundation for future scholarship by proposing a search for an approach that first and foremost values functional harmony and compatibility.

Following the period of the Cold War deadlock that mired the operational capacity of the United Nations, the end of the political strife and ideological conflict re-enabled the political consensus necessary for the United Nations Security Council (UNSC) to resume its mandates. However, significant formative changes had taken place within the global landscape during Cold War decades. In particular, the process of decolonization and the internationalization of the scope of human rights had irreversibly altered the dynamics of international reality.

The wave of decolonization following WWII and the emergence of international human rights provide fascinating areas of detailed study in their own right. Their rapid membership into the international community has indisputably changed and in many ways made this community of states truly 'international.' Prior to this process, the international community primarily consisted of European powers. The international legal system was therefore developed to regulate the interstitial relations between these European sovereigns. Rather than radically constructing their own system of international reality, the new states elected to join the existing one by acquiring the necessary concepts of sovereignty and statehood. Decolonization therefore refers to the complex and often painful process in which colonies gain independence from their withdrawing colonial powers.[1] This shift in the constituency of the global community exposed with increasing clarity the underlying tensions between the dominant hegemonic bloc and the rest of the community. In other words, it has brought to light questions of why a clear imbalance of power exists between equal sovereign entities on the international plane and how this has manifested in practice.

During the interwar period of the 1920s and 1930s, the key principle of self-determination of peoples, primarily developed in reference to the people in Eastern Europe, gained increasing traction in international rhetoric.[2] This movement was largely credited to American President Woodrow Wilson, who shortly after his famous Fourteen Points, claimed that, "National aspirations must be respected; people may now be dominated and governed only by their own consent. Self-determination is not a mere phrase; it is an imperative principle of action..."[3] The essence of this sentiment was recapitulated in the Atlantic Charter of 1941, protecting "...the right of all peoples to choose the form of government under which they will live; and [seeing] sovereign rights and self-government restored to those who have been forcibly deprived of them."[4] This principle was canonized in the post-war international consciousness through its enshrinement in the UN

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1   "Inquiring Minds: Studying Decolonization," The Library of Congress Blog, http:// blogs.loc.gov/ loc/2013/07/inquiring-minds-studying-decolonization/ (accessed September 1, 2015).

2   Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 196.

3   "February 11, 1918: President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances," Great War Period Document Archive, http://www.gwpda.org/1918/wilpeace.html (accessed September 2, 2015).

4   Atlantic Charter, August 14 1941, Clause 3, Courtesy of the Illinois Digital Archives, http://find.galegroup.com/gic/infomark.do?&idigest=fb720fd31d9036c1ed2d1f3a0500fcc2&type=retrieve&tabID=T0011&prodId=GIC&docId=CX2687500060&source=gale&userGroupName=itsbtrial&version=1.0 (accessed September 1, 2015).

Charter, as well as the two International Human Rights Covenants of 1966.[5] In a pivotal moment in 1960, the United Nations General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples.[6] It formally recognized the right to self-determination, and called for all powers to be transferred, without any conditions or reservations, to the non-self-governing territories, as well as all other territories which have not yet attained independence. It effectively concluded the League of Nations system of mandates, which had been absorbed by the UN under its trusteeship program.[7] Throughout this process, the composition of the international community ballooned to roughly 130 states by the end of 1960s, almost half of which were newly independent states.[8]

During the Cold War paradigm, the international community had generally been fractured into the West, Soviet, and the new "Third World."[9] Although there were two polar ideologies, as well as the increasing constituency of the Third World, it became increasingly clear that the international system was constructed strongly in favor of the Western bloc. They retained the majority of the permanent positions in the UNSC, and through concepts such as weighted voting, controlled the international financial institutions.[10] This concentration of privilege was reinforced by the underlying military and political strength of the West. Unlike the existing blocs of the West and the Soviet, many newly constituted states in Africa and Asia did not subscribe to a common overarching political ideology or cultural identity; they encompassed a wide political spectrum, with diverse cultural and economic circumstances. The main uniting commonality amongst these diverse states was their emotive perception towards the international system. As they were under colonial rule during the formative stages of international law, they were not able to participate in shaping it.[11] Rather than rejecting the operation of international law on these grounds, however, these states openly adopted

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5   UN Charter, Article 1(2); International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966 entry into force January 3, 1976, Article 1; International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966 entry into force March 23, 1976, Article 1.

6   UN Doc. A/RES/1514(XV) December 14 1960.

7   UN Doc. A/RES/1514(XV) December 14 1960, Clause 5; The Covenant of the League of Nations, Article 22; see UN Charter, Chapter XII.

8   Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 1997), 28.

9   French demographer Alfred Sauvy is credited with having coined the term 'Third World' in the 14 August 1952 edition of the magazine L'Observateur, where he drew a comparison between the third world countries and the third estate of the French Revolution.

10   Malanczuk, *Akehurst's,* 28.

11   Malanczuk, *Akehurst's,* 29.

it as the default medium of inter-state interaction. In doing so, international law, which had originated in Europe to benefit European states, was finally deemed to have become universal.[12] Instead of constructing a radically new form of international reality, the priority of these new states was to expose and change the laws and trends in international law that were inherently and intentionally disadvantageous to the new states.

The new states, who had finally acquired sovereignty and therefore formal equal standing on the international plane, had been optimistic about autonomy over their political and economic affairs. Further, they had looked forward to engaging in the international system as equal participants by either engaging in diplomacy to change old doctrines and principles that were unfairly in favor of the colonial powers or by making use of the existing framework to actualize their interests. These states adapted to the international landscape, and formed their own blocs to offset the existing ones of the West and the Soviets. The Non-Aligned Movement and the Group of 77, in particular, were created to improve their collective bargaining positions and pursue shared economic goals. The doctrine of permanent sovereignty over natural resources is an example of how these developing states attempted to utilize the rules of international law to limit the colonialist past and reaffirm their sovereign claim.[13] However, this particular example proved to be representative of the underlying orientation of the international system. In this case, the Western powers equally employed international law to curb these attempts at equality and autonomy; they claimed that the new states were acting in breach of classical principles of international law.[14] The new sovereigns claimed their exclusive right to the resources within their territory, and wanted to either modify or even annul existing legal arrangements that had been made previously by foreign investors.[15] The Western powers resisted these assertions of sovereignty and claimed that the new sovereigns were bound by these old contracts under the principle of *pacta sunt servanda*.[16]

These tensions between the Western states and the increasing number of frustrated Third World states had set the contest when it came to laws relating to self-determination, human rights, state responsibility, state succession, acquired rights, sources doctrine and the international law of

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12 Anghie, *Imperialism*, 196.
13 UNGA, Permanent Sovereignty over Natural Resources, December 17, 1973, UN Doc. A/RES/3171.
14 Anghie, *Imperialism*, 198.
15 N. Schrijver, *Sovereignty over Natural Resources* (Cambridge: Cambridge University Press 1997) 1
16 UN, Vienna Convention on the Law of Treaties, May 23,   1969, United Nations, Treaty Series, vol. 1155, 331, Article 26.

development.[17] Through these encounters, it became increasingly clear that although developing states had acquired the notion of sovereignty, it did not equate to real power on the international plane.

The pivotal question was whether international law, originally designed to serve the club of European states, could now accommodate the needs, desires, and priorities of the new global membership. As the traditionally unfettered right to initiate war was prohibited by the post-war international order as set by the UN, the contest between the powerful and the subjugated could not legitimately be resolved by acts of physical and military coercion. Rather, change would have to come internally through diplomatic and democratic channels within the community of states.

The International Human Rights Regime

Concurrently and related to the process of decolonization was the increasing recognition of human rights on the international plane. The post-war construction of the UN system fundamentally altered the concept of international law from being an interstitial network between states to a supranational forum of existence. As catastrophic human tragedy had provided the catalyst for its creation, the UN system spearheaded the codified protection of individuals within the international plane. Human rights principles were enshrined in the Universal Declaration of Human Rights in 1948, which provided the basis for subsequent global and regional instruments. In light of the new capability to address individuals globally without the necessary nexus to a state, developments in the international protection of refugees, as well as in international humanitarian law in armed conflict, were able to flourish. The essence of the post-war movement at the time was to proclaim that individuals worldwide intrinsically possessed certain inalienable and legally enforceable rights, which offered them protection from the state.[18] These rights were not seen as rising from the relationship between the individual and the state, but rather from the virtue of merely being human.

The Allies' experience of protecting German Jewish and other minorities during WWII, in particular, facilitated in severing the traditional notion that human rights arose from an individual's membership in a society and therefore were strictly internal matters for each state. The International Military Tribunal in Nuremberg was forced to set aside sovereign safeguards of non-interference in domestic affairs. By modifying the definition of crimes

17 Anghie, *Imperialism,* 198.
18 Malanczuk, *Akehurst's,* 209.

against humanity to include prohibited acts undertaken against *any* civilian population, it was able to hold the German state leadership accountable. Therefore, the gross failure of the German state to protect its population led to the Allies to intervene and deliver human rights that did not stem from citizenship or any other traditional grounds.

The growing discourse of international human rights is layered by at least three generations of civil and social rights. The first two generations, encompassing individual freedoms from state interference and social rights to claim welfare benefits from the state, respectively, are recognized as the 'traditional' rights. The more contentious third generation rights are said to include, *inter alia*, individual rights to peace, common heritage of mankind principle, right to development, right of minorities, and right to a clean environment.[19] Enforcement of these rights internationally remains significantly more difficult than legislating and codifying. Although the new supranational forum of the United Nations was able to aggregate and articulate the international human rights framework, its design based on a community of equal consenting sovereigns could not employ intrinsic measures to enforce compliance and sanction violations. Furthermore, though the rhetoric of the universality of human rights could be agreed upon, it was increasingly debatable as to which specific rights and principles were in fact deemed to be universal. Attempts at reaching consensus were made difficult, as different societies inherently projected their own priorities and perspectives. Western capitalist societies generally emphasized individual civil and political freedoms against state interference and governmental abuse of power. In contrast, socialist societies from the Cold War and onwards focused less on individual claims and more on collective rights that were to be guaranteed by the state, such as economic rights. In contrast again, developing states had priorities firmly fixated on the alleviation of poverty and the development of the economy. It was rationally articulated that 'fundamental' freedoms, such as the freedom of speech, could only come after having enough food to eat.[20]

Creating a general human rights framework to encompass all states was desirable in concept, but consensus on the specific protections simply could not be found. Consensus was paramount, as such a framework would by design violate the Westphalian safeguard of non-interference in internal affairs by external states. The discussions fell firmly within the contest between the developing states and the Western powers. Urgency and the

19 Ibid., 210.
20 Ibid.

undeniable universality of the concept of human rights protection was repeatedly emphasized, coursing through legal moralism. It was supported by the underlying presupposition that there existed a singular and unified corpus of human rights that were to be enshrined. In reality, it either ignored or failed to consider the compatibility of the perspectives of other cultures representing significant portions of the international community. Examples of the views of Islamic and East Asian societies in particular provide interesting insights. These societies have long possessed their own internal views on matters such as the freedom of religion, rights of women, concepts of social cohesion, and the social role of the individual. It was argued by Asian scholars and politicians that human rights of 'Western origins' focused excessively on individualism and decadence.[21] The concept of 'Asian values' were proposed as better representing their local communities based on social harmony of the group rather than conflict of individuals. In a similar vein, Islamic schools of thought resented what they viewed as Western pressures to force liberal transformation of their culture.[22] These societies, having had histories outside European secularization and the Age of Enlightenment, have naturally upheld different values and priorities as appropriate for their locality. Diverse examples over various cultures exist to illustrate the variations in how a particular community has prioritized their internal values, as appropriate for their circumstances. For example, Asian states in particular have elected to employ the concept of duties over rights, as they are believed to be less adversarial, while encouraging virtue.[23] African cultures similarly focused on the overall wellbeing of the community and prioritized respect, restraint, responsibility, and reciprocity over individual rights.[24] What becomes clear from the above snapshot of heterogeneous values is the increasingly difficult task of distilling a universal human rights regime based on consent. However, these relativist positions must necessarily be counterbalanced by the Western view that these cultural contexts are mere façades for facilitating authoritarian rule and blatant violations of established human rights.

The tension inevitably mounted as the rhetorical universality of human rights justified the dissemination of principles that were almost exclusively representative of 'Western' ideals. An extreme example was the right to a paid

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21 Daniel A. Bell, "The East Asian Challenge to Human Rights: Reflections on an East West Dialogue," *Human Rights Quarterly* 3 (1996): 641-67.

22 Y. Ghai in W. Twining, *Human Rights, Southern Voices* (Cambridge: Cambridge University Press, 2009), 111.

23 Ibid.

24 Shashi Tharoor, "Are Human Rights Universal?" World Policy Institute, www.worldpolicy.org/tharoor. html (accessed September 1, 2015).

vacation; the degree of incompatibility to their own culture could only bemuse the developing states. Under normal treaty rules, only signatory states could be held bound by these 'Western' human rights instruments, which could have perhaps alleviated some pressure by clearly demarcating its scope. However, it was further instigated that non-consenting states still incurred international human rights obligations under two avenues. By ratifying the UN Charter, they had implicitly given consent to the ramifications of articles 55(c) and 56, which laid out the foundations for general human rights obligations. The subsequent human rights instruments were perceived as merely elaborating this general obligation, rather than creating new ones.[25] In addition, customary international law was argued to have developed in parallel to specific human rights, and therefore endowed international entities the jurisdiction to monitor, encourage, and even enforce these rights within non-consenting states.[26] It is not difficult to understand from these legal acrobatics why many states felt that the philanthropic nature of human rights was being subverted by dominant states as a way to enforce cultural imperialism or neocolonialism through non-violent means. Traditional requirements such as state consent and democratic legitimacy became a mere illusion, as other tools of international law provided effective circumvention. Together with democracy, human rights was becoming a benchmark standard for Western states to assess the 'performance' of their sovereign equals in the international community.[27] Further exacerbating the discrepancy between formal equality through acquisition of sovereignty and 'real' equality, Western states had undertaken forms of interventions under humanitarian grounds, with varying degrees of legality, to forcibly install democracy in what they concluded were 'illegitimate regimes.'[28] It was supported by the political belief that there was a direct correlation between democratic governance and effective guarantee of human rights. These highly controversial expeditions of powerful states had re-introduced physical coercion and violence within interstate relations, albeit under legitimate and legalized guise. It was said to be for the betterment of humankind, by imposing transformation of non-conforming states in line with the Western form.

In his analysis of the peculiar trajectory of international human rights

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25   M. Byers, *Custom, Power, and the Power of Rules* (Cambridge: Cambridge University Press, 2004), 43.
26   Ibid.
27   Francis Deng, *Human Rights, Southern Voices,* ed. W. Twining, (Cambridge: Cambridge University Press, 2009), 36.
28   Malanczuk, *Akehurst's*, 31.

after WWII, Samuel Moyn puts forth the proposition that human rights was not a foundational truth latently waiting to be discovered, but was rather forged through opportune circumstances.[29] In doing so, he disproves idyllic notions that an established core content of human rights had existed in parallel to human society, ranging back to ancient Greece, and had simply awaited the recognition and legislation. His narrative distinguishes the traditional conceptions of human rights from the modern expressions; the central dividing factor is that modern forms do not require state involvement, as either the source of human rights or its regulator and enforcer. The momentum of human rights and its current successes often conceal its roots and developmental history, but Moyn identifies a curious phenomenon that human rights did not thrive immediately after WWII but rather decades later. This is made more peculiar by the fact that the underlying rhetoric of human rights decades later based itself on the atrocities of WWII. He explains this phenomenon through the usage of utopias; the body of human rights was able to offer an alternative utopia than the ones offered by the global superpowers during the Cold War stalemate.[30] It capitalized on the disillusionment and disappointment of the masses from the waning appeal of Western capitalism and Soviet socialism. It projected an apolitical reality that did not require subscription to these ideologies. In doing so, it provided a common and neutral framework that could conjoin global communities across language, culture, and state boundaries. Since the inceptive Universal Declaration of Human Rights in 1948, the human rights movement had been associated with movements emphasizing favorable agendas of Western Christianity, anti-communism, anti-colonialism, and anti-totalitarianism. Through his narrative, Moyn attempts to clarify his understanding of the 'actual' story of human rights. He asserts that modern human rights, having severed the prerequisite nexus to a sovereign state, now exist in international law to protect individuals as part of a 'general international regime.'[31] The post-Cold war era is viewed as the 'golden age' of the discipline, and the human rights trajectory continues to rise as a morally attractive mechanism for social change.[32]

Moyn's account arrives at introducing the human rights framework as an established system on the international plane, without necessarily detailing how this coexists with Westphalian principles, and more pointedly, how it

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29 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge; Harvard University Press, 2012), Prologue.
30 Ibid., 121-122.
31 Ibid., 176.
32 Ibid., 179.

will shape the future international legal order based around sovereignty. While it is true that this is not necessarily in the scope of his work, it is of importance to the current scholarship on ascertaining what implications the human rights framework may have on the international community of equal sovereigns. This is increasingly pertinent given the underlying contest between the dominant and developing states. This project proposes an alternate understanding of the development of human rights. Rather than focusing on the concept of utopias and pseudo-escapism, it focuses on the availability of forums as a marker for human rights developments. Prior to WWI, the supranational forum did not exist in the modern sense. The highest level of legal reality then was the national state forum, as international law merely governed the relations within the constellation of states suspended in an anarchic vacuum. Therefore, to contemplate human rights in a context separate from the state was unimaginable. In the re-construction of the international framework after WWII, with the advent of the United Nations, a new forum of legal existence transformed the vacuum in between and above the sovereigns. This supranational forum provided the basis for the rhetorical and positivist projection of human rights as an identifiable and globally applicable framework. By being adopted and codified at the supranational level, it was able to circumvent the concept of sovereignty and focus on individuals. Westphalian boundaries were further eroded by the supranational commitment to protect individuals globally irrespective of sovereign boundaries. However, although it was able to construct the human rights framework, either by direct consent of states or through indirect legal acrobatics, the supranational forum could not introduce direct measures for compliance, as it ultimately lacked unilateral coercive capabilities.

This discrepancy between the universal call for human rights and the technical inability of enforcement merely exposes the tensions between international legal morality and the limitation of the Westphalian foundations of international law. It is not in itself fatal to the current human rights momentum, as consenting states can collaborate to circumvent the legal obstacles. However, when it is further articulated that the specific content of these human rights being called upon engages only the conscience and desires of the dominant Western powers, it necessarily changes the equation. The tension is shifted from a conscionable international society aspiring for more yet unable to escape the archaic trappings of the old system, to a legalized hegemony creating and enforcing arbitrary international principles to aggravate non-conforming states who have not had the same historical developments as they have had. The latter perspective becomes even more complex when military interventions are often 'legalized' by the Euro-centric

international legal system to instate a more Western friendly government in the non-conforming states. Even with this articulation, it is far from being conclusive; it cannot satisfactorily assuage the Western suspicion that these non-conforming violators of human rights are merely justifying their crimes through their culture, religion, and heritage. The central problem with relativism is that it inherently makes a plea for any deviation from the set standard, some of which may include violations. Its counterpart, universalism, suffers from an inherent arrogance in its exclusive claim to applicability across all context and circumstances. Neither design is perfect, as selectivity and arbitrary application in both regimes often suggest underlying political agendas and extralegal sensitivities.

There cannot be a simple answer that can satisfy both factions, irrespective of which global reality one subscribes to. However, there can be an attempt to find a functional answer, one that attempts to integrate the *status quo* without passing judgement as to whether it is rightful or wrongful. Such a functional answer would perhaps in time facilitate further exchanges and cross-fertilization of viewpoints. Gradually, it is hoped that compatible views could one day be found to usher in the utopia of human rights to which everyone has agreed. One possible articulation of a functional approach could utilize the strengths of legal pluralism in international law. Perhaps a balance can be struck between universalism and relativism by collectively agreeing to uphold the central tenets of human rights protections without necessarily dictating its exact application in each diverse circumstance. This would encourage the developing states to adopt the core values of human rights, albeit being probably a narrower body than the existing regime, and apply it to their communities. It is imperative that these protections are absorbed by each state and its applications remain consistent with the local culture and heritage of the community. Although in its inceptive stage, a possible solution along this articulation allows Western states to extend the coverage of human rights law while permitting the contextualization of its implementation to have real effect on the subject society.

The power struggle is an inevitable condition of international existence, whether between communities, states, or blocs. Dominant parties will strive to maintain and strengthen their position, while weaker parties will seek to overthrow the former and seek to improve their own standing. A reoccurring theme seems to be that the Third World has not had the opportunities and experiences that the West has had. It is proposed that at the current junction, even if these states factually wanted to implement the full spectrum of human rights, they would not be effectively supported by the existing infrastructures, as these states have designed their societies to

realize other priorities. Though less than perfect, the key seems to be finding a compromise that may facilitate functionality and compatibility in hopes that such tentative collaboration may one day amount to cross-cultural understanding and faith in one humankind. **Y**