

To What Extent Does International Law Reflect the Sovereign Will of States?

Written by Sneha Dawda

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SNEHA DAWDA, APR 1 2016

'Law neither makes the sovereign, nor limits his authority; it is might that makes the sovereign and law is merely what he commands.' [1] International law and Hobbes' statement on law are intimately connected; the sovereign will of the state is the ultimate authority in the composition of international law. Essentially the role of international law is to regulate the behaviour of states. Although there is significant literature on the sources of international law and the factors that influence what international law reflects, it will be argued that there is undoubtable supremacy given to the state.

The concept of the nation-state and its consolidation of societal entities into one territorially defined country is a solely Western construct.[2] Thus the extent to which international law reflects the sovereign will of Western states is great. However, it falls short on the reflection of non-Western states' will. It is the aim of this essay to argue that the Western-centric notion of sovereignty and colonial discourse provide a coherent explanation to why international law reflects global inequalities over half a century after decolonisation. Hence international law does reflect the sovereign will of states to a large extent, but significantly fails to reflect the will of post-colonial states.

Firstly, the argument will address the idea of consent, reciprocity and the United Nations Security Council (UNSC) structure, as the indicators of sovereign will. It shall be established that the sovereign will of states is hegemonic in the international legal system. The argument will then highlight the inequalities of international law making amongst states. Instead of all states having an equal reflection in international law, there is a distinct colonial legacy of Eurocentric states acquiring much of the construction and application. By arguing that the pursuit for universal sovereignty and international law is a colonial mission, the extent to which international law reflects Western hegemonic states becomes apparent. Building on this historical argument, a legal perspective will infer that the domestic judicial systems of post-colonial states are still entrenched in the colonial judicial systems during the time of imperialism. Thus even if there is a significant input from non-Western states in international law making, it is still instilled with domestic sovereign structures inherently designed to benefit the colonial masters. In sum, international law reflects the sovereign will of Western states to a great extent and obstructs legal plurality from post-colonial states.

Consensual Mechanisms of Control

In this section it shall be argued that international law is reflective of the sovereign will of states by looking at the concept of consent and subsequently reciprocity. By focusing on enforcement mechanisms and the role of the state, it becomes apparent that power ultimately rests at the level of the individual state.

Duncan Hollis argues that state consent is a vital source of international law, with increasing importance in light of the September 11 attacks and the evolving face of threats.[3] He also highlights the plurality of actors influencing the construction of international law whilst questioning the role of the will of states.[4] However, Hollis asserts that 'the international legal order continues to lack universal, centralised, legislative and adjudicatory bodies that could definitively delineate the sources of law and judge their content.'[5]

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By comparing the weakness in structure and composition of international law with the state judiciary, it becomes clear that the prevailing organisational entity in effective judicial mechanisms is the state. Nevertheless, international law in various ways emulates the state's organisational structure. An example of this is the configuration of the UNSC. The overriding P-5 veto is the ultimate factor in the passing of resolutions; therefore any political concerns from the 5 nuclear powers will supersede those without a veto.[6] Not only does this result in state censorship of international law, it also perpetuates the inequalities between Western hegemonic powers – which are globally outnumbered – and post-colonial states. Subsequently, although all states consent to entering into the precedence of international legal systems, it is evident that the hegemonic structures possess ultimate authority in international law.

When exploring the structure of the United Nations (UN) and the prominence of states, it is hard to ignore the role of the US. Karen Mingst and Margaret Karns highlight the effect domestic politics has on US' diplomatic stance in the UN and how Security Council resolutions are voted on.[7] The US Congress has sole power over the budget for the UN, hence affecting the relationship between US statesmen and the UN.[8] Moreover, Mingst and Karns emphasise that 'the UN needs the support of the United States if it is to remain a vital institution'.[9] The US continues to retain hegemony in international organisations through its ability to pay, set the agenda and maintain an overriding veto on the Security Council.

Consensual rights in international law ultimately allow the state to control whether or not it agrees to the doctrine international law promotes. For instance, the state can refrain from ratifying a particular treaty.[10] This can be achieved through different methods; by signature, by exchange of instruments, by ratification and by accession.[11] These mechanisms however are dependent on state will to accept terms outlined by the treaty.

Niels Petersen identifies three aspects of consensual behaviour in relation to international customary law: 'states may affirm the legal rule through their practice, they may abstain from any relevant action, or they may explicitly oppose the formation of the legal rule.'[12] Thus, primary decision making power lies with the state which is guided by national interest. International law is a reflection of statehood because it is used as a tool of the state, rather than by its overriding power, due to the consent mechanism. If it were the arch sovereign over state activity with a constitution, it would no longer reflect the will of the states it governs.[13] Because states maintain decision-making powers, it reflects sovereign will.

The requirement to opt into treaties, organisations and international customary law is perceived to be for the benefit of the state, not due to the jurisdiction international law holds over states.[14] This brings into question the universality of international law. Universality is achieved through a consensus amongst states of what would be most beneficial. Nevertheless, international law is universally employed for national interests. However, questions arise from this view that further research will benefit from asking; how do post-colonial states use international law to further their interests if they are bound by hegemonic structures and how does this effect universality? To exemplify this dilemma, President Vladimir Putin signed a domestic law that entrenches constitutional sovereignty over any jurisdiction of the European Court of Human Rights (ECHR).[15] Essentially this gives Russia the power to still cooperate in international law, but choose when to. Moreover, VICE News reiterated Putin's stance by headlining 'Your Human Rights Court is not our Human Rights Court, says Putin.'[16] The ease with which Putin has separated Russia from the legal need to adhere to international law is testament to the control sovereign will has on international law. Summarily, it is treated by some states as an opt-in or opt-out mechanism, the effect of this on post-colonial states is yet to be discovered.

It is not Russia alone that uses international law in an ad hoc fashion that benefits state interest. The US, after investing resources and time in creating the International Criminal Court (ICC) which maintains jurisdiction over war crimes, voted against the Statute of Rome.[17] Thus, it is not a member of the ICC for fear of being investigated for previous crimes and despite the complementarity principle of the ICC's jurisdictions.[18] Although this fear would hinge on the outcome of the ICC's investigations, it still remains a court of last resort, and therefore national judicial structures remain sovereign.[19] Many post-colonial states, believing the membership to the ICC would be beneficial to reputation, ratified the Rome Statute.[20] This essentially perpetuates the inequalities in international law between Western and post-colonial states. Thus, international law does reflect the sovereign will of states through consent, but have proven to reflect Western powers' sovereign will.

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A further example of international law reflecting the sovereign will of states is reciprocity. Reciprocity is important to highlight due to its common reference as an enforcement mechanism attesting to the legitimacy and effectuality of international law. The dyadic relationships between states is regulated and promoted in order to generate positive engagement with each other. James Craig Barker argues that reciprocity 'encourages cooperation on the basis of the highest common denominator.' [21] This is a distinctive element of international law that reflects the sovereign will of states, due to the requirement for states to engage in relations in order for it to work. National interest is the definitive factor driving states to maintain and create a multitude of bilateral relations.

It has been the purpose of this section to display characteristics in international law that reflect the sovereign will of states. Through mechanisms such as consent and reciprocity and the ad hoc approaches to international law, sovereignty still lies with the state. In the next section it will be argued that although the sovereign will of states is reflected in international law, it is only for a select group of Eurocentric states. Through the medium of post-colonialism, it shall be argued that the notion of sovereignty itself, and therefore international law, is part of the colonial mission. Thereby, the conception of sovereignty in a colonial lens reflects upon and shapes international law.

An Exploration of Western Sovereignty

In order to assess to what extent international law reflects the sovereign will of Western states, one has to explore what sovereignty is and how it has shaped world order today. Moreover, it is necessary to provide an explanation as to the inequalities amongst states in international law, in order to prove it is derived from the sovereign will of states. Throughout this section the notion of sovereignty and how it is equipped to develop and influence international law will be recognised. However, an argument will be made for the colonial bias infringing on the novel notion of universality in international law.

Antony Anghie, a key scholar in post-colonial construction of international law, highlights a key flaw in the current focus of the discipline:

The principal analytic frameworks governing the [international law] discipline precluded any real examination of non-European societies and people, and the ways in which they impinged upon and shaped the making of international law. [22]

In other words, Anghie argues there is a historical bias within scholarship that overlooks epistemological flaws in understanding colonialism, thereby misshaping views on international law. Instead of thoroughly analysing how colonialism shaped modern day international law, the discipline has looked more towards an Austinian dialogue of sovereignty and justice. [23] This in turn, has neglected to highlight the inequalities between post-colonial states and the West in international law practice. [24]

Anghie declares that 'the non-European world plays an insignificant role' in the practical and theoretical changes of international law. [25] Specifically, he highlights the labelling of sovereign and 'non-sovereign' to colonial states which allowed Western hegemonic powers to simultaneously grant colonial states some independence, whilst also legitimising their presence economically and socially. [26] These 'mechanisms of exclusion' stressed the pursuit of exploitation by Western powers occupying colonial states by only granting them partial sovereignty. [27] By distinguishing the hierarchy created by colonialism, sovereignty can be understood in itself a 'civilising mission' required to ensure the imperial power endures despite decolonisation. [28] This allows only Western hegemonic states to be reflected in international law.

Moreover, a secondary effect of the paradoxical labelling is to provide extremely difficult issues for future international law to include post-colonial states and provide equality. [29] This deep-rooted sense of jurisprudential superiority and manipulation can be explained through post-colonial theory. Siba N'Zatioula Grovogui argues that 'European perceptions of the self and their metaphysical representations have been crucial to the structure of international law.' [30] There are therefore severe limitations to the input post-colonial states can have in the construction and jurisdiction of international law.

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There is the claim that non-European states have prescribed to and developed international treaties and further contemporary international law.[31] However, as Anghie asserts, there is a misconception amongst scholars on the birth of international law scholarship that racial politics and Eurocentric jurisprudential focus does not influence international law.[32] For example, Francisco de Vitoria prescribed to the aforementioned notion of a sovereign non-sovereign paradigm for colonial peoples and discredited colonial populations as 'children in need of a guardian' that required intervention by the 'agents of natural law.'[33] Consequently, international law's conception and universality is the result of Eurocentric sovereign will, comprised of state interests in the pursuit of colonial conquest and a universal dominance.

The lack of choice in colonial people prescribing to international law is apparent when one considers that

By the end of the 19th Century European expansion had ensured that European international law had been established globally as the one single system that applied to all societies. It was in this way that European international law became universal.[34]

Carlo Focarelli concurs that 'many existing states were born out of the extermination of native inhabitants on their territories.'[35] By reducing the power of the indigenous people, the universal application of Eurocentric judicial structures and international law was able to take place. The colonial project was therefore to export European law and abolish any previous systems of localised justice in indigenous communities. Universality in a colonial lens appears contradictory to the liberal notion and exportation of international law.[36]

If the universality of the nation-state structure is a colonial export, subsequent questions arise on the reflection of the nation state in international law. Focarelli raises the issue of the term 'international' in describing the treaties constructed between indigenous communities and colonial powers.[37] Particularly, the fact that indigenous people do not recognise the Westphalian concept of the state. However through passing an international treaty, they are forced to make a claim to their ancestral lands and become sovereign of it.[38] Thus they are in essence treated as a state in international treaties.[39] This is another more underlying attempt at colonising through jurisdictional mechanisms and exporting an international law that reflects the Eurocentric conception.

In this section it has been argued that sovereignty has been a colonial export from European hegemony. European imperialism replicated sovereign will across the globe in a Eurocentric structure. This was in order to continue creating international law to reflect the sovereign will of European states, not the post-colonial societies forced to accept statehood through decolonisation.[40] By doing so, international law was historically created to reflect the will of Western sovereign states. In light of this, it will now be argued that domestic judicial systems of post-colonial states are shaped to continue a colonial legacy that reflects on international law.

Justice and Law inside the Post-Colonial State

It was argued in the previous section that state sovereignty has been a colonial export through the process of decolonisation. In order to participate in and be reflected in international law making in any capacity, a post-colonial society was required to accept the Western construct of the nation-state. In this section, building on the previous argument, there will be an analysis of internal sovereign justice structures of post-colonial states and the notion of self-determination. This will exemplify the colonial mission to export Western judicial systems, in order to ensure that future international law reflects the sovereign will of Eurocentric states.

Argyrios Fatouros argues that cultural difference between European states and the non-European world is exaggerated and unconvincing; instead it is insignificant in contemporary international law making.[41] However, he dismisses cultural entities that existed with different political structures before colonisation and the exportation of the nation-state model. Furthermore, by arguing there is little difference between the West and non-West is Westernisation in itself. By subjugating cultural differences, Fatouros denies the existence of a plurality of participants, thus emulating the colonising mission. Moreover, he conceptualises the non-Western world as submissive to the dominant international structure of Western hegemony.

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In contrast Sally Engle Merry moves towards creating a 'theory of law and domination' that combines the 'large-scale transfer of laws and legal institutions from one society to another' with the political and social context of the colonial state.[42] By doing so she highlights that perspective is required to fully understand the effect colonial judicial enforcement had on indigenous populations. Merry argues that the 'law contributed to the construction of a new consciousness, a new set of understandings of persons and relationships.'[43] Within post-colonial states the legacy of this remains and continues to shape the legal system and culture in various ways.

Building on this, Leslie Sebba specifically claims that the 'features of the development of law in these societies is the fact that in many cases they have substantially retained the criminal codes enacted by the colonial power.'[44] During decolonisation, a new independent judiciary was not constructed in post-colonial states; instead they retained and developed the colonial laws already in place.[45] Consequently the reflection of the sovereign will of states in international law is bound by a structure of colonialism within the post-colonial states that attempt to shape and influence it. Sebba claims the most prominent and striking model of legislation to leave an enduring impact on post-colonial states is that of the 'conflict model.'[46] Through this model, domination through 'divide and rule' was the most effective way of maintaining control over indigenous people.[47] Related to the criminal justice system, Sebba notes that 'penal provisions' were enforced in order to maximise production, thus creating 'pseudo-slavery'.[48] The current inequalities at the international level amongst the West and non-West are testament to the increasing demand of cheaper goods from Western states manufactured at substantially lower wages.[49] As a result, international law reflects the disparities amongst nations, as it was previously argued that the sovereign will of the state decides the usage of international law.

Through the examination of internal judicial systems and their effect on the lasting legacy of colonialism, one must question what self-determination really means for the post-colonial state. This is due to the rigid link between self-determination equalling statehood and the sovereignty of the Western model.[50] Jan Klabbers reiterates that 'the very process of decolonisation could be explained in terms of the application of the right to self-determination.'[51] In other words, the right to self-determination is inextricably linked to the colonial experience and is ultimately the by-product of colonialism. If one should question the process of decolonisation, then how self-determination was and is perceived must change if international law is to reflect the sovereign will of all societies. Klabbers concurs that 'decolonisation should be established following the free and genuine expression of the will of the people concerned,' and in turn this will be reflected in international law.[52]

This shift would require a change in language and conceptualisation of how self-determination can be used by post-colonial societies. The entrenchment of the nation-state system across indigenous peoples has rendered the prospect of shifting outside of the state structure impossible. However, it is self-determination, not statehood that should be at the root of increasing international law's reflection of post-colonial societies. To exemplify this point, the International Court of Justice (ICJ) has been presented with the re-conceptualisation of self-determination in an advisory opinion in 1971 on Namibia. Specifically, the Court actively claimed self-determination as a 'principle' rather than a 'right', thus shifting it away from the 'lure of statehood'.[53] Klabbers goes one step further than the ICJ to suggest it is no longer about the right or principle of self-determination, but 'a right to be heard and be taken seriously.'[54]

Through an analysis of the internal judicial system and self-determination, it becomes apparent that engagement from post-colonial states is merely a reflection of their colonial past, and their historical failure of self-determination. Throughout this section it has been argued that the internal judicial procedure of post-colonial states has an effect on the international outlook they employ towards international law. This effect is a colonial legacy from imperial powers to marginalise plurality and subjugate broader input. Thus a dominant and submissive divide amongst Western and post-colonial sovereign states are created in the reflection of international law. In sum, universality of international law, and its equal reflection of the sovereign will of states is hindered by Western hegemony.

Conclusion

Summarily, it has been the aim of this essay to argue that international law does reflect the sovereign will of states to a great extent. Although, it has been constructed to marginalise the post-colonial world and limit their influence

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through several mechanisms. Firstly, it has been established that international law reflects the sovereign will of states because of the ad hoc manner in which it is used and how it is often bent in the interests of the state. The nature of international law and its highly debated enforcement mechanisms, or lack thereof, in addition to the consent basis provides a theoretical argument to the question. Secondly, it has been argued that the installation of nation states and the enforcement of statist sovereignty is part of a larger colonial mission. Therefore, the primary notion of the nation state is Eurocentric and imperialised. Finally, the essay argued that by looking into the internal judicial systems of post-colonial states, one finds evidence of colonial legacies that have continued to question the notion of self-determination even into contemporary international law making. The intention of this essay has been to highlight the disparities present in the international law structure amongst Western hegemonic states and post-colonial nations. By doing so, one can move beyond analysing international law in a vacuum of solely diminishing or flourishing sovereignty and place it within a context of global inequalities and historical trends, whilst still arguing that international law continues to reflect the sovereign will of states.

Endnotes

- [1] R. Tuck (1991) *Leviathan* (ed.) Cambridge, Cambridge University Press, ch. xvii.
- [2] K. J. Holsti (1996) *The State, War and the State of War*, Cambridge, Cambridge University Press, p. 203.
- [3] D. Hollis (2005) 'Why State Consent Still Matters – Non-state Actors, Treatise, and the Changing Sources of International Law' *Berkeley Journal of International Law*, Vol. 23, p. 137.
- [4] Hollis, 'Why State Consent Still Matters – Non-state Actors, Treatise, and the Changing Sources of International Law', p. 138.
- [5] Hollis, 'Why State Consent Still Matters – Non-state Actors, Treatise, and the Changing Sources of International Law', p. 144.
- [6] A. Carswell (2013) 'Unblocking the UN Security Council: The Uniting for Peace Resolution', *Journal of Conflict & Security Law*, Vol. 18, p. 456. The P-5 refers to the 5 nuclear-powers that permanently sit on the Security Council and maintain the usage of a veto.
- [7] K. A. Mingst and M. P. Karns (2012) *The United Nations in the 21st Century* (4th Ed) Colorado, Westview Press, p. 66.
- [8] Mingst and Karns, *The United Nations in the 21st Century*, p. 67.
- [9] Mingst and Karns, *The United Nations in the 21st Century*, p. 68.
- [10] M. Shaw (2003) *International Law* (4th ed), Cambridge, Cambridge University Press, p. 817.
- [11] Shaw, *International Law*, pp. 817-821.
- [12] N. Petersen (2011) 'The Role of Consent and Uncertainty in the Formation of Customary International Law' *Max Planck Institute on Collective Goods*, p. 2.
- [13] J. Klabbers, A. Peters and G. Ulfstein (2009) *The Constitutionalisation of International Law*, Oxford, Oxford University Press, p. 58.
- [14] Klabbers, Peters and Ulfstein, *The Constitutionalisation of International Law*, p. 301.
- [15] K. Howell (2015) 'Putin Signs Law allowing Russia to overturn International Human Rights Court rulings', *Washington Times* <http://www.washingtontimes.com/news/2015/dec/15/vladimir-putin-signs-law-allowing-russia-to->

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overtu/ (Accessed on 13th January 2016).

[16] 'Your Human Rights Court is not our Human Rights Court', *VICE News* <https://news.vice.com/article/your-human-rights-court-is-not-our-human-rights-court-says-putin> (Accessed 13 January 2016).

[17] M. Leigh (2001) 'The United States and the Statute of Rome' *The American Journal of International Law*, Vol. 95, p. 124.

[18] L. Yang (2003) 'Some Critical Remarks on the Rome Statute of the International Criminal Court' *Chinese Journal of International Law*, Vol. 2, p. 621. The Complementarity principle refers to the cooperation between ICC jurisdictions and national jurisdictions. The ICC actively seeks to compliment national judicial structures in order to make their rulings more acceptable.

[19] J. C. Barker (2000) *International Law and International Relations*, London, Continuum, p. 32.

[20] Yang, 'Some Critical Remarks on the Rome Statute of the International Criminal Court', p. 621.

[21] Barker, *International Law and International Relations*, p. 31.

[22] A. Anghie (2006) 'The Evolution of International Law: Colonial and Postcolonial Realities' *Third World Quarterly*, Vol. 27, p. 741.

[23] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 740. The Austinian Handicap claims that a consistent and coherent application of law requires a sovereign power to oversee enforcement, but is absent at the international level, questions the validity and jurisdiction of international law over states. This is however, a separate debate. Austin is referred to here as a main focus of international law scholars, it has been suggested by Anghie that a surplus of research has been done on this.

[24] D. Chandler (2010) *International Statebuilding: The Rise of Post-Liberal Governance*, New York, Routledge, p. 54. Inequalities include economic disparity, the inclusion of post-colonial states in international law construction and the exploitative nature of the West towards post-colonial states.

[25] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 741

[26] A. Anghie (2004) *Imperialism, Sovereignty and the Making of International Law*, Cambridge, Cambridge University Press, p. 9.

[27] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 741.

[28] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 742.

[29] Anghie, *Imperialism, Sovereignty and the Making of International Law*, p. 145.

[30] S. N. Grovogl (1996) *Sovereigns, Quasi-Sovereigns and Africans: Race and Self-Determination in International Law*, Minneapolis, University of Minnesota Press, p. 16.

[31] C. L. Lim (2008) 'Neither Sheep nor Peacocks: T. O. Elias and Post-Colonial International Law' *Leiden Journal of International Law*, Vol. 21, p. 306.

[32] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 742.

[33] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 743-744. Vitoria is often referred to as a proponent of equal rights between communities and states during the conception of international law.

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Anghie however disproves this common notion and applies a colonial context to Vitoria's writings.

[34] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 746.

[35] C. Focarelli (2012) *International Law as a Social Construct*, Oxford, Oxford University Press, p. 212.

[36] Focarelli, *International Law as a Social Construct*, p. 266.

[37] Focarelli, *International Law as a Social Construct*, p. 213.

[38] Focarelli, *International Law as a Social Construct*, p. 213.

[39] Focarelli, *International Law as a Social Construct*, p. 213.

[40] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 746.

[41] A. A. Fatouros (1964) 'International Law and the Third World, *Virginia Law Review*, Vol. 50, p. 788.

[42] S. E. Merry (1991) 'Law and Colonialism', *Law & Society Review*, Vol. 25, p. 891.

[43] Merry, 'Law and Colonialism', p. 892.

[44] L. Sebba (1999) 'The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies', *Crime, History & Societies*, Vol. 3, p. 71.

[45] S. F. Joireman (2001) 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy, *Journal of Modern African Studies*, Vol. 39, p. 3.

[46] Sebba, 'The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies', p. 76. The conflict model, according to Sebba, is the most likely method imperial powers used to dominate to create a colonial legacy.

[47] Sebba, 'The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies', p. 76.

[48] Sebba, 'The Creation and Evolution of Criminal Law in Colonial and Post-Colonial Societies', p. 76.

[49] Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', p. 750.

[50] J. Klabbers (2006) 'The Right to be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly*, Vol. 28, p. 191.

[51] J. Klabbers 'The Right to be Taken Seriously: Self-Determination in International Law', p. 191.

[52] Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly*, p. 193.

[53] Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', p. 190.

[54] Klabbers 'The Right to be Taken Seriously: Self-Determination in International Law', p. 202.

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Date written: January 2016