

THE STATE OF INTERNATIONAL LAW: FORMAL INCLUSION, STRUCTURAL EXCLUSION, AND THE CASE FOR NORMATIVE RECONSTITUTION

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Abstract

This paper argues that the international legal order remains structurally illegitimate, grounded in Eurocentric normative premises that preordain the terms of participation for Third World states. International law's foundational doctrines, sovereignty, statehood, and treaty-making capacity, were forged in European imperial practice and universalised not through consensus but conquest. The formal admission of Third World states into this order, notably through the United Nations system, created a framework of inclusion without equity: sovereign equality on paper, subordination in practice. The enforcement of the UN Charter reveals this discrepancy, as it operates through a selective, instrumentalist approach that permits participation by Third World states while maintaining structural dominance by former imperial powers. This paper contends that doctrinal expansion and institutional membership cannot cure a legitimacy deficit that is foundational rather than incidental. Genuine reform requires not merely inclusion within existing frameworks but the reconstitution of the normative premises upon which such frameworks are based.

Keywords: International Law, TWAIL, Eurocentrism, Structural Illegitimacy, Decolonisation, UN Security Council, ICJ, Third World.

1. Introduction

The conventional account of international law posits a trajectory of progressive universalisation. Originating from European roots, the discipline ostensibly expanded to encompass all sovereign states as equals,¹ ultimately culminating in the United Nations system as the institutional embodiment of a genuinely worldwide legal order. This narrative, while compelling in its simplicity, is perilous due to its omissions. It overlooks the violence involved in the globalisation of international law, the hierarchies it established, and the structural inequalities that continue beneath its universalist rhetoric.² This paper challenges that conventional account.

Drawing on Third World Approaches to International Law (TWAIL), postcolonial legal theory, and Marxist dependency analysis, it argues that the international legal order suffers from a structural legitimacy deficit rooted in its Eurocentric normative foundations.³ The central contention is that formal inclusion of Third World states in international institutions has not remedied this deficit because the terms of inclusion were themselves dictated by the very powers whose dominance the system was designed to perpetuate.⁴

The significance of this argument extends beyond academic critique. The proliferation of non-state actors, multinational corporations, international NGOs, and transnational social movements has complicated international law's traditional state-centrism without altering its foundational

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¹ United Nations Charter 1945 (UN Charter), Art 2(1)

² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 3–32; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001) 98–130.

³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 3–32.

⁴ BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3, 5–8.

hierarchies. If anything, the participation of powerful non-state actors from the Global North has deepened the structural inequities this paper identifies, introducing new forms of private authority that operate within and alongside the interstate system without fundamentally challenging its Eurocentric premises. The question is not whether international law is evolving, but whether that evolution can address a legitimacy deficit that precedes and transcends any particular institutional arrangement.

The paper is structured into five parts; part one provides the introduction, part two examines the theoretical framework by synthesising TWAIL scholarship, postcolonial legal theory, and dependency analysis to create a critical lens for examining the claims of universality in international law. Part three analyses the veto mechanism of the UN Security Council as an institutional expression of structural exclusion. Part four reviews jurisprudence of the ICJ to illustrate how the Court's reasoning has cautiously questioned the Eurocentric underpinnings of the legal system. Part five explores reform implications, arguing that substantive reconstitution necessitates not only procedural modifications but also a normative reimagining of the system.

2. Theoretical framework: Imperialism, dependency, and the Construction of the International Legal Order

2.1 TWAIL and the Colonial Origins of International Law

TWAIL scholarship has established, with considerable rigour, that international law did not merely emerge in Europe before diffusing outwards; it was constitutively shaped by the colonial encounter.⁵ Anghie's foundational work demonstrates that the sovereignty doctrine, far from being a neutral organising principle, was constructed through a dynamic of difference that positioned European polities as sovereign and non-European peoples as objects of sovereign authority.⁶ The so-called 'civilising mission' was not an incidental aspect of nineteenth-century international law; it was the engine through which the discipline defined itself, its subjects, and its boundaries.

This is not merely a historical observation. The normative framework that emerged from this period; the doctrines of statehood, recognition, treaty-making, and territorial sovereignty, remains the scaffolding of the contemporary system. When Third World States acceded to independence, they entered an order whose foundational categories had been designed without their participation and, in many instances, against their interests.⁷ Sovereign equality, as proclaimed in Paper 2(1) of the UN Charter, was grafted onto a structure that presupposed European institutional forms as the standard of political legitimacy.

Considering the doctrine of statehood itself, the criteria formalised in the Montevideo Convention of 1933; a permanent population, a defined territory, a government, and the capacity to enter into relations with other states,⁸ reflect a specifically European model of centralised territorial governance.⁹ However, these concepts reflected principles traceable directly to the Westphalian settlement of 1648. The Westphalian framework, characterised by territorial integrity, centralised sovereign authority, and the doctrine of non-intervention, served as the foundational paradigm for

⁵Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001) 98–130.

⁶Anghie (n 2) 100–115.

⁷ *ibid*

⁸ Montevideo Convention on the Rights and Duties of States 1933, art 1.

⁹ James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 37–95.

European political organisation.¹⁰ It was then exported globally through colonisation.¹¹ Pre-colonial African, Asian, and Indigenous political orders frequently functioned via kinship networks, intersecting authorities, porous territorial demarcations, and forms of distributed or shared sovereignty; features that do not conform to the requirements articulated in the Montevideo Convention.¹² This observation lies at the core of Third World Approaches to International Law (TWAAIL), which asserts that international law was not simply shaped by European imperialism, but was fundamentally constituted through processes of colonial subjugation and encounter.¹³ Consider the Berlin Conference of 1884–85, during which European powers delineated borders with little regard for pre-existing political communities, subsequently asserting that these arbitrary boundaries satisfied the 'territory' requirement for statehood.¹⁴ The decolonisation process uniformly imposed the Montevideo criteria upon diverse populations, irrespective of their distinct political contexts.¹⁵ At independence, colonial frontiers were enshrined within the criteria for statehood, thereby perpetuating what Anghie has termed the 'dynamic of difference' between European and non-European societies.¹⁶

It is noteworthy that some non-European civilisations, such as China, the Ottoman Empire, and the Inca Empire, exhibited forms of centralised territorial governance. Accordingly, the notion of centralised governance is not an exclusively European innovation. Rather, it was the European legal tradition that elevated this concept to the status of a universal legal prerequisite for international personality.¹⁷ The violence of this exclusion was not merely conceptual: it provided the juridical foundation for the colonial claim that non-European peoples inhabited terra nullius or lacked the sovereign capacity to consent to European occupation. International law did not merely describe a world of sovereign states; it prescribed which political communities counted as states and, in doing so, determined which peoples could be legitimately subjected to colonial rule. Furthermore, the Montevideo Convention possessed significant pragmatic value: it provided Latin American states with a declaratory theory of statehood, thereby facilitating resistance to United States interventionism. Thus, notwithstanding its Eurocentric intellectual origins, this legal instrument was also appropriated for anti-hegemonic purposes.¹⁸ The criteria continue to serve as gatekeeping measures. Somaliland meets every criterion established by the Montevideo Convention, yet it remains unrecognised. Meanwhile, the sovereignty of Palestine is partially

¹⁰ *ibid.*

¹¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 3–31.

¹² M W Muiu, and G Martin, "Indigenous African Political Systems and Institutions. In: A New Paradigm of the African State" (Palgrave Macmillan, New York. 2009) 23-47; Soeren J Henn and James A Robinson, 'Africa as a Success Story: Political Organisation in Pre-Colonial Africa' (Harris School of Public Policy Working Paper, 2025); Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (OUP 1990) 6–50; JC van Leur, *Indonesian Trade and Society* (W van Hoeve 1955) 95–120; see Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (OUP 1990) 6–50; Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001) 11–97.

¹³ Makau Mutua, 'What is TWAAIL?' (2000) 94 *ASIL Proceedings* 31–38.

¹⁴ General Act of the Berlin Conference on West Africa (26 February 1885); James Thuo Gathii, 'Imperialism, Colonialism, and International Law' (2007) 54 *Buffalo Law Review* 1013, 1046–1058.

¹⁵ Crawford (n 9) 128–133.

¹⁶ Anghie (n 11) 115–14.

¹⁷ Fahrettin Özsu, 'The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016) 123–137.

¹⁸ For the declaratory and constitutive theories of statehood, see Malcolm Shaw, *International Law*, (Cambridge University Press, 8th Edition, 2017)157-164.

challenged based on the criterion of 'effective government.' Conversely, failed states such as Somalia have maintained their statehood for decades despite lacking effective governance, thereby revealing that these criteria are applied selectively rather than being based on objective assessments.¹⁹

2.2 Postcolonial Legal Theory and the Persistence of Hierarchy

Postcolonial legal theory extends the TWAIL critique by examining the mechanisms through which colonial hierarchies are reproduced within ostensibly post-colonial institutions. Koskenniemi's analysis of the 'gentle civilizer' tradition reveals how international law's liberal self-image served to legitimise European hegemony while obscuring the power dynamics underlying legal doctrines.²⁰ Chimni's work sharpens this point: the post-1945 international institutional order did not represent a rupture with colonialism but its metamorphosis.²¹ The language changed from civilisation to development, the institutional forms from direct administration to conditional aid and structural adjustment, but the underlying logic of differentiation and subordination persisted.

Pahuja's analysis of development discourse in international law illustrates this continuity with particular clarity.²² The framing of Third World States as 'developing' as permanently in transition towards a normative endpoint defined by Western institutional models is not merely descriptive. It is prescriptive and hierarchical, positioning these states as perpetual pupils within a system whose standards they had no role in setting. The very metrics by which 'development' is measured, GDP growth, institutional governance indices, rule-of-law rankings, encode Western liberal assumptions about the relationship between markets, states, and legal systems that are presented as universal truths rather than historically contingent choices.²³

This has profound implications for the legitimacy of the international legal order. An order that claims universality while encoding the particularism of its architects lacks the normative foundation to command genuine authority. The gap between the rhetoric of sovereign equality and the reality of structural hierarchy is not a failure of implementation; it is the predictable outcome of an order whose foundational categories were constructed to serve the interests of a particular set of states and then imposed upon the rest as conditions of membership.

2.3 Marxist Dependency Theory and Structural Subordination

Marxist dependency theory provides the material dimension that complements TWAIL's doctrinal analysis and postcolonial theory's discursive critique. TWAIL and postcolonial theory explain how international law's doctrines and discourse were shaped by empire. Marxist dependency theory adds something they do not: an account of the material economic structures that sustain these hierarchies in practice. The central insight, developed most influentially by Frank, is simple: the poverty of Third World states is not a starting condition that international engagement will eventually remedy. It is a product of that engagement.²⁴ Third World economies were integrated into a global system on terms designed to serve European industrialisation; as suppliers of raw

¹⁹ Crawford (n 9) 131–134; see also Anghie (n 3) 196–210 on the perpetuation of colonial borders through the statehood framework.

²⁰ Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Duke University Press 2004) 23–40.

²¹ Chimni (n 4) 10–12.

²² Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 44–68.

²³ *ibid.*

²⁴ Andre Gunder Frank, 'The Development of Underdevelopment' (1966) 18 *Monthly Review* 17, 18–26.

materials and captive markets for manufactured goods. Independence did not alter these terms; it merely changed the institutional vocabulary through which they were enforced.

Wallerstein's world-systems analysis extends this argument directly to international law. The global economy, on his account, is not a collection of independent national economies that trade with one another as equals. It is a single integrated system in which wealthy states (the 'core') maintain their position precisely because poorer states (the 'periphery') remain subordinate.²⁵ International law provides the legal scaffolding for this arrangement. Trade rules negotiated under the WTO permit wealthy states to subsidise their agricultural sectors while requiring developing states to open their markets.²⁶ Intellectual property regimes compel Third World countries to pay licensing fees for technologies and pharmaceuticals developed in the Global North, even where public health emergencies demand affordable access.²⁷ The result is a legal framework that presents itself as a level playing field while systematically tilting outcomes in one direction.

The starkest illustration is the Investor-State Dispute Settlement (ISDS) system. Bilateral investment treaties, now numbering over three thousand, grant foreign investors the right to sue host governments before international arbitral tribunals, most commonly administered by ICSID, a World Bank institution. The asymmetry is structural: investors can bring claims against states, but states cannot bring claims against investors.²⁸ UNCTAD data confirms the predictable result: approximately seventy-five per cent of all ISDS claims are brought against developing countries, and around seventy per cent are initiated by investors from developed states.²⁹

This is the material reality that dependency theory illuminates and that doctrinal analysis alone cannot capture. The international legal order does not merely reflect existing inequalities; it actively constitutes and reproduces them. Where colonial administrators once directed the extraction of raw materials through administrative decree, international trade and investment law now accomplishes a functionally equivalent channelling of wealth through mechanisms that carry the imprimatur of legal neutrality and the consent of nominally sovereign parties.³⁰

3. The UN Security Council Veto: Institutional Structure of Exclusion

²⁵Wallerstein (n 20) 23–40.

²⁶ Agreement on Agriculture (Marrakesh, 15 April 1994) LT/UR/A-1A/2, arts 6, 9–11. Under the AoA, developed countries that had historically provided export subsidies were permitted to continue doing so at reduced levels, while countries without such entitlements — overwhelmingly developing states — were prohibited from introducing them. See further Joseph E Stiglitz, *Making Globalisation Work* (WW Norton 2006) 61–94.

²⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, 15 April 1994) LT/UR/A-1C/IP/1, arts 27–34. TRIPS imposed a minimum of twenty-year patent protection for pharmaceutical products across all WTO members, effectively requiring developing states to recognise patents held predominantly by Global North corporations. The severity of this burden was acknowledged in the Doha Declaration on the TRIPS Agreement and Public Health (WT/MIN (01)/DEC/2, 14 November 2001) para 4, which affirmed that the Agreement should be interpreted in a manner supportive of members' rights to protect public health. See also Joseph E Stiglitz, 'Economic Foundations of Intellectual Property Rights' (2008) 57 *Duke Law Journal* 1693, 1700–12.

²⁸ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 18 March 1965), art 25. ICSID was established under this Convention as an autonomous institution within the World Bank Group. On the number of bilateral investment treaties, see UNCTAD, 'International Investment Agreements: Trends and Key Issues' (IIA Issues Note No 2, October 2024) 1, recording 2,831 BITs within a total IIA universe of 3,291 treaties. On the structural asymmetry of investor-state arbitration, see M Sornarajah, *The International Law on Foreign Investment* (4th edn, CUP 2017) 299–314, noting that BITs grant procedural rights exclusively to investors without imposing corresponding obligations or granting reciprocal standing to host states.

²⁹UNCTAD, 'Facts and Figures on Investor-State Dispute Settlement Cases' (IIA Issues Note No 3, 2024) 1–5.

³⁰Anghie (n 11) 196–210.

If the theoretical framework above establishes that international law's normative foundations are Eurocentric, the UN Security Council's veto mechanism provides the most visible institutional proof. The Charter proclaims sovereign equality as a foundational principle.³¹ However, paper 27(3) immediately qualifies this principle by conferring upon five states; the United States, the United Kingdom, France, Russia, and China, the power to unilaterally block any substantive decision of the Council.³²

The composition of the P5 is itself a monument to the power configuration of 1945, reflecting the victors of the Second World War rather than any principled allocation of authority.³³ That this composition has remained unchanged for eighty years, despite the decolonisation of over a hundred states and the radical transformation of the global political landscape, speaks volumes about the system's resistance to structural reform. Africa, Latin America, and most of Asia regions comprising the overwhelming majority of the world's population have no permanent representation, much less veto power. The formal equality of the General Assembly, where each state commands one vote, cannot compensate for the Security Council's monopoly on binding enforcement authority.

The practical consequences are stark. The veto has been wielded repeatedly to shield P5 members and their allies from accountability. During the Cold War, the Soviet Union and the United States routinely blocked action against their respective client states.³⁴ In the post-Cold War era, Russia and China have vetoed resolutions on Syria, while the United States has consistently blocked resolutions critical of Israel.³⁵ Bedjaoui's critique remains as pertinent today as when he wrote it: the veto is not a procedural device but a structural guarantee of great power impunity.³⁶

The veto's distortive effect extends beyond what it blocks. Its shadow shapes what is never proposed. Third World states and their advocates learn, through repeated experience, which resolutions will survive and which will be vetoed. This anticipatory self-censorship is arguably more damaging than the veto's direct exercise: it means that the Security Council's agenda is pre-filtered to exclude issues that threaten the interests of the P5. The result is a body that intervenes

³¹UN Charter, art 2(1).

³²UN Charter, art 27(3).

³³Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International 1998) 178–205.

³⁴UN, Explained: The History of the United Nations Security Council Veto' (Better World Campaign, 11 September 2025) <https://betterworldcampaign.org/peace-and-security/un-explained-the-history-of-the-united-nations-security-council-veto> accessed 5 March 2026; *Encyclopaedia Britannica* United Nations Security Council — History' available at <<https://www.britannica.com/topic/United-Nations-Security-Council/History>> accessed 5 March 2026

³⁵Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979) 49–65; Syrian Network for Human Rights, 'Russia and China's Arbitrary Veto Use 16 Times Contributed to Killing Nearly a Quarter of a Million Syrians' (17 July 2020) <https://snhr.org/blog/2020/07/17/55263/> accessed 5 March 2026; Heieck J, 'The Security Council Veto in Syria: Imagining a Way Out of Deadlock' (Lieber Institute, West Point, 6 September 2024) <https://lieber.westpoint.edu/security-council-veto-syria-imagining-way-out-deadlock/> accessed 5 March 2026; Amnesty International, 'UN: Russia and China's Abusive Use of Veto "Shameful"' (28 February 2017) <https://www.amnesty.org/en/latest/news/2017/02/un-russia-and-chinas-abusive-use-of-veto-shameful/> accessed 5 March 2026; Amnesty International, 'Israel/OPT: US Sixth Veto of Resolution on Ceasefire, Hostage Release Is a Greenlight for Israel's Campaign of Annihilation in Gaza' (22 September 2025) <https://www.amnesty.org/en/latest/news/2025/09/us-sixth-veto-of-ceasefire-resolution-greenlight-for-israels-campaign-of-annihilation-in-gaza/> accessed 5 March 2026; Beth Van Schaack, *Imagining Justice in Syria* (OUP 2020)

³⁶Security Council Veto List, Dag Hammarskjöld Library <<https://research.un.org/en/docs/sc/quick>> accessed 15 February 2026.

selectively, authorising force in Libya in 2011,³⁷ while remaining paralysed over Palestine for decades, in ways that track the strategic preferences of its most powerful members rather than any principled application of the Charter's collective security provisions.

For Third World states, this arrangement means that participation in the UN system is conditioned on acquiescence to a hierarchy they cannot alter through the system's own mechanisms. Security Council reform has been debated for decades, yet every serious proposal, from expanding permanent membership to restricting the veto in cases of mass atrocity.³⁸ Founders on the P5's capacity to block any amendment to the Charter under Paper 108. The system contains its own immune response against structural change.³⁹ This is not an imperfection to be remedied through institutional adjustment. It is an intended feature, of an order designed to preserve the dominance of its architects.

The Responsibility to Protect (R2P) doctrine, adopted at the 2005 World Summit,⁴⁰ illustrates the depth of this structural problem. Presented as a progressive advancement, a commitment to prevent genocide, war crimes, ethnic cleansing, and crimes against humanity, R2P was instrumentalised almost immediately as a justification for regime change in Libya in 2011,⁴¹ while being conspicuously absent in contexts where P5 interests counselled non-intervention.⁴² For many Third World states, the Libyan intervention confirmed long-standing suspicions: that humanitarian norms in the Security Council function not as universal principles but as discretionary tools, deployed when they align with great power interests and shelved when they do not. R2P did not empower the vulnerable; it gave the powerful another vocabulary through which to exercise selective authority.

³⁷ Spencer Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13 *Melbourne Journal of International Law* 1; Andrew Garwood-Gowers, 'The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?' (2013) 36(2) *UNSW Law Journal* 594; Ved P. Nanda, 'From Paralysis in Rwanda to Bold Move in Libya: Emergence of the Responsibility to Protect Norm under International Law' (2011) 34(1) *Houston Journal of International Law* 1

³⁸ France and Mexico, 'Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities' (August 2015) <https://www.globalr2p.org/resources/political-declaration-on-suspension-of-veto-powers-in-cases-of-mass-atrocities/> accessed 5 March 2026; African Union, 'The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus' (March 2005) Ext/EX.CL/2 (VII); Inclusive Society Institute, 'Regulating the Veto: A Pragmatic Path to United Nations Security Council Reform' (5 November 2025) <https://www.inclusivesociety.org.za/post/regulating-the-veto-a-pragmatic-path-to-united-nations-security-council-reform> accessed 5 March 2026; UNGA, 'General Assembly Adopts Landmark Resolution Aimed at Holding Five Permanent Security Council Members Accountable for Use of Veto' (26 April 2022) UN Press Release GA/12417 <https://press.un.org/en/2022/ga12417.doc.htm> accessed 5 March 2026

³⁹Fassbender (n 34) 210–215.

⁴⁰ Global Centre for the Responsibility to Protect, '2005 World Summit Outcome A/60/L.1' <https://www.globalr2p.org/resources/2005-world-summit-outcome-a-60-l-1/> accessed 5 March 2026; The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement' (2018) 19(2) *Chicago Journal of International Law* 420 <https://cjlil.uchicago.edu/print-archive/united-nations-security-councils-implementation-responsibility-protect-review-past> accessed 5 March 2026.

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⁴¹ Gisselle Lopez, 'Responsibility to Protect at a Crossroads: The Crisis in Libya' (Humanity in Action, 2015) https://humanityinaction.org/knowledge_detail/responsibility-to-protect-at-a-crossroads-the-crisis-in-libya/ accessed 5 March 2026.

⁴²Mohammed Nuruzzaman, "Responsibility to Protect" and the BRICS: A Decade after the Intervention in Libya, (2022) 4(2) *Global Studies Quarterly*, ksac051, <https://doi.org/10.1093/isagsq/ksac051>

The core tension is this: R2P reconceptualised sovereignty as responsibility rather than privilege; a genuinely radical move. But the 2005 formulation deliberately funnelled all coercive action through the Security Council, which means R2P can only operate when the P5 permit it.

4. ICJ Jurisprudence: Adjudicating Within and Against the Eurocentric Frame

The International Court of Justice (ICJ) occupies an ambivalent position in this analysis. As the principal judicial organ of the UN, it operates within the normative framework that this paper critiques. Nonetheless, its jurisprudence reveals instances of both acquiescence in, and contestation of, the Eurocentric foundations of international law.

4.1 South West Africa and the Limits of Legal Formalism

The 1966 South West Africa judgment stands as perhaps an illustration of the ICJ's capacity to reinforce colonial structures through legal formalism.⁴³ On 4 November 1960, the governments of Ethiopia and Liberia, both former Member States of the League of Nations, initiated separate legal actions before the ICJ against the Union of South Africa, alleging that South Africa had violated its mandate obligations and that the territory remained subject to international oversight. After joining the two cases and overcoming preliminary objections, the ICJ ultimately ruled in 1966 that Ethiopia and Liberia lacked the necessary legal interest to bring the claims, thereby dismissing their applications. The case is significant for its interpretation of standing before the ICJ and its impact on the doctrine of international legal interests. Ethiopia and Liberia brought proceedings challenging South Africa's continued administration of South West Africa (Namibia) under the League of Nations mandate system. The Court, in a controversial reversal of its 1962 preliminary objections decision, held that the applicants lacked legal standing to bring the claim on the merits. Plausibly, by retreating into a narrow proceduralist reasoning, the Court did not decide on the substantive merits. The allegations before it were not abstract or speculative; they concerned the systematic imposition of apartheid upon the indigenous population of South West Africa in the course of a colonial administration ostensibly governed by the principle of sacred trust. The majority, by treating the threshold question of legal interest as dispositive, ensured that the lawfulness of institutionalised racial domination — the central question the proceedings had been brought to resolve; was never subjected to judicial determination. The inhabitants of South West Africa, the intended beneficiaries of the sacred trust, were left without a judicial remedy.

Judge Tanaka's dissent revealed the majority's reasoning for what it was: a choice, dressed in formalist language, to privilege the procedural architecture of the existing order over the substantive demands of decolonisation and racial equality.⁴⁴ The 1966 *South West Africa* majority decision could be construed as the use of procedural technicalities to foreclose substantive justice.

By reviving a standing objection, it had already rejected four years earlier,⁴⁵ the Court held that Ethiopia and Liberia (African States) possessed no cognisable legal interest in the treatment of African peoples under a system designed expressly for their protection, thereby reducing the "sacred trust of civilisation" to ornamental language, morally resonant but juridically empty. The doctrinal apparatus that made this possible, strict voluntarism, contractual formalism, was not ideologically neutral; it was the inheritance of a European-made legal order, and its application to

⁴³*South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6.

⁴⁴*South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Second Phase) [1966] ICJ Rep 6, dissenting opinion of Judge Tanaka, 250.

⁴⁵ *South West Africa Cases (Preliminary Objections)* [1962] ICJ Rep 319.

the mandates system produced precisely the outcome such an order was structured to deliver: the invisibility of the colonised and the insulation of colonial power from accountability. The Court never reached apartheid, never engaged the emergent customary norm of non-discrimination, never reckoned with an international community whose composition had been revolutionised by decolonisation, because the procedural ruling extinguished each question before it could be posed. What Judge Tanaka's dissent illuminated with such devastating clarity was that this was not a doctrine compelling a result but power selecting its instrument: international law, at the very moment it was called upon to vindicate the dignity of those it had historically excluded, chose instead to shelter behind the formal structures of the order that had excluded them. Therefore, it could be argued that the judgment demonstrated that legal formalism is not neutral; it operates to preserve existing distributions of power by treating the procedural rules of a colonial-era system as though they were value-free.

4.2 Tentative Resistance: The Wall Advisory Opinion and Chagos

Be that as it may, the ICJ has produced opinions that tentatively push against the Eurocentric frame. The 2004 Wall Advisory Opinion, while limited in its practical enforcement, represented a significant assertion of international humanitarian law and the right to self-determination against the objections of a major power's closest ally.⁴⁶ The Court's willingness to characterise the construction of the wall as contrary to international law, and to articulate the legal consequences flowing from that characterisation, demonstrated a capacity, however constrained, to hold powerful actors to account.⁴⁷ On its face, the Opinion was a forceful assertion of international humanitarian law: the Court applied the Fourth Geneva Convention, the ICCPR, and the ICESCR, rejected Israel's security justifications, and affirmed self-determination as an obligation *erga omnes*, what Crawford identified as one of the most significant judicial statements on the normative weight of that right since *East Timor*,⁴⁸ while Scobbie observed that it settled the long-contested extraterritorial application of human rights treaties in occupied territory.⁴⁹ However, this formal doctrinal inclusion must be read against the structural architecture in which it operates. The Opinion was advisory, referred by the General Assembly precisely because the Security Council route was blocked by the United States' veto, a dynamic that Anghie identifies as the predictable operation of an institutional order designed at San Francisco by and for a particular configuration of power, in which the formal universalisation of rights coexists with an enforcement machinery structurally captured by those who designed it.⁵⁰ Chimni's materialist critique reinforces this: the vocabulary of occupation and humanitarian protection appears doctrinally neutral, but the institutional machinery determining whether such vocabulary produces consequences is profoundly asymmetric, as the contrast with the Security Council's swift enforcement mobilisation over Kuwait in 1990 starkly illustrates.⁵¹ Within hours of Iraq's August 1990 invasion, the Council convened and adopted Resolution 660 demanding immediate withdrawal; within months, it had assembled an unprecedented enforcement architecture, including mandatory sanctions, Resolution

⁴⁶*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

⁴⁷*ibid* [155] [160].

⁴⁸J Crawford, 'The Wall Opinion and the Right of Self-Determination' in Bentounsi et al (eds), *The ICJ and International Law* (Brill 2014).

⁴⁹I Scobbie, 'Regarding/Disregarding: The Judicial Rhetoric of President Higgins in the Wall Advisory Opinion' (2005) 16 *Finnish Yearbook of International Law* 169.

⁵⁰A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005).

⁵¹BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3.

661, a naval blockade, and the authorisation of military force, Resolution 678.⁵² Vindicating the sovereignty of a small Gulf state with a speed and decisiveness that stood in stark contrast to the passive attention which characterised the Council's engagement with apartheid, a regime that did not attract mandatory Chapter VII sanctions until Resolution 418 of 1977, eleven years after the ICJ's decision in the *South West Africa Cases*,⁵³ and even then only in the modest form of an arms embargo.⁵⁴ Both situations involved clear violations of fundamental norms the prohibition of aggression in one case, systematic racial discrimination and the obligations of sacred trust in the other; notwithstanding the differential response was a function not of legal ambiguity but of political economy, confirming what scholars from Anghie,⁵⁵ Chimni,⁵⁶ Koskenniemi,⁵⁷ have long argued: that the universalist vocabulary of international law, sovereignty, equality, human dignity, operates within a distributional structure

Furthermore, the ICJ's Advisory Opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*⁵⁸ went further than the *Wall* Opinion in every doctrinal respect, yet its practical aftermath reinforces the formal inclusion/structural exclusion thesis with even greater force. The Court ruled directly against a permanent member of the Security Council, the United Kingdom, finding that the decolonisation of Mauritius was not lawfully completed, that the detachment of the Chagos Archipelago in 1965 constituted a wrongful act, and that the UK's continued administration was an internationally unlawful occupation. Allen observed that this represented the most unequivocal judicial condemnation of a continuing colonial situation in the Court's history.⁵⁹ The Court elevated self-determination beyond the *erga omnes* framing of the *Wall* Opinion, grounding it in the crystallisation of customary international law and approaching what Burri has characterised as *jus cogens* status, and the General Assembly endorsed the findings by an overwhelming majority in Resolution 73/295, demanding UK withdrawal within six months.⁶⁰ Still, the structural outcome was identical to the *Wall* Opinion: the United Kingdom simply refused to comply, the six-month deadline passed without consequence, Diego Garcia remains a joint US-UK military base, and the Chagossian population remains forcibly displaced. Anghie's framework applies here with particular clarity, because the Chagos situation is not a complex occupation with competing security claims amenable to proportionality analysis; it is straightforward colonialism, in which a metropolitan power detached territory from a colonised people as a condition of their independence and then expelled the indigenous population to construct a military installation.⁶¹ If the international legal order cannot enforce a finding of unlawful colonialism against one of its own architects, the enforcement gap ceases to be explicable as institutional weakness. González Hauck's TWAIL analysis of the Opinion makes precisely this

⁵² UNSC Res 660 (2 August 1990) UN Doc S/RES/660 (demanding Iraq's immediate withdrawal from Kuwait); UNSC Res 661 (6 August 1990) UN Doc S/RES/661 (mandatory economic sanctions against Iraq); UNSC Res 678 (29 November 1990) UN Doc S/RES/678 (authorising use of force against Iraq).

⁵³ *South West Africa Cases (Second Phase)* [1966] ICJ Rep 6

⁵⁴ UNSC Res 418 (4 November 1977) UN Doc S/RES/418 (mandatory arms embargo against South Africa)

⁵⁵ A Anghie, *Imperialism, Sovereignty and the Making of International Law*, (CUP 2005)

⁵⁶ BS Chimni 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3

⁵⁷ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge UP 2005)

⁵⁸ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95.

⁵⁹ S Allen, 'The Chagos Advisory Opinion and the Decolonisation of Mauritius' (2020) 69 *International and Comparative Law Quarterly* 203.

⁶⁰ UNGA Res 73/295 (22 May 2019). The resolution was adopted by 116 votes to 6, with 56 abstentions.

⁶¹ A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) ch 4.

point: the advisory jurisdiction functions as a pressure valve, permitting formal legal vindication without threatening the underlying power structure,⁶² while Pahuja's insight that self-determination was historically co-opted and narrowed by the international legal order finds direct application; Mauritius received judicial recognition of its sovereignty over the Archipelago, but the material reality of military occupation and population displacement remained entirely untouched.⁶³ Fitzmaurice and Lixinski have further demonstrated that the Opinion exposed the colonial genealogy embedded within the concept of sovereignty itself: the very principle of territorial integrity that the Court deployed to vindicate Mauritius was historically instrumentalised to consolidate colonial acquisitions, revealing the tools of vindication to be inseparable from the architecture of subordination.⁶⁴ Burri's analysis of the Opinion's doctrinal ambition, pushing self-determination towards peremptory status, only sharpens the paradox: the normative ceiling was raised while the structural floor remained unchanged.⁶⁵ Koskenniemi, and Gathii have argued from different vantage points: the Eurocentric foundation of the international legal order is not a historical residue awaiting progressive correction but the constitutive structure within which formal universalism and substantive asymmetry are mutually reinforcing.⁶⁶

4.3 The Structural Paradox of Adjudication

The ICJ's jurisprudence reveals a structural paradox: using the tools of the existing order to challenge its foundations. The Court can only apply law as it finds it; it cannot reconstitute the normative premises upon which that law rests.⁶⁷ Even in its most progressive opinions, the ICJ operates within doctrinal categories sovereignty, self-determination, territorial integrity that were shaped by the very imperial encounter TWAIL scholarship critiques. The *Congo v Uganda* judgment, for instance, affirmed the principle of non-intervention and territorial sovereignty but did so within a framework that could not adequately account for the economic imperialism and resource extraction that drove the conflict.⁶⁸

5. Beyond Inclusion: Reconstituting the Normative Foundations

The foregoing analysis leads to a conclusion that may be uncomfortable for those invested in incremental reform: the international legal order cannot be made legitimate by modifying its existing structures. Expanding Security Council membership, increasing Third World representation on the ICJ bench, and revising voting procedures; these measures, while potentially beneficial in the short term, do not address the foundational problem. They extend participation within a system whose normative premises remain those of its imperial architects.⁶⁹

⁶²S González Hauck, 'The Chagos Advisory Opinion: A TWAIL Appraisal' (2019) Voelkerrechtsblog, DOI: 10.17176/20190307-181550-0.

⁶³S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 44–72.

⁶⁴A Fitzmaurice and L Lixinski, 'The Chagos Archipelago Cases and the (Re)Construction of the Colonial in International Law' (2021) 34 *Leiden Journal of International Law* 449.

⁶⁵T Burri, 'The ICJ's Chagos Opinion and the Prospects of Self-Determination as Jus Cogens' (2020) 79 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 779.

⁶⁶M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005); JT Gathii, 'TWAIL: A Brief History of its Origins, its Decentralised Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26.

⁶⁷Anghie (n 1) 245–260.

⁶⁸Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 168.

⁶⁹Koskenniemi (n 68) 502–510.

The development paradigm illustrates this point with particular force. International financial institutions, themselves products of the 1944 Bretton Woods settlement, condition assistance on the adoption of economic policies derived from Western liberal models.⁷⁰ Structural adjustment programmes, now rebranded as policy conditionality, require Third World states to liberalise markets, reduce public spending, and open economies to foreign investment on terms that systematically favour capital from the Global North.⁷¹ Chang posits that the policy prescriptions imposed on developing states, such as trade liberalisation and deregulation, are precisely those that developed states themselves refused to adopt during their own industrialisation.⁷² This is not inclusion; it is incorporation on terms dictated by the powerful.

The history of international law offers a cautionary parallel. The League of Nations mandate system was presented as a progressive innovation, a humanitarian framework for administering territories whose peoples were deemed 'not yet able to stand by themselves.'⁷³ In practice, it provided juridical cover for the continuation of colonial exploitation under international supervision. The risk with contemporary reform proposals that leave the normative foundations intact is analogous: they may produce a more representative-looking system that continues to operate according to the logic of its imperial designer. Reconstitution, by contrast, insists that the rules of the game, not merely the players, must change.

5.1 Theoretical Foundations for Reconstitution

Chimni's TWAIL manifesto articulates the starting point: a reconstitution of the normative premises upon which the international legal order rests.⁷⁴ This does not mean rejecting international law as such. It means insisting that the discipline's foundational categories, sovereignty, statehood, recognition, and the sources of obligation, be renegotiated through processes that genuinely include those whom the current system marginalises. As Mutua argues, the question is not whether Third World states should participate in international law, but on what terms and towards what ends.⁷⁵

The concept of reconstitution theoretically rests upon three foundational pillars. The initial pillar is epistemic pluralism: the acknowledgement that the European Enlightenment tradition does not hold a monopoly on normative authority concerning questions of order, justice, and obligation. The source doctrine of international law, as codified in Paper 38(1) of the ICJ Statute, prioritises treaties, customary law, and general principles; predominantly identified by Western-trained jurists and institutions dominated by Western perspectives. A reformed legal order would broaden the epistemic basis for norm creation by incorporating the philosophical doctrines, legal practices, and

⁷⁰Pahuja (n 64) 195–220.

⁷¹C Tan, *Governance through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011); H-J Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2002); JE Stiglitz, *Globalization and Its Discontents* (W.W. Norton 2002); OC Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171; D.Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (W.W. Norton 2011); D.Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005)

⁷²H-J Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press 2002) 59–129.

⁷³See Covenant of the League of Nations, 1919, Paper 22; Treaty of Peace with Germany (Treaty of Versailles) 1919, Part I; Charter of the United Nations 1945, Chapters XII and XIII; S. Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015); J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006); R.Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008)

⁷⁴Chimni (n 67) 15–18.

⁷⁵Makau Mutua, 'What Is TWAIL?' (2000) 94 *American Society of International Law Proceedings* 31, 36–38.

cosmological paradigms of non-Western civilisations. These would be recognised not merely as supplementary elements but as co-equal sources of normative legitimacy.⁷⁶

The designation "civilised nations" within Paper 38(1)(c) should not be construed merely as a neutral terminological choice; rather, it functions as a gatekeeper within a hierarchical framework. This phrase implicitly affirms a civilisational hierarchy that has historically underpinned the development of international law, reflecting a worldview that privileges certain nations over others. Its usage underscores the sociopolitical assumptions embedded in the law's foundational structures, emphasising that the international legal order has been historically shaped by notions of cultural and civilizational superiority.

The second pillar is relational sovereignty. The Westphalian model posits sovereignty as exclusive territorial authority, a conception that mapped neatly onto the European state system but violently displaced political formations organised around kinship, migration, shared resources, or spiritual geography.⁷⁷ A reconstituted sovereignty doctrine would accommodate what Gathii terms 'overlapping jurisdictions': forms of political authority that are not reducible to the territorial state model but nonetheless exercise legitimate governance functions.⁷⁸ This is not a theoretical abstraction. The African Union's principle of non-indifference, which modifies the non-intervention norm to permit collective action against mass atrocities within member states, represents an existing departure from Westphalian orthodoxy; one that emerged from African political experience rather than European doctrine.⁷⁹ Paper 4(h) stipulates:

the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.⁸⁰

The third pillar is distributive justice as a structural principle rather than an aspirational policy. The current order treats economic equity as a policy goal to be pursued within existing institutional frameworks, through development aid, technical assistance, or preferential trade arrangements.⁸¹ A reconstituted order would embed distributive justice in the framework itself, treating the

⁷⁶ Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective' (2005) 43 *Osgoode Hall Law Journal* 171, 180–185.

⁷⁷ On African and Asian political systems see M.W Muiu, and G. Martin, *Indigenous African Political Systems and Institutions. In: A New Paradigm of the African State* (Palgrave Macmillan, New York, 2009) 23–47; Soeren J Henn and James A Robinson, 'Africa as a Success Story: Political Organisation in Pre-Colonial Africa' (Harris School of Public Policy Working Paper, 2025); Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest (OUP 1990)* 6–50;

⁷⁸ James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralised Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 40–48.

⁷⁹ B. Kioko, "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention," (2003) 85(852) *International Review of the Red Cross* 807–825; Dan Kuwali, "The end of humanitarian intervention: Evaluation of the African Union's right of intervention" (2010) 9(1) *African Journal on Conflict Resolution* 41–59.

⁸⁰ African Union Constitutive Act 2000, Art. 4(h).

⁸¹ Marrakesh Agreement Establishing the WTO (1994), Preamble, it acknowledges development needs but frames them as goals to be pursued through the existing trade system, not as enforceable rights nor independent obligation; OECD DAC, *DAC Guidelines and Reference Series* (OECD 2003), characterising official development assistance as voluntary transfers; Johannes Haaf, Felix Anderl, "A Right to Solidarity. World Ordering from the Margins through International Law?" (2024) 4(3) *Global Studies Quarterly* <<https://doi.org/10.1093/isagsq/ksae070>> last accessed 8 March 2026.

systematic extraction of wealth from the periphery not as an unfortunate externality but as a structural wrong that international law has an obligation to remedy.⁸²

5.2 A Practical Roadmap: Mechanisms for Reconstitution

Theory without institutional translation risks the abstraction for which TWAIL scholarship is sometimes fairly criticised. The question is how these normative pillars can be operationalised within and against the existing order. Four concrete mechanisms warrant consideration.

First, the convening of a Global Constitutional Convention for international law a deliberative process, modelled not on the San Francisco Conference of 1945 (which was dominated by fifty-one states, most under Western influence) but on genuinely representative principles. Such a convention would bring together states, Indigenous peoples, regional organisations, and civil society to renegotiate the foundational instruments of international order. The precedent is not as radical as it sounds: the drafting of the UN Declaration on the Rights of Indigenous Peoples involved sustained participation by non-state actors over two decades, producing a normative instrument that, whatever its enforcement limitations, reflects a broader constituency than the Charter itself.⁸³

Second, the institutionalisation of legal pluralism within existing dispute resolution mechanisms. The ICJ and international arbitral tribunals currently apply a closed universe of sources. A reformed procedural framework could require tribunals to consider relevant customary legal traditions of the communities affected by a dispute, not as subsidiary evidence of general principles, but as authoritative normative frameworks in their own right. The Inter-American Court of Human Rights has moved tentatively in this direction, recognising Indigenous customary law as relevant to property and territorial claims.⁸⁴ This is not revolutionary; it is an extension of the legal pluralism that already operates in domestic constitutional orders from South Africa to Bolivia.⁸⁵

Third, structural reform of the Security Council that goes beyond adding seats. The most promising proposal, and the one most vigorously resisted, is the restriction of the veto in cases involving mass atrocity, coupled with a sunset clause that requires periodic reaffirmation of permanent membership by a supermajority of the General Assembly. This would not eliminate the power asymmetry, but it would introduce an accountability mechanism that the current structure entirely lacks. The French-Mexican initiative proposing voluntary veto restraint in cases of mass atrocity reveals a fissure within the P5 itself: that at least two permanent members have concluded that unrestricted veto use in atrocity situations is politically and morally indefensible. While Russia and China have declined to endorse the declaration, France's willingness to publicly constrain its

⁸² Immanuel Wallerstein, *World-Systems Analysis: An Introduction* (Duke University Press, 2004)76–90.

⁸³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979) 120–135.

⁸⁴ The Inter-American Court has grounded indigenous territorial rights in customary land tenure systems independent of state recognition, *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No. 79 (31 August 2001); *Saramaka People v Suriname*, IACtHR Series C No. 172 (28 November 2007); *Yakye Axa Indigenous Community v Paraguay*, IACtHR Series C No. 125 (17 June 2005); *Sawhoyamaya Indigenous Community v Paraguay*, IACtHR Series C No. 146 (29 March 2006).

⁸⁵ *Constitution of the Republic of South Africa*, 1996, s 211; confirmed in *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18, where the Constitutional Court recognised communal land ownership rooted in Khoi-San indigenous law as an independent source of rights.; Political Constitution of the Plurinational State of Bolivia 2009, arts 2, 30 (guaranteeing indigenous territorial autonomy and the *jurisdicción indígena originaria campesina*). For comparative analysis, see Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law Around the World* (IUCN 2011).

own veto, and to invite others to do the same, signals that the norm of sovereign prerogative is not uniformly held even among those with the most institutional interest in its preservation.⁸⁶

None of this will be easy to achieve. The powers that benefit from the current order have every incentive to resist its transformation and, as the Security Council veto demonstrates, possess institutional mechanisms to block it. But the argument for reconstitution does not rest on its political feasibility; it rests on its normative necessity. An international legal order that cannot account for the interests and perspectives of the majority of the world's population cannot claim the universality upon which its authority depends.

6. Conclusion

This paper has argued that the international legal order suffers from a structural legitimacy deficit rooted in its Eurocentric normative foundations. Drawing on TWAIL scholarship, postcolonial legal theory, and Marxist dependency analysis, it has shown that the foundational doctrines of international law were forged in the colonial encounter and universalised through imperial power rather than genuine consensus. The formal inclusion of Third World states in the post-1945 institutional order, embodied in the United Nations system, created a structure of participation without equity, extending membership while reserving structural power for former imperial actors. The evidence marshalled in this paper stands on two institutional vantage points. The UN Security Council's veto mechanism institutionalises hierarchy in its most explicit form, conferring upon five states an unchallengeable power to shape or obstruct international peace and security while the overwhelming majority of the world's states look on without meaningful recourse. ICJ jurisprudence reveals a structurally constrained attempt to push against colonial structure through formalist reasoning, a jurisprudential oscillation that itself reflects the tension between the system's universalist aspirations and its particularist foundations. The Chagos Advisory opinion demonstrates that the Court was willing to characterise this as unlawful, even in a non-binding advisory opinion, suggesting a growing, if still fragile, judicial willingness to name colonial continuities for what they are. However, the United Kingdom's refusal to comply with the opinion's implications underscores the enforcement gap that limits even the Court's most progressive pronouncements in practice.

Nonetheless, these moments of resistance must be assessed against the structural limitations of the ICJ itself. The Court's advisory opinions are non-binding. Its contentious jurisdiction depends on the consent of the state. Together, these institutional analyses confirm what the theoretical framework predicts: that formal inclusion within a structurally unequal order cannot remedy a legitimacy deficit that is constitutive rather than incidental.

The task ahead is not one of reform but of reimagination, a willingness to ask what international law might look like if it were built from the ground up by the communities it currently marginalises. Until that reconstitution occurs, international law's claim to universality will remain what it has always been: a projection of particular power dressed in the language of general principle.⁸⁷

7. Recommendations

⁸⁶ *Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities* (France and Mexico, August 2015), available at Global Centre for the Responsibility to Protect <<https://www.globalr2p.org>>; French Ministry for Europe and Foreign Affairs, *Why France Wishes to Regulate Use of the Veto in the United Nations Security Council* (<https://www.diplomatie.gouv.fr>) (2023).

⁸⁷ Anghie (n 2) 310–316.

The study recommends the following:

7.1 Neutralisation of the United Nations Security Council Veto

Formal abolition of the veto is a structural impossibility: Article 108 requires ratification by all permanent members.⁸⁸ The recommendation is therefore neutralisation, not abolition. Two mechanisms are immediately available. First, a binding veto justification requirement, building on GA Resolution 76/262 and the French-Mexican initiative, compelling any permanent member exercising the veto to issue a formal legal justification to the General Assembly within seventy-two hours, subject to recorded scrutiny.⁸⁹ Second, the systematic use of the Uniting for Peace procedure (GA Resolution 377(V)) to route blocked Security Council action through the General Assembly as a standing institutional practice, not an exceptional measure, in every case involving mass atrocity, occupation, or self-determination. Neither mechanism requires P5 consent. Together, they render the veto politically costly without requiring its formal elimination, building the evidentiary and institutional foundation for the argument that the veto, as currently constituted, is incompatible with the Charter's own purposes.

7.2 Embed Legal Pluralism in International Adjudication

Article 38(1) of the ICJ Statute operates as an epistemic gatekeeper, determining which normative traditions count as law and which are relegated to cultural context.⁹⁰ African customary law, Indigenous governance frameworks, and Islamic jurisprudence are structurally excluded from the processes through which international norms are generated and applied. The institutional pathway for reform exists: the Inter-American Court recognised Indigenous customary law as a source of legally relevant norms in *Sarayaku v Ecuador*, and the South African and Bolivian constitutions embed legal pluralism as a structural feature of their domestic orders.⁹¹ It is noteworthy that in *Sarayaku v Ecuador*, the Court did engage with Indigenous customary frameworks, particularly in relation to communal property rights and cultural identity under Article 21 of the American Convention. However, the Court's reasoning recognised Indigenous customary law primarily in the context of *consultation rights and communal property*; it required the state to consult using "appropriate cultural procedures." It did not formally declare Indigenous customary law a freestanding "source" of international law in the sense of Article 38(1).⁹²

⁸⁸UN Charter, art 108. Any amendment requires ratification by all five permanent members, making formal abolition of the veto a structural impossibility within the system's own terms.

⁸⁹GA Res 76/262 (26 April 2022) 'Standing Mandate for a General Assembly Debate When a Veto Is Cast in the Security Council.' On voluntary veto restraint, see the Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocities, launched by France and Mexico (September 2015), signed by 104 member states and 2 UN observers as of July 2022. Separately, the Accountability, Coherence and Transparency (ACT) Group proposed a Code of Conduct (A/70/621, 14 December 2015) calling on all Security Council members not to vote against credible draft resolutions aimed at preventing or halting mass atrocities, signed by 121 member states as of April 2018. See Security Council Report, 'The Veto' (Research Report, October 2015) 1–24.

⁹⁰ICJ Statute, art 38(1). On the Eurocentric limitations of the source doctrine, see James Thuo Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralised Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26, 40–48.

⁹¹Case of the *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No 245 (27 June 2012) [159]–[176]; Constitution of the Republic of South Africa 1996, ss 39(2)–(3), 211; Constitution of the Plurinational State of Bolivia 2009, art 30.

⁹²Case of the *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No 245 (27 June 2012) paras 159–176.

The *Sarayaku* decision established that consultations with Indigenous peoples must follow their own cultural procedures, implicitly conferring juridical authority on Indigenous governance frameworks.⁹³ While this stops short of recognising Indigenous customary law as a formal source under Article 38(1), the logic is expansible: if non-compliance with Indigenous protocols renders a consultation legally defective, those protocols are not merely contextual but constitutive of the legal standard. Extending this reasoning to the ICJ is a logical next step, not a radical departure. The recommendation is to extend this logic to the international plane. A procedural reform of ICJ and arbitral tribunal practice should require that, in any dispute affecting a community governed by non-Western normative traditions, the tribunal must receive and consider submissions on the relevant customary legal framework as a potentially authoritative source of applicable norms, not as subsidiary evidence of general principles. This does not require amending the ICJ Statute; it can be achieved through a revision of the Rules of Court and the adoption of practice directions. The deeper point is structural: an international legal order that claims universality must possess the institutional architecture to engage with the normative traditions of the majority of the world's peoples.

⁹³ Ibid paras 212-220.