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From Colonialism to the Russian-Ukrainian War: The Principle of Sovereignty Equality and its Interaction with the Veto Power at the UN Security Council.

Master's Thesis

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INTRODUCTION

At the dawn of 24 February 2022, specifically at 4:50 a.m., Russian President Vladimir Putin announced through a recorded speech that he had decided to conduct a "special military operation […] to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime."[1]. This declaration was followed by a full-scale invasion of various territories in Ukraine at 05:07 am on the same day. A war - the term rather denied by Mr. Putin – took place and a tumultuous chapter started to unfold in Eastern Europe.

In essence, the conflict aspires from Ukraine's desire for independence and closer ties with the West, contrasting with Russia's historical influence and strategic interests in the region. The annexation of Crimea by Russia in 2014 and the subsequent support for separatist movements in eastern Ukraine fermented the soil for a social and political dispute over sovereignty and territorial integrity. At the flirting of the Ukrainian government with Western businesses (NATO and European Union), tensions that were held for years culminated in the war.

The Russian-Ukrainian war became a problem within the whole European continent. As in 2022 the aggression escalated rapidly, the conflict elevated security concerns across Europe – especially among the post-soviet countries – and there was a significant military investment. Among other problems, it is possible to observe the humanitarian crisis with countless people internally displaced. Seeking refugees in other countries, the Ukrainian population posed a massive challenge to the EU's policy on migration and economic impact. The fact that Ukraine is the transit route for Russian natural gas exportation to Europe, there was a rise in energy prices, impacting millions of individuals' lives.

Indeed, the branching of the ongoing conflict reverberated beyond European concern and brought debates over international relations, the balance of power, and International Law. When we put together the subjects of discussion, they can't ignore an observance of the Security

[1] Vladimir Putin - The Kremlin, 'Address by the President of the Russia Federation' (*President of Russia*, 24 February 2022) < http://en.kremlin.ru/events/president/news/67843 > accessed 08 April 2024

Council – and the fact that Russia is one of the 5 permanent members. Already early in February 2022, many legal websites and news were envisioning how would the Council act in case of a conflict, and if Russia would follow the rule of obligatory abstention present in Article 27 (3) of the UN charter. Yet, the UNSC resolution 2623 of 25 February 2022 confirmed Russia's veto towards the security in Ukraine.

Russia's veto brought now attention not only to the European fear of security but rather a global concern regarding the appliance of International Law when a great power acts directly in the conflict – the balance of power playing a bigger role rather than the Charter.

For the purpose of this master's thesis, I address the matter of threatening international security in International Law and its principle of sovereignty equality. The principle here in discussion is well-known as one of the fundamental sources of International Law, it is present in the Charter of the United Nations. Following the doctrinal concepts and the factual aggression of Russia, I made this logical connection concerning the legality of the use of this veto.

The veto power is addressed to the 5 permanent members of the Security Council, and any of them can use it in all measures that are not considered procedures. Yet, in article 27(3) of the United Nations Charter, the veto has its limitations revealed when an interested party to the dispute finds itself as a voting member of the Council (regardless if it is a permanent member or not). Hence my first question when drawing the problem of this study: According to the presented legal obligations, should not Russia abstain from its vote on the UNSC resolution regarding the war in Ukraine?

Many studies have shown how this obligatory abstention has been waived by permanent members of the UNSC since its first years of functioning, and surprisingly, how little have other states engaged in questioning and imposing the rule of Art. 27 (3). As a consequence, it is rather impossible not to debate that the principle of sovereignty equality is being disregarded in the one organ of the organization that has the power to enforce the law.

Hence, the research problem of this thesis is outlined considering that States do not possess sovereignty equality on a horizontal level – some states are more equal than others. But why the principle of sovereignty equality is not being well exercised? In order to solve this question, my research aims to analyze the construction of international law since its first encounter during the discovery age and how that challenges modern International Law and its loopholes.

To achieve the goal of this present research, the following questions are presented:

1) How did International Law interpret sovereignty during the Discovery Age?
2) What was the impact of the Peace of Westphalia in defying modern sovereignty?
3) How has the development of International Law through the civilization of non-European nations shaped the Charter of the United Nations?
4) Has the Charter favored hemogenic States' interests?
5) How does that affect the functionality of the principle of sovereignty equality?

In the first chapter of this master's thesis, I examine the structuring of international law from the Age of Discovery in the 15th century until the mid-17th century with the Peace of Westphalia, especially focused on the construction of sovereignty. The research goes back to this period as a form to understand how colonialism encounters shaped international law - when new lands and people were found by the Europeans, which rules applied, and how they recognized the sovereignty of those lands. The concept of natural law, which governed the European international law at that period, in the view of Francisco de Vitoria is essentially important to this master's thesis in order to be able to understand how the relations among the countries were regulated. In the form of doing deep analysis, the chapter goes beyond the shallow understanding of Vitoria's status as a humanitarian and father of International Law, revealing how sovereignty rights are shadowed by the rules of the law of nature. The chapter then moves to another remarkable figure of International Law, Hugo Grotius, who differentiates from Vitoria's work by separating natural law from the religious spectrum. Grotius addresses sovereignty individually, but as a counterargument, the research aims to show how that plays a major role in establishing International Law by the marginalization of individuals – and States – who do

not fit in his understanding of natural law. Thus, the explanation aims to show how Grotius's approach to International Law pushed away sovereignty from a global perspective.

Important to clarify that the terminology used to address the colonized societies remained solely with the terms of natives and indigenous. By reason of cultural respect, the terms such as 'Indians' and 'Aborigines' used by many researchers address solely people from India and a specific tribe. The correct Latin term to refer to is *indígena* (indigenous in English), which means "original, the one who is there before the others"[2]. The colonization in the Americas affected thousands of different tribes, and the correct use of the terminology embraces the recognition of each people.

After examining in the first chapter the concept of sovereignty between the 15th to 17th centuries, the second chapter focuses on the modernization of International Law with the establishment of the Peace of Westphalia and how that changed the understanding of sovereignty and created the model we still live in today. At this point in the research, I start to focus on the problems of the Peace of Westphalia and such understanding is important to strengthen my argument on how sovereignty was a formula created by the Europeans, discharging other cultural aspects, and imposing International Law only from their perspective. The research at this point is followed by the positivist era of International Law and aims to demonstrate how the concept of sovereignty was used in the 19th century to create unbalanced rights among nations. Here, it will be analyzed the relationship between establishing sovereignty and the legitimacy of the colonizing missions through international law.

The third chapter's central point is the creation of the United Nations and its main organ the Security Council. It will be shown how the negotiations of the Charter were envisioned, focusing on the negotiations of the great powers and their ambitions within the organization. Also, the thesis analyzes the principle of sovereignty equality in its definition, how it was firstly approached and then incorporated into the Charter. The examination follows then strictly the

[2] Indígena significa "originário, aquele que está ali antes dos outros" [Translated from PT-BR]; 'Estilo, Indígena/etnia' (*Senado Federal*) <https://www12.senado.leg.br/manualdecomunicacao/estilos/indio#:~:text=Para%20designar%20o%20indiv%C3%ADduo%2C%20use,N%C3%A3o%20use%20Dia%20do%20%C3%8Dndio. > accessed 08 April 2024

United Nations Security Council, how it was established, and the conditions it was approved by all 50 states at the San Francisco Conference. This analysis proves its relevance here as a form to understand how the past of international law – previously approached in the first and second chapters – played a fundamental role in creating the dichotomy of equality through sovereignty.

The fourth and last Chapter uses the Russian-Ukrainian War as a case study to exemplify the 'inequality of sovereignty' among states, through the use of veto power legitimized by the loopholes of the Charter. The examination follows the legality of the veto power issued by Russia in the UNSC Draft Resolution S/PV.8979 of 25 February 2022 and S/PV.9138 of 30 September 2022, according to the text of article 27 (3) of the UN Charter. This chapter's goal is to expose the unsolved issue regarding the restraint of veto power in the mentioned article and make a connection with the history of International Law.

Considering the description of this thesis' chapters, the methodology used can be best described as historical analysis (analytical), which involved the examination and interpretation of historical events and their context. The analytical methodology was also used in the last chapter to interpret legal documents.

I. FOUNDATION OF INTERNATIONAL LAW THROUGH COLONIALISM

The emergence of contemporary International Law is recognized, by most doctrines, with the establishment of the Peace of Westphalia in 1648[3]. It was then that, the concept of a State and its Sovereignty were drafted, and consequently, it was born the judicial unit of a State. Still, before the Peace of Westphalia, in the 15th century with the mercantilism system and the movement of European expansion through the seas, it was inevitable to address the matter of colonialism and the first appearances of legal doctrine on the matter back until that time frame period.[4]

It is possible to already observe the presence of international bilateral treaties such as the Treaty of Tordesillas, which divided the world into two parts for the colonial conquest of the Portuguese and the Spanish monarchy. But to utmostly, the establishment known as the Doctrine of Discovery[5] set the legality for these European empires to claim sovereignty over the territory, exercising political, religious, and economic power upon the local indigenous civilization they already established, and without their consent.[6]

Following the doctrine, discovering a place during the expansion period gave the right to the discoverer to rule exclusively upon that territory, thus respect within the European nations but no regard for the native indigenous population that inherently possessed sovereignty on the territory. The doctrine clearly transferred all powers to the so-called discoverers and the right to sell property was instantly diminished[7].

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[3] Malcom N. S., International Law, 5. ed. *Cambridge: Cambridge University Press*, 2003.
[4] Anthony Anghie, 'The Evolution of International Law: colonial and postcolonial realities', *Third World Quarterly*, Vol.27, No. 5, Pp 739-753, 2006. at 742.
[5] Johnson V. M'Intosh,21 U.S.543,588–97(1823).
[6] Robert J. Miller; Micheline D'Angelis, Brazil, Indigenous Peoples, and the International Law of Discovery, *Brooklyn Journal of International Law*, vol. 37 issue 1, 2011. at 2.
[7] Johnson 21, Ibid. at 573 – 585 as cited in Robert J. Miller and Micheline D'Angelis at 6.

The use of the Doctrine was first issued by a papal bull, which by the year 1436, the Christian Church held the state power within the European geographical land[8]. In this legal document issued firstly by Pope Eugenius IV and then by his subsequent, approached the general idea was to convert the native population from the discovered land into Christianism to "civilize" the "barbarians". The terms used by the Europeans during the occupation period were explained by Anghie (2006) in the first instance that "[i]nternational law in this view consists of a series of doctrines and principles that were developed in Europe, that emerged out of European history and experience, and that were extended in time to the non-European world which existed outside the realm of European international law."[9].

Of course, the interaction between the non-Europeans and the Europeans was not to say friendly. The Church as the legal identity drafted the jurisprudence[10] to legitimize the dominance of the indigenous lands based on the previously mentioned mission of Christianizing the non-European communities. In that sense, the European goal was achieved in the social-economical idea of the New World: As the pope exercised power to legalize wars upon the argument that indigenous people were barbarians - Saracens of the Americas -, the Spanish monarchs used it as a form to explore the goals of the mercantilism system, achieving the first form of colonization. This explains the first appearances of international law, which did not follow precedents, but arose in certain periods, in the demand of necessity[11].

The Europeans at the time followed the natural law, but from their perspective, this concept was based on Christian principles, and any other form of natural law was discarded, so was the society organization that differed from the European realm. Robert J. Miller and Micheline D'Angelis (2011) recount:

> King Duarte of Portugal appealed the ban on colonizing the Canaries and argued that Portugal's explorations and conquests were only on behalf of Christianity. Conversion of the Infidel "wild

[8] Robert J. Miller, THE DOCTRINE OF DISCOVERY: The International Law of Colonialism. *The Indigenous Peoples' Journal of Law, Culture & Resistance*, 5(1), 2019.
[9] Anthony Anghie, The Evolution of International Law: colonial and postcolonial realities. Ibid. at 740.
[10] Anthony Anghie, Imperialism, Sovereignty and the Making of International Law, *Cambridge Studies in International and Comparative Law*, Cambridge University Press, 2005. At 17.
[11] Ibid. at 15.

men" was justified, according to Duarte, because they did not have a common religion or laws, lacked money, metal, writing, housing, clothing, normal social intercourse, and lived like animals.[12]

The most legal figures, the representatives of the Church, thought of themselves as superiors chosen by God, they had the power to educate them into civilized and religious manners[13]. Therefore, the aftermath of the Doctrine of Discovery resulted in the massacre of the native population that resisted once it was legitimized by the same premise as in the Crusades: those were "just wars" to conquer a divine objective[14]. Summing up the interaction between the religious and economic interests granted in the doctrine, Anghie (2005) best described it as "[…] the characterization of non-European societies as backward and primitive legitimized European conquest of these societies and justified the measures colonial powers used to control and transform them."[15].

Important to highlight here that, there was no formal concept of sovereignty at the time presented, but inevitably the legitimacy issued by the Church played a key role in conceptualizing the first appearances of legal power between distinctive territories and populations, consequently equated to the current concept.

It was in this scenario of aggressions on the indigenous and possessing their land that, Francisco de Vitoria's work memorably contributed to the foundation of International Law as it is today. Vitoria was a Spanish priest and theologist at his time, and later considered equally as a humanitarian, jurist, and international lawyer[16]. He was part of the Salamanca University philosopher theorists and had a chair position as a *prima* professor. With this entitlement, his

[12] Robert J. Miller; Micheline D'Angelis, Brazil, Indigenous Peoples, and the International Law of Discovery, Ibid. at 13.
[13] Ibid. at 8.
[14] Ibid. at 10.
[15] Anthony Anghie (2005), Ibid. at 4.
[16] James Brown Scott, The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations, *Oxford: Clarendon Press*, 1934. At 68-69. To see a further detailed explanation of his occupation and titles given.

opinions were considerably respected by the Church, thus the Christian monarchs, although his opinions did not favor the Doctrine of Discovery[17].

Francisco de Vitoria most most-known work is called *On the Indians Lately Discovered*, where he drafted firsthand the recognition of the indigenous native people of America as independent humans who possessed lawful rights on the land that was being explored by the European metropoles. For him, the natives owned their rights under the concept of natural law, which was different than the divine law theory spread in the geographical land of Europe[18]. The application of the Papal's bull as deriving from divine law and to the conquest of the land that ruled over the concept of natural law was then invalidated.

All in all, his first conclusion relies on the fact that the indigenous natives were humane even if not Christians, and the pope could not exercise the Divine law on property rights that was ruled by natural law[19]. Anghie (2006) discourses Vitoria's recognition:

> "It is because of his acknowledgement of the humanity of the Indians of the New World that Vitoria is remembered as a champion of the rights of indigenous and non-European peoples. Equally, it is precisely because they possess reason that the Indians are bound by a universal natural law."[20]

As the known title as the Father of International Law, he is widely portrayed as the first jurist to bring the notion of Human Rights and Humanitarian Law. Yet, his theory of universal natural law has another face, after the famous humane side, in-depth analyses carry the legitimization of superiority carried by the Spaniards[21].

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[17] Paulo Emílio Vauthier Borges de Macedo, O mito de Francisco de Vitória**:** defensor dos direitos dos índios ou patriota espanhol? (The myth of francisco de vitoria: defender of the rights of the indians or spanish patriot?), *Revista de Direito Internacional, Brasília*, vol. 9 No. 1, 2012. At 3.

[18] Anthony Anghie, Imperialism, Sovereignty and the Making of International Law, Ibid. at 17.

[19] Robert J. Miller; Micheline D'Angelis, Brazil, Indigenous Peoples, and the International Law of Discovery, Ibid. at 20.

[20] Anthony Anghie, The Evolution of International Law: colonial and postcolonial realities. Ibid. at 743.

[21] Robert J. Miller; Micheline D'Angelis, Ibid. at 21.

Following the critique analysis of this research, in the following subchapter, the writer will analyze the theory Vitoria developed in connection to what extent the incited violence shadows the humane side protected by the laws of the time.

I.I. FRANCISCO DE VITORIA AND THE EUROPEAN SUPERIORITY: CREATING A UNIVERSAL LAW.

When Vitoria addressed the matter of human dignity and property rights to the indigenous people, he believed in the scheme of law beyond the simple idea of Christianity's sovereignty, addressing two distinct concepts: Human and natural law[22]. For him, the idea of legitimized sovereignty conceived by the Pope was not realistic, because, in the natural law facete, the indigenous people have their own legal rights[23].

Thus, Vitoria's understanding is, that at the first level of the encounter with the natives, Divine law granted by the pope and endorsed by human law created by the emperor had no such legal enforcement once the indigenous lived solely under the sphere of natural law[24], grating their property ownership, dominance, and sovereignty[25].

After this first encounter and the solved legal problem of sovereignty was dealt with in the New World, Francisco de Vitoria now deals with a crucial point on how these two very distinct cultures could interact under one system. Vitoria's observation on the description of the Indigenous concluded that was distorted by the Christian idea of how society should behave. Still, the natives in their system created an order for a society that worked properly under the regime of natural law[26]. This scheme drafted, resulted in the universality of natural law.

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[22] Anthony Anghie, Imperialism, Sovereignty and the Making of International Law, Ibid. at 17.
[23] Alfred P. Rubin, International Law in the age of Columbus. *Netherlands International Law Review*, 39, pp 5-35, 1992. At 21-23.
[24] Francisco de Vitoria, *Francisci De Victoria De Indis Et De Ivre Belli Relectiones.* Washington, The Carnegie Institution of Washington, 1917. At 120. As cited in Anghie (2005) at 18.
[25] Paulo Emílio Vauthier Borges de Macedo. Ibid at 6
[26] Anghie, 2005. Ibid. at 20.

For Vitoria, the universal system of natural law was born to solve the jurisdiction matter of the land. Now, aside from divine and human law, the Europeans live under natural law, such as the indigenous, and when this intersection happens, a universal law is bound to all people called *jus gentium*[27]. Well known in Latin languages, *jus gentium* is called as "law of the people", and it served the purpose of the first International Law relation amongst individuals, not only states[28]. To sum up this idea, Anghie shortly summarized Vitoria's concept of international law:

> "Natural law administered by sovereigns rather than divine law articulated by the Pope becomes the source of international law governing Spanish-Indian relations."[29]

Until here, Vitoria is very well known for his work, by the recognition of humanity amongst the indigenous people, and the first jurist to unfold the concept of human rights. Yet his contribution does not end here, and the idea of the "law of the people" had just begun to develop.

Under the concept of *jus gentium*, Vitoria dwells on several topics to explain how this relationship worked between the Spanish and the New World[30], but most importantly the "[…] duties that Indians owed Europeans under international law included allowing Spaniards the right to travel wherever they wished; the opportunity for free commerce, trade, and profits wherever they traveled; and the ability to collect and trade common items such as fish, animals, and precious metals."[31]. At first encounter, the concept presented a sense of equality between the Spanish and the indigenous, once reciprocity was applied to all people ruled by the universality of natural law[32].

The problem here is, that the scenario only existed by the European presence in the Americas and when creating the *jus gentium*, Victoria's scheme applies the 'natural law' under the realm of European identity of natural, which was based on Christianity. For Vitoria, the Europeans and the natives are on the same ontological level, and this creates a distinction only in the

[27] Francisco de Vitoria, Ibid. At 127. As cited in Anghie (2005) at 20.
[28] Anghie, 2005. Ibid. at 20.
[29] Ibid.
[30] To see in detail please read Alfred P. Rubin, International Law in the age of Columbus. Ibid. at 25-27.
[31] Robert J. Miller; Micheline D'Angelis, Ibid. at 21
[32] Anghie, 2005. Ibid. at 21.

cultural aspect. In practice, this would have always resulted in the violation by the indigenous by their own cultural resistance, since their nature did not ontologically exist in the universal natural law[33].

It is finally possible to observe that, the imposition of the universality of natural law, conceptualized by a European vision of society, creates an ambiguous term of equality, once the relationship here was not equal culturally. Anghie (2005) concludes on this matter:

> "Vitoria, I have argued, displaces the realm of divine law and thereby diminishes the power of the Pope. Nevertheless, once Vitoria outlines and consolidates the authority of a secular *jus gentium*, which is administered by the sovereign, he reintroduces Christian norms within this secular system; proselytising is authorised now, not by divine law, but the law of nations, and may be likened now to the secular activities of travelling and trading."[34]

When Sovereignty is mentioned, Vitoria in his work tries to conceptualize it taking into consideration the lack of State definition in that time frame, and connecting the sovereign power to the power of waging war. His remarkable conclusion is that the pagans – followed here by the indigenous reference – are impeded from commencing a war because that only belonged to Christians[35]. Thus, the indigenous would never be sovereign, putting a cease to exist any resistance to the Spanish presence on their land.

The problem now of his system unfolds to the fact that any kind of violation of *jus gentium* is legitimized as an act of war, justifying the sovereign right of the Europeans to engage in "just war". Here, in his scheme "[v]iolence arises, […] through the inevitable violation by the Indian of the natural law by which he is bound."[36]. It seems that in his work, Vitoria uses the law of nations developed by him to bind all individuals under natural law, creating a system that is failed by the indigenous in any situation.

[33] Anghie, 2006. Ibid. at 743-744.
[34] Anghie, 2005. Ibid. at 23.
[35] Ibid. at 26.
[36] Anghie, 2006. Ibid. at 744.

The mere existence of the indigenous people bound them to Europeans, without the chance of any resistance that then, resulted in "self-defense" legitimizing the colonization of the New World by the Spaniards[37]. Finally, the violence incited in the origin of *jus gentium* demonstrates the presence of dominance over one population and territory, which was legitimized by the first appearance of International Law.

I.II. HUGO GROTIUS: THE ENDORSMENT OF VITORIA'S WORK TO A MODERN INTERNATIONAL LAW UNTIL THE PEACE OF WESTPHALIA.

Hugo Grotius, like Francisco de Vitoria, is in the hall of being known as one of the fathers of International Law and humanists for the Indigenous cause. His myth, as most scholars like to describe it, is followed by victorious conquers, such as his groundbreaking book *The Rights of War and Peace*[38], where he changes the vision of wars bringing the still unknown concept of International Humanitarian Law.

He was a Dutch poet, historian, and jurist, born in Delft, who at the age of 11 years old started his studies in Law at Leiden University. Still very young, he started to work as a jurist at The Hague and practiced law in favor of the United Dutch East India Company[39]. Important to highlight he had personal interests linked with the intention of colonialism and an intimate relationship with the mercantilism market[40]. On an impeccable analysis of Grotius's story with his theories, Richard Tuck tells:

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[37] Paulo Emílio Vauthier Borges de Macedo, Ibid. at 10-11

[38] *The Rights of War and Peace, including the Law of Nature and of Nations,* translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, 1901).

[39] Luiza Diamantino Moura, *A PROTEÇÃO DA PESSOA EM HUGO GROTIUS: Uma análise pela perspectiva do Direito Internacional Humanitário*, CONPEDI (2014).

[40] Anghie, Antony, 'Towards a Postcolonial International Law', in Prabhakar Singh, and Benoît Mayer (eds), *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (Delhi, 2014; online edn, Oxford Academic, 20 Nov. 2014)

> "His family was (like many aristocratic mercantile families in the United Provinces) quite heavily involved in the Indies trade: cousins included directors of the United East India Company and admirals in its service, while his father as burgomaster of Delft was responsible for nominating to one of the seats on the company's board."[41]

He was truly considered the "Dutch miracle" once he was front-clashing the rulers of Europe: Portugal and Spain. Thus, his following works preceded being a legal consultant for the Prince of Nassau following a position of attorney general, on an extensive tryout to expand the Dutch State – and companies – to be included in the trade market within India.

His main argument, - which also gave him a humanist title - was the separation of Christianity from the concept of state. He firmly believed that the Law of Nations did not come from Christianity nor did the Church have the legal powers to engage in war based on spreading the gospel[42].

Following his secularization concept of the natural law, he affirms that the sense of sovereignty does not only come from the state but also the individual in his natural conditions, thus individuals have the power to wage war as much as states. Cavallar exposes Grotius's notion of sovereignty:

> "This power can be the state (*civitas*), but an individual enjoys the same power and rights, provided it has not transferred them to a civil society. Both natural individuals and states have the right to use force, the right to punish, and thus the right to make war. […] War itself is seen as a kind of lawsuit, the administering of justice by force."[43]

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[41] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (2001), Oxford University Press, at 79.

[42] Rashet Shrinkhal, 'Evolution of Indigenous Rights Under International Law: Analysis from TWAIL Perspective' (2019) 19 The Oriental Anthropologist 7.

[43] Georg Cavallar, "Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?" (2008) 10 Journal of the History of International Law 181. At 196.

Different from Victoria's idea of natural law's *jus gentium*, which was still based on religion, Grotius understood that natural law is inherited by each individual, regardless of religion, this was connected purely with human existence. For him, the state and the individuals were at the same level of sovereignty equality, thus non-Christian territories had the power to political and judicial ownership[44].

At first approach in his work *De jure Praedae*[45], the concept of sovereignty aimed to achieve a matter of freedom of the seas into the European realm, and it was considered revolutionary due to the current war waging in European societies. When the same concept was approached in his famous work *De Iure Belli Ac Pacis*[46], the idea was the same but with more detail regarding the natural law and Law of Nations. In the introduction of his series, he directly addresses the necessity humans have, by natural law, to live in a peaceful society[47]. He expresses:

> "Among the things which are unique to man is the desire for society [*appetitus societatis*], that is for community with those who belong to his species - though not a community of any kind, but one at peace, and with a rational order [*pro sui intellectus modo ordinatae*]. Therefore, when it is said that nature drives each animal to seek its own interests, we can say that this is true of the other animals, and of man before he comes to the use of that which is special to men […]. This care for society in accordance with the human intellect, which we have roughly sketched, is the source of jus, properly so called, to which belongs abstaining from another's possessions, restoring anything which belongs to another (or the profit from it), being obliged to keep promises, giving compensation for culpable damage, and incurring human punishment."[48]

The cultural difference between the indigenous of the New World and the Europeans is crucial to understanding how Grotius set the law of colonialism. Here, the natives were considered, by

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[44] Richard Tuck, Ibid. at 92.
[45] 'De lure Praedae Commentarius', I trans, Gladys I. Wiliams and Walter H. Zeydel (Carnegie Endowment for International Peace, Oxford University Press, 1950), 91-2. As cited in Tuck, Ibid.
[46] *The Rights of War and Peace, including the Law of Nature and of Nations*, Ibid.
[47] Richard Tuck, Ibid. at 97-99.
[48] *Hugo Grotius, De Jure Belli ac Pacis* (Paris, 1625). As cited in Tuck, Ibid. at 97.

the European vision, as "non-civilized". This, under the Grotian Natural Law system, is comprehended as a civilization that does not respect the concept of natural law and, thus is not included in the realm of the Law of Nations[49]. In contradiction to his own work of separating the church from the law, here he aligns with the church principles to define who was not respectful of the Law of Nature[50]. *In brevi*, indigenous were not sovereigns for not respecting the core of natural law (established by a European idealism), thus they must be punished by those who possessed the civilization manner.

The last aspect of his theory follows the notion of property, and once again he aims to solve the problem of Europe while "fertilizing the soil" of colonialism. First, he defines that there is the common property, which the common goods – fertile land, seas, air, forests, etc. – were a gift from God, thus every person on earth despite where they were from, could possess enjoyment[51]. For Grotius "[…] if the sea could not be owned by the men who hunted over it, neither presumably could the land."[52]

Within this argument, he develops his agricultural theory that aims to privatize the common goods. He first separates the definition between *dominium* (ownership) and *occupatio* (occupation). The indigenous possess *dominium* and jurisdiction over the land. Still, colonial powers retain an inherent and absolute right to occupy it[53], justified as if "things which are of no use to their owners, and therefore other people have a perfect right to occupy them."[54] He concludes his arguments, by stating that by making the land fruitful, then it belongs privately[55].

Conclusively, the contribution that Grotius is very well known for – humanist, peace constructor, and order among societies – is inevitable there, but only for the European benefit. The

[49] Georg Cavallar, Ibid. at 196.
[50] Ibid.
[51] Rashet Shrinkhal, Ibid. at 13.
[52] Richard Tuck, Ibid. at 104.
[53] Georg Cavallar, Ibid. at 197.
[54] Richard Tuck, Ibid. at 105.
[55] Rashet Shrinkhal, Ibid. at 13.

sovereignty is individual, yet does not belong to those who do not fit into his criteria aligned with Pope Innocent IV[56].

As he constructs the scenario of peace, a greater part of human individuals are not included in it. “Thus the Grotius celebrated for his great work directed at creating peace within Europe was simultaneously articulating the doctrines that would legitimize European expansion into the East Indies.”[57]

It was through it’s result of all of his work here exposed that the first contract of modern International Law was established, the Peace of Westphalia. His contribution to the set of treaties comes from the core of his natural law applied in the Law of Nations: The necessity of individuals to live in a peaceful society. To penalize and “civilize” the indigenous, was a mere consequence of his ideas, that set out the ground for colonialism as much as for the creation of International Law itself.

The relevance of Vitoria’s work, through Grotius’s, is the bridge between medieval secular law to the modern concept. Applied to the Peace of Westphalia until the United Nations Charter “[t]his is a history that continues, I would argue, to shape the contemporary discipline”[58], which will be developed in the next chapter.

[56] To see more details, access Richard Tuck, Ibid. at 102-104.
[57] Antony Anghie, 'Towards a Postcolonial International Law', Ibid. at 142.
[58] Ibid. at 141.

II. FROM PEACE OF WESTPHALIA TO THE UNITED NATIONS: THE MYTH OF SOVEREIGNTY THROUGH POSITIVISM OF INTERNATIONAL LAW

The extension of the 80 Years War to the brutality of the 30 Years War in the 16th to 17th centuries in Europe resulted in millions of deaths among the nationals of the territory. These conflicts started with religious divergences but in their final stages, the political powers' interests were dominant[59]. Long four-year negotiations, from 1644 to 1648, took place between "[…] the Holy Roman Empire; nation-states like France, Sweden, Spain, and Portugal; an emerging State, the Netherlands (then called the United Provinces); the Holy See; i.e., the Swiss Confederation; Italian units such as Venice, Tuscany, and Savoy; and various German principalities and bishoprics, etc."[60], and they culminated into the Peace of Westphalia.

The Peace treaties were divided into two main bodies, first signed in Osnabrück and then in Münster, settling in facto the distance of the Holy Roman Empire from European domination, and opening the doors to the Monarchy and Empires to also rule over the territory[61]. The goal when setting the treaty was not to determine the winner of the long-lasting wars but to cover the three main issues of Europe that resulted in conflicts.

First, religious issues were dealt with to give equal rights to Catholics and Protestants. The freedom of religion was the first one to be discussed since the emergence of other religious groups was the reasoning behind the numerous wars[62]. The regional emperor here would decide the religion of its region and shall respect the other territories' religions. Likewise, persons with distinctive religions shall not be prosecuted[63].

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[59] Stéphane Beaulac, 'The Westphalian model in defining International Law: Challenging the myth' (2004) AJLH Vol. 8, pp. 181-213.

[60] Ove Bring, "The Westphalian Peace Tradition in International Law: From Jus Ad Bellum to Jus Contra Bellum" (2000) International Law Studies vol.75, pp. 57-80. At 58.

[61] Stéphane Beaulac, Ibid. at 198 -201.

[62] Steven Patton, "The Peace of Westphalia and It Affects on International Relations, Diplomacy and Foreign Policy" (2019), The Histories, vol. 10: 1. Pp. 92-99

[63] Stéphane Beaulac, Ibid. at 200.

The second issue was the legitimacy of waging war. Before the peace, the cause for "just wars" was extremely shallow and the only path feasible, but the treaty aimed to maintain peaceful societies. Thus, it introduced the idea of diplomacy, negotiations, and foreign affairs. Further, princes and princes wouldn't depend on the Holy Empire to engage in war but had the liberty to do so[64].

Finally, the main solution of the treaties, and as a consequence of the two issues above, resulted in the concept of a sovereign state. The monarchy here was independent of the Holy Roman Empire and could exercise political, religious, legal, and other governance matters without outside interference. " This meant that the princes' power was greatly increased while the Holy Roman Emperor saw a drastic reduction in the scope of his. After the peace settlements, power in the Empire had become much more decentralized […]."[65]

This concept of a Sovereignty State in 1648 was considered revolutionary, a complete change of charter in the European realm. It culminated in the first drawing of the current model, as we call it the Westphalian System, where International Relations among States are established and modern International Law principles are set to govern these interactions[66].

Undoubtedly, the principle of sovereign equality changed the scenario of Vitoria's *jus gentium* based only on natural Law in interaction with Divine Law. It "[…] took on a more State-oriented meaning. International law, as we know it today, started to develop through new (more efficient) forms of diplomacy, relying to a greater extent on permanent missions and an increased registration of state practice."[67]

However, my argument follows how the Empire rule has passed through generations of International Law to lawfully infringe this principle, especially on the colonizing mission and the "civilizing" of the indigenous people. The Westphalian system was not solely used as a

[64] Steven Patton, Ibid. at 96.
[65] Ibid. at 95.
[66] Diego Santos Vieira De Jesús, "O Baile Do Monstro: O Mito Da Paz de Vestfália Na História Das Relações Internacionais Modernas" (2010) História vol. 29. Pp. 221 – 232.
[67] Ove Bring, Ibid. at 58.

method of freedom of individuals and collectiveness peace but as a form to still maintain the empire despite natural law principles. Modern International Law at that time was created to satisfy the Emperor's rule. Thus "the principle of national sovereignty was now in the foreground, while at the same time restrictions in sovereign rights were recognized as a consequence of, *inter alia,* the Westphalian Peace Treaties."[68]

Exposing the problem of the Peace of Westphalia can be observed even internally in the European States. It starts with the presence of the Diet of the Emperor limiting the freedoms concealed. For instance, the absolute right granted by the state sovereignty of choosing the religion would be shortened by provisions that depended on the Diet; When dividing the land property, the fief and other privileges would still pertain to the Holy; No international relations, treaty or alliance among the independent states could pose a threat to the Empire.[69]

It is easy to visualize that, even in the roots of the principle of sovereignty states, the legal document that would provide this freedom, at the same time would narrow it down to the still domain of the Emperor. Lawfully binding,

> "The purpose of *Westphalia,* in fact, was not at all about the creation of independent polities, let alone independent states. On the contrary, it kept the *imperium* very much alive, be it in the Empire's institutions, through feudal territorial links, or by restricting the Princes' alliance privileges. Finally, it was seen that the Empire did not disappear in favour of the German polities as an aftermath of the *Peace.* Indeed, despite reductions in the scope of their functions and powers, the Imperial institutions remained active until they disappeared."[70]

By all means, the Treaties did not achieve the goal of maintaining peace within the whole of Europe, but if anything the lack of balance of power with the introduction of state sovereignty established the ground for more conflicts[71]. As a consequence, the disappearance of the Diet of

[68] Ibid.
[69] Stéphane Beaulac, Ibid. To see in further detail access at 200-205.
[70] Ibid. at 211.
[71] Ove Bring, Ibid. at 62-65

the Holy Empire was an embryo of the establishment of several new Empires, that enjoyed their sovereignty granted by the Westphalia Peace, following the principles of naturalism.

The problem with the balance of power after the peace treaties was a turning point for the jurists of the time[72]. The simple establishment of human law through natural law principles without any political institution to supervise it, was the cause of the still continuous conflicts on territorial conquest. Hence, despite the forces of the emerging empires to maintain peace, to base it only upon moral values determined by natural law was not feasible[73]. On natural law principles at the Westphalian peace, there were no legal "[…] obligations as to collective action or sanctions were envisaged for the future."[74]

Jurists, starting from the mid-17th century, in the factualities of their time, started to comprehend that – based on the recognition of different cultures - the law of nations could not be based on morality ideas. Of course, the concept of human law had been approached but

> "custom was still approached through the naturalist framework which examined and assessed the validity of state behaviour with reference to the transcendental principles originating from the 'state of nature', the model society whose laws could be identified and elaborated by reason and which, ideally, governed state behaviour."[75]

As then a consequence of many conflicts of the 18th to 19th century, a new theory of law was studied and implemented to solve the problem of the wars between the emergence of sovereign states, called Positivism.

While positivism came to solve the problem of empires in Europe, its development was grounded on the shadow of the "civilizing" mission of the native population of the colonies[76]. For its greater authors, positivism was the next step in improving the law of nations and

[72] Ibid.
[73] Anthony Anghie (2005), Ibid. at 42.
[74] Ove Bring, Ibid. at 63.
[75] Anthony Anghie (2005), Ibid. at 42.
[76] Ibid.

achieving equal sovereignty. Yet, as I will argue in the next sub-chapter, the subjugation of the colonies' population was fundamental for the maintenance of European superiority while forging International Law.

II.I. POSITIVISM THEORY ESTABLISHING MODERN INTERNATIONAL LAW

After the establishment of the Peace of Westphalia earned from a Grotian heir's idea of International Law, its aftermath was not sufficient to resolve the issue of conflicts among its jurisdiction's sovereigns. The Law of Nations was still visioned, by Grotius's early successors – such as Christian Wolff and Emmer de Vattel –, in a naturalistic approach with inherited principles from the law of nature, even though those authors already highlighted the importance of man-made treaties[77].

This slow shift throughout the centuries of Law was a consequence of the emergence of positive laws – or human law as first addressed by Vitoria - among the European states to regulate their affairs, instead of depending just on the customs of natural law[78]. Hence, the interest of

> "[…] legal positivism arises from its commitment to clarity and legal certainty, both highly desirable in human affairs. If international law rests – as it always has done and ultimately must do – on 'reason' and 'the nature of human society', there will be many occasions for 'fragmentation' or interpretive confusion that 'definitions' and 'modifications' may do much to alleviate."[79]

Herewith, a strong positivist law theory was solidified by the end of the 19th century when its authors claimed the whole separation of the Law of Nations from the Natural Law. In the positivist law theory, sovereignty was the primary source of nations to interact in the scope of

[77] Ibid.
[78] Ibid. at 43.
[79] Mortimer N.S. Sellers, 'What Useful Role (If Any) Could Legal Positivism Play in the Study or Advancement of International Law?' (2012), 106 Am. Soc'y Int'l L. Proc. Pp. 373-377. At 375.

International Law, there is no law equally above it[80]. Conclusively, for positivism, International Law is born from sovereignties states.

The shift here occurs, while in natural law sovereignty would be accomplished by the respect of *jus gentium* principles by nations, in positivism sovereignty is a requirement to take place in the Law of Nations. Nevertheless, the Law of Nations is not inherited according to the theory, but only bound if agreed by sovereigns. "Thus for positivists, the rules of international law were to be discovered not by speculative inquiries into the nature of justice or teleology, but by a careful study of the actual behaviour of states and the institutions and laws which they created."[81]

The behavior of states is very important for positivists. It is from their interaction that treaties would be founded and agreed customs would be established. Still, as a central idea, the gross outcome would be a consequence of exercising sovereignty.

For John Austin – considered one of the fathers of jus positivism – in his earlier ideas, international law was not bound to be a positive law because the matter itself could not surpass the sovereignty of a state national law and could only apply to persons that belonged to the society of that sovereignty[82]. His later successors in the theory aimed to interpose this idea by arguing that, if a set of rules humanly made govern a society within its sovereignty, International Law is composed of a society of states that established a common ground of civilized manners – called costumes.

The stressing of customary law was the key to the late positivist thinkers to refute the idea that International Law was far away from morality, and it was indeed a bound law among sovereignties. International lawyers "[…] depended largely on establishing that a functioning system of rules governed the behaviour of states, as exemplified by the operation of customary international law."[83]

[80] Anthony Anghie (2005), Ibid. at 43.
[81] Ibid.
[82] Ibid. at 44
[83] Ibid. at 46.

Creating this scheme, the 19th-century positivists established not only sovereignty as a fundamental rule to the Law of Nations. If the observance of society's behavior established the rules for national law, thus international law was established with the observance of interaction among states in an international society grounds. Anghie (2005) best exposes:

> "Equally, however, it is because these states exist in society that international law can claim to be law. The interaction of the members of this society gives rise to rules which are regularly observed and which are enforced by sanctions. Consequently, society constituted law and law constituted society. It is through a complicated interplay between law and society that the result is circularly achieved, that international order is maintained and international law created"[84]

Suddenly, the fundamental understanding of International Law is not sovereignty *per se*. Still, society's understanding is the common ground that allows states to interact in a civilized manner, maintaining peace and security. Sovereignty is a requisite, while society is the participation in common rules accepted, called international law[85]. Thus, states that are not sovereign can not even flirt with the idea of living within an international society.

Up to this, it seems to be that positivism desired to place itself as far as possible from the divine idea of superior or divine principles. But how would the theory exercise that, while establishing international customs? My argument follows that, for positivism to establish an International Law far away from morality – or what it ought to be – was to legitimize the separation of civilized and uncivilized societies. At this point, I shift back to the problem outside of the European scope, with all the events between the establishment of the Peace of Westphalia until the 19th-century positivism theory and how they would implicate upon the colonized nations.

[84] Ibid. at 47.
[85] Ibid. at 48.

II.II. CUSTOMARY INTERNATIONAL LAW: CIVILIZING THE UNCIVILIZED

While in the framework of natural law, the legitimization of the colonial powers to exercise jurisdiction on a distinctive territory was bound by transcendental principles, in positive law this would cease to exist, once morality was not recognized as a necessary principle of creating a law. Hence the relevance of establishing the customs as guiding principles of international law. For the positivist jurists, the road was to separate the civilized nations, from the uncivilized – the non-Europeans.

The first step in this journey was defining a society to the claim that international law was a right that only belonged to civilized societies[86]. Civil societies, by the ideas of jurists at that time, were connected to the establishment of institutions within the state organization, and even though indigenous had tribal organization this did not fit into the European concept[87].

The complete disregard for the non-European institutional organization was fundamentally explained by the complete rejection of naturalism theory, establishing then the European superiority of understanding that any other distinctive form of state organization – so the creation of national law – was considered uncivilized. Thus, the "[…] [p]ositivist jurisprudence was so insistent on this distinction that any system of law which failed to acknowledge it was unacceptable."[88]. It was the necessity to completely marginalize natural law ideas that the separation of civilized nations from uncivilized ones made international law an actual law – refuting Austin's idea.

The aftermath of the first accomplishment of establishing positivism law into international law was the exclusion of all nations that were not part of that geographical belonging. The independence of former colonies was already taking place, such as the United States and Brazil yet these States were not part of the Law of Nations.

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[86] Ibid. at 53.
[87] A. Cafà, 'Colonialism, the "civilizing mission" and their impact on the formation of International Law' (*Gea Rights*, 17 December 2021) < https://gearights.org/?p=729> accessed 03 March 2024.
[88]Anthony Anghie (2005), Ibid. at 55.

The following step to the jus positivism to explain why those independent countries were not part of the Law of Nations fell into the scope of the sovereignty doctrine. Now, if countries outside of Europe possessed freedom and their state-like system of organization, should not they be sovereign? The matter of territorial dominance was already satisfied by its definition[89] but for the positivist doctrine, sovereignty was a consequence of civil society; thus states that fulfilled the territorial criteria were still not sovereignty for the Law of Nations by the simple fact of cultural difference – or as referred, civilized institutions.

Law is then a product of Europe, reflecting its best interests by assuring it under a universal concept[90], "while other remote societies may appear to have their own laws, any tendency to affirm this similarity must be immediately repulsed as it could result in the collapse of the language of sovereignty and therefore of international law itself."[91]. The contrast imposed by cultural differences was the main argument for jus positivism invalidating sovereignty to restrict the accessibility to the law of nations while imposing its system as universal.

Therefore, native societies were not legally authorized to resist any European interference, but to own international law they had to fit into the model imposed by its occupant[92]. While there was a differentiation of societies, from South America to Asia, and its levels of interaction with the society concept, the non-European model was unacceptable, and the European model was the sole mainstream to development[93].

Undoubtedly, the spread of international law to a universal sphere and the achievement of sovereignty among states is a product of the civilizing mission. As Anghie argues in his scholarship:

[89] Ibid. at 58.
[90] Amin George Forji, 'International Law, the Civilizing Mission and the Ambivalence of Development in Africa: Conceptual Underpinnings' (2013) JAIL 6:1. Pp. 191-225.
[91] Anthony Anghie (2005), Ibid. at 61.
[92] Amin George Forji, Ibid. at 202.
[93] Anthony Anghie (2005), Ibid. at 62-63.

> "Within the positivist universe, then, the non-European world is excluded from the realms of sovereignty, society, law; each of these concepts which acted as founding concepts to the framework of the positivist system was precisely defined, correspondingly, in ways which maintain and police the boundary between the civilized and uncivilized. The whole edifice of positivist jurisprudence is based on this initial exclusion, this determination that certain societies are beyond the pale of civilization. Furthermore, it is clear that, notwithstanding positivist assertions of the primacy of sovereignty, the concept of society is at least equally central to the whole system. […] Finally, the constitution of sovereignty doctrine itself was based on this fundamental distinction because positivist definitions of sovereignty relies on the premise that civilized states were sovereign and uncivilized states were not."[94]

Conclusively, the argument that international jurists at the time used to assert international law was indeed law grounded the floor for the civilization mission. Accordingly, the universality of international law was not a mere collision of Europe with other territories, it was willingly a product of it[95].

After all the exhaustive extension on defining civilized from uncivilized, the legal positivist theory had to develop a legally substantial method of the civilizing mission for the inclusion of the uncivilized under the Law of Nations, while at the same time prevailing the interests of the European society[96].

The establishment of the doctrine of assimilation, the colonial encounter, and the Berlin Conference of 1884-1885[97] gave a somewhat sense of inclusion of the non-Europeans into the realm of international law, still very much attached to the dependence of shaping into the society concept of European powers. At this period "[i]nternational law specifically strengthened the moral argument that the civilizing mission was doing a generous service by putting Africa on a

[94] Ibid. at 63.
[95] Amin George Forji, Ibid. at 207.
[96] Anthony Anghie (2005), Ibid. at 66.
[97] To see further, ibid. at 67-100.

platform of progress. Order, peace and development were the projected goals of the mission."[98]. Hence, morality – customary law – was still much present in the scenario.

Finally, the modern concept of sovereignty granted by the Peace of Westphalia and endorsed into international law through the jus positivism theory was, at least, dubious to be established as the empowerment of nations. The concept of sovereignty is the reinsurance of authority to preserve the culture of a population[99] but to fully achieve sovereignty, a non-European state had to engage with European models of institution and society, completely neglecting its cultural personality[100].

The acquirement of sovereignty by non-European nations would be granted if the colonial powers had control over the law through its expansion. Here, founding a system of the Law of Nations at the end of the 19th century failed in the mission of expanding sovereignty in its definition, but achieved the naturalism of Vitoria aiming for "progress"[101]. And it was this idea of progress that legitimized the civilizing mission[102].

Critically, it was the establishment of *jus gentium* on the Westphalian system that endowed European superiority, because they were the superior states. The difference between the two main theories exposes that

> "[u]nder naturalism, everybody—sovereigns and non-sovereigns alike were bound by natural law. Under positive law, the sovereign beside administering and enforcing the law could go even further to create other laws and manipulate existing codes. Under positivist international law, the only means for the uncivilized to join the family of nations was to size up with the standard of civilization".[103]

[98] Amin George Forji, Ibid. at 206.
[99] Anthony Anghie (2005), Ibid. at 104.
[100] Ibid. at 105.
[101] Ibid. at 106-107.
[102] Amin George Forji, Ibid. at 207.
[103] Ibid. at 224.

I argue here that, through its most developed tools to distance itself from naturalism, positivism *de facto* made it lawful to use morality as a form to enforce the Law of Nations. As Anghie best expressed "[a]s a technology (international law) it could lend itself to the project of making real the Victorian ideals of progress, optimism, and liberalism which, when applied specifically to the non-European world, meant the civilizing of the benighted native peoples."[104].

The contradiction of achieving sovereignty by waiving its historical cultural heritage left the legacy of the progress of the 19th century a tremendously ambiguous character[105]. The achievement of sovereignty by non-European States while framing its institutions and laws to the European concept created more of a weakness in its identity instead of its empowerment of engaging in the Law of Nations. Succinctly, sovereignty in the 19th century annulled its goal of empowerment through submission[106].

Even though the period of the 19th century is wanted to be forgotten for its embarrassment, it was through this weakness of empowerment that non-European societies little could engage in the advances of the discipline of International Law[107]. Alongside Anghie in his book *Imperialism, Sovereignty and International Law*, I rest my argument on his shoulders that the tradition of that century shall not be put aside because contemporary international law was shaped essentially by that period, and it must be exposed to understand how certain governing principles of the subject.

The idea that international law has transcended its past as visualized in the decolonization period was much appreciated in the 20th century, but its legacy of its very much present in international law of the following century when establishing International Organizations. "At a material level, the systems of economic and political inequality which were created by colonialism under the auspices of nineteenth-century international law continue to operate despite the ostensible

[104] Anthony Anghie (2005), Ibid. at 107.
[105] Ibid. at 108.
[106] Ibid.
[107] Ibid.

change of legal regime."[108]. Sovereignty, nevertheless achieved, was still instituted through a Eurocentric form of international law.

The consequences of the positivism era in developing international law are abundant and have generated the most diverse criticism on the cosmopolitan version of the subject – such as the Universal Declaration of Human Rights, the rights of indigenous people, etc – nevertheless, as an object of this study, I follow exclusively on the pathway of equality sovereignty among States.

With the emergence of new devasting wars – The Great War and World War II – the goal of the Law of Nations has shifted completely to security and peace maintenance, and periphery the option of engaging in war. Notice that before, while the Peace of Westphalia established peace there was still present the question of who shall have the right to engage in war, and war was a great part of the civilizing mission and establishing colonization.

The creation of a most recent form of state interaction in the international sphere was the establishment of the United Nations and its Charter[109]. With all the bounding rules of international society, a focal point in the principle here established as sovereign equality[110] sought to suppress the paradox of superiority in positivism.

As I have stressed so far inequality sovereignty among states was the pavement of international law to consolidate as a law *per se*, earlier in my argument through natural law, later on in history through positivism and the civilized-uncivilized separation. I continue my dissertation on the establishment of this organization and its incoherence with the mentioned principle following the creation of the Security Council with the Power Veto – which will be further developed in the following chapter.

[108] Ibid. at 111.
[109] Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI.
[110] Ibid. Art. 2 (1)

As Aghie argues, "[…] because sovereignty was shaped by the colonial encounter, its exercise often reproduces the inequalities inherent in that encounter."[111]. Historical factors were indeed inevitable to understanding the unfoldment of International Law, and as I shift to a post-colonial century, my main argument relies on the still presence of historical factors that impact and shape the new challenges of International Law.

[111] Anthony Anghie (2005), Ibid. at 114.

III. CHARTER OF THE UNITED NATIONS: THE PRINCIPLE OF SOVEREIGNTY EQUALITY, THE SECURITY COUNCIL AND THE POWER OF VETO

At the beginning of the 20th century, the world faced a huge threat to International Peace, called The Great War. To prevent future atrocities at such a level, states created the first global organization called The League of Nations, which showed later in the century its inefficiency with the eruption of World War II (WW II)[112]. At the time, the Allied forces concurred that there was the necessity of imposing a new and better-organized global institution, that would promote international peace among all states.

It was while still in War when the first conferences happened to establish the United Nations – a whole new international organization -, which was born in 1945, shortly after the fall of the Axis[113]. When establishing the United Nations, the leading countries that designed the organization - The United States, Great Britain, and the Soviet Union - had many troubles with deciding voting powers since each one was individually seeking its own interests[114].

The negotiation of the creation of a global organization to enforce an International Law took time and effort. Traced back to the 1941 Atlantic Charter, an exhausted British Empire threatened by the advancement of Nazi Germany, came together with the United States to create a better system of international security by settling down common principles[115].

In 1942 the Allies came together and drafted a plan against the Axis power expansion. At this time the Soviet Union was included because of its Anglo-Soviet Agreement[116] and China due to

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[112] David L. Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (New York, Oxford University Press, 2009) 256. At 3.

[113] 'Preparatory Years: UN Charter History', (*United Nations*) < https://www.un.org/en/about-us/history-of-the-un/preparatory-years > accessed 08 of March 2024.

[114] Council on Foreign Relations Editors, 'Backgrounder: The UN Security Council', (*Council on Foreign Relations,* 26 February 2024) <https://www.cfr.org/backgrounder/un-security-council> accessed 08 March 2024.

[115] David L. Bosco, Ibid. at 12.

[116] This was an agreement between the United Kingdom and the Soviet Union to act in cooperation in to defeat Nazi Germany. It was made after the invasion of the Nazi Army in the Soviet Union, which established the Soviets as part of the Allies.

its battles against the Japanese Empire[117]. With the establishment of the "Big Four", they drafted the 1942 Declaration by the United Nations, which was not a global organization but a military alliance[118]. Nevertheless, the Declaration maintained the Atlantic principles of international governance and it was later signed by other 21 states[119].

At the very end of 1943, the Big Four jointly met in Moscow where they, together, recognized the necessity of a new International Organization above a military alliance. At first, they recognized the principle of sovereign states as a peace-loving interaction was fundamental[120]. A month later in Teheran, the United States, The British Empire, and the Soviet Union confirmed the necessity of preserving peace[121]. The only pathway to save all people from all nations would be through international cooperation – An international legal institution establishing universal governance.

At its final meetings before the signing of the Charter, the 1945 Dumbarton Oaks Conference took place and the Big Four finally came to a final draft of the Charter – At the time called Proposals for the Establishment of a General International Organization[122]. There was one unresolved issue: the voting procedure of the Security Council, which was negotiated at the 1945 Yalta conference where the Soviet Union met with the United States and the British Empire and agreed upon the veto power.

Decisively, the San Francisco Conference brought together 50 states and the United Nations Charter was finally approved[123]. It was at this conference that, the so-called "Big Four",

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[117] This was seen by the United States as a great power at the Asian region of the world, establishing China as one of the Great Four.
[118] David L. Bosco, Ibid. at 13.
[119] 'Preparatory Years: UN Charter History', Ibid.
[120] David L. Bosco, Ibid.
[121] Preparatory Years: UN Charter History', Ibid.
[122] Proposals for the Establishment of a General International Organization as Submitted by the Dumbarton Oaks Conference, signed on 9 October 1944.
[123] 'United Nations Charter', (*United Nations*) < https://www.un.org/en/about-us/un-charter#:~:text=The%20Charter%20of%20the%20United,force%20on%2024%20October%201945. > accessed 08 March 2024.

established the purpose of the organization in Article 1 and framed it following guiding principles and its organs along the Charter[124].

The principles set for the United Nations in its Charter are present in Article 2 and they articulate under the purpose of the organization. Seven principles are exposed: the principle of the sovereign equality of all its members[125]; Good faith among its members[126]; Settlement of disputes by peaceful means[127]; prohibition on the use of force[128]; and Collective security among states[129]; The United Nations Principle has the effect of *jus cogens* norms[130]; Non-interference in the domestic jurisdiction[131].

After settling down its purpose and principles, almost as one could say as a "guideline" for the United Nations to function, the organs are finally exposed in the charter. At the moment of funding the organization, six main organs[132] were established: The General Assembly[133]; The Secretariat[134]; the International Court of Justice[135]; the Economic and Social Council[136]; the Trusteeship Council (inactive since 1994)[137]; and The Security Council[138].

When establishing these principles and organs, the founders of the United Nations sought peaceful international relations among states, once the aftermath of both wars was devasting for the world. The establishment of the Security Council came following the three organizing powers of the United Nations, considered to be the Allies, with a demand to incorporate China

[124] David L. Bosco, Ibid. Pp. 32-38.
[125] Charter of the United Nations, Ibid. art. 2 (1).
[126] Ibid. art. 2 (2)
[127] Ibid. art. 2(3)
[128] Ibid. art. 2(4)
[129] Ibid. art. 2(5)
[130] Ibid. art. 2 (6)
[131] Ibid. art. 2(7)
[132] Ibid. art 7(1)
[133] Ibid. Chapter IV, art. 9-22.
[134] Ibid. Chapter XV, art. 97-101
[135] Ibid. Chapter XIV art. 92-96; Statute of the International Court of Justice, (adopted on 26 June 1945, entry into force 18 April 1946) 33 UNTS 993
[136] Charter of the United Nations, Ibid. Chapter X art. 61-72.
[137] Ibid. Chapter XIII art. 86-91.
[138] Ibid. Chapter V. art. 23-32.

and France, which showed great power at the time to maintain international security[139]. They understood since these countries had a great investment in seeking the end of World War II, they deserved a permanent seat on the organ that would function in favor of keeping the world at a peaceful stage[140].

This permanent seat comes with several powers that will be discussed in further topics, but just by its nomenclature, it can be understood that they have an advantage over the other countries that do not hold this benefit. Therefore, if the United Nations' purpose in seeking peace upon the principle of sovereign equality among all States, how could that unfold with the Security Council's permanent members?

For this question, the present chapter will solely focus on the principle of sovereign equality, The Security Council, and the power to veto[141]. The historical approach remains in this dissertation, to the indispensable understanding of its impact on the current model of International Law.

III.I. THE PRINCIPLE OF SOVEREIGNTY EQUALITY IN THE UN ERA

The establishment of the United Nations created the biggest shift in the history of International Law. As I have exposed here, Classical international law was based on the inequality of States, through the civilization mission and colonialism. The central idea of the classical period was sovereignty based on the concept of *jus ad bellum* and the conquest of territory.

As for the United Nations era, states – and especially the Allies – understood that they would live in peaceful coexistence. Modern International law seeks this new approach, to peace as the center figure of international relations, and the recognition of sovereignty equality was the fundamental start.

[139] David L. Bosco, Ibid. Pp. 21-28.
[140] Giorgia Papalia, 'A Critique of the Unqualified Veto Power', [2017] 2 PILJ 55, 56.
[141] Charter of the United Nations, Ibid. art. 27 (3).

The idea offered by The Principle of Sovereign Equality was to once and for all reach the idealistic purpose of all States being treated equally before International Law, regardless of their political, military, and economic power. Hence, States are sovereign, and because they are sovereign, they are equally capable of engaging with International Law to maintain world peace.

It was first discussed in the 1943 Four Power Declaration "the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security."[142]

Yet, there was still a lack of understanding of the core concept of the term 'sovereignty equality'. It was in 1944 that Hans Kelsen spoke on the subject, breaking the main principle into two inevitable parts. For him, the terms sovereignty and equality are embedded in the order. It is exposed that "[…] the equality of states is explained as a consequence of or as implied by their sovereignty."[143]. At this level of analysis, there is an emergence of two different levels of concepts.

First, the individualized concept of State Sovereignty for superficial understanding could easily be mixed up with the idea of the highest level of independent power one can get. When given state sovereignty, under the rules of International Law, Kelsen argues that despite the sense of independence caused by horizontal sovereignty, this is still under an international mandate of rules to be followed. He then concludes that the concept of sovereignty under this principle "[…] can mean only the legal authority or competence of a State limited and limitable only by international law and not by the national law of another State."[144] Thus, the idea of Sovereignty is among the States, but to yet be limited by International Law.

[142] Joint Four-Nation Declaration (4), The Moscow Conference of October 1943.
[143] Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 YLF (1944) 207. at 3.
[144] Ibid. at 208

In the second part of the principle, the Equality matter is important to, at first glance, expose that this does not mean that all States are equal but have equality concerning international rights. When applying this concept of equality to the Charter, the idea is to apply it in a lawful sense, not raw political. Kelsen conceptualizes this by saying that: "Equality is the principle that under the same conditions, States have the same duties and the same rights."[145]. Equality, in the international law sphere, is then a consequence of sovereignty.

According to the text of the United Nations Charter in Article 2, the title entails that "[t]he Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act following the following Principles."[146]. The attention must be brought to the thoroughness of the writer once it addresses responsibility not only to the binding states but also to the whole United Nations itself – as for the activities of its organs. When constructing the organization, the Charter ensures that while functioning as an organization, this must follow on its daily works every principle exposed.

It has been shown just briefly that achieving sovereignty equality among states in practical international relations is almost impossible. However, shouldn't the establishment of an organization that sets that goal, follow it precisely? It must be impossible to exercise this principle by States solely, but in the functioning of the United Nations, this must have been exercised. Yet, in the most powerful organ of the organization, The Security Council, there is a contradiction of this understanding.

This principle, when applied to the Charter, ought to be seeking independence and equal powers to become free and respectful of each other. It is because of it that States are judicial equals in International Law. Yet, I argue that seeking its concept seems more of an illusion, once to achieve this principle States must partially wave their sovereignty to the Security Council and its veto power – the only institution with legal enforcement in the United Nations.

[145] Ibid. at 209
[146] Art. 2.

III.II. BUILDING THE SECURITY COUNCIL: POLITICAL INTERESTS SHAPED INTO LAW.

The Security Council of the United Nations (UNSC) is one of six of the main organs that belong to the organization. Its responsibilities rely on the exercise of "[…] the maintenance of international peace and security"[147] and it is regulated under Chapter V of the Charter.

The UNSC is addressed with several heavy powers, such as the recommendation of new states[148], international military intervention[149], and applying sanctions upon States[150], to determine when there is a threat to peace[151] and so on. It is to its most important to note that, the biggest threats upon humankind are held by the decision of the Security Council on its existence. Therefore, if the UNSC does not agree to a breach of peace in an existent armed conflict this one is envisaged as lawful to the Charter.

The composition of the UNSC is crucial to understanding developments around global history. It is divided into the 5 permanent members and the 10 non-permanent seats – which is changed every 2 years per 5 chairs. The P5 is composed of: China, France, The United States, The United Kingdom, and Russia (successor of the Soviet Union). The 10 other seats must be filled as 5 African and Asian States; 1 Eastern European State; 2 Latin America and the Caribbean; and 2 seats for the Western European States[152]. Yet, this structure is a modern version of its historical and problematical foundation.

[147] United Nations Security Council, 'Peace and Security'(*United* Nations) <https://www.un.org/securitycouncil/> accessed 08 December 2023.
[148] Charter of the United Nations, Ibid. art. 4 (2).
[149] Ibid. art. 42
[150] Ibid. art. 41
[151] Ibid. art 39
[152] UNGA Res 1991 (17 December 1963) A/RES/1991(XVIII)

3.2.1. THE NEGOTIATIONS BASED ON THE POWER COUNCIL

The vision of a postwar organization seemed overly necessary in the vision of the United States and British Empire as they negotiated in the Atlantic Charter and the idea of regional alliances must be kept aside. Especially the United States – represented by Roosevelt at the time – brought up the necessity that the greater powers should be engaging in this prototype of the United Nations, but not only, that they should be making the "real decisions"[153].

Britain's input on creating a global council administered by the four nations seemed controversial at first once Churchill – Prime Minister of the British Empire – was "alighted on the idea of regional councils as the basis for postwar security. He envisioned a European council, an Asian council, and one for the Americas—a 'three-legged stool', he termed it."[154]. His ideals of a decentralized organization did not last. With the long effort of the Foreign Office, they convinced Churchill that Britain needed security from other states once it was weakened by WW II[155].

The inclusion of the Soviet Union was in simple terms, as long as they upheld powers. The cooperation with the other two big powers seemed to be a greater deal after the Nazi-German conflict in 1941[156]. In addition to the expansion of the Soviet Union in the annexation of bordering States, its main worry was with security and border matters. Stalin – Soviet leader at the time – also flirted with the idea of the regional councils to protect the lawfulness of its new "acquirements". But for him, it did not matter the structure.

> "Whatever its precise form, the Soviets wanted a postwar organization to focus narrowly on security. The economic, development, and human rights agendas that sometimes appealed to Western politicians and activists did not interest Stalin. He saw the

[153] David L. Bosco, Ibid. Pp. 14-15.
[154] Ibid. Pp. 16
[155] Ibid. Pp. 17.
[156] Vladislav Zubok and Constantine Peshakov, *Inside the Kremlin's Cold War: From Stalin to Khrushchev* (Cambridge, Massachusetts; Harvard University Press, 1996) 282. At 25

organization first and foremost as an instrument for securing the Soviet Union's borders." [157]

One thing these three major power nations had in common: The presence of their interests above anything else. It is conclusive to say that the addressing of legal power to these nations founded the whole system of the organization. "By the end of the war, the Big Three behaved almost as a private club, with shared memories and jokes that only they could understand."[158].

3.2.2. RESPONSIBILITY AND STRUCTURE OF THE COUNCIL

The development of the United Nations took place in the common sense of the establishment of a council with powers to address security measurements. The matter of how this council would function was now the issue. It was at the Dumbarton Oaks conference that the representatives of the three powers sat together and addressed their negotiation.

The responsibility of the council was easier to discuss, after all, their interests on that matter were aligned[159]. The council's responsibility was for the maintenance of peace and security, hence the name Security Council – as an idea offered by the Soviets[160]. The ladder offered by the council would follow negotiation and mediation between disputing parties, yet they could enforce peace if a breach of global security is threatened. "And, as peace enforcer, the council's powers would be vast: it could take 'any measures necessary' to restore security when it found a threat, including severing diplomatic and economic relations, imposing blockades, and deploying air, naval, and ground forces."[161].

[157] David L. Bosco, Ibid. Pp. 18.
[158] Vladislav Zubok and Constantine Peshakov, Ibid.
[159] The goal was to avoid any more conflicts, aside from political interests, they all envisioned protection.
[160] David L. Bosco, Ibid. Pp. 21.
[161] Ibid.

Structuring the Council was another challenge. As the Great Powers were briefly aligned with their ideals on a council with special powers, the United States and Britain presented two more components to their equation. China, presented by the USA, offered geographical strategies against Japan. And France, sponsored by Britain, held the military power in Europe. The idea of bringing emerging states into the composition was offered to Brazil, but it was not compelling.

Best described by David Bosco:

> "Already concerned about America's anticolonial instincts, Churchill did not want the balance tilted even further in that direction. Nor would the Soviets stand for yet another pro-Western vote on the council. With Brazil's brief candidacy rejected, the permanent membership of the new Security Council was all but final; the Big Three had decided to become the Permanent Five."[162]

As I strengthen my argument, the foundation of the United Nations based on negotiation between these nations was not funded on the principle of sovereignty equality as the organization proudly claims to be on its history website[163]. In fact, it is the marginalization of small powers that allowed the establishment of the organization. The separation of domineering from the dominated is still much alive. "The major powers envisioned a universal organization, but they drafted what would become its charter as an elite club. And they designed the Security Council to institutionalize that difference of status, although with a few concessions to the rest of the world."[164]

The so-called "few concessions" to other states would take form in two ways. First, as an assembly – nowadays the General Assembly – where states could express their concerns and vote together. This assembly, incidentally, was non-binding and secondary to the council.

[162] Ibid. at 28.
[163] 'Preparatory Years: UN Charter History', Ibid.
[164] David L. Bosco, Ibid. Pp. 22.

Second, the council would hold non-permanent seats lacking powers belonging only to the permanent members – the veto power yet to be developed[165]. The inclusion of the rest of the world was necessary for the functioning of the organization, but formal equality was once more used as bait to waive material equality[166].

3.2.3. PRIMACY OF VETO POWER FOR THE UNITED NATIONS

The issue of the voting procedures of the council was far more difficult to decide. While the Soviets demanded unanimity among the permanent members, the British resisted the idea, and the Americans had their concerns[167]. It was clear that at the time of the Dumbarton Oaks conference, the delegates would not reach an agreement, and this matter was postponed.

It was at the beginning of 1945, with the weakness of the Nazis and finally, the end of the war was visually close, the major powers urged the necessity of a final agreement. The three leaders – Roosevelt, Churchill, and Stalin – agreed on the necessity of a present meeting within them and following the ineluctable insistence of Stalin's desire to stay close to the Kremlin, the conference took place in Crimea, called the Yalta Conference of 1945[168].

As the Soviets had strongly set their foot at Dumbarton Oaks, the voting proceedings must be unanimous, even if one of the parties to the substantive matter was part of the permanent members. Coming to the Conference, there was still resistance from the US and UK parties with the unanimity of the Security Council. So, a proposal was made, and "[w]hile it included the veto, the US was still proposing that a party to a dispute should abstain from voting on the

[165] Ibid.
[166] Formal equality is guaranteed by a written document, a law as it is, nations (international law) and individuals (domestic law) are equals. While material equality is the practice of formal equality, it is concrete so that social justice manifests itself equally for everyone.
[167] Ibid. Pp. 24.
[168] Ibid. Pp. 29.

resolution in question, including permanent members, thereby removing the veto in those instances."[169].

The refusal of the proposal came bluntly, and as they proceeded to the Yalta conference, the three leaders agreed on a formula. The veto could only be exercised in a substantive matter, while the procedures matters shall not be impeded[170]. The Yalta Formula resulted in the veto power, being the foremost reason for the Charter's existence.

If it was not for this formula, the charter itself would most likely not be presented. It is "[b]ecause the nonpermanent members would not have a veto, the Yalta agreement preserved, just barely, the notion that the Security Council was a step forward for international organization, and not a repetition of past mistakes."[171]. Regardless, it was the liquidation of the absolutism of sovereignty equality that allowed the organization to exist.

Not enough, when the big powers expressed their justification for the necessity of the veto power it was explained:

> "Marshal Stalin said that he was prepared in concert with the United States and Great Britain to protect the rights of the small powers but that he would never agree to having any action of any of the Great Powers submitted to the judgment of the small powers. The President (Roosevelt) said he agreed that the Great Powers bore the greater responsibility and that the peace should be written by the Three Powers represented at this table."[172]

The historical construction of equality showed yet not to be balanced. In the past, the language might have been used differently, like for the civilizing mission. But the claws of superiority

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[169] Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge University Press 2020) 342. At 14.
[170] David L. Bosco, Ibid. at 30.
[171] Ibid.
[172] Office of the Historian, Foreign Relations of the United States: Diplomatic Papers, Conferences at Malta and Yalta, 1945, 'Voice of Smaller Powers in Postwar Peace Organization' (4 February 1945) <https://history.state.gov/historicaldocuments/frus1945Malta/d331 > accessed 19 march 2024.

have surpassed history and are now translated into power language. Powerful nations entitled themselves as global governments and smaller nations shall not be horizontally equals. The veto power is the translation into making it legal.

3.2.4. SILENCING SMALL STATES AT THE SAN FRANCISCO CONFERENCE

With a final agreement between the big powers, they urgently proceed to a worldwide conference to present the Charter to the other nations. They chose carefully as those that were in opposition to the Axis and took part in the 1942 Declaration by United Nations. In total, forty-five nations were invited, and the negotiations took place between April to June of 1945[173].

As presumable, the other nations did not have a positive reaction to the veto power proposition. "[N]umerous small and medium-sized States protested against the privileged status of the five permanent members as a form of victors' justice and an unacceptable infringement on the sovereign equality of States"[174]. The problems presented generally consisted of the worry about the exercise of the Council's decisions – after all, it would take one simple vote (or as it it's a veto *per se*) to diminish a whole security measurement[175].

Other relevant pinpoints to the matter were addressed. The influence of political and economic interests and the absence of procedural measurements could result from the exercise of veto power[176]. The absence of voting when one of the interested parties as part of the P-5 was heavily questioned and a committee for the interpretation of the Yalta Formula was established, but little was solved there[177].

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[173] 'Preparatory Years: UN Charter History', Ibid.
[174] Jan Wouters and Tom Ruys, 'Security Council Reform: A New Veto for a New Century?' (2005) Egmont Paper 9 IRRI-KIIB 39, at 5.
[175] Jennifer Trahan, Ibid. at 17.
[176] Ibid.
[177] Jan Wouters and Tom Ruys, Ibid. at 6-7.

A few tensions emerged at the P-5 with all the questioning and worries from small nations, but it was the stubbornness of the Soviet Union those were easily dismissed[178]. In the end, all members of the conference were aware that, for the organization's existence the veto power was its primacy. At its most appealing actions, the American Senator Connally said at the conference:

> "'You may go home from San Francisco if you wish and report that you have defeated the veto,' he lectured the delegates in his committee as he brandished a copy of the draft charter. 'Yes, you can say you defeated the veto, but you can also say, 'We tore up the Charter!'' The senator then ripped up his copy, threw the scraps on the table, and "stared belligerently at one face after another."[179]

Almost as an inevitable form of security, the Council was accepted in the terms of the great power. But why other proposals were not further discussed? The fear of new small insurgent states lacking security. They realized that "they needed to capitulate in order to have a United Nations and because they perceived they would need to rely on the military power of the permanent members to engage in enforcement measures."[180].

As I have exposed in the first Chapter, the whole period of colonization based on natural law set the ground for domination. In the nineteenth century, the distinction between the civilized and uncivilized addressed the legality of the civilizing mission. While all those nations were affected at different levels, by the time modern International Law was constituting itself, they had no participation in it. This is due to the reasoning of their disempowerment over the past centuries.

It is even possible to observe that at the San Francisco conference itself. The state representation of the African continent was as small as three states, once most of its territory was still colonized[181]. When voting in favor of the unanimity clause – a hidden form of expressing the

[178] David L. Bosco, Ibid. at 36-37.
[179] Tom Connally, *My Name Is Tom Connally* (New York: Crowell, I954) 283. As cited in David L. Bosco, Ibid. at 36.
[180] Jennifer Trahan, Ibid. at 19.
[181] David L. Bosco, Ibid. at 32.

word veto –, the Peruvian Delegate discourse is embedded in the hope of the prevalence of the principles above the exercise of the veto power[182].

The small states saw a glimpse of hope in finally achieving equality with the ones who colonized and disempowered them – and they would not waive it at that time. The San Francisco conference was the stage to broadcast to the whole world how the big powers held the small state in the palm of their hands.

My exposure to historical factors that led to the origins of International Law is finally visible to the point of a direct effect on modern conflict development - after all the articles defined in the charter over 75 years ago remain the same. I suggest that because of the colonization and the civilizing mission the small states hold a sense of imminent threat followed by a long disempowerment. As a result, they had to comply with the P-5 formula of the veto power.

[182] Documents of the United Nations Conference of International Organization San Francisco (1945) Vol. XI. Available at < https://digitallibrary.un.org/record/1300969?v=pdf >. At 166-168.

IV. THE RUSSIAN AGGRESSION ACTS ON UKRAINE: A RESULT OF THE ABSTENTION GAP?

The approval of the United Nations Charter opened a whole new era of international law and relations. With time and the decolonization period, more states were able to join the organization, and what started with 50 countries has now 196 state parties[183]. Yet, universal peace was not and still isn't fully achieved by the organization, and the Security Council's actions – or its inertia lacking actions – have been heavily criticized on the matter[184].

Critics of the Security Council since its approval have been heavily on the interpretation of Articles 27 (2) and (3). In 27 (2), when the legislator addresses the nomenclature of procedural measures, states question what would be considered procedural and how to differentiate it from non-procedural. As for Art. 27 (3), a more complex understanding of definitions is required once the veto power is addressed and the abstention rule is imposed concomitantly with Article 52 (3).

These issues were once brought still at the San Francisco Conference. While small states were reluctant to veto business, a committee was created to deal with Article 27 (3) of the Charter[185]. They submitted a questionnaire to the committee and as a response, the committee issued the San Francisco Declaration – which lacked most of solving.

The importance of the understanding of this definition is about art. 52 (2), and when should the P-5 abstain from casting a veto. In the following subchapters, I will address how the great powers dealt with this in the past, and how has it affected the present actions of the Council in preventing breaches of the international peace.

[183] 'Growth in United Nations membership' (*United Nations*) < https://www.un.org/en/about-us/growth-in-un-membership > accessed on 25 March 2024.
[184] Jan Wouters and Tom Ruys, Ibid. at 9.
[185] Ibid. at 6.

IV.I. INTERPRETATION OF PROCEDURAL MATTER AND THE 'DOUBLE VETO'

The present text on Art. 27 of the Charter, approved at the San Francisco conference separates two main types of provisions adopted by the Council. First, in article 27(2) it is said: "Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members"[186]. It is clear that the legislator did not address the veto power, hence procedures matters shall not be subjective in casting a veto.

Secondly, Article 27 (3) says:

> "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."[187]

Let me separate this article into two objectives. In its first part, the veto is finally exposed in a hidden form. The use of the terminology "concurring" can be translated into an agreement, thus if any permanent member is against the matter no decision will be concluded. As tempting as it sounds, the paragraph still raises the question of the definition of what is procedural measurement, and what is not – this is most relevant to what could be vetoed and its limitations.

At the San Francisco conference, when the small states addressed their questions to the great powers, one of them questioned the problem of "who decides if a question is 'procedural' and therefore not subject to the veto?"[188], as a response "[t]he sponsoring governments said the question would rarely arise since the Charter explicitly identifies procedural articles—but if such a question ever arose, that would be a substantive question and the veto would apply"[189]. Thus any preliminary question would still be subjective to voting on the Security Council bound

[186] Charter of the United Nations, Ibid. art 27 (2).
[187] Ibid. Art. 27 (3).
[188] Robert A. James, 'The San Francisco Conference and the Evitable UN Vetoes' (2024) 14:97 JNSLP < https://jnslp.com/2024/01/20/the-san-francisco-conference-and-the-evitable-un-vetoes/ > accessed 20 March 2024. At 114.
[189] Ibid.

to the risk of casting a veto, creating the effect of a double veto[190]. This broad interpretation of the veto exercise was dealt with primarily in the United Nations General Assembly in its first years[191]. Even with the text of the Declaration never making it to the Charter the problem of the 'double veto' is still unresolved. There are still doubts "[w]hereas the UN Charter itself suggests that the preliminary question on the procedural nature of a decision, which requires the concurring votes of the P-5, is only intended for cases of doubt, practice on the matter is by no means clear."[192].

There is no record of the use of double veto since 1959 due to the development of the organization itself, and addressing such questions to the UNGA[193], but I argue here because this is an unresolved issue it can still be brought up to the solution methods of international security and specially affect the obligatory abstention in the security council.

IV.II. ARTICLE 27 (3) AND ITS OBLIGATORY ABSTENTION

In the second part of article 27 (3), the veto power has its limitations there revealed. The legislator addressed the matter when a vote should not take place – when the party to the dispute is a party of the conflict in discussion of the Council. Following the text of the Charter, the interested party must abstain from voting, making it obligatory. This provision applies as much to elected members as it does to permanent ones. Its establishment was set based on the principle of *nemo iudex in sua causa*[194] and as a form for the P5 to not turn against each other with coercive measures[195].

[190] Jan Wouters and Tom Ruys, Ibid. at 7.
[191] Ibid.
[192] Ibid. at 8.
[193] Alan R. Feldstein, 'The Double Veto in the Security Council: A New Approach' (1969) 18 Buff. L. Rev. 550. <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol18/iss3/9> accessed 27 March 2024. At 551.
[194] A term from Latin meaning that no one should be the judge on its own case.
[195] Jan Wouters and Tom Ruys, Ibid. at 12.

The principle mentioned also reaches out to another form of abstention. States can freely claim they are an interested party to the matter in discussion, hence making the abstention voluntary. This is the most used one and claimed by all parties in the Security Council[196].

Nevertheless, obligatory abstention has its conditions to conform with the legality of the Charter following Art 52(3)[197]. Besides the requisite that one or more members of the council be a party to the dispute, the obligatory abstention follows a few requisites. It is only applied to matters of a peaceful settlement which is included in Chapter VI of the Charter, and it must be a dispute, not a situation[198].

The problem lies here when these small terms in the charter lack clarity. Jan Wouters and Tom Ruys best expose:

> "Firstly, the distinction between 'disputes' and 'situations' is a matter of great uncertainty. […]. Secondly, no agreement exists on the exact meaning of a 'party' to a dispute […]. Finally, the Security Council does not always make explicit whether it is acting under Chapter VI or VII of the Charter."[199]

At the very beginning of the United Nations, these matters were very well-watched by the small states while taking action through the General Assembly. The UNGA created an Interim Committee to cover the lack of definition of the Charter's terms, but the P5 made their individual statements on how they interpreted the Charter fail to prevent modern conflicts [200]. Hence, when to differentiate a situation from a dispute, or actions under Chapters VI and VII, is still subjective.

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[196] Enrico Milano, 'Russia's Veto in the Security Council: Whither the Duty to Abstain under Art. 27(3) of the UN Charter?' (2015) 75 ZaöRV 215-231, at 222.
[197] Stephen Eliot Smith, 'Reviving the Obligatory Abstention Rule in the UN Security Council: Reform from the Inside Out' (2014) 12 NZYIL 15-27, at 19.
[198] Jan Wouters and Tom Ruys, Ibid. at 12.
[199] Ibid.
[200] Enrico Milano, Ibid. At 217-219.

If we look back at the Yalta Formula, the goal of the P5 was to apply the unanimity clause at its primacy[201], and such definitions were left open for the Security Council's judgment[202]. In fact, it was the pressure from small states with its nonconformity with the veto power that made the inclusion of the obligatory abstention clause possible[203]. If this had not happened, the obligatory clause probably would not have been made into the Charter.

Yet, the P5 made it possible to bypass the absolutism of this rule. Article 27 (3) might look covered by its text, but I argue that the legality of it is still subjective to the semantics of the words used – thus is not concrete. As a consequence of the conferences that succeeded in the United Nations, Leo Gross makes the connection:

> "The legal effect of absence is, after all, a question of the interpretation of the Charter, even though in this respect the Charter, like many other international instruments, is expressive of a political agreement. This agreement was formalized at the Yalta Conference, in the Statement of the Four Sponsoring Governments in which France concurred, and finally in the Charter itself."[204]

In practice, all of the limitations imposed to create the obligatory abstention were a mere factual action of the P5 states, as to narrow down the window of its appliance[205]. A lack of common agreement on terms such as what is a situation or when this comes to a dispute, how to define what is a breach of international peace, and when to worry about it or not brings the clause to its inefficiency.

As proof of my statement, other studies point out that even when scholars approached the number of times this clause has been evoked, it is not authoritative or certain[206]. This happens because of how hard it is to interpret if a state is abstaining voluntarily or obligatory, following

[201] David L. Bosco, Ibid. at 30
[202] Ibid. at 22.
[203] Stephen Eliot Smith, Ibid. at 19.
[204] Leo Gross, 'Voting in the Security Council: Abstention from Voting and Absence from Meetings' (1951) 60 YLJ 209, at 257.
[205] Stephen Eliot Smith, Ibid at 19.
[206] Ibid. at 23

the limitations imposed in the text – and its non-clarification. The lack of common understanding on this matter has resulted in the abuse of veto power with little room to question its legality[207].

As I have stressed enough about the gaps left from history to the current impact of the Charter's functionality, in the next subchapter I will expose my arguments in a case study. The ongoing Russian-Ukrainian war has been the subject of discussion in the Security Council, and at all times, has been vetoed by Russia. My argument prevails that the poorly managed powers addressed to the P5 have been proven to maintain the 'inequality' of sovereignty among states.

IV.III. RUSSIAN-UKRAINIAN WAR: THE UNITED NATIONS SECURITY COUNCIL MEETINGS.

Among the numerous legal problems raised by the full-on invasion of Ukrainian territory by the Russian Federation, the matter of how the UNSC would act towards it was at great attention, especially because the Russian party is one of the permanent seats of the Council – hence, having the veto power to cast at its given moment.

Following its history, Russia has a significant role in the UNSC when talking about vetoes. Besides the history of being unreluctant with the establishment of the unanimity principle – which was later translated into the veto power –, the country has used its power a total of 120 times until February 2024[208], being its last frequent use regarding the conflicts in Ukraine – including 2014 with the annexation of Crimea[209].

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[207] Jan Wouters and Tom Ruys, Ibid. at 14-16.

[208] 'UN Security Council Working Methods: The Veto' (*Security Council Report*, 13 February 2024) < https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php#:~:text=23)%E2%80%94the%20veto%20has%20been,to%20half%20of%20all%20vetoes. > accessed 1 April 2023.

[209] United Nations Security Council Draft Resolution (15 March 2014) UN Doc S/2014/189; (29 July 2015) UN Doc Series S/2015/562

On 25 February 2022, a session was held at the UNSC Headquarters to deal with the situation in Ukraine, and a drafted resolution was proposed[210]. As predicted, Russia exercised its veto power, and in an extensive justification for it Mr. Nebenzia – Russia's representative at the UNSC - concludes waiving the existence of a dispute:

> "I wish to conclude by emphasizing that we are not waging a war against Ukraine or the Ukrainian people. We are carrying out a special operation against nationalists to protect the residents of Donbas and for the purposes of denazification and demilitarization."[211]

The resolution issued from this meeting had its core vetoed, but it was issued regardless, addressing the matter to the General Assembly[212]. Later in the year, when the matter of security and peace in Ukraine is addressed in a session of the UNSC, Russia's approach to the matter is almost like the concept of 'reversed burden of proof'[213]. In the voting for the draft resolution S/PV.9138, Mr. Nebenzia relies upon the people's voice through a referendum in the regions of the conflict and their wish to become independent from the Ukrainian government[214].

In his discourse, he addresses the blame on the Ukrainian Government and allegedly affirms that if they respected the Russian citizens in Donetsk and Luhansk regions '[…] there would have been no need for our special military operation.'[215]. Still, in attempting to shadow away the peace breach caused by Russia's "special operation", he then goes on about the right to self-determination and its restriction upon approval of the Western allies in the Council. Mr. Nebenzia affirms:

> "They said the international law did not prohibit declaring independence. Today we hear a completely different position from Western delegations. […] They fully support the right to self-determination only when it suits their geopolitical interests, […] [b]ut when

[210] United Nations Security Council Draft Resolution (25 February 2022) UN Doc S/2022/155.
[211] Ibid. at 14.
[212] UNSC Res 2623 (27 February 2022) UN Doc S/RES/2623.
[213] Inversão do Ônus da Prova (PT). This concept in Brazilian Law designates the obligation of proving a fact from the typical party responsible for its proof to the opposing party.
[214] Security Council, 77th year : 9138th meeting (27 September 2022) UN Doc S/PV.9138. at 15-16.
[215] Ibid. at 14.

> self-determination appears to be the only way to save the people of Donbas from genocide, the West says they have no such right. […]. [A]ll states should respect the sovereignty and territorial integrity of any State whose government respects the principle of self-determination of peoples and represents all peoples within its territory."[216]

It is possible to observe that when taking the right to exercise the veto power, Russia's position takes on another principle of international law and affirmed accuse the other party of threatening it. Fact is, even with the long discourse of Russia in the UNSC about the crimes committed by the Ukrainian Government, the invalidity of its military intervention shall not be discredited. There was a clear break of Article 2 (4) of the Charter.

Not enough, Russia deliberately appropriates the discourse by blaming the "West models" of independence and sovereignty. In a later meeting addressing the same matter, Mr. Nebenzia excused Russia's actions under the discourse of the less-favored states that often criticize the latter of equality offered by the charter. He calls: "those [states] who are prepared to pursue an independent policy and uphold the principle of the sovereign equality of States and freedom of action; and those who oppose the hegemony of one State and its satellites that do not see other States as equal partners."[217].

Easy to notice that Russia tends to use the same argument that I approach in my research – hemogenic states, through historical construction, still threaten International Law principles. Seems to be that the country tends to create sympathy for insurgent states, to gain political support. But as I have exposed in the previous chapter, Russia is one of the states that enforced this dichotomy of equality. No need to go further in detailing its participation – as I have stressed enough previously –, but its participation and how it has contributed to the establishment of the Charter proves the contrary of what is being claimed in the UNSC Meetings.

My question on this specific topic imposes that, even with the speech of Russia's representative, legally speaking would not it be breaking the abstention rule under article 27 (3)? And why have

[216] Ibid. at 15-16.
[217] Security Council, 77th year : 9143th meeting (30 September 2022) UN Doc S/PV.9143. at 4.

not other states raised this question? My argument follows the analysis of the behavior of the Council in other matters, and how the Charter was written on a deadlock for the veto power to be a shield for the P5.

4.3.1. THE SILENCE OF THE COUNCIL AND THE POSSIBILITY TO USE OF A 'DOUBLE' VETO TO WAIVE OBLIGATORY ABSTAIN

When resolution 2623 was issued, its text was differentiated from the draft. At the draft, the UNSC called for a cease-fire in the Russian-Ukrainian Conflict; while at the resolution, the Council addressed the matter to the United Nations General Assembly[218]. This resolution was different from its draft as a consequence of the veto power exercised by Russia in the discussion. Because the final text of the resolution regarded a procedural measure, its final text was not under the scope of vetoing.

The question of obligatory abstain of Russia as an interested party remained open. When Article 27 (3) of the Charter refers to a party's obligatory abstention, it directs and restricts a dispute – leaving out the rule for when a 'situation' is in the discussion. Even with all the work of the UN to settle de differences between these two concepts[219], the work of the council itself also counts. Milano best shows:

> "Yet even the most elaborate and pristine constructions of the obligatory abstention under Art. 27 have had to grapple with the fact that the practice of application of the obligatory abstention rule dates back to the first five years of the organization, namely

[218] Graham Melling, 'Evaluating the persisting relevance of the Uniting for Peace resolution for the maintenance of international peace and security: Russia's invasion of Ukraine and Security Council Resolution 2623' (2022) 23 (1) International and Comparative Law Review 256 < https://researchportal.northumbria.ac.uk/en/publications/evaluating-the-persisting-relevance-of-the-uniting-for-peace-reso > accessed 4 April 2024

[219] Enrico Milano, Ibid. at 217-218; Stephen Eliot Smith, Ibid. at 18; Jan Wouters and Tom Ruys, Ibid. at 12.

between 1946 and 1951, whereas subsequently the provision has become most notable for its persistent non- application."[220]

In its first years, the UNSC exercised abstention always on a voluntary basis[221]. But, when one of the P5 was a party to dispute, it was possible to observe several times where the obligatory rule was disregarded[222]. One clear example is when France was questioned upon its veto on the Island of Mayotte, its representative said that they 'could give a rather impressive list of precedents where [...] in cases completely analogous and similar to the one [...] of today [members of the Council] did not hesitate to use their veto, and cases where this right has never been challenged by anyone'[223]. This was the only time a veto was raised against Article 27 (3), and the response set a common practice established by the UNSC.

Following this common practice of the Council, I raise other two main arguments as to why states remained silent when the non-abstention of the Russian party.

First, if states were to question this veto under art. 27 (3), it would be the procedure of the council that would define whether Russia was obliged to abstain or not[224]. Following its precedents and France's previous declaration, ought to be impossible to invoke that article. If the question follows the legality aspect of written definitions, the dispute-situation scenario is most likely to be raised. Specifically when deciding what is either a dispute or a situation, the Council is dealing with preliminary measures which ought to be subjective of a veto. Hence, the veto is finally exposed to its deadlock.

Finally, I argue that as much as other States exhaustively effort to make art. 27 (3) obligatory rule work, it is the lack of definitions that empowers the Council veto's right. The issue of 'double veto' was observed previously in the sense of defining what is 'procedural and other

[220] Enrico Milano, Ibid. at 219.
[221] Jan Wouters and Tom Ruys, Ibid. at 13.
[222] Ibid.
[223] Ibid. at 14 [footnotes omitted].
[224] John Chappell, Emma Svoboda, 'Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?' (*Lawfare*, 11 February 2022) < https://www.lawfaremedia.org/article/must-russia-abstain-security-council-votes-regarding-ukraine-crisis > accessed 04 April 2024

measures' and that it hasn't been used since 1959[225]. Yet, I argue here that the double veto is also extended to the obligatory abstention rule, once the requirements of this rule depend on the agreement of the Security Council – which ought to be subject to the veto. Now, if the Council defines the requisites for the only rule that restrains its power, it is possible to affirm that all roads would lead to a legitimate veto under International Law.

For the final time, I recall that the legitimization of veto rights exercised by the P5 is the outcome product of hemogenic states' desire of holding power. It is linked to the history of the world, upon building empires and legitimizing colonization that the flaws in International Law were empowered and remain threatening sovereignty equality, failing to prevent modern conflicts.

[225] Jan Wouters and Tom Ruys, Ibid. at 8.

CONCLUSION

In the first chapter of my present master's thesis, it was carefully analyzed what was International Law when it first appeared with the colonialism encounter, the natural law basis, and its impacts on the notion of sovereignty. This chapter took a closer look at Francisco de Vitoria beyond his affirmations on property rights for the indigenous and went further deeper on understanding that making the indigenous lawful owners of their land, also meant the lawfulness of natural law principles on departing sovereignty. Hugo Grotius was approached as a precursor of Vitoria's work, which even though envisaged natural law in a further position from religion, was still aligned with the idea of sovereignty - that belonged only to individuals who respected the principles of natural law. Hugo Grotius was then, the bridge between medieval society and law, into a more modern and complex law, that culminated in the Peace of Westphalia.

Considering the first research question of the present thesis, how does International Law understand sovereignty in the Discovery Age, the analysis of the work of those two well-known jurists aimed to explain in detail how the developing International Law at the period addressed sovereignty. The relevance of this chapter is achieved when is concluded that while international law was in its premature years, sovereignty was extremely restricted – and inexistent for the colonies.

The research approached the shift in international relations and its impact on international law when the Peace of Westphalia was approved in the 17th century. Many states became independent within the European realm, but the colonies were still not enjoying this treaty. Indeed, the 1648 Peace of Westphalia played a major role in establishing sovereignty. It is the model we still live in nowadays and how states interact under International Law. But it was also a model created within only European consideration of how sovereignty must be recognized.

In the 19th century, the development of jus positivism played a key role in connecting the condemning past of European colonization, with the legitimacy of it centuries later. The theory vastly explains what is the civilization's mission and why is it necessary – its justification is all

based on sovereignty. The mission of civilization aimed to civilize the nations that did not enjoy sovereignty in order to – supposedly – guarantee them freedom through sovereignty. The consequence was many nations were left disempowered by the massive exploitation.

When the United Nations was developing itself into the organization that it is today, it was the interest of the major power of that time, with the fear of small states that brought it to life. Interesting pointing out, the third chapter presents in more detail the exclusive negotiations and demands of those states that today sit at the P5. The matter of sovereignty is presented even before the Charter, in an earlier negotiation – and later made into the text of the Charter, guaranteeing formal sovereignty equality. In contradiction to this principle, I conclude that the veto power addressed to the P5 weakens the sovereignty of states.

Conclusively, the veto power makes the states that enjoy it more equal in international law than others. the charter was only approved if the demands by them were all accepted. My understanding within the whole research up to this point was that, because of the civilizing mission – smaller states were once disempowered – the Charter was accepted. The thesis points out that not only is the power veto unnegotiable but how hemogenic states' interests prevailed within the current system of International Law.

Lastly, in the fourth chapter, the case of the Russian-Ukrainian war plays a key role in exemplifying how the P5 states have their sovereignty overly protected in considering the rest of the nations. The chapter opens up in detail the term under Article 27(3), its interpretation and how has it developed through history. The article is meticulously analyzed as a form to prove how the legal interpretation led to gaps and the abuse of veto power throughout the years of the UNSC.

Also, The UNSC Meetings in February and September of 2022 regarding the security in Ukraine raised the question of why the have not States raised the obligatory abstention rule when disregarded by Russia. As an outcome of this question being raised before in the 70's, and the pathway probably leading to the same answer, states remain silent. To put it briefly, the forms of waiving the obligatory abstain of Article 27 (3) are existent and have been used before. Not

only that but the ‘double veto’ technique could be also used as a form to exercise the veto before the matter is discussed within the council.

To answer the final proposed research question, the final chapter’s explanation concludes that the exercise of veto power overcomes the principle of sovereignty equality. Of course, states prevail over sovereigns regardless of a simple veto casting, but within that action, the principle established is not functioning at full. Its functionality is at discharge, and inequality remains as a big role in International Law binding decisions. The dichotomy is still very much present, from greater power to smaller states.

In conclusion, once the principle here analyzed remains not absolute, the other states do not enjoy the same level of sovereignty as the P5. Upholding the power of veto blinds those states from suffering such sanctions that others are vulnerable to. Not only, the P5 can also use the veto as a form to help other allied states to them.

The International Law system, which works because states have the sovereignty to engage with it, proves to be weakened. The history of international law in marginalizing sovereignty rights has proven to change with time and the development of societies, but as a goal of this master thesis, is proven to be far from absolute; and by that, as in history, the powerful states remain legally dominants.

Finally, in conclusion to my findings in this research, I present an alternative solution to the problem. As with most of the sources I have used here, the most logical thinking would be to follow a proposition for reform in the Security Council. Still, as this approach has been used for decades now and it appeared to be farfetched from reality – considering the conditions to change the Charter –, my proposal follows academic development in the niche. Starting from more scholarship programs in the field of history of international law, building lawyers with a critical analysis of the subject, and investigating historical negotiations. Followed by the inclusion of the History of International Law in the curricula of law schools and master’s programs, as a form to expose students to a more critical thinking development.

The master thesis has proven so far that International Law is a subject developing within social changes and global impact events, my proposal follows the idea of exposing the historical construction of it to develop a social change within the professionals of the field. Opening the academic field to young professionals as a form to question and find answers, would certainly impact the future development of equality in International Law.

BIBLIOGRAPHY

- Primary Sources

Cases

1. Johnson V. M'Intosh,21 U.S.543,588–97(1823).

Treaties

1. Joint Four-Nation Declaration (4), The Moscow Conference of October 1943.

2. Proposals for the Establishment of a General International Organization as Submitted by the Dumbarton Oaks Conference, signed on 9 October 1944.

3. Charter of the United Nations (adopted 26 June 1945, entry into force 24 October 1945) 1 UNTS XVI.

4. Statute of the International Court of Justice, (adopted on 26 June 1945 entry into force 18 April 1946) 33 UNTS 993.

Official Documents

1. Documents of the United Nations Conference of International Organization San Francisco (1945) Vol. XI. Available at <https://digitallibrary.un.org/record/1300969?v=pdf >

2. Security Council, 77th year: 9138th meeting (27 September 2022) UN Doc S/PV.9138.

3. Security Council, 77th year: 9143rd meeting (30 September 2022) UN Doc S/PV.9143.

4. UNGA Res 1991 (17 December 1963) A/RES/1991(XVIII).

5. UNSC Res 2623 (27 February 2022) UN Doc S/RES/2623.

6. United Nations Security Council Draft Resolution (15 March 2014) UN Doc S/2014/189; (29 July 2015) UN Doc Series S/2015/562.

7. United Nations Security Council Draft Resolution (25 February 2022) UN Doc S/2022/155.

- Secondary Sources

Books

1. Anghie, Anthony. Imperialism, Sovereignty and the Making of International Law (Cambridge Studies in International and Comparative Law, Cambridge University Press, 2005) 320.

2. Bosco, David L. Five to Rule Them All: The UN Security Council and the Making of the Modern World (New York, Oxford University Press, 2009) 256.

3. Brown Scott, James. The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations (Oxford: Clarendon Press, 1934) 307.

4. Connally, Tom. My Name Is Tom Connally (New York: Crowell, I954) 283.

5. Grotius, Hugo. De lure Praedae Commentarius', I trans, Gladys I.. Wiliams and Walter H. Zeydel (Carnegie Endowment for International Peace, Oxford University Press, 1950) 362.

6. Grotius, Hugo. The Rights of War and Peace, including the Law of Nature and of Nations, translated from the Original Latin of Grotius, with Notes and Illustrations from Political and Legal Writers, by A.C. Campbell, A.M. with an Introduction by David J. Hill (New York: M. Walter Dunne, 1901) 418.

7. N. Shawn, Malcom. International Law. (Cambridge: Cambridge University Press, 2003) 1118.

8. Trahan, Jennifer. Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (Cambridge University Press 2020) 342.

9. Tuck, Richard. The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant (Oxford University Press, 2001) 250.

10. Zubok, Vladislav. Peshakov, Constantine. Inside the Kremlin's Cold War: From Stalin to Khrushchev (Cambridge, Massachusetts; Harvard University Press, 1996) 282.

Articles

1. A. James, Robert. 'The San Francisco Conference and the Evitable UN Vetoes' (2024) 14:97 JNSLP, Pp. 97-119. Available at <https://jnslp.com/2024/01/20/the-san-francisco-conference-and-the-evitable-un-vetoes/ >

2. Anghie, Anthony. 'The Evolution of International Law: colonial and postcolonial realities' (2006) Third World Quarterly, Vol.27, No. 5, Pp. 739-753.

3. Beaulac, Stéphane. 'The Westphalian model in defining International Law: Challenging the myth' (2004) AJLH Vol. 8, Pp. 181-213.

4. Bring, Ove. 'The Westphalian Peace Tradition in International Law: From Jus Ad Bellum to Jus Contra Bellum' (2000) International Law Studies vol.75, Pp. 57-80.

5. Cavallar, Georg. 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?' (2008) 10 Journal of the History of International Law, Pp. 181-209.

6. Diamantino Moura, Luiza. 'A PROTEÇÃO DA PESSOA EM HUGO GROTIUS: Uma análise pela perspectiva do Direito Internacional Humanitário' (2014) CONPEDI, Pp. 78-102.

7. Feldstein, Alan R. 'The Double Veto in the Security Council: A New Approach' (1969) 18 Buff. L. Rev. Pp. 550-580. Available at < https://digitalcommons.law.buffalo.edu/buffalolawreview/vol18/iss3/9 >

8. Forji, Amin George, 'International Law, the Civilizing Mission and the Ambivalence of Development in Africa: Conceptual Underpinnings' (2013) JAIL 6:1. Pp. 191-225.

9. Gross, Leo. 'Voting in the Security Council: Abstention from Voting and Absence from Meetings' (1951) 60 YLJ, Pp. 209-257.

10. J. Miller, Robert. ‘THE DOCTRINE OF DISCOVERY: The International Law of Colonialism.’ (2019) The Indigenous Peoples’ Journal of Law, Culture & Resistance 5(1), Pp. 35-42.

11. J. Miller, Robert; D'Angelis, Micheline. ‘Brazil, Indigenous Peoples, and the International Law of Discovery’ (2011) Brooklyn Journal of International Law, vol. 37 issue 1, Pp 1-63.

12. Kelsen, Hans. ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1944) 53 (2) YLF, Pp. 207 - 220.

13. Melling, Graham. ‘Evaluating the persisting relevance of the Uniting for Peace resolution for the maintenance of international peace and security: Russia’s invasion of Ukraine and Security Council Resolution 2623’ (2022) 23 (1) International and Comparative Law Review, Pp. 256 - 272. Available at <https://researchportal.northumbria.ac.uk/en/publications/evaluating-the-persisting-relevance-of-the-uniting-for-peace-reso >.

14. N.S. Sellers, Mortimer. ‘What Useful Role (If Any) Could Legal Positivism Play in the Study or Advancement of International Law?’ (2012) 106 Am. Soc’y Int’l L. Proc. Pp. 373-377.

15. P. Rubin, Alfred. ‘International Law in the Age of Columbus’ (1992) Netherlands International Law Review, 39, Pp. 5-35.

16. Papalia, Giorgia. ‘A Critique of the Unqualified Veto Power’ (2017) 2 PILJ, Pp. 55-63.

17. Patton, Steven. ‘The Peace of Westphalia and it Affects on International Relations, Diplomacy and Foreign Policy’ (2019) The Histories Vol. 10:1., Pp. 92-99.

18. Shrinkhal, Rashwet. ‘Evolution of Indigenous Rights Under International Law: Analysis from TWAIL Perspective’ (2019) 19 The Oriental Anthropologist, Pp. 7-24.

19. Smith, Stephen Eliot. ‘Reviving the Obligatory Abstention Rule in the UN Security Council: Reform from the Inside Out’ (2014) 12 NZYIL, Pp. 15-27.

20. Vauthier Borges de Macedo, Paulo Emílio. 'O mito de Francisco de Vitória: defensor dos direitos dos índios ou patriota espanhol? (The myth of Francisco de Vitoria: defender of the rights of the Indians or Spanish patriot?)' (2012) Revista de Direito Internacional, Brasília vol. 9 No. 1, Pp 1-13.

21. Wouters, Jan; Ruys, Tom. 'Security Council Reform: A New Veto for a New Century?' (2005) Egmont Paper 9 IRRI-KIIB, Pp. 3-35.

Websites

1. Acafà, 'Colonialism, the "civilizing mission" and their impact on the formation of International Law' (*Gea Rights*, 17 December 2021). Available at < https://gearights.org/?p=729 > Accessed 03 March 2024.

2. Council on Foreign Relations Editors, 'Backgrounder: The UN Security Council', (*Council on Foreign Relations*, 26 February 2024). Available at < https://www.cfr.org/backgrounder/un-security-council > Accessed 08 March 2024.

3. 'Estilo, Indígena/etnia' (*Senado Federal*) < https://www12.senado.leg.br/manualdecomunicacao/estilos/indio#:~:text=Para%20designar%20o%20indiv%C3%ADduo%2C%20use,N%C3%A3o%20use%20Dia%20do%20%C3%8Dndio. > Accessed 08 April 2024.

4. John Chappell, Emma Svoboda, 'Must Russia Abstain on Security Council Votes Regarding the Ukraine Crisis?' (*Lawfare*, 11 February 2022). Available at < https://www.lawfaremedia.org/article/must-russia-abstain-security-council-votes-regarding-ukraine-crisis > Accessed 04 April 2024.

5. 'Growth in United Nations membership' (United Nations) https://www.un.org/en/about-us/growth-in-un-membership accessed on 25 March 2024.

6. ‘Preparatory Years: UN Charter History’, (*United Nations*) Available at < https://www.un.org/en/about-us/history-of-the-un/preparatory-years > Accessed 08 of March 2024.

7. ‘UN Security Council Working Methods: The Veto’ (*Security Council Report*, 13 February 2024). Available at < https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php#:~:text=23)%E2%80%94the%20veto%20has%20been,to%20half%20of%20all%20vetoes. > Accessed 1 April 2023.

8. ‘United Nations Charter’, (*United Nations*). Available at < https://www.un.org/en/about-us/un-charter#:~:text=The%20Charter%20of%20the%20United,force%20on%2024%20October%201945. > Accessed 08 March 2024.

9. Office of the Historian, Foreign Relations of the United States: Diplomatic Papers, Conferences at Malta and Yalta, 1945, ‘Voice of Smaller Powers in Postwar Peace Organization’ (4 February 1945). Available at < https://history.state.gov/historicaldocuments/frus1945Malta/d331 > Accessed 19 March 2024.

10. Vladimir Putin - The Kremlin, ‘Address by the President of the Russia Federation’ (*President of Russia*, 24 February 2022). Available at < http://en.kremlin.ru/events/president/news/67843 > Accessed 08 April 2024.