

# The Changing Character of Sovereignty in International Law and International Relations

WINSTON P. NAGAN, FRSA\* AND CRAIG HAMMER\*\*

*This Article makes observations on the concept of sovereignty; we suggest that the concept be studied using the contextual mapping method articulated by the New Haven School of jurisprudence. We observe tension in applying the concept to developing and developed states, and explore the possibility that sovereignty can be abused. We propose state typologies to explore the concept further and to scrutinize the accommodations of authority and control.*

INTRODUCTION.....	140
I. CONTEXT, MAPPING, AND THE MEANING OF SOVEREIGNTY .....	147
II. SOVEREIGNTY AND THE UN CHARTER .....	152
III. SOVEREIGNTY AND UNIVERSALIZING INTERNATIONAL CRIMINAL JURISDICTION.....	158
IV. AFRICAN SOVEREIGNTY AND WORLD ORDER .....	165
V. INTERNATIONAL SECURITY THREATS AND SOVEREIGNTY: THE TERRORISM PROBLEM.....	168
VI. THE CHANGING CHARACTER OF SOVEREIGNTY	

---

\* Sam T. Dell Research Scholar Professor of Law, University of Florida, Levin College of Law; Affiliate Professor of Anthropology, University of Florida; Visiting Fellow, Brasenose College, Oxford; Honorary Professor, University of Cape Town, South Africa; Director, Institute for Human Rights, Peace and Development, University of Florida; Former Chair of the Board, Amnesty International (USA); Former President, Policy Sciences Center; Fellow, Royal Society for the Encouragement of Arts, Manufactures, and Commerce.

\*\* Teaching and Research Assistant to Professor Nagan; Senior Research Fellow, Institute for Human Rights, Peace and Development, Levin College of Law, University of Florida; Co-Director, Project for Advanced Studies and Research in Peace and Human Rights, University of Florida.

IN MUNICIPAL LITIGATION: THE  
 INTERPRETATION OF DOMESTIC LAW IN LIGHT  
 OF INTERNATIONAL LAW ..... 176  
 CONCLUSION..... 183

[T]here exists perhaps no conception, the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.<sup>1</sup>

*Lassa Oppenheim*

INTRODUCTION

This Article explores the changing character of sovereignty in international law and international relations.<sup>2</sup> International lawyers may wonder whether this conservative, apparently vastly overwritten subject might still provoke intellectual curiosity. It seems counterintuitive to presume that we might shed new light on such a venerable concept. However, the goal of this Article is indeed to bring new understanding to this important idea.

We cannot offer a single definition of “sovereignty.”<sup>3</sup> The term is widely used—and not always used in the same way—by

---

1. 1 LASSA OPPENHEIM, INTERNATIONAL LAW 137 (Sir Arnold D. McNair ed., 4th ed. 1928).

2. This Article is based upon a public lecture given by Professor Nagan on March 8, 2003, at the University of Asmara, Eritrea.

3. Scholars have also characterized the concept of sovereignty as variable. Among them, Professor Louis Henkin has written extensively on the subject. Specifically, Henkin argues that sovereignty “means many things, some essential, some insignificant; some agreed, some controversial; some that are not warranted and should not be accepted.” LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8 (1995). This variable nature of sovereignty has been interpreted as detrimental to the development of international law and international relations. Henkin has written that “[s]overeignty is a bad word, not only because it has served terrible national mythologies; in international relations, and even in international law, it is often a catchword, a substitute for thinking and precision.” *Id.* Henkin suggests that the concept of sovereignty be entirely disposed of, asserting that “[f]or legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.” *Id.* at 10. He reasons:

As applied to states in their relations with other states, ‘sovereignty’ is a mistake. Sovereignty is essentially an internal concept, the locus of ultimate authority in a society . . . . Surely, as applied to the modern secular state in relation to other secular states, it is not meaningful to speak of the state as sovereign. Sovereignty, I conclude, is not per se a normative conception in international law.

*Id.* at 6.

scholars, journalists, practical politicians, international civil servants, jurists, and others from widely divergent cultural traditions, professions, and intellectual disciplines.<sup>4</sup> It may mean different things to different people living in different cultures throughout different periods (historically and contemporaneously) who practice (and practiced) different specialized or professional competences.<sup>5</sup> It may have different meanings in jurisprudence, political science, history, philosophy, and other related fields. The following list provides some examples of the different, though overlapping, meanings given to the term:

- Sovereignty as a personalized monarch (real or ritualized);<sup>6</sup>
- Sovereignty as absolute, unlimited control or power;<sup>7</sup>
- Sovereignty as political legitimacy;<sup>8</sup>
- Sovereignty as political authority;<sup>9</sup>

---

4. See *id.* at 4 (discussing multiple meanings of sovereignty); see also CAROLINE THOMAS, *NEW STATES, SOVEREIGNTY, AND INTERVENTION* 11 (1985) (discussing sovereignty as a political concept which later became transformed). For an alternative viewpoint, see STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 43–72 (1999) (discussing the multifaceted nature of sovereignty).

5. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (relating the sweeping history and diverse nature of sovereignty cross-culturally, stating that it has many “meanings, hues and tones” which depend upon the individuals who invoke it).

6. With regard to monarchic sovereignty, it has been argued that subjects voluntarily comply with royal edicts because they accept as valid the source of the monarchy’s (i.e. the rulemaking institution’s) claim to the exercise of authority. To illustrate, Professors Falk and Strauss observed that “the Fifteenth Century English citizenry might have complied with a royal decree criminalizing the practice of witchcraft either because the citizenry believed that witchcraft was evil or because it accepted as valid the claimed source of the crown’s lawmaking authority—that is, that the monarch was appointed by God.” See Richard Falk & Andrew Strauss, *On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty*, 36 STAN. J. INT’L L. 191, 207 (2000).

7. To Sixteenth Century French jurist and natural law philosopher Jean Bodin, *majestas* (i.e. sovereignty) could be equated with absolute power. See JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALE* 84 (Kenneth D. McRae ed., Richard Knolles trans., 1962). In Appendix B, Kenneth McRae supplies the French and Latin definitions of vocabulary employed by Bodin to express major concepts. *Majestas* is equated with sovereignty at A75.

8. Political systems require machinery to exact compliance with decrees made by a State’s ruling authority. Sovereignty bestows legitimacy on State exercises of power. See THOMAS, *supra* note 4, at 11 (giving the political implications of the concept of sovereignty). See generally Falk & Strauss, *supra* note 6 (exploring the issue of legitimacy in democratic processes and institutions of States in the global community).

9. The definition of “sovereignty” is, in part, “the supreme political authority of an independent state.” BLACK’S LAW DICTIONARY 1402 (7th ed. 1996). “Sovereign power” is defined as “the power to make and enforce laws.” *Id.* at 1401. A contemporary definition of “State” was offered by Opinion No. 1 of the Badinter Commission (*Commission d’Arbitrage de la Conference de la Paix en Yougoslavie*) and requires “a population subject to an organized political authority.” Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No. 1, 31 I.L.M.

- Sovereignty as self-determined, national independence;<sup>10</sup>
- Sovereignty as governance and constitutional order;<sup>11</sup>
- Sovereignty as a criterion of jurisprudential validation of all law (*Grundnorm*, rule of recognition, sovereign);<sup>12</sup>
- Sovereignty as the juridical personality of sovereign equality;<sup>13</sup>
- Sovereignty as international recognition;<sup>14</sup>
- Sovereignty as a formal unit of a legal system;<sup>15</sup>

---

1488, 1495 (1992).

10. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 1 (1993) (asserting that a core principle of sovereignty is that each nation-State is the autonomous master of all that occurs within its territory); see also U.N. CHARTER art. 2, para. 7 (declaring that state autonomy must be preserved in international law).

11. See MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE 11, 20–24 (1995) (stating that sovereignty is a “handy tool” when employed by internal constitutional systems to defend the independence of the State).

12. See H.L.A. HART, THE CONCEPT OF LAW 97–114 (1961) (suggesting that the “rule of recognition” is the primary rule that establishes the certain parties or organizations, such as a monarchy, as rulemaking institutions). The foundation of the German constitutional state is its *Grundgesetz* (Basic Law), which is an intricately structured framework of rules and values. Each constitutional provision manifests a binding legal norm that obliges complete, unequivocal implementation. The Constitution represents the *Grundnorm*, or basic norm, which governs and validates the legal order. Accordingly, any law or practice that is not reconcilable with the Basic Law is by definition unconstitutional. See generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (1961).

13. Ian Brownlie claims that the importance of sovereignty stems from its relationship to the “equality of states [which] represent[s] the basic constitutional doctrine of the law of nations.” See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (4th ed. 1990). For an alternate point of view, see KRASNER, *supra* note 4, at 43–72. Krasner discusses two forms of sovereignty: “Westphalian sovereignty” and “international legal sovereignty.” *Id.* at 9–25. His conception of “Westphalian sovereignty” is a state’s total exclusion of all external actors from any position of authority within the state’s boundaries. *Id.* at 20. His conception of “international legal sovereignty” is simply any legal capacity derived from mutual state recognition. *Id.* at 14. He argues that under the banner of sovereignty, states pursue their individual interests in an environment characterized by a severe imbalance of power. *Id.* at 16. Specifically, he wrote that “[n]either Westphalian nor international legal sovereignty has ever been a stable equilibrium from which rulers had no incentives to deviate.” *Id.* at 24. In other words, he postulates that the norms of sovereignty are inconsequential because they do not constrain state behavior.

14. The legitimacy of sovereignty might be based on the “rule of recognition,” which is that which establishes rule-making institutions. See HART, *supra* note 12, at 97 (explaining that some laws are backed by threats of the sovereign and other laws are based on a system of primary rules of obligation). See also HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 4–6 (1946) (distinguishing the viewpoint that an entity that satisfies the criteria of statehood is bound to legal rights and duties under international law whether or not other states recognize it from the viewpoint that only the act of recognition by already recognized states can transform unrecognized entities into sovereign states subject to international law). See generally Michael Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INT'L L.J. 29 (1995).

15. For example, national sovereignty figures into domestic legal systems by way of the

- Sovereignty as legal immunities;<sup>16</sup>
- Sovereignty as jurisdictional competence to make and/or apply law;<sup>17</sup> and
- Sovereignty as basic governance competencies (constitutive process).<sup>18</sup>

---

direct applicability of treaties. Many international law scholars point to the successful interplay between state autonomy and international governance functions manifested by multilateral treaty regimes. Specifically, Hersch Lauterpacht identifies the “subjectation of the totality of international relations to the rule of law” as the primary feature of the Grotian conception of international society. Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1, 19 (1946). Similarly, Harold Hongju Koh favors “a thoroughgoing account of *transnational legal process*: the complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997). Other scholars, such as Chayes and Chayes, identify a new type of sovereignty, which is created by the interpenetration of multilateral treaty regimes across sovereign borders. Specifically, they argue that “to be a player, the state must submit to the pressures that international regulations impose . . . [because] sovereignty . . . is status—the vindication of a state’s existence as a member of the international system.” ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 27 (1995).

16. Until Nuremberg, the prosecution of individuals for crimes against humanity was precluded by the lack of an applicable international penal code. See BENJAMIN FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE* 10–11 (1980). At that time, sovereignty was generally accepted as a symbol of the unconditional power and breadth of the privileges enjoyed by sovereign heads of state, which traditionally included immunity from the criminal jurisdiction of foreign courts. See M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* 10–11 (1980). This changed only after the atrocities of World War II. See *id.* Sovereignty can still be construed as a symbol of the powers, privileges, and immunities enjoyed by State officials, but it is no longer absolute and extends only to “[State] actions . . . which are covered by public law,” or *ius imperii*. See *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997), at 10.

17. For example, the U.S. Supreme Court crafted a standard for personal jurisdiction in 1877, which it created by correlating a state’s sovereign interests to that state’s territorial boundaries. See *Pennoyer v. Neff*, 95 U.S. 714 (1877). *Pennoyer* established that a state could exercise jurisdiction over a non-resident defendant, so long as this defendant was served with process within the forum. *Id.* at 722 (holding that “no tribunal . . . can extend its process beyond [the State’s own] territory so as to subject either persons or property to its decisions”).

18. As part of the novel perspective regarding international legal scholarship, Harold Lasswell and Myres McDougal shifted their attention away from pure positivism—which basically views international law with reference to the formal criterion of what the law simply *is*, independent of moral or ethical considerations—toward a more policy-oriented constitutive approach. This new method avoids positivism’s highly formal effort to grasp the concept of law based exclusively on rules. Rather, it views international law through the lens of decision-making, so that actors in the global community can illuminate and apply their common interests according to their individual expectations of what best constitutes an appropriate process and how to most effectively control certain behavior. See, e.g., Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, in *INTERNATIONAL LAW ESSAYS* 355, 360–62 (Myres S. McDougal & W. Michael Reisman eds., 1981).

Conceptions of sovereignty are derived from various sources. For example, one of the conceptions of sovereignty identifies it with ultimate, effective political power, and another conception identifies it with the nature of law itself.<sup>19</sup> The identification of sovereignty with power stems from the political culture.<sup>20</sup> The identification of sovereignty with law stems from jurisprudence and the legal culture,<sup>21</sup> which also finds the idea of authority to be an essential

---

19. John Austin regarded law as a command from a sovereign. According to Austin, to interpret a legal system, one must first identify a sovereign or a person or group of people who habitually obey(s) no one, and whose commands are habitually obeyed. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 199–212 (Wilfrid E. Rumble ed., 1995) (1863).

20. Politics is the quintessential study of power in all its relevant social, economic, cultural, and political dimensions. The phrase “political culture” captures the breadth of this definition. See WALTER ROSENBAUM, *POLITICAL CULTURE* 5 (1975) (arguing that “[t]o say that political culture involves the important ways in which people are subjectively oriented toward the basic elements of their political system is an accurate but not yet satisfactory definition”). See also GABRIEL ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 498 (1963) (stating that the development of a stable and effective democratic government “depends upon more than the structures of government and politics: it depends upon the orientations that people have to the political process—[it depends] upon the political culture. Unless the political culture is able to support a democratic system, the chances for the success of that system are slim.”). “Politics” is the study of decisions regarding primary values, such as the allocation of goods, services, and honors in society. Politics, according to Professor Harold Lasswell, is the study of “who gets what, when, and how.” See generally HAROLD LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (Meridian ed. 1958) [hereinafter LASSWELL, *WHO GETS WHAT*]. We might add one more term to Lasswell’s formulation: “why?”

21. The definition of “law” should probably be partly included in the definition of “politics” because it certainly seems that all law is politics but not all politics is law. Vladimir Lenin, the distinguished Socialist, once wrote, “Law is a political tool; it is politics.” Vladimir I. Lenin, *Concerning a Caricature of Marxism and Concerning Imperialist Economism*, in *COLLECTED WORKS* 79 (4th ed. 1949). Decisions that count as “law” are those that allocate goods, honors and values through authoritative and controlling procedures and institutions. Thus, decisions that constitute law must be political because for them to be meaningful, some degree of control or efficacy is required. Those political decisions which count as law must as well be accompanied by some symbol of legal obligation of authority, or more precisely, an “authority signal.” See W. Michael Reisman, *International Lawmaking: A Process of Communication*, *AM. SOC. INT’L L. PROC.* 110 (1981) (arguing that the “authority signal” is the key element of the competence to prescribe a rule, or more exactly, policy, the scope of which signal infuses law with a weak or strong normative dimension.) “Law,” though accompanied by the requisite authority, cannot be an objective “fact” because it must be respected, honored, and enforced at an individual level. See generally ANTHONY D’AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 221–27 (1984) (arguing that law has inherent normativity). The legitimacy of law is tied to its essential theoretical justification. Law must either theoretically emanate from an authoritative source—the sovereign, the *Grundnorm*, or the master rule of recognition—or it must emerge from the basic expectations about how authority is constituted and continuously maintained in a State or body politic, which could be communicated in a formal constitution or even a “living” constitutional arrangement. Eugen Ehrlich, the father of the modern sociological school of law, developed the concept of *lebendes Recht* (the “living law”), or unwritten law expressed in social conduct. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 497 (1936). Ehrlich

element of the concept of operative sovereign power.

The continuing vitality of the concept of sovereignty is evident. Indeed, sovereignty as the concept was developed in Europe in the Seventeenth through Nineteenth Centuries is vigorously asserted today by non-European states that historically operated with the concept of empire rather than of sovereignty. For example, China claims that Tibet<sup>22</sup> and Taiwan<sup>23</sup> are an integral part of Chinese sovereignty.<sup>24</sup> But is Chinese sovereignty—in its historical tradition—the same sovereignty that is drawn from Europe’s historical experience, drawn from the emergence of European nation-States?<sup>25</sup> The ancient Chinese State was an empire, whereas the

---

asserted that living law “[i]s not the part of the content of the document that the courts recognize as binding when they decide a legal controversy, but only that part which the parties actually observe in life.” *Id.* His exploration of the general function of “living law” inspired other legal scholars to investigate the implications in specific societies. Specifically, in 1941, Karl Llewellyn and E. Adamson Hoebel published their account of the living law of the Cheyenne Native Americans of Montana, which functioned as a kind of living constitution. KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941). They identified the “law-ways” of the Cheyenne, which were not written down, but rather ascertained by the entire culture by way of a comprehensive understanding of a series of disputes and “cases”—called the “trouble-cases”—unique to the Cheyenne culture. *See id.* at 328–29. The subject matter of these cases ranged from rectifying a dispute over ownership of stray horses to banishing a girl from the community for aborting her unborn child. *See id.* at 118–19, 224–25. Essentially, law must be understood within the context of the realities of human social life.

22. *See* J. R. V. PRESCOTT, *POLITICAL FRONTIERS AND BOUNDARIES* 36–51 (1987); J. R. V. PRESCOTT ET AL., *FRONTIERS OF ASIA AND SOUTHEAST ASIA* 6–7 (1977); GERARD M. FRITERS, *OUTER MONGOLIA AND ITS INTERNATIONAL POSITION* 183–93 (1949); ALASTAIR LAMB, *THE MCMAHON LINE: A STUDY IN THE RELATIONS BETWEEN INDIA, CHINA, AND TIBET, 1904–1914*, at 436–56 (1966).

23. *See generally* Hans Kuijper, *Is Taiwan a Part of China?*, in *THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER* 9 (Jean-Marie Henckaerts ed., 1996).

24. Ever since the rise of nation-State, both international and humanitarian law have been predominantly viewed through a Eurocentric lens, as opposed to more deep-rooted views reflecting Chinese or Islamic perspectives. However, “[t]he theory that [international and] humanitarian law [are] essentially ‘Eurocentric’ is in reality more a criticism of most literature on the subject than a reflection of historical fact.” *See* *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT* 13 (Dieter Fleck ed., 1995). Some principles of international and humanitarian law are closely tied to recent political infrastructures in China, India, Southwest Asia, and Japan. Indeed, some scholars argue that some alternative conception of international law based on the Chinese tradition exists, though other scholars do not share this viewpoint. *See* GREG AUSTIN, *CHINA’S OCEAN FRONTIER* 38–40 (1998). China has, however, accepted traditional sources of international law, some of which arguably comport with preexisting Chinese governmental principles. *See* YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 431–32 (1st ed. 1997). More recently, in 1981, China published its first textbook on international law; various Chinese universities have since promoted studies in international law and Chinese scholars have also endeavored to “divorce the analysis of international law from remnants of Marxian ideology.” *Id.*

25. Throughout this Article, “State” with a capital “S” will refer to a sovereign nation.

European State system and its legacy of sovereignty was an outgrowth of and a reaction to the imperial tradition of the Holy Roman Empire and those imperial bodies politic which sought to expand their influence under color of Papal authority.<sup>26</sup> Indeed, European sovereign States emerged, in part, as a reaction to sweeping, religion-oriented claims of imperial hegemony.<sup>27</sup>

This Article collects our reflections from several perspectives on the changing concept of sovereignty. Part I proposes that the method of contextual mapping, as developed by Professor Myres McDougal and other members of the New Haven School, be applied to the concept of sovereignty. Part II remarks on the role of the United Nations (UN) Charter in both limiting and promoting sovereignty. Part III offers an analysis of sovereignty under which the International Criminal Court should be seen as promoting rather than limiting sovereignty. Part IV observes the peculiar challenges and promises that the concept of sovereignty holds out for the States of Africa. Part V discusses how the theory behind the U.S.-led “war on terror” implies a novel concept of sovereignty. Finally, Part VI provides some observations on the notion of sovereignty presupposed by the U.K. House of Lords’ decision that former head of State Augusto Pinochet is not protected by sovereign immunity from trial for certain crimes.

---

26. Contemporary State legal systems are arguably still constrained by practices entrenched in Christendom-era Western Europe. See MAIVAN LAM, AT THE EDGE OF STATE: INDIGENOUS PEOPLE AND SELF-DETERMINATION 86 (2000). The Treaty of Westphalia, drafted and ratified in 1648, created the fundamental basis for states to become “sovereign and independent” from the Holy Roman Empire, but it also brought an untidy merger of government and religion. See ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 38 (1986). The Treaty of Westphalia put an end to the Thirty Years’ War in Europe and replaced the ruling religious hierarchical structure dominated by the Pope and Holy Roman Emperor with a horizontal structure of independent sovereign states that notionally possessed equal legal legitimacy and authority. The existence of state sovereignty is typically traced to the 1648 Treaty of Westphalia, which laid the juridical foundations of sovereign independence for the European nation-State. See R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 148 (7th ed. 1992) (stating that in international law, the Peace of Westphalia initiated the current European *Staaten* system, or system of sovereign states). See Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposal*, 84 YALE L.J. 969, 980–87 (1975). The text of the Treaty of Westphalia, reprinted in 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (Fred L. Israel ed., 1967).

27. See LAUTERPACHT, *supra* note 15, at 93, 99–100 (discussing the Grotian concept of international order as an order based on alternative to imperial hegemony).



## I. CONTEXT, MAPPING, AND THE MEANING OF SOVEREIGNTY

Contextual mapping, a technique associated with the New Haven School,<sup>28</sup> can be used to clarify the meaning and workings of sovereignty. The technique is based on the principle that concepts and terms are better understood when the contexts in which they are used are better understood. We argue that contextual mapping shows that among nation-States and within nation-States, the concept of sovereignty is used as an instrument by which to establish and maintain authority.

We may define nation-States by four essential characteristics. First, traditional international law requires a State to control a territorial base with determinable boundaries.<sup>29</sup> Second, a State is required to control a population connected by solidarity, loyalty, and primary notions of group affiliation and identity.<sup>30</sup> Third, there is the related aspect of internal governance that requires a controlling internal power and competencies.<sup>31</sup> The fourth traditional criterion is

---

28. The founding members of Yale's New Haven School examined how governing hegemons manipulate social development and world public order. *See generally* HAROLD LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935). Consisting initially of Harold Lasswell, Myres McDougal, and their colleagues, the New Haven School seeks to illumine the world political process by ascertaining and examining meaningful cultural, financial, psychological, and emblematic factors that lay beneath social behaviors. To track this examination, the New Haven School created a comprehensive contextual mapping system of human social structures. *See generally* LASSWELL, *WHO GETS WHAT*, *supra* note 20; *see also* HAROLD LASSWELL, *WORLD POLITICS FACES ECONOMICS* (1945); HAROLD LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK OF POLITICAL INQUIRY* (1950); HAROLD LASSWELL & MYRES MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992).

29. Phillip Jessup, U.S. Representative to the Security Council, remarked on the definition of a State to the UN that:

[t]he reason for the rule that one of the necessary attributes of a state is that it shall possess territory is that one cannot contemplate a state as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some position of the earth's surface which its people inhabit and over which its government exercises authority.

U.N. SCOR, 383rd mtg., Supp. No. 128, at 9–12 (1948). *See also* NII LANTE WALLACE-BRUCE, *CLAIMS TO STATEHOOD IN INTERNATIONAL LAW* 53 (1994).

30. This emerging human element is the foundation of community norm generation. *See generally* Georg Simmel, *Social Interaction as the Definition of the Group in Time and Space*, in *INTRODUCTION TO THE SCIENCE OF SOCIOLOGY* 348 (Robert E. Park & Ernest W. Burgess eds., 3d ed. 1924).

31. A State may be characterized as “an autonomous territorial and political unit having a central government with coercive power over men and wealth.” *See* Henry T. Wright, *Toward an Explanation of the Origin of the State*, in *EXPLANATION OF PREHISTORIC CHANGE* 215, 217 (James N. Hill ed., 1977) (citing Robert L. Carneiro, *A Theory of the Origin of the State*, 169 *SCI.* 733 (1970)).

the requirement of a controlling power to represent the State or territorially organized body politic in the international environment.<sup>32</sup> However, the four traditional criteria obscure what is arguably the most vital building block of the “State:” how authority is constituted. Contextual mapping clarifies that process.

For the purpose of contextual mapping, the New Haven school identified three fundamental processes: the *social process*, the *power process*, and the *constitutive process*. The social process is simply the activity of human beings seeking, through institutions (such as the family), to promote their values. The power process is a specialized aspect of the social process; it is the activity of human beings pursuing power through institutions. The constitutive process is an aspect of the power process; it is the process by which institutions for the management of power are effectively and authoritatively developed. More precisely, the constitutive process is the creation of reasonably predictable expectations about the allocation of fundamental decision-making authority. When the power process is mapped onto the constitutive process we begin to observe the emergence of authority in constituting fundamental power arrangements, where *authority* is understood, in contradistinction from power, as having a normative element.

To illustrate, any community exhibits contestations for power. These contestations may take the form of violent rebellions or a revolution. Suppose one side in the conflict wins. The winners will seek to “constitute” or institutionalize their authority. They may have won a battle, but winning the peace and stabilizing their power basis may require more concrete formulations of the “authoritative” and “controlling” aspects of power. Even if no clear winner emerges from the conflict, the contesting parties may see that stabilizing their claims and expectations about power is in their mutual self-interest.<sup>33</sup> This is because stabilizing expectations about how the basic institutions of decision are established and continuously sustained are vital to the constitution of power and its concurrent and subsequent “recognition.”<sup>34</sup>

From an empirical rather than a legal point of view,

---

32. A State may be identified by its ability to defend itself against external international pressures or conflicts. *See id.* at 216–217.

33. Notwithstanding this process of vying for sovereign power over a community, it has been argued that at least to some extent the beliefs of individual members of that community are reflected in each act of their sovereign ruler. *See generally* Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280 (1982).

34. *See* HART, *supra* note 12, at 97, 110–11.

constitutions, written or otherwise, are nothing but codified expectations of authority and stability in contradistinction to the prospect of continuous (even violent) conflict over how power and authority are to be constituted and exercised. Realistically, conflict and its polar opposite, collaboration, are present in all forms of social organization; indeed, they have ever been ubiquitous in States and societies. Even when authority is provided for in a formal constitution, there shall always be conflict regarding the precise allocations of power and competence. This means that even when the high intensity violent conflict is contained, the settlement will be fraught with contestations for power. Conflict cannot be banished from human relations, but its form can change. Often, post-conflict settlements generate situations of constructive conflict. Thus, some forms of conflict may be socially beneficial. For example, economic competition, as any capitalist knows, is a form of conflict<sup>35</sup> that is regarded as indispensable to economic development in market systems.<sup>36</sup> Similarly, non-violent competition in democratic governance is indispensable, not only to facilitate openness, but also to further progress and change in society.

The constitutive process is continuous. But it does not render irrelevant the similarly continuing process of conflict in accordance with the constitution. There is an intuitive, ongoing relationship between contestations for power and the constituting and stabilizing of such contestations. Accordingly, the continuing constitutive process shapes communication regarding conflict management and collaboration to establish and maintain the basic political and juridical institutions of effective and authoritative decision-making.<sup>37</sup>

---

35. John Stuart Mill regarded economic competition as a legal sanction that harms others and causes conflict. See JOHN STUART MILL, ON LIBERTY 251–54 (Stefan Collini ed., 1989) (1859).

36. See SUSAN STRANGE, THE RETREAT OF THE STATE—THE DIFFUSION OF POWER IN THE WORLD ECONOMY 46 (1996) (arguing that “the world economy . . . has shifted the balance of power away from states and toward [competitive] world markets”); see also WILLIAM GREIDER, ONE WORLD, READY OR NOT 11–26 (1997) (discussing the emphasis on competitive global capitalism).

37. From the perspective of the New Haven School, international lawmaking, or prescription, is seen as a process of communication involving a communicator and a target audience. The substance of this communication functions as signs or symbols of policy content, symbols of authority, and symbols of controlling intention. These three signs or symbols are: (1) the “policy content,” which is the prescription, (2) the “authority signal,” which is the legitimate basis from which to prescribe, and (3) the “control intention,” which is the enforcement power. In other words, a core philosophy of the School is that in order to count as law, international law must have a prescriptive policy content, it must be accompanied by symbols or signs indicative of widespread community acceptance (because the community is the notional basis for authority in international law), and it must be accompanied by a conception that some institutionalized control exists to

One of the most important outcomes of the power process is the patterns of communication regarding conflict and possible collaboration. The understandings generated by power brokers in their contestations for power frequently involve communications and understandings about the limits, constitution and uses of power for collaboration rather than conflict. From an observer's point of view, a central feature of what is called "constitutional law" is its way of institutionalizing expectations relating to the management of power in the basic institutions of authoritative and controlling decision-making. The understandings that emerge from the power process reflect the development, however imperfect, of cultural forms that seek to constrain excessive, destructive conflicts and to structure conflicts productively.

Practical frameworks of communication and collaboration are generated, and basic human expectations that, under scrutiny, may reveal a "living" constitutional arrangement where cultural expectations of how decision-making is fundamentally interwoven with social organization are actually or behaviorally constitutionalized.<sup>38</sup> This might happen without a written constitution and still be an effective instrument of constitutive authority. Alternatively, the outcomes of social conflict, such as civil war, anti-colonial wars, or agitation for self-determination, might lead to the formulation of written expectations about the management of basic decision-making competences in the political culture. In short, conflict sometimes provokes the creation of a written constitution. On the international stage, wars and multi-State conflicts have historically stimulated the development of regional compacts and mutual understandings. Indeed, perhaps the clearest example yet of a global compact representing the parties' common interest is the UN Charter.<sup>39</sup>

---

ensure that the prescribed law is real. See Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1966-67). See also Reisman, *supra* note 21, at 108-10 (1981) (discussing three aspects of prescriptive communication that essentially convey legal norms because they designate policy that both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control.)

38. See Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC. ISSUES 49, 56-58 (1971) (documenting an experiment in which several Berkeley students were locked in a penthouse for three months. The focus of this experiment was the evolutive character of law).

39. For example, the UN Charter identifies authoritative decision-makers and procedures by which decisions might be made because it articulates a framework of practices created to facilitate decisions in the interest of "[maintaining] peace and security," which, as Professor W. Michael Reisman puts it, "[requires] more and more cooperation between large and small states." See W. Michael Reisman, *The Constitutional Crisis in the United Nations*,

The world power process includes claims to become sovereign, to remain sovereign, and to change or realign sovereign competence. Mapping this process requires the identification of operative participants in the world social and power processes, their perspectives, demands, and expectations, their bases of power, the situations in which they operate, their general strategies for action, and the basic outcomes and effects of politically conditioned action. One of the major outcomes of the process of effective power has been the creation and maintenance of the institutions of authoritative decision-making.<sup>40</sup>

Placing the concept of sovereignty within the map of the social, power and constitutive processes, we find that sovereignty reflects the allocation of fundamental decision-making competencies about the basic institutions of governance itself. Within a nation-State, it is the authorization and recognition of persons or institutions competent to make basic decisions about governing power at all levels. On the international stage, the stabilization of expectations in political bodies with effective control over populations, territorial bases, as well as over the instruments of internal governance and external recognition leads to the creation of sovereignty with independence and international legal personality.<sup>41</sup>

---

87 AM. J. INT'L L. 83 (1993). Professor Reisman goes on to assert, "The United Nations Charter is only a part of [the] ongoing world constitutive process . . ." *Id.* at 100. The New Haven School, on the other hand, is not concerned with formal structures of government. It instead remains focused on policy so that it can explore the interplay between law and the world community through the lens of social processes. Specifically, the New Haven School explores the processes of decision-making with specific regard to the "legal process, by which . . . [McDougal and Lasswell meant] the making of authoritative and controlling decisions." Myres S. McDougal and Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 9 (1959). The School's lead scholars suggest that international law is a "world constitutive process of authoritative decision," and not simply a conventional set of regulations, perhaps referring to existing legal regimes such as the UN Charter. The goal of international law, the School's founders argue, is the establishment of world public order by instituting regimes of effective control and moving away from existing regimes of ineffective control. *See generally* McDougal, *supra* note 37, at 253.

40. McDougal and Lasswell offer a configurative conception of jurisprudence that is the end result of an authoritative decision-making process. *See* LASSWELL & MCDUGAL, *supra* note 28, at 24–25. They argue that a scientifically grounded answer to any policy-oriented problem can be reached that might promote the common interest to achieve a world order based on fundamental principles of human dignity. *Id.* at 34–36. Scholars and policymakers regard their approach to decision-making as a rigorous one embedded in a social context. *Id.*

41. Scholars disagree about the extent to which recognition is required to establish legal personality, or if legal personality can indeed exist independently of recognition. If legal personality can exist without recognition, recognition is transformed into a legal duty possessed by the state. *See* PETER H.F. BEKKER, *THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS* 74 (1994).

The term “sovereignty,” by itself, gives us no clues as to its creation, how it is maintained, its changing character, or indeed how it is terminated.<sup>42</sup> Contextual mapping may provide a useful bridge between the different disciplines and cultural contexts in which the term is used, often abused, and certainly misunderstood. Our aim in this Part has been to point the way to the application of contextual mapping to this subject.

## II. SOVEREIGNTY AND THE UN CHARTER

The Charter of the UN is an instrument by which members both assert their sovereignty and limit their sovereignty. The Charter is more than a formal constitution for the international community. It is, from the point of view of contextual mapping, an outcome of the world, social, and power processes. It was a reaction to World War II—to the experience of total war and the Holocaust. As a preventative measure, the Charter placed limits on its members’ sovereignty. Yet, paradoxically, membership in the UN is an important means of asserting sovereignty. An examination of the history and text of the Charter reveals this tension.

The Charter was written for the sovereign nation-States of the world community. Many of those sovereigns had been members of the UN’s predecessor, the League of Nations. The Charter also inherited a sizable body of international law that preceded its entry into force. One of the principles it inherited was that articulated in the *Lotus* case:<sup>43</sup> that restrictions upon the sovereignty of States could not be presumed. This suggested, in writing the Charter nearly twenty years later, that some deference would have to be given to the expectation that there are no presumptive limitations to sovereignty in the international legal system. It should also be noted that the failure of the League of Nations was rooted in the principle that any individual sovereign State could exercise a veto in the League. The UN Charter, in effect, would have to respond to these and other

---

42. The technique of contextual mapping provides indicators that locate sovereignty within the interpenetrating regional, national, and global constitutive processes. The mapping technique permits an inquiring scholar to locate sovereignty within an appropriately comprehensive social and power context and permits us to mark out areas of stability and change the sovereign influence on global public order and civil society as a scholastic agenda. The idea that sovereignty is a central element of whatever is meant by constitutional law is neither new nor remarkable. The mapping technique seems to confirm this in a more objective way. More importantly, however, the technique permits us to look behind the *Grundnorm* realistically and dynamically.

43. See *The Case of the S.S. Lotus*, 1927 P.C.I.J. (ser. A) No. 10.

problems in defining the scope of sovereignty and the force of international obligation.

The Charter does not define sovereignty. The first words in the Preamble of the Charter introduces the key terms: “We the Peoples of the United Nations determined . . . .”<sup>44</sup> The references to “Peoples” and “Nations,” when coupled with the term “determined,” suggest that the peoples of the world are the ultimate source of international authority. Moreover, the peoples have “determined,” or made an affirmative decision, to adopt the Charter of the UN because of certain problems and conditions of global salience.<sup>45</sup> The member States of the UN are sovereign; the idea that sovereign legitimacy and authority under the Charter is derived from the “Peoples”<sup>46</sup> ultimately assumes that in the international community, sovereign national authority is itself in some degree constrained by the authority of the people it seeks to symbolize or represent.<sup>47</sup> In short, the tacit assumption of the authority of sovereignty is actually rooted in the perspectives of all peoples in the global community who are not objects of sovereignty but subjects of it. The demands of the “Peoples” are expressed in four fundamental principles on which the UN is premised: prevention of war,<sup>48</sup> protection of human rights,<sup>49</sup> respect for social progress according to the rule of law,<sup>50</sup> and higher<sup>51</sup> living standards and development for all.<sup>52</sup>

---

44. U.N. CHARTER pmb.

45. The promulgation of the UN Charter in 1945 created an unambiguous, globally codified constitution that is “not merely a treaty . . . [but rather] the constitutive instrument of a living global organization.” See Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT’L L. 63, 66–67 (1991).

46. U.N. CHARTER pmb.

47. Article 1 of the Charter even provides that “[t]he Purposes of the United Nations are . . . [t]o maintain international peace and security, and . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” See *id.* art. 1. This statement of purpose safeguards the rights of the individual, because the Charter tacitly recognizes that the responsibility of maintaining international peace and security falls squarely on the shoulders of individuals.

48. See *id.* pmb. (proclaiming the United Nations’ pledge “to maintain international peace and security, and . . . to ensure . . . that armed force shall not be used, save in the common interest”).

49. See *id.* (proclaiming the United Nations’ goal of reaffirming “faith in fundamental human rights [and] the dignity and worth of the human person”).

50. See *id.* (proclaiming the United Nations’ pledge to “promote social progress”).

51. See *id.* (proclaiming the United Nations’ pledge to respect “the equal rights of men and women and of nations large and small”).

52. These principles were based on Roosevelt’s four freedoms: freedom from fear, freedom from want, freedom of expression, and freedom of conscience and belief, all of which constituted the war aims of the Allies. See Franklin D. Roosevelt, Four Freedoms Speech (January 6, 1941), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D.

The concepts of “United” and “Nations” must be understood conjunctively. When read together, these terms seem to generate conflicts about the nature of sovereignty. One such conflict is evident: the key operative components of the UN are sovereign nations.<sup>53</sup> Accordingly, the efficacy of the UN should be measurable by examining the sum of its parts. It is a body of coordinate sovereigns; its institutional authority cannot aspire to more authority than that reposing in the will of the sovereigns themselves. Yet, on some occasions, the UN has the authority to invoke an institutional capacity broader than the sum of its sovereign parts. In short, there is tension in the international constitutional system based on principles of international concern and obligation on the one hand and sovereign, territorial, and political independence on the other.

The Preamble and Article 1 of the Charter spell out the scope of international concern and the limitations on sovereignty.<sup>54</sup> Article 2 gives us a different structure of the division of competence and concern. For example, Article 2(1) states that the UN is “based on the principle of sovereign equality of all its Members.”<sup>55</sup> Article 2(7) comes closest to defining sovereignty by indicating that the UN is not authorized to intervene “in matters which are essentially within the domestic jurisdiction of any state.”<sup>56</sup> This Article could also be read in light of Article 2(4), which prohibits the threat or use of force to attack the “territorial integrity or political independence of any state.”<sup>57</sup> Among the specific restrictions on State sovereignty in Article 2 is that States are subject to a good faith obligation to honor Charter values and are required to settle disputes by peaceful methods.<sup>58</sup>

A further criterion that strengthens the principle that the UN Charter is a sovereignty-dominating instrument is found in the membership provisions of Chapter II. Article 3 states that the original

---

ROOSEVELT 663 (Facts-on-File, Inc. ed., 1995).

53. Oppenheim asserts that the phrase “sovereign nation” entails two kinds of sovereignty possessed by each State: *dominium*, or territorial sovereignty, which is supreme authority over all persons, items, and acts within that state’s territory, and *imperium*, or personal sovereignty, which is supreme authority over all citizens of that State, be they at home or abroad. See 1 OPPENHEIM’S INTERNATIONAL LAW § 123 (H. Lauterpacht ed., 8th ed. 1955).

54. U.N. CHARTER pmb., art. 1.

55. *Id.* art. 2(1).

56. *Id.* art. 2(7).

57. *Id.* art. 2(4).

58. *Id.* arts. 1(2), 1(3).



members of the UN “shall be . . . states,”<sup>59</sup> and Article 4(1) states that membership in the UN is open to “all other peace-loving states which accept the obligations contained in the present Charter.”<sup>60</sup> Although membership in the UN is exclusively a matter of State sovereignty, an institutional set of limits is imposed: the State must be “peace-loving” and accept all Charter obligations and accept the obligations of international law as developed under the Charter. Likewise, Article 6, though it may be exercised only in highly unusual or exceptional circumstances, stipulates that a State may be expelled from the UN if it is a persistent violator of the UN Charter.<sup>61</sup> The scope of prohibited activity that results in expulsion may be controvertible. For example, expulsion can entail the loss of recognition. Perhaps it might also impose a duty not to recognize an expelled entity, or its acts, in the context of international relations and law. Whether such a procedure may be pushed to the limit of regime replacement may be hotly disputed, but at least in theory the question of expulsion under Article 6 implicates the idea that the sovereign equality of States is conditioned by UN Charter obligations and that a persistent violation of these obligations erodes the authority of the State. In short, the Charter supports and seeks to protect and advance a particular form of good governance-oriented sovereignty. It also aims to discourage other forms of government that seek to position sovereignty above Charter obligations.

There are, of course, other Charter based limits on sovereignty. For example, Chapter IV of the Charter outlines the composition and workings of the General Assembly and gives the Assembly the power to highlight any issue by making it a matter for international discussion and elaboration. Specifically, Article 10 states that “[t]he General Assembly may discuss any questions or any matters within the scope of the . . . Charter.”<sup>62</sup> In addition, the Assembly has the power to initiate studies and make recommendations.<sup>63</sup> This “promotional” Assembly function may shape international expectations. Assembly recommendations may even create soft international law that might be binding on sovereign States in limited circumstances.<sup>64</sup>

---

59. *Id.* art. 3.

60. *Id.* art. 4(1).

61. *Id.* art. 6.

62. *Id.* art. 10.

63. *Id.* art. 13.

64. The International Court of Justice (ICJ) has advanced the notion that each UN General Assembly Resolution is a form of soft law that in itself gradually becomes a binding

The powers of the UN Security Council confer special security-related competences upon certain member States. The five permanent members exercise what some scholars deem to be super sovereign powers.<sup>65</sup> The five permanent members have the special power of the veto in the Council.<sup>66</sup> Other elected members have extra powers by virtue of membership in the Council, but do not have unilateral veto power. The importance of these powers cannot be gainsaid. The Security Council is given the primary global responsibility for peace and security<sup>67</sup> and has the competence to enforce its decisions peacefully (Chapter VI) or by the use of force (Chapter VII).<sup>68</sup> It has the authority to make the determination as to whether there exists “any threat to the peace, breach of the peace, or act of aggression.”<sup>69</sup>

The powers of the Security Council, even when supported by the five permanent members, are nevertheless subject to certain inherent powers of sovereign States. Article 51 of the Charter assures to members “the inherent right of . . . self-defense . . . until the Security Council has taken the measures necessary to maintain international peace and security.”<sup>70</sup> The term “inherent” is ambiguous.<sup>71</sup> It seems to make reference to the notion that Article 51

---

form of law. The ICJ asserted in the Nuclear Weapons Advisory Opinion that “General Assembly resolutions. . . provide evidence important for establishing the existence of a rule or the emergence of *opinio juris* . . . [A] series of [General Assembly] resolutions may show the gradual evolution of *opinio juris* required for the establishment of a new rule.” See Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 254–55 (July 8). Oscar Schachter argues that a unanimous assertion in good faith by all—or at least nearly all—states manifests *opinio juris communis* (instant custom) and thus, “[I]f nearly all States agreed on what is the law, was there a sufficient reason to deny effect to that determination?” See Oscar Schachter, *International Law in Theory and Practice*, in INTERNATIONAL LAW 114, 116 (Barry E. Carter & Phillip R. Trimble eds., 1991).

65. See LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 290–309 (3d ed. 1969) (discussing the history of UN Charter and offering justifications as to why the Security Council is imbued with such power).

66. U.N. CHARTER art. 27(3).

67. *Id.* arts. 24, 41, 42.

68. *Id.* art. 42.

69. *Id.* art. 39.

70. *Id.* art. 51.

71. The International Court of Justice has not interpreted the term “inherent” as used in Article 51 regarding a State’s right to self-defense. Accordingly, it could be interpreted using one or more of the following seven methods: (1) summary, (2) literal, (3) systematic, (4) logical, (5) historical, (6) functional, and (7) authoritative. The summary approach relies on an intuitive understanding of what is a “natural” or an “ordinary” meaning. The literal approach emphasizes the meaning of words in isolation and in the syntax of the sentence to which they belong, while the systematic approach attaches significance to the meaning of words in the wider context of the treaty as a whole. The objective of the logical approach is to eliminate self-contradictions, inconsistencies and absurdities by conclusive reasoning. In

itself codifies this “inherent” right. At the same time “inherent” may refer to rights which are not clearly articulated in Article 51 but instead existed antecedent to the Charter. It is one of the most contested provisions in the entire Charter and possibly in all of international law.<sup>72</sup>

What is clear is that the Charter represents a continuing constitutional process of conflict and collaboration with respect to the basic architecture of international law and international relations. The contestation sometimes reflects a strong *Lotus* version of sovereignty, thus seeking to weaken the scope of international obligation. At other times, it is the strength of the international obligation supported by the critical powers within the UN that seems to weaken the scope of sovereignty under the Charter. The classic tension, therefore, between what counts as a matter of international concern under the Charter and what is exclusively reserved to the domestic jurisdiction of a State generates controversies in the actual practice of international law and international relations. When we examine the UN Charter as a process of communication and collaboration—as a continuing process of working through and refining precise allocations of competence in the international system—we find that it is like a work of art still in progress. The scope of international obligation and domestic sovereign competence is and will remain controverted. The rights of peoples within the constitutional system, with its undefined boundaries of authority, will consistently challenge the institutional foundations of the UN system itself.

---

the historical approach, the meaning of the text is clarified by reference to the drafting history. The functional (or teleological) approach considers the functions that a particular clause or treaty as a whole is intended to fulfill in regulating the legal relations between the parties. Finally, the authoritative approach calls for the joint interpretation of a legal document by the parties. See GEORGE SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 153–54 (4th ed. 1960).

72. For example, assume that State A has stockpiled weapons of mass destruction (WMD) and that the relations between State A and B are and have been conflict-prone. Can State B consider the stockpiling of WMD to be a “threat” sufficient to provoke an anticipatory level of self-defense under Article 51? Since the use of force, even in defense, may implicate the *jus in bello* and general human rights standards, what are we to make in retrospect of the problem of nuclear weapons deployments and the theory of deterrence based on mutually assured destruction? The weapons that cannot be constrained by either principles of necessity or proportionality or humanitarianism challenge the concept of sovereignty to the extent that the use of force may be without limit or restraint. Thus, the lawfulness of the threat or use of force using nuclear weapons was given a careful juridical appraisal in the ICJ advisory opinion on this issue. A majority of the Court held that nuclear weapons might be used consistently with Article 51 only where the “survival” of the state was at stake under the prevailing state of international law conditions. See generally Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8).

### III. SOVEREIGNTY AND UNIVERSALIZING INTERNATIONAL CRIMINAL JURISDICTION

One of the most important outcomes of World War II was the general acceptance of the principle that States that act as aggressors abuse their sovereignty, and their leaders may be accountable directly to the international community. The establishment of this principle marked a revolutionary change in the scope of sovereignty. This was a major change in the international constitutional system, not only by limiting sovereignty, but also by making individual State officials directly accountable, thus creating the principle that individuals have rights and obligations directly under international law. To date, these changes in the concept of sovereignty have been most strongly embodied in the Rome Statute, the founding document of the International Criminal Court (ICC). From one angle it can be said that the Rome Statute represents a reduction of state sovereignty in order to promote individual human rights. We argue, however, for viewing the Rome Statute from another perspective, one from which it appears that the ICC is an instrument for promoting sovereignty.

We begin with historical background on the founding of the ICC. The post-World War II limitations on sovereignty and State absolutism covered such concerns as those identified with *jus ad bellum*, *jus in bello* and the principles of humanitarianism. The Nuremberg Charter and subsequent trials provided a serious limitation on the absolutist idea of sovereignty. Nazi absolutism could not provide a defense for Nazi leaders responsible for war crimes. The ascription of individual responsibility for war crimes also created another critical innovation in international law. The individual could assert civil and political rights—human rights—directly under international law. The Nuremberg process and the growth of human rights changed the concept, if not the foundations, of sovereignty under the Charter system. Moreover, it is currently asserted that States as sovereigns have no competence to commit acts of aggression, to transgress the Geneva Conventions and its Protocols, or to violate basic fundamental human rights. As previously mentioned, the Nuremberg Tribunal implied that States and sovereigns are abstractions and can best be held responsible if it is recognized that behind the State and the sovereign is the actual, finite State group of officials. Some of these officials were held to account directly under international law; they were tried, convicted, and executed.<sup>73</sup> The

---

73. The International Military Tribunal at Nuremberg was authorized to impose “death or such other punishment as shall be determined by it to be just” upon an individual

implications of this idea are problematic for the post-World War II State system.

Nuremberg established the principle that State officials could be tried for criminal offenses under international law. They could be apprehended according to the principle of universal jurisdiction and tried for territorial and extra-territorial offenses against international law; ultimately, they were convicted and executed. The end of the Cold War and the occurrences of ethnic conflict, accompanied by mass murder and heinous violations of basic human rights and humanitarian precepts, gave rise to a renewed interest in the necessity of holding State and quasi-State officials accountable. Public opinion left the world community no option but to create two *ad hoc* tribunals for trying individuals who committed heinous crimes against international law in the former Yugoslavia and Rwanda. A renewed and purposeful interest was spearheaded to create an International Criminal Court and the Rome Statute entered into force on July 1, 2002.<sup>74</sup> This development was mainly inspired by a new international alignment of progressive States; the so-called “like-minded” group of States actors.<sup>75</sup> Superpower support for these developments remained lukewarm or, in some instances, hostile.<sup>76</sup> At the same time, smaller States that had much to gain from a working international rule of law concept—including the protections of their political independence and territorial sovereignty given by law—began exercising jurisdiction within their domestic legal processes over criminal conduct by foreign leaders deemed to be subject to universal jurisdiction.

---

convicted of crimes against humanity. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 27, 82 U.N.T.S. 279, 300. Specifically, in the trial of the major war criminals, seven of the accused were sentenced to extended prison terms, eleven were sentenced to death by hanging, and three were acquitted. See JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 397–405 (1994).

74. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute on the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF/183/9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

75. See Kofi Annan, *UN-Secretary General Urges “Like-Minded” States to Ratify the Statute of the International Criminal Court*, M2 PRESSWIRE, Sept. 2, 1998 (calling for the global community to sign the Rome Statute of the International Court of Justice).

76. See Joseph Lelyveld, *The Defendant*, THE NEW YORKER, May 27, 2002, at 87 (“The total of sixty-six ratifying nations included America’s closest allies. . . [but the] holdouts include Russia, China, and the ‘axis of evil’: Iran, Iraq, and North Korea.”). The Congress of the United States has indicated its distaste for the International Criminal Court in proposed acts of legislation, such as the American Servicemember and Citizen Protection Act of 2002, H.R. 4169, 107th Cong., 2d Sess. (2002). See generally JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (2002).

Spain issued an indictment against Pinochet and asked the United Kingdom to apprehend and extradite him to Spain to stand trial there for violations of international criminal law.<sup>77</sup> The House of Lords ruled that he was extraditable, and it was only because of a finding of ill health that the Home Secretary chose not to extradite Pinochet. Other States such as Belgium<sup>78</sup> have already tried a case<sup>79</sup> and issued arrest warrants for foreign governmental officials on the basis that there is cause to believe that they have committed international crimes sufficient to activate universal jurisdiction. Specifically, Belgium issued arrest warrants against an African Foreign Minister<sup>80</sup> and the current Prime Minister of Israel.<sup>81</sup>

In the case of the African Foreign Minister, the World Court ruled that the arrest warrant could not be issued against the official

---

77. The notion of universal jurisdiction exercised by an individual state or sovereign is deeply rooted in British practice of the Nineteenth Century. Acts of piracy violated the law of nations. See OPPENHEIM, *supra* note 1 at 505. The rules relating to the prohibition of slavery and piracy were considered to be rules of universal prescriptive force. In other words, every nation had the right to punish the perpetrators, regardless of where and against whom the acts were committed. See HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 176 (3d ed. 1846). It should be noted that even at this point in history, judges and jurists carefully drew a distinction between universally prohibited acts of piracy on the high seas and acts prohibited by domestic municipal laws of any given State. See OPPENHEIM, *supra* note 1, at 506. James Brierly, the British publicist, justified this early version of universal jurisdiction when he wrote that in cases of piracy, offending ships were regarded as stateless entities. By virtue of the offenders' commission of acts of piracy, they effectively forfeited any protection afforded by their national flags. See J. L. BRIERLY, *THE LAW OF NATIONS* 306–07 (Sir Humphrey Waldock ed., 6th ed. 1963). The enforcement of these rules was left to the institutions and practices of individual states. See *id.* Great Britain outlawed slavery in all of its territories in 1833 and used its political, diplomatic, and military competence to enforce these international law rules of universal import. The importance of British historical practice seems to have escaped the attention of the learned Law Lords.

78. In 1999, the Belgian legislature amended a 1993 law (specifically, the Law of 16 June 1993, 2 Codes Belge (Bruylant), at 240/5 (62d Supp. 1996)), giving its national courts jurisdiction to try offenses arising under the 1949 Geneva Conventions and Additional Protocols I and II regardless of where they were committed. This amendment effectively gave Belgian courts jurisdiction over crimes against humanity and genocidal acts. See *Loi Relative a la Repression des Violations Graves de Droit International Humanitaire*, Art. 3 A–B (1999), in *MONITEUR BELGE*, Mar. 23, 1999.

79. Belgium forcefully pursues individuals it regards as perpetrators of crimes against humanity. See *Special Report: Judging Genocide*, *THE ECONOMIST*, June 16, 2001, at 23–24 (discussing a Belgian jury's 2001 decision to convict Sisters Gertrude and Maria Kisito, two Catholic nuns, for their involvement in the commission of genocidal acts in Rwanda).

80. In April 2000, Belgium issued an international arrest warrant for then Foreign Minister of the Republic of the Congo, Abdulaye Yerodia Ndombasi. The Democratic Republic of the Congo contested this arrest warrant. See *Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belg.)*, 2002 I.C.J. 3 (Feb. 14).

81. See Tom Miles, *Sharon faces war crimes trial once out of office*, *INDEPENDENT*, (London), Feb. 13, 2003, at P 12 (reporting that Belgium's highest court ruled that after Israeli Prime Minister Ariel Sharon leaves office, he can be prosecuted for war crimes).

since he was protected at the time by the principle of sovereign immunity.<sup>82</sup> In Arusha, the International Criminal Tribunal for Rwanda (ICTR) convicted a Rwandan *bourgmestre*—a position akin to being mayor of a city—on an indictment based partially upon the crime of genocide.<sup>83</sup> It is indeed remarkable that such an historic precedent took place in Africa. In Europe, the ICTY is currently trying Slobodan Milosevic,<sup>84</sup> and a general has already been convicted for crimes against humanity.<sup>85</sup> The legal basis for these developments is built on the principle of universal jurisdiction. It is obvious that this precept challenges the principle of unlimited sovereignty, or in international constitutional terms, the reach of internal “domestic jurisdiction” under Article 2(7) of the UN Charter.<sup>86</sup>

The scope or ambit of the assertions of universal jurisdiction gave the *ad hoc* tribunals the “power to prosecute persons responsible for serious violations of international humanitarian law.”<sup>87</sup> The term “humanitarian law” included grave breaches of the Geneva Conventions of 1949,<sup>88</sup> violations of the laws and customs of war,<sup>89</sup>

---

82. See *Arrest Warrant*, *supra* note 80, at 29–30. The Court stressed that immunity from prosecution does not exonerate the individual from criminal responsibility, but only delays the ability to prosecute him until he no longer has official duties to perform on behalf of the State. *Id.* at 25–26.

83. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), reprinted in 37 I.L.M. 1399 (1998).

84. See *Prosecutor v. Milosevic*, Case No. IT-99-37, Initial Indictment (May 24, 1999), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>.

85. Trial Chamber convicted Lieutenant-General Radislav Krstic of genocide for the July 1995 massacre of more than 7000 male Bosnian Muslims in Srebrenica and sentenced him to forty-six years imprisonment. *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, para. 726 (Aug. 2, 2001). The Tribunal declared that the events in Srebrenica “defy description in their horror and their implications for humankind’s capacity to revert to acts of brutality under the stresses of conflict.” *Id.* para. 2. In 2004, Trial Chamber set aside Krstic’s genocide conviction on appeal. Trial Chamber acknowledged that it did not identify individual members of the Armed Forces of the Republika Srpska Main Staff as the principal participants in the genocide at issue, which Trial Chamber stressed “[did] not negate the finding that Radislav Krstic was aware of their genocidal intent.” *Prosecutor v. Krstic*, Case No. IT-98-33-A, Judgment, para. 143 (April 19, 2004). Accordingly, Trial Chamber entered a conviction of Krstic for aiding and abetting genocide and sentenced him to thirty-five years imprisonment. *Id.* para. 275.

86. U.N. CHARTER art. 2(7).

87. Statute of the International Criminal Tribunal for the former Yugoslavia, art. 1, contained in the Report of the Secretary-General pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1170 (1993).

88. *Id.* art. 2.

89. *Id.* art. 3.

genocide,<sup>90</sup> and crimes against humanity.<sup>91</sup> The importance of the creation and effective functioning of the *ad hoc* tribunals seemed to pave the way for a renewed and sustained effort to create an International Criminal Court for the most serious violations of international criminal law.

The Preamble of the Rome Statute of the International Criminal Court affirms that the “most serious crimes” are of “concern to the international community and must not go unpunished.”<sup>92</sup> The Preamble also indicates that the international community is determined to put an end to impunity. Article 1 of the Rome Statute establishes the International Criminal Court and stipulates that it shall be a “permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern.”<sup>93</sup> Article 27 makes explicit that the statute applies to high-level governmental officials such as the head of State or the head of government, as well as governmental officials or elected politicians.<sup>94</sup> None are “exempt from criminal responsibility.”<sup>95</sup> Article 27(2) makes explicit that immunities or special procedural rules will not shield the court from exercising its jurisdiction.<sup>96</sup> The standard that delineates the kinds of acts considered to be international crimes that fall within the jurisdiction of the ICC is wider than the standards articulated by the Nuremberg Tribunal and those of both the *ad hoc* Tribunals for Rwanda and the Former Yugoslavia.<sup>97</sup> Nuremberg did not include the crime of genocide within its jurisdiction since there was no such international crime in 1945. The *ad hoc* tribunals’ statutes omitted the crime of aggression. How do these developments affect the concept of State sovereignty as conventionally understood?

A general concern is that the idea of universal jurisdiction itself is simply incompatible with a system of international law and international relations based on sovereign States. The idea of the sovereign State can be characterized by its inherent realism because it

---

90. *Id.* art. 4.

91. *Id.* art. 5. Acts qualifying as crimes against humanity under the Yugoslavian Statute are similar to those delineated in the Nuremberg Charter, such as: extermination, murder, torture, enslavement, deportation, rape, imprisonment, political/racial/religious persecutions, and other inhumane acts. *Id.*

92. Rome Statute, *supra* note 74, pmbl.

93. *Id.* art. 1.

94. *Id.* art. 27.

95. *Id.* art. 27(1).

96. *Id.* art. 27(2).

97. These are genocide, crimes against humanity, war crimes, and the crime of aggression.



is a repository of real power in the international system. It likewise exercises a near monopoly on domestic lawmaking power. As a result of the problem of real power, which links the sovereign to lawmaking, it seems that the bases of claims to universal jurisdiction would be weak and highly problematic in theory and practice. We would submit, however, that there is another way to analyze the ostensible conflict between sovereignty and the claim to universal jurisdiction in international law.

In contemporary international law, sovereignty does not draw its essential validity exclusively from the barrel of the gun. It does not draw its vitality from the older, perhaps arcane idea of State absolutism. Sovereignty is not a top-down matter. It draws both its power and its essential legitimacy from the bottom—from the people. Because sovereignty has such a close affinity with effective power, it is like all frameworks of power relations: it is always contested whether the contestation happens in a democracy or some other form of sovereign governance. The central problem behind the crimes prosecuted in the Rome Statute is that these are crimes essentially against the people, or against the sovereignty established by the people. Indeed, the Rome Statute's enumeration of crimes is designed to protect sovereignty, which is understood to be rooted in the will of the people. In other words, universal jurisdiction, in its conceptual and normative design, is an instrument for the protection of sovereignty, which is based on the human and humanitarian rights of people.

One of the most important clarifications of the nature of sovereignty under the UN Charter is in the International Covenant on Civil and Political Rights. According to Article 16, "[e]veryone shall have the right to recognition everywhere as a person before the law."<sup>98</sup> Article 18 specifies the people's right to freedom of thought.<sup>99</sup> Article 19 stresses the people's "right to hold opinions without interference" and that the people "shall have the freedom of expression."<sup>100</sup> Article 25 stresses the right to participate in the political welfare of the State, the universal right to vote, and the right to have access to public service.<sup>101</sup> Perhaps the most significant change wrought by the UN Charter and subsequent practice is that the

---

98. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp (No. 16), U.N. Doc. A/6316 (1966) 999 U.N.T.S. 171 [hereinafter ICCPR].

99. *Id.* art. 18.

100. *Id.* art. 19.

101. *Id.* art. 25.

idea of sovereignty as identified with State absolutism has been incrementally changed by rooting its conceptual basis not only in the monopoly of effective power, but that the power of sovereignty is normatively based on a predicate of authority and legitimacy, which is rooted in the people's expectations.

The Declaration on the "Guidelines of the Recognition of New States in Eastern Europe and in the Soviet Union" made recognition subject to strong normative standards of international justice.<sup>102</sup> The Guidelines include "respect for the provisions of the Charter of the UN and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights."<sup>103</sup> The Summit of the Americas: Declaration of Principles and Plan of Action articulated that democracy is "the sole political system which guarantees respect for human rights and the rule of law."<sup>104</sup>

The 1991 Charter of Paris is another crucial expectation-creating instrument that roots "sovereignty" in the popular will of the people.<sup>105</sup> Respect for human rights and the rule of law is an essential safeguard against what this Charter calls "an over-mighty State."<sup>106</sup> Democracy, it declares, is "based on the will of the people" and "has as its foundation respect of the human person and the rule of law."<sup>107</sup> These illustrations and many others are an indication that fundamental expectations of the nature of the State, including its basic institutions of governance and its sovereignty, are being conditioned by what distinguished scholars have called a right to democratic governance.<sup>108</sup> The idea is that the formal historic requirements for the de facto recognition of a State (e.g. territory, population, internal governance, foreign relations)<sup>109</sup> have been supplemented by the

---

102. See Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," Dec. 16, 1991, 31 I.L.M. 1485, 1485 (1992).

103. *Id.* at 1487.

104. Summit of the Americas: Declaration of Principles and Plan of Actions, Dec. 11, 1994, 34 I.L.M. 808, 810 (1995).

105. See Charter of Paris for a New Europe, Nov. 21 1990, 30 I.L.M. 193, 193 (1991).

106. *Id.* at 193-94.

107. *Id.*

108. Professor Thomas Franck suggests that there exists a right to be governed by representative democracy, and that international law permits enforcement of this right, by or through the Security Council. See generally Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

109. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT] (defining a state as "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities").

normative constraints and demands of critical symbols of authority associated or identified with the human right to democratic governance. These demands, which are often rooted in the aspirations of the “people,” include laws reflecting transparency, responsibility, and accountability, and a commitment that the Rule of Law—in its widest sense—must be an intrinsic component of the nature, scope, and practical functions of sovereignty.

Returning to the issue of universal jurisdiction and the Rome Statute, we suggest that the values sought by the Statute manifest the idea that sovereignty is rooted in the authority and expectations of the people. For example, the Statute makes the crime of aggression subject to its jurisdictional, and, in the process, prosecutorial reach.<sup>110</sup> One of the most important sovereignty-securing themes in the Statute is that the international system seeks to protect sovereignty by outlawing crimes against the peace and acts of aggression that target the territorial integrity and political independence of the sovereign State. Since weak, small, or mid-sized sovereign States may be vulnerable to aggression, the value of the legal rules that proscribe aggression and seek to ensure criminal punishment for those who perpetrate them is meant to strengthen the sovereignty of the State and safeguard the security of the people, who, again, are the basis of authority of State sovereignty.<sup>111</sup>

#### IV. AFRICAN SOVEREIGNTY AND WORLD ORDER

The concept of sovereignty has played a crucial role in the experiences of Africa. States that have evolved from colonial rule have been particularly sensitive about their sovereignty and about the principles of non-intervention. This strong version of sovereignty is very much a part of African political development. Historically, African sovereignty was a critical aspiration for a continent subordinated to imperial and colonial interests. African political leaders agitated, and in some cases fought, for freedom from alien

---

110. See Rome Statute, *supra* note 74, art. 5.

111. Previous exercises of universal jurisdiction as a response to acts of genocide illustrate that mass extermination of people—the primary body of authority in non-totalitarian sovereign States—is criminal. They also show that mass murder constitutes an attack on the authoritative foundations of a State. Accordingly, it might be possible to construe war crimes and crimes against humanity similarly. We submit that since the conceptual and normative bases of national sovereignty have shifted the root of state authority to the people, the developments in international law regarding human rights and humanitarian law shall give increasingly critical normative guidance to sovereignty. It is, after all, based on popular will and supported by the Rule of Law.

rule and colonial sovereignty.<sup>112</sup> The claim to freedom from alien rule was based on the idea that alien sovereignty could not maintain the imprimatur of popular sovereignty—an idea tied to claims for self-determination and independence.

A contemporary example is provided by Eritrea, which only recently became a new, sovereign State.<sup>113</sup> Eritrea successfully fought a war of national liberation for Eritrean sovereignty from the former Ethiopian Empire. Ethiopian-Eritrean arbitration was obliged to give practical meaning to the territorial aspect of sovereignty in the effort to precisely define Eritrea's borders, maritime possessions, titles, and ensure that its territorial integrity and security are protected under international law.<sup>114</sup>

Because of the African emphasis on a strong, pre-World War II version of sovereignty, the Organization of African Unity (OAU) developed a markedly modest institutional capacity to forge distinctively African concepts of continental legal obligation as limitations on African sovereignty.<sup>115</sup> Correspondingly, African

112. One of the most celebrated examples of this in history is the Republic of South Africa. See S. AFR. CONST. pmb. (1996) (stating the national objective of building “a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”).

113. Ethiopia is one of Africa's most ancient civilizations. Throughout the last one hundred years, it has brought various nationalities, including the Eritreans, under the imperial rule of a fundamentally feudalist Amharic Ethiopian ruling class. See Peter A. Nyong'o, *The Implications of Crises and Conflict in the Upper Nile Valley*, in CONFLICT RESOLUTION IN AFRICA 95, 97–98 (Francis M. Deng & I. William Zartman eds., 1991). In the late Nineteenth Century, Ethiopia was colonized by the Italians. Concurrently, from the late 1880s to 1941, Eritrea was colonized and controlled by Italy. The Treaty of Wuchale was executed between Italy and Ethiopia in 1889 to establish the still-existing geographic borders of Eritrea, which functioned as a concession to Italy in return for Italy's pledge to refrain from colonizing other Ethiopian regions. See DAYLE E. SPENCER & WILLIAM J. SPENCER, THE INTERNATIONAL NEGOTIATION NETWORK: A NEW METHOD OF APPROACHING SOME VERY OLD PROBLEMS 11–12 (1992). A result of the cultural, political, and economic predominance of the Amharans was Eritrea's compelling claim to self-determination. The Provisional Government of Eritrea was established by the Eritrean People's Liberation Front (EPLF) on May 29, 1991, after the EPLF defeated Ethiopian forces of the former Mengistu regime and achieved control of Asmara, the provincial capital. See Jane Perlez, *Talks on a New Ethiopia Affirm Right to Secede*, N.Y. TIMES, July 4, 1991, at A4.

114. See First Stage, Territorial Sovereignty and Scope of the Dispute (Eri. v. Yemen), paras. 451–52 (Perm. Ct. Arb. 1998), reprinted in 40 I.L.M. 900 (2001). For information regarding the Eritrea-Ethiopia Boundary Commission, see generally Eritrea-Ethiopia Boundary Commission: Decision on Delimitation rendered Apr. 13, 2002, available at <http://www.pca-cpa.org/PDF/EY%20Phase%20I.PDF>.

115. Before World War II, especially during the Nineteenth Century, a sense of African solidarity emerged among African-American intellectuals, which slowly spread to the African continent. See OWEN CHARLES MATHURIN, HENRY SYLVESTER WILLIAMS AND THE ORIGINS OF THE PAN-AFRICAN MOVEMENT 1869–1911, 52, 55 (1976). Eventually, this emergent sense of solidarity became a socio-political movement in the Pan-African struggle against racial discrimination. See ELENGA M'BUYINGA, PAN AFRICANISM OR NEO-

human rights have had a weak framework of intergovernmental support as well. This situation may well change.

A new African conception of sovereignty is being formulated in terms of continent-wide obligations, thereby subordinating African sovereignty to the continent's own constitutional and public order priorities and values. This is a reformulation of sovereignty that, for want of a more apt expression, we might call "cooperative sovereignty."<sup>116</sup> The reformulation of the doctrine in these terms would entail recognition of the common interest of African governance in strengthening state and society through principles of cooperation in the common interests of peace, human rights, and development on a continent-wide basis. One might analogize the constitution of the OAU as having evolved into a constitutional scheme that approximates sovereignty in the League of Nations system. It will be recalled that under the League, the strong, unilateral doctrine of sovereignty came at the expense of a recognizable, political, and juridical obligation to secure the major purposes and objectives of that institution.<sup>117</sup> It might similarly be said that African unity in the OAU Charter was compromised, in some degree, by the claims of some States to ignore or pay lip service to the normative mandate of the OAU.<sup>118</sup> When we explore the evolution of the African Union (AU), we see a greater political and juridical insistence on the principle of cooperative sovereignty as a cornerstone of a new form of continental governance in Africa.

In Africa we can observe clusters of States in formal and informal alignments in North Africa, West Africa, East Central Africa, and Southern Africa. The Southern African Development Community (SADC), for example, has pursued an agenda of common interests based on economic development and integration of the

---

COLONIALISM?: THE BANKRUPTCY OF THE O.A.U. 34-42 (Michael Pallis trans., 2d ed. 1982) (1979). The Pan-African movement persisted even after World War II as a mechanism by which Africans fought for independence from colonialism in Africa. See RONALD W. WALTERS, PAN AFRICANISM IN THE AFRICAN DIASPORA: AN ANALYSIS OF MODERN AFROCENTRIC POLITICAL MOVEMENTS 139-45 (1993).

116. For some uses of this principle, see Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 132-33 (1995); see also FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW (2000). See generally Winston Nagan, *International Intellectual Property, Access to Healthcare, and Human Rights: South Africa v. United States*, 14 FLA. J. INT'L L. 155 (2002).

117. See generally FRANK P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS (1952); ALFRED E. ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW (1936).

118. See generally Colin Legum, *The Organisation of African Unity—Success or Failure?*, 51 INT'L AFF. 208 (1975).

region as a whole.<sup>119</sup> Economic integration sometimes serves as a basis for broader patterns of political and cultural integration. Indeed, it is sometimes the case that economic choices are so politically limiting that they almost become apolitical; some permit agreements, understandings, and alliances that are generally impossible if the economic tail is wagging the political dog. Yet, once these understandings become, in some degree, institutionalized expectations, they can influence and stimulate broader patterns of political and cultural collaboration in the common interest. Frequently, these regional alignments reflect regional issues, such as trade and investment, but may be expanded to ultimately include security, health, education, labor, population migration, and more.

The critical component of African sovereignty, security, and development is the still-elusive framework or process that might give the phrase “African unity” a meaning. International jurists and scholars are still searching for a system of continental African governance that can facilitate local, regional, and state management to stimulate development in which notions of peace and security are inextricably entrenched. In other words, the objective is an African sovereignty that furthers a single political, economic, and cultural agenda that makes equity and fairness practical expectations. It would therefore seem that the concept of governance, which is deeply rooted in sovereign state processes, must transcend them to include regional interests and objectives. It must further secure a dynamic role for a continent-wide form of constitutional governance that strengthens the interests of both the sovereign States of which this governance is comprised and the people who comprise the States.

## V. INTERNATIONAL SECURITY THREATS AND SOVEREIGNTY: THE TERRORISM PROBLEM

Contemporary threats to international peace and security in the aftermath of 9/11 have generated concerns that powerful non-State actors might find refuge behind State protectors that in turn invoke the principle that sovereignty in international law bars intervention in

---

119. The Southern African Development Community (SADC) was established in 1992 and replaced the Southern African Co-ordination Conference in order to advance cooperation among member states (Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe) and to support their economic growth and development. See ROBERT RANGELEY ET AL., INTERNATIONAL RIVER BASIN ORGANIZATIONS IN SUB-SAHARAN AFRICA 11–12 (World Bank Technical Paper No. 250, 1994).

the sovereign domestic jurisdiction of a State. States targeted by terrorist acts are reluctant to accept that their responses to such attacks are constrained by principles of sovereignty in international law. In response to this tension, the Bush administration has developed a national security doctrine with important challenges to sovereignty, and to notions of self-defense, the use of force, and intervention.<sup>120</sup> The most controversial elements of the Bush doctrine are its claim to legitimate preemptive intervention, the implicit notion that “rogue” States may not invoke sovereignty to escape retribution, and the advocacy of regime change.

In an international environment in which sovereign States may invoke sovereignty to protect non-State groups not influenced by or indifferent to the usual deterrents in the inter-sovereign State order, there is an incentive to provide more precise typologies of State and sovereignty. The UN Charter provides normative guidance by making membership contingent on a State’s commitment to honoring the major purposes of the UN Charter. Among the criteria of statehood and sovereignty in international law as earlier indicated are the formal indicators of control: territory, population, governance and foreign relations competence.<sup>121</sup> A critical notion of historic salience was the idea that, since the sovereign is the ultimate lawmaker, the sovereign is above the law and thus incapable of abusing its sovereign powers. The newer idea of sovereignty is that it is incomplete without an authority component rooted in the popular will. The new Bush doctrine actually sees certain kinds of States as either terroristic or rogue-like. This doctrine, however, requires a more precise typology of States and sovereignty. Applying the idea that sovereignty might be abused, we submit that there are at least twelve types of States in the international system.<sup>122</sup> They are:

- Failed State: a State that is “incapable of protecting individuals” within its territory;<sup>123</sup>

---

120. See generally White House, The National Security Strategy of the United States of America (Sept. 17, 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

121. See RESTATEMENT, *supra* note 109, §201.

122. Philosophers, with prescriptive rather than descriptive aims in mind, have also thought about the adequacy of the conceptions of states and have suggested more discriminating typologies. See JOHN RAWLS, THE LAW OF PEOPLES 4 (1999) (distinguishing among five varieties of societies: liberal peoples, decent peoples, outlaw states, burdened peoples and benevolent absolutisms).

123. See KAREN MUSALO, ET AL., REFUGEE LAW AND POLICY 988 (1997) (defining a failed state as one that is “incapable of protecting individuals within [its territory].” Examples include Somalia, Bosnia, Cambodia, Mozambique, and Liberia. See generally ASIL Meeting and Regional Activity: 1994 Annual Meeting to Examine the Transformation of Sovereignty, ASIL NEWSLETTER, Sept. 1993 (delineating Somalia, Bosnia, and Cambodia

- Anarchic State: a State with no meaningful legal system;<sup>124</sup>
- Genocidal State: a State that engages in a deliberate policy of genocide;<sup>125</sup>
- Homicidal State: a State that engages in a deliberate policy of repression and violence against its subjects;<sup>126</sup>

---

as “failed states”). Accordingly, the UN Security Council has sponsored comprehensive projects in Somalia, Cambodia, and elsewhere to restore crumbling governmental and civil structures. See Report of the Secretary-General on the Work of the Organization, U.N. GAOR, 48th Sess., Supp. No. 1, at 80–87, U.N. Doc. A/48/1 (1993). Regarding Mozambique, see Barry Schutz, *The Heritage of Revolution and the Struggle for Governmental Legitimacy in Mozambique*, in COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY 109, 109–110 (I. William Zartman ed., 1993) [hereinafter COLLAPSED STATES] (stating that Mozambique may lack infrastructural legitimacy). Regarding Liberia, see Martin Lowenkopf, *Liberia: Putting the State Back Together*, in COLLAPSED STATES, at 91, 91 (noting that Liberia is “fragmented, the population dispersed, and the economy ruined”).

124. Examples include Afghanistan and Zaire. After the end of the Afghan-Soviet War in 1989, a struggle for power ensued in Afghanistan at the instigation of various individuals in multiple clans, political parties, and militias, the result of which was that much of the State descended into “complete anarchy.” See Carla Power, *When Women are the Enemy: Afghanistan’s Taliban Fighters Have Taken the War Between the Sexes to a New Extreme*, NEWSWEEK, Aug. 3, 1998, at 37. Zaire (currently the Democratic Republic of Congo) arguably qualified as an anarchic state. See John Darnton, *Zaire Drifting into Anarchy as Authority Disintegrates*, N.Y. TIMES, May 24, 1994, at A1 (reviewing the economic and social dysfunction in the then-existing State of Zaire); see also S.C. Res. 1078, U.N. SCOR, 51st Sess., 3710th mtg. at 1–3, U.N. Doc. S/RES/1078 (1996) (communicating the Security Council’s concern regarding the worsening humanitarian state of affairs in Eastern Zaire).

125. Examples include Nazi Germany, Rwanda, Burundi, Cambodia, and Stalinist Russia. Regarding Stalinist Russia, Stalin commenced his extensive collectivization effort beginning in 1929, a strategy he devised to collectivize farming by destroying the social class of farmers—collectively referred to as “kulaks”—who owned property by divesting them of this property. In reality, “kulak” was a loose term to describe anyone who opposed Stalin’s collectivisation strategy from 1929 to 1953, and was thus used to describe huge numbers of peasants as well as land-owning farmers. This collectivisation strategy was a thinly disguised genocidal campaign in which approximately ten million Russians were murdered from 1929 to 1939. Millions more were imprisoned in labor camps in which many were worked to death and millions more than that were purposefully allowed to starve to death. See generally SHEILA FITZPATRICK, *STALIN’S PEASANTS: RESISTANCE AND SURVIVAL IN THE RUSSIAN VILLAGE AFTER COLLECTIVIZATION* (1994); see also MARTIN SHAW, *WAR AND GENOCIDE: ORGANIZED KILLING IN MODERN SOCIETY* 36 (2003).

126. Examples include Saddam Hussein’s Iraq, Mao Zedong’s People’s Republic of China, and Idi Amin’s Uganda. Regarding Saddam Hussein’s Iraq, see SAID K. ABURISH, *SADDAM HUSSEIN: THE POLITICS OF REVENGE* 61 (2000). Criminal law under Chairman Mao Zedong imposed the death penalty for “crimes of counterrevolution,” or situations that in any way jeopardize the sovereignty or security of China, as well as for offenses such as setting fires, committing espionage, and bribing police officials, and sabotaging utility installations. See Wang Minghy, *Uphold Mao Zedong’s People’s Democratic Dictatorship-Style Viewpoint on the Death Penalty as a Guide to Our Legislative and Judicial Practice on the Death Penalty*, in AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH/ASIA, Vol. 6 No. 9, Aug. 1994, at 19. Regarding Uganda, see ROBERT H. JACKSON & CARL G. ROSBERG, *PERSONAL RULE IN BLACK AFRICA* 252–265 (1982) (documenting that from 1971 to 1979, Idi Amin expelled the Asian community from Uganda and expropriated their property. During his homicidal rule, Amin transformed Uganda into a “slaughter-house” by killing or bringing



- Rogue or Terrorist State: a State that sponsors terrorism;<sup>127</sup>
- Drug-influenced State: a State in which drug cartels exercise significant influence over the State or interfere with the State's functions;<sup>128</sup>
- Organized crime-influenced State: a State in which criminal organizations exercise significant influence over the State or interfere with the State's functions;<sup>129</sup>

---

about the disappearance of hundreds of thousands of Ugandans).

127. Afghanistan is an excellent example and was even among a series of countries designated by the State Department as being of "particular concern" as state sponsors of terrorism or, in recent years, as "rogue states." Former Secretary of State Madeleine Albright also designated Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism. See 31 C.F.R. 596.201 (2000). In his State of the Union Address of Tuesday, January 29, 2002, President George W. Bush identified Saddam Hussein's Iraq, Iran, and North Korea as terrorist states that, with "their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world." See Press Release, White House, President Delivers State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/20020129-11.html>. The United States additionally identified Cuba, Libya, and Syria as nations it claims are deliberately seeking to obtain chemical or biological weapons. See *US Expands "Axis of Evil"*, BBC NEWS, May 6, 2002, available at <http://news.bbc.co.uk/1/hi/world/americas/1971852.stm>.

128. Examples include Taliban-controlled Afghanistan and Colombia. The Taliban regime was long a drug-influenced state and a source of significant international concern. See S.C. Res. 1214, U.N. SCOR, 3952d mtg., U.N. Doc. S/RES/1214 (1998) (chronicling the concern had by the UN General Assembly, which demanded that the Taliban regime stop "the cultivation, production and trafficking [of illegal drugs]"). According to the Bureau for International Narcotics and Law Enforcement Affairs in the U.S. Department of State,

Afghanistan became the world's largest producer of opium poppy in 1999. Traffickers of Afghan heroin route most of their production to Europe but also target North America . . . [E]fforts at crop eradication, drug supply reduction, counter narcotics law enforcement, and demand reduction have completely failed. In fact, . . . the Taliban, who [along with other factions] control 97% of the territory where poppy is grown, promote poppy cultivation to finance their war machines.

See Bureau for Int'l Narcotics and Law Enforcement Affairs, U.S. Dep't of State, International Narcotics Control Strategy Report, 1999 (2000), available at <http://www.state.gov/g/inl/rls/nrcrpt/1999/923.htm>. Indeed, the Taliban regime "[enjoyed] significant financial benefits from a reported ten percent tax on opium transactions [in Afghanistan]." See *id.* Regarding Colombia, the drug trade has historically been a significant element in the infrastructure of the State of Colombia, and the effects have been felt worldwide. One reason was that the Medellin Cartel—run by Colombian drug lords—has consistently produced most of the world's cocaine. See Bradley Graham, *Impact of Colombian Traffickers Spreads*, WASH. POST, Feb. 24, 1988, at 1. See also Tod Robberson, *DEA Money Laundry Pressing on in Panama, Drug Cartels Get Along Without Noriega*, WASH. POST, Feb. 13, 1993, at A20 (reporting that Colombian drug traffickers benefited from other Colombian government ties and continued to launder billions of "narcodollars" through banks in Panama even after Noriega was arrested).

129. Examples include Colombia, the Russian Federation, and Italy. In Colombia, the Revolutionary Armed Forces of Colombia (FARC), a guerilla terrorist network, funds its rebellion through its extensive connections to organized crime lords, especially by protecting

- Kleptocratic State: a State in which corrupt officials illegally expropriate public resources for public benefit;<sup>130</sup>
- Authoritarian State: a State in which an individual or small group of elites exercises dictatorial control over the State without reference to the ostensible formal legal system of the State;<sup>131</sup>

---

drug traffickers. See M. Cherif Bassiouni & Eduardo Vetere, *Organized Crime and its Transnational Manifestations*, in 1 INTERNATIONAL CRIMINAL LAW 883 (M. Cherif Bassiouni ed., 2d ed. 1999). Regarding the Russian Federation, see CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, RUSSIAN ORGANIZED CRIME: GLOBAL ORGANIZED CRIME PROJECT 2–3 (1997); STEPHEN HANDELMAN, COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA (1995). Regarding Italy, States with weak infrastructures—such as Italy—can be recognized by conspicuous voids where government and organization should exist. These vacuums are sometimes filled by non-state tyranny represented by transnational criminal organizations. See Louise I. Shelley, *Transnational Organized Crime: The New Authoritarianism*, in THE ILLICIT GLOBAL ECONOMY AND STATE POWER 25, 32 (H. Richard Friman & Peter Andreas eds., 1999). For a comprehensive analysis of the relationship between organized crime and sovereignty, see Winston P. Nagan, *Rule of Law: Lofty Ideal or Harsh Reality?*, 8 J. FIN. CRIME 347, 347–49 (2001). Nagan also delivered this article as a theme introduction at the 2000 International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (ISPAC). See International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (ISPAC), *The Rule of Law in the Global Village: Issues of Sovereignty and Universality, Report of the Workshop Held at Palermo, Italy, 11–14 December 2000*.

130. See ARNOLD A. ROGOW & HAROLD D. LASSWELL, POWER, CORRUPTION & RECTITUDE 132 (1963) (stating that a “corrupt [or kleptocratic] act violates responsibility towards at least one system of public or civic order and is in fact incompatible with (destructive of) any such system”). Examples of kleptocratic states include then-named Zaire, Nigeria, and Indonesia. Regarding the then-named Zaire (now the Democratic Republic of the Congo) Mobutu Sese Seko—one of the world history’s most notoriously corrupt dictators—funneled millions of dollars looted from Zaire’s national treasuries into Swiss bank accounts. See Michela Wrong, *The Dinosaur at Bay*, FIN. TIMES, Nov. 2, 1996, at 7. Mobutu’s theft qualified then-named Zaire as one of the first to be designated as a kleptocracy. See *id.* Regarding Nigeria, most Nigerian governmental regimes have been marred by corruption throughout the past several decades, but it culminated in 1993 when General Sani Abacha seized power in 1993. See John Erero & Tony Oladoyin, *Tackling the Corruption Epidemic in Nigeria*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 280, 282–84 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000). Regarding Indonesia, see Barbara Crossette, *The World: A Global Gauge of Greased Palms*, N.Y. TIMES, Aug. 20, 1995, at E3 (designating Indonesia as one of the most corrupt States in the world). Indonesia has also contemporaneously been designated the most corrupt State in the world. See Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope and Cures*, 45 INT’L MONETARY FUND STAFF PAPERS 579–80 (1998).

131. Examples include Robert Mugabe’s Zimbabwe, most States in the Middle East (Syria, Saudi Arabia, Egypt, Algeria, etc.), China, and South Africa (under apartheid). For a detailed examination of the authoritarian, corrupt nature of the Mugabe government, see STEPHEN CHAN, ROBERT MUGABE: A LIFE OF POWER AND VIOLENCE 147–180 (2003). Regarding the Middle East, authoritarian Middle Eastern regimes, particularly Saudi Arabia, continue to maintain tightly their holds on power even though “people living in the Middle East . . . are demanding that their rights be respected.” See Pierre Sane, *Human Rights and the Clash of Cultures*, 10 NEW PERSP. Q. 27 (1993); BERNARD LEWIS, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 13–14 (1995) (explaining that authoritarian governments predominate in the Middle East); SAMUEL P. HUNTINGTON, THE CLASH OF

- Garrison or National Security State: a State in which concerns with respect to national security have predominant or significant influence over certain or all areas of state policy,<sup>132</sup>

---

CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 113 (1996) (stating, “[t]he governments in the two score other Muslim countries [are] overwhelmingly nondemocratic: monarchies, one-party systems, military regimes, personal dictatorships, or some combination of these, usually resting on a limited family, clan, or tribal base . . .”). Regarding China, each year the U.S. Department of State submits to Congress a “full and complete report regarding the status of internationally recognized human rights” for all member states of the UN. The 2000 report on human rights practices was highly critical of the People’s Republic of China. Specifically, the report states the following:

The People’s Republic of China (PRC) is an authoritarian state in which the Chinese Communist Party (CCP) is the paramount source of power. At the national and regional levels, Party members hold almost all top government, police, and military positions. Ultimate authority rests with members of the Politburo. Leaders stress the need to maintain stability and social order and are committed to perpetuating the rule of the CCP and its hierarchy. Citizens lack both the freedom peacefully to express opposition to the Party-led political system and the right to change their national leaders or form of government.

U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2000) (Joint Comm. Print 2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/eap/index.cfm?docid=684>. Regarding apartheid-era South Africa, the authoritarian nature of the South African apartheid regime was an “enduring consequence” of the “symbiotic relationship [which] had developed between, on the one hand, the adapted local version of Roman-Dutch law and, on the other hand, a hierarchical social order in which racial distinctions and the division between colonist and colonized reinforced each other and a typically colonial extractive economy.” See Francois du Bois & Danie Visser, *Symposium: Export of the Rule of Law: The Influence of Foreign Law in South Africa*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 593, 602 (2003). This transformed Roman-Dutch law was then “developed with white colonial rule” which culminated in the long apartheid regime. See *id.*

132. Examples include Israel and the United States. For an explanation of what constitutes a “garrison State,” see generally DAN HOROWITZ & MOSHE LISSAK, METZUKOT BEUTOPIA [TROUBLES IN UTOPIA] (1990). Regarding Israel, in the face of continuous threats to its security, Israel developed patterns of militarism now inherent in its national security doctrine and foreign policy, especially with regard to its dealings with other States in the Middle East. This development—when viewed in light of the Israeli government’s contemporary practices—has prompted international scholars to label Israel a Garrison State. See Gabriel Sheffer, *Has Israel Really Been a Garrison Democracy? Sources of Change in Israel’s Democracy*, ISRAEL AFF., Autumn 1996, at 13–38. Domestic national security has ever been a monumental priority in the United States. See generally MELVYN P. LEFFLER, A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR (1992); DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE (1977); MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945–1954 (1998); MELVYN P. LEFFLER, THE SPECTER OF COMMUNISM: THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1917–1953 (1994); WALTER LA FEBER, AMERICA, RUSSIA, AND THE COLD WAR, 1945–1992 (1967). Recent examples of U.S. Garrison State practices abound. Following September 11, 2001, the Federal Bureau of Investigation rounded up and arrested more than one thousand Middle-Eastern men in the United States. See Peter Grier, *Which Civil Liberties—and Whose—Can be Abridged to Create a Safer America?*, THE CHRISTIAN SCI. MON., Dec. 13, 2001, available at <http://www.csmonitor.com/2001/1213/p1s2-usju.html>. In

- Totalitarian State: a State which exercises significant or predominant influence over all aspects of its subjects' political, social, cultural and economic lives through social atomization, surveillance, violence and state control over all associations, activities and institutions;<sup>133</sup> and
- Democratic Rule of Law State: a State which practices "social democratic capitalism" through participatory institutions which operate without significant recourse to state violence or oppression.<sup>134</sup>

Scholars recognize a distinctive "abuse of sovereignty" concept.<sup>135</sup> This should not be unusual since the international system

---

October 2001, rules were created to suspend attorney-client confidentiality privileges for certain categories of this group of detainees. *See id.* These rules are a part of a "multipiece package of legal changes which, taken together, represent a profound increase in federal policing powers." *See id.* To justify these new policies, the Bush administration reasoned, "[w]e're battling an enemy committed to an absolute unconditional destruction of our society." *See id.*

133. The prime, historic examples are Nazi Germany and the former Soviet Union. In a "totalitarian state like . . . Nazi Germany . . . economic totalitarianism is combined with political totalitarianism" so that, for example, it was generally impossible for citizens to make almost any changes to their academic, professional, and political statuses without getting permission from the political authority. *See* MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 10 (1962).

134. Some examples of note are Sweden, Norway, Denmark, Netherlands, Finland, and South Africa. Sweden's governmental infrastructure mingles elements of socialism—specifically redistributive welfare—with capitalism. *See* HENRY MILNER, *SWEDEN: SOCIAL DEMOCRACY IN PRACTICE* 186–212 (1989). *See* PETER DICKENS ET AL., *HOUSING, STATES AND LOCALITIES* 3 (1985) ("Sweden, it should be noted, can be taken as the exemplar of social democratic capitalism."). Regarding other democracies of note, see Evelyne Huber & John D. Stephens, *Globalisation, Competitiveness, and the Social Democratic Model*, 1 *SOC. POL'Y & SOC'Y* 47–57 (2002) (discussing social democracy in Denmark, Finland, Norway, and Sweden). Regarding South Africa, it arguably constitutes one of the best examples in history of the inherent value of democracy. The process by which South Africa moved from apartheid to a highly regarded democratic government in spite of the country's long and tortured history is an edifying one that should be emulated elsewhere in the world. *See* DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 271–272 (1999). *See also* ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY: THE INSIDE OF SOUTH AFRICA'S ROAD TO CHANGE* 121 (1995); *see also* Adrien Katherine Wing, *Towards Democracy in a New South Africa*, 16 *MICH. J. INT'L L.* 689, 691–92 (1995) (book review) (discussing the victory of the African National Congress in the 1994 elections).

135. Thomas Franck finds the concept of abuse of sovereignty in the context of Security Council Resolution 687, asserting, "[A] Member State's 'uncooperative behaviour' can rise to the level of a threat to the peace and implicate the use of collective measures to compel cooperation with international normative standards beyond those specified as binding obligations of the Charter . . ." *See* Thomas M. Franck, *The Security Council and "Threats to the Peace: Some Remarks On Remarkable Recent Developments"*, in *THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL, PEACE-KEEPING AND PEACE-BUILDING* 83, 99 (Rene-Jean Dupuy ed., 1993). Pieter Kooijmans suggests that "it is an abuse of sovereignty if a Government refuses to co-operate with the [UN], with the possible consequence that the [UN] will be forced to intervene, at a later stage, and at much higher cost for the [UN] as well as for the population, if the crisis becomes really explosive." *See* Pieter H. Kooijmans, *The*

provides both rights and obligations for sovereigns. If they abuse their rights and disparage their obligations, they could be accused of being delinquent in international law, which could be described—in some cases—as an abuse of sovereignty.<sup>136</sup> This abuse of sovereignty de-legitimizes the State's sovereignty. State abuse of sovereignty fueled by authoritarian, totalitarian, or chauvinist ideologies has indeed created a crisis of legitimacy for the view of international relations and law based on the juridical artifact symbolized by the treaty of Westphalia: the sovereign nation-State. Sovereignty is not a license to kill, to make war, to commit crimes against the peace, to disparage basic human rights, to despoil the ecosystem, to subject human aspirations to the whims of caprice or avarice or to arbitrary expedience flowing from the barrel of a gun, or to strip human beings of all vestiges of essential dignity. These kinds of outcomes of sovereign governance comprise abuses of sovereignty and a general depreciation of sovereign authority. In short, sovereignty today is a critical component of the global process of juridical order in the world constitutive process of authoritative decision. Within that larger process, the process of sovereignty constitutes and identifies the basic or fundamental features of those decisions that constitute authoritative and controlling decision-making and assure its continued vitality as an institution of governing competence under law.

---

*Enlargement of the Concept "Threat to the Peace," in id.*, at 111, 120. Even political theorist and skeptic Bernard Crick, who calls sovereignty "a greater curse and a source of more conceptual confusion than even Clausewitz's dubious doctrine," despite his distaste for it, does recognize the existence of abuses of sovereignty. See Bernard Crick, *The Curse of Sovereignty*, THE NEW STATESMAN, May 14, 1982, at 7. The specific abuse of sovereignty upon which Crick focuses is the Falklands/Malvinas affair. See *id.* He seems to suggest that it is by virtue of these abuses that sovereignty remains relevant and important, because when a "country is threatened, sovereignty becomes meaningful: as in 1914–18 and 1939–45." *Id.*

136. This characterization was used by the by the U.S. Ninth Circuit Court of Appeals in *Quinn v. Robinson*, with regard to the delinquent nature of a state's commission of crimes against humanity. Specifically, the Ninth Circuit observed that "crimes against humanity . . . violate international law and constitute an 'abuse of sovereignty' because . . . they are carried out by or with the toleration of authorities of a state." See *Quinn v. Robinson*, 783 F.2d 776, 799–800 (9th Cir. 1986) (emphasis added). This characterization was likewise used by an Israeli District Court regarding the possibility that Argentina might offer sanctuary to infamous Nazi war criminal, Adolf Eichmann, the decision of which was affirmed by the Supreme Court of Israel. See *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R. 18 (Dist. Ct. 1961), *aff'd* 36 I.L.R. 277 (Sup. Ct. 1962) (1968). Specifically, the District Court noted that "[t]here is considerable foundation for the view that the grant of asylum by any country to a person accused of a major crime of this type and the prevention of his prosecution constitute an *abuse of the sovereignty* of that country contrary to its obligation under international law." *Id.* at 74 (emphasis added). In other words, any effort by Argentina to protect a major war criminal such as Adolf Eichmann would constitute an abuse of sovereignty and would thus not be accorded legal recognition.

## VI. THE CHANGING CHARACTER OF SOVEREIGNTY IN MUNICIPAL LITIGATION: THE INTERPRETATION OF DOMESTIC LAW IN LIGHT OF INTERNATIONAL LAW

Although the UN Charter is a comprehensive constitutional compact, it is—by the standards of a working national constitutional model—a weak form of constitutionalism. Sovereign States still have a great deal of power in the international system. National sovereigns have highly developed court systems and a significant measure of international law is often decided in the national fora of national sovereigns. This is not surprising since domestic courts routinely make and apply multi-State private international law. They also have a vital role to play in making general international law. Clearly, national courts are a vital element in the ability of law to settle disputes on an international basis within the framework of the rule of law. In this Part we criticize the conception of sovereignty presupposed by the widely discussed decision of the U.K. House of Lords that the doctrine of sovereign immunity did not protect Pinochet from U.K. extradition proceedings initiated by a Spanish judge.<sup>137</sup>

Our interest lies in a question faced by the Lords even before they had to decide whether the former head of State was protected by the doctrine of sovereign immunity. For the question of the applicability of the doctrine of sovereign immunity even to arise, the Lords first had to find that the crimes for which extradition was sought were crimes that were extraditable under the U.K. Extradition Act of 1989. In the course of deciding that prior question, there arose the issue of the “double criminality rule.” As Lord Browne-Wilkinson put it:

The power to extradite from the United Kingdom for an ‘extradition crime’ is now contained in the Extradition Act [of] 1989. That Act defines what constitutes an “extradition crime.” For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law of both of Spain and the United Kingdom. This is known as the double criminality

---

137. For background regarding this litigation, see Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415 (2000).

rule.<sup>138</sup>

The first decision of the House of Lords (*Pinochet I*),<sup>139</sup> later vacated (*Pinochet II*),<sup>140</sup> presumed that the double criminality rule would be satisfied if the acts for which extradition was sought were crimes under both Spanish and U.K. law *at the time of the extradition request*. This assumption was rejected by the Lords upon their reconsideration of the case.<sup>141</sup> The Lords held that the acts in question must have been crimes under both Spanish and U.K. law *at the time of the allegedly criminal conduct*.<sup>142</sup> Under this interpretation of the double criminality rule, only two categories of the alleged acts of Pinochet qualified as “extradition crimes:” first, “conspiracy in Spain to murder in Spain . . . and such conspiracies in Spain to commit murder in Spain;” secondly, acts of torture and conspiracy to torture, *but only if the acts of torture and conspiracy to torture occurred after September 29, 1988*, on which date torture became a crime under the Criminal Justice Act of 1988 enacted by Parliament pursuant to the Convention against Torture and Other

---

138. Regina v. Bow St. Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 3), 1 A.C. 147, 188–89 (H.L. 1999) [hereinafter *Pinochet III*].

139. Regina v. Bow St. Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 1), 1 A.C. 61 (H.L. 1998).

140. Regina v. Bow St. Metropolitan Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 2), 1 A.C. 119 (H.L. 1999). The decision of the House of Lords in *Pinochet I* was set aside because of a concern that Lord Hoffmann had been a member of Amnesty Charities. Since Lord Hoffmann was a member of Amnesty, it was thought to influence his judgment. His membership was, of course, independent of Amnesty’s substantive work because he was in a position of a “trustee,” a position that only obliged him to ensure that the accounts of the organization were regular. From 1989 to 1992, Winston Nagan, co-author of this Article, was Chairman of the Board of Amnesty International USA and was consulted by Mr. Peter Duffy of Amnesty International’s International Council about the appointment of Lord Hoffman as an overseer of Amnesty Charities. The central qualification for this appointment was Lord Hoffman’s independence of Amnesty, since it was his obligation to ensure that every penny raised by the organization was spent in accordance with the law. It was discovered that Lord Hoffmann was involved with Amnesty International Charity Limited, a company controlled by Amnesty International, and that he did not disclose his involvement prior to the hearing. See *In re Pinochet*, 38 I.L.M. 430 (H.L. 1999). On April 15, 1999, the U.K. Home Secretary, Jack Straw, decided that he would allow the extradition process to continue. Pinochet was subsequently rearrested on new charges and his lawyers challenged Mr. Straw’s decision. A new decision (on appeal from the Divisional Court of the Queen’s Bench Division) was then passed on extradition. See Regina v. Bartle and the Commissioner of Police for the Metropolis and others, *ex parte* Pinochet, 38 I.L.M. 581 (H.L. 1999) [hereinafter *Regina v. Bartle*]. After setting aside its former ruling, the House of Lords impaneled a new committee to rehear the case. Britain’s highest court then upheld the appeal.

141. *Pinochet III*, *supra* note 138 at 188–89.

142. *Id.*

Cruel, Inhuman or Degrading Treatment or Punishment 1984 (Torture Convention).<sup>143</sup> As Lord Browne-Wilkinson stated,

No one has suggested that before section 134 [of the Criminal Justice Act of 1988] came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime.<sup>144</sup>

We give careful analysis to the Pinochet case because it presents an important technical problem of the relationship between municipal law and international law, namely, the problem of what the appropriate standards are for giving meaning to a domestic statute (here, section 134 of the Criminal Justice Act 1988) enacted pursuant to an international legal rule or standard (in this instance, the Torture Convention). The complex relationship between municipal law and international law in the domestic courts of a State significantly implicate the scope and character of both sovereignty and international obligation. To make this point more explicit, we might provisionally hold that in the common law tradition, criminal law statutes tend to be strictly construed so as not to unfairly encroach upon the defendant's right to freedom. This raises a number of important questions: What is the appropriate standard when the criminal law prescription is derived from an international treaty? Is the interpreter in the domestic court to be guided by the limitations on the sovereign's power to restrict liberty through criminal law prescriptions, or should the interpreter be guided by the standards of interpretation in Article 2 of the Vienna Convention on the Law of Treaties? Since these two approaches to interpretation might lead to different and, indeed, incompatible results, they could be read as either restricting or enhancing sovereign immunity, or, conversely, restricting or enhancing the scope of the international obligation. It is in these kinds of cases that we begin to see the incremental and careful ways in which the concept of sovereignty is sometimes strengthened and sometimes made more porous. In any event, these

---

143. Since there was no question that extradition for the first set of extradition crimes, murder and conspiracy to murder in Spain, was blocked by sovereign immunity, the attention of the Lords then focused on the second set of extradition crimes: acts of torture and conspiracy to torture occurring later than September 29, 1988.

144. *Pinochet III*, *supra* note 138 at 189.



developments seem to change the character of sovereignty, but not in ways that are easily predicted.

The implied assumption of the double criminality rule is that crimes are proscribed by the sovereigns, and for one sovereign to extradite an accused defendant to another sovereign who wishes to prosecute that defendant under that sovereign's law, the crime for which extradition is sought must be also recognized as a crime in the State from which extradition is sought. The practical problem with the U.K. Extradition Act of 1989 thus construed is that it does not specifically account for crimes of a specifically international character in a substantive sense.

The idea of crimes of universal import substantially finds its roots in the post-World War II growth of crimes held to be universally prohibited.<sup>145</sup> It is possible that the double criminality rule assumes that such behavior is generally regarded as criminal. The assumption is that such crimes would be normally proscribed because the international criminal law would apply as an incident of the sovereign's police powers. For these crimes, the double criminality rule would trivially be satisfied.

Lord Browne-Wilkinson, however, essentially views the issue of criminality as one that must be created under English law.<sup>146</sup> Accordingly, any claim to extradition must ultimately be a function of the actual nature of English law.<sup>147</sup> This ignores the distinction between the international prohibition of torture's substantive and procedural aspects. It might be said, for example, that from a substantive point of view, torture has long been prohibited and made criminal under international law.<sup>148</sup> On the other hand, the procedure for applying and enforcing the prohibition is much more problematic. Since there has been no international juridical institution for prosecuting crimes of torture or assessing the guilt or innocence of potential defendants, the enforcement of international law has perforce been a matter allocated to the more decentralized form of legal accounting, which is found in domestic institutions. In other words, the prescription was international, but the application was in

---

145. The Nuremberg principles established that the violation of the laws and customs of war is a crime, that the inhumane acts upon civilians in connection with war is a crime, and that the initiation and waging of and conspiracy to wage aggressive war is a crime.

146. *Regina v. Bartle*, *supra* note 140, at 586–89.

147. *See id.*

148. *See generally* Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87 (2001).

large measure a matter presumed to be the responsibility of individual States. It has long been recognized that municipal courts are one of the most important institutions for the direct prescription and application of general international law. In part, this development is simply a reflection of the relatively decentralized character of a great deal of international decision-making in the world arena. Lord Browne-Wilkinson seems to have ignored the issue of universality when he held that Pinochet's conduct must have been criminal under U.K. law at the time it was allegedly perpetrated.<sup>149</sup> If the logic of this decision is correct, then we must assume that the law of Nuremberg is not the British law, or that this ruling overturns the Nuremberg precedent and other sources of law that implicate crimes of a universal character.

We might also consider, for example, whether the construction and interpretation of the U.K. Extradition Act of 1989, as it relates to the issue of torture as a universal crime, should not be interpreted in light of Articles 55 and 56 of the UN Charter.<sup>150</sup> The prohibition of torture is a matter that the UN is obliged to promote. Specifically, as a member of the UN, the United Kingdom has pledged, *inter alia*, "to take joint and separate action in co-operation with the Organization"<sup>151</sup> to achieve "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."<sup>152</sup> It would therefore seem that U.K. courts, when vested with a juridically cognizable problem, should provide appropriate levels of construction and interpretation of U.K. law in order to respect its obligation under the UN Charter.<sup>153</sup> Although UN General Assembly resolutions are not technically law, when they elucidate specific provisions of the UN Charter, they can provide normative guidance for the construction and interpretation of national law implicating international obligations. In the UN General Assembly Resolution that adopted the UN Principles of International Co-operation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, the following principles are of direct relevance to the construction given

---

149. See *Regina v. Bartle*, *supra* note 140, at 588.

150. See U.N. CHARTER arts. 55–56.

151. See *id.* art. 56.

152. See *id.* art. 55.

153. There is soft international law support for this Charter interpretation. See Panel Discussion, *A Hard Look at Soft Law*, 82 AM. SOC. INT'L L. PROC. 371 (1988); see also Paul Szasz, *General Law-Making Processes*, in *THE UNITED NATIONS AND INTERNATIONAL LAW* 27, 27–64 (Christopher Joyner ed. 1997).

by Lord Browne-Wilkinson:

3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take domestic and international measures necessary for that purpose.

4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.

5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connection, States shall co-operate on questions of extraditing such persons.

6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial the persons indicated in paragraph 5 above and shall exchange such information . . . .

8. States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest extradition and punishment of persons guilty of war crimes and crimes against humanity.<sup>154</sup>

The obligation specifically to cooperate and bring to justice those charged with crimes against humanity is supported by Article 15(2) of International Covenant on Political and Civil Rights<sup>155</sup> and Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>156</sup> Both conventions establish the

---

154. See G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9326 (1973), reprinted in 13 I.L.M. 230 (1974).

155. See ICCPR, *supra* note 98, art. 15(2); see also Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

156. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

principle that persons accused of committing crimes against humanity can be prosecuted in domestic courts under international law. Even if a State has not incorporated specific international crimes into the structure of its domestic criminal law, that State will still have an international obligation to cooperate procedurally, as fully as it can, to enhance the rule of law in this context. The UN Committee Against Torture has indicated that, irrespective of whether a State has specifically ratified the Torture Convention, there exists “a general rule of international law which should oblige all States to take effective measures to prevent torture and to punish acts of torture.”<sup>157</sup>

Lord Browne-Wilkinson’s construction and interpretation of the U.K. Extradition Act of 1989, relating to both the principles of double criminality and the conduct date, served to radically diminish the scope of the prohibition of torture. We submit that the statute is read in an astigmatic manner and additionally gives an inadequate conceptual explanation of the scope and essential character of torture as a universally prohibited crime under international law. It may well be worth a jurisprudential reminder that procedural law is adjectival; it exists for the purpose of giving reasonable effect to the principles of substantive law.

The decision of the House of Lords may be viewed both positively and negatively. In a positive light, the principle under international law established by his arrest as well as the Lords’ holding that Pinochet could be extradited to Spain for a criminal act of torture is important. It sends a compelling message that torturers who travel abroad may be at risk. Also, given that Pinochet was a former head of State, the principle is established that the torturer is not above the law, even if laws enacted in the torturer’s own national jurisdiction seek to protect the torturer from being prosecuted in the international arena. The point that a head of State, after leaving office, may be subject to prosecution under international law for an international crime is certainly a milestone in the jurisprudence of international criminal law regarding universally proscribed crimes. Indeed, what is particularly important about *Pinochet II* is that the following general point has now been clearly established: governmental officials accused of universal crimes, such as torture, can be subjected to prosecution in any part of the world. This is a particularly important landmark that gives efficacy to the effort to eradicate torture. But the interpretive limitations imposed by the learned Law Lords on the scope of the crime of torture read in the

---

157. See O.R., M.M., and M.S. v. Argentina, Comms. Nos. 1/1988, 2/1988 and 3/1998, U.N. GAOR, 45th Sess., Supp. No. 44, at Annex V, para. 7.2, U.N. Doc. A/45/44 (1990).

light of the law of extradition and immunity seem to limit unduly the importance of international law, and also seem to weaken the human rights foundations of international legal order. The proper scope of sovereign governance remains disputed in domestic law fora.

## CONCLUSION

We have seen that the term “sovereignty” comes freighted with many nuanced meanings, generating high levels of ambiguity. Ambiguity often leads to unconstrained discretion in arenas of practical decision-making. Correspondingly, the term, when operationalized, can be used to produce a great deal of social good or a great deal of social tragedy. As early as 1925, Laski, the British political theorist, suggested that the term simply be abandoned:

[I]t would be of lasting benefit to political science if the whole concept of sovereignty were surrendered. That, in fact, with which we are dealing is power; and what is important in the nature of power is the end it seeks to serve and the ways in which it serves that end. These are both questions of evidence which are related to, but independent of, the rights that are born of legal structure.<sup>158</sup>

The political scientists Lasswell and Kaplan provide a refinement and a retreat from Laski’s “Surrender Doctrine.” According to these authorities:

[I]t is precisely this relation of power to the “legal structure” (the regime, the structure of authority) which makes it necessary to invoke such concepts as sovereignty. It is this very concern with the ends and means of power which demands the inclusion of authority into the field of political inquiry.<sup>159</sup>

We have demonstrated that the term “sovereignty” must make core references to the concept of power and the concept of authority.

---

158. HAROLD J. LASKI, *GRAMMAR OF POLITICS* 44–45 (G. Allen & Unwin eds., 1925).

159. LASSWELL & KAPLAN, *supra* note 28, at 177.

This itself requires a degree of ambiguity. To lessen the ambiguity, we have recommended that the terms “sovereignty,” “power,” and “authority” be systematically contextualized. The reference to “power,” for example, must itself be ambiguous because power might refer to efficacy or might refer to its exercise without limits. Similarly, “authority” might refer to responsibility, accountability, and transparency. Nonetheless, we must clarify the relationships between sovereignty on the one hand and authority and control on the other.

This is the dynamic aspect of sovereignty; the meaning of “sovereignty” must thus be unpacked from the point of view of its actual operations in social process. When policy and decision are made a focus of inquiry for the study of sovereignty, a deeper appreciation of sovereignty’s relationship to the complex but broader world process of constitutive decision-making becomes possible. These clarifications give us a clue to the operational uses of the term “sovereignty.” These concepts may therefore be better understood using the method of contextual mapping developed by the New Haven School of international law. It is clear that by using this focus, we are asking different questions, but we also illuminate more precisely the changing nature, uses, and variable contexts of claiming, managing, and changing sovereignty under current world conditions. Although the mapping process should be developed with much greater specificity, a central observable fact is that the sovereignty of the nation-State, whatever its precise normative and political boundaries, is an outcome of the global constitutional process.

It should be added that there are many other complex outcomes of this process, which include, for example, the constitutional architecture of the European Union, the African Union, the Organization of American States, and even the framework of military alliances under the changing character of NATO. These regional organizations carry attributes of authority and control and, in turn, reconfigure the framework of decision-making competences that were exclusive to the sovereign State. The regional organizations exercise their authority sometimes concurrently with the nation-States, sometimes in complex patterns of sequential authority. This makes the interplay between the constitutional architecture of the various forms of political and legal association under current world conditions a complex, technical, but vitally important matter. The strength and the weakness of multilateral constitutional arrangements are, in some degree, dependent upon the strengths and the weaknesses

of national sovereignty.<sup>160</sup>

The trend in modern international law has been in the direction of enhancing the authoritative foundations of the international system and to moving State practice away from State absolutism. This does not mean that claims to unilateralism may not trump the solidarity of cooperation and collaboration in the common interest. This sometimes happens. We must wait and see whether the current crisis of terrorism will work significant changes in the practice of international relations based on international law and the authority of the UN. One trend, however, is clear. Sovereignty as State absolutism is no longer a tenable precept in international law and international relations. Sovereignty based on the authority of people's expectations is a vital and critical element in promoting international peace and security and enhancing human rights, and it is a basic element in the foundations and possibilities of good governance as well as transparent and responsible authority.

---

160. To some degree, these ideas are loosely associated with Judge Lauterpacht's theory of recognition as being reflective of a constitutive rather than an exclusively declaratory design. See LAUTERPACHT, *supra* note 14.