THE CHANGING CHARACTER OF SOVEREIGNTY IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

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> There 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.[1]
>
> — Lassa Oppenheim

I. INTRODUCTION

This article explores the changing character of sovereignty in international law and international relations.[2] 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. Yet, the challenge of discovering something novel about the idea of sovereignty, which might enhance and deepen collective understanding of this vital concept, is our objective.

New States[3] are emerging as the result of political and juridical developments in the international community to stabilize global conditions of independence, statehood, and governing sovereignty. Recently, Eritrea became a new, sovereign State.[4] Eritrea, like other fledgling nations, is quite interested in the nature, scope, and efficacy of its sovereignty. Its safety, security, identity, basic

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[1] See 1 LASSA OPPENHEIM, INTERNATIONAL LAW 66 (Sir Arnold D. McNair ed., 4th ed. 1928).

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

[3] Throughout this article, "State" with a capital "S" will refer to a sovereign nation.

[4] 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, 96-102 (Francis M. Deng & I. William Zartman eds., 1991). In the late nineteenth century, it 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 Italy in return for Italy's pledge to refrain from colonizing other Ethiopian regions. See 2 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 generally, *Talks on a New Ethiopia Affirm Right to Secede*, N.Y. TIMES, July 4, 1991, at A4.

values, and aspirations both derive from its sovereign independence. Its people fought a war of national liberation for Eritrean sovereignty from the former Ethiopian Empire and has achieved its independence.[5] 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.[6]

If the idea of sovereignty has an intellectual, scholastic staleness to it, it is also the case that, practically, its value for national independence and security is alive and well.[7] The changing character of sovereignty assumes an uneasy point of analytical departure; such an explorative effort traditionally requires the authors to offer some definition of the subject matter—sovereignty—in the context of international law and international relations. It further assumes that we can, in some degree, understand and measure its changing character. These are large and controverted assumptions.

The term "sovereignty" permeates the language of law and politics.[8] It likewise critically influences the language of practical diplomacy in international law[9] as well as international relations.[10] It is a term widely used—and not always similarly understood—by scholars, journalists, practical politicians, international civil servants, jurists, and others from widely divergent cultural traditions, professions, and intellectual disciplines;[11] indeed, in would take a major intellectual effort to decipher

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[5] *See supra* text accompanying note 4.

[6] *See Eritrea v. Yemen, First Stage, Territorial Sovereignty and Scope of the Dispute*, paras. 106, 239, 451-52 (Perm. Ct. Arb. Oct. 9, 1998). For information regarding the Eritrea-Ethiopia Boundary Commission, *see generally* Eritrea-Ethiopia Boundary Commission: Decision on Delimitation rendered April 13, 2002, available at <http://www.pca-cpa.org/PDF/EEBC/EEBC%20TOC.htm> (last visited November 25, 2003).

[7] Sovereignty, although a critical constitutional component of modern international law, is not an absolute entitlement. *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, 142 (1995) (noting international law rejects the "admissibility of absolute sovereignty as the basic principle of international law") [hereinafter *Strengthening Humanitarian Law*]. However, the principle of sovereignty, whatever its precise scope, still thrives in international law and international relations. *See* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW POWER, AND THE SOVEREIGN STATE 11 (1995) (describing sovereignty of states as being "of cardinal importance" for international relations). This sentiment has been recapitulated, for "of all the rights that can belong to a nation, sovereignty is doubtless the most precious" *Id.* (quoting EMERICH DE VATTEL, THE LAW OF NATIONS 154 (Joseph Chitty ed., 1883)).

[8] The English term, "sovereignty" is derived from the French term *souverain*: "a supreme ruler not accountable to anyone, except perhaps to God." See FOWLER & BUNCK, *supra* note 7, at 4 (citing IVO D. DUCHACEK, NATIONS AND MEN: INTERNATIONAL POLITICS TODAY 46 (1966), discussing the etymology of the English word *sovereign*). Bodin's analysis of the term "sovereignty" in his SIX BOOKS OF A COMMONWEALTH seems to lose something in translation. The English translation of the original French text offers a less potent restatement of Bodin's analysis of sovereignty: "Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth." See JEAN BODIN, THE SIX BOOKS OF A COMMONWEALTH 84 (Kenneth D. MacRae ed., Richard Knolles trans., 1962) [hereinafter SIX BOOKS]. The original French text offers a clearer understanding of sovereignty, with punctuated emphasis (in its phrasing and deliberate capitalization) on its nature as "absolute" and "perpetual": "*La SOUVERAINETÉ est la puissance absolue & perpétuelle d'une République*." *See* JEAN BODIN, LES SIX LIVRES DE LA REPUBLIQUE 122 (1576) [hereinafter SIX LIVRES]. Shortly thereafter in the English translation, he expresses, "Sovereignty is not limited either in power, charge, or time." *See* SIX BOOKS, *supra* note 8, at 85. The original French again gives the concept significantly more strength: "[*La*] *souveraineté n'est limitée, ni en puissance, ni en charge, ni à certain temps*." *See* SIX LIVRES, *supra* note 8, at 124. Regardless of the terminology he used or the language into which it is translated, to Bodin, the term "sovereignty" designates the existence of the highest unified power available to a State.

[9] Sovereignty is key because international law is "a body of rules which binds states and other agents in world politics in their relations with one another and is considered to have the status of law." *See* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 122 (1977).

[10] *See* FOWLER & BUNCK, *supra* note 7, at 11-32 (detailing why sovereignty remains ubiquitous and important today).

[11] *See id.* at 4 (discussing multiple meanings of sovereignty); *see also* CAROLINE THOMAS, NEW STATES, SOVEREIGNTY, AND INTERVENTION 11 (1985) (discussing sovereignty as political concept which later became transformed); for an

the subtle gradations of the nuances typically ascribed to the term "sovereignty" in each of these divergent disciplines. In short, sovereignty 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.[12] It may hold different nuanced meanings for jurisprudence, political science, history, philosophy, and other related fields. Indeed, there are at least 13 different overlapping meanings of the term sovereignty.

Sovereignty may refer to:

- Sovereignty as a personalized monarch (real or ritualized);[13]
- Sovereignty as a symbol for absolute, unlimited control or power;[14]
- Sovereignty as a symbol of political legitimacy;[15]
- Sovereignty as a symbol of political authority;[16]
- Sovereignty as a symbol of self-determined, national independence;[17]
- Sovereignty as a symbol of governance and constitutional order;[18]

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alternative viewpoint, see also STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 43-72 (Princeton 1999) (discussing the multifaceted nature of sovereignty).

[12] See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 A.J.I.L. 866, 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).

[13] 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. *See* HLA 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 a s a monarchy, as rulemaking institutions). 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). However, Vernon Bogdanor, a professor and political scientist in Brasenose College, Oxford, writes that the British constitutional monarchy and parliamentary system has outlived its utility. Specifically, Professor Bogdanor asserted that the British system "has become a warning [to new constitution-makers] of what to avo*Id.*" He went on to state that "[i]n the 1990s, not one of the new democracies of Central and Eastern Europe contemplated adopting the British system." See VERNON BOGDANOR, POWER AND THE PEOPLE: A GUIDE TO CONSTITUTIONAL REFORM 11 (1997).

[14] To 16th Century French jurist and natural law philosopher Jean Bodin, *majestas* (i.e. sovereignty) was equitable with absolute power. *See* SIX BOOKS, *supra* note 8, at Appendix B (in Appendix B, Kenneth McRae supplies the French and Latin definitions of vocabulary employed by Bodin to express major concepts; *majestas* is defined at A75).

[15] 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 11, at 11 (giving the political implications of the concept of sovereignty). *See generally Falk & Strauss*, *supra* note 13 (exploring the issue of legitimacy in democratic processes and institutions of States in the global community).

[16] The definition of "sovereignty" is, in part, "the supreme political authority of an independent state." *See* 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." *See* Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 & July 4, 1992, 31 I.L.M. 1488, 1495.

[17] 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* CHARTER OF THE UNITED NATIONS, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, art. 2, para. 7 (declaring that state autonomy must be preserved in international law) [hereinafter UN Charter].

[18] *See* FOWLER & BUNCK, *supra* note 7, at 20-24 (stating that sovereignty is a "handy tool" when employed by internal constitutional systems to defend the independence of the State).

- Sovereignty as a criterion of jurisprudential validation of all law (*grundnorm*, rule of recognition, sovereign);[19]
- Sovereignty as a symbol of the juridical personality of Sovereign Equality;[20]
- Sovereignty as a symbol of "recognition";[21]
- Sovereignty as a formal unit of legal system;[22]
- Sovereignty as a symbol of powers, immunities, or privileges;[23]
- Sovereignty as a symbol of jurisdictional competence to make and/or apply law;[24] and

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[19] The foundation of the German constitutional state is its 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* HANS KELSON, GENERAL THEORY OF LAW AND STATE 115 (1961). In German administrative law, the sovereign power to mete out justice is a fundamental concern. See Joseph Isensee, *Staat und Verfassung in* JOSEPH ISENSEE & PAUL KIRCHHOF, HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, § 13 (Heidelberg, 1987).

[20] 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 11, at 43-72. Krasner focuses on 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. His conception of "international legal sovereignty" is simply any legal capacity derived from mutual state recognition. He argues that under the banner of sovereignty, states pursue their individual interests in an environment characterized by a severe imbalance of power. 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.

[21] The legitimacy of sovereignty might be based on the "rule of recognition," which are those that establish rule-making institutions. *See* HART, *supra* note 13, at 97 (explaining that some laws are backed by threats of the sovereign and other law are based on a system of primary rules of obligation). *See also* HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (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 J. INT'L L. 129 (1995).

[22] For example, national Sovereignty figures into domestic legal systems by way of the 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, Sir Hersh Lauterpacht identifies "the subjection of the totality of international relations to the rule of law" as the primary feature of the Grotian conception of international society. *See* Hersh 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." *See* 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." *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 27 (1995).

[23] 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 *jus imperii*. *See Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997 (Court of First Instance of Leivadia, Greece, 1997), at 10.

- Sovereignty as a symbol of basic governance competencies (constitutive process).[25]

An important meaning associated with the concept of sovereignty identifies it with ultimate, effective political power. It has also been identified with the nature of law itself.[26] The reference to "power" is a reference to the political culture.[27] The reference to law is a reference to jurisprudence—to legal culture.[28] This reference to law apparently implicates the idea of "authority" as an essential element of operative sovereign power.[29]

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[24] For example, the United States 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 v. Neff* 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").

[25] 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, 377 (Myres S. McDougal & W. Michael Reisman eds., 1981) [hereinafter *Prescribing Function*].

[26] 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, whose commands are habitually obeyed. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 199-212 (1995) (1832).

[27] Democratic political culture is the foundation upon which power is created because it provides the point from which politics—the mechanism by which power is exercised—is "constructed." John Rawls suggests that the language in which politics is carried out is "public reason." He held that "[t]he idea of public reason…belongs to a conception of a well ordered constitutional democratic society. The form and content of this reason . . . is part of the idea of democracy itself." *See* JOHN RAWLS, POLITICAL LIBERALISM 765 (New York: Columbia University Press, 1993). Accordingly, the seat of democratic power is democratic political culture. Rawls clarifies the concept of political culture in that it comprises:

> [The]…fundamental political relation of citizenship [in a democracy, which] has two special features: first, it is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death; and second, it is a relation of free and equal citizens who [create and] exercise ultimate political power as a collective body.

See id. at 766, 769-70 (footnotes omitted).

[28] Justice Benjamin Cardozo acknowledged that judges must construct the law and thus guide legal jurisprudence. Specifically, he stated, "[t]he inherent lawmaking aspect of a decisionmaker is one of necessity and not one of choice. Independent of the methodology or the result reached it is in creating the result that the decisionmaker legislates." *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921).

[29] Harold Lasswell and Myres McDougal founded policy-oriented jurisprudence of the New Haven approach—or "School"—of international law. The essential object of the New Haven School was a deliberate focus on policy and decision-making. This approach is distinctive of the New Haven School. Professors Lasswell and McDougal thus recognized,

> …law [may be characterized]…not merely as decision, but as *authoritative* decision, in which elements of both authority and control are combined. By authority, we mean participation in decision in accordance with community perspectives about who is to make what decisions, by what criteria, and by what procedures; the reference is empirical, to a certain frequency in the perspectives of the people who constitute a given community. By control we mean effective participation in the making and enforcing of decision; choice in outcome must be realized in significant degree in practice. When

In general, law and politics have similarities and differences.[30] They are similar in that they are broadly concerned with the problem of power. The definition of "politics" should probably be partly included in the definition of "law" because it certainly seems that all law is politics but not all politics is law.[31] Politics is the quintessential study of power in all its relevant social, economic, cultural, and political dimensions.[32] The phrase, "political culture" captures the breadth of this definition.[33] Law has a similar breadth in the social process, and the phrase, "legal culture" captures the comprehensive nature of law in human relations.[34] The specific underlying mechanism that ties political culture to legal culture is the ubiquity of the process of decision-making in social relations. "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?"[35] We might add one more term to Lasswell's formulation: "why."

Decisions that count as "law" are those that allocate primary and secondary goods, honors, and values through authoritative and controlling procedures and institutions.[36] Thus, decisions that

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> decisions are authoritative but not controlling, they are not law but pretense; when decisions are controlling but not authoritative, they are not law but naked power.

See HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY, vol. 1, 26 (1992) [hereinafter JURISPRUDENCE FOR A FREE SOCIETY]. A significant result of their novel approach was to shift international attention away from legal positivism.

[30] Contemporary governmental responses to significant international incidents suggest that the importance of the interplay between law and politics—or State practice implicating the underlying legal norms that govern each State's relevant affairs—is directly related to the issue of whether formal laws have practical salience. The formal law is often seen as the official "myth." It is the tension between the mythic system and the operational code of state practice which underlines the realistic emphasis of the New Haven school of international law. *See generally* INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1988).

[31] Vladimir Lenin, the distinguished Socialist, once wrote, "law is a political tool; it is politics." *See* Vladimir. I. Lenin, *Concerning a Caricature of Marxism and Concerning Imperialist Economism*, *in* COLLECTED WORKS 79 (4th ed. 1949).

[32] Some authorities regard the study of power through the lens of politics as the integral factor in domestic and international spheres of influence. Jeffrey Pfeffer states, "today more than ever, it is necessary to study power and to learn to use it skillfully…" *See* JEFFREY PFEFFER, MANAGING WITH POWER: POLITICS AND INFLUENCE IN ORGANIZATIONS 8 (1992).

[33] *See* WALTER ROSENBAUM, POLITICAL CULTURE 5 (1975) (arguing, "[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").

[34] Felix Cohen saw law in social process terms, the implications of which are fundamentally oriented toward cause and effect in the real world. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Cohen later explained his rationale for viewing law through the lens of human interaction, "because each of us operates in a value-charged field which gives shape and color to whatever we see." See Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 242 (1950).

[35] According to Professor McDougal, law was a critical part of a comprehensive process of policy-making from the local to the most inclusive global dimensions. Through his approach, he sought to improve the understanding of the synergy as well as antagonism between law and politics. He particularly sought to undermine the traditional law-politics distinction, which sought to establish the concept of an autonomous law from the larger social and political environment. These insights were largely influenced by his colleague, Professor Harold Lasswell. Professor Lasswell defined politics in terms of problems and conflicts about basic values and social goods. *See generally* HAROLD LASSWELL, POLITICS: WHO GETS WHAT, WHEN, HOW (Meridian ed. 1958). *See generally* HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY (1950).

[36] The rule of recognition is a customary rule of the most authoritative official law-applying organ. Analytical positivism teaches us that the practices of the state's highest law-applying organ are the best indicators of what constitutes the

comprise 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,"[37] the scope of which infuses law with a weak or strong normative dimension.[38] 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,[39] which could be communicated in a formal constitution or even a "living" constitutional arrangement.[40] Authority might demand a stronger or weaker signal to realistically constitute the processes of authoritative and controlling decision-making in a body politic as a whole.[41]

The practical effect of the shaded differences in the meaning of the term, "sovereignty," is evident because its meaning is largely "Eurocentric,"[42] but its vitality today is vigorously asserted by

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normative content of the official legal order. See JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 6 (1970). Compare also the work of HLA Hart. *See* HART, *supra* note 13, at 5.

[37] W. Michael Reisman holds the "authority signal" as the key element of the competence to prescribe a rule, or more exactly, policy, which encompasses the durability and consistency of its application and acknowledgment in practice. *See* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101, 110 (1981).

[38] "Law," though accompanied by the requisite authority, cannot be an objective "fact" because it must be respected, honored, and enforced at an individual level. Accordingly, "law" has an inherent normativeness. *See generally* ANTHONY D'AMATO, JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW 221-27 (1984).

[39] HLA Hart recognized that Austin's view, namely that law stems from the command of a political superior, did not account for the requisite authoritative component of law; Hart then generally addressed the nature and implications of the missing authoritative element. *See generally* HART, *supra* note 13. Hans Kelsen recognized that historicist notions of law cannot sufficiently assist decision-makers in the decision-making process in the increasingly progressive, multicultural domain of the Dual Monarchy. Accordingly, he created his "pure theory of law" in part to transcend historicist notions. *See generally* HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., 1967).

[40] 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. *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 497 (1936). Ehrlich 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. *See generally* 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 313. The subject matter of these cases ranged from rectifying a dispute over ownership of stray horses (*see id*. at 224-25) to banishing a girl from the community for aborting her unborn child (see *Id.* at 118-19). Essentially, law must be understood within the context of the realities of human social life.

[41] See generally, W. Michael Reisman, *International Law-Making: a Process of Communication*, *Lasswell Memorial Lecture, American Society of International Law*, 24 Apr. 1981, *in* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 101 (1981).

[42] See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 2 (1999) (stating that by 1914, people on the Asian and African continents had been assimilated into the European law system, which was derived from European thought and experience). However, it is important to note that a great deal of European international law thought and theory is rooted in Islamic law. The roots of Eurocentric law can be seen in the hierarchical structure of sources of Islamic law, which is detailed in C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE 30-58 (1988). It should further be noted that much of modern Eurocentric international law is rooted in treaty law created by international covenants between Western and non-western sovereigns. *See generally* CHARLES H. ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (1967). *See generally* CHARLES H. ALEXANDROWICZ, THE EUROPEAN-AFRICAN CONFRONTATION: A STUDY IN TREATY MAKING (1973).

all States and peoples.[43] For example, the peoples of Republic of China claims that Tibet[44] and Taiwan[45] are an integral part of Chinese sovereignty.[46] These claims are partly historically rooted. But was Chinese sovereignty—in its historical tradition—the same as the concept of sovereignty drawn from historical Eurocentric experiences and the resultant emergence of European nation-States? The Chinese concepts of State and sovereignty are apparently rooted, in part, in the imperial "boundaries" of China. The ancient Chinese State was, in fact an "Empire."[47] The 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.[48]

Religious warfare was inextricably linked to the separation of national sovereignties from the nominal imperial control of Rome and its political bases of support.[49] Indeed, Eurocentric sovereign

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[43] International scholars long ago suggested that there exists an organic unity between an individual and his/her state. *See* PHILLIP JESSUP, A MODERN LAW OF NATIONS 9 (1948). Accordingly, there has long been a state-oriented basis of international law, such that an individual's legal significance is solely derived from his/her relationship to a single state by way of citizenship or nationality. *Id* at 9. However, the interrelatedness of the world community has shifted the focus off the individual and the state, and onto the "society of states." See Phillip C. Jessup, Transnational Law 2 (1956). Hence, Jessup coined the phrase "transnational law," to incorporate "all law which regulates actions or events that transcend national frontiers." *Id.* at 2. Accordingly, sovereignty is a principle of transnational law. *See generally* EMERIC DE. VATTEL, LES DROIT DES GENS, OU, PRINCIES DE LA LOI NATURELLE, APPLIQUE A LA CONDUITE ET AUX AFFAIRES DES NATIONS EY DES SOUVERAINES [The Law of Men or Principles of National Law Applied to the Conduct and Affairs of Nations and Sovereigns] (Charles G. Fenwick trans. pub'd. as THE LAW OF NATIONS, Wash. D.C. 1916) (1758).

[44] *See* J. R. V. PRESCOTT, POLITICAL FRONTIERS AND BOUNDARIES 36-51 (1987); *see also* J. R. V. PRESCOTT, HAROLD JOHN COLLIER, & DORORTHY FRANCIS PRESCOTT, FRONTIERS OF ASIA AND SOUTHEAST ASIA 6-7 (1977); *see also* GERARD M. FRITERS, OUTER MONGOLIA AND ITS INTERNATIONAL POSITION 183-93 (1949); *see also* ALASTAIR LAMB, THE MCMAHON LINE: A STUDY IN THE RELATIONS BETWEEN INDIA, CHINA, AND TIBET, 1904-1914, at 436-56 (1966).

[45] *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).

[46] Ever since the rise of nation-state, both international and humanitarian law have predominantly been 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 some scholars do not share this viewpoint. *See* GREG AUSTIN, CHINA'S OCEAN FRONTIER 38-40 (1998). However, China has 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 (1st ed. 1997). More recently, in 1981, China has published its first textbook on international law, and various Chinese universities have since promoted studies in international law, and Chinese scholars have also endeavored to "divorce the analysis of general international law from the remnants of Marxian ideology." *Id.*at 431.

[47] The nation-states of the North China plain were first unified into a single empire by the nation-state known as Ch'in in 221 B.C. While the dynasty established by Ch'in collapsed sixteen years later, its empire continued and expanded under the name, China. *See generally* DERK BODDE, CHINA'S FIRST UNIFIER: A STUDY OF THE CH'IN DYNASTY AS SEEN IN THE LIFE OF LI SSU (1967).

[48] 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 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 34 (1986). The text of the Treaty of Westphalia appears in 1 MAJOR PEACE TREATIES OF MODERN HISTORY 7 (F. L. Israel ed. 1967).

[49] There was an important correlation between the existence of religious warfare, the end of religious persecution, and the emergence of the nation-state following the fall of the Roman Empire. *See generally* JOHN T. NOONAN, JR. & EDWARD

States emerged, in part, as a reaction to sweeping, religion-oriented claims of imperial hegemony.[50] The Treaty of Westphalia (1648) put an end to religious strife in Europe and laid the juridical foundations of sovereign independence for the European nation-State.[51] Chinese sovereigns might seek to claim as contemporary the sovereignty of imperial hegemony. However, such claims shall likely be resisted because they have been controverted. To the extent that Ethiopia asserts a claim against Eritrean sovereignty, it may, in part, be based on the imperial ambitions of the old, hegemonic Ethiopian empire.[52]

The historic tensions between claims to imperial hegemony and those to sovereign independence continue to have a lingering influence on the scope and efficacy of the concept of sovereignty from the time of Westphalia to the present. The collapse of modern sovereignty into imperial claims of the past is highly problematic; it asserts a claim to sovereignty from the "Emperor's" point of view and converts the populace into objects of that claim.[53] From the peoples' perspective, paying a nominal tribute to an empire in order to keep the imperial hordes alien to their territory away from their homes, culture, and traditions could be seen as a protective expedient for

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MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM 2-66 (2001). When Galerius issued the Edict of Toleration for Christians in 311 A.D. and Constantine the Great and Licinius issued the Edict of Milan in 313 A.D., they were in effect the Roman Empire's first steps to bring to an end to centuries of Christian persecution. *Id*. at 38. Religious tolerance was developed by the Roman Empire as a means of social order among diverse religious communities; in other words, it was established as an attempt to restore and preserve political unity in the Roman Empire. However, as Gibbon wrote: "The various modes of worship, which [eventually] prevailed in the Roman world, were all considered by the people, as equally true; by the philosopher, as equally false; and by the magistrate as equally useful. And thus toleration produced not only mutual indulgence, but even religious concord." 1 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 29 (J.M. Dent & Sons Ltd. 1910) (1776). This religious concord culminated concurrently with the decline and fall of the Roman Empire in 476 and eventually resulted in the emergence of ecclesiastical law in the Middle Ages. *See* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 24 (1947).

[50] *See generally* Lauterpacht, *supra* note 4 (discussing the Grotian concept of international order as an order based on alternative to imperial hegemony).

[51] The existence of state sovereignty is typically traced to the 1648 Treaty of Westphalia, which brought 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. *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 *Staatensystem*, or system of sovereign states). *See generally* Richard Falk, *A New Paradigm for International Legal Studies: Prospects and Proposal*, 84 YALE L.J. 969, 980-87 (1975).

[52] Ethiopia is one of Africa's oldest 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, 96-102 (Francis M. Deng & I. William Zartman eds., 1991). In the late nineteenth century, it 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 Italy in return for Italy's pledge to refrain from colonizing other Ethiopian regions. *See* 2 DAYLE E. SPENCER & WILLIAM J. SPENCER, THE INTERNATIONAL NEGOTIATION NETWORK: A NEW METHOD OF APPROACHING SOME VERY OLD PROBLEMS 11-12 (1992). A persisting result of the cultural, political, and economic predominance of the Amharans is Eritrea's compelling claim to self-determination.

[53] Alberico Gentili, the classic seventeenth-century writer on jus gentium, argued that if people conferred all sovereignty and power on the emperor, "they did so in order that they might be governed like men, not sold like cattle." *See* 2 ALBERICO GENTILI, DE JURE BELLI LIBRI TRES para. 610 (John C. Rolfe trans., 1931, Carnegie ed. 1933) (1612). He continued that even if the emperor has "freest possible power…it is not for purposes of tyranny, but of administration." *Id*. Accordingly, an emperor may not "alienate his subjects." *Id*. at para. 612.

preserving their own sovereignty or autonomy.[54] This "price" associated with protection functions as the alternative to the extinction of their autonomy, their self-determination, or their very existence.

Imperial claims can be destabilizing and fraught lethal with conflict. The claims to a greater Germany,[55] greater Russia,[56] greater Serbia,[57] greater Ethiopia,[58] or a greater Umma[59] in the guise of either Pan Arab or Islamic fundamentalism, makes the concept of sovereignty a vital aspiration, but challenges its continued relevance as a critical constitutional pillar of world order.[60] These preliminary

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[54] The relationship between a sovereign leader and his or her people is a delicate balance. "[T]he king cannot sea regno abdicare or transfer the jus summi imperii of the kingdom or any part thereof without the consent of the kingdom, for they have an interest in his protection as he hath in their subjection." *See* SIR MATTHEW HALE'S THE PREROGATIVES OF THE KING 15-16 (Selden Society Pub. No. 92, David E. C. Yale ed., 1976) (unpub. ca. 1640-1660).

[55] Groups such as the Deutscher Schutzbund (The German Protection League), the Sudetendeutscher Heimatbund (Sudeten German Home League), the Deutscher Kulturverband (the German Culture Association), and the Bund Deutscher Osten (the East German Alliance) quickly emerged across Central and Eastern Europe following World War I, and promoted the unification of all German-speaking people into a Greater Germany. *See* RUDAMIR LUZA, THE TRANSFER OF THE SUDETEN GERMANS: A STUDY OF CZECH-GERMAN RELATIONS 50-51, 54, 59 (1964).

[56] Notwithstanding the highly problematic and tragic social, political, and economic conditions that resulted from actions perpetrated by previous champions of a Greater Russia, another promoter of a Greater Russia has recently emerged. Vladimir Zhirinovsky, a Russian Federation hardliner and founder of the Liberal Democratic Party dreams of a "march to the sea." Steven Erlanger, *Greater Russia's Champion*, N. Y. TIMES, Dec. 13, 1993, at A10. He has frequently spoken of his desire to see Russian forces march south until "Russian soldiers can wash their boots in the warm waters of the Indian Ocean." *Id*.

[57] For a general summary of the Bosnian Serb goal to create an ethnically "cleansed" state of "Greater Serbia," *see* CHRISTOPHER BENNETT, YUGOSLAVIA'S BLOODY COLLAPSE 238 (1995).

[58] Some argue that the consolidation of the Ethiopian government into a "Greater Ethiopia" can be viewed as "an ingathering of peoples with deep historical affinities" as opposed to a conquest. *See* DONALD N. LEVINE, GREATER ETHIOPIA: THE EVOLUTION OF A MULTIETHNIC SOCIETY 26 (1974).

[59] *Umma* is the Islamic term for a "community of believers." S. Sayyid writes:

> The idea of the Muslim Umma is an attempt to come to terms with the limits and the crisis of the nation-state…[t]he nationalisation of the Umma was an attempt to destroy the possibility of the Muslim Umma as a universal cultural formation. Processes associated with globalisation have lead to the de-nationalisation of peripheral nation-state forms at the same time as the expansion of central nations. The Muslim Umma occupies an undecidable position. As clearly being located within the periphery, it is subject to a process of de-nationalisation - but this de-nationalisation opens up the possibility of the re-configuration of a cultural formation that is less and less particular and more and more universal.

See S. Sayyid, *Beyond Westphalia: Nations and Diasporas—the Case of the Muslim Umma*, *in* UNSETTLED MULTICULTURALISMS: DIASPORAS, ENTAGLEMENTS, TRANSRUPTIONS 43 (2000).

[60] Richard Falk has repeatedly argued that the statist nature of the current international system comprises a significant obstacle to the institutionalization of international human rights objectives. He states that a "breakthrough in the internationalization of the protection of human rights is conceptually irreconcilable with the Westphalian logic of world order." *See* Richard Falk, *A Half Century of Human Rights*, *in* THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 4 (1999). *See also* Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples), in* THE RIGHTS OF PEOPLES 17 (J. Crawford ed. 1988) (again discussing the statist orientation of international law, resulting in a statist concept of human rights with regard to indigenous peoples). He again mirrored this argument when he argued that:

> …the statist view of democratization will itself not be viable unless reinforced by the extension of democracy to all arenas of authority, those of societal character (family, workplace, place of worship) and of an institutional character, including the family of organizations that constitute the United Nations itself.

points stress the obvious: there are diverse basic conceptions held about "sovereignty." These conceptions, if not clearly understood, might generate conflict with tragic and far-reaching consequences to world order.

II. CONTEXT, MAPPING AND THE MEANING OF SOVEREIGNTY

The technique of contextual mapping to clarify the meaning and workings of sovereignty is based on the principle that concepts and terms are often better understood when the context in which they are used is illuminated in a discriminating manner. In short, terms and phrases are better understood in their appropriate contexts, and their multiple meanings are given coherence when we appreciate the divergent contexts within which they are used. In order to develop the appropriate predicate for contextual mapping, we recognize that notwithstanding the various nuanced meanings attached to the term, "sovereignty,"[61] that we can distill points of reference of sufficient conceptual generality to give coherence to the appropriate description of sovereignty in the context of contemporary international law and international relations.[62] In light of the difficult—or impossible[63]—nature of setting out a definition of "sovereignty, our challenge is not to exactly delineate what comprises sovereignty, but to better communicate how it works and how it might change or transform under new conditions. It is part of a process that first requires us to examine the four-pronged definition of a "State." First, traditional international law requires a State to control a territorial base with determinable boundaries.[64] Second, it is required to control a population connected by solidarity, loyalty, and primary notions of group affiliation and identity.[65] Third, there is the related aspect of internal governance that requires controlling internal power and competencies as well.[66] The fourth traditional criterion is the requirement of a controlling competence to represent the State or territorially organized body politic in the international environment.[67] These traditional criteria stress an important and unifying dimension: the condition of control. International law provides markers of the process by which effective power is exercised in domestic or international environments, which influences the prospect and efficacy of sovereign claims, but do not give us a

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See Richard Falk, *The United Nations and Cosmopolitan Democracy: Bad Dream, Utopian Fantasy, Political Project, in* RE-IMAGINING POLITICAL COMMUNITY: STUDIES IN COSMOPOLITAN DEMOCRACY 326 (1998).

[61] *See* OPPENHEIM, *supra* note 1.

[62] This coherence might best be understood in light of Louis Henkin's memorable sentiment that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." *See* LOUIS HENKIN, HOW NATIONS BEHAVE 42 (1968).

[63] *See* OPPENHEIM, *supra* note 1.

[64] 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." *See* 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).

[65] 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 (R. Park and E. Burgess, ed., 3d ed. 1924).

[66] 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 217 (James N. Hill ed. 1977) (citing Robert L. Carneiro, *A Theory of the Origin of the State*, 169 SCI. 733 (1970)).

[67] A State may be identified by its ability to defend itself against external international pressures or conflicts. *See* Wright, *supra* note 66, at 216-217.

more discriminating sense of the "map" of effective power. Indeed, these criteria obscure what is arguably the most vital building block of the operational definitions of "State" and "sovereignty: how authority is constituted. Contextual mapping might help to clarify these criteria and their interactions so that the conditions of sovereignty might be better observed and, perhaps, understood.

In this article, we use contextual mapping associated with the New Haven School approach to international law to clarify the meaning and value of sovereignty in international law and international relations.[68] We hold that sovereignty is both an organizing concept and a critical symbol had by the most significant power-conditioned participants in global society: the nation-States. These sovereignties are territorially organized bodies politic and there are approximately 192 of them.[69] They are the central participants in the global community,[70] in the world process of effective power,[71] and in the world constitutive process.[72]

A contextual map designed to clarify the interrelations of social, power, and the constitutive process must perforce start with the idea that constitutional expectations are outcomes of social and power relations. Power is an outcome of social interaction; a precise, contextual appreciation of power must take into account the contextual outcomes of social processes.[73] The power process is critical to deepen our understanding of sovereignty.[74]

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[68] The New Haven School's approach to international law, with its policy-oriented emphasis, holds that it is a process of authoritative and controlling decision-making, whereby members of the entire global community clarify and implement their common interests. *See Prescribing Function*, *supra* note 25, at 377. This school greatly values human dignity—which it currently regards as a high level abstraction—and strongly desires to instigate a shift to a more specific approach to global respect for human dignity in international law. *See* Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence,* 1 YALE STUD. IN WORLD PUB. ORDER 1, 36-37 (1974). Professor Lasswell wrote, "A suggestive aid in moving from [human dignity, which is a] high-level abstraction toward specification is afforded by the Universal Declaration of Human Rights, which outlines some of the implications of human dignity." *See* HAROLD LASSWELL, A PRE-VIEW OF POLICY SCIENCES 42 (1971).

[69] *See* U.S. Dep't of State Bureau of Intelligence and Research, Fact Sheet, Independent States in the World <http://www.state.gov/s/inr/rls/4250.htm> (Nov. 13, 2002).

[70] In his description of world power processes, Myres McDougal articulates that the primary basis of power is derived from nation-States and intergovernmental organizations. *See* MYRES S. MCDOUGAL & FLORENTINO P. FELITIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 13-14 (1961). Specifically, McDougal stated that "the other participant groups and entities [such as individuals, intranational party movements, and private organizations] frequently either act through the state or function as instrumentalities of state policy." *Id*. *See generally* HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (6th ed. 1985).

[71] *See* Myres S. McDougal, W. Michael Reisman, & Andrew R. Willard, *The World Process of Effective Power: The Global War System*, *in* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, POWER AND POLICY IN QUEST OF LAW 353 (1985) [hereinafter *Global War System*].

[72] Professors McDougal, Reisman, Willard, and Lasswell offer three highly detailed approaches to policy-oriented jurisprudence. *See* Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988) (exploring the nature of policy-oriented jurisprudence in the world community); *see* Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 403 (1967), *reprinted in* 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (Richard A. Falk & Cyril E. Black eds., 1969) [hereinafter *World Constitutive Process*] (exploring the nature of policy-oriented jurisprudence in international law); and *see generally Global War System*, *supra* note 71 (exploring the nature of policy-oriented jurisprudence in world politics).

[73] *See* RAYMOND WILLIAMS, MARXISM AND LITERATURE 112 (1977) (arguing that that power is constantly produced by habitual practices that comprise social interactions because it "does not exist passively as a form of dominance. It has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, challenged by pressures not all its own.").

[74] The ubiquitous and critical role of the influence of power in human interaction varies. *See Global War System*, *supra* note 71, at 376 (holding that, "much of the strategic use of bases in the world effective power process involves prepositioning and communication"). This study of power done by Lasswell, McDougal, and the New Haven School is the

The world power process includes claims to become sovereign, to remain sovereign, and to change or realign sovereign competence. This means that there are participants, resources, and demands that fuel the contestation for power. 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.[75] Sovereign nation-States are an important part of both the process and the outcome. The constitutive process is related to the outcome of the power process, which identifies the various participants in the world constitutive process (such as nation States, non-governmental entities, international and regional institutions of governance, and the newly mighty individual as an emerging subject of international law), as well as their perspectives, operations, resources, bases of competence, strategies, operational situations, as well as their outcomes and effects for world and public order.[76] The world constitutive process is an outcome of the global system of effective power of conflict communication and collaboration, which constitutes and identifies the appropriate, authority-supported institutions of authoritative, controlling decision-making in the global community.

The world constitutive process of authoritative decision-making is not identical to the national constitutive process of authoritative decision-making; however, national sovereigns are a significant part of the participatory universe of this process.[77] The mapping process provides a more precise and comprehensive set of conceptual markers. It allows an observer to pinpoint with greater accuracy the

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most radically contextual specification and mapping of the power process. The technique used to accomplich this end is both comprehensive, flexible, and at the same time permissive of high particularity. This specifically means that particular claims or problems rooted in the specific detail of human interaction can nonetheless be mapped, described, and appraised against their world order background or context.

[75] McDougal and Lasswell offer a configurative conception of jurisprudence that is the end result of an authoritative decision-making process. *See* JURISPRUDENCE FOR A FREE SOCIETY , *supra* note 29, 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*.

[76] The key to the effective, collective achievement of international goals is the installation of a successful world constitutive process. *See* MCDOUGAL & FELICIANO, *supra* note 70, at 63. The New Haven School compiled a list of variables designed to evaluate different systems of public order. These variables are: 1) conceptions of law, a variable which views law through the lens of authority or control; 2) features of power processes protected by law, a variable which explores how law represents the command of the sovereign and how jurisdiction is divided among sovereign states; and 3) features of basic value processes protected by law, a variable that investigates the extent to which wealth, enlightenment, respect, well-being, skill, rectitude, and affection are protected. *See* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 A.J.I.L. 1 (1953), *reprinted in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 126-36 (Robert J. Beck et al. eds., 1996).

[77] The New Haven School of Jurisprudence confronts the analytical traditions of jurisprudence previously espoused by positivists Austin, Kelsen, and Hart and their preoccupation with rules by focusing on process and context and further developing sociological approaches to law. The School uses the terms "constitutional" and "constitutive" in distinctly different way than they are generally employed in jurisprudence. The School explains that the phrase, "constitutive process" is the "authoritative power exercised to provide an institutional framework for decision and to allocate indispensable functions." *See World Constitutive Process supra* note 72, at 192. The outcomes of these "constitutive processes" are the "constitutive decisions." These "constitutive decisions" identify various authoritative community decision-makers, elucidate community policies, create bodies of authority, assign and authorize bases of decision-making power, and obtain the continuing performance of various kinds of decision-oriented functions that are necessary to formulate and administer general community policy. *See* JURISPRUDENCE FOR A FREE SOCIETY , *supra* note 29, at 93. The approach stresses, among other things, a balanced emphasis between perspectives and operations, more precisely, between technically formal rules and operational practice.

complex, dynamic interrelationships of the processes of both effective power and constituting authority throughout the various levels of social organization. In this map, "sovereignty" is one important element of this complex process. A central insight about the language of sovereignty in international law is that terms such as "internal" affairs, "domestic" jurisdiction, or "international concern," do not provide adequate conceptual markers to clearly signal the core interdependence of internal and external conditions which tie local phenomena to global concerns and vice versa.[78]

Today, sovereignty confronts the challenge of globalism.[79] It is commonly held that the conditions which support "globalism," such as technological advances, the communications revolution, advances in business organization, political activism, terrorism, and organized crime conspire to undermine territorial boundaries and permit the exchange of science, culture, political economy, and the growth of beneficent and malevolent global civil society.[80] This does not mean the demise of sovereignty: it means change. Sovereignty may indeed be strengthened as it changes to meet new needs and opportunities. In other ways, sovereignty may be limited in its capacity to deny international responsibilities and domestic obligations. Contextual mapping should help us account for these complexities; it is a technique to more adequately improve our understanding of the conditions, consequences, and challenges of sovereignty in the world constitutional process.

An analysis of the world social process will yield a vast number of participants and institutions that comprise the global community.[81] Among these are State sovereigns, international and regional organizations, political parties, business groups, pressure groups, NGO's, and individuals in various roles relevant to social relations within and across State and national lines.[82] Among the important outcomes of the world community process is the relatively specialized process of effective power, which involves connecting linkages between interaction and interdetermination operating in micro-social institutions, large-scale social formations such as the State, even larger aggregates of States, and a still larger and complex world process of effective power. Again, a description of this process would

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[78] The terminology to describe the notion that all nations are supreme within their own spheres but stand together as equals is shifting, presumably because of its lacking. *See* David Kennedy, *Theses about International Law Discourse*, 23 GER. Y.B. INT'L L. 353 (1980).

[79] *See generally* Winston P. Nagan, *Lawyer Roles, Identity, and Professional Responsibility in an Age of Globalism*, 13 FLA. J. INT'L L. 132 (2001). *See also* Philip R. Trimble, *Globalization, International Institutions and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1946 (1997) ("The new conditions loosely associated under the platitudinous rubric of 'globalism' pose new and quite visible challenges to national sovereignty…").

[80] However, political scientist Stephen Krasner theorized that two issues are central to the broad conception of sovereignty: 1) Westphalian sovereignty, which excludes foreign actors from all domestic decision-making and 2) interdependence, which speaks to State control over the cross-border movement of goods, services, and information. *See* KRASNER, *supra* note 11, at 9-25. By examining the advent of globalism and the corresponding rise of NGOs, Krasner argues that sovereignty has long been "frail as a legal principle" because States ignore it whenever it suits their national interests despite more contemporary efforts to balance the distribution of sovereign power between States and international organizations. *See id*. at 9-25.

[81] International law and sovereignty are two prominent elements of the decision-making processes of the world's many leaders and various other members of the global community. *See* Mary Ellen O'Connell, *New International Legal Process*, 93 A.J.I.L. 334, 337 (1999) (generally exploring how decision-making parties shape their decisions).

[82] McDougal uses "about-law" categories with regard to the position of individuals and players within the scheme of the global constitutive process. *See World Constitutive Process supra* note 72, at 73. He suggests that the individual can play an important role in world processes. *Id*. at 93-94. Specifically, both McDougal and Lasswell seem to bypass the internal and external sovereignty of nation-states by defining a "world social process" as that in which individuals participate directly. *See* Myres McDougal & Harold Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AJIL 1, 4-5 (1959), *reprinted in* M.S. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC LAW ESSAYS 15 (1981). They suggest that rather than a world society (public order), a world "community" exists, and is characterized by "interaction," which is a matter of "going and coming, of buying and selling, of looking and listening; and more." *Id.* at 7, 11.

focus on every feature of social organization that conditions or is conditioned by power.[83] This is illustrated by mapping the context of social process to the context of effective power.[84]

One of the most important outcomes of the power process is that it is characterized by patterns of communication regarding conflict and possible collaboration, which may function concurrently and or sequentially among the political contestants for power. The understandings generated by power brokers in their contestations for power frequently involve communications and understandings about the limits, the constitution, and uses of power for collaboration and mutual interest rather than conflict and destruction.[85] 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. Thus, one of the outcomes of the social process itself is the development of mechanisms of social, cultural, and economic decision-making.[86] Other particularly important outcomes of the social process are the decision-making capabilities created by and specialized for contestations of power. Examples of a specialized outcome of the power process are interrelated phenomena: war and peace (or more generally, conflict and the management of conflict in the common interest).[87] The understandings that emerge from these processes reflect the development, however imperfect, of cultural forms that seek to constrain excessive, destructive conflicts, to structure conflicts synergistically, and to creatively create the capacity to improve law, culture, and political economy.

The outcomes of the power process may generate practical frameworks of communication and collaboration with regard to basic human expectations that, upon 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.[88] This might happen without a written constitution, and still be an effective instrument of constitutive authority. For example, 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, sometimes conflict provokes the

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[83] *See generally*, ERIC BERNE, GAMES PEOPLE PLAY: THE PSYCHOLOGY OF HUMAN RELATIONSHIPS (1964).

[84] The technique of mapping employs a series of concept markers, which may permit a description of the social and power processes, or any discreet aspect of it, and may permit levels of generality and particularity, depending upon the purpose of the inquiry. *See* Myres S. McDougal et al., *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988) (holding that a more realistic conception of world order must incorporate a more comprehensive map of the global social process from which problems, especially violence, typically emerge).

[85] A basic principle of sovereignty—rooted in medieval conceptions of autocratic power—is *par in parem imperium non habet* (an equal cannot exercise power and jurisdiction over an equal). *See* BLACK'S LAW DICTIONARY 1673 (7th ed. 1999). This principle refers to a ruler's authority to create, change, or eliminate law in the jurisprudence of the Ius commune.

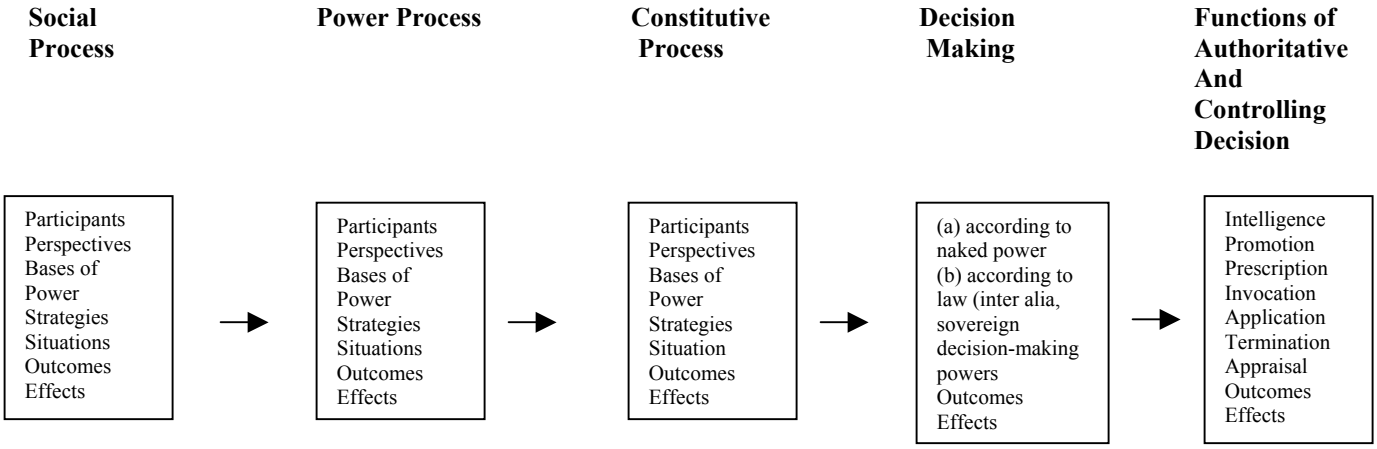
[86] *See* JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 29, at 24-25 (1992).

[87] The processes of political and legal decision-making, which characterizes the development of the European Economic Community and the European Political Union have already generated strong expectations, as well as conflicts about the development of a formal pan-European constitution. The developments represent firmly held expectations about the management of the institutions of peace and security in Europe, and more. These developments are a complement to the insight of John Foster Dulles that global peace and stability "depend[s]…upon the existence of an adequate body of international law." *See* JOHN FOSTER DULLES, WAR OR PEACE 198 (1950). It is within this "body of international law" where there exists "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations," which are intuitively formulated power processes to promote the common good. *See* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983).

[88] *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).

creation of a written constitution. 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 common interest is the United Nations Charter.[89]

Accordingly, the complete map of the social, power, and constitutive processes might be represented as follows:[90]



Let us now briefly examine contextual mapping as a tool in our newly clarified understanding of the sovereignty idea and the relevance of "context" for approaching how it works, its operational value, as well as its outcomes for regional, national, or world order. We understand that sovereignty is a reflection and description of the allocation of fundamental decision-making competencies about the basic institutions of governance itself. It is the authorization and recognition of persons or institutions competent to make basic decisions about governing power at all levels.

We additionally understand that the immediate relevance of the social process context (i.e. the community in general) to the explanation of sovereignty is based on the observation that sovereignty and other important decision-conditioned outcomes are the results or products of social interaction.[91] A short hand description of any social process context is that it involves human beings, who pursue values (such as power, respect, affection, skill, method, well-being, wealth, rectitude, and enlightenment) through institutions supported by resources. The phase analysis in the contextual map outlined above provides conceptual markers to ask contextually relevant questions about who the

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[89] For example, the UN Charter identifies authoritative decision-makers and procedures by which decisions might be made because it articulates a "network of practices specialized to decision." *See World Constitutive Process supra* note 72, at 194. Yet, the New Haven School does not focus on "description[s] of a number of formal governmental structures." *Id*. at 198-99. By remaining focused on policy, the School can explore the interplay between law and the world community through the lens of social processes. See *Id*. at 195.

[90] *See* HAROLD LASSWELL, THE DECISION-PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS (1956); *see also* World Constitutive Process *supra* note 72, at 253.

[91] The notion of "sovereignty" is a legal construct that expresses how social interaction is governed. Professor Michael Reisman argues that it is "a decision about decision making." See W. MICHAEL REISMAN, LAW FROM THE POLICY PERSPECTIVE, IN INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 9 (1981). He evidently agrees with McDougal and Lasswell, who suggested that it is "a structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decision by what criteria and what procedures." See Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 A.J.I.L. 1, 20 (1959).

participants are, their perspectives of identity, their claims and expectations, their bases of power, the situations (institutional, geographic, or territorial, temporal, and crises) within which they interact, the strategies of action (diplomatic, military, economic, propaganda) they use or might use, and the relevant outcomes and effects.[92]

One of the most important outcomes of the social process background is the generation of perspectives and operations specialized to power relationships in society.[93] This too may be expressed in general terms; power-conditioned human beings pursue power values through institutions based on resources. In short, in any social process—at any level—there are human beings who identify with power, claim it, or defend expectations about it. Thus, we might refer to the power process as a relatively specialized outcome of social interaction.[94]

The process of effective power might be more carefully assayed using the conceptual markers indicated in the phase analysis above. The above outcomes indicate the processes of actual control or power. To illustrate, suppose a community exhibits contestations for power. These contestations may take the form of violent rebellions or a revolution. At some point, one side in the conflict will win and the other will lose. 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 about 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.[95] This is because stabilizing expectations about how the

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[92] Professor Reisman has also employed a slightly similar checklist, which integrates inquiry into relevant legal policies and authority for contextual inquiries to determine outcomes by exploring "who is using [a] strategy, for what purpose and in conformity with what international norm, with what authority, decided by what procedures, where and how, with what commensurance to the precipitating event, with what degree of discrimination in targeting, …and what peripheral effects on general political and economic processes." *See* W. Michael Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision,* 71 AM. SOC'Y INT'L L. PROC. 182, 184 (1977). *See also* W. MICHAEL. REISMAN, NULLITY AND REVISION—THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 839 (1971). For more detail regarding phase analysis, *see, e.g.,* Harold Lasswell & Myres McDougal, *Criteria for a Theory About Law,* 44 S. CAL. L. REV. 362, 386-88 (1971); Suzuki, *The New Haven School of International Law: An Invitation to a Policy Oriented Jurisprudence,* 1 YALE STUD. WORLD PUB. ORD. 1, 23-27 (1974); and Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell,* 54 VA. L. REV. 662, 669-70 (1968).

[93] *See* MYRES MCDOUGAL, INTERNATIONAL LAW, POWER AND POLICY: A CONTEMPORARY CONCEPTION 137 (1954) (quoting ROSCOE POUND, PHILOSOPHICAL THEORY AND INTERNATIONAL LAW) (suggesting that power relationships in international law are social ends, the legal order of which are "process[es] and not…condition[s]"). Tacit in Eurocentric concepts of sovereignty is the principle that sovereignty is the supreme—though not necessarily absolute—power of a State's controlling body to render and enforce decisions; accordingly, power relationships are inextricably linked to the existence of sovereignty. *See*, for example, MENNO BOLDT & J. ANTHONY LONG, TRIBAL TRADITIONS AND EUROPEAN-WESTERN POLITICAL IDEOLOGIES: THE DILEMMA OF CANADA'S NATIVE INDIANS, IN THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 335 (1985).

[94] Locke and Rousseau believed that sovereignty stems from the absolute authority derived from a voluntary agreement of the independent wills of individual members of society, who collectively delegate their authority to the sovereign government. Locke presumed that these citizens voluntarily entered into such a social pact to obey the government because governments were merely the "agents and trustees of the people." *See* The Federalist No. 46, at 330 (James Madison) (Benjamin Fletcher Wright ed., 1961). To Rousseau, sovereignty also functions as a social compact. Specifically, Rousseau held that "the act of association comprises a mutual undertaking between the public and the individuals, and that each individual, in making a contract, as we may say, with himself, is bound in a double capacity; as a member of the Sovereign he is bound to the individuals, and as a member of the State, to the Sovereign." *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 392 (Encyclopedia Britannica Great Books ed., 1952) (1792).

[95] 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 A.J.I.L. 280 (1982).

basic institutions of decision are established and continuously sustained are vital to the constitution of power and its concurrent and sequential "recognition."[96] This stabilization of expectations in bodies politic 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.[97] Evidence of the dynamic interplay between power and constitutive process might be seen in the phenomenon of decolonization, which is fueled by claims to self-determination and independence.[98]

It is perhaps a paradox that sovereign independence is now often accompanied by sovereign membership in various regional associations and international organizations, which juridically limits sovereignty.[99] For example, membership in the United Nations conditions sovereignty;[100] in other words, sovereignty cannot trump the obligations and international responsibilities of the UN.[101] Even more striking are State claims to associate with supranational regional compacts and, in so doing, relinquish some autonomy in exchange for the benefits of membership. Examples of this include the European Union,[102] the African Union,[103] and the Organization of American States.[104]

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[96] *See* HART, *supra* note 13, at 97.

[97] 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 had by the state. *See* PETER H.F. BEKKER, THE LEGAL POSITION OF INTERGOVERNMENTAL ORGANIZATIONS 74 (1994).

[98] *See* MYRES S. MCDOUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 114 (1980) (connecting decolonization to calls from dispossessed peoples for increased participation in creating and enjoying global values, especially human rights).

[99] Of the relationship between sovereignty and international law, Kelsen asserted, "Sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law." *See* Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L. J. 207, 208 (1944). In short, the notion of sovereignty conveys the legal status that the international community assigns to its principal members.

[100] By joining the United Nations, member states willingly surrendered aspects of their national sovereignty. For example, they consented to submit decisions relating to international peace and security to the UN Security Council, thereby limiting their ability to use force. *See* UN Charter, *supra* note 17, at art. 24 (granting the U.N. Security Council primary responsibility for the maintenance of international peace and security). *See id*. art. 33 (requiring member states to exhaust peaceful means of conflict resolution before resorting to the use of military force). Additionally, UN Security Council decisions are binding on members states. *Id*. art. 25. The International Court of Justice similarly champions the importance of international rules over domestic rules. An excellent example of this is in an Advisory Opinion issued on April 26, 1988, in which the Court asserted that "the fundamental principle of international law that it prevails over domestic law." *See* Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 ICJ REP. 12, 34, para. 57 (Advisory Opinion of Apr. 26). Justice Schwebel added that "a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations" under a treaty. *Id*. at 42 (Schwebel, J. sep. op.). Ultimately, the court accepted that tacit in a State's membership in the international community is a clear limitation on its sovereignty.

[101] Even HLA Hart admitted that a State's sovereignty cannot excuse it from its international treaty obligations. He asserted, the "view that a state may impose obligations on itself by promise, agreement, or treaty is not…consistent with the theory that states are subject only to rules which they have thus imposed on themselves." *See* HART, *supra* note 13, at 219 (1961). Instead, he continued that if appropriate rules within the state exist, then "a state is bound to do whatever it undertakes by appropriate words to do." *Id*.

[102] See Draft Treaty Establishing a Constitution for Europe Submitted to the European Council Meeting in Thessaloniki, 20 June 2003 European Convention. Luxembourg: OOPEC, 2003 in the Official Journal, C169, 18 July 2003 online, *available at* <http://europa.eu.int/eur-lex/en/archive/2003/c_16920030718en.html> (last visited November 24, 2003). The official text of the Convention is *available at* <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited November 24, 2003). For an interesting examination of British stances on the validity of the European Constitution, *see* Polly Toynbee and David Heathcoat-Amory, *How Would You Vote in a Referendum Favouring the European Constitution?*, RSA J., October 2003, at 16.

As indicated, the constitutive process is an outcome of the world process of effective power and is continuous in its communication and collaboration to constitute and reconstitute authority.[105] The constitutive process does not render irrelevant the similarly continuing process of conflict, especially regarding access to, the establishment of, and specific, contextual uses of power. There is an intuitive, ongoing relationship between contestations for power and the efficacy of constituting and stabilizing such contestations. Accordingly, the constitutive process is a continuing one that focuses on communication regarding conflict management and collaboration to establish and maintain the basic political and juridical institutions of effective and authoritative decision-making. There is much truth in the insight of the legal realist, Karl Llewellyn, that the idea of a constitution is tied to the idea of an institution. From the point of view of legal theory, the contextual mapping method permits us to systematically examine the conditions of sovereignty as well as its consequences for social organization. This means that we might more systematically examine the social forces behind the *grundnorm*, or behind the rule of recognition.

The constitutive process thus involves human beings who pursue constitutive authority as a value, in roles specialized to the institutions of power through institutions specialized to claiming and constituting the system of authority in society. The above phase analysis, with its methodological, conceptual markers, gives us a sense of the comprehensive nature of this process and offers us prospective guidance to understand it with more particularity. 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.[106] The broad outline of the theoretical nature of the contextual method, especially 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.

III. FROM CONFLICT TO SOVEREIGN GOVERNANCE: THE DYNAMIC OF POWER AND CONSTITUTIONAL AUTHORITY

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[103] *See generally* Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15 (July 11, 2000) (entered into force May 26, 2001), *available at* <http://www.africa-union.org> (last visited November 24, 2003).

[104] *See generally* Charter of the Organization of American States, as amended, adopted April 4, 1948, 119 U.N.T.S. 4. The interplay between force and sovereignty was brought to the fore when the Protocol of Washington, 33 ILM 1005 (1994), amended the original OAS Charter by including a modified Article 9, which authorizes the suspension of a member state if its democratically constituted government is forcefully overthrown.

[105] From the perspective of the New Haven School, international lawmaking or prescription is seen as a process of communication involving commincator and target audience: the communication of symbols of policy content, the symbols of authority, the symbols of controlling intention. *See* W. Michael Reisman, International Lawmaking: A Process of Communication, The Harold D. Lasswell Memorial Lecture (Apr. 24, 1981). That is to say, they discuss three aspects of prescriptive communication, which essentially convey legal norms because they designate policy that both emanates from a source of authority and create an expectation in the target audience that the policy content of the communication is intended to control. *See World Constitutive Process supra* note 72 at 274. These three signals 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. *See* Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1966-67).

[106] 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 in a more objective way. More importantly, however, the technique permits us to look behind the *grundnorm* realistically and dynamically.

The methodological outline of contextual mapping provides a background for exploring the interdependence between ideas, such as power and conflict on the one hand and constituting governance and sovereignty on the other. The conceptual basis of the connection between social conflict and governance is complex[107] and requires clarification. Realistically, conflict and its polar opposite, collaboration, are present in all forms of social organisation; indeed, they have ever been ubiquitous manifestations in States and societies. With regard to the term "governance," we are, of course, alluding to constituted authority, usually in the form of the State. Yet, in the hands of observers rather than lawyers, constitutions are nothing but codified expectations of authority and stability—whether or not they are written—in contradistinction to the prospect of continuous (even violent) conflict over how power and authority are to be constituted and exercised. 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 might 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[108] that is regarded as indispensable to economic development in market systems.[109] Similarly, non-violent competition in governance is indispensable, not only to facilitate openness, but also to further progress and change in society.[110]

The concept of sovereign governance generally refers to the constituted authority of the State.[111] If we subordinate (or confine) the definition of the term, "governance" to sovereignty, the gloss on constitutionalism, which is reflective of complex accommodations of authority and control, suggests that explanations of the practical distribution of power and authority within a State are still required. Additionally, should we wish to redesignate a State's sovereign character from, for example, a terror-prone body politic, or a failed State, or a State enmeshed in high or low-intensity, violent political conflict, to something else,[112] the question of what kinds of transformations are possible or appropriate[113] arises. This is the dynamic challenge of sovereignty.[114]

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[107] From a sociological standpoint, conflict can eventually create organization. See L. A. COSER, THE FUNCTIONS OF SOCIAL CONFLICT (Glencoe, IL: Free Press, 1956). Organizations created from a conflict can be characterized by their complexity, division of labor, institutionalization, and goal displacement. *See id*.

[108] John Stuart Mill regarded economic competition as a legal sanction to harm others and cause conflict. *See* JOHN STUART MILL, ON LIBERTY 87-88 (1975).

[109] *See* SUSAN STRANGE, THE RETREAT OF THE STATE—THE DIFFUSION OF POWER IN THE WORLD ECONOMY 46 (1996) ("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).

[110] Generally, the equitable distribution of benefits and burdens in a community is crafted and balanced by that community's physical survival needs; such a distribution may be a logical consequence of objective morality or the result of non-violent competition between individuals and groups with regard to economics, beliefs, etc. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[111] The roots of this modern concept of governance can be traced to the Eighteenth Century Federalist notion that "thought in terms of authority and stressed the responsibilities of the constituted authorities to govern." *See* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 10 (1956).

[112] *See* Richard D. Kearney, *The Twenty-Sixth Session of the International Law Commission*, 69 A.J.I.L. 591, 599 (1975) (discussing the International Law Commission's commentary on whether there is a distinction between a post-conflict, newly independent state and a separated state).

[113] *See* DANIEL P. O'CONNELL, INTERNATIONAL LAW 365 (1970) (maintaining that any disruption to the international legal community as the result of changes in state sovereignty can be minimized by the rules of state succession).

[114] *See infra*, Part VIII Abuses of Sovereignty, notes 296 to 313 and accompanying text.

The commonly accepted normative objective of State transformations has been in the general direction of good governance.[115] The indicators of good governance are basically uncontroversial; they include elements of transparency, accountability, and responsibility.[116] These principles presuppose a democratic political culture supported by the rule of law. However, the complex accommodations and understandings of the actual distributions of power within a State often obscure structural and functional elements crucial to understanding the actual conditions of governance[117] as well as the prospect of transformation in the direction of sovereignty characterized by good governance. Thus, the presupposition that a democratic sovereign State will necessarily engage in good governance is not axiomatic truth. Injustice does happen in democratic States, hence the salience of the rule of law and sovereign authority.

Let us explore these insights in the context of Africa because a disproportionate number of new sovereigns have emerged from the conflict and decolonization characteristic of the continent. It is said that the significant power of the African State is centralized in the metropole.[118] It may still be the case that actual authority and control in the State at large may be in the hands of traditional forms of authority and control outside the metropole; in other words, a State that appears to have a highly centralized, valid authority structure might, in fact, be quite anarchic.[119] A fashionable phrase that is often used interchangeably with good governance is "civil society."[120] We would suggest that an active civil society in the African continent is far more ubiquitous than it is commonly supposed, not because it is self-consciously cultivated, but because it is a social reality.[121] Perhaps it is representative of the strengths of society and social organization; it might also represent a weakness of the State. The challenge is to reorganize State and civil society so that they complement each other and strengthen normative foundations of good governance rather than undermine the possible existence of good governance by opposing each other. To focus on the State, however, is not only to suggest that the

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[115] *See generally* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 A.J.I.L. 46 (1992). *See generally* BETWEEN SOVEREIGNTY AND GLOBAL GOVERNANCE: THE UNITED NATIONS, THE STATE AND CIVIL SOCIETY (1998) (discussing the nature of contemporary changes in sovereignty—specifically in the post Cold War world—toward collective government and the capacity of the United Nations to manage this change).

[116] *See* HILTON L. ROOT, SMALL COUNTRIES: BIG LESSONS: GOVERNANCE AND THE RISE OF EAST ASIA PASSIM 145 (1996) (observing that the definition of "good governance" is complicated, but that "it must give equal account to the particular and the universal. The abstract and the concrete must be blended. Leadership must be balanced by institutions…[and] Democracy [must be balanced] by meritocracy").

[117] For example, *see generally* JOSEPH A. CAMILLERI & JIM FALK, THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD (1992) (exploring the impact of economic, technological, and institutional changes in sovereignty).

[118] For example, *see* D.K. FIELDHOUSE, BLACK AFRICA 1945-80: ECONOMIC DECOLONIZATION & ARRESTED DEVELOPMENT 55 (1986) (observing that the colonial "governments" in Africa were merely administrative bureaucracies crafted from concepts established by the metropoles).

[119] Political philosophers have long argued that organized society is substantially the result of the human desire to forestall anarchy, which suggests that though society might be apparently organized, it may yet have an anarchic core. *See* THOMAS HOBBES, LEVIATHAN, 106 (1994) (1651).

[120] Hobbes and Locke held that the central purpose of civil society is to institutionalize the natural right of individuals to protect themselves. *See id.* at 117; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 323-25 (1988) (1690).

[121] *See generally* JEAN-FRANCOIS BAYART, CIVIL SOCIETY IN AFRICA, IN POLITICAL DOMINATION IN AFRICA: REFLECTIONS ON THE LIMITS OF POWER 109-25 (1986) (exploring how the State relates to civil society with regard to political development in Africa); *see generally* CIVIL SOCIETY AND THE POLITICAL IMAGINATION IN AFRICA: CRITICAL PERSPECTIVES (1999) (suggesting that civil society can be multi-faceted, have many pretexts, is essentially exclusive and egalitarian, and is susceptible to autocratic, parochial application in untried territory); see also Naomi Chazen, *State and Society in Africa: Images and Challenges*, *in* THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA 325, 325-41 (1988) (exploring political change and social challenges faced by continental Africa and Africans).

State's framework of power is often complex and challenging, but also that it requires wider contextual understanding to appreciate its inner workings and general potential.

Conceptions of the State, governance, and society do not weaken or subvert the concept of sovereignty. The world is not characterised by rigidly bound or hermetically sealed bodies politic. Rather, the world is comprised of complex patterns of interdependence and interdetermination, which is generally referred to as "globalism."[122] To some, the phenomenon of globalism seems to be a novel form of cultural or political dominance. These perceptions may require States and societies to be more aware, or in some cases concerned, about the problems and involvements of nearby countries, with special regard to regional threats and opportunities. Thus, 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 region as a whole.[123] 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, labour, 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 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.

The complexity of the notion of sovereign governance must be understood in light of the existence of problematic conflicts, conflict prevention, and the imperative of developmental values.[124]

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[122] Thomas Franck observed, "never…have notions of sovereignty demanded as much…rethinking as now." *See* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 3 (1995). This was because accelerating international interdependence, which exploded at the end of the Cold War, created new international circumstances that have since been characterized by the sometimes banal rubric of "globalism."

[123] The Southern African Development Community (SADC) was established in 1992 and replaced the Southern African Coordination Conference in order to advance cooperation among member states (Angola, Botswana, Malawi, Mozambique, South Africa, Tanzania, Namibia, Zambia, and Zimbabwe) and to support their economic growth and development. *See* Robert Rangeley et al., *The World Bank, International River Basin Organizations in Sub-Saharan Africa* 11-12 (World Bank Technical Paper No. 250, 1994).

[124] Some international scholars suggest that globalization detrimentally affects the sovereignty governance of developing States. *See* Dorith Grant-Wisdom, *Globalization, Structural Adjustment, and Democracy in Jamaica*, *in* DEMOCRACY AND HUMAN RIGHTS IN THE CARIBBEAN 194-95 (1997) (discussing State sovereignty and globalization). *See also* DAVID HELD & ANTHONY MCGREW, GLOBALIZATION/ANTI-GLOBALIZATION 23-24 (2002) (surveying the disputed legitimacy of global and regional interconnectedness, as well as the effect of intergovernmental, transnational, and supranational forces on State sovereignty).

A major purpose of the UN Charter is the maintenance of international peace and security.[125] Other vital Charter purposes include the commitment to global constitutional order and the rule of law as well as the promotion of social progress, human rights, and development.[126] The Universal Declaration of Human Rights States in blunt terms that if humanity is to avoid the scourge of war and recourse to rebellion, there must be a universal respect for human rights; that is, the notions of peace and human rights are interdependent.[127] When peace is compromised, the process of human rights violations is accelerated.[128] When human rights violations transpire, the capacity for conflict is escalated. Therefore, it should come as no surprise that the African agenda to create peace and security is tied to the existence of a new form of sovereignty, which is characterized by humane sovereign governance, and social, cultural, and economic equity.

We hold that "good" sovereign governance is critical if peace and security is to be achieved. The existence of peace and security, in turn, is critical for a comprehensive culture of human rights to develop, which also requires an institutional capacity if it is to be sustainable. Accordingly, sovereignty is salient because it is supported by civil society, the rule of law, and the people, in whom authority is ultimately vested. The successful sustainment of human rights, people-oriented culture will accordingly sustain peace and sovereign integrity. The political and juridical problems we confront generally harmonize on the perceived issue that sovereignty is actually bereft of authority; in other words, acting unilaterally, parochially, or chauvinistically can never sustain the interdependence required to generate good governance, peace, development, and the empowerment of civil society, which comprise goals of the United Nations, a clear foundation of global interdependence.

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[125] *See* ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 836-41 (1985) (documenting that the purposes of the United Nations are to "maintain international peace and security" and to encourage "friendly relations" and cooperation between nations).

[126] To some extent, all international law is a form of international human rights law because the rights attributed to a State are effectually the rights had by a group of people. *See* Harold G. Maier, *Ethics, Law, and Politics*, 15 YALE J. INT'L L. 190, 194-95 (1990). As HLA Hart taught us, only human beings can have expectations regarding the capabilities of decision-makers because only human beings can make decisions relevant to the State and international law. *See* HART, *supra* note 13, at 198-99.

[127] The Universal Declaration of Human Rights comprises the most extensive applicability of all international law by providing human rights guarantees for all people in all locations at all times. See Universal Declaration of Human Rights 71, U.N. Doc. A/810, arts. 13, 14 (Dec. 10, 1948). All individuals everywhere are guaranteed right to the right to "life, liberty and security of person" (Article 3) because "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Article 1). All peoples are likewise guaranteed such freedoms as that from torture and cruel or inhuman treatment or punishment (Article 5), as well as freedom from arbitrary arrest and detention and to fair and just trial by an impartial tribunal (Articles 7-11).

[128] In Justice Weeramantry's famous Nuclear Weapons dissent, he articulated:

> The enormous developments in the field of human rights in the post-war years, commencing with the Universal Declaration of Human Rights in 1948, must necessarily make their impact on assessments of such concepts as "considerations of humanity" and "dictates of the public conscience". This development in human rights concepts, both in their formulation and in their universal acceptance, is more substantial than the developments in this field for centuries before. The public conscience of the global community has thus been greatly strengthened and sensitized to "considerations of humanity" and "dictates of public conscience". Since the vast structure of internationally accepted human rights norms and standards has become part of common global consciousness today in a manner unknown before World War II, its principles tend to be invoked immediately and automatically whenever a question arises of humanitarian standards.

See Nuclear Weapons, 1996 ICJ REP. at 490.

IV. SOVEREIGNTY AND THE UN CHARTER

The Charter of the United Nations is more than a formal constitution for the international community. From the point of view of contextual mapping, it is an outcome of the world, social, and power processes. In the aftermath of World War II, with the experience of total aggressive war as well as a vast depreciation of human dignity, the Charter can be seen as a reaction to the form of conflict and its consequences represented by the war. The Charter system also inherited as a condition of its own structure the sovereign nation States of the world community. Many of those sovereigns were members of the League of Nations. It also inherited a sizable body of international law, which preceded the Charter process. One of the principles it inherited was the principle articulated in the *Lotus* case[129] that restrictions upon the sovereignty of States could not be presumed. This seemed to suggest that in writing the Charter, 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 the veto in the League. The UN Charter, in effect, would have to respond to these and other 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 key terms: "We the Peoples of the United Nations determined…"[130] The references to "Peoples" and "nations," when coupled with the term "determined," suggest that the people of the world are the ultimate source of international authority; moreover, the people have "determined," or made an affirmative decision, to adopt a Charter of the UN because of certain problems and conditions of global salience.[131] The member States comprising the UN are sovereign; the idea that sovereign legitimacy and authority under the Charter is derived from "the Peoples"[132] 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.[133] In short, the tacit assumption of the authority of sovereignty is actually rooted in the perspectives of all people 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: war prevention and security;[134] protection of human rights and dignity;[135] respect for social progresses according to the rule of law;[136] and higher

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[129] *See generally, The Case of the S.S. Lotus*, P.C.I.J., Ser. A, No. 10 (1927).
[130] *See* UN Charter, *supra* note 17, at pmbl.
[131] The promulgation of the UN Charter in 1945 created an unambiguous, globally codified constitution is it "not merely a treaty…[it is] 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 A.J.I.L. 63, 66-67 (1991).
[132] *See* UN Charter, *supra* note 17, at pmbl.
[133] Article 1 of the Charter even provides that "the Purposes of the United Nations are to 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*., at art. 1. This statement of purpose safeguards the rights of he individual because the Charter tacitly recognizes that the responsibility of maintaining international peace and security falls squarely on the shoulders of individuals.
[134] *See id*., at pmbl. (proclaiming the United Nation's pledge "to maintain international peace and security, and…to ensure …that armed force shall not be used, save in the common interest").
[135] *See id*. (proclaiming the United Nation's goal of reaffirming "faith in fundamental human rights [and] the dignity and worth of the human person").
[136] *See id*. (proclaiming the United Nation's pledge to "promote social progress ").

living standards and development, with the goal being global socio-economic equity.[137] These principles were based on Roosevelt's four freedoms: freedom from fear, want, freedom of expression, and freedom conscience and belief,[138] all of which comprised the war aims of the Allies.

The concepts of "united" and "nations" must also 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.[139] Accordingly, the efficacy of the UN can be measured, in some degree, 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. Whether the United Nation is more than the sovereign sum of its parts and whether it has the authority to invoke an institutional capacity broader than the sum of its sovereign parts is a more complex question; the broad answer is "yes," in some degree, and "no" in other circumstances. 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 Chapter I of the Charter spell out the scope (including the outer limits) of international concern and the limitations on sovereignty.[140] Chapter II gives us a different structure of the division of competence and concern. For example, Article 1(1) States that the "organization" is based on the principle of sovereign equality of member States.[141] Article 2(7) comes closest to defining sovereignty by indicating that the UN is not authorized to intervene "in matters essentially within the domestic jurisdiction of any State."[142] This article could as well 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."[143] Among the specific restrictions on State sovereignty in Article (2) are that States are subject to a good faith obligation to honor charter values and that they must settle disputes by peaceful methods.[144]

A further criterion that strengthens the principle that the UN Charter is a sovereignty-dominated instrument is found in the membership provisions of Chapter II. Article 3(1) States that the original members of the UN "shall be States."[145] Article 4 States that membership in the UN is open to "all other peace loving States which accept the obligations contained in the "Charter."[146] 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. Although Article 6 may be exercised in highly unusual or exceptional cases, it does stipulate that a State may be expelled from the UN if it is a

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[137] *See id*. (proclaiming the United Nation's pledge to respect "the equal rights of men and women and of nations large and small").

[138] *See Four Freedoms Speech, Franklin D. Roosevelt, 1941,* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663 (Facts-On-File, Inc., ed. 1995).

[139] Oppenheim asserts that the phrase "sovereign nation" entails two kinds of sovereignty possessed by each State: *dominum*, *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)

[140] *See* UN Charter, *supra* note 17, at pmbl. and Chapter I.

[141] *See id.* at art. 1(1).

[142] *See id.* at art. 2(7).

[143] *See id.* at art, 2(4).

[144] *See id.* at art's. 1(2) and 1(3).

[145] *See id.* at art. 3(1).

[146] *See id.* at art. 4.

persistent violator of the UN Charter.[147] The scope of prohibited activity that results in expulsion may be controvertible. For example, expulsion may entail the loss of recognition. Perhaps it might also impose a duty to not 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 highly controverted, but at least in theory the question of expulsion under Article 6 puts into perspective 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 sovereignty of the State itself.[148] In short, the Charter supports and seeks to protect and advance a particular form of good governance-oriented sovereignty. It also seeks to discourage other forms of sovereignty associated with State absolutism, which seeks to position sovereignty above Charter obligations.

There are, of course, other UN Charter limits on sovereignty that emerge from the creation of the institutions of decision-making that comprise the UN. For example, Chapter IV, which outlines the composition and workings of the General Assembly, gives the Assembly the power to highlight any issue and mobilize Assembly opinion by making it a matter for international discussion and elaboration. Specifically, the General Assembly States that Article 10 "may discuss any matter within the scope of the…Charter."[149] In addition, the Assembly has the power to initiate studies and make recommendations;[150] this "promotional" Assembly function may have expectation-creating communicative properties. Assembly recommendations may even be a form of soft international law making that might be binding on sovereign States in limited circumstances.[151]

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.[152] The five permanent members have the special power of the veto in the Council.[153] Other elected members have extra powers by virtue of membership in the Council, but do not exercise veto competence. The importance of these powers cannot be gainsaid; the Security Council is given the primary global responsibility for peace and security[154]and has the competence to enforce its decision pacifically (Chapter VI) or by the use of force (Chapter VII).[155] It has the competence to determine whether there exists "any threat to the peace, breach of the peace, or act of aggression."[156]

The powers of the Security Council, even when supported by the five permanent members, are nevertheless subject to certain inherent powers allocated to sovereign States. Article 51 of the Charter makes clear the sovereign prerogative of the inherent right of self-defense.[157] The term "inherent" is ambiguous.[158] It seems to make reference to the notion that Article 51 itself codifies this "inherent"

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[147] *See id.* at art. 6.
[148] *See id.* at art. 6.
[149] *See id.* at art. 10.
[150] *See id.* at art. 10.
[151] *See id.* at art. 13. *See generally Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20).
[152] *See* LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 290-309 (3d ed. 1969) (discussing the history of the Charter of the United Nations and offering justifications as to why the Security Council is imbued with such power).
[153] *See* UN Charter, *supra* note 17, at art. 27(3).
[154] *See id.* at art's. 24, 41, 42.
[155] Specifically, *See id.*at art. 42.
[156] *See id.* at art. 39.
[157] *See id.* at art. 51.
[158] The International Court of Justice has not interpreted the terminology employed in Article 51 regarding a State's right to self-defense, especially the term, "inherent." Accordingly, it can be interpreted using one or more of the following four methods: 1) textual; 2) systematic; 3) intentional; and 4) teleological. *See* 1 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 153-54 (4th ed. 1960). The textual approach is comprised of a "plain meaning," contextual reading

right. At the same time "inherent" may refer to rights that exist, but which are not clearly articulated in Article 51. It is one of the most contested provisions in the entire Charter, and possibly of all of international law.[159] What seems to be clear is that the Charter represents a continuing constitutional process of conflict and collaboration itself about the basic architecture of international law and international relations. The contestation reflects sometimes 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, while anchored in sound precepts of international law, are highly controverted in the actual practice of international law and international relations. When we examine the UN Charter as a process of communication and collaboration, a continuing process for 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 growth of human rights and humanitarian law standards and the strength of popular support they experience in global and civil society puts additional pressure on both the institutions of international governance as well as the foundations of sovereign governance within the international community. What contextual mapping provides is a set of markers by which we may more realistically appreciate the fluidity and realistic challenges of the evolving international constitutional order.

V. SOVEREIGNTY AND UNIVERSALIZING INTERNATIONAL CRIMINAL JURISDICTION

One of the most important outcomes of the conflict of World War II (including the concept of total war and the idea that the State can exterminate, enslave, or otherwise brutalize human beings it regards as "others" and "inferiors" even if these people were citizens of the State or citizens of States subject to belligerent occupancy) was the principle that the aggressor State abused its sovereignty and its leaders could be accountable directly to the international community for criminal conduct. The principle established was a challenge to the scope of sovereignty, which was inherited from the (pre-WWII) past. These changed were, in fact, revolutionary from an international law/international relations point of view. They were major changes in the international constitutional system, not only as limitations on sovereignty, but also by making individual State officials directly accountable, they

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of ambiguous words regardless of the drafters' intent. *See id*. The systematic approach analyzes the "four corners" of the document, and seeks to assign the document consistent phraseology. *See id*. The intentional approach is comprised of a thorough analysis of the drafters' intent at the time the document was signed. *See id*. The teleological approach considers the function and goals of the document throughout the passage of time. *See id*.

[159] For example, assume that State A has stockpiled 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 ius 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.

created the principle that individuals have rights and obligations directly under international law. Contextual mapping permits us to delineate these facts, perhaps with greater clarity.

The limitations on sovereignty and State absolutism covered such concerns as those identified with the *jus ad bellum*, the *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 Nazi defendants also had basic rights under international law, then doctrinally, the individual for certain purposes was also a subject of 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 strongly asserted that States as sovereigns have no competence to commit acts of aggression, transgress the Geneva Conventions, and its protocols or violate basic fundamental human rights. As previously mentioned, the Nuremberg Tribunal held that States and sovereigns are abstractions and can best be held responsible if it is recognized that behind the State and the sovereign are the actual, finite State of officials. Some of these officials were held to account directly under international law; they were tried, convicted, and executed.[160] The implications of this idea were—in some degree— problematic for the post-World War II State system.

Nuremberg established the principle that State officials and leaders 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 and breaches of fundamental moral decency. Ultimately, they could be 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 to account. 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.[161] This development was mainly inspired by a new international alignment of progressive States; they are the so-called "like-minded" group of States actors.[162] Super power support for these developments remained lukewarm or in some instances hostile.[163] At the same time, smaller States

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[160] 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 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, 288. 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).

[161] *See generally* 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/189/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

[162] *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).

[163] *See* Joseph Lelyveld, *The Defendant*, THE NEW YORKER, May 27, 2002, at 82. ("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"). *Id* at 87. 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

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.

As we have seen, Spain issued an indictment against General Pinochet and asked the United Kingdom[164] to apprehend and extradite him to Spain to stand trial there for violations of international criminal law. We have noted that the House of Lords eventually ruled that although he was extraditable under international human rights law, General/Senator Pinochet's State of health made him (apparently) unfit to be extradited and possibly tried for his alleged crimes in Spain. Other States such as Belgium[165] have already tried a case[166] 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[167] and the current Prime Minister of Israel.[168]

In the case of the African Foreign Minister, the World Court ruled that the arrest warrant could not be issued against the official since he was protected at the time by the principle of sovereign immunity.[169] In Arusha, the ad hoc tribunal of Rwanda, a court created by the Security Council, convicted a Rwandan *bourgmestre*, or elected commune leader—a position akin to being mayor of a

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Cong., 2d Sess. (2002). *See generally* JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 11-15 (2002).

[164] The notion of Universal Jurisdiction exercised by an individual state or sovereign is deeply rooted in British practice of the 19th Century. Acts of piracy violated the law of nations. *See* OPPENHEIM, *supra* note 1 at 616. 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., Philadelphia, Lea & Blanchard 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 617. 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.

[165] 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), in which Belgium enacted legislation that gave 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] to give Belgian courts jurisdiction over crimes against humanity genocidal acts. *See Loi Relative a la Repression des Violations Graves de Droit International Humanitaire*, Art. 3 A-B (1999), published in Moniteur Belge, Mar. 23, 1999.

[166] 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).

[167] 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 Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*) 441 I.L.M. 536 (2002) at para. 1 [hereinafter Case Concerning the Arrest Warrant].

[168] *See* Tom Miles, Sharon faces war crimes trial once out of office, Indep. (London), Feb. 13, 2003, at P12 (reporting that Belgium's highest court ruled that after Israeli Prime Minister Ariel Sharon leaves office, he can be prosecuted for war crimes).

[169] *See* Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 167 at 209. 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.

city—on an indictment based inter alia upon the crime of genocide.[170] It is indeed remarkable that such an historic precedent should have taken place in Africa. In Europe, the ad hoc tribunal for the former Yugoslavia is currently trying Slobodan Milosevic,[171] and a General has already been convicted for crimes against humanity.[172] 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(4) of the UN Charter.[173]

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."[174] The terms "humanitarian law" included grave breaches of the Geneva Conventions of 1949,[175] violations of the laws and customs of war,[176] genocide,[177] and crimes against humanity.[178] 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 to the Rome Statute of the International Criminal Court affirms that the "most serious crimes" are of "concern to the international community and as a whole must not go unpunished."[179] 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."[180] 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.[181] None are "exempt from criminal responsibility."[182] Article 27(2) makes explicit that immunities or special procedural rules will not shield the court from exercising its juridical power.[183] The standard that delineates the (sufficiently horrendous) 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

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[170] *See generally* Judgment, Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998, International Criminal Tribunal for Rwanda).
[171] *See* Prosecutor v. Milosevic, Initial Indictment, Case No. IT-99-37 (I.C.T.Y., May 24, 1999), *available at* http://www.un.org/icty/indictment/english/mil-ii990524e.htm (last visited Nov. 21, 2003) (ongoing).
[172] Trial Chamber convicted General Radislav Krstic of genocide for the July 1995 massacre of more than 7,000 male Bosnian Muslims in Srebrenica and sentenced him to forty-six years imprisonment. *See Prosecutor v. Krstic*, Case no. IT-98-33-T, Judgment (Aug. 2, 2001) at para. 726. 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." *See id*. at para. 2.
[173] *See* UN Charter, *supra* note 17, at art. 2(4)
[174] *See* Statute of the Yugoslavian Tribunal art. 1, contained in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1170.
[175] *See id*. at art. 2.
[176] *See id*. at art. 3.
[177] *See id*. at art. 4.
[178] *See id*. at art. 5. Acts qualifying as crimes against humanity under the Yugoslavian Statute are similar to those delineated in the Nuremburg Charter, such as: extermination, murder, torture, enslavement, deportation, rape, imprisonment, political/racial/religious persecutions, and other inhumane acts. *Id*.
[179] *See* Rome Statute, *supra* note 161 at pmbl.
[180] *See id*. at art. 1.
[181] *See id*. at art. 27.
[182] *See id*. at art. 27(1).
[183] *See id*. at art. 27(2).

both the Ad Hoc Tribunals for Rwanda and the Former Yugoslavia.[184] Nuremberg did not include the crime of genocide within its jurisdiction since there was no such international crime in 1945. The Ad Hoc Tribunal's statute 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 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 crimes enumerated in the Rome Statute are 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. Individuals who constitute the "people" according to Article 16 "shall have the right to recognition everywhere as a person before the law."[185] Article 18 specifies the peoples right to freedom of thought;[186] Article 19 stresses the peoples "right to hold opinions without interference" and that the people "shall have the freedom of expression;"[187] Article 25 stresses the right to participate in the political welfare of the State, the universal right to vote and to participate in public service.[188] Perhaps the most significant change wrought by the UN Charter and subsequent practice is that the 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, and therefore sovereign acceptance into the European community of States, subject to strong normative standards of international justice.[189] 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

[184] These are genocide, crimes against humanity, war crimes, and the crime of aggression.
[185] *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 16, reprinted in 999 U.N.T.S. 171, and 6 I.L.M. 368, 369 [hereinafter ICCPR].
[186] *See id.* at art. 18.
[187] *See id.* at art. 19.
[188] *See id.* at art. 25.
[189] *See generally*, Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," Dec. 16, 1991, 31 ILM 1485, 1486 (1992).

regard to the rule of law, democracy and human rights."[190] The Summit of the Americas Declaration of Principles and Plan of Action articulated that democracy is the sole political system that guarantees respect for human rights and the rule of law.[191]

The 1991 Charter of Paris is another crucial expectation creating instrument that roots "sovereignty" in popular will of the people.[192] Respect for human rights and the rule of law is an essential safeguard against what this Charter calls "an over-mighty State."[193] Democracy, it declares, is "based on the will of the people" and is the "foundation of human respect."[194] These illustrations and many others are an indication that fundamental expectations of the nature of the State, including its basic institutions of governance and it sovereignty are being conditioned by what distinguished scholars have called a right to democratic governance.[195] The idea is that the formal historic requirements for the de facto recognition of a State (territory, population, internal governance, foreign relations)[196] have been supplemented by the 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 the laws to transparency, responsibility, 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 manifests 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 process prosecutorial reach.[197] 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.[198]

VI. AFRICAN SOVEREIGNTY AND WORLD ORDER

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[190] *See id*. at 1487.
[191] *See generally* Summit of the Americas: Declaration of Principles and Plan of Actions, 34 I.L.M. 808 (1995).
[192] *See* Charter of Paris For A New Europe, 21 November 1990, 30 ILM 190, 193 (1991).
[193] *See id*. at 193-94.
[194] *See id*.
[195] 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 AJIL 46 (1992).
[196] *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").
[197] *See* Rome Statute, *supra* note 161, at art. 5(1).
[198] Previous exercises of universal jurisdiction as a response to acts of genocide illustrates that mass extinction of people—the primary body of authority in non-totalitarian sovereign States—is criminal. It also shows that mass murder comprises an attack on the authority 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.

States that have evolved from the colonial experience 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. For this reason, the Organization of African Unity (OAU) developed a very modest institutional capacity to forge distinctively African concepts of continental legal obligation as limitations on African sovereignty. Correspondingly, African human rights have had a weak framework of intergovernmental support as well. This situation may well change.

Developments in Africa, including the recent adoption of the institution of the African Union, will significantly influence the scope of sovereignty in the future. 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 rule and colonial sovereignty.[199] 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. In effect, Africans were challenging a weak and outmoded form of colonial sovereignty. The political developments that followed the demise of colonial rule, however, saw the assertion of a strong form of sovereignty based on the idea that developing societies carried historic weaknesses and needed to be protected from unjustifiable interference in their internal affairs.

Unfortunately, conditions of world order as well as issues specific to Africa seemed to strengthen the idea of sovereignty, not necessarily from outside pressures, but from internal contestations for power. As sovereignty became separated from issues of good governance, the authority foundations of African sovereignty also began to weaken. For these reasons, the concept of sovereignty, as understood in the African political and legal reality, is under pressure for change doctrinally, as well as in practice from what is, in effect, a pre-UN Charter version of sovereignty which claims that there can be no presumptive limitations on it. Given the crucial need for recognition of interdependency already explained, the pre-UN Charter version of sovereignty is indeed a dangerous legal and political artifact because it moves in the direction of sovereignty based on State absolutism.

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."[200] The reformulation of the doctrine in these terms would first 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 Organization of African Unity (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.[201] It might similarly be said that African

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[199] One of the most celebrated examples of this in history is the Republic of South Africa. *See Constitution of the Republic of South Africa, 1996*, Act No. 108 of 1996, s. 174 (entered into force 4 February 1997), Preamble (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").

[200] For some uses of this principle, *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); *see also* FRANZ XAVER PERREZ, COOPERATIVE SOVEREIGNTY: FROM INDEPENDENCE TO INTERDEPENDENCE IN THE STRUCTURE OF INTERNATIONAL ENVIRONMENTAL LAW (2000). *See Strengthening Humanitarian Law*, *supra* note 7, at 132-133.

[201] *See generally* ALFRED E. ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW (1936). *See generally* FRANK P. WALTERS, A HISTORY OF THE LEAGUE OF NATIONS (1952).

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.[202] When we explore how evolution of the African Union (AU), we see a greater political and juridical insistence on the principle of co-operative sovereignty as a cornerstone of a new form of continental governance in Africa.

VII. INTERNATIONAL SECURITY THREATS AND SOVEREIGNTY: THE TERRORISM PROBLEM

There are, of course, different ways to conceptualize the problem of international terrorism. One way is to view it as a completely antithetical strategy to the idea of law. This means that international terrorists seem to maintain an assault on the outcomes of stability and security, which characterize contemporary world order. Again, contextual mapping permits us to account for threats to the constitutive process in a far more explicit way than other approaches. 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 States protectors who in turn invoke the principle that sovereignty in international law does not permit intervention into the sovereign domestic jurisdiction of a State. States victims of terrorist acts of aggression are, of course, reluctant to concede the principle that may be attacked without the prospect of legitimate self-defense for real security concerns. After 9/11 the Bush administration developed a national security doctrine with important challenges to sovereignty, self-defense, the use of force and the issue of intervention.[203] The most controversial elements of the doctrine were the claims to preemptive intervention, the idea of the illegitimacy of "rogue"[204] State as well as the doctrine of regime change.[205]

The Bush doctrine construes conventional strategies of deterrence to be of little value[206] when the enemy is a non-State actor, protected by rogue sovereign States, and able to deploy weapons of mass terror and mass murder.[207] When such groups are fueled with religious, apocalyptic ideologies and their actions are effectively non-risk averse then there is a case for a more discriminating concept of sovereignty in international law, one which squarely embraces the fundamental values of modern

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

[203] *See generally* WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (Sept. 17, 2002), *available at* <http://www.whitehouse.gov/nsc/nss.pdf> (last visited November 21, 2003) [hereinafter National Security Strategy].

[204] Former Secretary of State Madeleine Albright designated Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria as state sponsors of terrorism, or "rogue states." *See* 31 C.F.R. 596.201 (2000).

[205] Generally, the practice of regime change has been a historically strategic objective of humanitarian interventions. "Regime change" is simply another phrase used to describe the use of unilateral force to change the international climate in some degree, which has apparently gained legitimacy since NATO bombed Serbia and Kosovo in 1999. A variety of commissions were established to review the lawfulness of NATO's action and eventually concluded that it was illegal, yet given the circumstances it was the right thing to do. *See generally* HOUSE OF COMMONS, FOREIGN AFFAIRS COMMITTEE—FOURTH REPORT, Kosovo (May 23, 2000), *available at* <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2802.htm>.

[206] The Bush administration believes that simple deterrence is insufficient. The administration intends to be prepared to respond to conventional and nuclear threats with defense capabilities over and above deterrence, including effective intelligence, surveillance, interdiction, and domestic law enforcement to detect any WMD threats. President Bush's strategy blends a reliance on enhanced counterproliferation measures, increased nonproliferation efforts to combat WMD proliferation, and consequence management to respond in the event that WMD are deployed against the United States. *See* National Security Strategy *supra* note 203.

[207] The future of terrorist attacks will assume a massive scope as terrorists adopt the use of biological and nuclear WMD to their strategy of "activated hatred." *See generally,* PHILIP B. HEYMANN, TERRORISM IN AMERICA: A COMMON SENSE STRATEGY FOR A DEMOCRATIC SOCIETY (2000).

international law and the UN Charter. In short, sovereignty is not simply a matter of control; it is as well a matter of authority as well.

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.[208] A critical question of historic salience was the notion that if 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 popular will. The identification of sovereignty with absolutism thus weakens the authority signal in the State. The UN Charter provides normative guidance when it makes membership contingent on a States' commitment to peace as well as its commitment to honor the major purposes of the UN Charter. The New Bush doctrine, which was formulated after September 11, 2001, actually sees certain kinds of States as either "terroristic" or "rogue-like." These concepts might simply be rhetorical. However, when they are viewed in the context of the changing authority standards of contemporary sovereignty, there may be an incentive to provide more precise typologies of State and sovereignty. There may also be demands that States, which seek the benefits of international society, should be more concerned about their authority predicate and practices of good governance under the Charter.

VIII. ABUSE OF SOVEREIGNTY

Scholars recognize a distinctive "abuse of sovereignty" concept.[209] This should not be unusual since the international system 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, and that delinquency could be described—in some cases—as an abuse of sovereignty.[210] For example,

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[208] *See* RESTATEMENT, *supra* note 196 at § 201 (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").

[209] Peter Kooijmans holds that "it is an abuse of sovereignty if a Government refuses to co-operate with the Organization, with the possible consequence that the Organization will be forced to intervene, at a later stage, and at much higher cost for the Organization as well as for the population, if the crisis becomes really explosive." *See* PETER H. KOOIJMANS, THE ENLARGEMENT OF THE CONCEPT "THREAT TO THE PEACE," IN PEACE-KEEPING AND PEACE-BUILDING, THE DEVELOPMENT OF THE ROLE OF THE SECURITY COUNCIL 120 (Rene-Jean Dupuy ed., 1993). Thomas Franck finds the concept of abuse of sovereignty in the context of Security Council Resolution 687, which asserts that "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 co-operation 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, 92-95 (Rene-Jean Dupuy ed., 1993). 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*.

[210] This characterization was used by the by the United States' 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 possiblility 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., Dec. 12, 1961) (1968) [hereinafter District Court Opinion] *aff'd* 36 I.L.R. 277 (Sup. Ct., May 29, 1962) (1968).

the Bush administration's rogue State idea seems to be an implicit recognition of the abuse of sovereignty concept.[211] Changes in international law and the scope of international obligation suggest that more discriminating typologies of sovereign State be developed, which allow us to critically account for the normative foundations of Statehood and sovereignty. We submit that there are (at least) thirteen typologies of different States in the international system that implicate the abuse of sovereignty idea.[212] They are:

- Failed States;[213]
- Anarchic States;[214]
- Genocidal States;[215]

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." *See* District Court Opinion *id*. at 74 (emphasis added). In other words, any effort by Argentina to protect a major war criminal such as Adolf Eichmann would comprise an abuse of sovereignty and would thus not be accorded legal recognition.

[211] President Bush used the phrase "rogue state" in Part V of the 2002 National Security Strategy of the United States of America entitled, "Prevent Our Enemies From Threatening Us, Our Allies, and Our Friends, with WMD." *See generally* National Security Strategy *supra* note 203. According to President Bush, rogue states are delinquent in their international obligations; they are those state which brutalize their own people, squander national resources for personal gain, give no regard to international law, threaten neighboring States, violate treaty obligations, acquire (or are determined to acquire) WMD (or similar advanced technology), are aggressive, sponsor terrorism, reject human rights, hate the United States, and hate the values of the United States. *See id*.

[212] These thirteen typologies constitute serious threats to the international constitutional system. Some of their characteristics may overlap, but they nevertheless challenge world order and provide incentives to change the paradigm in a more complete manner so that sovereign authority provides an ideal rather than a reluctant fit for the international system. This list does not include states in complex forms of constitutional association implicating conventional federal and confederal infrastructures, nor does it include non-self-governing entities in various forms of dependency and association (such as trust territories, paramount cities, colonies, occupied territories and states, associate states, etc.).

[213] A "Failed State" has been defined as one that is "*incapable* of protecting individuals within [its territory]." *See* KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, REFUGEE LAW AND POLICY 988 (1997). *See generally*, Symposium, Theoretical Perspectives on the Transformation of Sovereignty, 88 AM. SOC'Y INT'L L. PROC. 1 (1994) (delineating Somalia, Bosnia, and Cambodia as failed states). Accordingly, the U.N. 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). Respectively, *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 109-110 (1993) [hereinafter COLLAPSED STATES] (stating that Mozambique may lack infrastructural legitimacy); *see also* Martin Lowenkopf, *Liberia: Putting the State Back Together*, *in* COLLAPSED STATES, *id*. at 91 (noting that Liberia is "fragmented, the population dispersed, and the economy ruined"); *see also* Edmond Keller, *Remaking the Ethiopian State*, *in* COLLAPSED STATES, *id*. at 125, 128, 130 (stating that attempts to reorganize the infrastructure of Ethiopia have not been successful).

[214] Examples include Zaire and Afganistan. Zaire (currently the Democratic Republic of Congo) arguably qualified as an anarchic state. *See generally*, 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). Also, after the end of the Afghan-Soviet War in 1989, a struggle for power ensued in Afganistan 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.

[215] Examples include Nazi Germany, Rwanda, Burundi, Cambodia, and Stalinist Russia. Regarding Nazi Germany, *see generally* RICHARD LAWRENCE MILLER, NAZI JUSTIZ: LAW OF THE HOLOCAUST (1995); *see generally* ROBERT J. LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1988) (discussing examples of Nazi Germany's practices of Genocide, including the medical practice of experimentation and euthanasia). Regarding Rwanda, *see generally* ALISON DES FORGES, LEAVE NONE TO TELL THE STORY (Human Rights Watch 1999); *see also* PHILIP

- Homicidal States;[216]
- Rogue States;[217]
- Drug-influenced States;[218]
- Organized crime-influenced States;[219]

GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 147-71 (1998); *see also* GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 276-80 (1995); *see also* Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 390-91 (1999). Regarding Burundi, *see generally Burundi's Civil War: The People Want Peace*, ECONOMIST, Sept. 28, 2002, at 44; *see also* Andrew Purvis, *A Contagion of Genocide: The Civil Wars of Rwanda and Burundi Spread to Eastern Zaire*, *in* "A Bloody Conflict the World Ignores," TIME, July 8, 1996, at 38. Regarding Cambodia, *see generally*, THE UNITED NATIONS AND CAMBODIA: 1991-1995 (1995); *see generally* Tina Rosenberg, *Cambodia's Blinding Genocide*, N.Y. TIMES, April 21, 1997, at A14; *see generally* POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977 (David P. Chander et al. eds. & trans., 1988). Regarding Stalinist Russia, *see generally* M. WAYNE MORRIS, STALIN'S FAMINE AND ROOSEVELT'S RECOGNITION OF RUSSIA (1994); *see also* Barbara B. Green, *Stalinist Terror and the Question of Genocide: The Great Famine*, *in* IS THE HOLOCAUST UNIQUE?: PERSPECTIVES ON COMPARATIVE GENOCIDE 138, 156 (Alan S. Rosenbaum ed., 1996) (arguing that Stalin did not intentionally exterminate Ukrainians; rather, the Great Famine "was the result of Stalin's effort to ... rapidly industrialize...[and since] [t]he burden of industrialization…fell most heavily on peasants…[and the] Ukrainians were overwhelmingly a peasant people, [so] they suffered disproportionately").

[216] 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* Chris A. Anderson, *Assassination, Lawful Homicide, and the Butcher of Baghdad*, 13 HAMLINE J. PUB. L. & POL'Y 291, 311 (1992); *see generally* CON COUGHLIN, SADDAM: KING OF TERROR (2002); *see generally* ELAINE SCIOLINO, THE OUTLAW STATE: SADDAM HUSSEIN'S QUEST FOR POWER AND THE WAR IN THE GULF (1991). Regarding Mao Zedong's People's Republic of China, "[a]round thirty-five percent of the [approximately two hundred] criminal offenses specified in the Criminal Law are now punishable by death." See AMNESTY INTERNATIONAL, HUMAN RIGHTS WATCH/ASIA, Vol. 6 No. 9, Aug. 1994, at 9. 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 id*. 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, expropriated their property; during his homicidal rule, Amin transformed Uganda into a "slaughter-house" by killing or bringing about the disappearance of hundreds of thousands of Ugandans). An approximate figure of the number of individuals murdered by the Ugandan state is 750,000 between 1971-1987. *See* Arlene Levinson, *World Wipes Bloody Hands as Century Nears End: Advance of Civilization Has Brought with it Decline in the Value of Sanctity of Life*, PEORIA J. STAR, Sept. 17, 1995, at A1; *see also* SAMUEL DECALO, COUPS AND ARMY RULE IN AFRICA: MOTIVATIONS AND CONSTRAINTS 139-198 (2d ed. 1990) (describing Amin's rule in Uganda as a murderous "personal dictatorship").

[217] 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).

[218] Examples include Taliban-controlled Afganistan and Columbia. In post-Afghan-Soviet War Afghanistan, drug gangs, which armed themselves and formed into bands of highwaymen, clashed as the result of widespread drug dealing. *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. Additionally, the drug trade has historically been a significant element in the infrastructure of the State of Columbia, the power has been felt worldwide. One reason was that Medellin Cartel—run by Columbian drug lords—has consistently produced the majority of the world's cocaine. *See* Bradley Graham, *Impact of Columbian 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 Columbian drug traffickers benefited from other Columbian government ties and continued to launder billions of "narcodollars" through banks in Panama even after Noriega was arrested).

[219] Examples include Columbia, the Russian Federation, Italy, and Sicily. In Columbia, the Revolutionary Armed Forces of Colombia (FARC), a guerilla terrorist network, funds its rebellion by it extensive connections to organized crime lords, especially by protecting 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). According

- Kleptocratic States;[220]
- Terrorist States;[221]

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to French Intelligence Reports, criminal organizations from Columbia, Russia, China, Japan, and Italy periodically come together "to discuss carving up [certain geographic locations, such as] western Europe for drugs, prostitution, smuggling and extortion rackets." *See* Andrew Alderson & Carey Scott, *Crime Kings Meet to Carve Up Europe*, SUN. TIMES, Mar. 29, 1998. Regarding Russian corruption, it has been said that "the Russians stand out among their peers because they are talented enough and frightening enough to have achieved in two or three years what the others achieved in twenty or a hundred." *See* CLAIRE STERLING, THIEVES' WORLD 16 (1994). Indeed, Russia has been proclaimed "the world capital of organized crime." *See id*. at 17. The Russian "Mafiya" has been deemed "[t]he world's largest, busiest, and possibly meanest collection of organized hoods." *See id*. at 90. The number of individuals complicit in Russian organized crime has been approximated at three million. *See id*. According to Louis Freeh, former director of the U.S. Federal Bureau of Investigation, the number of countries in which branches of Russian organized crime have been established jumped from twenty-nine in 1994 to fifty in 1997. *See* Center for Strategic and International Studies, Russian Organized Crime: Global Organized Crime Project 2-3 (1997). *See generally* STEPHEN HANDELMAN, COMRADE CRIMINAL: RUSSIA'S NEW MAFIYA (1995). Regarding Italy and Sicily, States with weak infrastructures—such as Italy and Sicily—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 detailed analysis of the scope of Sicilian organized crime, *see generally* CLAIRE STERLING, OCTOPUS: THE LONG REACH OF THE INTERNATIONAL SICILIAN MAFIA (1990). 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. OF FIN. CR. 347, 347-349 (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 Held at Palermo, Italy, 11-14 December 2000*.

[220] A "corrupt [or kleptocratic] act violates responsibility towards at least one system of public or civic order and is in fact incompatible with any such system." See ARNOLD A. ROGOW & HAROLD D. LASSWELL, POWER, CORRUPTION & RECTITUDE 132 (1963). Examples of cleptocratic 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. 2-3, 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 & DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE-STUDIES 282-84 (Kempe Ronald Hope, Sr. & Bornwell C. Chikale eds., 2000). Abacha embezzled an estimated three billion dollars from Nigerian State funds during his five year reign. See *Swiss banks rapped over Abacha loot*, 4 September, 2000, available at http://news.bbc.co.uk/1/hi/world/africa/909972.stm (last visited November 22, 2003). The problem was self-perpetuating; past military rulers cited corruption as a chief impetus for overthrowing past regimes, yet corruption persisted under each new regime. *See* Erero & Oladoyin, *id* at 282. However, steps are currently being taken to attempt to eradicate corruption, but there is much to do. For example, *see* Ola Awoniyi, *Nigeria Starts Corruption Hearings, Official Pleads Not Guilty*, AGENCE FRANCE-PRESSE, May 28, 2001, at 1. As of 2001, corruption was still prevalent in Nigerian institutions of authority. *See* Corruption United Nations, Global Corruption Report 82 (2001), *available at* http://www.globalcorruptionreport.org/gcr2001.shtml#download (last visited November 22, 2003). 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 ten 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).

[221] 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 which, 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 has additionally

- Authoritarian States;[222]
- Garrison or national security States;[223]

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identified Cuba, Libya, and Syria as "terrorist States." *See US Expands "Axis of Evil"*, BBC NEWS, May 6, 2002, *available at* http://news.bbc.co.uk/1/hi/ world/americas/1971852.stm.

[222] Examples include Robert Mugabe's Zimbabwe, most States in the Middle East (Syria, Saudi Arabia, Egypt, Algeria, etc.), China, South Africa (under apartheid) etc. Robert Mugabe's Zimbabwe African National Union Patriotic Front (Zanu-PF) party was an increasingly corrupt source of authoritarian power in Zimbabwe, which resulted from racial tension and a colonial past even though at one time, Zanu-PF was a Maoist-type party that appealed to the "rural masses." *See* PATRICK BOND & MASIMBA MANYANYA, ZIMBABWE'S PLUNGE: EXHAUSTED NATIONALISM, NEOLIBERALISM AND THE SEARCH OF SOCIAL JUSTICE 77 (2002). 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). Mugabe's own authoritarian nature has been repeatedly indicated by his firm belief that he was above the law and not bound by court orders that were contrary to his intentions. It has been reported that "President Robert Mugabe has publicly declared that he will no longer respect court judgments that he deems unobjective. He has also ignored all court judgments against his controversial land reforms." *See* Basildon Peta, *Court Ruling Fails to Stop the Exodus of Zimbabwe Farmers*, INDEPENDENT (London), Aug. 9, 2002, at 14. South African President Thabo Mbeki, Nigerian President Olusegun Obasanjo, and Australian Prime Minister John Howard articulated that "Mr. Mugabe… will be held accountable for his corrupt practices" and refuted "the idea that the elections had been free and fair." *See* Editorial, *Zimbabwe's Loss*, WASH. TIMES, Mar. 21, 2002, at A18. Regarding the Middle East, authoritarian Middle Eastern regimes, particularly Saudi Arabia, continue to tightly maintain 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). See also 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). *See also* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 113 (1996) (stating that "[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…"). With regard to China, each year the United States 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 United Nations; the 1999 report on human rights practices was highly critical of the People's Republic of China (PRC). Specifically, the report states:

> 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.

See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999 (Joint Comm. Print 2000), *available at* <http://www.state.gov/www/global/human_rights/ drlreports.html> (last visited November 22, 2003). Regarding apartheid-era South Africa, African National Congress constitutional expert Albie Sachs articulated that South African law was transformed into a process which "under the guise of purifying and saving Roman-Dutch law managed to combine extremely authoritarian views supportive of the apartheid state with a medieval scholarship." *See* ALBIE SACHS, THE FUTURE OF ROMAN DUTCH LAW IN A NON-RACIAL DEMOCRATIC SOUTH AFRICA: SOME PRELIMINARY OBSERVATIONS 7 (1989). John Dugard stated that there existed a total absence of moral values in apartheid-era South African law. *See* JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 402 (1978). For a comprehensive analysis of the relationship between sovereignty and apartheid, *see* Winston P. Nagan & Lucie Atkins, *Conflict Resolution and Democratic Transformation*, 119 S. AFR. L.J. 174, 198 (2002).

[223] Examples include Israel and the United States of America. With regard to Israel, in the face of continuous security 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*

- Totalitarian States;[224] and
- Democratic rule of law States.[225]

AFFAIRS, 3(1):13-38 (Autumn 1996); *see also* Dan Horowitz, *Is Israel a Garrison State?* JERUSALEM QUARTERLY, 4:58-75 (Summer 1977). For an explanation of what constitutes a "Garrison State," *see generally* DAN HOROWITZ & MOSHE LISSAK, METZUKOT BEUTOPIA [Troubles In Utopia] (1990). 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); *see generally* DANIEL YERGIN, SHATTERED PEACE: THE ORIGINS OF THE COLD WAR AND THE NATIONAL SECURITY STATE (1977); *see generally* MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945-1954 (1998); *see generally* MELVYN P. LEFFLER, THE SPECTER OF COMMUNISM: THE UNITED STATES AND THE ORIGINS OF THE COLD WAR, 1917-1953 (1994); *see generally* WALTER LAFEBER, AMERICA, RUSSIA, AND THE COLD WAR, 1945-1992 (1967). Recent examples of US 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 (last visited September 25, 2003). In 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*.

[224] 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 most any changes to their academic, professional, and political statuses without getting permission from the political authority. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 10 (1962). Nazi Germany additionally employed social totalitarianism; mechanisms like secret police organizations and networks of informants and listening devices were common in order to maintain the Nazi grip on power. *See* Philip E. Agre, *Surveillance and Capture: Two Models of Privacy*, 10 THE INFORMATION SOCIETY 105-06 (1994). *See generally* A.L. UNGER, THE TOTALITARIAN PARTY (1974). Regarding the Soviet Union, *see generally* WILLIAM A. CLARK, AUTHORITARIAN ELITES AND POST-COMMUNIST TRANSITION IN THE FORMER SOVIET STATES (1998). *See also* Sam G. McFarland, et al., *Authoritarianism in the Former Soviet Union*, 63 J. PERSONALITY & SOC. PSYCHOL. 1004, 1008 (1992) (stating that the authoritarianism characteristic of the former Soviet Union was tied to conventionalism as opposed to ideology). This authoritarianism was political as well as social, and was often highly restrictive and violent; for example, communist leaders used organizations, such as the KGB, to use tactics against the civilian populace akin to those used by the "mafialike groups." *See* Brian Duffy & Jeff Trimble, *The Wise Guys of Russia*, U.S. NEWS & WORLD REP., Mar. 7, 1994, at 41, 43; *see generally* FREDRICK S. SIEBERT, FOUR THEORIES OF THE PRESS: THE AUTHORITARIAN, LIBERTARIAN, SOCIAL RESPONSIBILITY AND SOVIET COMMUNIST CONCEPTS OF WHAT THE PRESS SHOULD BE (1982).

[225] 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 201 (1989). "Sweden, it should be noted, can be taken as the exemplar of social democratic capitalism." *See* PETER DICKENS ET AL., HOUSING, STATES AND LOCALITIES 11-12 (1985). Regarding Norway, *see generally* DONALD MATTHEWS & HENRY VALEN, PARLIAMENTARY REPRESENTATION: THE CASE OF THE NORWEGIAN STORTING (1999) (articulating that Norway has long been an important, edifying model for the study of democracy). Moreover, the dynamics of Norwegian electoral and legislative politics can simulate insight to fundamental understandings of how democracy functions. *See id*. Regarding other democracies of note, *see* Evelyne Huber & John D. Stephens, *Globalisation, Competitiveness, and the Social Democratic Model*, 1(1) SOC. POL'Y & SOC'Y 47-57 (2002) (discussing social democracy in Norway, Sweden, Finland, and Denmark). With regard to South Africa, it arguably comprises 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* Daniel D. Bradlow, *Debt, Development and Human Rights: Lessons From South Africa*, 12 MICH. J. INT'L L. 647, 649 (1991) ; *see also* Adrien Katherine Wing, *Towards Democracy in a New South Africa*, 16 MICH. J. INT'L L. 689, 691-92 (1995) (discussing the victory of the African National Congress in the 1994 elections).

After World War I, former German colonies were reformulated and designed to honor the well-being of their dependent people. After World War II, the processes of decolonization and self-determined independence further affirmed this trend. The abuse of sovereignty, as reflected in the practices of totalitarian regimes such as Nazi Germany, de-legitimized the State's sovereignty, especially because it sought to industrialize the business of mass murder. The Nazis were not the only abusers of sovereignty. Professor Rudi Rummel has indicated that in the Twentieth Century, as many as 170 million people have been murdered by sovereigns, political groups, and claimants to sovereignty.[226] State absolutism fueled by authoritarian, totalitarian, or chauvinist ideologies has indeed created a crisis of legitimacy for the paradigm of international relations and legal order 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 essential, basic human rights, to despoil the eco-system, to reduce human aspirations to the whims of caprice, avarice, or arbitrary expedience flowing form 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, which can contemporaneously be expropriated from its primary perpetrators, the people. 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.

VII. THE CHANGING CHARACTER OF SOVEREIGNTY IN MUNICIPAL LITIGATION: STANDARDS OF INTERPRETATION IMPACTING ON THE DEFINITION OF SOVEREIGNTY AND SOVEREIGN RESPONSIBILITY

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. The 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 must often be decided in the national for a of national sovereigns. This is not unusual if one broadens one's perspective to note that domestic courts routinely make and apply multi-State private international law. They also have a vital role to play in the making and application of 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.

Two of the most important aspects of sovereignty that directly impact upon practical litigation are tied to the doctrines of sovereign immunity and Act of State. These principles are tied to the jurisdiction of domestic courts. Recently, the Spanish Supreme Court stated the importance of the relationship between jurisdiction and the sovereignty of a State in the context of asserting jurisdiction over a genocide claim. The Court stated:

> …jurisdiction is a manifestation of a State's sovereignty, which in many ways is delimited by other States. In this regard, the references to places not subject to any State sovereignty are not absolutely comparable to those

[226] *See* RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 9 (1994).

> in which jurisdictional intervention affects the acts committed in the territory of another sovereign State.[227]

The court went on to explain that in the criminal law context, the exercise of extraterritorial jurisdiction may be justified by the existence "of particular interests of each State,"[228] which could be based as well upon "the nature of the crime itself."[229] When the nature of the crime becomes the basis of universal jurisdiction, the domestic court is confronted with how to reconcile its claim to universal jurisdiction with "other principles of public international law."[230]

The general framework of the immunity of a sovereign is governed by the principle that a foreign sovereign cannot be subject to the jurisdiction of a coordinate sovereign without its consent.[231] This principle implies a form of absolute immunity from jurisdiction in the municipal courts of a foreign State.[232] The law currently recognizes a distinction in the law of sovereign immunity reflected in the principle that a sovereign would enjoy immunity in the courts of a foreign jurisdiction if that sovereign has acted within the ambit of the principle *jure imperii*. If sovereigns have acted *jure gestionis*, they are to be treated like any other litigant and enjoy no special immunities. Many States have legislated these principles into law, in, for example, the Foreign Sovereign Immunity Acts of the United States and the United Kingdom.

Many sovereigns have legislated these two principles into law, as indicated in the Foreign Sovereign Immunity Acts of both the United States and the United Kingdom. However, a huge amount of litigation still emerges in the courts over the precise scope of each of these doctrines. Indeed, one might suggest that the changing character of the reach of immunity or its restriction has a great deal to do with the forms of technical legal interpretation, which the courts use to analyze the statutory rules or to interpret the relevant case law. Indeed, when the role of domestic courts is appraised in the context of international litigation, an enormous amount of legal policy is determined by standards of construction and interpretation. The devil, so to speak, is often buried in the detail.[233] The conceptual basis of the distinction between *jure imperii* and *jure gestionis* is a reasonably clear one. The sovereign cannot engage in normal activities analogous to an ordinary citizen and be insulated from legal accounting in the ordinary courts. The sovereign cannot take rights and be immune from correlative obligations. The practical problem is that in the context of making specific applications, the juridical lines between these to ideas become more controverted. These controversies

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[227] *See Decision of the Spanish Court Concerning the Guatelmala Genocide Case*, Feb. 25, 2003 (Decision no. 327/2003), available at http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html (last visited November 25, 2003) at 18.
[228] *See id*.
[229] *See id*.
[230] *See id*.
[231] Sovereign immunity and the Act of State doctrine share a common origin. See generally Note, *Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity,* 17 U.S.F. L. REV. 91, 93-94 (1982). The principle underlying each can be traced back to the 17th Century English case, *Blad v. Bamfield*, 36 Eng. Rep. 992 (Ch. 1674). In *Blad v. Bamfield*, the King of Denmark granted the plaintiff, a Danish citizen, a patent which gave him exclusive trading rights with Iceland. When the plaintiff sought to enforce this patent in England, the English court granted him a perpetual injunction against suits brought by British subjects whose property was seized as the result of enforcing the patent. The court noted in its opinion that it would be "monstrous and absurd" to permit either a court to decide the validity of the King's patent or a jury to decide whether the British subjects have a right to trade in Iceland. See 36 Eng. Rep. at 993.
[232] It would be tedious to trace the development of the legal ways in which the absolute version of sovereign immunity has become subject to legal restrictions, so we shall forego doing so.
[233] See *Equal Emp. Opportunity Comm'n v. Arabian Am. Oil Co*., 499 U.S. 244 (1991). In this case, Justice Rehnquist claims that legislation enacted by Congress must be interpreted against "the backdrop of the presumption against extraterritoriality."

can be highly technical, involving conflicts about interpretation, construction of precedents and other relevant forms of legal advocacy, as well as decision-making in the domestic courts of concerned sovereigns.[234]

There is no simple way to measure the actual practice of States against concrete normative understandings, which in the modern era have sought to concretize the rules of humanitarian and human rights law as specific obligations that both restrict the sovereignty of the State and concurrently may enlarge the prescriptive and applicative reach of a State's jurisdiction to fulfill its international obligations. One thing is clear. The rules relating to both sovereign immunity and Act of State clearly codify a principle of limited sovereignty in the domestic courts of a State. Among the leading modern cases that seek to clarify the scope of sovereignty, the obligations of sovereignty, and the reality of international obligations for the protection for human rights and humanitarian law is the *Ex Parte Pinochet* case, decided in the House of Lords. The trail of the Pinochet case is complex, involving several House of Lords decisions. At the end of the day, both Pinochet and the human rights community sought to declare victory. The picture is not quite so simple. Ultimately, a reconstituted House of Lords did uphold the jurisdiction to extradite Pinochet to Spain.[235] However, it did so on excruciatingly narrow grounds supported by ostensibly confused, convoluted reasoning.

There are, of course, other opinions of the learned Law Lords that provide a much clearer picture of the nature of sovereign immunity, its limits, and the relevance of appropriately recognizing international law as imposing limits on what sovereigns can do and making them accountable on a near-universal basis. We give careful analysis to the Pinochet case because it presents an important technical problem of the interrelationship between municipal law and international law, namely the problem of what the appropriate standards are for giving meaning to a domestic statute triggered by the construction of an international legal rule or standard. 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 entrench 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?

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[234] Sovereign immunity is a doctrine of international law that prevents domestic courts from prosecuting or exercising other type of authority over foreign authorities. See, BLACK'S LAW DICTIONARY 1396 (6TH ED. 1990). Originally, it had an absolute character thus representing a total exemption for one nation from suit in another nation, regardless of the nature of the act. See, LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 891 (2nd ed. 1987). This absolutistic approach was followed in the United States, as is evidenced by the earlier decisions the U.S. Supreme Court. Thus, in the *Schooner Exchange v. McFaddon*, the U.S. Supreme Court stated: "One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." 11 U.S. 116, 137 (1812). However, soon the absolutistic approach proved impractical. As the state was more and more engaging in commercial activities, an alternative approach had to be found. It was found in what is called restrictive immunity.

[234] *See Strengthening Humanitarian Law*, *supra* note 7, at 139 (discussing sovereign immunity and the Act of State doctrine).

[235] The opinion of the Lords of Appeal of March 24, 1999, allowed the extradition of Pinochet for acts of torture committed after December 8, 1988, based on the Torture Convention. *Regina v. Bow Street Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte*, [1999] 2 W.L.R. 827 (H.L.).

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

In 1970, Salvador Allende Gossens led a coalition of left-wing socialist to electoral victory in Chile.[236] The election marked the first example of a Marxist-oriented government democratically elected into office in the American sphere. Not surprisingly, the Allende's government sought to prescribe and implement a socialist-oriented social and economic policy for Chile. This had large-scale repercussions involving both domestic and foreign efforts to destabilize the Chilean economy and create a crisis for the regime. On September 11, 1973, a military junta led by General Pinochet organized a coup d'etat with the acquiescence, if not support, of the United States.[237] As a result, Pinochet remained in power as President for some sixteen years.[238] During this period, the junta implemented a strategy of eliminating and repressing Chileans identified with left-wing, socialist values with the utmost force.[239] The patterns of State repression involved widespread use of torture. Human rights organizations documented with great precision the identities of the torture victims, where they were tortured, how they were tortured, and who the torturers were.[240] These torturous acts of unspeakable horror were perpetrated against both men and women.[241] Coupled with its use of torture, the regime perpetrated disappearances and mass murder, which lent to the Pinochet's

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[236] Eduardo Frei Montalva, a founder of the Chilean Christian Democratic Party, defeated Dr. Salvador Allende Gossens to become president of Chile from 1964 to 1970 and introduced cautious social reforms, but failed to curtail inflation. For a comprehensive analysis of the governmental history of Chile, *see generally* LARISSA ADLER LOMNITZ & ANA MELNICK, CHILE'S POLITICAL CULTURE AND PARTIES: AN ANTHROPOLOGICAL EXPLANATION (2000).

[237] See generally, Philip Shenon, *U.S. Releases Files on Abuses in Pinochet Era*, N.Y. TIMES, July 1, 1999, at A11.

[238] Several documents provide description of events and evaluation of situation in Chile in the 1970's and 1980's. Among them perhaps one, *Informe de la Comision Nacional de Verdad y Reconciliacion* (also known as *Informe Rettig)* is noteworthy for its thoroughness and objectivity. See *Report of the Chilean National Commission on Truth and Reconciliation,* translated by Philip E. Berryman, 1993. In 1992, the Truth and reconciliation Commission in Chile was replaced by the Reparation and Reconciliation Corporation. The Corporation had been set up under the administration of the then President Patricio Aylwin. In 1996, the Corporation presented President Aylwin with its final report. The report recognized a further 123 disappearances and 776 extrajudicial executions or death under torture during the military junta's government, in addition to those previously recognized by its predecessor, the Truth and Reconciliation Commission. Combined, the number of cases was staggering. It amounted to 3,197 cases officially recognized by the Chilean state. From that, 1,102 were cases of disappearances and 2,095 were cases of extrajudicial executions or death under torture.

[239] Pinochet personally ordered the commission of various human rights abuses and supervised numerous horrendous acts. Some of his methods included having military subordinates train dogs to rape women. *See* Amnesty International, *Chilean Gov't Is Making a Mockery of Duties to Citizens*, M2 PRESSWIRE, Jan. 28, 1999, available in 1999 WL 7551292. These subordinates were also ordered to savagely beat people, subject pregnant women to electro-shock torture, and apply electroshock equipment to male genitalia. *See id*. His military forces also dragged victims from a helicopter or hurled them into the ocean, systematically broke their bones, or burned them. *See Pinochet Hearings Resume, with Change of Tack*, AGENCE FRANCE-PRESSE, Jan. 19, 1999, available in 1999 WL 2531079.

[240] In 1975, the U.N. Ad-Hoc Working Group on Chile was established by the U.N. Commission on Human Rights Resolution 8 of February 27, 1975. It was this Working Group on Chile and the Inter-American Commission on Human Rights of the Organization of American States which extensively documented the widespread violations of human rights in Chile. In 1976, the U.N. Ad-Hoc Working Group on Chile concluded that cases of torture committed by the military junta should be prosecuted by the international community as crimes against humanity. *See* U.N. Doc. A/31/253 of October 8, 1976, para 511.

[241] See *supra* text accompanying note 239.

reputation as one of the worst human rights violators in the hemisphere.[242] General Pinochet organized amnesty for himself before giving up power, as a means to insulate himself from responsibility and accountability for what transpired during his presidency.[243] In his role as a Chilean Senator, he visited the United Kingdom to obtain expert medical treatment and during his visit, a Spanish judge, Baltasar Garzon, issued an arrest warrant and requested that Britain extradite him to Spain to face criminal charges.[244] This is the background of the important litigation involving the question of whether the crimes for which General Pinochet was accused were sufficient to justify his extradition under the law of the United Kingdom and international law.

A. The First Decision of the House of Lords (Pinochet I)[245]

The House of Lords' decision in *Ex Parte Pinochet*, issued on November 25, 1998 held that General Pinochet could be extradited to Spain based on international warrants issued by a Spanish judge and that he could be sent to Spain to stand trial for the crimes of torture, hostage taking, and murder.[246] This decision was based upon the request for extradition of General Pinochet (signed in Madrid on November 3, 1998) by the judge who issued an international warrant alleging that General Pinochet breached Spanish law relating to torture, genocide, and terrorism.[247] In short, the request for extradition averred that:

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[242] It was proved that one particular governmental agency, the intelligence service, DINA (Directorate of National Intelligence), played a central role in the implementation of the policy of systematic and widespread human rights violations in Chile. Furthermore, a connection exited between the General Pinochet and DINA. During the period under consideration (i.e. from 1973 to 1977), DINA reported directly to General Pinochet through its Director, General Contreras. When in February 1998 the former head of DINA testified in front of the Chilean Supreme Court, he indicated that General Pinochet was in an overall command of the operations of DINA. Moreover, General Pinochet was also a head of the armed forces, which also played an important role in implementation of the governmental policy.

[243] In Chile, several mechanisms were invented guaranteeing impunity to various human rights perpetrators. These mechanisms have blocked effective judicial investigations. In 1978, the military government of General Pinochet decreed an amnesty designed to shield those responsible for human rights violations committed between 11 September 1973 and 10 March 1978 from prosecution, i.e. in practice amounting to self-amnesty. See Decree aw No. 2191 (April 18, 1978), published in Diario Official, No. 30,042 (April 19, 1978) (Chile). Also, the Constitution of Chile of 1980 included a system of senators for life who, as parliamentarians, have complete immunity under Chilean law. General Pinochet was assured his position as senator for life on retiring from armed forces. See CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE (1980).

[244] On 16 October 1998, while General Pinochet was on a visit to the United Kingdom for medical purposes, he was arrested based on a Spanish provisional arrest warrant issued at the request of a Spanish court, alleging that he has been responsible for the murder of Spanish citizens in Chile at a time when he was the head of state of Chile. On 22 October 1998, he was served with a second Spanish provisional arrest warrant alleging that he was responsible for systematic acts of murder, torture, disappearance, illegal detention and forcible transfers both in Chile and other countries. Then, on October 28, 1998, the High Court of Justice granted General Pinochet immunity from prosecution, denying Spain's request. See United Kingdom High Court of Justice, Queen's Bench Division *In re Augusto Pinochet Ugarte* [October 28, 1998] 38 I.L.M. 68 (Q.B. 1998). In response, lawyers from Spain, Amnesty International and other human rights groups appealed the decision to a five-member panel of Law Lords. These Law Lords ruled 3-2 against General Pinochet. *See* United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302 (H.L. 1998). Subsequently, the U.K. Home Secretary, Jack Straw, allowed the case to proceed through the House of Lords. See, 38 I.L.M. 489 (H.L. 1999).

[245] Although Pinochet I was discarded, it is an objective indication of perspectives of important Law Lords on the important question of Pinochet's immunity.

[246] *See* United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302 (1998).

[247] *See* Opinion of Lord Slynn of Hadley; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1305 (1998).

> These offences have presumably been committed, by Augusto Pinochet Ugarte, along with others in accordance with the plan previously established and designed for the systematic elimination of the political opponents, specific segments of the sections of the Chilean national groups, ethnic and religious groups, in order to remove any ideological dispute and purify the Chilean way of life through the disappearance and death of the most prominent leaders and other elements which defended Socialist, Communist (Marxist) positions, or who simply disagreed.[248]

The National Court Criminal Division of Spain held, by an order of November 5, 1998, that Spain was competent under international law and therefore had jurisdiction to try a defendant in the position of General Pinochet for crimes of torture, genocide, and terrorism regardless of whether the victims were Spanish nationals or not.[249] According to the court:

> Spain is competent to judge the events by virtue of the principle of universal prosecution for certain crimes - a category of international law - established by our internal legislation. It also has a legitimate interest in the exercise of such jurisdiction because more than 50 nationals were killed or disappeared in Chile, victims of the repression reported in the proceedings.[250]

The issue certified to the House of Lords was a "point of law of general public importance," because the decision identified "the proper interpretation and the scope of the immunity enjoyed by a former head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed when he was a head of State."[251] Three Law Lords, Lord Nicholls, Steyn and Lord Hoffmann, ruled to allow the appeal, concluding in part that "General Pinochet is not entitled to an immunity of any kind."[252] According to Lord Nicholls:

> Acts of torture and hostage taking, outlawed as they are by international law, cannot be attributed to the State to the exclusion of personal liability. Torture is defined in the [T]orture [C]onvention . . . and in the United Kingdom legislation[253] . . . as a crime committed by public officials and persons acting in a public capacity. . . It is not consistent with the existence of these crimes that former officials, however senior, should be immune from prosecution outside their own jurisdictions. The two international conventions made clear that these crimes were to be punishable by courts of individual States. The [T]orture [C]onvention, in Article 5 and 7 expressly provided that States are permitted to establish

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[248] *See id*.
[249] *See id*.
[250] *See id*.
[251] *See id*. at 1304.
[252] Opinion of Lord Steyn; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1338 (1998).
[253] *See* Section 134 of the Criminal Justice Act 1984.

> jurisdiction where the victim is one of their nationals, and that States are obliged to prosecute or extradite alleged offenders.[254]

His Lordship also concluded that the United Kingdom had, in fact, legislated an element of the international crime of torture.[255]

Lord Nicholls also addressed the question of the scope of immunity of a former head of State. Lord Nicholls referred to Section 1 of the State Immunity Act of 1978[256] and quoted the principle that a foreign State is "immune from the jurisdiction of the courts of the United Kingdom."[257] It must be noted that the State Immunity Act of 1978 comes freighted with important exceptions. A great deal of controversy is still connected to how the principle of State immunity and its exceptions might be coherently construed. Judges often forget that, at least in capitalist societies, the legislative codification of the principle of sovereign immunity was driven by the principle that it should be limited. This reflected, in part, the diversification of the modern State's role as being involved in various activities, especially commerce, which certainly expands the scope of a State's sovereign identity. The advent of Twentieth Century totalitarianism and authoritarianism, each of which claimed sovereignty over all matters related to civil society and commercial enterprise, generally provides a distorted view of the role of the State in many of its dimensions, especially through the lenses of international communication and collaboration. Thus, the issue of whether the concept of sovereign immunity should be limited or unlimited merits attention. Since the principle of sovereign immunity was initially prescribed in State legislation, which, in so doing, inundated the concept with various important qualifications and exceptions to limit its use, this central issue of the judicial determination would ultimately devolve upon the interpretive principle of how broadly or narrowly the principle of sovereign immunity and its exceptions had to be construed. Unfortunately, international law precedents in both the United Kingdom and the United States seem to gravitate toward a creeping absolutism in the construction of the principle of sovereign immunity and its appropriate scope and limitation.[258]

Lord Nicholls cites three cases which support a broad construction of the general principle of sovereign immunity, but concludes that these cases are not relevant to the Pinochet situation because they all concern civil actions against the State.[259] We submit that he is correct in making this

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[254] Opinion of Lord Nicholls; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1334 (1998). *See also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. No. 51, art. 7, at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

[255] Opinion of Lord Nicholls; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1334 (1998).

[256] *See* The State Immunity Act, 17 I.L.M. 1123 (1978).

[257] *See id*. at 1331.

[258] *See Strengthening Humanitarian Law*, *supra* note 7, at 139 (discussing sovereign immunity and the Act of State doctrine).

[259] While addressing the issue of state immunity, Lord Nicholls states: "In cases which fall within section 1 but not within any of the exceptions, the immunity has been held by the Court of Appeal to be absolute and not subject to further exception on the ground that the conduct in question is contrary to international law: *see Al-Adsani v. Government of Kuwait* (1996) 107 I.L.R. 536, where the court upheld the government's plea of state immunity in proceedings where the plaintiff alleged torture by government officials. A similar conclusion was reached by the United States Supreme Court on the interpretation of the Foreign Sovereign Immunities Act 1976 in *Argentine republic v. Amerada Hess Shipping Corporation* (1989) 109 S. Ct. 683. This decision was followed by the Court of Appeals for the Ninth Circuit, perhaps with a shade of reluctance, in *Siderman de Blake v. republic of Argentina* 965 F. 2d 699 (9th Cir. 1992), also a case based upon allegations of torture by government officials. These decisions are not relevant in the present case, which does not concern civil proceedings against state. So I shall say no more about them." Opinion of Lord Nicholls; United Kingdom House of

distinction. However, we also respectfully submit that he might have challenged the critical principles of interpretation that inform these cases in light of the relevant statutes that were construed and interpreted to limit the accountability of a State in the context of domestic litigation. According to Lord Nicholls:

> …international law recognizes . . . that the functions of the head of State may include activities which are wrongful, even illegal, by the law of his own State or by the laws of other States. But international law has made plain that certain kind of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone. This applies as much to heads of State, or even more so, as it does to anyone else; the contrary conclusion would make a mockery of international law.[260]

Lord Nicholls squarely contrasts the State Immunity Act of 1978, which would seek to limit the sphere of international concern over matters arguably within the domestic jurisdiction of a State, with the idea that international law clearly places limits on the functions of a head of State.[261]

The opinion of Lord Steyn draws particular attention to the opinion of the Lord Chief Justice in the Court of Appeals.[262] This is important because two Law Lords have effectually embraced the broader construction of sovereign immunity, as opposed to the majority of the Law Lords in this opinion. The critical question, involving matters of fact and law, was whether facts about torture would be regarded as "official acts." If the head of State's acts were "official acts," then General Pinochet would at least be entitled to immunity from process with respect to some crimes implicated in those facts. But then the critical question is "where does one draw the line?"[263] Lord Steyn correctly concludes:

> …it is inherent in this . . . conclusion that there is no or virtually no line to be drawn. It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as head of State. That is where the reasoning of the Divisional Court inexorably leads. Counsel for General Pinochet submitted that this conclusion is the inescapable result of the statutory wording.[264]

Lord Steyn's review of the opinion of the Lord Chief Justice focuses on his conclusion that even in respect to acts of torture the "former head of State immunity" would prevail. The logic of Lord

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Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1331 (1998). It could be urged that the notion of a universal crime is created by all sovereign members of the international community as well as by the collective constitutional expression of what comprises such a notion. In this sense, a universal crime is one created by English law that participates in the international law-making process; the crime is thus created under both English and international law. This assumption supplies a creeping monism. In the United Kingdom, monism and dualism have been identified in some degree with the "transformation" or "incorporation" processes that occur between domestic law and international law.

[260] *See id*.

[261] *See* Opinion of Lord Nicholls; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1333 (1998).

[262] See Opinion of Lord Steyn; United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [November 25, 1998] 37 I.L.M. 1302, 1335 (1998).

[263] *See id*. at 1337.

[264] *See id*.

Steyn's opinion seems to be compelling, namely that the former head of State immunity principle simply cannot be justified in law.

This 3 - 2 decision of the House of Lords, while it did generate some agreement, produced deep disagreements with regard to the principle itself and to the theories used to interpret relevant provisions of the law. To put it briefly, the disagreements involve three Law Lords who favored a limited form of immunity for a former head of State, which was consistent with the inroads made on State sovereignty in the Nuremberg tradition. The Nuremberg tribunal held that sovereignty could not shield State officials for certain kinds of conduct deemed criminal in international law.[265] The crime of torture would clearly fall within this category of limited immunity.[266] The other Law Lords provided a kind of double-read on the issue of State sovereignty, very much in keeping with those who proclaim a very strong *Lotus* position in international law. It should be noted that the *Lotus* case[267] was decided prior to Nuremberg. These Law Lords may be loosely characterized as the pro-immunity Law Lords. Apart from a use of interpretation, there are also questions of the political consequences of subjecting a former head of State to extradition proceedings. Technically, it is within the competence of a State's Foreign Secretary to extradite a defendant to another sovereign State. However, with the construction of international law and relevant principles of sovereign immunity on the one hand, and international concern and responsibility on the other, some form of international law development through the domestic courts of sovereign members of the international community is required. The Convention Against Torture[268] works on the principle established in Articles 55 and 56 of the U.N. Charter;[269] specifically, States acting individually and collectively will collaborate in order to enhance the purposes of the United Nations, which includes human rights. The principle of enforcement implicit in the idea of "prosecute or extradite" works on the assumption that the enforcement of international law is still very decentralized and that States, acting through their foreign ministries, executive organs, bureaucratic agencies, and domestic courts, must apply and prescribe both national and international law, often in the same litigation. One must therefore be cautious about a policy that withdraws the legal process from the development of international law through the most important legal fora in the international system: domestic courts.

B. The Second Decision of the House of Lords (Pinochet II)

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. His membership was, of course, independent of

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[265] When the sovereign immunity still followed the absolutistic approach, the immunity extended not only to the nation, but to the ruler as well, basically because at that time the nation and the ruler were viewed as one and the same. Later, however, the state immunity and head of state immunity became two distinct concepts. See, Jerrold L. Mallory, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 170-71 (1986). In 1945, the Nuremberg Charter formally codified the principle that everyone, including a head of state, is individually responsible for, among others, crimes against humanity. *See* Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279, *reprinted in* 39 AM. J. INT'L L. 257, 257-58 (Supp. 1945).

[266] *See* Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 89 (2001) (discussing the Amnesty International observations about the criminal nature of torture, which is still practiced in some 125 countries in the world).

[267] *See* The Case of *The S.S. Lotus (France v. Turkey)* Permanent Court of International Justice (1927), P.C.I.J. Ser. A No.10, 2 Hudson, World Ct. Rep. 20.

[268] *See* Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment. G.A. Res 39/46, FOAR 39th Sess., Supp. No. 51, at 197 U.N. Doc A/39/51 (1985).

[269] *See* UN Charter, *supra* note 17, at art. 55 and art. 56.

Amnesty's substantive work because he was in a position of a "trustee,"[270] a position that only obliged him to ensure that the accounts of the organization were regular.[271] After setting aside its former ruling, the House of Lords impaneled a new committee to rehear the case.[272] Britain's highest court then upheld the appeal.[273] The three opinions of the Law Lords that merit most careful consideration are those of Lord Browne-Wilkinson, Lord Goff of Chieveley, who dissented on the important issue of immunity, and Lord Millett, who also had reservations with regard to some aspects of Lord Browne-Wilkinson's judgment.

The opinion of Lord Browne-Wilkinson indicates the limitations of trying to give as much literal meaning to the State Immunity Act of 1978, the (U.K.) Extradition Act of 1989, the Vienna Convention on Diplomatic Relations, the Diplomatic Privileges Act of 1964, and the Convention Against Torture without regard to the fact that the problem requires that they must be read in the light of the principle of complementarity,[274] and construed reasonably applying them to the specific circumstances. However, none of these legal instruments were drafted at the same time; they were created by different drafters and each takes into account the specific legal import of each instrument with regard to the others. This requires a challenging application of both principles of advocacy and standards of interpretation, which may differ in cases of purely local import, but may be quite different when international law prescriptions are involved. Here, the international standards of implementation, which are indicated in the Vienna Convention on the Law of Treaties, represent an authoritative codification.[275]

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[270] 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.

[271] Amnesty International is a non-governmental organization asked to be a friend of the court, with no ties to any side or any judge. Amnesty wrote an opinion on the case before the judgement was stated, and since Lord Hoffmann was a member of Amnesty, it was thought to influence his judgement.

[272] It was discovered that Lord Hoffmann was involved with Amnesty International Charity Limited, a company controlled by Amnesty international, and did not disclose his involvement prior to the hearing. *See* United Kingdom House of Lords: *In Re Pinochet*, 38 I.L.M. 430 (1999).

[273] On April 15, 1999, the U.K. Home Secretary, Jack Straw, decided that he would allow the extradition process to continue. General 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* United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581 (1999).

[274] This principle generally establishes that the an international court or tribunal may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction. See, for example, Rome Statute, *supra* note 161, at pmbl.

[275] The rules of interpretation of treaties are set out in section 3 of the Vienna Convention on the Law of Treaties. *See id.., at* art's. 31-32. The general rule of interpretation stipulates: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall compromise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accept by other parties as an instrument related to the treaty. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. A special meaning shall be given to a term if it is established that the parties intended." See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), art. 31.

It should be noted that even the excruciatingly narrow basis of Lord Browne-Wilkinson's decision was challenged by Lord Goff.[276] Lord Goff held that since the Torture Convention does not address the issue of immunity of officials, then it does not cover officials who may be subject to prosecution or extradition within a State, even if that State is a party to the Convention.[277] It is difficult to accept that if an obligation *erga omnes* trumps sovereignty, it does not also require the trumping of sovereign immunity. According to Lord Goff's reading, the term "officials" in the definition of torture in the Convention must mean absolutely nothing. The fact is that if State officials are a part of the very definition of "torture," it is difficult to imagine how those officials may at the same time claim immunity from prosecution by virtue of their being officials. Lord Goff suggests that it would be dangerous to imply an abrogation of immunity to the Torture Convention, but surely the governmental officials—who negotiated governmental responsibility—knew or should have known that they were negotiating the concept of legal accountability for officials. In fact, when the United States issued its reservations, declarations, and understandings relating to the Convention Against Torture,[278] among the issues that emerged were the scope of the crime of torture and the procedural protections of potential defendants.[279] Let us return to the reasoning of Lord Browne-Wilkinson.

The central problem in Lord Browne-Wilkinson's opinion[280] covers the issue of extradition law and the issue of sovereign immunity on the one hand, and the scope of universal jurisdiction over the crime of torture on the other. The issue of torture under the UK Extradition Act of 1989 carries forward the principle of the UK Extradition Act of 1870, which codified the rule of "double criminality." 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 UK Extradition Act of 1989 thus construed is that it does not specifically account for crimes of a specifically international character in a substantive sense. What is interesting about the double criminality rule, is that the procedure of cooperation must rest upon a shared perspective of

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[276] Opinion of Lord Goff of Chieveley, United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581, 595-609 (1999) [hereinafter Opinion of Lord Goff]. Lord Goff's opinion, as well as Lord Brown-Wilkinson, seemed to be influenced by a strong doctrinal commitment to the principle of dualism. It would have been helpful if the Law Lords had addressed the issues of "monism" and "dualism" more directly to determine precisely how these concepts influence the hidden meanings of sovereignty and international obligation. "Monism" and "dualism" are critical elements of the evolving constitutional discourse regarding modern international law. *See generally* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 290-94 (Robert Tucker ed., 2d ed. 1966). The "transformation" theory holds that international law transforms domestic law, yet they are two distinct systems. *See id*. Conversely, the "incorporation" theory holds that international law is part of domestic law, but without a ratifying procedure. *See Trentex Trading Corp. v. Central Bank of Nigeria*, [1997] 1 Lloyd's Rep 581; *see also Maclaine Watson v. Dep't of Trade & Indus*., [1989] 3 All ER 523 (accepting the incorporation doctrine). Human rights litigation has added to the force of the incorporation doctrine. *See also* MURRAY HUNT, USING HUMAN RIGHTS LAW IN ENGLISH COURTS 25 (1998)

[277] *See id*. at 600-08.

[278] Winston P. Nagan, co-author of this article, was involved in this process. For preratification debate and text of resolution of ratification, see 136 CONG. REC. S17,486, 491-92 (daily ed., Oct. 2, 1990) (specifically, see statement of Winston P. Nagan before the U.S. Senate Foreign Relations Committee).

[279] *See id*. These issues were so stridently put forward by members of the U.S. Department of Justice, that when co-author Winston P. Nagan queried these officials about the stridency of their concerns for defendants' rights, he was reminded that in this context the defendants were governmental officials and that they had as much interest in defending themselves as ordinary criminals.

[280] Opinion of Lord Browne-Wilkinson, United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581, 582-95 (1999).

what constitutes a crime. However, this shared perspective must ultimately entirely agree with the mutual existence of the notion of an inclusive form of criminality between two States for which extradition cooperation is requested.

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.[281] It is possible that the double criminality rule assumes that such behavior is generally regarded as criminal, which would then make it's criminal nature characteristic of most developed criminal justice expectations. Accordingly, the assumption would be that such crimes would be normally proscribed because the law would apply as an incident of the sovereign's police powers. It therefore seems that the concept of double criminality is a *non-sequitur* if the crime is of universal import. By "universal" we mean that, substantively, the crime is universally proscribed, and if this is the case, then an extradition treaty—when put into statutory form—can be construed in one of two ways. It could be construed to indicate that since double criminality is not universal criminality, the matter cannot be covered by the UK Extradition Act of 1989. Alternatively, it could be argued that the UK Extradition Act must be rationally construed to advance the purposes of a substantive criminal law prescription that, as far as possible, is universal. In doing so, this prescription would be obligated to provide as much procedural universality to rationally enhance the objectives of the universal criminal law mandate.

Lord Browne-Wilkinson, however, essentially views the issue of criminality as one that must be created under English law.[282] Accordingly, any claim to extradition must ultimately be a function of the actual nature of English law.[283] This is a profoundly important theoretical issue because, in part, the jurisprudence regarding the international prohibition of torture evinces a "substantive versus procedural" argument. It might be said, for example, that torture has long been prohibited and made criminal under international law, from a substantive point of view.[284] On the other hand, the situation with the procedure for applying and enforcing the prohibition is much more problematic. Since there was no international juridical institution for prosecuting crimes of torture or assessing the guilt or innocence of potential defendants, the enforcement of international law was perforce 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 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. Moreover, the principles of civil law, reflected in the rules of private international law, demonstrate that domestic fora routinely make and apply law for problems involving more than one State, in which facts and issues have relevant connecting ties with concerned jurisdictions.

We submit that the ways in which the principles of sovereign immunity are constructed are flawed. We submit that they are flawed because they rest on a misunderstanding of both the limited nature of sovereign immunity as currently understood, as well as the nature of an individual's accountability under international law for crimes committed in violation of *jus cogens* principles. The

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[281] 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.

[282] See *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581, 582-95 (1999) at 586-89; *see also* Opinion of Lord Goff, *supra* note 276.

[283] *See id*.

[284] *See generally* Nagan & Atkins, *supra* note 266.

most important development in the law of sovereign immunity it is restriction.[285] The restricted concept of sovereign immunity accepts the principle that a forum State may permit its courts to adjudicate certain forms of conduct of a foreign State in its domestic tribunals; this is the principle of *jure gestionis*. It recognizes that the State may be involved in ordinary matters of legal importance and that in doing so, the State cannot use the symbol of sovereignty to avoid its legal responsibilities in international law. It also recognizes that while the modern State naturally performs classical State functions, called *jure imperii*, there are other matters, in which States are involved, that ought not to be immune from ordinary accounting. Even the Act of State doctrine has been reinterpreted to reflect the now axiomatic notion that some forms of State conduct must not be given immunity. These developments represent the weaker version of limitations upon sovereign immunity. The stronger version comes from the Nuremberg experience itself, in which the principle of following State orders was held to not immunize official accountability. The International Military Tribunal at Nuremberg held that underlying the abstractions, "State" and "sovereignty," there are finite agents of decision-making who must be held responsible when their conduct violates the most elementary standards of legality and decency.[286] Nothing could be clearer in international law than the continuously affirmed principle that in a narrow class of cases, there is an obligation to make governmental officials

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[285] The restrictive theory has also been applied to the Act of State doctrine. In the United States, the courts have held that the Act of State Doctrine and the Sovereign Immunity Doctrine are rooted in the same conceptual foundation, opening the way for the development of a restricted version of the Act of State Doctrine as well. With the emergence of human rights law and the possibility that violations of some aspects of human rights law might subject a foreign sovereign to the exercise of criminal jurisdiction in a foreign court for violations of international human rights or humanitarian law has generated complex questions about both the prescriptive reach of universal jurisdiction, which implicates the definition of sovereignty in the international system. Additionally, the specific application and enforcement of such prescriptive norms also influence the scope and character of national sovereignty within the international system. Justice Rehnquist, in *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (2nd Cir. 1973), provided at one stroke the key to the restrictive theory of both sovereign immunity and the Act of State doctrine. He noted that the conceptual basis of both sovereign immunity doctrine and the Act of State doctrine are essentially the same. According to the Justice Rehnquist, "both the Act of State and sovereign immunity doctrines are judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." It follows therefore, that the limitations that apply to the sovereign immunity doctrine will also apply to the Act of State doctrine. Thus, for example, if the executive branch indicated that there was no reason to proceed with the case, the judiciary would be free to decide the case according to law. According to Justice Rehnquist, "[t]he only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign with its own territory might frustrate the conduct of this country's foreign relations. But the branch of the government responsible for the conduct of those foreign relations has advised us that such a consequence need not be feared in this case. The judiciary is therefore free to decide the case without the limitations that would otherwise be imposed upon it by the judicially created Act of State doctrine." Having collapsed the Act of State doctrine into the doctrine of sovereign immunity, the Act of State doctrine would now come with the limited version of the doctrine of sovereign immunity itself. This line of reasoning was emphatically endorsed by the U.S. Supreme Court in *Alfred Dunhill on London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). Citing to the case of *Mexico v. Hoffman*, 324 U.S. 30 (1945), in which the Court denied immunity with regard to a commercial ship belonging to the Mexican government, the Court pointed out that in fact the United States have "adopted and adhered to a policy declining to extent sovereign immunity to the commercial dealings of foreign governments." The Court noted that this policy was predicated upon the recognition that the limited approach to sovereign immunity had been "accepted by a large and increasing number of foreign State in the international community." The Court concluded that the restrictive theory of sovereign immunity had been accepted as "the prevailing law of this country." The court thus extended the limited theory of sovereign immunity unequivocally to the Act of State doctrine as well. Although the concept of sovereign immunity here refers to a commercial exception, there is no reason in law that the concept of commercial should not be construed to mean either private of refer to conduct outside of what public law and morality sanctions, and what is specifically and unequivocally prohibited by international law.

[286] *See generally* International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946, *reprinted in* 41 A.J.I.L. 172, 173 (1947).

accountable for knowingly committing acts in violation of known law. The construing of the State Immunity Act of 1978 as well as the Vienna Convention on Diplomatic Relations[287] must be done in light of both the restrictive theory of sovereign immunity and a deeper and more internationalist appreciation of obligations *erga omnes,* which are inherent in a realistic construction of the entire international effort to proscribe torture, including the laws codified in the Torture Convention itself.

There is a serious question concerning the interpretive import of both Article 2 and Article 4 of the Torture Convention when they are read in light of the State Immunity Act of 1978. Can the latter Act be read as trumping a *jus cogens*, *erga omnes* obligation under international law? Can this Act be read as trumping the non-derogability principle of Article 2? Can this Act be read as trumping the clear import of the abrogation of the superior order defense? Must the State Immunity Act of 1978 be construed to make torture a "non-grave" crime? The relevant international law standard of interpretation when statutes, conventions, treaties or other appropriate sources of law are incomplete, ambiguous, or even contradictory on their face is the standard of reasonable construction and interpretation.[288] Clearly, the UK Extradition Act of 1989, the Vienna Convention on Diplomatic Relations, the State Immunity Act of 1978, and the Torture Convention must be subject to a reasonable standard of interpretation, the object of which is to integrate or reconcile the major purposes of each discrete source of law. The questions we have raised require some explanation of both the plain language of these instruments and a possible supplementation of the meanings of the relevant terms and concepts in light of the most reasonably construed objectives that these laws are meant to secure.

The Torture Convention[289] provides an interpretive gloss on the practical implications of what is discussed above. The Convention could be construed as creating a universal crime of torture with a universal approach to the question of jurisdiction. It could also be seen as a codification of preexisting expectations and a sharper delineation of the procedural obligation to cooperate to eradicate torture on a universal basis. If the Convention is the only starting point with regard to the criminal basis of torture under English law, then no prior obligation exists with regard to the prohibition of torture prior to the adoption of the Torture Convention in the United Kingdom. If, however, the Convention is seen, in part, as codifying important aspects of what is considered to constitute an international crime, then the Convention is only one aspect of the larger question of the substantive and procedural aspects of torture as a crime under international law. In other words, the literal text of the UK Extradition Act of 1989 should be through the lens of the entire evolving process and practice of law relating to the universal prohibition of torture.[290] A literal reading of the UK Extradition Act of 1989 and the Torture Convention makes them virtually irreconcilable. The UK Extradition Act of 1989 does not mention

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[287] Vienna Convention on Diplomatic Relations, April 18, 1961, *entered into force*, April 24, 1964; 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

[288] The standard of reasonable construction and implementation was formulated by Professor H.A. Smith as follows: "The law of nations which is neither enacted nor interpreted by any visible authority universally recognized, professes to be the application of reason to international conduct. From this it follows that any claim which is admittedly reasonable may fairly be presumed to be in accord with law, and the burden of proving that it is contrary to the law should lie in the state which opposes the claim." *See* Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Test in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 660 (1955) (quoting HLA SMITH, THE LAW AND CUSTOM OF THE SEA 20 1950)).

[289] Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment. G.A. Res 39/46, FOAR 39th Sess., Supp. No. 51, at 197 U.N. Doc A/39/51 (1985).

[290] On 24 March 1999, a seven-judge panel of the House of Lords voted 6 to 1 that acts of torture are "extraditable offenses" under the UK Extradition Act of 1989 if they transpired after 29 September 1988, which was the date on which the UK Criminal Justice Act entered into force in the United Kingdom and established the crime of torture. *See* Memorandum of Understanding between the United Nations and the Republic of Iraq (Feb. 23, 1998), *attachment to* Letter Dated 25 February 1998 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/1998/166, *reprinted in* 37 ILM 501 (1998).

torture as a crime, but it is hardly likely that the Act would contain a specific catalogue of every conceivable existent or prospective crime.[291] This is precisely an issue of judicial construction and interpretation. It involves lawmaking that is molecular rather than molar.

The Court of Appeals had held that according to section 2(1)(a) and (3)(c) of the Extradition Act, it could refer a request for extradition to be operative on the "request date" or on the "conduct date."[292] Although the UK Extradition Act of 1989 generates some degree of ambiguity about the critical date for which the double criminality rule must be complied with, it should be kept in mind that the conceptual basis of the double criminality rule is different from the conceptual basis of a crime with a universal character. Lord Browne-Wilkinson seems to ignore the issue of universality when he holds that General Pinochet's conduct must have been criminal under the law of United Kingdom when it was allegedly perpetrated.[293] 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 UK 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 U.N. Charter.[294] The prohibition of torture is a matter that the United Nations is obliged to promote. Specifically, as a member of the United Nations, the United Kingdom has pledged, *inter alia*, "to take joint and separate action in co-operation with the Organization"[295] 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."[296] It would therefore seem that the United Kingdom's courts, when vested with a juridically cognizable problem, should provide appropriate levels of construction and interpretation of the law of the United Kingdom in order to respect its obligation under the UN Charter.[297] 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,[298] the following principles are of direct relevance to the construction given 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.

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[291] The first schedule to the Extradition Act of 1870 contained a list of crimes and was headed "The following list of crimes is to be construed according to the law existing in England…at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act." *See* United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581, 588 (1999).
[292] *See id.* at 586.
[293] *See id.* at 588.
[294] *See* UN Charter, *supra* note 17, at art. 55 and art. 56.
[295] *See id.* at art 56
[296] *See id.* at art 55
[297] There is soft international law support for this Charter interpretation. *See Panel Discussion of the American Society of International Law, A Hard Look at Soft Law*, PROC. AM. SOC. INT'L L. 371-95 (1998); see also PAUL SZASZ, GENERAL LAW-MAKING PROCESSES, IN THE UNITED NATIONS AND INTERNATIONAL LAW 27-64 (1997).
[298] *See* General Assembly Resolution 3074 (XXVIII) of 3 December 1973.

> 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.

The obligation specifically to cooperate[299] and bring to justice those charged with crimes against humanity is supported by Article 15(2) of International Covenant on Political and Civil Rights[300] and Article 7(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[301] Both conventions establish the 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."[302]

Lord Browne-Wilkinson's construction and interpretation of the UK 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 style of interpretation used to construe the meaning and reach of the UK Extradition Act's impact upon the crime of torture has also influenced his Lordship's analysis of the issue of immunity.[303] It should be noted that the issue of immunity is procedural rather than

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[299] *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation 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).
[300] *See* ICCPR, *supra* note 185, at art. 15(2).
[301] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221.
[302] Recalling the Nuremberg principles and the Universal Declaration of Human Rights, the U.N. Committee Against Torture expressed this opinion in decision of 23 November 1989, Communications Nos. 1/1988, 2/1988 and 3/1998, Argentina, decisions of November 1989, para 7(2).
[303] See Opinion of Lord Browne-Wilkinson, United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581, 591-95 (1999)

substantive and therefore, when confronted with a *jus cogens* international crime, such as torture, it would seem that the procedural tail should not wag the substantive dog. Even more importantly, the major purpose of the Torture Convention is narrow with respect to the class of potential torture defendants. Torture can only be committed "by a public official or other person acting in an official capacity."[304] General Pinochet was a public official *par excellence*. In effect, he was *the* public official of Chile.[305] This principle, on its face, directly conflicts with the general principle of sovereign immunity, which is claimed *ratione personae*. In effect, what his Lordship has held is that General Pinochet enjoys sovereign immunity, i.e. *ratione materiae*, for actions he perpetrated while he was a head of State, but enjoys no sovereign immunity for acts done when he ceased to be a head of State.[306] In other words, the single charge (charge 30) saved the international community from precluding General Pinochet from accountability under the rule of law.[307]

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 General Pinochet could be extradited to Spain for a criminal act of torture are important. It sends a compelling message that torturers who travel abroad may be at risk. Also, as 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 general point has now been clearly established that 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.[308] However, the scope and role of the law relating to sovereign immunity (which

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[304] Convention Against Torture and Other Inhumane or Degrading Treatment or Punishment. G.A. Res 39/46, FOAR 39th Sess., Supp. No. 51, at 197 U.N. Doc A/39/51 (1985).

[305] General Pinochet was the head of state of Chile from 11 September 1971 to 11 March 1990.

[306] See Opinion of Lord Browne-Wilkinson, United Kingdom House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and others, Ex Parte Pinochet* [March 24, 1999] 38 I.L.M. 581, 595 (1999).

[307] This is also why both the opponents and the supporters of General Pinochet stated the ruling of the highest court in Britain to be a victory. Family members of the murdered, tortured and of the disappeared as well as Chilean and various other human rights groups' members cheered that the panel of the House of Lords agreed with their position that General Pinochet does not have immunity as a former head of state and is eligible for extradition to Spain. General Pinochet's supporters celebrated that they could eventually win his release on appeal since the two primary charges (that he was involved in the torture of a single prisoner and in a conspiracy to torture others after 1988) would not stand up to judicial scrutiny. *See Pinochet Supporters, Critics Cheer Verdict; Both Sides Say Their Causes Will Benefit*, WASH. POST, March 25, 1999, at A27; *In Chile, Opponents and Supporters View Ruling as a Victory*, the N.Y. TIMES, March 25, 1999, at A6. *See also Pinochet Foundation Issues Statement on Law Lord's Ruling*, B.B.C., March 26, 1999, Part 5 Africa, Latin America and the Caribbean, CHILE, AL/D3493/L.

[308] It may be that the decision of the House of Lords in Pinochet II, however narrowly formulated, has provided an important level of legal influence on general Pinochet's status in Chile itself. Recently, for example a Chilean Court of Appeals by a vote 13 to 9 stripped General Pinochet of his immunity under Chilean law. Having removed this obstacle to making the General answerable at law, it is possible that, if the General lives long enough, he could face charges of being involved in the kidnapping, murder and torture of thousands during the seventeen years of his dictatorship. According to the New York Times, under Chilean law, while a legislator is protected by immunity, judges may remove that immunity if there is evidence that a crime may have been committed. It is probable that Pinochet will appeal this ruling against him. It remains to be seen whether the independence of the post-dictatorship judiciary is real or imaginary. See Clifford Krauss, *Chile Strips Pinochet of Immunity, Lifting One Barrier to Trial*, N.Y. TIMES, Thursday, May 25, 2000, at A1 and A4. The broader principle is that human rights groups are now becoming, according to the Wall Street Journal, "hyperactive." Vast numbers of the world's dictators are or were located all over the planet. Idi Amin Dada was closeted in Saudi Arabia;

apparently is construed as continuing to have efficacy while the head of State is in power) is much more problematic from the standpoint of both the theory and practice of international law. The interpretive limitations imposed by the learned Law Lords on the scope of the crime of torture read in the light of the law of extradition and immunity seems to unduly limit the importance of international law and seems to weaken the human rights foundations of international legal order. The proper scope of sovereign governance remains disputed in domestic law fora.

IX. 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 and 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:

> It 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.[309]

The political scientists Lasswell and Kaplan provide a refinement and a retreat from Laski's "Surrender Doctrine." According to these authorities,

> …it 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.[310]

Alfredo Stroessner is in Brazil; Mengistu Haile Mariam was protected by former President Robert Mugabe in Zimbabwe; Milton Obote of Uganda has been living in Zambia; and "Baby Doc" Duvalier has been in France. It has become apparent to human rights groups that, if these dictators are targeted for legal action in here and now, a strong message of deterrence might be sent to those dictators currently in power and willing to use gross methods of human rights violations to remain in power. This has also resulted in changes in the way in which human rights intelligence work is done. The shift focuses on the gathering and organization of evidence that is usable in courts of law, establishing the physical location of dictators in order to more carefully assess the jurisdictional questions of legal accounting. *See* Marc Champion, *Pinochet Is Freed, But No Ex-Dictator Should Feel Safe*, WALL STREET JOURNAL, at A1 and A12. Probably the most successful and important development targeting a notorious dictator under the Torture Convention occurred in the African country of Senegal involving the arrest and subsequent prosecution of Hissene Habre of Chad. According to newspaper accounts, "[t]here was a quiet meeting with the Senegalese minister of justice who promised not to interfere in the court case. The first hearing, Mr. Brody recalls, was 'the best moment of my legal career. Here we were in an African court, in an African country, seeing an African dictator held to account by African judge.' By Feb. 3, Mr. Habre was indicted and under house arrest." *Id*. at A12.

[309] H.J. LASKI, GRAMMAR OF POLITICS 44-45 (G. Allen & Unwin, eds., 1925).

[310] Harold D. Lasswell & Abraham Kaplan, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY 177 (1950).

We have demonstrated that the term, "sovereignty" must make core references to the concept of power and the concept of authority. This itself requires a degree of ambiguity reposing in the limits of meaning we can attach to terms and phrases. To lessen 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 the value of efficacy, or might also refer to its exercise without limits. On the other hand, "authority" might refer to responsibility, accountability, and transparency, but might itself lack the efficacy to secure practical applications in the real world. Nonetheless, we must, so to speak, clarify the relationships between sovereignty on the one hand and authority and control on the other. The dynamic aspect of sovereignty, we submit, lies in a deliberate emphasis of inquiry on policy and decision.

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 component of the focus of inquiry for the study of sovereignty, we provide a framework for inquiry that permits a deeper appreciation of sovereignty's relationship to the complex but broader world process of constitutive decision-making. These clarifications give us a clue to the operational uses of the term, "sovereignty." A further or more contextually sensitive development of 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 using this focus, we are asking different questions, but also we also illume more precisely the changing nature, uses, and variable contexts of claiming, managing, and changing sovereignty under current world order 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 the attributes of authority and control and, in turn, reconfigure the framework of decision-making competences that are exclusive to the sovereign State, those which are sometimes shared concurrently with the nation-State, and those which are to be exercised 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 order conditions, a complex, technical, but vitally important matter. The strength and the weakness of multilateral constitutional arrangements are, in some degree, dependant upon the strengths and the weaknesses of national sovereignty. In some degree, these ideas have a loose affinity with Judge Lauterpacht's theory of recognition as being reflective of a constitutive rather than an exclusively declaratory design.

The trend in modern international law has been in the direction of seeking to enhance the authority foundations of the international system and to provide normative guidance to move 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. The current crisis of terrorism and world order will tell as much about the changes that international law might secure for the practice of international relations based on the authority of the UN Charter. 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, enhancing human rights and is a

basic element in the foundations and possibilities of good governance as well as transparent and responsible authority.