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Sovereignty in Theory and Practice

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SOVEREIGNTY IN THEORY AND PRACTICE

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INTRODUCTION

This article deals with the theory and practice of sovereignty from the perspective of a trend in theoretical perspectives as well as the relevant trend in practice. The article provides a survey of the leading thinkers and philosophers views on the nature and importance of sovereignty. The concept of sovereignty is exceeding the complex. Unpacking its meanings and uses over time is challenging. An aspect of this challenge is that the discourse about sovereignty is vibrant in diverse policy, academic and political constituencies. At times its narratives are relatively discrete and at other times the narratives overlap with the discourses from other professional orientations. In this article we seek to provide enhance clarification about the sovereignty discourses and narratives used in theory and practice. For example the article begins with the work of Bodin and Hobbes. Both of these theorists make a case for the exercise of political power in hierarchical terms. It is unclear whether they are describing political power as it is or recognizing the hierarchical aspect of sovereignty as it ought to be. Both Bodin and Hobbes were scholars, although Bodin was also a prominent politician. They were both attracted to the idea of hierarchical sovereign power because they saw it as important to the maintenance of public order which they saw as threaten by religious sectarian violence. In this sense they would appear to be a normative preference for the concentration and centralization of power to retain minimum order. This would implicate the creeping into their analysis of a minimum normativity. Additionally, they were both aware that the concentration of power could lead to its abuse. They denied sovereign absolutism in somewhat modest terms. In short they were concerned about social chaos and in a limited way sovereign abuse.

Our study moves into the sovereignty idea in the context of international law with reference to the work of Grotius, the Dutch international lawyer of the early 17th century. Grotius took the sovereignty discourse to another level by considering the problem of sovereignty in an environment of multiple sovereigns. This was an environment which required law and legal skills and therefore provided a framework within which reasoned legal elaboration would provide a mechanism to coordinate sovereign relations and thereby provide international restraints on sovereign absolutism. The article then considers a significant 17th century juridical event in the practice of international law. We refer to the Treaty of Westphalia (1648) and its relevance to the development of sovereignty in practice. The importance of the Treaty is that it juridicalized the idea of an international society based on sovereign nation States. It is a framework that has had incredible traction over time and was reflected in the most powerful theories of international law founded on the nation State participants. The article then reviews the work of other international scholars and philosophers from Pufendorf to Austin. These early international lawyers grapple with the idea of sovereignty and the subordination of sovereignty to the idea of international obligation. Their work begins to show the influence of positivism and the development of international law based on empirical sources such as treaty and custom. These developments are then confronted with a new and rigorous jurisprudential theory of sovereignty developed by the English legal philosopher, John Austin. Austin developed the theory of sovereignty of considerable power and durability and modified versions of his idea of sovereignty continue to be important in international law and international relations today.

It is important to note that Austin’s view of sovereignty was an explicit indication of the use of a positivistic, scientific view of law. Technically, the logic of Austin’s system was to deny the legal character of international law. Since there was no global super-sovereign, there could be no global super-law that subordinated sovereign competence. In his view, international law was a form of positive morality. Austin did not demolished international law completely, but his thick version of sovereignty had a dramatic influence on the development of international law into the 20th century. Additionally, Austin’s approach to law suggested that all law was rooted in the orders of the sovereign. This reshaped legal thinking globally. It implicated as
well two different versions of science: the first, logical and analytical; the second, empirical. Each version had a distinctive approach to the identification of the sovereign, who was the source of all law. The analytical approach was considerably refined in the 20th century by such leading theorists as H.L.A. Hart and his influence has been significant in the scholarship of British international law and the discourse it has generated on the concept of sovereignty. Several important British jurists are considered in this article. The article also shifts its focus in the 20th century. It examines the changing character of sovereignty in the aftermath of the First and the Second World Wars and the implications of the UN Charter for rethinking the boundaries of sovereignty. The article then focuses on the practice of international law and its influence on the boundaries of sovereignty in terms of international agreements regulating global spaces, resources, including the oceans and Polar Regions. Part IV examines the significant contributions made by scholars from the United Kingdom to the theory and understanding of sovereignty. This includes the work of H.L.A. Hart, Brownlie, and other more contemporary UK scholars.

Part V shifts the focus to the scholars who had significantly influenced the ideas of sovereignty in US practice and theory. Here the influence of Austin has been less analytical and conceptual and more empirical. In part, this is a reflection of the complexities of the form of constitutional governance in the United States as well as the influence of the revolt against formalism in United States and its influence on legal theory. The article traces the influence of positivism in its empirical sense on such theorists as Holmes, Gray and Thayer. In the social sciences, the influence of the empirical approach was also beginning to find traction. A leader in the behavioral movement in the United States was the political theorist Harold Dwight Lasswell. In the 1930s he published two books which had a significant effect on providing an empirical orientation to the ideas of sovereignty and the nation State. In his book *Psychopathology and Politics* he reconceptualized the State as a manifold of events and insisted that the State was not a super individual phenomenon, but empirically a many individual phenomenon. He then explored the importance of understanding the global environment in terms of the individual’s perspectives of identity, demand, expectation, insecurity and anxiety in a precautious book called *World Politics and Personal Insecurity*. In fact, Lasswell was virtually recasting international relations in international law with a focus on sovereign personalities, to the idea of world politics in which the give and take of actual human beings shapes the conditions of world order from the local to the global and vice versa. These ideas were later to emerge in an approach to sovereignty that involves more refined theories and methods of a contextually understanding and the rooting the sovereignty idea in global social, power and constitutive processes. This is discussed in the last part of the article. In the meanwhile there were more intermediate developments in legal and political theory in the US. We explore the works of Hart and Sacks, Carl Schmitt and Hannah Arendt and in contemporary terms the contributions of Judge Samuel Alito and the scholars Professor Ackerman (Yale), Yoo (Berkley) and Tribe (Harvard). The article concludes by reference to the implications for sovereignty of international practice indicated in the Nuremberg Proceedings and then refers to the developments of Lasswell and the New haven School and the ideas and methods of contextual mapping for the empirical specification of the sovereignty idea.

### I. The Historical Context

The era of world politics in our time recognizes that the most important, territorially organized body politic in global political culture is the State. The most basic characteristic of a State is that it needs a degree of control over the body politic, and control must invariably be accompanied by the component of authority in the exercise of the governing competences. The complex combination of authority and control in the governance of a State is generally described in terms of the idea of sovereignty. The conventional meaning of a State that is sovereign is that it is (1) a territorially-organized body politic; (2) which has indications of a
person or institution vested with supreme control and authority for that entity. The two qualities that are indispensable to the idea of sovereignty are the elements of control and authority, which accompanies the sovereign’s supreme governing competences.\(^1\) Since the term supreme qualifies the term sovereign, there is some ambiguity between the idea of ‘supreme’ and the quantum of power necessary to assure supreme power. The clarification of this issue is empirical. It would require a greater understanding of the production and distribution of effective power within the body politic as well as the projection of sovereign power externally. To reduce sovereignty to the idea of control or supreme control seems to be incomplete. The general expectation is that the sovereign requires something more than raw power or control in the exercise of effective governing competence. It is generally thought that sovereign competence is accompanied by the idea of authority. The inquirer therefore needs some clarification about whether the authority aspects of sovereignty are purely matters of conceptual and normative discourse or whether some aspects of authority are matters that ought to be empirically defined and therefore have a scientific component to them. This entry seeks to integrate a historical, a jurisprudential and a world politics perspective. In the context of jurisprudence, it cuts new ground by bringing in the work of Harvard professors that were not directly unpacking sovereignty but in fact their theory advances understanding with its notion of institutional competence, and in this sense it breaks some new ground. The perspective of world politics as reflected in the New Haven School is also meant to bring newer insights into sovereignty by understanding it as an outcome of important global processes which inform world politics and world public order.

Most theorists would agree that the term sovereignty includes references to supreme power and authority relating to a body politic that is territorially determined or determinable. However, giving concrete meaning to ideas like ‘supreme’, ‘power’, ‘authority’, ‘body politic’, and ‘territoriality’ are complex matters and their meanings appear still to be intellectually and scholastically unfolding. In addition, there are other levels of complexity. Sovereignty, as understood in terms of governing competence, is tied to the prescription, application, and enforcement of law. This really requires clarification from a very different branch of inquiry: law. The work of Herman Dooyeweerd introduces the idea of how sovereignty has a special meaning in the context of jurisprudence and how in territorial terms it exists with coordinate sovereigns organized in these terms.\(^2\) Jenks and Larson seek to clarify this level of complexity by suggesting that sovereignty has an internal and an external dimension.\(^3\) Rosalyn Higgins concluded in her work that it is the complexity of the external dimension of sovereignty that must also be considered.\(^4\) Sovereignty has meanings and applications in such fields as international relations, world politics, and international law and diplomacy.

It may be that the sovereignty of internal domestic imperium and sovereignty in the context of international relations and world affairs represent very different conceptual worlds. According to Harold Lasswell and Abraham Kaplan explained in their work how external sovereignty must accommodate a world of alternate sovereigns through the mechanisms of diplomacy and a wide variety of methods of formal and

\(^1\) McDougal, M.S./Reisman, W.M./ Williard, A.R. The world process of effective power: The global war system In Power and Policy in Quest of Law, P. 353 (1985); Literature that empirically explores power; As Rosalyn Higgins does (see Higgins 1976), he discusses the meanings of power and authority under New Haven jurisprudence.

\(^2\) Dooyeweerd, H., “The contest about the concept of sovereignty in modern jurisprudence and political science,” Free University Quarterly (1951); Traces the historical development of Sovereignty in legal and social thought.

\(^3\) C. Wilfred Jenks Arthur Larson and others, Sovereignty within the Law. London: Stevens and Sons Ltd.; Dobbs Ferry, New York: Oceana Publications (1965); Collection of essays by leading thinkers addressing the problem of limiting sovereignty under the rule of law.

\(^4\) Higgins, Rosalyn, Integrations of Authority and Control, in TOWARD WORLD ORDER AND DIGNITY, ESSAYS IN HONOR OF MYERS S. MCDOUGAL, W. Michael Reisman & Bums H. Weston eds. (1976); Leading academic commentator on the issues of control and authority in the structure and process of International Legal Order. She discusses the meanings of power and authority under New Haven jurisprudence and indicates that authority constitutes expectations of appropriateness in regard to the phases of effective decision processes maintaining that authority has to be seen as interlocking with supporting control, or power.
informal communications strategies. The central issue here is the reach of sovereign competence across State and sovereign lines. Reisman and Weisman enhance awareness of complexities which represent a major intellectual challenge in unpacking sovereignty for the conditions of the new millennium. Sovereignty is not static but instead is a changing phenomenon, changes take place when the very concept itself means different things to different professions, disciplines, and political and legal cultures. Additionally, the nature of world politics and international relations has been deeply impacted by processes encapsulated in the term globalization. The simplest explanation of the globalization phenomenon is in terms of its effects on sovereignty. The phenomenon of globalization works on the insight that sovereign borders have in fact become porous in the face of the global flow of goods, services, people, and communications.

A. JEAN BODIN AND SOVEREIGNTY THEORIES IN CONTEXT

The modern concept of sovereignty owes a great intellectual debt to the French political theorist Jean Bodin. Bodin’s work is credited with giving the sovereignty concept coherence, content, and currency. The simplistic sense of Bodin’s contribution is that it was committed to the concentration of power in the monarchy and therefore laid the foundations of sovereign absolutism. While it is possible to impose such a gloss on his work, there is ample evidence contradicting this in the work of Salmon, in his work on sovereignty as well as evidence of his public life. Bodin was by no means committed to sovereign absolutism. It would be better to see Bodin’s work on sovereignty in the context of the political turmoil of his time. The public order of Europe, based on the Holy Roman Empire and the idea of Christian universality, was in fact crumbling under the influence of the Reformation. The demise of the Holy Roman Empire diminished the sense of Christian Universalism in Europe which produced a legacy of religious wars which appeared interminable and which generated social dislocation and anarchy; matters that universalism could not remedy. Bodin’s theory explains how public order tasks fell to local elites who controlled territory and population and how the local prince was seen as representing the idea of majestas. Bodin had a number of lives - political, scholastic, and religious - making his view of sovereignty more complex. Bodin’s experience seems to indicate that what was needed locally was order that could be best sustained by hierarchy. The prince or the king seemed to be an ideal fit for the offline public order and safety needs of the body politic. Bodin was a scholarly eminence in matters of governance. He was consulted by the king on technical matters.

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8 Bodin, J., On Sovereignty: Four Chapters From Six Books of the Commonwealth, Cambridge, UK: Cambridge University Press (1992); It should be examined considering its perspective from a scholarly outlook of his experience as a protector of the people and a limitor of royal power. Its external aspect covers war and international relations. Sovereignty its define in terms of a Roman Law idea—majestas; “Majesty or sovereignty is the most high, absolute, over the citizens and subjects in a commonwealth.”
9 Salmon, J.H.M., Jean Bodin; Theory of Sovereignty: Europe, 1450 to 1789, Encyclopaedia of the Early Modern World (2004); These books represent Bodin’s work on sovereignty. It is possible that Bodin’s theory could be seen as justifying royal sovereign powers. Bodin also saw this property as belonging to the people and not the crown.
10 Reiss, R.M., THE CLASH OF CIVILIZATIONS OR RELIGIONS (2004); Analyses the impact of religion and or culture on the secular nation State in world order. It gives an explanation of how the conflicts of religion that were generated during this period were a major public policy problem.
11 Rose, P.L., Selected Writings on Philosophy, Religion and Politics, Genève: Droz, (1980); A compendium of Jean Bodin’s most important pieces. The author uses them to provide an orientation to Bodin’s work and to attract the reader to the context of Bodin’s work which implicated religious conflict. Contains “Épitre à son neveu” 1586; “Consilium de institutione principis” 1603; “Sapientiae moralis epîtome” 1586; “Paradoxon” 1596; “Le Paradoxe de J. Bodin” 1598; “Lettre à Jean Bautru de Matras” 1568–69; “Lettre de M. Bodin” 1590.
of governance, held elected office and was elected a deputy of Vermandois and to the Estate’s General of Bolis. He received the presidency of the deputy of the Third Estate. In this role he was a tenacious defender of the interests of “the people.” This could be seen as promoting a weakening of the monarchy in the interests of the Third Estate. Bodin had a record of challenging royal power over economic issues. The religious man in him resisted royal policies that he saw as provocative of religious conflict rather than tolerance.

Bodin grapples with the problem of the sovereign’s relation to tyrannicide suggesting that there are circumstances in which tyrannicide is justified and circumstances where it is absolutely forbidden. Bodin acknowledges that sovereignty has an internal aspect that covers full political power and that there are different forms of State and forms of governance suggesting that the notion of sovereignty in the form of an absolutist monarch is only one form of governance. Bodin’s focus on monarchical sovereignty draws an awkward distinction between a despotic monarchy and a tyrannical one. A despotic monarchy is still sovereign if it has defeated its enemies in a ‘just’ war and then treats them as a despot. The war is valid under the law of nations, and therefore this form of despotism is valid. If the sovereign conquers in an ‘unjust’ war, then his conduct in expropriating the rights of the conquered is the one of a tyrant. In Bodin’s view, despotism may be appropriate and sometimes legal but tyranny is never legitimate; it is contrary to divine and natural law. Bodin has tied sovereignty to certain limiting factors. In the definition of sovereignty, Bodin uses the term absolute, an adjective drawn from Roman Law experience where is linked to the idea of sovereign prerogatives (legibus solutus). Bodin’s sovereign is not subject to civil or positive law. However, the sovereign is bound by natural and divine law. In short, the concepts of ‘supreme’ or ‘absolute’ are unequivocally limited by natural law, divine law and, to some extent, international law. This suggests that Bodin’s use of the term absolute is meant to be qualified, and suggests restraints on sovereignty within the domain of natural and international law. Bodin’s sovereignty was trying to reconcile the need for some level of hierarchical authority for public order with his belief in the legitimacy of the people and in divine and natural law. The element of explicit elucidation lacking in Bodin is the conjoining of authority with sovereignty or majestas. It is clear that when distinguishing different forms of State and governance, it is not at all clear that sovereignty draws its authority from the body politic. Bodin’s distinctions between despotism and tyrannicide seem to diminish the salience of divine and natural law as sources of sovereign authority.

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12 Nagan, W.P., FRSA and Craig Hammer, The Changing Character of Sovereignty in International Law and International Relations (2003); Explores conceptual basis of sovereignty in terms of theory and international legal practice. It seeks to understand sovereignty in the changing context of international relations, globalization and the developments in international law that have constitutional characteristics under the UN Charter and practice. It also seeks to root contemporary ideas of sovereignty in the authority of the people’s perspectives themselves, idea that is given formal expression in the preamble of the UN Charter itself.

13 Jean Bodin, Stanford Encyclopedia of Philosophy (SEP) (2010); This is a useful summary of the life of Bodin and the central ideas that influenced his work in general and in particular on the idea of sovereignty.

14 Jasentuliya, N., Perspectives on international law. Kluwer Law International. p. 20 (1995); Gives an explanation of how the traditional definitions provided for in the Montevideo Convention remain a generally accepted concern within States in the International community.

15 Shaw, M.N., International law. Cambridge University Press. p. 178 (2003); Exploration of the most widely accepted formulation of the criteria of statehood in international law provided in Article 1 of the Montevideo Convention on Rights and Duties of States, 1933 which lays down that the State as an international person should possess the a permanent population, a defined territory, a government and capacity to enter into relations with other states.
B. THE WORK AND CONTRIBUTIONS OF THOMAS HOBBES

Thomas Hobbes believed that the motivation for the covenant creating sovereignty is the notion of insecurity and fear.\(^\text{16}\) Hobbes expressed this idea as a fear of an outside conqueror or fear of one's fellow citizens. This kind of social contract or covenant involves the renunciation of rights or the transfer of rights and the authorization of sovereign competence. The central issue of the authority of the sovereign is not the covenant or contract but whether if the sovereign can effectively discharge the obligation to protect those who have consented to obedience. In order to discharge the obligation to protect, the sovereign needs effective government. To have effective government, its authority must be absolute. It is essential for sovereignty to have certain rights that cannot be tested. These rights confer powers that must be reliably and effectively used in governance. In this sense, Hobbes provides a cleaner and more precise concept of sovereignty in terms of effective power or control. Indeed, Hobbes believes that limiting authority generates difficult disputes about what the precise limits are of authority itself. Moreover, if the individual citizen may unilaterally determine whether the government should be obeyed or not, then the result may be civil war or paralyzed government. According to Hobbes there can be no authority above the authority of the sovereign for defining the question of authority itself.\(^\text{17}\) In effect, Hobbes works on a dismal view of the human capacity for cooperation and a greatly enhanced view of the ubiquity of social conflict. Hobbes taught that "man is a wolf to other men" because he believed that people, by nature, were selfish, and acted only to serve their own interests.\(^\text{18}\) Hobbes believed that governments existed to protect people from their own evil nature. He further taught that the only way for lasting peace to be achieved was for people to subjugate themselves to a supreme, sovereign monarch. Although Hobbes makes a strong case for sovereign absolutism, his writings also suggest that there are some limits to State absolutism. The citizen may disobey the government because the citizen obtains a right of self-defense against sovereign power.

C. THE WORK AND CONTRIBUTIONS OF HUGO GROTIUS

Austin's later theory sought to be logically rigorous concluding that both, international law and constitutional law, which purported to limit the law making competence of the sovereign, were not really law but simply forms of positive morality. This view challenged centuries of international law which had been largely sustained by the ideas of the *ius gentium* and later developments in natural law. It would be appropriate to briefly retrace the footprints of sovereignty's influence on international law prior to Austin. The most important contribution to natural law emerged from the Dutch Jurist, Hugo Grotius. Grotius came from a nation State that had been immediately involved in a war of independence against Spanish colonialism. The states that comprised the Netherlands were vigorous claimants of the right to self-determination and independence of the nation state. Grotius masterly integration of the independence and autonomy of the sovereign state and the challenges of developing orderly relations between states in periods of war and peace, shows how a great deal of international law effectually evolved with a working through of the imperatives of sovereign power and authority and the constraints suggested by reason and expressed in the form of international law.\(^\text{19}\) A good indication of Grotius approach is found in the following quotation: “Fully

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\(^{16}\text{Lloyd, S.A. and Sreedhar, S., "Hobbes's Moral and Political Philosophy", The Stanford Encyclopedia of Philosophy, Edward N. Zalta (ed.) (2011); Hobbes is widely regarded as one of the great political philosophers in history. His great work the “The Leviathan” is compared to the great works of the classical philosophers such as Plato, Aristotle, Locke, Rousseau, Kant, and Rawls.}\)

\(^{17}\text{Foisneau, L. and Sorell, T., Leviathan after 350 years, Oxford: Oxford University Press (2004); An elegant appraisal of the legacy of The Leviathan.}\)

\(^{18}\text{Lloyd, S.A., “Special Issue on Recent Work on the Moral and Political Philosophy of Thomas Hobbes”, Pacific Philosophical Quarterly, 82 (3&4) (2001); This affirms the current salience and durability of Hobbes’ ideas.}\)

\(^{19}\text{Grotius, H., The Law of War and Peace (De Jure Belli ac Pacis) (1625); This piece is a masterly integration of the independence and autonomy of the sovereign state and the challenges of developing orderly relations between states in periods of war and peace. It}\)
convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon the subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.” One of the most important contributions that Grotius made to the understanding of sovereignty in a climate of multiple sovereigns was his introduction of the idea that legal thought and legal reasoning, which implicated rationality, could be deployed in a way that brought reason to the conduct of sovereigns among themselves. Grotius did much to establish the idea of just war essentially maintaining that there were discoverable natural justice principles which would justify war recognizing as just cause principles of self-defense, reparation for injury and punishment. The concept of just war is not really a license to make war, it is meant to be a constraint on recourse to war. His work also established the legal foundations of restraint found in the *ius in bello*.

**D. The Treaty of Westphalia**

The theories of Bodin and Hobbes should also be seen against the practical world of international diplomacy of the 17th century. The most significant diplomatic and juridical event for the idea of sovereignty emerges from the Peace of Westphalia of 1648.20 This was essentially a peace treaty seeking to establish a response to religious conflict in Europe. Notably Bodin had sought to constrain the impulse of this conflict in France. It is possible that Hobbes, too, may have been influenced by the problems of conflict and the importance of strong central authority to constrain it. The Treaty of Westphalia, in effect, recognized that a European body politic would be a decentralized sovereignty-dominated body politic. And this meant that the local elites (dukes, princes, kings, etc) would now exercise secular sovereign authority over the lands and territories over which they could claim authority and control. It is commonly understood that the Peace of Westphalia was the decisive political and juridical event for establishing a European system of authority based on the sovereignty of the nation state.21 Moreover, the nation State would define its internal obligations according to the citizenship of its subjects rather than their religious or confessional outlook. The important point here is that the rooting of sovereign authority in secular terms would also imply that the limitations (that, for example, Bodin supported on sovereign authority based on natural law and divine law) would no longer be relevant to a form of sovereignty that was meant to separate itself from religion. It is this development of the sovereignty idea and its political expression and development in the Treaty of Westphalia that provides us with the prototype of the modern State system. This system is a sovereignty-dominated paradigm of the global, legal, and political process, significantly dominated by the nation state. It would appear that the drafters of the Westphalian Treaty were not only motivated by the enduring religious conflicts but also by the influence of Bodin and Hobbes. What is distinctive in Westphalia is that these theoretical and philosophical views are given a strong institutional expression in the form of a multilateral treaty. Modern

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20 O’Connell, E., *Treaty of Westphalia (1648)*, In International Law and the Use of Force; Documentary Supplement (2005); The centrality of the Treaty is that it was generated by interest groups seeking to end interminable religious conflicts in Europe. It essentially diminishes the political importance of the idea of Christian Universalism under Papal authority and effectually decentralizes control and authority in terms of aggregates of a population, territory and the localized structures of hierarchical authority.

21 Falk, Richard *A new Paradigm for International Legal Studies; Prospects and Proposals*, The Yale Law Journal Vol. 84, No. 5 (1975); Contemporary salience of Westphalia for the sovereignty/State paradigm of world order. Draws attention to forces emerging in the global environment that essentially transcend to state, including the importance of the emergent global civil society and the work of the New Haven School and the procedures and methods which anticipate the possibility of other social forces and foundations of modern international law.
commentators have suggested that from the perspective of International Relations and International Law the Treaty of Westphalia was a decisive juridical event. In this sense theory and philosophy gravitate to law and jurisprudence.

E. THE WORK AND CONTRIBUTIONS OF PUFENDORF AND VATTEL

Baron Samuel von Pufendorf was a German scholar with a wide range of powerful interdisciplinary skills. As a jurist he did his most creative work at Lund University on international law. Pufendorf shows how he struggled with Hobbes’ views and rejected the destructive implications of Hobbes’ views of human nature. Pufendorf was also influenced by Grotius and therefore by Grotius ideas of international obligation and the reality of the state explaining how he speculated that the state represents the aggregate will of individuals in it, an idea that seems to anticipate the rooting of sovereignty in the authority of the people. In regard to international law he argued that natural law does not extend beyond the limits of this life and that it confines itself to regulating external acts. In this sense Pufendorf was seeking to secularize natural law and bring the idea closer to what later would be considered empirical science. In particular the externalization of natural law effects may be seen as an effort to make it objective. Pufendorf also tried to strengthen the authority foundations of the sovereign state by suggesting that the state (civitas) was a moral person (persona moralis). This idea would strengthen the idea of sovereignty of the nation state at the same time the introduction of the moral element meant that all nations, whether Christians or not, were a part of humanity which expresses itself through the state as a moral person and therefore international law recognizes states with a certain moral persona subject to obligations as moral persona in their interactions with each other. The international law of the 16th century was also influenced by the work of the international law scholar, Swiss philosopher and jurist, Emerich de Vattel. Vattel shows how he accepted the sovereignty of the nation state but also stressed the importance of the nation state for advancing the common good. His fundamental idea is expressed in the following quotation: “All nations are therefore under a strict obligation to cultivate justice towards each other, to observe it scrupulously, and carefully to abstain from everything that may violate it. Each ought to render to the others what belongs to them, to respect their rights, and to leave them in the peaceable enjoyment of them. (Book II, Chapter V).”

F. THE WORK AND CONTRIBUTIONS OF MOSER AND MARTENS

The work of Johann Jakob Moser and Georg Friedrich von Martens is particularly important for changing and justifying the endurance of a strong or thick version of sovereignty in international law. Both of these writers were influenced by the positivist approach to international law. This meant a sharp break with the ideas of international obligation as founded in terms of morality or natural law. What was important was what sovereigns did and how they acted. In the international context, sovereigns overwhelmingly communicated with each other in terms of agreements. Moser shows that this meant that a positive
source of international law would be found in the agreements made by sovereigns between themselves. According to Martens the method of establishing this was to collect all the treaties they could possibly collect, organize them and from the treaties one could determine empirically what exactly sovereigns consented in their agreements. Such agreements represent the consent of the sovereign to be bound and therefore such consent is reconcilable with the sovereign powers of the state. A second component of international law was reflected in the recognition of the custom that the sovereigns had generated in their operations with each other. In technical sense, custom is a non-consensual source of international law, and since it could be seen as non-consensual it might be inconsistent with the sovereign autonomy of the other state. The test evolves in such a way as to suggest that custom carries the implicit consent of the State to be legally bound. Essentially custom was qualified by the principle *opinio juris sive necessitates*. Custom and treaty therefore became the primary sources of international law and these sources could be reconciled with the sovereignty of the nation state without recourse to the vagaries of the natural law tradition. Powerful as these theories were they could not quite destroy the Grotian tradition which sought to make international law subject to a principle of reasonable prescription and application. Additionally, the Moser-Martens approach still had to confront the power of Austin’s theory and its challenge to the reality of international law that it was merely positive morality. The leading English international lawyer of the 19th/early 20th century lamented that international law reflected the vanishing point of legal theory.

## G. John Austin and the Theory of Sovereignty

The political and philosophical writings of Bodin and Hobbes, and the practical expression of some of these themes in the European State system in the aftermath of the Westphalian peace, received a significant and strengthened intellectual presence through developments in legal theory and legal culture. In his early works, Austin developed his imperative theory of law that used the emerging tools of positivism to provide for a linguistically sensitive effort at definition and redefinition of the nature of law. The central idea was that law was the command of a sovereign imposed by a sanction. The command was directed at members of the community, who were in the habit of obedience regarding the sovereign’s commands. Since the State in Europe had evolved with higher degrees of centralization and administration, the idea of the State as sovereign (and as the source of all law) had an intuitive commonsense appeal. This was a relatively easy model to understand. It was straightforwardly hierarchical. It had the genius of having some of the most essential characteristics of law, which it could account for. The problem with Austin’s theory is that it had a close affinity with power or control. The element of authority in his model was lacking. This meant that the model, which reduced law to superior power, looked no different from a gunman who enters a bank with a gun and demands that the cash be handed over to him. In short, the gunman exercises a power to force someone (or oblige someone) to do or refrain from doing something. But the question of whether there is an obligation, which is founded on authority, which requires compliance, is ignored. The Austinian model

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25 Johann Jakob Moser, *Versuch des neuesten europäischen Völkerrecht in Friedens- und Kriegszeiten; Beiträge zu dem neuesten europäischen Völkerrecht in Friedenszeiten; Beiträge zu dem neuesten europäischen Völkerrecht in Kriegszeiten* (1732 to 1780); For Moser International law was above all professional practice and was the first to discuss in an adequate form the subject of European international law in times of peace and war being the first legal scholar to bring out a complete presentation of German constitutional law. His entire work shows his influence in the process of making public law an academic science.

26 Martens, G.F., *The Law of Nations: Being The Science of National Law, Covenants, Powers & c.; Founded upon the Treaties and Customs of Modern Nations in Europe*, 4th Edition (1815); This book is a list of the principal treaties from 1748 to the time of its creation that have great practical utility even when it might be seen as a very partial view of the systems of Europe of that time. It had gone through 13 editions and in 1894 Holland won the Swiney Prize of £100 and a silver cup.

27 Holland, T.E., *The Elements of Jurisprudence*, 392 (13th ed. 1924); Explanation of positive law, its source, object and the importance of the laws of rules of human action in the determination of rights of public or private character providing a guide on how to analyze them and their leading classification, which is based on the persons with whom it is connected; public persons being the state or its delegates.
II. THE THEORY OF SOVEREIGNTY AND INTERNATIONAL LAW

A. SOVEREIGNTY AND INTERNATIONAL OBLIGATION AFTER THE FIRST WORLD WAR

A vast corpus of treaty law was generated between European colonizers and non-European potentates. These potentates were deemed to be sovereign for the purpose of transferring their powers to their colonial conquerors. And these powers were recognized by the colonial competitors between themselves. However, in this process, vast sectors of the planet experienced the loss of sovereignty if it is defined generally in terms of control and authority. The 19th century development essentially made those states outside of Europe candidates for admission into the initially established European system of international law. And in the 20th century, as we can see in the 2006 United Nations Member States List, and as decolonization accelerated, admissions to the international club of State sovereigns were accelerated. Today, according to the 2008 Non-member States and Entities List, there are some 203 sovereign states. The 20th century saw a greatly expanded idea of sovereignty, supported by the theoretical underpinnings of legal theory. One of these results of this was the idea that a sovereign State had no clear limits to the exercise of its competence without having consented to those limits. The failures of this somewhat anarchical system resulted in the great tragedy of the First World War. Here actors acting under color of sovereign authority could mistakenly set in motion events that would culminate in a war of global proportions. The American president, Woodrow Wilson, promoted the idea of sovereign cooperation via a League of Nations—an idea that was concurrently supported by General Smuts of South Africa. But as it is explained in Fenwick, the idea of a League of Nations would require some subordination of sovereignty to international law. However, the

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28 Austin, John, “The Province of Jurisprudence Determined”, London University Lectures (1832); Austin was the leading legal positivist of his time and his approach to sovereignty is an effort to bring the objectivity of science to the description and analyses of law based on sovereign authority. His model is essentially a hierarchical concept of law with the sovereign in a superior position issuing orders and commands to the community which is in the habit of obedience.

20 Watson, G.R., The Death of Treaty, 55 Ohio St. L.J. 781 (1994); Describes how positivism reached its height in the writings of the English philosopher John Austin. Explains how the developments of sovereignty where consolidated by the Congress of Vienna and later by the Concert of Europe; a process where the European states met and considered transnational matters of European policy and public order.

30 Alexandrowicz, C.H., “An Introduction to the History of the Law of Nations in the East Indies” (1967); This pioneering study challenges the conventional wisdom that the roots of modern international law are purely Eurocentric. Professor Alexandrowicz draws attention to the practice and customs of colonial expansion done through the currency of legal instruments with non-European sovereigns. It should be noted that the treaties and practices between European and non-European sovereigns were included as sources of Eurocentric International Law.

31 “United Nations Member States”, Press Release ORG/1469 (2006); Documents the expansion of Sovereignty in the World Community.

32 “Non-member States and Entities”, United Nations ST/SG/SER.A/298 (2008); These statistics demonstrated the vitality of the expansion of sovereign members of the world community.

33 Anghie, A., Imperialism, Sovereignty and the Making of International Law, Cambridge Studies in International and Comparative Law (2008); This study demonstrated the use of the Eurocentric idea of sovereignty in non European contexts.

34 Fenwick, C.G., International Law, P. 619-624 (1965); Short introduction to International legal arrangements after the First World War.
sovereignty idea still dominated negotiations and the League emerged with a unanimity rule. If a single sovereign objected to a League determination on a matter within its competence, then the League would be unable to act. In this sense, the strong or thick version of sovereignty subverted the emerging and difficult idea of subjecting sovereignty to international obligation. The paralysis of the League is, in the judgment of some theorists, one of the reasons that may have contributed to the Second World War.

B. SOVEREIGNTY AND INTERNATIONAL OBLIGATION AFTER THE SECOND WORLD WAR

The Second World War was conducted under the principle that a sovereign may determine whether (and if so what limits) it would honor in the conduct of war. Hitler's Germany developed the idea that it was involved in what it described as “total war”. Under the guise of sovereignty there was the implicit claim that there were no rules from the law of war that could constrain the prerogatives of the sovereignty. Additionally, the Nazis were race-obsessed; and they viewed persons of Jewish ethnicity as candidates for physical extinction. They viewed the Slavic people as untermenschen ("subhuman people") that could be treated with extreme cruelty and used in whatever terms the Nazis thought were in their own interest. Nazi absolutism developed the death camps in which vast numbers of Jews and other ethnic ‘expendables’ were exterminated. It should be added that, outside of Nazi atrocities, the growth of the totalitarian state—especially in Europe—had generated monumental atrocities but often these were targeted at their own citizens. Thus, it has been estimated that Russia has accounted for some 60 million murders by government.

A significant aspect of this statistic is identified with Stalinistic totalitarianism. At the end of the WWII, considerable disquiet was generated about the notion of the abuse of State sovereignty and the scale of the horror that it generated. The most important effort to clearly establish that there are limits to what government can do is reflected in the work of the Nuremburg Tribunal. In Nuremburg, it was determined that the defense that the defendants were merely following the orders of the sovereign was rejected. The court stressed that behind the veil of the State and sovereign are the finite human agents of decision making. A court of law could therefore penetrate the veil of the State and sovereign and hold the decision makers to account. In historic terms, Nuremburg established a critical repudiation of the principle of sovereign absolutism. It, in effect, repudiated legal theories of sovereignty that sought to shield defendants from responsibility for mass murder.

35 Schachter, O., Towards a Theory of International Obligation, 8 VA. J. I N T ’L L. 300 (1968); A refined and systematic study of the theory of international law obligations as a limiting source of authority on the conduct of sovereign states in the international environment.
36 Bauer, Y., Rethinking the Holocaust, Yale University Press New Haven & London (2001); Review of an insightful overview and reconsideration of the Holocaust history and meaning. Bauer uses his historiography and analysis to insist on an understanding of the political foundations and decision within the State that generated and executed policies creating the Holocaust. In a sense it draws attention to the abuse of sovereignty.
37 Lifton, R.J. & Markusen, E., The Genocidal Mentality: Nazi Holocaust and Nuclear Threat (1990); This book brings the reality of the psychopathological personalities and their role in the Holocaust or possible role in a future nuclear Holocaust. In this sense a realistic sense of sovereignty must account for the personalities that are prone to genocide and mass destruction of human beings.
38 Rummel, R.J., Death by Government, New Brunswick, N.J.: Transaction Publishers (1994); These studies are an indication of the unlimited abuse of sovereignty as a world order problem. This study with the copious statistical data underlines the dangers of sovereignty in the modern era. In short the sovereign State with its implications for killing and mass murder needs some dimension of control and prevention to avoid the absolutism that may lead to mass murder and human destruction.
39 Nagan, W.P., Racism, Genocide, and Mass Murder: Toward a Legal Theory about Genop Deprivation, National Black Law Journal Vol. 17, No. 2 (2004); Rethinks the boundaries of human rights, humanitarian law and the scope of intervention. Draws attention on the problem that states have indulged in unlimited atrocity justified as an exercise of sovereign absolutism seeking to generalize the major forms of human rights, humanitarian deprivation and the problems generated by a thick version of sovereignty developing a general social process of contextual foundations.
C. Threshold Empirical Ideas and Sovereignty

After the First World War Harold Lasswell, a member of the Chicago’s School, that sought to reshape the study of politics as an empirical science, wrote two important books that were to reshape the thinking about sovereignty in an empirical direction. The first of these books was his pioneering study titled *Psychopathology and Politics*. If the study had been dominated by a historical/institutional focus of enquiry, Lasswell deliberately shifted that focus to the individual human participants in politics. Some of those individuals, who were in leadership roles, whether covering themselves in the symbols of sovereign authority, could bring to the role of political leadership psychological deficits and dysfunctions. These deficits could be a result of psychopathological personality orientations. If this were true, some political leaders, who were psychopathological in personality orientation, would constitute a danger to the State and to world order. Therefore, there could be an urgent necessity for the development of a form of preventive politics. These insights penetrate the veil of sovereignty and anticipate the idea of leadership accountability as well as restrains on the conduct of leadership. In short, restrains on sovereignty. In order to make the theory more credible there was a critical necessity to deconstruct the idea of the sovereign State which was insulated in the symbolism of an impenetrable juridical curtain of non-transparency. To advance this agenda required a radical empiricism for unpacking the nature of the State to clearly understand the nature of authority, control, and personality in the organization and functions of the State. Lasswell reconceptualization of the State was that it was empirically and observable manifold of events. However, the study of the State as a manifold of events, which involves individual participants as well as participants in the aggregate, generated a lifelong quest for an adequate theory and method of enquiry to completely understand the interdependence and inter-determination of the individual and society or more generally the interrelationships between personality and culture. Lasswell saw within the idea of the State as a manifold of events, that within the manifold there is the importance of the study of the individual personality upon the meaning of the political process as a whole. Such interactions between person and culture operate within what Lasswell termed an ‘event manifold’. Within the event manifold Lasswell understood the complexity of what he was suggesting:

“since the psychopathological approach to the individual is the most elaborate procedure yet devised for the study of human personality, it would appear to raise in the most acute form the thorny problem of the relation between research on the individual and research upon society.”

The idea of the State as a manifold of events is in effect an appropriation from the Cambridge Logical School, in particular the philosophy of Alfred Whitehead. This idea essentially provided a flexible architectural tool within which to tentatively identify and observe events, and since events for Lasswell were influenced by human dynamism, events were frequently and emergent dynamic of society, which dynamic would be obscured by formalistic or reified ideas of State and sovereignty. Indeed, Lasswell believed that to exclude the individual from understanding the social dynamics of the collectivity was to misdirect legitimate inquiry. According to Lasswell;

“It may be asserted at the outset that our thinking is vitiated unless we dispose of the fictitious cleavage which is sometimes supposed to separate the study of the "individual" from the study of "society." There is no cleavage; there is but a gradual gradation of reference points. Some events have their locus in but a single individual, and are unsuitable for comparative investigation. Some events are widely distributed among individuals, like breathing, but have no special importance for

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42 Id.
interpersonal relations. Our starting-point as social scientists is the statement of a distinctive event which is widely spread among human beings who occupy a particular time-space manifold.”

Having demolished the rationality of a familiar dualism between the individual and the group or the State Lasswell in effect set his agenda on the next important intellectual challenge: the individual in the global environment. Lasswell set out his thoughts in his now classic: *World Politics and Personal Insecurity.* This was a study in the social sciences that established an important place for the individual in the arena of world politics. By implication the sovereign State clearly did not now monopolize this arena of action. The central idea was that the global environment was a generator of meaning and understanding in terms of symbols that penetrated sovereign lines. Those symbols sometimes influenced individual behavior because they could be perceived symbolically as threats to security and thus productive of individual anxiety. This work laid the foundations for a movement away from the monopoly of the sovereign State as the exclusive subject of international law, and the sovereign State as the monopolizer of international relations. Clearly the individual was also participating in this universe and thus reflected an important human subjectivity in terms of the values implicated in the global system. These ideas were not a direct attack on sovereignty, but they provided a framework that after later developments provided a sophisticated empirical approach to mapping the salience features of global processes critical to outcomes we describe as the sovereign nation State.

**D. SOVEREIGNTY AND THE UN CHARTER**

The Charter of the UN is an instrument by which members both assert their sovereignty and limit their sovereignty. The Charter is more than a formal constitution for the international community. It is, from an outcome of the world, social, and power processes. It was a reaction to World War II - to the experience of total war and the Holocaust. As a preventative measure, the Charter placed limits on its members' sovereignty. Yet, paradoxically, membership in the UN is an important means of asserting sovereignty. An examination of the history and text of the Charter reveals this tension. The Charter was written for the sovereign nation-States of the world community. Many of those sovereigns had been members of the UN’s predecessor, the League of Nations. The Charter also inherited a sizable body of international law that preceded its entry into force. Although the higher law aspirations of theorists such as Grotius, Vattel and Pufendorf continued to have traction, the tradition of Moser and Martens positivism was very much in evidence since the Charter represents a form of sovereign consensual obligation. The influence of this latter perspective is well illustrated by the Permanent Court of International Justice in the *Lotus Case* from where international law inherited one of its very important principles. The PCIJ stated “that restrictions upon the sovereignty of States could not be presumed”. This suggested that some deference would have to be given to the expectation that there are no presumptive limitations to sovereignty in the international legal system. It should also be noted that the failure of the League of Nations was rooted in the principle that any individual sovereign State could exercise a veto in the League. The UN Charter, in effect, would have to respond to these and other problems in defining the scope of sovereignty and the force of international obligation. In this case the Court articulated a powerful version of strong or thick sovereignty indicating in effect that a sovereign has to consent in order to be bound by an international obligation. The Court said that limits to the sovereignty of the State could not be presumed. Thus, recognizing a limited form of international obligation

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43 Id.
44 Harold D. Lasswell, *World politics and personal insecurity,* Free Press (1965)
45 Goodrich, L.M., et al., *CHARTER OF THE UNITED NATIONS*, 290-309, 3d ed. (1969); Discusses the history of the Charter of the United Nations and offering justifications as to why the Security Council is imbued with such power
46 *The Case of the S.S. Lotus* (France v. Turkey), Permanent Court of International Justice, Twelfth (Ordinary) Session, PCIJ, Ser. A., No. 10 (Sept. 7) (1927). This is the Lotus Case decided by the Permanent Court of International Justice. It is judicial authority for the idea of thick sovereignty. It central proposition was that there were no presumptive limits to sovereign authority in international law.
the Court stressed a presumption which gave primacy of thick sovereignty to the nation State. Another
important example of practice during this period emerged from the influential arbitral decision of the Island of Palmas Case where in practice of international law strengthened the definition of sovereignty. In this arbitration the arbitrator considered that mere discovery as a basis for title to the sovereign dominion and control of the territory was weak and could not defeat the assertion of sovereignty of the State that exercised continuous control and authority over the land. In this sense the arbitrator favored sovereignty as an exercised by effective power versus sovereignty as a nominal legalistic assertion of titled by discovery.

III. MODERN INTERNATIONAL SOVEREIGNTY

The Charter does not define sovereignty. The first words in the Preamble of the Charter introduces
the key terms: "We the Peoples of the United Nations determined..." The references to "Peoples" and "Nations," when coupled with the term "determined," suggest that the peoples of the world are the ultimate source of international authority. Moreover, the peoples have "determined," or made an affirmative decision, to adopt the Charter of the UN because of certain problems and conditions of global salience. The member States of the UN are sovereign; the idea that sovereign legitimacy and authority under the Charter is derived from the "Peoples" 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. In short, the tacit assumption of the authority of sovereignty is actually rooted in the perspectives of all peoples in the global community who are not objects of sovereignty but subjects of it. Roosevelt expressed in 1941 that the demands of the "Peoples" are expressed in four fundamental principles on which the UN is premised: prevention of war, protection of human rights and dignity, respect for social progress according to the rule of law, and higher living standards and development for all. The concepts of "United" and "Nations" are to 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. Accordingly, the efficacy of the UN should be measurable by examining the sum of its parts. It is a body of coordinate sovereigns; its institutional authority cannot aspire to more authority than that reposing in the will of the sovereigns themselves. Yet, on some occasions, the UN has the authority to invoke an institutional capacity broader than the sum of its sovereign parts. In short, there is tension in the international

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47 The Island of Palmas Case (Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928); This case is a territorial dispute over the Island of Palmas between the Netherlands and US. It was heard by the Permanent Court of Arbitration. It established three important rules concerning island territorial disputes becoming one of the most highly influential precedents dealing with island territorial conflicts.

48 Charter of the United Nations; Preamble and Chapter 1 (Article 1 and Article 2); Spells out the scope of international concern and the limitations on sovereignty providing the purposes of the UN (maintain international peace and security and to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples). States are subject to a good faith obligation and are required to settle disputes by peaceful methods.

49 Franck, F. & Patel, F., UN Police Action in Lieu of War: "The Old Order Change", 85 A.J.I.L. 63, 66-67 (1991); This section is meant to document the modifications and permutations of sovereignty under the UN Charter.

50 Four Freedoms Speech, Franklin D. Roosevelt, 1941, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 663, Facts-On-File, Inc., ed. (1995); Proclaims that the UN pledge to maintain international peace and security, and to ensure that armed force shall not be used. Proclaims UN's goal of reaffirming "faith in fundamental human rights [and] the dignity and worth of the human person, and its pledge to "promote social progress", respect and the equal rights of men and women and of nations large and small.

51 Oppenheim, L., International Law: A Treatise, 8th edn, H. Lauterpacht ed, volume I: Peace (1955); Oppenheim asserts that the phrase "sovereign nation" entails two kinds of sovereignty possessed by each State: dominium, or territorial sovereignty, which is supreme authority over all persons, items, and acts within that state's territory and imperium, or personal sovereignty, which is supreme authority over all citizens of that State, be they at home or abroad.
constitutional system based on principles of international concern and obligation on the one hand and sovereign, territorial, and political independence on the other.

A. UN Charter's Membership, Obligations, and Responsibilities

A further criterion that strengthens the principle that the UN Charter is a sovereignty-dominated instrument's found in the membership provisions of Chapter II. Article 3\textsuperscript{52} states that the original members of the UN “shall be ... states,” and Article 4(1)\textsuperscript{53} states that membership in the UN are open to "all other peace-loving states which accept the obligations contained in the present Charter." Although membership in the UN is exclusively a matter of State sovereignty, an institutional set of limits is imposed: the State must be "peace-loving" and accept all Charter obligations and accept the obligations of international law as developed under the Charter. Likewise, Article 6, though it may be exercised only in highly unusual or exceptional circumstances, stipulates that a State may be expelled from the UN if it is a persistent violator of the UN Charter.\textsuperscript{54} The scope of prohibited activity that results in expulsion may be controverted. For example, expulsion can entail the loss of recognition. Perhaps it might also impose a duty not to recognize an expelled entity, or its acts, in the context of international relations and law. Whether such a procedure may be pushed to the limit of regime replacement may be hotly disputed, but at least in theory the question of expulsion under Article 6 implicates the idea that the sovereign equality of States is conditioned by UN Charter obligations and that a persistent violation of these obligations erodes the authority of the State. In short, the Charter supports and seeks to protect and advance a particular form of good governance-oriented sovereignty. It also aims to discourage other forms of government that seek to position sovereignty above Charter obligations. There are, of course, other Charter based limits on sovereignty. For example, Chapter IV of the Charter outlines the composition and workings of the General Assembly and gives the Assembly the power to highlight any issue by making it a matter for international discussion and elaboration. Specifically, Article 10 states that "the General Assembly may discuss any questions or any matters within the scope of the ... Charter".\textsuperscript{55} In addition and in accordance to Article 13 the Assembly has the power to initiate studies and make recommendations.\textsuperscript{56} This "promotional" Assembly function may shape international expectations. For example the Advisory Opinion of the ICJ in 1962, was influenced by General Assembly recommendations.\textsuperscript{57} Such recommendations may even create soft international law that might be binding on sovereign States in limited circumstances.

B. Security Council

\textsuperscript{52} UN Charter; Article 3; Stipulates that the original members of the UN shall be states which participated in the United Nations Conference and who have signed and ratified the document.

\textsuperscript{53} UN Charter; Article 4(1); States the general principle that UN membership is also open to “all other peace loving states” which accept the obligations contained in the UN Charter.

\textsuperscript{54} UN Charter; Article 6; Targets a State which is a persistent violator of the Charter and which State may be expel upon a recommendation of the Security Council.

\textsuperscript{55} UN Charter; Article 10; Gives the General Assembly the competence to discuss any questions or matters within the scope of the Charter.

\textsuperscript{56} UN Charter; Article 13; The General Assembly has the competence to initiate studies and make recommendations for the purpose of promoting international cooperation and the progressive development of international law. This competence extends as well to cooperation in the economic, social, educational and health as well as human rights and fundamental freedoms.

\textsuperscript{57} Certain Expenses of the United Nations: Advisory Opinion (1962), Duke Law Journal, Vol. 1963, No. 2, pp. 304-306 (1963); This case effectually upheld a constitution innovation in the UN Charter, the so called Uniting for Peace Resolution. The case validated expenses expended under the power of the Resolution.
The UN Charter Chapter V, Articles 24, 27(3), and 39,60 confers to the Security Council special security-related competences upon certain member States. The five permanent members exercise what some scholars ideal to be super sovereign powers.61 These members have the special power of veto. Other elected members have extra powers by virtue of membership in the Council, but do not have unilateral veto power. The Security Council is given the primary global responsibility for peace and security and has the competence to enforce its decisions peaceably Chapter VI, Articles 41,62 and 42,63 or by the use of force Chapter VII, Article 51.64 It has the authority to make the determination as to whether there exists "any threat to the peace, breach of the peace, or act of aggression." The powers of the Security Council are nevertheless subject to certain inherent powers of sovereign States. Article 51 of the Charter assures to members "the inherent right of ... self-defense ... until the Security Council has taken the measures necessary to maintain international peace and security". The term "inherent" is ambiguous.65 It seems to make reference to the notion that Article 51 itself codifies this "inherent" right. "Inherent" may at the same time refer to rights which are not clearly articulated in Article 51 but instead existed antecedent to the Charter. It is one of the most contested provisions in the entire Charter and possibly in all of international law. The Charter represents a continuing constitutional process of conflict and collaboration with respect to the basic architecture of international law and relations.66 The contestation sometimes reflects a strong Lotus version of sovereignty, thus seeking to weaken the scope of international obligation. At other times, it is the strength of the international obligation supported by the critical powers within the UN that seems to weaken the scope of sovereignty under the Charter. The classic tension between what counts as a matter of international concern under the Charter and what is exclusively reserved to the domestic jurisdiction of a State generates controversies in the actual practice of international law and relations. When the UN Charter is examine as a process of communication and collaboration, it can be find that the scope of international obligation and domestic sovereign competence is and will remain controverted.

C. THE PRACTICE OF INTERNATIONAL LAW IN THE TWENTIETH CENTURY AND SOVEREIGNTY

The early part of the twentieth century saw a breakdown in the state system as the world was enveloped in the WWI. There was a recognition that sovereignty unconstrained by some form of

58 UN Charter; Chapter V, Article 24; The Article confers on the Security Council the primary responsibility for maintaining international peace and security.
59 UN Charter; Chapter V, Article 27(3); The decisions of the Security Council are affirmed by majority vote with a concurrence of the five permanent members.
60 UN Charter; Chapter V, Article 39; The Security Council has the competence to determine the existence of a threat or breach to international peace and security or an act of aggression, and may recommend actions consistent with Articles 41 and 42.
61 Goodrich, L.M. et al., CHARTRER OF THE UNITED NATIONS 290-309, 3d ed. (1969); Discusses the history of the Charter of the United Nations and offering justifications as to why the Security Council is imbued with such power.
62 UN Charter; Chapter VI, Article 41; Deals with measures to give effect to its decisions that do not involve the use of armed force.
63 UN Charter; Chapter VI, Article 42; If the Security Council considers that the measures on Article 41 are not effective it may take coercive action using air, sea or land forces as unnecessary to restore and maintain international peace and security.
64 UN Charter; Chapter VII, Article 51; 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 established four methods.
65 Schwarzenberger, G., A MANUAL OF INTERNATIONAL LAW 153-54, 4th ed. (1960); Textual approach is comprised of a "plain meaning”; contextual reading of ambiguous words regardless of the drafter’s intent. Systematic approach analyzes the “four corners” of the document and seeks to assign the document consistent phraseology. Intentional approach is comprised of a thorough analysis of the drafters; Intent at the time the document was signed. Teleological approach considers the function and goals of the document throughout the passage of time.
66 Nagan, W.P., Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium, 24 Yale J. Int'l L. 485 (1999); 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.
international legal obligation could lead the way into another global catastrophe. However, the idealism which generated the League of Nations and its modest mandate system for an extended legal obligation could not overcome the strength of State commitment to sovereign autonomy.\textsuperscript{67} Thus the League of Nations had a unanimity rule which meant that a single sovereign could block action in the League. The rise of European totalitarianism accelerated the conflicts of the time precipitating a WWII. After the WWII there was a renewal result to strengthen the force of international obligation and correspondingly constrain the scope of sovereign absolutism. The initial move in this direction was the Charter of Nuremberg, an international agreement among the allies that there would be a criminal justice response to the crimes committed by the Axis Powers. We discuss this later in this entry. The second significant development was the adoption of the UN Charter in the form of a treaty obligation. Consistent with the positivist view of sovereignty the Charter was essentially an agreement giving sovereign consent to the compact. The compact established certain major purposes for international, legal and political order. A central element in the Charter was that it had constitutional characteristics in a global setting. And within this framework two dynamic themes were developed. First, the Charter had to account for the sovereignty of its constituent members and define the scope of that sovereignty in terms of the domestic jurisdiction of the State over its internal affairs. This concept of sovereignty was a complemented by an effort to develop the jurisdictional concept of international concern. If a matter was exclusive to domestic jurisdiction it was exclusively a matter of the primacy of sovereignty. If a matter triggered the elements of international concern then sovereign autonomy would be shared and if necessary constrained by the scope of international jurisdictional concern. Notwithstanding that this rethinking of sovereign competences in the context of the political reality of global interdependence, the technical instrument used to develop these expectations came in the form of a treaty and States adopted this treaty indicating their sovereign consent to be bound by it.

D. THE TREATY MODEL AFTER THE UN CHARTER: SOVEREIGNTY AND THE CONTROL AND REGULATION OF GLOBAL SPACES AND RESOURCES

One of the most important international instruments clarifying the reach sovereignty and the scope of international concern is indicated in the Declaration on Principles of International Law.\textsuperscript{68} This Declaration is not a Treaty. However, it is a Declaration based on the foundational principles of international constitutionalism found in the Charter. The Declaration expresses in more concrete ways matters that constrain States because these are matters of international concern, and protects State sovereignty from inappropriate interference, again because such interference also constitutes a matter of international and constitutional concern. It could be suggested that the Declaration is an effort to codify the principle of sovereignty under the rule of law. Additionally the breadth of the Declaration and its foundation in any international law obligation that requires cooperation in promoting the values of the UN Charter suggests that the Declaration, read in the light of the UN Charter and the International Bill of Rights, is a development in entrenching expectations of a global constitutional design. Indeed prior to the adoption of the UN Charter there already existed important multilateral treaties which refined the reach of sovereign competence and established by agreement frameworks of collaborative competence over matters of transnational salience. The Chicago Convention on International Civil Aviation is another international treaty that has an effect on

\textsuperscript{67} Goodman, R. \& Jinks, D., \textit{Toward an Institutional Theory of Sovereignty}, Stanford Law Review, Vol. 55:1746 (2003); Proposes a sociological model of sovereignty that illuminates the ways in which global social constraints empower actors, including states and the ways in which institutions, including the bundle of rules and legitimated identities associated with state sovereignty constrain actors.

\textsuperscript{68} Declaration on Principles of International Law, Resolution 2625 (XXV) (1970); This document strengthens the sovereignty foundations of international legal order by restricting interference with the appropriate internal functioning of a State and at the same time insists that the rules that constrain inappropriate State relations are in effect a positive duty under international law to cooperate in promoting friendly relations and cooperation.
sovereignty. When sovereignty ideas were developed travel over air-space had not been imagined. The development of the technologies of air travel required some rethinking of the ideas of territorialism, boundaries, regulation and cooperation. Technological advances reaching into space open up another dimension of sovereignty and international concern. Logically it could be said that the sovereign States borders extend geometrically as far as the State can exercise its sovereign powers in outer space and that there is a finite rational limit to the indefinite expansion of sovereignty into space. The Outer Space Treaty of 1967 is a recognition that whatever height above the Earth we designate, the space above that will be the common property of mankind’s shared inheritance. Its first priority is the peaceful uses of space and a high priority is to keep weapons of mass destruction from been deployed in space. The Treaty also prohibits testing nuclear weapons in space. It also declares that celestial resources such as the Moon or accessible planets are a common heritage of mankind. The Treaty seeks to secure a demilitarization of space and to encourage scientific discovery.

E. SOVEREIGNTY AND THE SPACES RELATING TO THE OCEAN’S AND POLAR REGIONS OF THE WORLD

The post-war period was significantly influenced by the development of scientific technologies that permitted the appropriation of resources not traditionally included within the boundaries of the sovereign state. Among these resources were the resources of the seas and the Polar Regions. The Geneva Conventions on the Law of the Sea of 1958 was a major instrument of importance to the territorial dimensions of sovereign competence which expanded and constrained sovereignty by agreement. It added to the territorial competence of the State the adjoining continental shelf and clarified the principle of the freedom of the seas as an exercise of sovereignty over the uses of the deep sea ocean. It also sought to limit the excessive exploitation by limiting sovereignty rights in order to conserve the living resources of the high seas. Another important resource was in the region of the Antarctic. The Antarctic Treaty System of 1959 recognizes that the presence on the Antarctic of nation States’ scientific teams occupying parts of this continent would exercise a limited form of occupancy/possessor rights consistent with the flag carried by the research team. The recognition of these rights required corresponding obligations. The presence of these teams is limited to peaceful activities stressing the freedom of scientific inquiry and the distribution of results. Subsequent developments had concerned matters of agreement on conservation regulating mining activity and environmental protection. Another important treaty that shaped sovereignty in inclusive spaces and resources is the most recent Convention on the Law of the Sea of 1982. This document extended the territorial sea

69 Chicago Convention on International Civil Aviation, First edition; Signed at Chicago on 7 December 1944. Trilingual text: English/French/Spanish (Doc 7300) (1944); Establishes a regime concerning the uses of air-space with a determination of areas of air-space that are exclusive to the sovereign State and areas which are essentially exceptions to permit shared used and shared competences between the parties. Is an illustration of the use of a traditional idea of sovereignty and its malleability in the face of technological advances.

70 Outer Space Treaty, UN Resolution 2222 (XXI), 1967; It is another Treaty that reflects upon the impact of technological advances on national sovereignty and international obligations. It provides for the establishment of the idea that the space that is technologically proximate to the Earth space community should be part of mankind’s shared inheritance.


72 Antarctic Treaty, Washington D.C., (1959); This Treaty recognizes that the presence on the Antarctic of nation States’ scientific teams occupying parts of this continent would exercise a limited form of occupancy/possessor rights consistent with the flag carried by the research team. The recognition of these rights required corresponding obligations like the limited presence for peaceful activities. It stresses the freedom of scientific inquiry and the distribution of results.

limits of the State, the contiguous zone adjoining the State, established a 200 nautical mile exclusive economic zone for the State, and clarified the reach of sovereign authority over the continental shelf. It was confronted with how to control and regulate certain resources on the high seas such as the manganese nodules which contain many of the critical minerals for the modern industrial State and exist in high volume on the deep sea ocean floor. The practical problem was that under the traditional law of the sea, a State could use its technology to exploit those common resources for itself. States that monopolize the technology of deep sea mining could exploit these resources solely for their own benefit. The Convention sought to solve this problem by the creation of a Deep Sea Bed Authority which could license mining in return for fees which could be distributed through the UN system.

IV. CONTEMPORARY JURIS CONSULTS RELATING TO THE LEGAL THEORY ASPECTS OF SOVEREIGNTY: UK SCHOLARSHIP

A. THE WORK AND CONTRIBUTIONS OF H.L.A. HART

One of the most important contributions to the jurisprudence of sovereignty is reflected in the work of the former Professor of Jurisprudence in Oxford, H.L.A. Hart. Hart provided a critical deconstruction of the Austin Theory of Sovereignty as a foundation of jurisprudence.74 His critique exposed the problem that Austin system of orders back by threats totally obliterated one of the most central concepts in jurisprudence; the concept of obligation. Coercion may oblige one to act in a certain way but in no way can it suggest that one has an obligation to act in such a manner. It would seem that the concept of obligation has an affinity with the idea of authority. Austin’s sovereignty functions in the absence of authority. Thus implicit in the Hart view was the idea that authority and obligation were central to the idea of law and the idea of the governing authority of law. Hart substituted for the idea of sovereignty a complex structure of interdependent rules. For him law was the union of primary and secondary rules. And among the secondary rules was a master secondary rule of recognition which identifies valid rules and laws. It can be inferred that Hart’s model was partly inspired by the significant voting right cases in South Africa in the 1950’s. In the case of Harris v. Donges of 1952 the Appellate Division of the South African Supreme Court provided a novel clarification of the scope and limits of Parliamentary Sovereignty.75 In a prior decision the Court had ruled that Parliament, bicamerally, had passed a law to deprive black South Africans of their voting rights. After the war Parliament again using the same procedure stripped coloured voters of their voting rights. This time the court ruled that Parliament had acted unconstitutionally. The theory of the court was that the prior precedent had not asked the right questions concerning what is Parliament and what is an act of Parliament. The answer to the question was firstly that entrenched clauses of the South African Constitution required for the Parliament to sit unicamerally and that it would be able to terminate constitutional rights with a two thirds majority. The sovereignty of Parliament was subject to a pre-existing rule of recognition determining what Parliament was and how it was to function in order to exercise sovereign powers. Hart’s insight was probably inspired by the judgment of the Appellate Division of the South African Supreme Court.

74 H.L.A. Hart, *The Concept of Law* (1961); Draws attention to this and other weaknesses in Austin’s theory. He therefore reconstructs the foundations of a legal system in terms of a more complex architecture of different kind of legal rules. Within the system of rules there is a master “secondary rule of recognition” that permits us to identify what is law and what is not.

75 *Harris v. Donges* (Harris v. Minister of the Interior) 1 TLR 1245 (1952); Coloured voters deprived of their voting rights relying on an earlier decision that determined the idea of Parliamentary Sovereignty as the supreme expression of law making in the state. Its constitutionality was challenged by suggesting that the wrong questions were addressed.
B. THE CONTRIBUTIONS OF IAN BROWNLIE

Brownlie provides two important chapters on the legal aspects of sovereignty. He deals with sovereignty as a subject of international law and examines the legal criteria for determining statehood as well as various aspects of continued statehood including the complex processes of the recognition of States and governments and the complex permutations of the territorial aspects of sovereignty. One aspect of sovereignty requires clarification of the extent of the definition of the reach of territorial sovereignty. This would have to take into account the existence of other aspects of territory in the global community and their precise legal statuses, for example, are they trust territories; are there territories that are classified as *res nullius* or *res communis*. Territory weaves into the juristic concept of jurisdiction and the extent of jurisdiction.

Sovereignty and territory also have an overlapping meaning with the civil law idea of ownership and title. International lawyers distinguish this issue as the difference between *imperium* and *dominium*. The idea of title and imperium reflects interminable problems and conflicts such as the conflict between India and Pakistan over Kashmir. The status if Taiwan which exists somewhat autonomously from the People’s Republic of China but which the PRC claims is an integral part of China. In the 1960’s China invaded India because it rejected the boundary understandings that India accepted as a colonial inheritance. The problems of sovereignty and jurisdiction also raise complexities where the sovereign concedes a long-term control to another sovereign, such as the status of Guantanamo. Concepts of possession and use such as the status the US enjoyed in Panama also required a complex understanding of the law of possession and the scope of uses.

Brownlie outlines many problems in which there are legal variations on the way sovereign title is exercised and provides an overview of the imperium exercise over the sub-soil, air spaces and internal waters and concerning the transfer and acquisition of territory and a careful legal appraisal of the way in which title affects the creation and transfer of territorial sovereignty. Brownlie also explores a number of concepts derived from the civil law dealing with scope of property and entitlements including the role of prescription and novation and clarifies the principle that territorial sovereignty cannot be exercised over territory as a consequence of conquest by force of arms. Brownlie’s approach is firmly in the positivist tradition of the examination of international legal phenomena through the lens of operational practice.

C. THE CONTRIBUTIONS OF NICO SCHRIJVER AND ANTHONY CARTY

A more ambitious study from a theoretical point of view is found in the work of Nico Schrijver. Schrijver take off point is the General Assembly Resolution which articulated in the idea of permanent sovereignty over natural resources. This was a claim that grew out of the processes of decolonization and represented a claim to thick sovereignty by new States over natural resources. This claim evolved into the broader claims for a new international economic order. These claims were contested by foreign investor States. And its currency is disputed. It has however had traction in context of environmental and sustainable development and these contexts along with the issue of international trade and investment the sovereignty concept is undergoing modification and change. In the context of the theory of sovereignty one of the most original contributions is to be found in the work of Anthony Carty. Carty examined international law generally with an important preference for sovereignty mainly in the context of the development of practice.

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76 Brownlie, I., *Principles of Public International Law*, 7th ed., Oxford University Press, p. 57-201; p. 105 -167 (2008); Outlines many problems in which there are legal variations on the way sovereign title is exercised. It provides an overview of the imperium exercise over the sub-soil, air spaces and internal waters as well as an analysis concerning the transfer and acquisition of territory and a careful legal appraisal of the way in which title affects the creation and transfer of territorial sovereignty.

77 Schrijver, N., *Sovereignty over Natural Resources*, Cambridge University Press (1997); The take off point is the General Assembly Resolution articulated in the idea of permanent sovereignty over natural resources which grew out of the processes of decolonization and represented a claim of thick sovereignty by new States over natural resources. It has traction in context of environmental and sustainable development.
and theory in the UK explaining that the inheritance of nineteenth century scholarship was really directed by statesmen seeking to reinforce the importance of the rule of law.\textsuperscript{78} He also notes that leading statesmen of the time were more concerned to enhance British greatness by the force and the influence of British power and resources and that English international lawyers tended to accept the basic positivist position which separated law from morality and made the analysis of law as it is the most prestigious task of an international lawyer. This was an approach that also appealed to the canons of the practice of law because it underscored the objectivity of law. More recently there has been considerable ferment about the foundations of international law and the foundations of sovereignty. He draws attention to Professor Allott’s work which perhaps inspires him about “a more penetrating concept of international society”. There is clearly the influence of the New Haven School on Allot and Carty when it is suggested that at the back of a penetrating concept of international society there is “a responsible network of individuals interacting in a web of international interpersonal relations”. Carty’s suggestion is what he describes as a preliminary, introductory outline which is “the bare bones of an ethnographic phenomenology of human conduct in which communication with words are critical”. As suggested we later seek to produce a map of what this ethnographic phenomenology of human conduct might look like.

**D. THE WORK AND CONTRIBUTIONS OF NEIL MACCORMICK AND PHILIP ALLOT**

Another important contribution to sovereignty is Neil MacCormick. MacCormick’s theory is not as far reaching as that of Carty. His focus is on the European compact and the subordination of European sovereignties to that compact.\textsuperscript{79} He raises the question of whether there is a reconfiguration of Europe. The challenge is how to effectively conceptualize this development. MacCormick thinks that conceptualization as a European commonwealth might help. In a sense it is the implications of moral and political values that might make this appealing. It seems to stimulate active political participation or the ideas of popular self management and idea that self government and participatory democracy would be part of such an understanding. Additionally MacCormick grapples with the problem of commonwealth on one side and nationalism on the other. Modern European identity reflects strong versions of national solidarity, but the question that remains open is whether a pan European identity may moderate and constrain appeals to more parochial national identities. At the back of this question is the extent to which nationalism is central to the idea of sovereignty in the nation State and whether the new European experiment will transcend that. The MacCormick approach also implicitly suggests the need for a better conceptualization of the foundations of sovereignty and international legal order. Allot is one the most theoretically advanced in thinking about the theory of international law from the perspective of a UK academic.\textsuperscript{80} Although there are important differences in the way he conceptualizes central ideas relating to society as an important predicate for constitutionalism and for the outcomes of well-being in the global community his approach is the closest of a UK scholar to the approach of the New Haven School. His stress on the interrelationship between society and the construction of a constitutional order on a global basis is a significant advance in British legal theory and, as mentioned before, Allott’s work inspired other scholars to a more penetrating concept of international

\textsuperscript{78} Anthony Carty, Philosophy of International Law, Edinburgh University Press (2007); Examines international law generally with important preference to sovereignty as the important predicate for constitutionalism and for the outcomes of well-being in the global community his approach is the closest of a UK scholar to the approach of the New Haven School.

\textsuperscript{79} MacCormick, N., *Questioning Sovereignty: Law State and Nation in the European Commonwealth*, Oxford University Press (1999); Focuses on the European compact and the subordination of European sovereignties to that compact raising the question of whether there is a reconfiguration in Europe that impacts upon sovereignty. He sees the challenge intellectually as how to effectively conceptualize this development. He thinks that conceptualization as a European commonwealth might help.

\textsuperscript{80} Allott, P., *EUNOMIA; New Order for a New World*, Oxford University Press (1990); One the most theoretically advanced in thinking about the theory of international law from the perspective of a UK academic. Although there are important differences in the way he conceptualizes central ideas relating to society as an important predicate for constitutionalism and for the outcomes of well-being in the global community his approach is the closest of a UK scholar to the approach of the New Haven School.
society. Baeyens shows how recent developments in European thinking on Pan-European governance suggest a skepticism of the tendency to function within the EU on an inter-sovereignty, intergovernmental model. The Shadow European Council takes the position that is meant to transcend MacCormick’s concerns with national parochialism. Baeyens explains how their recommended Action Plan, contains an investment program for the transformation of the European economy, a federal act for economic governance and a change in European mechanisms for banks with a more global vision. European leaders suggest that European unity may represent “the best hope the human race has for bring the world together around the twin challenges of global warming and enacting a worldwide economy that can provide a descent standard of living for 6.5 billion people” and they conclude with the question: “if Europe doesn’t lead, who will?” The ideas that are emerging have an affinity with the approach of Allot as well as the approach of the New Haven School.

E. THE CONTRIBUTIONS OF COLIN WARBRICK AND STEPHEN TIERNEY

Warbrick and Tierney have contributed to the idea of sovereignty in the international legal community from a contemporary perspective. They set as a primary task the effort to grapple with the adequacy of the traditional concept of sovereignty, as the way in which international law defines its fundamental target community of sovereign nation states. The state of sovereignty, whose meaning is still influenced by Austin, cannot provide an adequate explanation of the effective role that international law plays in both domestic and international legal order. There is a recognition that international law reflects an expansion of the idea of authority and sovereignty cannot account for this as a theoretical matter. This work notes the growth of institutions of international salience that serve as the foundations of authority behind much of modern international law. The issue they confront is that they still try to understand the changing character of authority in modern international law within the limits of the idea that sovereignty is still the most reliable source of law based on authority and control. They suggest that the boundaries of legal order internationally have shifted from rigid territorial sovereignty to the exercise of sovereign competence in functional terms. Additionally, following traditional positivism, they argue that the transnational source of authority in these institutions involves a transfer of sovereign authority that is voluntary; but sovereign authority still ultimate authority. This raises the question about whether the quantum of sovereignty voluntarily transferred to the international level requires a significant rethinking of sovereignty itself in its relationship with international law. The difficulty with the sovereignty/authority assumption is that there is a single locus of authority, a criterion of the validation of a law as authoritative. There is a clear and a prudent recognition that the international legal system is a system in transition and an agreement that the traditional international legal community of sovereign States model is no longer a serviceable model. There is a need for a new paradigm. The phenomenon of globalization has made the traditional boundaries of the sovereign State porous. This contribution is an important step in attempting to get a better description of the global social

81 Baeyens, H., Strategic Thinking on European and World Governance, Conference Paper of Prof. Kuklinski for the second Lower Silesian Conference on “THE RENAISSANCE of EUROPEAN STRATEGIC THINKING”, Wroclaw June 16-19, 2011 (2011); Baeyens in this paper explores the importance of a more integrated and consolidated European Union as a critical factor in global leadership toward the concept of world governance.

82 Baeyens, H., European Strategic Planning in the XXI Century, Advisor Haviland, (Region surrounding Brussels Capital), in Flanders, Belgium (2011); In this paper Baeyens focus on European strategic planning in the 21st century to consolidate the European Union and the implications for its’ enhance role in world affairs. Baeyens focuses on developing the strategies for this possible future. These views would seem to significantly transform sovereignty as it is currently understood.

83 Warbrick, C. and Tierney, S., Towards an “International Legal Community”: the Sovereignty of States and the Sovereignty of International Law, London: British Institute of International and Comparative Law (2006); It sets as a primary task the effort to grapple with the adequacy of the traditional concept of sovereignty, as the way in which international defines its fundamental target community: a community of sovereign nation states. It also recognizes that sovereignty, whose main meaning still influenced by Austin cannot provide an adequate explanation of the effective role that international law, plays in both domestic and international legal order.
process which includes a changing role of State sovereignty. The concept of contextual mapping this process and understanding its role in the context of the global power and constitutive process provides empirical insights into the foundations of international law in an age of globalization.

V. SOVEREIGNTY, INSTITUTIONAL COMPETENCE AND US PRACTICE

A. THE BACKGROUND TO THE DEVELOPMENT OF THE SOVEREIGNTY IDEA IN US LEGAL PRACTICE AND SCHOLARSHIP

The United States was a new State and one whose creation stood as a challenge to the international status quo dominated by European sovereigns.84 As a consequence the earlier American State reflected certain cautions about its relations with States whose political orientation could be seen as antagonistic to the Republican/Democratic values that emerged from the American Revolution. In this sense there is an emergent perspective that gives strength to both, the value of isolationism85 as well as the value of American Exceptionalism.86 These ideas would find legitimacy in the mantle of emergent American national identity, as well as the idea of an American sovereignty necessary to defend and promote Americanism.87 However, the political arrangements of the new State were built upon a skepticism of power and the fear of the abuse of power in the new political order.88 Thus, the new political order based upon an articulate division of powers between the different branches of the government as well as the division of powers between the States and the Federal government provided a blueprint for the future. However, it was not a blueprint that could cover every possible future contingency. Hence, the practice of American democracy as well as the practice involving the allocation of competence within the body politic and its implications in the nation’s foreign relations remained matters of contestation in the political arena and importantly in the legal arena. It was in the legal arena that the Supreme Court could carve out a major role for itself as the ultimate decision maker on certain matters that required Constitutional interpretation.89 The Court asserted a competence within the scope of its reviewing authority that was based on the importance of the natural law tradition which had been developing in Europe and England.90 The natural law tradition permitted the legal profession to appropriate the important processes of reasoned elaboration in the context of vigorous adversarial argument of legal proceeding to justify its limited but important sphere of ultimate authority.91 The 19th Century jurisprudence of the Supreme Court therefore represents an important application in practical circumstances of ideas of right reason applied to the solution of the problems of the rational interpretation of the Constitution.

In the latter part of the 19th Century the United States came under the influence of the importance of science in the cultural understandings of evolving US culture.92 Science came in the form of positivism. And in law positivism expressed itself in terms of Austin’s theory of sovereignty. The science behind Austin theory was that the ultimate source of law, the principle which validated law was to be found in an empirical and finite sovereign. The sovereign was the source of all law. This idea did not provide an easy fit for a political system that had already created space for natural law ideas as an intrinsic part of how law is made and applied.

84 Howard Zinn, People’s History of the United State, HarperCollins (2010)
89 Wright, J. Skelly, Role of the Supreme Court in a Democratic Society: Judicial Activism or Restraint, 54 Cornell L. Rev. 1 (1968-1969)
90 Charles Warren, The Supreme Court in United States history Volume 1, Little, Brown (1922)
Austin model therefore would have to be modified to more appropriately fit American circumstances. Clearly the Austenian model had an influence on such late 19th Century thinkers as Oliver Wendell Holmes, Jr., John Chipman Gray and James Bradley Thayer.

1. **James Bradley Thayer**

Thayer was a distinguished Harvard Law professor. His most famous article was titled *The Origin and Scope of the American Doctrine of Constitutional Law.* Thayer's approach was to vest as much sovereignty as possible in the competence of the legislatures. This is an idea that has an affinity with the idea of Parliamentary sovereignty.

The nuanced version of this is that given the existence of a rigid Constitution, sovereignty vests with legislatures who are the primary determinants of the constitutionality of laws. Thayer carves out a space for the Courts. This space significantly limits the discretionary invocation of natural law. The reviewing power of the Court is limited to the idea of a clear error test. There is no *de novo* reviewing power. Thus, Thayer brings into the discourse about American sovereignty the importance of legislature sovereignty and the secondary nature of legal sovereignty at least as expressed in the Courts. Thayer's theory has had enormously influential track record in the development of American ideas of sovereign authority.

2. **John Chipman Gray**

Examining more directly the state of legal theory and the influence of legal positivism in the 19th Century was John Chipman Gray. His most important work was titled *The Nature and Sources of Law.* Gray's work essentially grappled critically with Austin sovereignty idea which he felt was insufficiently empirical to guide proper inquiry into the operational workings of the machinery of government. Gray notes that the supreme governors of society, who control and regulate the wills of their fellows, represent a complex empirical question which often defies easy definition and identification. The State essentially creates an architecture to which the machinery of government is attached. To add Austin sovereign as somehow pre-estate and pre-machinery of government simply adds an idea that is not amenable to empirical specification, is in fact undiscoverable and intangible. The idea is difficult, “purely academic” and irrelevant. Gray also took the position that law is normally declared by the composition of rules which originate in judicial organs. Those rules prescribe the determination of rights and duties. Gray also took the position that statutes were not law but only a source of law. They became law by judicial construction form which a determination of allocation of rights and duties resulted. To the extent that there is some sort of sovereign it will be repose in the Supreme Court, composed of nine old man, some conceivably of limited intelligence. From Gray we see that the positivism of Austin is rejected as unrealistically formalistic and a new kind of positivism emerges drawn from the complex of experience of modern governance. Austin original science was essentially been given a different empirical orientation. Grays orientation, effectually seeks to undermine the formalistic implications of Austin’s approach. It does not say that the clarification of authority and control is irrelevant. In fact it seeks to empirically establish the nature and sources of law on the basis of empirical realism.

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93 James Bradley Thayer, *The origin and scope of the American doctrine of constitutional law*, Little, Brown (1893)
3. Oliver Wendell Holmes, Jr.

Oliver Wendell Holmes was a Harvard Law professor and later Associate Justice of the Supreme Court of United States. Holmes was a significant and original legal thinker and his contributions to the practice and the theory of law in United States are without peer. Holmes was also a figure influenced by the ubiquity of the influence of science on political and legal culture in the US in the late 19th Century. He was therefore influenced by the general orientation of positivism and in particular the objective of positivism to state the law as it is and not as it ought to be. The particular gloss on Holmes’ positivism is the imprint of philosophical pragmatism on Holmes’ development of legal thought in the direction of a form of positivism. We can distill two forms of positivism in Holmes’ work. First, Holmes was committed to a more empirical view of the sources and validity of law. As he stated “the life of the law has not been logic; it has been experience.” And his great skepticism of the alleged virtues of logic as reflected in Austinian positivism was rejected when Holmes suggested that as a Judge, he could give any conclusion, a logical form. Thus, we see a concern that interpretation reflected certain skepticism of doctrine, and therefore there would be skepticism of the source of legal doctrine, the sovereign. Holmes on the other hand was also concerned that the implications of his skepticism might undermine the idea, central to scientific approach, that law must be objective and objectively determinable. This latter idea is essentially Austinian. In a sense Holmes promoted both of these ideas and never sought to secure a theoretical reconciliation between the life of the law as experience and the objectivity of law as determined by factors more akin to logical extrapolation. In practice Holmes was impeccably opposed to the natural inclinations of judges who using natural law ideas were in effect putting into judicial form their subjective ideological or idiosyncratic preferences. In the case of Lochner, Holmes pointed out “a Constitution is not intended to embody a particular economic theory and in his resistance to natural law, Holmes stated “Men make their own laws… these laws do not flow from some mysterious omnipresence in the sky, and… Judges are not independent mouth pieces of the infinite. The common law is not a brooding omnipresence in the sky.” In cases like Lochner, Holmes followed Thayer by insisting that the legislative supremacy of the States be respected. In this sense, Holmes in practice endorsed a version of State legislature sovereignty. Holmes’ great influence on American legal practice ultimately prevailed in the famous case of Erie v. Tomkins. Holmes had been a critic of the idea that federal judges could create the common law out of natural law thinking. In Erie the Court finally agreed and established the importance of law as emanating from a sovereign State and not from the imaginative insights of natural law thinking in judges. The pathway plotted by Holmes, Gray and Thayer provided a rich foundation from which ideas of sovereignty and constitutionalism could evolve in American theory and practice.

B. Hart and Sacks: The Legal Process Approach

The approach of H.L.A. Hart may be contrasted with the approach of the idea of sovereignty in the work of two Harvard Professors: Hart and Sacks who developed a legal process approach to legal theory. That approach provides insights into the nature of sovereignty itself. Central to their approach is the sense that traditional positivism asking the question of what is law, essentially misdirected the focus of relevant

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99 Oliver Wendell Holmes, Jr., The Common Law, p. 1 (1881)
100 Francis Biddle, Justice Holmes, Natural Law and the Supreme Court, p.49 (1960)
101 Southern Pac. Co. V. Jensen, 244 U.S. 205, 222 (1917) (dissent)
103 Erie Railroad, Co. v. Tomkins, 304 U.S. 64 (1938)
inquiry and description. In their view a better focus is developed if we change the question to what is a legal question. In effect one could not answer this question without taking into account the idea that a legal question must be differentiated from a legislated, an administrative and an executive question. This therefore refers to institutions of governance and therefore the unpacking of sovereignty was tied to the processes by which human beings settled problems in society. According to Hart’s: “Indeed, it is a by no means indefensible view of law to think of it as consisting most importantly of an operating system of general propositions, established by authority of the society, answering the questions of the who and how with respect to all methods of concern to the members of society, and so making possible their peaceable settlement. “[L]aw comprises (although it may not be confined to) a series of institutionalized processes for settling by authority of the group various types of questions of concern to the group”. From this perspective they develop a principle of institutional settlement which is a foundation of governance in the modern state. Some problems are quintessentially juridical. Thus the institution specialized to generating distinctively legal decisions will be the ultimate institutional authority for the expression of final legal decisions. In this sense some ultimate decision making competence is vested with distinctively legal institutions. The institution was competence specialized to legislation will be the ultimate authority of legislative expression. The same could be indicated for administrative and executive competence. In this sense sovereignty seen in the complex institutional competences of specialized institutions of governance is not undifferentiated but aspects of sovereign power vested in different institutional mechanisms whose competences may be objectively delineated as legislative, judicial, administrative, or vested with executive authority. This approach to the idea of sovereignty is more complex and requires a searching determination of the precise locus of ultimate authority in terms of the specialized institutional context.

C. CARL SCHMITT: SOVEREIGNTY ROOTED IN THE POLITICAL EXCEPTION

Carl Schmitt was a philosophic theorist of sovereignty during the Third Reich. Carl Schmitt’s ideas about sovereignty and its above the law placement in the political culture of the State have important parallels in the developing discourse in the United States about the scope of presidential authority and power. His views have attracted the attention of American theorists. Schmitt developed his view of sovereignty on the basis of the concept described as “the exception”. This idea suggests that the sovereign or executive may invoke the idea of exceptional powers which powers are distinct from the general idea of theory of the State. In Schmitt’s view the normal condition of the functions of the theory of State ride with the existence of the idea of the exception. The exception is in effect intrinsic to the idea of a normal State. In his view the normal legal order of a State depends on the existence of an exception. The exception is based on the continuing existence of an existential threat to the State and it is the sovereign that must decide on the exception. In short, the political life of a State comprises allies and enemies. For the purpose of State craft “an enemy exists only when at least potentially, one fighting collectively of people confronts another similar collectivity”. In this sense the political reality of the State always confronts the issue of the survival of the group. This reality is explained as follows:

104 Hart, H.M. & Sacks, A.M., The Legal Process; Basic Problems in the Making and Application of Law (1994); This study is not directly focused on the elucidation of sovereignty as such. However, this authors have clarified the conception of sovereignty from a functional point of view by underscoring a deeper understanding of the appropriate sphere of institutional competences in the modern state. This suggests that for different purposes different institutions may be charge with making final or ultimate decisions in the body politic.
105 Hart, H.M., Notes and Other Materials for the Study of Legislation (1950); Reminder that legal theory still generates important insights into the nature of sovereignty.
“The political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping. *** [A]s an ever present possibility [war] is the leading presupposition which determines in a characteristic way human action and thinking and hereby creates a specifically political behavior. *** A world in which the possibility of war is utterly eliminated, a completely pacified globe, would be a world without the distinction between friend and enemy and hence a world without politics."109

Schmitt view bases the supremacy of the exception on the supremacy of politics and power. Thus, the exception, as rooted in the competence of the executive is not dependent on law for its authority but on the conditions of power and conflict, which are implicitly pre-legal. The central idea is that in an emergency the power to decide based on the exception accepts its normal superiority over law on the basis that the suspension of the law is justified by the pre-legal right to self-preservation. Schmitt view is a powerful justification for the exercise of extraordinary powers, which he regards as ordinary, by executive authority. This is a tempting view for executive officers but it may not be an adequate explanation of the interplay of power, legitimacy and the constitutional foundations of a rule of law State. In a later chapter we draw on insights from the New Haven School which deals empirically with the problem of power and the problem of constituting authority using the methods of contextual mapping. Nonetheless, Schmitt view provides support for theorists who seek to enlarge executive power on the unitary presidency theory.

D. HANNAH ARENDT: SOVEREIGNTY ROOTED IN PEOPLE’S EXPECTATIONS

Another important contribution to the clarification of the sovereignty concept is found in the scholarship of Hannah Arendt. Arendt looks at politics differently from Schmitt. The give and take of politics is generated by the interaction and internal bondings of members of the community. Hence, politics is not myopically a matter of outside threats to survival. She expresses these ideas as follows:

“The man of the American Revolution, on the contrary, understood by the very opposite of a pre-political natural violence. To them, power came into being when and where people would get together and bind themselves through promises, covenants, and mutual pledges; only such power, which rested on reciprocity and mutuality, was real power and legitimate***.”110

In Arendt’s view law is in part constitutive of politics because it “produces the arena where politics occur”.111 Additionally it “defines the space in which man live with one another without using force”.112 In her view law is not post-political, it is pre-political. This is a social scientists way of justifying the supremacy of law and the limitations of claims to sovereign absolutism implicit in Schmitt. Again, Arendt is dealing with the interplay of politics and law but suggests the notion that social forces and power relations somehow pre-politically create law and thus the space for politics. This too is an approach that is not unproblematic. The relationships between the social processes which generate outcomes of effective power also generate the processes by which effective power is moderated by understandings of mutual cooperation and self-interests among power brokers. It is here that understandings about managing power and expectations generate the framework of legal orders for political space. We refer again to this issue when we outline the social and power process background to law and map those processes onto the idea of a constitutive process. Additionally, the dynamics of power and power generated understandings operate across State lines as well.

E. JUSTICE SAMUEL A. ALITO JR.: THE UNITARY EXECUTIVE
Justice Alito is generally regarded as the initiator of the so-called “unitary executive theory.” It is a theory which is developed in the context of constitutional interpretation, but appears to have a strong affinity with the philosophical reflections of the German political theorist Carl Schmitt. It is not clear whether Alito was aware of Schmitt’s work and was influenced by him or whether he had come to a position concerning the powers of the President that have strong parallels with the philosophical justification given by Schmitt for the idea of unfettered powers vesting in the executive. In any event we reproduced Schmitt’s fundamental ideas above because they provide a broader philosophical justification for Alito’s theory of the unitary executive based on a textual analysis of the Constitution. Alito was a lawyer in the Office of Legal Counsel. His tenure with the Reagan Justice Department came in the aftermath of the still lingering political effects of the removal of Republican President Richard Nixon from office. Nixon’s demise in the context of the Watergate Scandal resulted in stronger assertions of legislative supremacy to constrain the abuse of power by the executive. President Ford sought to find ways to reestablish presidential power without unduly drawing the attention of Congress to it. When Reagan came into office there remained an urge with this new Republican Administration that presidential powers, which had been reduced in the fall of Nixon, should be recaptured by the executive branch. Alito was well placed to consider what legal strategies might be used to advance the cause of presidential power within the framework of executive authority.

The central problem that Alito saw as a lawyer representing the executive interests was the problem of the expansion of congressional power and a corresponding limitation of presidential power. His approach was therefore to develop an interpretative logic that sought to narrowly characterize the scope of congressional power. And in order to expand the power of the executive he provided a bold, unjudicially tested, theory of the executive which had the implication that its boundaries were expansive and unlimited. In Alito’s view he suggested that “the theory of the unitary executive... best captures the meaning of the Constitution’s text and structure.” Central to his analysis is the ideal that the text of the Constitution vests “all executive power” in “the President.” Alito additionally stressed that the national interest required “a vigorous executive.” Prime reliance is placed on Article 2 of the Constitution which stipulates “the executive power shall be vested in the President of the United States of America.” There is no guidance as to the scope of this power. The Constitution also stipulates that “the President shall be Commander in Chief of the Army and the Navy.” However, the Constitution also, and separately, assigns the power to declare war, raise Armies and regulate the taking of prisoners to Congress. Essentially the Constitution is much more explicit about specifying the powers of Congress. Implicit in this fact is the idea that what is not
specifically enumerated is presumptively outside of the competence of Congress. On the other hand, the vesting of competence in the executive is over all matters of an executive character (however this is defined). Since the specific allocation of competence to the President are not enumerated in detail, it is appropriate Constitutional interpretation to give as expansive an interpretation of executive power as can plausibly be claimed. Professor Steven Calabresi has been a strong supporter of Judge Alito’s theory. According to Calabresi “[u]nitary executive theorists read the Constitution … as creating a hierarchical, unified executive department under the direct control of the President. … The practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.” 126 The importance of the Alito view lies in the fact that he was widely supported by a legal interest group identified with conservative causes: The Federalist Society. One of the techniques used to secure the allocation of greater competence to the executive at the expense of the Congress was the Alito’s suggestion of the use of presidential signing statements.127

After the momentous events of 9/11 the issue of the scope of the President’s powers under emergency conditions became an acute issue. In addition to these conditions, Vice President Cheney brought to the office of the executive a long memory of the loss of presidential powers in the aftermath of Watergate. 9/11 provided and ideal justification for the executive to reclaim these powers. In the conduct of the war against terrorism the administration’s lawyers placed reliance on the unitary presidency theory for broad assertions of unaccountable power. The President’s lawyers maintain that the unitary nature of the power of the executive could not be limited by treaty obligations or indeed congressional legislation which purported to govern the treatment of enemy prisoners. On September 25, 2001, John Yoo wrote that “the centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and can mobilize national resources with a speed and energy that is far superior to any other branch.” 128 An even stronger claim emerged from Assistant Attorney General Jay Bybee in August 2002. Bybee’s advice to the President was that “even if an interrogation method were to arguably violate (an anti-torture law), the statute would be unconstitutional if it impermissibly encroached on the President’s power to conduct a military campaign.” 129 So reliant was the Bush policies in conducting the war on terror on the unitary presidency theory that according to Calabresi “if the theory were wrong there would be no way the Bush administration’s anti-terrorism policies could be constitutionally justified.” 130 The technique that Judge Alito effectively advocated to the executive was the President’s use of signing statements to exempt himself from otherwise lawfully enacted congressional legislation.132 The Bush administration claimed the inherent power to authorizes the torture of military detainees in violation if US law and Treaty obligations. The President’s use of the technique of signing statements attached to bills that were become US law involved the President issuing over a hundred signing statements which in effect exempted him from those laws when he felt that they interfere with these unitary executive powers. The unitary theory relied on a claim of powers inherent in the idea of executive authority.

128 Robert J. Delahunty, John C. Yoo, The President’s constitutional authority to conduct military operations against terrorist organizations and the nations that harbor or support them, Memorandum Opinion for the Deputy Counsel to the President (September 25, 2001)
130 Id.
It should be noted however that the concept of “inherent” is itself littered with flexibility and therefore represents an unpredictable and undefined ambit for a unified authority claim by the President. The President’s reliance in his inherent powers as Commander in Chief was relied on to authorized warrantless domestic spying in violation of the Foreign Intelligence Services Act. He also claimed inherent authority to have subordinates torture military detainees in violation of US law and treaty obligations.

Although Alito’s supporters, like Yoo, do provide functional justifications for the assertion of executive powers in the context of national security emergencies, even these justifications should be understood in terms of little notice historical fact about the Constitution. The American Revolution was fought and justified on the basis of the concentrated, arbitrary powers of the Monarch. A major purpose in the drafting of the Constitution was to avoid the concentration of power and to provide for a text that would provide guidance concerning the balance of power. Moreover, the founders were deeply concerned to not create an American Monarchy, an executive that would fit the role of a monarch-like sovereign. This major purpose, which guided the drafting of the Constitution, appears to be a value that remains unconsidered by the proponents of the executive theory.

Jeffrey Steinberg writing in *Executive Intelligence Review* has argued that the unitary executive idea, which carries strong support from ultra right wing constituencies, represents in contemporary terms the idea of the Führerprinzip version of a sovereignty dominated executive identified with Carl Schmitt. Schmitt placed ultimate sovereignty in the Fuhrer as a position above the law. Steinberg notes that Schmitt’s view has been used to legitimate the emergence of totalitarian regimes in for example Franco’s Spain and Pinochet’s Chile and he sees the Schmitt’s footprint on the Alito/Bush/Chaney reconstruction of an above the law office of the President. He refers specifically to the McCain amendment, which banned the torture of American held prisoners in the war on terrorism. The President signing order simply permitted him to ignore the bill’s ban on torture. This was a bill passed by a bipartisan, veto proof majority. The dangers of the unitary executive idea as with the dangers of Carl Schmitt’s Führerprinzip are well expressed by Steinberg as follows:

“These are the issues before the U.S. Senate in the case of Judge Alito. The doctrine of the "unitary executive" promoted by Alito is a carbon copy of the doctrine of law devised by Carl Schmitt to justify the Hitler dictatorship of February 1933 and the Pinochet dictatorship of Sept. 11, 1973. In both the Hitler and Pinochet cases, Schmitt was "on the scene." As the leading German jurist of the 1920s and '30s, Schmitt wrote the legal opinion justifying Hitler's Reichstag fire coup. Schmitt argued that the "charismatic leader" derives unbridled power from "the people" in time of crisis, and that any form of government, based on a system of checks and balances, consensus, and separation of power, is illegitimate, because it stands in the way of the absolute ruler's responsibility to "protect the people."

In the case of the Pinochet coup in Chile, Schmitt's student-protégé Jaime Guzman, argued that the government had to use violence to impose order. Guzman was the sole source of legal justification for the Pinochet coup and dictatorship, and he insisted that violence was a precondition for success. In effect, Schmitt acolyte Guzman ran fascist Chile—in the name of the same doctrine of "unitary

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134 Jeffrey Steinberg, *Judge Samuel Alito and The 'Führerprinzip*', Executive Intelligence Review (January 13, 2006)
135 Id.
136 Id.
executive” power that Schmitt had earlier codified in the Führerprinzip. It is the same doctrine that Cheney et al. seek to impose today on the U.S.A.

This is fascism—pure and simple, and it must be crushed, now, if the United States is to survive as a constitutional republic.”

Justice Alito’s idea of the unitary presidency has an uncanny affinity as well with the sovereignty theory of law espoused by John Austin in the early 19th Century. Here Alito appears to salvage the notion of the President as the ultimate sovereign and the near ultimate law giver. In this sense it could be urge that the theory of sovereignty, its precise scope and relevance, while controverted, is very much a part of a vital national debate about the fundamentals of authority and control which touch on political culture, legal culture and the basic social values of United States.

F. JOHN YOO: THE UNITARY PRESIDENCY

John Yoo was an Assistant Attorney General in the office of Legal Counsel. In short, he was a lawyer for the executive branch. Yoo gained prominence for a number of memoranda he offered which sought to expand the powers of the executive so as to make them superior to those of the legislature or the judiciary. At the back of these memoranda was the theory of the executive which came to be known as the theory of the unitary executive. This theory carried the implication that when exercising certain emergency powers the executive was exercising ultimate, non-accountable sovereign powers. There appeared to be an affinity to the Carl Schmitt view of the exception being a normal part of the theory of the State. Yoo consolidated these views in a recent book which provides a vigorous defense of the unitary presidency idea. The gist of the Yoo theory for a robust appreciation of executive power is expressed in the following quotation from his book:

“Hamilton and the other Federalists *** understood the executive to be functionally best matched in speech, unity, and decisiveness to the unpredictable high-stakes nature of foreign affairs. *** Rational action on behalf of the nation in a dangerous world would be best advanced by executive action. Edward Corwin observed that the executive’s advantages in foreign affairs include “the unity of office, its capacity for secrecy and dispatch, and its superior sources of information, to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress creates a mass of executive power that can help Presidents rise the challenges of modern age. This power does not ebb and flow with the political tides, but finds its origins in the very creation of the executive. The Framers rejected the legislative supremacy of the revolutionary state governments in favor of a Presidency that would be independent of Congress, elected by the people, and possessed with speed, decision, and vigor to guide the nation through war and emergency. They did not carefully define and limit the executive power, as they did the legislative, because they understood that they could not see the future”.

The Yoo view rests on a historical and in some ways functional reconstruction of the separation of powers and the distinctiveness of powers reserved to the President. It also stresses the role of expanded powers in the context of emergencies and war and underlines the fact that the lack of specification of presidential powers in the Constitution should not be read as a limitation, but a potential, exponential expansion of those powers. For example, if the President invokes his power as commander in chief, what limits are there on the exercise of these powers that may be exercised by the legislature or the courts. The

137 Id.
139 Id.
President must determine what is required by military necessity. To what extent is his determination subject to review by the coordinate branches of government. Some writers suggest that the Constitution represents a more complex multi-branch framework of cooperation and collaboration and guidance.140

G. BRUCE ACKERMAN: LEGISLATIVE EMERGENCY SOVEREIGNTY

Professor Bruce Ackerman expresses concern about the authority foundations of the executive to conduct activity that are essentially extra-constitutional. The question here puts is how a scholar committed to the basic values of the Constitution can approach the problem of the possible excesses of the extra-constitutional decision-making. In short, the events related to the terrorist attacks have served to weaken the fundamental Constitutional values that Americans cherish. The central issue that Ackerman addresses is the claim of executive emergency sovereignty, which in general emerges as a temporary suspension of the Constitution, but the fear is that the temporary becomes a relatively permanent fixture of government unless we can develop a constitutional strategy to better secure constitutional values and to restrain the claims of emergency unaccountable sovereignty. Ackerman suggests the following as a fix to the problem of runaway sovereignty:

“The first and most fundamental dimension focuses on an innovative system of political checks and balances, ***[including] constitutional mechanisms that enable effective short-run responses without allowing states of emergency to become permanent fixtures. *** Given the formidable obstacle course presented by Article V of the U.S. Constitution, my proposal is a nonstarter as a formal amendment. Nevertheless much of the design could be introduced as a ‘framework statute’ within the terms of the existing Constitution. Congress took a first step in this direction in the 1970s when it passed the National Emergencies Act. But the experience under this Act demonstrates the need for radical revision.”141

Professor Ackerman’s concern is that once the State travels the road of emergency jurisdiction as a justification for the preclusion of fundamental constitutional values, it is difficult to limit such constrains on the Constitution. The late Professor Mathews, an expert on the national security law experience in South Africa, in fact wrote an article identifying this problem which he titled “The Permanence of the Temporary”. The problem with the enactment of such legislation is really the concern of the legislators, about the politics of patriotism. When an appeal is made for exceptional powers in a security context it is usually justified by strident appeals to patriotism with the implicit assumption that opposition or restraints on such claims to competence reflect an inadequate or lukewarm form of patriotic loyalty. For example the far reaching Patriot Act, had not been read by most members of Congress, yet the fear of voting against the Act was a fear of voting against popularly understood patriotism. We therefore do not believe that the Ackerman position has political traction in the real world of legislative politics. It is a position that can work only if a multitude of constituencies and interest groups with compelling media access can constrain the appeals to crass patriotism and formulate a structure of public opinion that reflects mature judgment that moderates destructive emotionalism. That is a tall order.

H. LAURENS TRIBE AND PATRICK GUDRIDGE: THE SUPREMACY OF LAW

Professor Tribe and Gudridge provide a considered response to the Ackerman view that the last resort for the protection of fundamental values in a state of emergency must rest with the Congress. In their view they believe that the substantial reliance on the legislative process rather than reliance on the explicit

expectations coded in the Constitution itself concedes too much to the legislative branch and too little to the culture of constitutional prescription, application and enforcement. In essence Ackerman’s theory of an emergency constitution whose protections are vested with the legislature branch in effect suggests a concession that the Constitution itself has no political and legal efficacy. It essentially involves giving up on the Constitution and its practices as conventionally understood. This is a grand bargain that Tribe and Gudridge believe should be rejected because it represents the prospect that threatens us with less vigilant about the government’s encroachment on the Constitution in the interest of patriotism. They suggest “the lessons of history teach us that we had best be most on our guard” if Ackerman’s grand bargain is acted upon. In the Tribe view there is skepticism of legislative sovereignty and its capacity to respect the Constitution in the context of a national security crisis. The Tribe view believes that there should be no compromising on the strength and institutions of legal culture to constrain the abuse of sovereign power under the Constitution. The implications of this view may suggest that in the context of national emergencies, sovereignty under the Constitution is inappropriate if it sidelines the legal profession and the judicial branch of government. In this sense it is implicit that sovereignty is a shared complex competence in peace or war between the executive, the legislative and the judicial branches of government.

VI. CONTEMPORARY PROBLEMS IN THEORY AND PRACTICE

The meaning of sovereignty in the 16th century is obviously different from its meaning in the 20th century although there is such an institution as the Queen in Parliament, the central idea of sovereignty is reflected in the idea of Parliamentary Sovereignty. The authority foundation of sovereignty has shifted to the sovereignty of the people expressed in their elected representatives. The diverse and often partial meanings attributed to the term sovereignty mean that its invocation is unclear and fraught with ambiguity. Indeed, from the practice of decision-makers and the writings of eminent scholars, there are certain identifiable core references which the term sovereignty evokes. For example, the term includes a reference to the notion of a body politic (a complex idea of which the nation-State is simply one example); it includes a reference to control or efficacy in political and legal processes; and it includes an ambiguous reference to the idea of governance with either an implicit legitimacy or an authority component. These core designations have been implicit in the many partial and incomplete references the term has come to symbolize, such as Sovereignty as a personalized monarch (real or ritualized); as a symbol for absolute, unlimited control or power; as a symbol of political legitimacy; as a symbol of political authority; as a symbol of self-determined, national independence; as a symbol of governance and constitutional order; as a criterion of jurisprudential validation of all law (grundnorm, rule of recognition, sovereign); as a symbol of the juridical personality of Sovereign Equality; as a symbol of "recognition"; as a formal unit of a legal system; as a symbol of powers, immunities, or privileges; as a symbol of jurisdictional competence to make and/or apply law; and as a symbol of basic governance competencies (constitutive process).

The multitude of meanings attributable to the sovereignty idea reflects its usability in many diverse contexts of social organization. One of the most important of these contexts is the global environment. The sovereignty issue was critical to understanding the conduct and abuses of the parties to the Second World War and its aftermath. This background problems and the

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142 Franck, T.M., LEGITIMACY IN THE INTERNATIONAL SYSTEM, 82 Am. J. Int’l L. 759 (1988); This study stressed the importance of International obligation and legitimacy as conditioning sovereign authority.

143 Nagan, W.P., “STRENGTHENING HUMANITARIAN LAW: SOVEREIGNTY, INTERNATIONAL CRIMINAL LAW AND THE AD HOC TRIBUNAL FOR THE FORMER YUGOSLAVIA” 6 Duke J. Comp. & Int’l L. 127 (Fall 1995); The contemporary challenges relating to State sovereignty include the idea of non intervention in the domestic jurisdiction of the state. Humanitarian law is essentially a law that stresses the idea of international concerns which involves humanitarian values and which are a justification for establishing the jurisdictional predicate of international concern which therefore validates some form of humanitarian intervention.
variability in the meaning of sovereignty serve as an important background for developments relating to sovereignty in the twentieth century.

A. **Empirical Perspectives and Theories of Decolonization**

There is an alternative approach to the clarification of theory of the sovereignty idea. This approach is more empirical and draws on the jurisprudence of the new haven school of international law. This approach which is rooted in the reality of the global social and power processes generates a concern that this reality generates astonishing complexity. We therefore outline some of the components of this complexity for understanding the idea of sovereignty and proceed to apply novel ideas of theory and method that are empirically grounded to clarify the idea of sovereignty in the world community today. Distinguished international law publicists recognize what they regard as the "inescapability of the concept of sovereignty as a quality of the State under present-day international law."\(^{144}\) They also recognize it as a "fundamental principle of the law of nations." However, even the strongest proponents of the positivist view of international law conditioned by sovereign states assert that international law strongly rejects the admissibility of absolute sovereignty as the basic principle of international law. Surveys of the writings of diverse authors indicate a clear repudiation of any absolutist notion of sovereignty implicit in the command theory of law and its progeny.\(^{145}\) It will doubtless be recalled that Austin relegated international law to the domain of positive morality, a dubious status it shared with constitutional law.\(^{146}\)

Theory and practice concede certain flexibility about what aspects of international and constitutional law are to be designated sovereign. However, the criteria by which such practical designations are made often reflect levels of reification and porousness about what is and is not sovereign, and what effect and deference are in practice to be accorded such characterizations. The law of sovereign immunity is a good example of this proposition. The reification of State behaviors labeled *jure imperii* gave ground in practice to State behaviors that could be juridically classified as *jure gestionis*, or the competence of a domestic court or tribunal to treat a foreign sovereign State just like any other litigant.\(^{147}\) The act of State doctrine in U.S. practice has been similarly eroded, including the implicit sovereignty assumptions that served to insulate acts of sovereign states done within their own territories from adjudication in the courts of other sovereign states. The roots of reification and porousness in modern international law practice and custom are tied to the processes of decolonization and the expansion of the State sovereign system. The post World War II processes of decolonization penetrated, and later eroded, the claims of colonial powers that their colonies fell within their sovereignty and were thus beyond the reach of international law concern. The key doctrine that eroded the colonial sovereignty idea was the claim of indigenous political movements to self-determination, which in post cold war practice became a *jus cogens*. In this context, the claim to self-determination simultaneously denied colonial sovereignty and affirmed sovereignty sustained by self-determination. Latent in claims to self-determination was the idea of sovereign independence. The outcome of the decolonization self-determination process was a radical increase in internationally recognized claims to national State sovereignty. However, vast

\(^{144}\) Stanislaw, K. M., *Some Present Aspects of Sovereignty in International Law* 16-17 (1961); This study remains one of the leading international law texts on the elucidation of sovereignty from a multitude of vantage points and disciplines.

\(^{145}\) Larson, A. and Jencks, W., *Sovereignty Within The Law* (1965); This is an excellent collection of essays by leading thinkers on the issue of sovereignty and international obligation.

\(^{146}\) Austin, J., *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* 12, 140 (1964); contra J.W. Harris, Legal Philosophies 226-30 (1980); This book is based on Austin’s lectures on the University of London. It spells out his imperative theory of law founded on the idea of an objective and identifiable sovereign as the source of all positive law.

\(^{147}\) Nagan, W.P., *STRENGTHENING HUMANITARIAN LAW: SOVEREIGNTY, INTERNATIONAL CRIMINAL LAW AND THE AD HOC TRIBUNAL FOR THE FORMER YUGOSLAVIA*, 6 Duke J. Comp. & Int’l L. 127 (1995); Provides an explanation to the importance of strengthening humanitarian law and human rights law, which is evident in light of the recourse to violence to resolve international and internal conflicts.
numbers of these newly independent sovereign states were weak in terms of national integration and foreign relations. Moreover, many new states were both products and victims of cold war politics. This led to widespread reification of sovereignty in vast numbers of newly independent states, justified under the internal affairs domestic jurisdiction clause of the UN Charter, Article 2(7). At the same time that states were claiming widespread immunity from international duties and obligations (especially in the human rights sphere), these same states were claiming expanded sovereign rights as a form of compensation for the wrongs of colonial-imperialist exploitation and hegemony.

B. THE UNITED NATIONS AND THE INTERNATIONAL CRIMINAL JUSTICE

The term "sovereignty" in the UN Charter is most visible in the context of sovereign equality. Outside this context, the term is rarely used in the text of the Charter. Indeed, Charter Article 2.7 uses the term "domestic jurisdiction" as a precept that seems intentionally less inclusive than the term "sovereign" suggests. The UN Charter is part of a world constitutional instrument. As a constitution, the Charter is the formal basis of an international rule of law. One of its primary purposes is to constrain sovereign behaviors inconsistent with its key precepts. It was in fact the United Nations Security Council, operating under the authority of Chapter VII that gave its backing to an international constitutional innovation, the Tribunals for the former Yugoslavia and Rwanda, even if that innovation is only an ad hoc one. On the other hand, it is well known that the United Nations is going through a crisis of redefinition in the post-cold war era, and its credibility in the security and peace-protecting arena has been severely tarnished. United Nations officials have been quick to project blame onto the sovereignty aspect of international power. They hold that stripped of all the trimmings, the United Nations serves as a directorate of states. If this is the reality, then two of the most important premises built into the Charter may be severely compromised. We refer to use of the "people" and the "individual" as important constraints and components of international legal order. The crisis that the United Nations faces is not simply focused on the legal and policy dimensions of its constitutional architecture in the post-cold war era. Rather, the situation the United Nations finds itself in raises the important issue of international public opinion regarding the organization. That opinion is an authority base crucial to maintaining the effective role and function of the organization.

C. NUREMBERG AND INDIVIDUAL RESPONSIBILITY

The work of Fogelson gives a good explanation of why the war crimes trials in Nuremberg and Tokyo represent the most remarkable exception to the decentralized character of international criminal law. The great historic question about Nuremberg is whether it was an aberration, or whether it represents a sufficiently strong institutional expression of the international rule of law in action so that the process of criminal justice it created will become central to an improved world order. Indeed, a central policy feature of

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148 UN Charter; Chapter I, Article 2, P 7; This section shifts the focus from the analytical and normative to the empirical. It provides a short overview of continuing problems in exploring the nature of sovereignty and why an empirical approach may advance around the standing of the sovereignty idea. UN Charter Article 2.7 is the Charter’s reference to sovereignty. However, it avoids the term. It stipulates that nothing in the Charter authorizes the UN to intervene in matters which are “essentially within the domestic jurisdiction of any State”.
149 Id.
150 Marquand, R., U.S. Must Support War Crimes Prosecution, Christian Sci. Monitor (1994); States how at that moment it was well known that the United Nations was going through a crisis of post-cold war era redefinition describing how the credibility in its security and peace-protecting arena was severely tarnished.
151 Crossette, B., UN Finds Skepticism Is Eroding the Hope That Is Its Foundation, N.Y. Times, 1 at 1 quoting Indiana Representative Lee H. Hamilton (1991); Representative Lee H. Hamilton, discussing the relationship between the role of the United Nations and United States policy, stated that notions of threats to American independence of action are important issues to Americans: “In some groups of Americans, there is a distinct fear of loss of U.S. sovereignty to the U.N.”
Nuremberg was the ancient function of the law of preventive politics. In this sense, the law serves as a restraint on unlimited decisional competence because it requires some minimal responsibility and accountability for decisions. The Nuremberg Tribunal held the agents of State decision-making personally responsible for crimes against peace, war crimes and crimes against humanity. These transgressions were not only international legal wrongs, but wrongs punishable through the ascription of personal responsibility by criminal law sanctions. The message of Nuremberg is clear. Those who authorized and committed crimes against the peace, war crimes and humanitarian crimes would be personally responsible for those crimes and would be made to suffer the consequences of their conduct. To hold the perpetrators of these proscribed forms of conduct accountable signifies that terrible things cannot be done to people without a resulting meaningful international sense of responsibility. Nuremberg’s detractors have attacked it on two grounds: it was seen to represent the victors’ justice, and it was thought to compromise the *nulla poena* principle. These are not the strongest objections to the Nuremberg process. The real objections to Nuremberg are tied to sovereignty issues. First, Nuremburg made the sovereign State and its officials subject to the international rule of law. This was precisely the point that U.S. Secretary of War Henry Stimson had in mind when he lent his weight to the idea of trying the Nazi war criminals. At the core of his thinking was the idea of a crime against the peace as part of the indictment. Second, Nuremberg permitted penetration of the veil of sovereignty in order to identify the concrete agents of decision who were responsible for criminal behavior. From an international law perspective, the idea that individuals could be directly responsible under international law subverted a cardinal tenet of the positivist conception of international law.

**D. THE NUREMBERG PRINCIPLES**

If we view the operational State of international criminal law as constitutionally allocated to sovereign states by custom, practice and treaty law, then Nuremberg was an important constitutional allocation of competence to the international community and away from the sovereign nation state. This is the accurate juridical position which Nuremberg (and Tokyo) occupied in the global constitutive process. The Nuremberg tribunal confronted the dualism between sovereign versus personal responsibility directly: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law." Shortly after the Nuremberg decision, the United Nations General Assembly, in a unanimous resolution, affirmed the Nuremberg principles as accepted principles of international criminal law. Perhaps the most concise statement of the essential juridical meaning of the Nuremberg process came from Justice Jackson: “An agreement between the major powers for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law namely, that to prepare, incite, or wage a war of aggression ... is a crime.

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153 Jackson, R.H., *The Nuremberg Case* (1971); Prosecutor Jackson declared that the trial in the eyes of the world were to be candidly faced before getting into evidence considerations because … the record on which those defendants were to be judged was to be the record on which history will judge them in the future.

154 Bosch, W.J., *Judgment on Nuremberg: American Attitudes Towards The Major German War-Crime Trials* (1970); Critics of Nuremberg in the United States included Robert Taft and Norman Thomas. The problem with the argument of victors’ justice is that it ignores the decentralized character of the international constitutive process, and argues essentially that because there is no central, neutral authority, war crimes must be consigned to a legal vacuum. Victors’ justice is an aspect of the principle of jurisdiction by necessity.

155 Smith, B.F., *The Road To Nuremberg* (1981); Smith notes that Lord Simon prepared a draft advocating summary execution of high-ranking Nazis with a number of legal and political arguments to show the trials were inappropriate because the Moscow Declaration contenotions implied that the problem would be dealt politically, not judicially and that the best thing to do was simply to shoot a handful of the top Nazi leaders.

156 Jackson, R.H., *Final Report to the President of the United States on the Nuremberg Trials*, cited in Robert H. Jackson, *The Nuremberg Case at XII/XV* (1947) (1946); Jackson outlined the invasions of other countries and initiation of wars of aggression in violation of international law or treaties as one out of three categories of crimes that the defendants would be asked to account for. He regarded this crime as central to the entire conception of the trial.
against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime ...” Nuremberg was technically based on an agreement between the States who became the victors over the Axis Powers.\(^{157}\) However, it should be acknowledge that even among the allies there was no agreement on the precise legal foundation of the proposed proceedings. Stalin for example thought that the execution of fifty-thousand SS Operatives would satisfy the demand for post-conflict justice. Churchill thought this was excessive and speculated with a figure of 5,000 SS executions. From the record it appears that the English Legal establishments were opposed to the idea of trying the sovereign or its representatives. Somehow, the Nuremberg proposal went through negotiations and then the novel trials subjecting the sovereigns officials to international criminal justice became a living global institution of legal accountability. The Nuremberg Trials had to solve important problems. For example although the defendants were on trial for unprecedented crimes, according to the Principles, they were entitled to the idea of a fair trial with competent legal representation meaning that they had certain fundamental rights granted by international legal order.\(^{158}\)

VII. **Constitutive Process and Sovereignty in the Aftermath of Nuremberg**

A further question of the Nuremberg Trials, crucial to the defense, was that since they were acting under the authority of a sovereign State, they could not be personally liable. Here Nuremberg made a major advance in legal thinking. Essentially the sovereign is an abstraction from reality. Behind the sovereign are the active human agents of decision-making. In that role they were legally accountable and appropriately prosecuted in the Nuremberg proceedings. The significant innovation here was to refute the idea that the sovereign, assuming traditional monarchical powers, could do no wrong. This version of sovereignty was subject to principles that today significantly inform the legitimacy of the concept because they stress the ideas of transparency, responsibility and accountability and the rejection of the idea that invoking the idea of sovereignty provides a cloud in which there is no responsible agent of decision. The discourse of international criminal law would be greatly improved if the reification and porousness of the term sovereignty is put into a more disciplined theoretical focus that stresses the issue of constitutive competencies and interests, permitting analysis to clarify which interests are sovereignty exclusive and which are sovereignty inclusive. Such a focus would do a great deal to clarify the reach, purpose and competence to apply, prescribe and enforce what is called "international criminal law".\(^{159}\) One of the major vices of the term "sovereignty" is the designative reference given to the analytically distinct concepts of authority and control. The sovereignty idea in reified garb continues to perpetuate the Austinian fallacy of collapsing authority and control, making it extremely difficult to properly appreciate how international criminal law is rationally prescribed and applied. Indeed, a proper appreciation of these processes is crucial to developing a more rational approach to the international, constitutional allocation of competence in controlling and regulating criminal behaviors that require effective community interventions. The destructive impact of criminal behaviors on important world order values are serious enough that effective policing is required from local to global levels in the name of

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\(^{157}\) The Nuremberg Decision, 6 F.R.D. 69, 110 (1946); A major innovation in international law in which the victorious allies held Nazi leaders criminally responsible for the crimes committed under the banner of the Nazi State.

\(^{158}\) Affirmation of the Principles of International Law recognized in the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), UN GAOR, 1st Sess., at 188, UN Doc. A/236 (1947); This resolution sought to extinguish any lingering doubts concerning the legality of the Nuremberg Trials.

\(^{159}\) McDougal et al., *The World Constitutive Process of Authoritative Decision*, 91 Journal of Legal Education 253 (1969); Overview on the constitutive foundations of sovereignty in the International System. It explains how a complete denial of the principles of humanitarian law, especially when grave breaches of that law are involved, also represents a rejection of fundamental human rights precepts and may point to an alternative normative order that essentially disparages the precept of human dignity.
the world community as a whole. To strengthen the conceptual and doctrinal basis of humanitarian law we must purge the sovereignty precept of the conceptual and normative confusion it generates and use more precision about the nature of the specific problems in which sovereignty is invoked as a sword or a shield.160

A clearer perception of the common and special interest of the term sovereignty sometimes seeks to promote, protect or compromise a clearer delineation of the precise role in the constitutional order and promise of the UN Charter. We must map and locate sovereignty more precisely within the context of global power and constitutive processes. As applied to the constitutional position of the ad hoc Tribunals, the practical question is whether the common interest of sovereign entities is better protected by this constitutional innovation, or whether exclusive parochial interests of a reified sovereignty precept undermine this effort at grounding international justice in its practical application. Some states may view them as just an exception to the overriding imperium of State sovereign competence over international criminal law. Other State parties have seen this constitutional innovation as an important step in creating an independent, international criminal court. Contextual mapping, a technique associated with the New Haven School, can be used to clarify the meaning and workings of sovereignty.161 The technique is based on the principle that concepts and terms are better understood when the contexts in which they are used are better understood. We argue that contextual mapping shows that among nation-States and within nation-States, the concept of sovereignty is used as an instrument by which to establish and maintain authority. We may define nation-States by four essential characteristics. First, and according to UN SCOR 1948, traditional international law requires a State to control a territorial base with determinable boundaries.162 Second, a State is required to control a population connected by solidarity, loyalty, and primary notions of group affiliation and identity.163 Third, it is the related aspect of internal governance that requires a controlling internal power and competencies.164 The fourth traditional criterion is the requirement of a controlling power to represent the State or territorially organized body politic in the international environment. However, the four traditional criteria obscure what is arguably the most vital building block of the "State"; how authority is constituted. Contextual mapping clarifies that process.

160 McDougal, Lasswell & Reisman, _The World Constitutive Process of Authoritative Decisions_, in _The Future of the International Legal Order_ (C. Black & R. Falk eds. 1969) reprinted in M. McDougal & W. M. Reisman, _International Law Essays_ (1981); The founding members of Yale’s New Haven School examined how governing hegemons manipulate social development and world public order. The technique of contextual mapping provides indicators that locate sovereignty within the interpenetrating regional, national, and global constitutive processes allowing an inquiring scholar to locate sovereignty within an appropriately comprehensive social and power context.

161 Lasswell, H., _World Politics and Personal Insecurity_ (1935); Consisting initially of Harold Lasswell, Myres McDougal, and their colleagues, the New Haven School seeks to illuminate the world political process by ascertaining and examining meaningful cultural, financial, psychological, and emblematic factors that lay beneath social behaviors. To track this examination, the New Haven School created a comprehensive contextual mapping system of human social structures.

162 UN SCOR, 383rd mtg., Supp. No. 128, at 9-12 (1948); Jessup, Phillip, U.S. Representative to the Security Council, remarked on the definition of a State to the UN that: “the 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.”

163 Simmel, G., _Social Interaction as the Definition of the Group in Time and Space, in Introduction to the Science of Sociology_, Robert E. Park & Ernest W. Burgess eds., 3d ed. (1924); This emerging human element is the foundation of community norm generation.

164 Wright, H.T., _Toward an Explanation of the Origin of the State, in Explanation Of Prehistoric Change_ 215, 217 (citing Robert L. Carneiro, _A Theory of the Origin of the State_, 169 Sci. 733 (1970)); James N. Hill ed. (1977); A State may be characterized as "an autonomous territorial and political unit having a central government with coercive power over men and wealth." A State may be identified by its ability to defend itself against external international pressures or conflicts.
A. THE NEW HAVEN APPROACH: EMPIRICAL AND NORMATIVE INTEGRATION

The New Haven school identifies three fundamental processes of contextual mapping: the social process, the power process, and the constitutive process.165 The social process is simply the activity of human beings seeking, through institutions, to promote their values. The power process is a specialized aspect of the social process; it is the activity of human beings pursuing power through institutions. The constitutive process is an aspect of the power process; it is the process by which institutions for the management of power are effectively and authoritatively developed. The constitutive process is the creation of reasonably predictable expectations about the allocation of fundamental decision-making authority. When the power process is mapped onto the constitutive process we begin to observe the emergence of authority in constituting fundamental power arrangements, where authority is understood, in contradistinction from power, as having a normative element. To illustrate, any community exhibits contestations for power that may take the form of violent rebellions or a revolution. The winners will seek to "constitute" or institutionalize their authority.166 They may have won a battle, but winning the peace and stabilizing their power basis may require more concrete formulations of the "authoritative" and "controlling" aspects of power. Even if no clear winner emerges from the conflict, the contesting parties may see that stabilizing their claims and expectations about power is in their mutual self-interest. This is because stabilizing expectations about how the basic institutions of decision are established and continuously sustained are vital to the constitution of power and its concurrent and subsequent "recognition."167 From an empirical point of view, constitutions, written or otherwise, are nothing but codified expectations of authority and stability in contradistinction to the prospect of continuous conflict over how power and authority are to be constituted and exercised.168 Conflict and its polar opposite, collaboration, are present in all forms of social organization.169 Even when authority is provided for in a formal constitution, there shall always be conflict regarding the precise allocations of power and competence. Even when the high intensity violent conflict is contained, the settlement will be fraught with contestations for power. Conflict cannot be banished from human relations, but its form can change. Often, post-conflict settlements generate situations of constructive conflict. Thus, some forms of conflict may be socially beneficial.

B. THE MAP AND MARKERS OF THE GLOBAL SOCIAL PROCESS

The work of McDougal, Reisman and Willard identifies the markers used to map the social process context.170 Lasswell and McDougal provide an extensively developed map of the Social Process Context of

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165 Lasswell, H. & McDougal, M., Jurisprudence for a Free Society Vol. I, page 28 (1992); Decisions which identify and characterize the different authoritative decision makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions necessary to making and administering general community policy.

166 Maier, H.G., Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int'l L. 280 (1982); 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.

167 Reisman, W.M., International Law Essays (1981); Discusses the three aspects of prescriptive communication that essentially convey legal norms because they designate policy that both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control.

168 Weyrauch, W.O., The "Basic Law" or "Constitution" of a Small Group, 27 J. Soc. Issues 49, 56-58 (1971); Documents 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.

169 Reisman, W.M. The Constitutional Crisis in the United Nations, 87 Am. J. Int'l L. 83 (1993); The UN Charter identifies authoritative decision-makers and procedures by which decisions might be made because it articulates a framework of practices created to facilitate decisions in the interest of "[maintaining] peace and security," which, as Professor Reisman puts it, "[requires] more and more cooperation between large and small states."

Law. The first marker is the Identification of Participants. These include the Governmental Group including National and Transnational; Nongovernmental Group which includes Political Parties, Pressure Groups and Private Associations; and finally Individuals. These participants emerge with subjectivities which are mark as Perspectives which include the markers of Identity, Claim and Expectation. Claiming includes Demands for all the central values in social organization such as power, respect, enlightenment, wealth, skill, well-being, skill, rectitude and affection. All subjectivities implicated in human perspectives may result in claims generating problems which require social responses. These problems related to subjectivities are located in identifiable Situational Context. These include geographic, temporal, institutionalization and crisis. Each of these situational contexts will influence the efficacy and realism of the claims of perspective. In order to proceed with the claims of perspective in different situations, the claimant must have some access to bases of power to give the claim a sense of efficacy and realism. In law it is the skill in the mobilization of authority as base of power that is helpful. However, any Value may not only be sought for its own sake but may serve as a base of power to facilitate the realization of a claimed perspective. The participant mobilizing bases of power must still use available Strategies to achieve the satisfaction of demand. In general these strategies include the following: diplomatic, ideological, economic and military. In short, strategies may be persuasive or coercive. The penultimate marker identifies the Outcomes of interaction between perspectives, values, strategies and institutions. These outcomes reflect upon the production, conservation, distribution and consumption of all values. The final marker requires the identification of the Effects of social interaction on social process in terms of the shaping and sharing of values. One of the major outcomes and effects of social interaction concerns specialized feature of the social process specialized to the production and distribution of power; the identifiable power process.

C. THE MAP AND MARKERS OF THE WORLD POWER PROCESS

The world power process includes claims to become sovereign, to remain sovereign, and to change or realign sovereign competence. Mapping this process requires the identification of operative participants in the world social and power processes, their perspectives, demands, and expectations, their bases of power, the situations in which they operate, their general strategies for action, and the basic outcomes and effects of politically conditioned action. One of the major outcomes of the process of effective power has been the creation and maintenance of the institutions of authoritative decision-making. Placing the concept of sovereignty within the map of the social, power and constitutive processes, we find that sovereignty reflects the allocation of fundamental decision-making competencies about the basic institutions of governance itself.

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172 McDougal, M.S. et al., The World Constitutive Process of Authoritative Decision, 19 J. Legal Educ. 253 (1967); A core philosophy of the New Haven School is that in order to count as law, international law must have a prescriptive policy content, it must be accompanied by symbols indicative of widespread community acceptance, and it must be accompanied by a conception that some institutionalized control exists to ensure that the prescribed law is real.

173 McDougal, M.S. and Lasswell, H.D., The Identification and Appraisal of Diverse Systems of Public Order, 53 Am. J. Int'l L. 1, 9 (1959); The New Haven School is not concerned with formal structures of government. It instead remains focused on policy so that it can explore the interplay between law and the world community through the lens of social processes. The New Haven School explores the processes of decision-making with specific regard to the legal process, by which the authors meant the making of authoritative and controlling decisions.

174 McDougal, M.H., Lasswell & Reisman, W.M., The World Constitutive Process of Authoritative Decisions, in The Future of the International Legal Order (C. Black & R. Falk eds. 1969) reprinted in M. McDougal & W. M. Reisman, International Law Essays (1981); The founding members of Yale’s New Haven School examined how governing hegemons manipulate social development and world public order. Discusses three aspects of prescriptive communication that essentially convey legal norms because they designate policy that both emanates from a source of authority and creates an expectation in the target audience that the policy content of the communication is intended to control.
Within a nation-State, it is the authorization and recognition of persons or institutions competent to make basic decisions about governing power at all levels. On the international stage, the stabilization of expectations in political bodies with effective control over populations, territorial bases, as well as over the instruments of internal governance and external recognition leads to the creation of sovereignty with independence and international legal personality. 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. The empirical focus of 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. The sovereignty idea is a critical component of the processes by which authority and control are institutionalized in different contexts from the global constitutional process to the national and local constitutional processes. An important insight into both theory and the practice of sovereignty is that a precise meaning is still elusive. This may reflect the tough reality that power at all levels is a contested matter. Additionally the salience of authority is as contested as the nature of power. Whether this is a problem that may be solved by conceptual/analytical analysis or whether as suggested by the theorists of the New Haven approach, the approach should be empirical using the techniques of contextual mapping to secure a more precise contextually defined description and justification of the sovereignty concept, is a matter for future theoretical speculation.

According to McDougal and Reisman, expanding on Lasswell and Kaplan, the global power process is an outcome of the global social process, which generates claims about the shaping and the sharing of power. The relevant markers start with the marker which identifies Participants. Participants include groups that are governmental non state groups, i.e. the individual. These groups may be national or transnational. They include groups that are non-governmental, pressure groups as well as the myriad global and national associations of civil society. The next marker focuses on the Power directed subjectivities of both groups and individual participants in the global power process. These subjectivities comprise the Perspectives of claiming or demanding power to participate in the shaping and sharing of power and in the maintenance of the processes of authoritative decision making. Perspectives also include claims to identification that have power implications as well as claims to perspectives of expectations that implicate the shaping and the sharing of power. The actions implicating the perspectives of power occur in Arenas which are the same as those marked in the social process. The next marker identifies the Basis of Power that the claimants and contestants for power may deploy. They require that all values that the claimant has access to or control over may be used as a base to advance the claim with regard the shaping and the sharing of power. Power may be a base of power to get more power. Wealth may be used to get power and all other values, such as respect, enlightenment, health and well being, affection and rectitude may also be used as bases to enhance the power position. The next marker focuses on the Strategies of the use of power which are usually strategies of coercion or persuasion. They include at the global level the strategies of diplomacy, ideology, economy and military values. The

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176 Bekker, P.H.F., *The Legal Position of Intergovernmental Organizations* 74 (1994); Scholars disagree about the extent to which recognition is required to establish legal personality, or if legal personality can indeed exist independently of recognition. If legal personality can exist without recognition, recognition is transformed into a legal duty possessed by the state.

177 Lasswell and MacDougall, *Jurisprudence for a Free Society*, Vol. I, p. 335-257 (1992); They offer a configurative conception of jurisprudence that is the end result of an authoritative decision-making process. 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. Scholars and policymakers regard their approach to decision-making as a rigorous one embedded in a social context.


180 Reisman, *Private Armies in a Global War Systems: Prologue to Decision*, 14 V.J.I.L. 1 (1973); A specific development of the map in terms of non-State coercion.
The constitutive process is an outcome of the power process. It is a continuous process but it does not render irrelevant the similarly continuing process of conflict in accordance with the constitution. There is an intuitive, ongoing relationship between contestations for power and the constituting and stabilizing of such contestations. The continuing constitutive process shapes communication regarding conflict management and collaboration to establish and maintain the basic political and juridical institutions of effective and authoritative decision-making. One of the most important outcomes of the power process is the patterns of communication regarding conflict and possible collaboration. The understandings generated by power brokers in their contestations for power frequently involve communications and understandings about the limits, constitution and uses of power for collaboration rather than conflict. From an observer's point of view, a central feature of what is called "constitutional law" is it's a way of institutionalizing expectations relating to the management of power in the basic institutions of authoritative and controlling decision-making. This might happen without a written constitution and still be an effective instrument of constitutive authority. Alternatively, the outcomes of social conflict, such as civil war, anti-colonial wars, or agitation for self-determination, might lead to the formulation of written expectations about the management of basic decision-making competences in the political culture. In short, conflict sometimes provokes the creation of a written constitution. On the international stage, wars and multi-State conflicts have historically stimulated the development of regional compacts and mutual understandings. Indeed, perhaps the clearest example yet of a global compact representing the parties' common interest is the UN Charter. One of the most important outcomes of the global constitutive and power process is the creation of the sovereign State.


182 McDougall, Jurisprudence for a Free Society, Vol. II; The Application of Constitutive Prescription: An Addendum to Justice Cardozo, Appendix V, p.1489-1526 (1992); Examines the way on which sovereign constituted authority develops procedures for grounding value judgments in instances of particular application. These principles are applied to the challenges of sovereign decision making implicating human rights.


184 McDougall, M.S. and Lasswell, H.D., The Identification and Appraisal of Diverse Systems of Public Order, 53 Am. J. Int'l L. 1 (1959); The School's lead scholars suggest that international law is a "world constitutive process of authoritative decision..." perhaps referring to existing legal regimes such as the UN Charter. The goal of international law, the School's founders argue, is the establishment of world public order by instituting regimes of effective control and moving away from existing regimes of ineffective control... and authority.
The constitutive process is an outcome of the power process. The critical outcome of the power process is the process of decision making according to power and decision function. The constitutive process emerges from the understandings of the dominant claimants to power. Those understandings reflect expectations about how decisions are to be authorized and allocated for the purpose of vest those decisions with a degree of “authorization”. This is the constitutive process. The markers for the purpose of mapping the global constitutive process start with the marker of Participation. This marker covers the same range of participants as the social process. The critical indicators of participation reflect under inclusivity of the process and the assignment of responsibility. The second marker touches on the subjectivities of Perspectives. The perspective of demand focuses on claims that are directly toward the clarification of the common interest of the community and focuses on the degree of inclusivity or exclusivity involve in the process of clarifying the common interest. This marker also requires a preference for inclusivity in the clarification of the common interest and the rejection of special interests redefining the community interests. The perspectives of identification requires an identification with the entire community. The perspectives of expectation require that it be contextual, realistic and rational. The perspectives of expectation also recognize that constitutive expectations are complementary in character and therefore requires some supplementation to strengthen and support fundamental community expectations about the constitution of power.

From the markers that touch on participants and their subjectivities (subjectivities if identification, demand and expectation) we now mark the Arenas within which power condition participants interact. Lasswell and McDougal identified the arenas of the constitutive process, which are socially important for the institutional and geographic reach. At the level of institutionalization the constitutive process generates institutions of decision that are legislative, judicial, executive and administrative. The reach of the constitutive process in geographic terms touches on the problems of the degree of centrality and the reach of authority to the periphery. This process has an important temporal dimension which may be random and occasional or sustained and continuous. The geographic and temporal arena of the constitutive process is a crucial component of the territorially organized sovereign state. Another important marker is the marker of Crisis. Constitutive process claims are claims about power and therefore represent the prospect of the clash of power and conflict. Decision making in this context has to account for the effects of crisis on decision making. A critical dimension of the constitutive process is the issue of Access. The question of whether access is open and or compulsory indicates a great deal about the nature and quality of the constitutional culture. The Bases of Power are bases that reflect decision making and its invocation that are both authoritative and controlling. The Strategies are essentially the same as community process. Detailed procedures implicating specialized types of decision making are an important part of the strategies of the constitutive process. The penultimate marker refers to Outcomes. The outcomes of constituting power in effect vest power with authority. One of the outcomes of constitutionalizing power and authority in a territorially organized body politic is the outcome of sovereign competence. The last marker reflects on the Effects. Clearly the constitutive process has important consequences for the system of public order. One of the important outcomes is the outcome of sovereign nation State competence. The critical question is whether the dominance of the sovereign nation State will endure from a global perspective.

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186 McDougal and Lasswell, Jurisprudence for a Free Society, Vol. II, p. 1131-1154 (1992); A concise summary of the constitutive process and the overriding principles which provide guidance in understanding this process.